Proposed Clean Water Act
Section 401 Water Quality Certification Improvement Rule

State and Territory Listening Session

Office of Water
U.S. Environmental Protection Agency

June 15, 2022
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Today’s Agenda

- EPA Presentation on CWA Section 401 Rulemaking and Clarifying Questions (35 mins)
- Listening and Feedback Session (70 mins)
- Closing Remarks and Next Step (5 minutes)
Overview of the Proposed Rule
“Clean Water Act Section 401 Water Quality Certification Improvement Rule”
Background: What is Clean Water Act (CWA) section 401?

- Under CWA Section 401:
  - A federal agency may **not** issue a license or permit to conduct any activity that may result in any discharge into a “water of the United States”, **unless** the state or authorized tribe where the discharge would originate either issues a CWA Section 401 water quality certification or waives certification.

- Section 401 applies to **any** federal license or permit that may result in a discharge into a water of the United States.
Background: Who is involved in CWA section 401 certification?

- **Project proponent**: applicant for a federal license or permit or the entity seeking certification
- **Federal licensing or permitting agency**: any agency of the Federal Government to which application is made for a license or permit that is subject to CWA section 401
- **Certifying authority**: a state or authorized tribe where the discharge originates
  - **State**: states and territories
  - **Authorized tribes**: tribes with “treatment in a similar manner as a state” for section 401
  - **EPA**: acts as the certifying authority if no authorized tribe or state
Background: Previous Agency Actions on CWA Section 401

- EPA promulgated regulations for water quality certification in 1971, prior to the CWA, which created section 401.

- On July 13, 2020, the “Clean Water Act Section 401 Certification Rule” (“2020 Rule”) was published. This rule went into effect on September 11, 2020.
On January 20, 2021, President Biden issued Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,” which directed EPA to review and consider revising the CWA section 401 certification regulations.

On May 27, 2021, Administrator Regan signed a Federal Register notice announcing EPA’s intention to reconsider and revise the CWA Section 401 Certification Rule found at 40 CFR 121.
Proposed CWA Section 401 Water Quality Certification Improvement Rule

- On **June 1, 2022**, the Administrator Regan signed the proposed “Clean Water Act Section 401 Water Quality Certification Improvement” rule to modernize and clarify EPA’s existing regulations at 40 CFR 121 and 40 CFR 124.53-55.
Proposed rule: Overview

Certification Process

Pre-filing Meeting Request ≤ 30 DAYS
Request for Certification ≤ 30 DAYS
Federal Agency (FA) and Certifying Authority (CA) set the RPT or it defaults to 60 days
Public Notice and Certifying Authority Analysis ≤ ONE YEAR
Reasonable period of time (RPT)
Certification Decision*
*If certification is denied, the process stops here

Post-Certification Process

Certification Granted or Waived ≤ 5 DAYS
Federal Agency notifies EPA ≤ 30 DAYS
EPA 401(a)(2) Determination ≤ 60 DAYS
Neighboring Jurisdiction Determination
Permit/License Issuance
Key features of the proposal

- Request for certification
- Reasonable period of time
- Scope of certification
- Contents of a certification decision
- Federal agency review
- Modifications
Proposed Rule: Request for certification

- All requests for certification must:
  - Be in writing, signed, and dated;
  - Include a copy of the draft license or permit (unless legally precluded from obtaining a copy); and
  - Include any existing and readily available data or information related to potential water quality impacts from the proposed project.

- Defines additional requirements when EPA is the certifying authority (or when state/tribes do not define additional requirements in regulations).

- States/tribes may define other necessary elements for a request for certification in their regulations.
Proposed Rule: Reasonable period of time

- A certifying authority must act on a request for certification within the RPT, as determined by the federal licensing or permitting agency and certifying authority within 30 days of receiving a certification request.
  - The RPT shall not exceed one year.
  - If they fail to set an RPT, it will default to 60 days from the receipt of a request for certification.

- Two ways the RPT may be extended:
  - **Automatically extended** in two scenarios upon written notification by the certifying authority before the end of the RPT: (1) need to meet certifying authority public notice requirements or (2) force majeure events, e.g. natural disaster.
  - **Extended upon agreement** between the certifying authority and federal agency, after consulting with the project proponent, as long as it does not exceed one year from receipt of the certification request.
Proposed Rule: Scope of certification

• The scope of a certifying authority’s review is whether the *activity as a whole* will comply with water quality requirements.
  • “Water quality requirements” means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, and federal and state or tribal laws or regulations implementing those sections, and *any other water quality-related requirement of state or tribal law*.

• Section 401 certifications are limited to addressing potential *water quality effects* from federally licensed or permitted projects.
Proposed Rule: Contents of a certification decision

- A decision to grant, grant with conditions, deny, or expressly waive certification must, at a minimum:
  - be in writing; and
  - include the elements listed in the proposal

- Elements of certification decisions:
  - **Grant** – section 121.7(c)
  - **Grant with conditions** – section 121.7(d)
  - **Denial** – section 121.7(e)
  - **Waiver** – section 121.7(f)
Proposed Rule: Federal agency review

Federal agency review is limited to reviewing a certification decision for compliance with **four facial requirements from section 401**:  
1. whether the decision indicates whether it is a grant, grant with conditions, denial, or express waiver;  
2. whether the proper certifying authority issued the decision;  
3. whether the certifying authority provided the appropriate public notice; and  
4. whether the decision was issued within the RPT.

Consequences of federal agency review:  
- **Failure to indicate decision or provide appropriate public notice**: the federal agency must provide an opportunity to remedy the deficiency, and if necessary, extend the RPT to provide such an opportunity (provided the extension would not exceed one year from receipt of the certification request)  
- **Failure to have proper certifying authority issued the decision**: federal agency must notify project proponent that it must seek notification from the proper certifying authority  
- **Failure to issue decision within the RPT**: a waiver may occur
Proposed Rule: Modifications

- Certifying authorities and federal agencies may agree to modify a certification, but modification is limited to the scope of the agreement and may not change the nature of the decision (e.g., modify a grant into a waiver).
Any clarifying questions?
State and Territory Discussion
State and Territory Discussion

Please vote on which discussion areas you have an interest in prioritizing for today’s discussion:

- Request for certification
- Reasonable period of time
- Scope of certification
- Contents of a certification decision
- Federal agency review
- Modifications
- Implementation
Discussion topic: Request for certification

- **Question 1**: In your experience, what types of “existing and readily available data or information related to potential water quality impacts from the proposed project” have informed your certification analysis? Have you experienced any challenges with obtaining this type of information? How long, on average, does it take to obtain this type of information?

- **Question 2**: Does your state or territory provide specific elements that must be included in a request for certification in regulation? In guidance? In practice? How does your state or territory communicate this information to project proponents?

- **Question 3**: Are there other elements EPA should define as minimum requirements for all requests for certification? Should EPA define minimum requirements for certifying authorities other than EPA?
Discussion topic: Request for certification

- **Question 4:** In your experience, would the alternative approach provide enough information to commence the reasonable period of time? Would this alternative approach work for some federal licenses or permits but not others?

- **Question 5:** Does your state or territory have a publicly defined process to determine whether a request for certification is complete or submitted? Should EPA define “applicable submission procedures?”

- **Question 6:** Should there be a specified timeframe for when the certifying authority must send written confirmation to the project proponent and federal agency of the date of receipt of the request for certification?
Discussion topic: Reasonable period of time

- **Question 1**: Should the federal agency and certifying authority collaboratively set the RPT? Should the federal agency be solely responsible for setting the RPT?

- **Question 2**: Should the Agency define factors that the federal agency and certifying authority must consider in setting the RPT?

- **Question 3**: Should there be a different default RPT? What factors should inform the length of the default? Please provide any information, data, or experiences that could illustrate these factors.
Discussion topic: Reasonable period of time

- **Question 4**: If EPA required a federal license or permit application, instead of a draft license or permit, in the request for certification, should the default RPT be different?

- **Question 5**: Should EPA establish regulations specifically authorizing withdrawals and resubmissions in certain factual situations similar (or not) to the circumstances in *Hoopa Valley Tribe*?
Discussion topic: Scope of certification

- **Question 1**: Should EPA readopt the “activity as a whole” definition of scope of review under section 401(a)(1) and scope of conditions under section 401(d), or should EPA adopt the “discharge-only” scope of review announced in the 2020 Rule? Can you provide any examples of your state or territory’s experience implementing either or both interpretations?

- **Question 2**: Should the word “activity” in the term “activity as a whole” include all activities at the project proponent’s “project in general” with the potential to affect water quality, or should EPA specifically define the term “activity” to mean only those activities at the project site that are specifically authorized by the federal license or permit in question?

- **Question 3**: Can the federal licensing or permitting agency effectively implement a certification with conditions that addresses impacts from the “activity as a whole” if it has authority over only a small part of a larger project?
Discussion topic: Contents of a certification decision

**Question 1:** Should EPA define minimum information requirements for certification decisions for certifying authorities other than EPA? Are these proposed minimal information requirements sufficient? Should there be other information defined for any of the actions?
Discussion topic: Federal agency review

- **Question 1:** What is the scope of federal agency review under section 401? Does section 401 authorize other aspects of a certification decision to be subject to federal agency review aside from the proposed limitations?

- **Question 2:** Should EPA identify in regulation what elements must be used (or may be used) to demonstrate to a federal agency that it has met the section 401 facial requirements subject to federal agency review? Or should EPA defer to federal agencies to define those elements?

- **Question 3:** Should EPA develop procedures regarding how a certifying authority should respond to a federal agency’s notice regarding deficiencies in its certification decision? For example, should EPA provide a timeframe for the certifying authority to affirmatively respond to the federal agency’s notice of deficiency and provide a justification for any extension to the reasonable period of time (e.g., length of the public notice period)?
Discussion topic: Modifications

- **Question 1**: Should project proponents have a role in the modification process? If so, how?

- **Question 2**: Should modification be allowed only if the actual language of the certification modification is agreed upon by the federal agency and certifying authority, as opposed to the more general agreement currently proposed?

- **Question 3**: Should the certification modification process account for whether there is a federal license or permit modification process already in place? Should the certification modification process account for which point in time in the licensing or permitting cycle a modification is considered (e.g., if new information supporting a modification arises either before or after issuance of the final license or permit)?
Discussion topic: Implementation

**Question 1**: What implementation materials, if any, would be most beneficial in implementing any final rule?
Closing Remarks and Next Steps
Outreach and Engagement

- Upcoming state and territory outreach and engagement:
  - June 22 (3-5 PM EDT)
  - June 28 (3-5 PM EDT)

- EPA will be hosting a public hearing on July 18, 2022.

- Comments may be submitted until August 8, 2022 (60 day period) to Docket ID No. EPA-HQ-OW-2022-0128

- Please visit https://www.epa.gov/CWA-401 for more information on how to register and for up-to-date information on outreach opportunities.
Additional Information

- Visit https://www.regulations.gov to view the docket for this rulemaking, identified by Docket ID No. EPA-HQ-OW-2022-0128.

- For more information on CWA section 401 and this rulemaking, please visit https://www.epa.gov/CWA-401.

- If you have any questions, please send an e-mail to cwa401@epa.gov.