



Clean Water Act Section 401 Water Quality Certification Improvement Rule June 2022

EPA is proposing a rule to support a predictable, efficient, stable, and transparent water quality certification process under Clean Water Act (CWA) section 401. The Agency's proposed rule is grounded in the fundamental principles of cooperative federalism that have been essential to the effective implementation of the CWA by EPA, states, territories, and Tribes over the past 50 years. For more information on submitting written comment on the proposal or to register for the virtual public hearing on the proposed rule, see www.epa.gov/cwa-401.

Overview: Section 401 Empowers States, Territories, and Tribes to Protect Vital Waters

Under the Clean Water Act section 401, Congress provides states, territories, and Tribes with a tool to protect their waters from adverse impacts from federally licensed or permitted projects. Under section 401, a project proponent for a federal license or permit which may result in a discharge into waters of the United States must obtain a water quality certification from the certifying authority. Certifying authorities are typically a state (which includes territories), or a Tribe with treatment in a similar manner as a state (TAS).

Federal licenses and permits that may require section 401 water quality certification include CWA section 404 dredge and fill permits from the Army Corps of Engineers (Corps), hydroelectric licenses from the Federal Energy Regulatory Commission (FERC), and CWA section 402 pollutant discharge permits from EPA. A broad range of individuals and entities seek section 401 certification for these kinds of projects, including corporations and other businesses, federal and state agencies (e.g., state departments of transportation), contractors, and individual citizens. Thousands of water quality certifications are granted each year for a wide range of projects.

Actors in this process include:

- **Certifying authorities.** The state, territory, or Tribe with TAS where the discharge from the federal project originates *or* EPA if a state, territory, or Tribe does not have jurisdiction over the area.
- **Federal licensing or permitting agency.** The federal agency whose license or permit is subject to section 401 certification.
- **Project proponents.** Those seeking a section 401 certification, including project applicants or federal agencies seeking certification for permits and licenses.

EPA first promulgated implementing regulations for water quality certification in 1971, which remained in effect until the Agency promulgated the 2020 CWA Section 401 Certification Rule (2020 Rule). After reviewing the 2020 Rule pursuant to Executive Order 13990, the Agency announced its intention to revise the 2020 Rule to better uphold the role of states, territories, and Tribes under section 401 as an essential component of the Act's system of cooperative federalism. The Agency's actions will be grounded in robust stakeholder input.



Key Components of EPA's Proposed Rule

Pre-Filing Meeting Requests

Project proponents would request a pre-filing meeting from a certifying authority at least 30 days before requesting certification unless the certifying authority waives or shortens this requirement. This approach **encourages early engagement** between project proponents, federal agencies, and certifying authorities, while providing certifying authorities flexibility to determine if a pre-filing meeting is necessary. This allows the certification process to move efficiently by providing an early opportunity (if deemed necessary) to address any issues or questions.

Requests for Certification

All requests for certification would include: (1) a copy of a draft license or permit; and (2) any existing and readily available data or information related to potential water quality impacts from the proposed project. Certifying authorities may define, in their regulations, other necessary elements for a request for certification. If they choose not to do so, the proposed rule includes a default list of five elements that must be included in the request. This approach **promotes an efficient and transparent certification process** by clearly defining when a project proponent must request certification, and by allowing certifying authorities to clearly define in their regulations what other information, if any, they need to start their certification review. Starting certification only after the license or permit is drafted and shared allows the certifying authority to see the federal agency's proposed conditions, increasing the efficiency of the section 401 process.

Reasonable Period of Time

For the first time, the EPA regulations would be updated to provide certifying authorities with a role in determining the "reasonable period of time" to review the request for certification. The statutory "reasonable period of time" for reviewing a request for certification begins when a certifying authority receives the request for certification in accordance with its submission procedures. The certifying authority may collaborate with the federal licensing or permitting agency to establish a reasonable period of time to review the request for certification. If the certifying authority and federal agency do not reach an agreement within 30 days on the length of time for review, it will default to 60 days from receipt of the request for certification. The default is automatically extended upon notice by the certifying authority (before the end of the reasonable period of time) that the certifying authority's public notice requirements will take longer than 60 days *or* if there is a force majeure event. This proposal **reflects the unique needs of different certifying authorities** by allowing for automatic extensions due to public notice procedures or extenuating events such as natural disasters. Further, in the event there is no agreement, this approach establishes a default time period for review to provide stakeholders with certainty and ensure the certification process moves in a predictable and transparent manner.

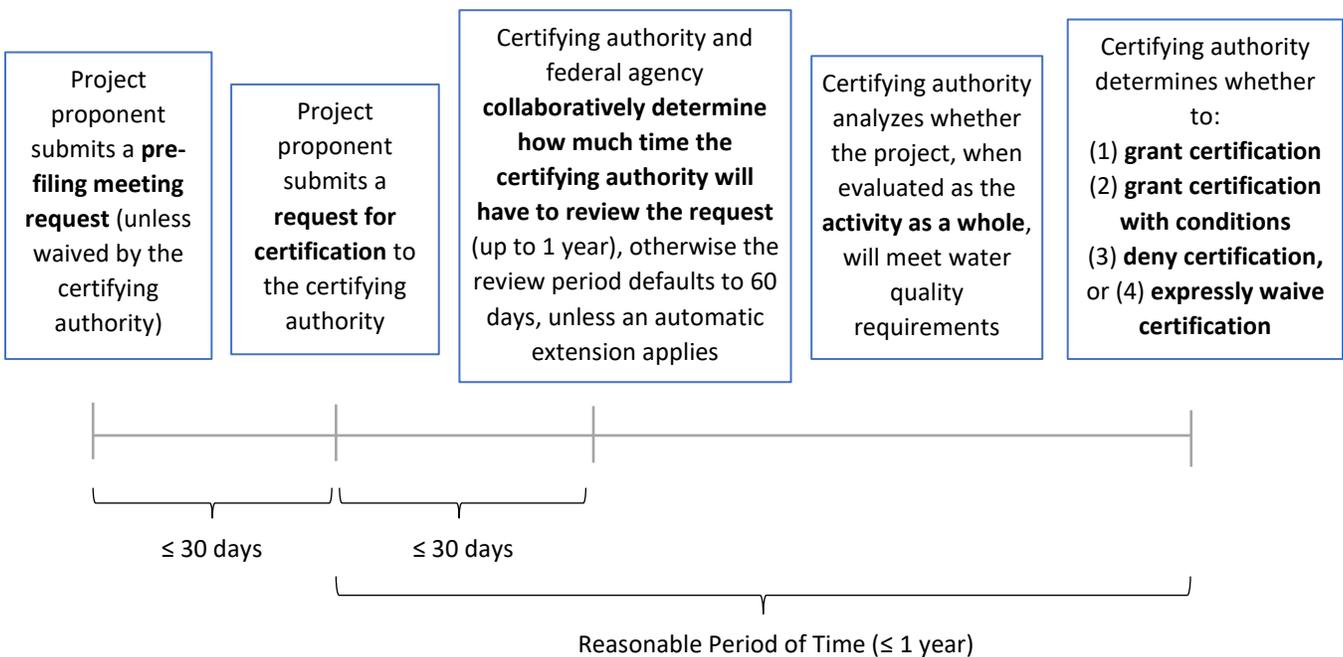
Scope of Review

EPA proposes that when a certifying authority reviews a request for certification, it looks at whether the activity as a whole will comply with water quality requirements, which include water quality-related state or Tribal laws. This approach allows a certifying authority to **holistically evaluate the water quality impacts** of a federally licensed or permitted project. Certifying authorities may evaluate impacts from any aspect of the project activity with the potential to affect water quality. This approach reinstates the broader and more environmentally protective scope of review that the Supreme Court affirmed in 1994.

Certification Decisions

A certifying authority may make one of four certification decisions on a request for certification: (1) grant certification; (2) grant certification with conditions; (3) deny certification; or (4) expressly waive certification. Each decision must be in writing and include minimum information defined in the proposed rule. This approach provides certifying authorities with the flexibility to provide additional, supporting information for any certification decision, while defining the minimum requirements of that decision to **promote good government and allow for stakeholder clarity and certainty**.

Figure 1:
Key components in EPA’s proposed CWA Section 401 Water Quality Certification Improvement Rule



Additional Provisions of EPA’s Proposed Rule

Federal Agency Review

The proposed rule would limit federal agency review of certification decisions to whether: (1) the certifying authority has indicated the nature of the certification decision (i.e., grant, grant with conditions, deny, or waiver); (2) the proper certifying authority issued the decision; (3) the certifying authority provided public notice on the request for certification; and (4) the decision was issued within the reasonable period of time. If federal agency review reveals that the certifying authority did not indicate its decision or did not provide public notice on the request for certification, the federal agency would be required to provide the certifying authority with an opportunity to remedy the deficiency, provided the time period for review has not expired or if the time can be extended. Consistent with the statute, a waiver of certification may only occur if the certifying authority fails or refuses to act within the reasonable period of time. This approach clarifies the limited circumstances under which waivers occur, which **provides certainty for certifying authorities, project proponents, and federal agencies**.



Neighboring Jurisdictions

EPA is proposing to provide more detail and explanation on the neighboring jurisdiction process under section 401(a)(2), including the roles of the actors involved, defining when the neighboring jurisdiction process begins, and the minimal contents of a notification to EPA. This approach **clarifies a valuable tool** that allows states, territories, and Tribes with treatment in a similar manner as a state (TAS) status to participate in the federal licensing or permitting process where EPA has determined that a proposed project subject to section 401 certification in another jurisdiction may affect their water quality.

Modifications

Certifying authorities and federal agencies may agree to modify a grant of certification (with or without conditions). However, only the agreed upon portions may be modified. The proposed rule clarifies that the certifying authority may not unilaterally modify the certification decision, and that the nature of certification decision (i.e., grant, deny, waiver) cannot be changed. This approach allows certifying authorities and federal agencies to **respond to changing circumstances in an efficient, transparent way**. At the same time, it protects project proponent interests by clarifying that **modifications may not be done unilaterally** and may not change the nature of a certification decision.

Tribes with Treatment in a Similar Manner as a State

The proposed rule includes provisions for Tribes to obtain TAS status for the section 401 certification program or to obtain TAS to act as a neighboring jurisdiction under section 401(a)(2), making it the first time Tribes will have this option, without also applying for TAS for water quality standards under section 303(c). This approach **promotes tribal autonomy** and efficiency by providing additional opportunities for Tribes to obtain TAS to participate in the water quality certification process.

Enforcement and Inspection

The proposed rule does not include regulatory text on enforcement and removes the previous regulatory text on inspections. Enforcement is not expressly addressed in the text of section 401, so EPA is not proposing regulations. Instead, the preamble provides guidance on enforcement and inspection issues to **promote good government and clarity**.