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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

## **CLEAN WATER ACT SECTION 401 GUIDANCE** **FOR FEDERAL AGENCIES, STATES AND AUTHORIZED TRIBES**

Pursuant to Executive Order 13868, the U.S. Environmental Protection Agency (EPA) is issuing this updated guidance to clarify and provide recommendations concerning the implementation of Clean Water Act (CWA) Section 401.<sup>1</sup>

### **I. Introduction and Section 401 Certification Overview**

Congress enacted Section 401 of the CWA to provide states and authorized tribes with an important tool to help protect water quality within their borders in collaboration with federal agencies. Under Section 401, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a state or authorized tribe where the discharge would originate issues a Section 401 water quality certification verifying compliance with existing water quality requirements or waives the certification requirement. As described in greater detail below, Section 401 envisions a robust state and tribal role in the federal permitting or licensing process, but places limitations on how that role may be implemented to maintain an efficient process that is consistent with the overall cooperative federalism construct established by the CWA.

The EPA, as the federal agency charged with administering the CWA,<sup>2</sup> is responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including Section 401. The EPA also serves as the Section 401 certification authority in certain circumstances.

Federal agencies that issue permits or licenses subject to a Section 401 certification (federal permitting agencies) also have an important role to play in the Section 401 certification process. Early coordination between federal permitting agencies and states and tribes, for example, can help identify information gaps that otherwise could delay the permitting or licensing process, help ensure the submission of substantively sufficient certification requests, and streamline the overall approval process for our nation's critical projects, including infrastructure and related development projects.

### **II. Clarifying Section 401 Provisions**

The purpose of this guidance is to facilitate implementation of Executive Order 13868 (the E.O.) by providing clarification on CWA Section 401 requirements and procedures and the EPA's

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<sup>1</sup> This guidance document is intended to assist federal permitting agencies and states and tribes until the EPA promulgates a final rule updating its CWA Section 401 regulations.

<sup>2</sup> Section 404 of the CWA is jointly administered by the EPA and the Army Corps of Engineers.

existing regulations at 40 C.F.R. Part 121. As directed by the E.O., this guidance addresses the following topics:

1. Statutory and regulatory timelines for review and action on Section 401 certifications;
2. The appropriate scope of Section 401 certification review and conditions; and
3. Information within the scope of a state or tribe’s Section 401 certification review.

Consistent with the E.O., this guidance also provides recommendations for how federal permitting agencies and states and tribes can better coordinate to improve the Section 401 certification process. As part of the EPA’s ongoing efforts to provide greater regulatory certainty under its CWA programs, in addition to issuing this guidance, the Agency has identified its Section 401 implementing regulations, last updated in 1971, for modernization. The EPA intends to update those regulations consistent with the timelines in the E.O. and may consider adopting some elements of this guidance during the rulemaking process. The EPA expects this guidance to provide clarification and recommendations on many aspects of Section 401 as the Agency works to update its regulations more holistically.<sup>3</sup>

This guidance is not a regulation, nor does it change or substitute for any applicable regulations. Thus, it does not impose legally binding requirements on the EPA, states, tribes, other federal agencies or the regulated community. This guidance provides important clarity to inform future permitting decisions and other actions; it neither alters legal rights or obligations nor changes or creates law. In the event of a conflict between the discussion in this guidance and any statute or regulation, this guidance would not be controlling.

#### **A. Statutory and regulatory timelines.**

The plain language of Section 401 provides a state or authorized tribe a reasonable period of time, which shall not exceed one year, to act on a Section 401 certification request.<sup>4</sup> Importantly, the CWA does not guarantee that a state or tribe may take a full year to act on a Section 401 certification request, but only grants as much time as is reasonable. By enacting Section 401, Congress clearly intended states and tribes to have an important role in federal permitting and licensing, but also clearly limited the timeline to act on a certification request to one year or less. In doing so, Congress signaled that states and tribes have the water resource expertise and the ability to evaluate potential water quality impacts from even the most complex proposals within a reasonable timeline, and in all cases within a single year.

Consistent with Section 401’s general provisions and the EPA’s existing regulations, federal permitting agencies have the authority and discretion to establish certification timelines so long as they are reasonable and do not exceed one year.<sup>5</sup> Some federal permitting agencies, including the EPA, have promulgated specific timelines within which states and tribes must act on a Section 401

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<sup>3</sup> Consistent with the E.O., the Agency’s ongoing state, tribal and federal agency outreach is generating additional concepts for rulemaking that may help modernize existing federal Section 401 regulations.

<sup>4</sup> “If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.” 33 U.S.C. § 1341; see also *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

<sup>5</sup> 33 U.S.C. § 1341; 40 C.F.R. § 121.16(b).

request.<sup>6</sup> The EPA recommends that project proponents seeking a Section 401 certification, states, tribes, and federal permitting agencies be familiar with all applicable federal regulations to understand if specific timelines apply to a particular certification request.

The CWA provides that the timeline for action on a Section 401 certification begins upon receipt of a certification request.<sup>7</sup> Although the EPA's prior Section 401 guidance indicated that the timeline for action begins upon receipt of a "complete application," the CWA does not use that term and therefore its use in the EPA's guidance document as a regulatory trigger, without notice and comment rulemaking, is inappropriate. Further, Section 401 of the CWA makes no mention of a state or tribe's authority to determine that a request is incomplete or delay the start of the timeline on that basis. The EPA recommends that states and tribes and project proponents establish a process to ensure appropriate and sufficient information is submitted to facilitate timely evaluation and action within the established reasonable timeline. Upon receipt of a written request for certification, the timeline for review begins, and the EPA recommends that states and tribes promptly begin evaluating the request to ensure timely action.

If a state or tribe does not grant, deny, or voluntarily waive the Section 401 certification within the established reasonable timeline, or seek an extension of time, federal permitting agencies are authorized to determine that the Section 401 certification requirement has been waived and issue the federal permit or license.<sup>8</sup> Once the certification requirement has been waived and the federal permit or license is issued, absent any project modification, a subsequent action by a state or tribe to approve, condition, or deny Section 401 certification has no legal force or effect. Because there is no tolling provision in Section 401, the timeline does not pause or stop for any reason before action is taken on the certification request. One recent court decision held that withdrawing and resubmitting the same Section 401 request for the purpose of circumventing the one year statutory deadline does not restart the timeline.<sup>9</sup> Although the CWA does not provide any procedure by which a project proponent may negotiate or agree to provide the state or tribe with more time to consider the request, the CWA also does not prohibit a federal permitting agency from modifying an established reasonable timeline, provided the modified timeline remains reasonable and does not exceed one year from receipt of the request.

The EPA recommends that federal permitting agencies and states and tribes maintain clear and open channels of communication well in advance of approaching deadlines to ensure waiver does not occur inadvertently.

## **B. Appropriate scope of Section 401 review and conditions.**

Section 401 of the CWA is a statutory tool intended to provide states and tribes with authority to

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<sup>6</sup> For example, the EPA's Section 401 certification regulations provide that generally six months should be considered a reasonable timeline for a state or tribe to act on a certification request (40 C.F.R. § 121.16(b)) and specifically for National Pollutant Discharge Elimination System permits provide 60 days unless a finding is made that unusual circumstances require more time (40 C.F.R. § 124.53(c)(3)); the Army Corps of Engineers has promulgated a timeline for certification of 60 days, unless special circumstances require a shorter or longer timeline (33 C.F.R. § 325.2(b)(ii)); and the Federal Energy Regulatory Commission has codified that a failure by a certifying authority to act within one year results in waiver (18 C.F.R. §§ 4.34, 5.23).

<sup>7</sup> 33 U.S.C. § 1341(a)(1).

<sup>8</sup> 33 U.S.C. § 1341; 40 C.F.R. § 121.16(b).

<sup>9</sup> See *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

protect water quality within their jurisdictions. CWA Section 401(a) does so by authorizing states and tribes to certify that a discharge to navigable waters that may result from a proposed activity will comply with applicable provisions of certain enumerated sections of the CWA, including effluent limitations and standards of performance for new and existing sources (Sections 301, 302 and 306 of the CWA), water quality standards and implementation plans (Section 303), and toxic pretreatment effluent standards (Section 307).<sup>10</sup> Also referenced throughout Section 401 is the requirement to ensure compliance with “applicable effluent limitations,” and “water quality requirements,” further underscoring the focused intent of this provision on the protection of water quality. Accordingly, the EPA recommends that the scope of a Section 401 certification review, and the decision whether to issue or deny a Section 401 certification, be limited to an evaluation of potential water quality impacts.

When granting a Section 401 certification, states and tribes are authorized by CWA Section 401(d) to include conditions, including effluent limitations, other limitations and monitoring requirements that are necessary to assure that the applicant for a federal permit or license will comply with appropriate provisions of CWA Sections 301, 302, 306 and 307, and with any other appropriate requirement of State law.<sup>11</sup> Consistent with the scope of review described above, the EPA recommends that conditions in a Section 401 certification be limited to ensuring compliance with the enumerated provisions of the CWA and other appropriate state or tribal water quality requirements. The EPA recommends that federal permitting agencies and states and tribes be engaged early and often to establish clear expectations for the scope of a Section 401 certification review as well as any potential certification conditions for a particular federal permit.

If a state or tribe issues a Section 401 certification with conditions beyond the scope of Section 401, i.e., conditions not related to water quality requirements, or has denied a water quality certification for reasons beyond the scope of Section 401, federal permitting agencies should work with their Office of General Counsel and the EPA to determine whether a permit or license should be issued with those conditions or if waiver has occurred. Some courts in limited jurisdictions have concluded that the CWA does not authorize federal permitting agencies to reject conditions of a Section 401 certification, and that a federal license or permit must contain all conditions of a certification. By way of reference, EPA’s longstanding National Pollutant Discharge Elimination System certification regulations authorize the Agency to determine if state or tribal conditions are valid under certain circumstances.<sup>12</sup> Given the regulatory uncertainty in this area, the EPA may consider providing additional clarity during its rulemaking process.

### **C. Scope of information relevant to a state or tribe’s Section 401 certification review.**

There is no CWA provision that requires specific information to be submitted with a Section 401 certification request. Similarly, there is no statutory provision that prohibits a state or tribe from requesting specific information, or additional information, to help inform its decision on whether to issue, issue with conditions or deny certification, or whether to waive the certification requirement. To evaluate a certification request, a state or tribe should only need the application materials submitted for the federal permit or license. The EPA encourages states and tribes to consult past certifications, available state or tribal water quality data and information (such as stream gauges and water quality monitoring information), and any standard operating procedures

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<sup>10</sup> 33 U.S.C. § 1341(a)(1).

<sup>11</sup> 33 U.S.C. § 1341(d).

<sup>12</sup> 40 C.F.R. Part 122.

for project reviews to inform their conversations with project proponents and federal permitting agencies about the certification process and potential project-specific information needs.

In some cases, a state or tribe might request additional information, including an environmental assessment or environmental impact statement prepared by the project proponent or the federal permitting agency pursuant to the National Environmental Policy Act (NEPA). The EPA encourages project proponents and federal permitting agencies to timely provide any requested information that is available; however, the EPA recommends that the state or tribe not delay action on a certification request until a NEPA review is complete unless the request is submitted at or near the conclusion of the NEPA process. The environmental review required by NEPA has a broader scope than that required by Section 401. For example, the NEPA review evaluates potential impacts to all environmental media, as well as potential impacts from alternative proposals that may not be the subject of a federal permit or license application. By contrast, a Section 401 certification review is tailored to assessing potential water quality impacts from the proposed project. Additionally, the NEPA process has historically taken more than one year to complete and waiting for a NEPA process to conclude may result in waiver of the certification requirement for failure to act within a reasonable timeline.

As noted above, an outstanding or unfulfilled request for information or documents does not pause or toll the timeline for action on a certification request. Accordingly, any effort by a state or tribe to delay action past the reasonable timeline due to insufficient information may be inconsistent with the Act and specifically with Section 401. However, just as a federal permitting agency needs sufficient information to issue a permit or license, a state or tribe needs adequate information to issue a Section 401 certification. The EPA recommends that project proponents provide appropriate water quality-related information to the state or tribe to ensure timely action on a request. Given the interest and attention this issue has generated, the EPA may consider providing additional clarity during its rulemaking process.

### **III. Additional Guidance for Federal Permitting Agencies and states and tribes.**

In addition to the general clarifications provided above, the EPA is providing more specific guidance to its federal partners and state and tribal co-regulators based in part on feedback the EPA has received on ways the Section 401 certification process could be improved.<sup>13</sup> The EPA acknowledges that its current federal regulations may not provide clear and comprehensive procedures for implementation of the Section 401 certification process, and the Agency intends to propose some procedures that may help clarify and streamline Section 401 certifications. The following recommendations are intended to provide guidance while the EPA undertakes a more comprehensive rulemaking effort.

#### **A. Early collaboration and clear written communication can reduce or eliminate concerns and minimize litigation risk.**

It is vital that federal permitting agencies, states and tribes, and project proponents maintain early and frequent communication. The EPA recommends that federal permitting agencies and states and tribes coordinate to develop model procedures to facilitate efficient and consistent completion

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<sup>13</sup> The EPA solicited pre-proposal recommendations on the forthcoming Section 401 rulemaking. Comments received in response are available in Docket ID No. EPA-HQ-OW-2018-0855.

of Section 401 certifications. Topics might include: anticipated timeline for federal permitting or licensing process; pre-application meetings; identification of relevant aquatic resources and relevant effluent limitations and water quality standards; development of milestone checklists and timelines for data availability; issue resolution procedures; establishment of formal points of contact; and other best practices.

To promote advance coordination as much as possible, the EPA recommends that federal permitting agencies notify states and tribes of projects that may require Section 401 certification as soon as possible. For instance, under the One Federal Decision policy established in Executive Order 13807, that notice might occur as early as two years in advance of the federal permitting action. Similarly, when an agency issues a Notice of Intent pursuant to NEPA, the EPA recommends that the federal permitting agency immediately notify the relevant states and tribes in writing.

### **B. Recommendations for federal permitting agencies.**

As described above, federal permitting agencies have the authority and discretion to establish reasonable timelines for action on Section 401 certification requests. In establishing a reasonable timeline for action on a particular certification request, the EPA recommends federal permitting agencies consider the type of permit or license under review, the complexity of the project to be permitted, and whether the state or tribe has previously reviewed similar Section 401 certification requests. In the interest of transparency and regulatory certainty, federal permitting agencies might wish to consider developing alternative timeframes categorically, such as by sector, by type of discharge, or with reference to other easily segregable categories. Early communication between the federal permitting agency and the state or tribe will help set expectations for action, ensure that an appropriate and reasonable timeline is established, and ensure that the state or tribe has a clear understanding of the timeline within which they must act. In lieu of established categorical timelines, the EPA recommends that federal permitting agencies communicate the reasonable timeline in writing to the state or tribe where practicable.

In addition, because federal permitting agencies have the authority to determine when the Section 401 certification requirement has been waived, the EPA recommends federal permitting agencies have a procedure in place to ensure they are properly notified of the date a certification request is received by the state or tribe. This will allow the federal permitting agency to track the Section 401 certification as a milestone to be completed along with other federal permit process milestones. The EPA further recommends that federal permitting agencies notify states or tribes in writing of waiver determinations once made, with sufficient explanation to support the determination. For activities requiring Section 401 certification from multiple federal permitting agencies and that are subject to the One Federal Decision policy, the EPA recommends that the lead federal agency be responsible for coordinating deadlines and making waiver determination recommendations for its federal partners when appropriate.

Federal permitting agencies have particular expertise in the types of projects for which they routinely issue permits and licenses, and the EPA recommends those agencies offer, and provide as requested, technical assistance to states and tribes throughout the Section 401 certification process, to the extent consistent with agency regulations and procedures. Providing technical assistance can promote timely, efficient, and cooperative project planning and successful permitting outcomes. The EPA further recommends that federal permitting agencies clearly document all assistance

provided to states and tribes.

Consistent with the One Federal Decision policy, the EPA recommends that, where appropriate, federal permitting agencies encourage project proponents to request all necessary Section 401 certifications at the same time. This coordination will facilitate the lead federal agency's management of the overall permitting process and may enhance coordination with the relevant states or tribes.

Finally, where questions arise concerning the appropriate scope or application of Section 401, federal permitting agencies (as well as states or tribes and project proponents) may request that the Administrator of the EPA provide relevant information on applicable limitations, standards, regulations or requirements, or water quality criteria and comment on any related compliance methods.<sup>14</sup> This provision has not been used very often; however, with the increase in litigation over Section 401 certifications, the EPA encourages its federal partners to utilize this provision where technical assistance on Section 401 issues may be appropriate. As the agency responsible for administering the CWA, the EPA may be able to provide useful guidance to its federal partners on a case-by-case basis.

### **C. Recommendations for States and Tribes.**

The EPA encourages states and tribes and project proponents to communicate and coordinate in good faith well in advance of the need for a Section 401 certification. The EPA recommends that states and tribes work with their regulated communities to establish expectations for what information may be necessary to timely act on a certification request. Through advance notice from the project proponent and early coordination with the project proponent and the federal permitting agency, states, and tribes can clarify decision-making needs prior to receiving a Section 401 certification request. Such advance coordination will help ensure that the Section 401 certification process can be completed within a timeframe consistent with the CWA and other project planning activities.

The EPA similarly encourages open communication between the project proponent and the state and tribe throughout the certification process. This is particularly important to help ensure that a state or tribe's request for additional information is timely issued and tailored appropriately to potential water quality impacts, and that the project proponent's response is timely issued and appropriately responsive. Although the EPA understands that outstanding information requests or non-responsive project proponents can be challenging, the EPA recognizes that states and tribes are water resource experts and have significant experience issuing permits and approvals for many types of projects, including for discharges to waters, dredge and fill projects, and above- and below-ground pipelines in their jurisdictions. With this experience and local water resource expertise, the EPA encourages states and tribes to evaluate the potential risk associated with information or data gaps and consider issuing timely certification with conditions that may address those potential risks. If a state or tribe intends to deny a Section 401 certification, the EPA recommends that the notice of denial be in writing and identify with specificity the reasons, and

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<sup>14</sup> 33 U.S.C. § 1341(b) states, “[t]he Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.”

any outstanding data or information gaps, so the project proponent has a meaningful opportunity to cure the identified deficiencies in a new request.

Through its outreach and engagement on Section 401, the EPA heard concerns from states and tribes and federal permitting agencies about the enforceability of Section 401 conditions. Some states and tribes suggested that federal permitting agencies infrequently enforce Section 401 certification conditions. Federal permitting agencies indicated that implementation and enforcement of Section 401 certification conditions can be challenging when those conditions are vague, unclear, or not clearly tethered to a specific state or tribal water quality requirement. A condition that is not well understood cannot be effectively implemented or enforced. To assist a federal permitting agency in properly implementing and enforcing Section 401 certification conditions, the EPA recommends that states and tribes identify conditions that are clear, specific, and directly related to a state or tribal water quality requirement. Including citations to the relevant state or tribal law requirement may provide the federal permitting agencies with the context necessary to successfully implement and enforce the condition. States and tribes may wish to work with federal permitting agencies to develop template conditions that can be used for certain types of projects or permits. At a minimum, the EPA recommends that states and tribes coordinate with federal permitting agencies to ensure that the intent and purpose of project-specific conditions are well understood. This collaboration and coordination will help ensure that the federal permitting agency fully understands the conditions and has the tools necessary for enforcement.

#### **IV. Conclusion**

Congress enacted Section 401 of the CWA to give states and tribes a direct role in federal permitting and licensing processes to ensure that activities subject to federal permitting comply with established water quality requirements. Though Section 401 envisions a robust state and tribal role in the federal permitting and licensing process, it places limitations on how that role may be implemented to maintain an efficient permitting process within the overall cooperative federalism construct established by the CWA. The EPA encourages federal permitting agencies and states and tribes to actively coordinate on timing, information needs, and obligations under the CWA. Communicating frequently and establishing expectations at the outset of a Section 401 certification process can help create a more predictable and transparent Section 401 certification process.