

# CWA Section Water Quality Certification

## A Powerful Tool for Aquatic Resource Protection

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# 401 Certification: Overview

- Clean Water Act (CWA) §401 says:
  - No federal permit or license can be issued that may result in a discharge to waters of the United States

Unless

- The state or authorized tribe certifies that the discharge is consistent with standards and other water quality goals, or waives
- No 401 cert or waiver means no federal permit or license

# Who Has 401 Cert Authority?

- All states where the discharge originates have 401 cert authority
  - Direct grant from CWA, not from EPA
- Indian tribes authorized to administer the WQS program can receive 401 cert authority if they request
  - No separate application needed
  - Need to identify tribal organization that will administer the 401 cert
  - EPA Regional office certs on behalf of tribes not yet authorized

# What Actions Trigger 401 Cert?

## ➤ CWA permits

- §402 NPDES permits
- §404 dredge/fill permits

## ➤ 401 cert not limited to CWA Actions

- Rivers and Harbors Act
- Federal Power Act
  - Applicability of 401 to FPA licenses unanimously confirmed by Supreme Court in 2006 (*SD Warren*)
- Atomic Energy Act

## ➤ Look for federal permit / license authorizing discharge into waters of the US

# Basic 401 Certification Process

- Applicant applies to state or tribe for a cert
  - where the discharge originates, not occurs
- State or tribe reviews
  - Public notice required
  - Public hearing possible
- Applicant provides application with 401 cert to federal permit / licensing agency
- Federal permit / licensing agency notifies EPA

# Recommendation: Early Coordination

- Check with EPA / other Federal agencies for applicability of 401 cert
  - Is a “water of the US” involved?
  - What is the permitting/licensing agency’s timeframe?
- Project proponents should contact the state and understand what information is necessary to apply for 401 cert
- Talking early and often helps avoid costly surprises

# Evaluating a 401 Cert Request

- States / tribes should consider
  - All potential water quality impacts,
    - both direct and indirect,
      - For the life of the project
  
- Decision can be based on:
  - Data from applicant
  - Any other available and reliable data

# What Must Be Determined?

- Before issuing a cert, the state/tribal should conclude that the permitted or licensed activity will be consistent with:
  - Effluent limitations for conventional and non-conventional pollutants
  - Water quality standards
  - New source performance standards
  - Toxic pollutant limitations, PLUS
  - Any more stringent state/tribal requirements

# What Can a State/Tribe Do Under 401 Cert?

- **Grant**: indicates activity consistent with standards and other provisions
- Effect of granting:
  - federal agency can proceed and evaluate whether a permit / license should be issued, and with what conditions

# What Can a State/Tribe Do Under 401 Cert?

- **Grant With Conditions**: indicates activity consistent only if listed conditions are met
  - Scope of potential conditions can be quite broad
- Effect of granting with conditions:
  - Every 401 condition must become a term of the permit or license, if issued. Federal agency can't pick and choose.
  - If applicant dislikes conditions, needs to take issue to "appropriate forum of state law" – federal agency can't do anything about the conditions.

# What Can a State/Tribe Do Under 401 Cert?

- **Deny**: indicates activity is not consistent with water quality standards and other goals
  - Implication is that no conditions would be adequate to ensure goals met if permit / license issued
- **Effect of denying:**
  - Federal agency can't issue permit or license

# What Can a State/Tribe Do Under 401 Cert?

- **Waive**: state/tribal agency decides to not act on 401 application request
  - Waiver can be by passage of time, or explicit
  - CWA provides “any reasonable period not to exceed one year”
  - Watch out for federal permit/license agencies with shorter timeframes
  
- Effect of waiving: 401 cert not required for federal agency to issue permit/license

# Recommendation

Never waive by accident

# What About Neighboring Jurisdictions?

- EPA receives notice of the 401 cert from the federal permitting / licensing agency
- EPA notifies potentially affected state/tribe
- State/tribe submits objections (if any)
- State/tribe can request public hearing
- EPA submits evaluation and recommendations at the hearing
- Federal agency must condition its permit or license so will comply with water quality requirements

# Reviewing the Players

- Project proponent / applicant
- Federal permitting or licensing agency
- Agency with 401 cert authority
  - State / tribe where discharge originates
  - EPA regional office, if tribe not authorized
- Neighboring states or tribes

# State/Tribal 401 Cert Regulations

- Not required by EPA, just recommended
- Ideally would include
  - Procedures
  - Timeframes
  - Content of complete application
  - Fees
  - Decision basis

# 401 Certification Regulations

## ➤ Procedures

- Procedural and substantive
- Goals:
  - A defensible decision
  - Resource requirements minimized

## ➤ Timeframes

- Harmonize with federal agency timeframes – not always one year
- Clock starts with a complete application
  - Regs should clarify what is a complete application

# 401 Certification Regulations

## ➤ Application Fees

- Allowed under the CWA

## ➤ Basis for Decisionmaking

- Describe basis for decision
- Specify who is responsible for demonstrating compliance with water quality provisions
- Identify types and sources of information potentially considered
- Goal: a defensible well-documented decision

# 401 Cert: Example of Conditions

- Application for golf course and subdivision
- Conditions on the 401 cert included:
  - Stormwater runoff controls
  - Fish stocking
  - Vegetated buffer areas
  - Biological control of weeds and pests
  - Best management plans

# 401 Cert: Example of Conditions

- Application for new hydropower dam
- 401 cert denied because:
  - Wetlands destroyed or damaged
  - Loss of habitat
  - Threatened or endangered species impacted
  - Specific water quality standards violations likely
  - Applicant underestimated area impacted

# 401 Certification: Review

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# Question #1

T or F?

EPA is the certifying agency for all Federal licenses and permits under Section 401.

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*False. The State or Indian Tribe is unless the State or Tribe has no authority to give a certification.*

# Question #2

T or F?

An Indian Tribe that has assumed responsibility to administer the water quality standards program must make a separate application to EPA for approval to issue 401 certifications.

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An Indian Tribe that has assumed responsibility to administer the water quality standards program must make a separate application to EPA for approval to issue 401 certifications.

*False.*

*A Tribe authorized to administer the WQS program may also receive 401 certification authority.*

# Question #3

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*401 certifications are necessary only for activities licensed or permitted under the Clean Water Act.*

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*T or F?*

*401 certifications are necessary only for activities licensed or permitted under the Clean Water Act.*

*False.*

*Certification required for any Federal license or permit that may result in a discharge to waters of the U.S.*

# Question #4

*In reviewing an application for a Federal license or permit, the certifying agency may consider which of the following factors?*

- A. Short-term direct water quality impacts only*
- B. Long term direct water quality impacts only*
- C. Both short and long term (not to exceed five years) direct and indirect impacts*
- D. Direct and indirect short and long term impacts over the life of the project*

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- D. Review can include potential impacts*

# Question #5

Which of the following is (or are) a possible outcome of a 401 certification application review?

- A. Grant
- B. Approve
- C. Disapprove
- D. Amend
- E. Condition
- F. Deny
- G. Waive

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C. Disapprove

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E. Condition

F. Deny

G. Waive

**A, E, F, G.**

*(B, C, D are terms used in connection with WQS. Waiver of certification can be either explicit or implied if review exceeds acceptable time frame).*

# Question #6

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*If the project is located in jurisdiction A but there are water quality impacts in jurisdiction B, jurisdiction B is powerless to affect jurisdiction A's decision.*

*False. Jurisdiction B can submit objections and request a public hearing.*

# Question #7

*T or F?*

*Since 401 certifications apply to Federal licenses or permits, the State or Tribe may not consider any requirements of State or Tribal regulations that are more stringent than Federal implementing regulations.*

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*T or F?*

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*False.*

*Applicant must comply with any more stringent State/Tribal requirements included in the certification.*

# Question #8

*In making the decision on a 401 application, the certifying agency may consider which of the following?*

- A. Only information submitted by the applicant*
- B. Information on the project generated independently by the certifying agency*
- C. Information submitted by the applicant and any other information available to the certifying agency.*

# Question #8

*In making the decision on a 401 application, the certifying agency may consider which of the following?*

- A. Only information submitted by the applicant*
- B. Information on the project generated independently by the certifying agency*
- C. Information submitted by the applicant and any other information available to the certifying agency.*

*C. Many sources of information can be used if available.*

## Question #9

*Which of the following is correct? In a 401 certification review, EPA may.....*

- A. Request a public hearing*
- B. Submit its evaluation and recommendations*
- C. Override the certifying agency's decisions if it was arbitrary and capricious.*
- D. Notify other jurisdictions if a project will have impacts in multiple jurisdictions*

# Question #9

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- A. Request a public hearing*
- B. Submit its evaluation and recommendations*
- C. Override the certifying agency's decisions if it was arbitrary and capricious.*
- D. Notify other jurisdictions if a project will have impacts in multiple jurisdictions*

***B and D. A State or Tribe may request a public hearing.***

# Question #10

*T or F?*

*It is possible for a State or Tribe to lose the right to condition or deny certification for a permit or license application simply by taking too long for the review.*

# Question #10

*T or F?*

*It is possible for a State or Tribe to lose the right to condition or deny certification for a permit or license application simply by taking too long for the review.*

*True.*

*It is extremely important to review the application within the allotted time and to be clear what that time frame is since it is not always the same for every Federal agency.*

# Question #11

*To whom does the applicant for a Federal license or permit submit its request for 401 certification?*

- A. The appropriate EPA regional office*
- B. The 401 program office of EPA headquarters in Washington, D.C.*
- C. The environmental agency of the State or Tribe where the discharge is located*
- D. In both the jurisdiction where the discharge is located and in the jurisdiction where the water quality may be impacted.*

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- B. ~~The 401 program office of EPA headquarters in Washington, D.C.~~*
- C. The environmental agency of the State or Tribe where the discharge is located*
- D. In both the jurisdiction where the discharge is located and in the jurisdiction where the water quality may be impacted.*

*C. The applicant is required, by statute, to provide the licensing or permitting agency a certification from the State (or Tribe) where the discharge will originate.*

# Question #12

*T or F?*

*It is illegal for an applicant to contact the State or Tribe concerning certification before submitting a request for a Federal license or permit to the appropriate Federal agency.*

# Question #12

*T or F?*

*It is illegal for an applicant to contact the State or Tribe concerning certification before submitting a request for a Federal license or permit to the appropriate Federal agency.*

*False.*

*Not all that unusual even though it's not the procedure described in the statute. Early and frequent communication will help smooth the process*

# Question #13

*T or F?*

*Anyone answering all these questions correctly automatically receives a \$1,000 check from EPA.*

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*T or F?*

*Anyone answering all these questions correctly automatically receives a \$1,000 check from EPA.*

*Answer: Fat chance!*