

**Clean Water Act Section 401 Water Quality Certification
Questions and Answers on the 2020 Rule Vacatur
12/17/21**

The Environmental Protection Agency (EPA) is providing these questions and answers in response to the applicable CWA section 401 requirements and procedures following the Northern District of California's October 21, 2021 remand with vacatur of the 2020 CWA Section 401 Certification Rule (2020 Rule). These questions and answers are not a regulation, nor do they change or substitute for applicable regulations. Thus, they do not impose legally binding requirements on EPA, states, tribes, other federal agencies or the regulated community. These questions and answers neither alter legal rights or obligations nor change or create law. Please use the email box at cwa401@epa.gov to submit additional questions regarding CWA section 401.

1. Which EPA regulations now govern the CWA Section 401 certification processes?

The CWA 401 certification regulations EPA promulgated in 1971, formerly codified at 40 CFR Part 121. On October 21, 2021, the U.S. District Court for the Northern District of California issued an order remanding and vacating (i.e., invalidating) EPA's 2020 Clean Water Act Section 401 Certification Rule. The vacatur is nationwide, and the order requires a temporary return to EPA's 1971 Rule until EPA finalizes a new certification rule. The CWA 401 certification regulations EPA promulgated in 1971, formerly codified at 40 CFR Part 121.

2. Is EPA continuing the rulemaking process?

Yes. The Agency will continue the rulemaking process that was announced in May 2021. Please visit www.epa.gov/cwa-401 for more information and upcoming engagement opportunities.

3. When will EPA propose a new rule?

EPA expects to propose a new CWA Section 401 rule in Spring 2022. EPA is following the Administrative Procedure Act to develop the new rule. For more information on how you may participate in the rulemaking process, please visit www.epa.gov/cwa-401.

4. Where can I find a copy of the 1971 Rule?

The language of the 1971 Rule can be found [here](#). Citations listed throughout these questions and answers refer to the 1971 Rule text.

5. In light of the district court's vacatur of the 2020 Rule, does EPA expect to revisit certification actions completed between September 11, 2020 (the 2020 Rule's effective date) and October 21, 2021 (the 2020 Rule's vacatur date)?

The court's order vacated the 2020 Rule. It did not address certifications or federal licenses or permits issued while the 2020 Rule was in effect. Generally, EPA does not expect to revisit certifications the Agency issued while the 2020 Rule was effective.

6. What is the effect of vacatur on pending certification requests?

Pending certification requests should be processed in accordance with the 1971 Rule. For example, if a certification request was received before October 21, 2021, the certifying authority should review and act upon the certification request in accordance with the 1971 Rule.

7. Are certification modifications allowed under the 1971 Rule?

Certification modifications are allowed under the 1971 Rule, subject to the requirements of 40 CFR 121.2(b).

8. Are the 2020 Rule’s requirement for a pre-filing meeting request and a 30-day wait period still in effect?

No. The pre-filing meeting request process is not a requirement of the 1971 Rule. However, EPA continues to recommend early communication and coordination between the applicant, the certifying authority, and the federal licensing or permitting agency.

9. Is there a definition of the term “certification request” that applies to submissions to states and tribes under the 1971 Rule?

No. The 1971 Rule defines the contents of a certification application only when EPA acts as a certifying authority. 40 CFR 121.22.

10. Are states and tribes required to provide public notice on certification requests?

Yes. CWA section 401(a)(1) requires states and tribes to establish procedures for public notice for certification requests.

11. When does the “reasonable period of time” begin under the 1971 Rule?

CWA section 401(a)(1) and the 1971 Rule provide that the “reasonable period of time” begins “after receipt” of a certification request. 33 USC 1341(a)(1); 40 CFR 121.16(b).

12. Under what circumstances is the certification requirement waived under the 1971 Rule?

The 1971 Rule provides that the certification requirement shall be waived (a) upon written notification from the certifying authority that it expressly waives the certification requirement or (b) upon written notification from the federal agency that the certifying authority failed to act on a certification request within a reasonable period of time after such request, as determined by the federal agency, not to exceed one year. *See* 40 CFR 121.16.

13. What are the components of a certification decision under the 1971 Rule?

The components of a certification decision are identified at 40 CFR 121.2(a).

14. To what extent may a Federal agency review a state certification under the 1971 Rule?

The 1971 Rule specifies only that the federal licensing or permitting agency shall send written notification to EPA if the certifying authority fails to act on a request for certification within a reasonable period of time after receipt of such request. *See* 40 CFR 121.16.

15. Do federal agencies still have to notify EPA pursuant to section 401(a)(2)?

Yes. *See* 33 USC 1341(a)(2); 40 CFR 121.11.

16. Do section 401(a)(2) notifications get sent to EPA if the certification decision was a waiver?

Yes. *See* 40 CFR 121.16.