

Implementation Challenges Associated with Clean Water Act Section 401

Public Listening Session

July 2025



Background: CWA Section 401

What is 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 “waters 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.

Who is involved in CWA Section 401?



PROJECT PROPONENT

applicant for a federal license or permit, or the entity seeking certification



CERTIFYING AUTHORITY

a state or authorized tribe where the discharge originates



All 50 states, the District of Columbia, and the territories



Tribes with “treatment in a similar manner as a state” (TAS) for section 401



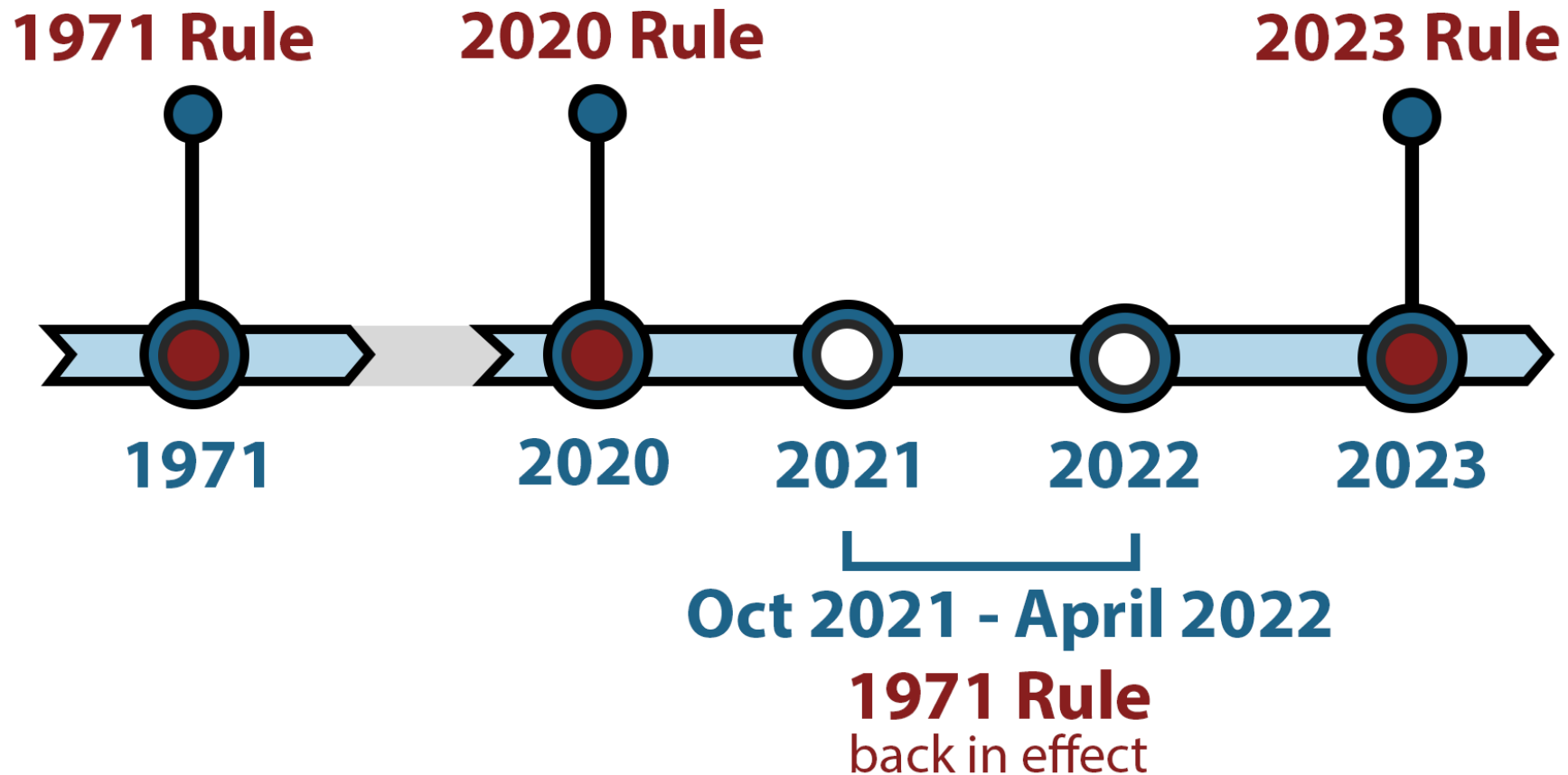
EPA acts as the certifying authority where there is no authorized tribe or state



FEDERAL LICENSING OR PERMITTING AGENCY

any agency of the Federal Government to which application is made for a Federal license or permit that is subject to CWA section 401

Background: Previous Regulatory Actions





May 21, 2025

MEMORANDUM

SUBJECT: Clarification regarding the Application of Clean Water Act Section 401 Certification

FROM: Peggy S. Browne, Acting Assistant Administrator

Browne,
Peggy

Digitally signed by
Browne, Peggy
Date: 2025.05.21
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Consistent with the overall cooperative federalism framework of the Clean Water Act, Section 401 authorizes states and authorized Tribes to play a role, but a specific and limited one, in the federal licensing or permitting process. The U.S. Environmental Protection Agency, as the lead federal agency for administering the CWA, is responsible for developing regulations and guidance to ensure effective implementation of CWA programs, including Section 401. The agency promulgated regulations on CWA Section 401 certifications in September 2023 (2023 Rule). Recently, some stakeholders have raised questions about potential applications of the 2023 Rule's scope of certification.¹ The purpose of this document² is to reiterate the EPA's longstanding position that states and Tribes must utilize CWA Section 401 only for its statutory purpose – to protect water quality – and not as a weapon to shut down projects for reasons with no basis in the statute or applicable regulations. A certifying authority's evaluation is limited to considering adverse impacts to water quality, and only such impacts insofar as they prevent compliance with applicable water quality requirements.

The scope of certification refers to the purview of a certifying state's or authorized Tribe's analysis when it evaluates a request for certification related to an application for a federal license or permit, to determine whether it will issue certification, deny certification, or waive certification. The most common examples of federal licenses or permits that may be subject to CWA Section 401 certification are CWA Section 404 permits for the discharge of dredged or fill material permits issued by the Army Corps of Engineers as well as Rivers and Harbors Act Sections 9 and 10 permits issued by the Army Corps of Engineers; hydropower and interstate natural gas pipeline licenses issued by the Federal Energy Regulatory Commission; and CWA Section 402 National Pollutant Discharge Elimination System permits issued by the EPA in jurisdictions where the EPA administers the NPDES permitting program.

¹ See, e.g., America Builds: Clean Water Permitting and Project Delivery Hearing before Subcommittee on Water Resources and Environment, 119th Cong. (2025) (statement of Robert D. Singletary, Executive Director, Oklahoma Department of Environmental Quality, statement of Noah Hanners, Executive Vice President, Nucor Corporation, on behalf of the National Ass'n of Manufacturers).

² This document is not a regulation, nor does it change or substitute for any applicable regulations. Thus, it does not impose legally binding requirements on the EPA, states, Tribes, other federal agencies or the regulated community. This document neither alters legal rights or obligations nor changes or creates law. In the event of a conflict between the discussion in this document and any statute or regulation, this document would not be controlling.

Background: Recent Events



May 21, 2025 - Issued a memorandum on the scope of certification



July 1, 2025 – Signed *Federal Register* notice announcing listening sessions and recommendations docket



July 7, 2025 – Federalism and Tribal consultation begins



- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

A. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This amended proposed action will apply, if finalized as proposed, to certain areas of Indian country throughout Oklahoma as discussed in the preamble, and therefore has tribal implications as specified in E.O. 13175 (65 FR 67249, November 9, 2000). However, this action will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This action will not impose substantial direct compliance costs on federally recognized tribal governments because no actions will be required of tribal governments. This action will also not preempt tribal law as no Oklahoma tribe implements a regulatory program under the CAA, and thus does not have applicable or related tribal laws. Consistent with the EPA Policy on Consultation with Indian Tribes (December 7, 2023), the EPA has offered consultation to tribal governments that may be affected by this action and provided information about this action.

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: June 26, 2025.

James McDonald,
Director, Air & Radiation Division, Region 6.

[FR Doc. 2025-12520 Filed 7-3-25; 8:45 am]

BILLING CODE 5565-55-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 121

[EPA-HQ-OW-2025-0272; FRL-12813-01-OW]

Establishment of Public Docket and Listening Sessions on Implementation Challenges Associated With Clean Water Act Section 401

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public listening sessions; request for public comment.

SUMMARY: The U.S. Environmental Protection Agency (EPA) will initiate a series of stakeholder listening sessions and invite written feedback on regulatory uncertainty or implementation challenges associated with the Clean Water Act (CWA) section 401 certification process as defined in the 2023 Water Quality Certification Improvement Rule. The Agency will use this input to determine whether guidance or rulemaking are necessary to address identified areas of regulatory uncertainty or implementation challenges regarding the scope of certification. The Agency also seeks stakeholder input related to CWA section 401(a)(2) implementation.

DATES: Written feedback must be received on or before August 6, 2025.

ADDRESSES: You may send written feedback, identified by Docket ID No. EPA-HQ-OW-2025-0272, by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting written feedback.

- **Email:** OW-Docket@epa.gov. Include Docket ID No. EPA-HQ-OW-2025-0272 in the subject line of the message.

Instructions: All submissions received must include the Docket ID No. EPA-HQ-OW-2025-0272. Written feedback received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending written recommendations and additional information on the forthcoming listening sessions, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Lauren Kasperek, Oceans, Wetlands and Communities Division, Office of Water (4502-T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202)-564-3351; email address: cwa401@epa.gov.

SUPPLEMENTARY INFORMATION: Section 401 of the Federal Water Pollution Control Act (FWPCA, also commonly known as the Clean Water Act or CWA) authorizes States¹ and authorized

Tribes² to play a specific role in Federal licensing or permitting processes. 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 navigable waters, unless the State or Tribe where the discharge would originate either certifies “that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307” of the CWA or waives certification. 33 U.S.C. 1341(a)(1). When granting a CWA section 401 certification, States and Tribes may include conditions, including “effluent limitations and other limitations, and monitoring requirements” that are necessary to assure that the applicant for a Federal license or permit will comply with applicable provisions of CWA sections 301, 302, 306, and 307, and with “any other appropriate requirement of State law.” *Id.* at 1341(d).

Congress originally established the water quality certification requirement in section 21(b) of the Water Quality Improvement Act of 1970. The EPA promulgated regulations implementing this water quality certification requirement in 1971. Congress subsequently enacted CWA section 401 in 1972 amendments to the FWPCA that borrowed from the text of the earlier statutory provision but also differed in material respects.³

In 2020, the EPA amended its regulations regarding water quality certification at 40 CFR part 121 for the first time since enactment of CWA section 401. Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020). The EPA promulgated revisions to the 2020 Rule in September 2023. Clean Water Act Section 401 Water Quality Certification Improvement Rule (2023 Rule), 88 FR 66558 (September 27, 2023). The 2020 Rule and 2023 Rule differed in material respects, including on several of the issues set out below.

One central aspect of water quality certification is the scope of certification. The scope of certification refers to the extent of a certifying State or authorized Tribe’s analysis when it evaluates a request for certification to determine whether it will deny certification, waive certification, or grant certification, including any conditions to include in a grant of certification. The 2023 Rule provides that when a certifying

¹ The CWA defines “state” as “a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.” 33 U.S.C. 1362(3).

² Authorized Tribes refers to Tribes that have been approved for treatment in a manner similar to a State status for CWA section 401. See 33 U.S.C. 1377(e).

³ 36 FR 22487 (November 25, 1971), redesignated at 37 FR 21441 (October 11, 1972), further redesignated at 44 FR 32899 (June 7, 1979).

Federal Register Notice & Request for Input

The Agency will use stakeholder input on regulatory uncertainty and implementation challenges associated with the CWA section 401 certification process as defined in the 2023 Rule to determine **whether guidance or rulemaking are necessary to address identified areas of regulatory uncertainty or implementation challenges** regarding the scope of certification. The Agency also seeks stakeholder input related to CWA section 401(a)(2) implementation.

The Agency is seeking input, data and information on the following six topics:

1

Defining the scope of certification generally and the scope of certification conditions (Section 121.3)

2

Defining “water quality requirements” (Section 121.1(j))

3

Determining what parameters inform making the “may affect” determination under Section 401(a)(2)

4

Establishing categorical determinations under Section 401(a)(2)

5

Stakeholder experiences with the 2023 Rule

6

Stakeholder experiences with the application of the 2023 Rule’s scope of certification.

Overview of Input Requested

What is the Agency doing?

The Agency will use stakeholder input to determine **whether guidance or rulemaking are necessary to address identified areas of regulatory uncertainty or implementation challenges.**

The Agency is seeking input, data and information on the following six topics:

1

Defining the scope of certification generally and the scope of certification conditions (Section 121.3)

Defining “water quality requirements” (Section 121.1(j))

Determining what parameters inform making “may affect” determinations under Section 401(a)(2)

Establishing categorical determinations under Section 401(a)(2)

Stakeholder experiences with the 2023 Rule

Stakeholder experiences with the application of the 2023 Rule’s scope of certification.

Overview of Input Requested

- Legal rationale for interpreting scope as applicable to the “discharge” versus the “activity”
- Whether the Agency should clarify or revise its interpretation of scope of certification
- Whether justification is necessary to demonstrate that certification conditions included in a certification decision are within the appropriate scope
- Whether further clarification is needed on the waters considered in acting on a request for certification

The Agency is seeking input, data and information on the following six topics:

2

Defining the scope of certification generally and the scope of certification conditions (Section 121.3)

Defining “water quality requirements” (Section 121.1(j))

Determining what parameters inform making “may affect” determinations under Section 401(a)(2)

Establishing categorical determinations under Section 401(a)(2)

Stakeholder experiences with the 2023 Rule

Stakeholder experiences with the application of the 2023 Rule’s scope of certification.

Overview of Input Requested

- Whether the Agency should further clarify or revise its interpretation of the statutory phrase “other appropriate requirements of State law” from CWA section 401(d)
- Whether the Agency should clarify or revise the definition of “water quality requirements”
- Any legal rationale for such clarifications or revisions

The Agency is seeking input, data and information on the following six topics:

Defining the scope of certification generally and the scope of certification conditions (Section 121.3)

Defining “water quality requirements” (Section 121.1(j))

3

Determining what parameters inform making “may affect” determinations under Section 401(a)(2)

4

Establishing categorical determinations under Section 401(a)(2)

Stakeholder experiences with the 2023 Rule

Stakeholder experiences with the application of the 2023 Rule’s scope of certification.

Overview of Input Requested

- Data or information about what parameters the Agency should consider when determining whether a neighboring jurisdiction’s water quality may be affected by discharge for purposes of section 401(a)(2)
- Data or information which may support the Agency establishing a categorical determination that the quality of no neighboring jurisdiction's waters may be affected by discharge in such circumstances
 - E.g., specific types of activities, geographic regions, types of waterbodies, or other types of circumstances, etc.

The Agency is seeking input, data and information on the following six topics:

Defining the scope of certification generally and the scope of certification conditions (Section 121.3)

Defining “water quality requirements” (Section 121.1(j))

Determining what parameters inform making “may affect” determinations under Section 401(a)(2)

Establishing categorical determinations under Section 401(a)(2)

5

Stakeholder experiences with the 2023 Rule

Stakeholder experiences with the application of the 2023 Rule’s scope of certification.

Overview of Input Requested

- Any data or information on stakeholder experiences with the 2023 Rule, e.g.,
 - Where challenges were identified
 - Areas for improvement
 - Areas for increased transparency
 - Areas of positive engagement, and
 - Best practices or lessons learned from the stakeholder perspective

The Agency is seeking input, data and information on the following six topics:

Defining the scope of certification generally and the scope of certification conditions (Section 121.3)

Defining “water quality requirements” (Section 121.1(j))

Determining what parameters inform making “may affect” determinations under Section 401(a)(2)

Establishing categorical determinations under Section 401(a)(2)

Stakeholder experiences with the 2023 Rule

6

Stakeholder experiences with the application of the 2023 Rule’s scope of certification.

Overview of Input Requested

- Data or information from stakeholders about the application of the 2023 Rule’s scope of certification
 - E.g., examples of certification decisions issued under the 2023 Rule that are believed to exceed the 2023 Rule’s scope of certification

Additional Information & Resources



For more information on CWA section 401 and upcoming engagement opportunities, please visit <https://www.epa.gov/cwa-401>.



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

- Written recommendations can be submitted to the Docket ID **EPA-HQ-OW-2025-0272**.
 - Go to <https://www.regulations.gov> and follow the online instructions for submitting feedback to the docket.
 - Written feedback must be received on or before **August 6, 2025**.