

# Clean Water Act Section 401 Certification Final Rule

## Overview and Key Changes from Proposal

On April 10, 2019, President Trump issued [Executive Order 13868](#), “Promoting Energy Infrastructure and Economic Growth,” which directed the EPA to review Clean Water Act (CWA) Section 401 and EPA’s related regulations and guidance to determine whether the Agency’s policies should be updated or clarified. On June 1, 2020, the EPA finalized the “Clean Water Act Section 401 Certification Rule” to implement the water quality certification process consistent with the text and structure of the CWA. The final rule establishes procedures that promote consistent implementation of CWA Section 401 and regulatory certainty in the federal licensing and permitting process. For the first time in Agency history, the certification process outlined in the final rule was informed by a holistic analysis of the statutory text, legislative history, and relevant case law.

The final rule addresses some key areas of the CWA Section 401 certification process, including:

- 1. Timelines for Review and Action** –Reaffirms the statutory requirement that action on a certification request must be taken within a reasonable period of time, but in no case later than one year after receipt of a certification request.
- 2. Initiating Certification** –Reaffirms that certification is required for federally licensed or permitted activities that may result in a discharge from a point source into a water of the United States.
- 3. Scope of Certification Review** –Clarifies that the scope of a certifying authority’s CWA Section 401 certification review and action is limited to assuring that the discharge from a point source into a water of the United States resulting from a federally licensed or permitted activity will comply with “water quality requirements,” as defined in the rule.
- 4. Technical Assistance** –Reaffirms the Agency’s statutory responsibility to provide technical assistance to any party involved in a Section 401 water quality certification process.
- 5. Early Engagement** –Promotes early engagement and coordination among project proponents, certifying authorities (the regulating entity responsible for acting on a CWA Section 401 certification), and federal licensing and permitting agencies.

## **Background**

Section 401 of the CWA provides states and authorized tribes with an important tool to help protect the water quality of federally regulated waters within their borders, in collaboration with federal agencies. Section 401 of the CWA requires that, for any federally licensed or permitted project that may result in a discharge into waters of the United States, a water quality certification be issued to ensure that the discharge complies with applicable water quality requirements.

## **Key Changes from Proposal**

In response to public comment, the EPA updated provisions in the final rule to increase clarity and regulatory certainty, including:

- New pre-filing meeting provisions to promote early coordination in the water quality certification process;
- Additional elements required in a “certification request,” which are required to start the reasonable period of time for certification review;
- A clarified definition of “water quality requirements”;
- Refined information requirements that must be included in a decision document; and
- Clarification that federal agency review of a certifying authority’s decision document is focused on compliance with the procedural requirements of section 401 and the final rule.

## **For More Information**

To learn more about the CWA Section 401 water quality certification process and the EPA’s rulemaking effort, please visit <https://www.epa.gov/CWA-401>. The docket for the final rule (Docket ID No. EPA-HQ-OW-2019-0405) can be found at <https://www.regulations.gov>.