Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule

Public Hearing

Office of Water
U.S. Environmental Protection Agency

July 18, 2022
Using Zoom

- The Zoom menu bar appears at the bottom of the Zoom window once the meeting begins.
- If you don’t see the menu bar, move your mouse slightly and the bar should appear.

Technical contact: meetings@erg.com
Today’s Agenda

- CWA Section 401 Rulemaking Presentation (20 mins)
- Public Comments (95 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, 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.
**Certification Process**

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Pre-filing Meeting Request</td>
</tr>
<tr>
<td>2</td>
<td>Request for Certification</td>
</tr>
<tr>
<td>3</td>
<td>Federal Agency (FA) and Certifying Authority (CA) set the RPT or it defaults to 60 days</td>
</tr>
<tr>
<td>4</td>
<td>Public Notice and Certifying Authority Analysis</td>
</tr>
<tr>
<td>5</td>
<td>Certification Decision*</td>
</tr>
</tbody>
</table>

*If certification is denied, the process stops here

Reasonable period of time (RPT): ≤ ONE YEAR

**Post-Certification Process**

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Certification Granted or Waived</td>
</tr>
<tr>
<td>7</td>
<td>Federal Agency notifies EPA</td>
</tr>
<tr>
<td>8</td>
<td>EPA 401(a)(2) Determination</td>
</tr>
<tr>
<td>9</td>
<td>Neighboring Jurisdiction Determination</td>
</tr>
<tr>
<td>10</td>
<td>Permit/ License Issuance</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Timeframe</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>≤ 30 DAYS</td>
<td>≤ 30 DAYS</td>
</tr>
<tr>
<td>≤ ONE YEAR</td>
<td>≤ 60 DAYS</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>Certification Granted or Waived</td>
</tr>
<tr>
<td>12</td>
<td>Federal Agency notifies EPA</td>
</tr>
<tr>
<td>13</td>
<td>EPA 401(a)(2) Determination</td>
</tr>
<tr>
<td>14</td>
<td>Neighboring Jurisdiction Determination</td>
</tr>
<tr>
<td>15</td>
<td>Permit/ License Issuance</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Timeframe</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>≤ 5 DAYS</td>
<td>≤ 30 DAYS</td>
</tr>
<tr>
<td>≤ 60 DAYS</td>
<td>≤ 60 DAYS</td>
</tr>
</tbody>
</table>
Key features of the proposal

- Pre-filing meeting request
- Request for certification
- Reasonable period of time
- Scope of certification
- Contents of a certification decision
- Federal agency review
- Neighboring jurisdiction process
- Modifications
- Treatment in a similar manner as a state (TAS)
Proposed Rule: Pre-filing meeting request

- All project proponents must request a pre-filing meeting from the appropriate certifying authority at least 30 days prior to submitting a certification request unless this requirement is waived or shortened by the certifying authority.
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: 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: 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).
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.
Public Comment
Certification Process

- Pre-filing Meeting Request
- Request for Certification
- Federal Agency (FA) and Certifying Authority (CA) set the RPT or it defaults to 60 days
- Public Notice and Certifying Authority Analysis
- Certification Decision*

*If certification is denied, the process stops here

- ≤ 30 DAYS
- ≤ 30 DAYS
- ≤ ONE YEAR
- Reasonable period of time (RPT)

Post-Certification Process

- Certification Granted or Waived
- Federal Agency notifies EPA
- EPA 401(a)(2) Determination
- Neighboring Jurisdiction Determination
- Permit/License Issuance

- ≤ 5 DAYS
- ≤ 30 DAYS
- ≤ 60 DAYS
Closing Remarks and Next Steps
Outreach and Engagement

- Visit [www.regulations.gov](http://www.regulations.gov) to view the docket for this rulemaking, identified by Docket ID No. EPA-HQ-OW-2022-0128.
  - Comments may be submitted to the Docket until August 8, 2022 (60-day period).

- Please visit [www.epa.gov/CWA-401](http://www.epa.gov/CWA-401) for more information on how to provide comment.
Additional Information

- For more information on CWA section 401 and this rulemaking, please visit [www.epa.gov/CWA-401](http://www.epa.gov/CWA-401).
  - Fact Sheet – in English and Spanish
  - Rule Provision Comparison Table from the Economic Analysis
  - Recorded Webinar – Overview of the Proposed Rule
  - Listening Session Slides and Discussion Questions

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