Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule

Tribal 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.
Background: Executive Order 13990

- 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**, 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
  - ≤ 60 DAYS
- Public Notice and Certifying Authority Analysis
- Certification Decision*
  - ≤ ONE YEAR
  - Reasonable period of time (RPT)

*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
- Neighboring Jurisdiction Determination
- Permit/License Issuance
  - ≤ 60 DAYS
Key features of the proposal

- Request for certification
- Reasonable period of time
- Scope of certification
- Neighboring jurisdictions
- Treatment in a similar manner as a state (TAS)
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: Neighboring jurisdiction

- The federal agency must notify EPA within 5 days of receiving the license or permit application and related certification or waiver.

- Clarifies that EPA must determine whether a discharge “may affect” water quality in a neighboring state or authorized tribe.

- Requires the neighboring jurisdiction to notify EPA, the federal agency, and the certifying authority if it objects to the issuance of the federal license or permit and defines the contents of its notification.

- Requires the federal agency to provide public notice at least 30 days prior to the hearing and requires EPA to provide its evaluation and recommendations at the hearing.
Proposed rule: Treatment in a similar manner as a state (TAS) for Section 401

- A tribe may obtain TAS for section 401 without obtaining TAS for water quality standards.

- A tribe may also obtain TAS solely for section 401(a)(2) to participate as a neighboring jurisdiction.
Any clarifying questions?
Tribal Discussion
Tribal 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
- Neighboring jurisdiction
- Treatment in a similar manner as a state (TAS) for section 401
- 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 tribe provide specific elements that must be included in a request for certification in regulation? In guidance? In practice? How does your tribe 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 tribe 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 tribe’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: Neighboring jurisdiction

- **Question 1**: Under proposed section 121.14(b), EPA defines the contents of a neighboring jurisdiction’s objection. Should EPA require the neighboring jurisdiction to identify a license or permit condition that it thinks would resolve the objection?

- **Question 2**: Should EPA establish a deadline by which the federal licensing or permitting agency must make a determination after a public hearing on a neighboring jurisdiction’s objection?

- **Question 3**: Should a neighboring jurisdiction be allowed to withdraw its objection before a public hearing is held, thus eliminating the requirement to hold a public hearing?
Discussion topic: Treatment in a similar manner as a state (TAS) for Section 401

- **Question 1:** Would your tribe be interested in participating in the section 401 certification process without obtaining TAS for water quality standards? Would your tribe be interested in participating in only the Section 401(a)(2) process? If applicable, please provide examples of your experience obtaining TAS for other CWA programs.
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 tribal outreach and engagement:
  - June 22 (12-2 PM EDT)
  - June 28 (12-2 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](https://www.epa.gov/CWA-401) for more information on how to register and for up-to-date information on outreach opportunities.
Tribal consultation

- The Agency held a pre-proposal tribal consultation and coordination period from June 7, 2021 to September 7, 2021.

- EPA is continuing to consult with individual tribes, upon request and as time and resources permit.
  - If you are interested in requesting consultation on the proposed rule, please e-mail cwa401@epa.gov.
Additional Information

- Visit [https://www.regulations.gov](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](https://www.epa.gov/CWA-401).

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