

***UPDATING THE  
SECTION 401 WATER  
QUALITY  
CERTIFICATION  
REGULATION***

**Proposed Rule**

# PROPOSED RULE

- Updates the Agency's 2023 regulatory requirements for water quality certification under Clean Water Act section 401.
  - Revises several procedural and substantive aspects of the current regulations to increase transparency, efficiency, and predictability for certifying authorities and the regulated community,
  - Better aligns the regulations with the text and legislative history of the CWA, and to ensure States and authorized Tribes understand and adhere to their section 401 role.
- Visit <https://www.regulations.gov> to view the docket for this rulemaking and submit comments, identified by **Docket ID No. EPA-HQ-OW-2025-2929**.

Please visit  
<https://www.epa.gov/cwa-401>  
for more information on  
outreach opportunities and to  
find copies of the proposed  
rule, fact sheets, and more.

# AGENDA

- CWA Section 401 Background
- Overview of Pre-Proposal Outreach
- Proposed Revisions
- Public Input Opportunities and Outreach

# AGENDA

- CWA Section 401 Background
- Overview of Pre-Proposal Outreach
- Proposed Revisions
- Public Input Opportunities and Outreach

# 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?



### APPLICANT

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: EPA'S ROLES

- 1 To act as the **certifying authority** when a State or Tribe does not have authority to act on a request for certification
- 2 To provide **technical assistance** to applicants, certifying authorities, or federal agencies upon request
- 3 To determine **whether a discharge may impact** the water quality of another State (potentially requiring notification and additional processes)

# BACKGROUND: FEDERAL LICENSES OR PERMITS SUBJECT TO SECTION 401

Examples of Federal license or permits that may trigger the need to seek section 401 certification



**EPA-issued CWA section 402 permits** for discharge of pollutants



**FERC certificates** for construction/operation of interstate natural gas pipeline projects



**CWA section 404 permits** issued by Corps for discharge of dredge/fill materials



**Shoreline permits** issued by Tennessee Valley Authority for shoreline construction activities



**Rivers and Harbors Act section 10 permits** issued by Corps for construction of wharfs, piers, etc.



**Nuclear power plant licenses** issued by Nuclear Regulatory Commission



**Rivers and Harbors Act section 9 permits** issued by Corps (for construction of dams/dikes) and Coast Guard (for construction of bridges and causeways)



**Permits for wineries and distilleries** issued by Alcohol and Tobacco Tax and Trade Bureau



**FERC licenses** for construction/operation of non-Federal hydropower projects



**Mine plans of operation for mining activities** on National Forest Service Lands approved by the Forest Service

## BACKGROUND: TIMING IN THE CERTIFICATION PROCESS

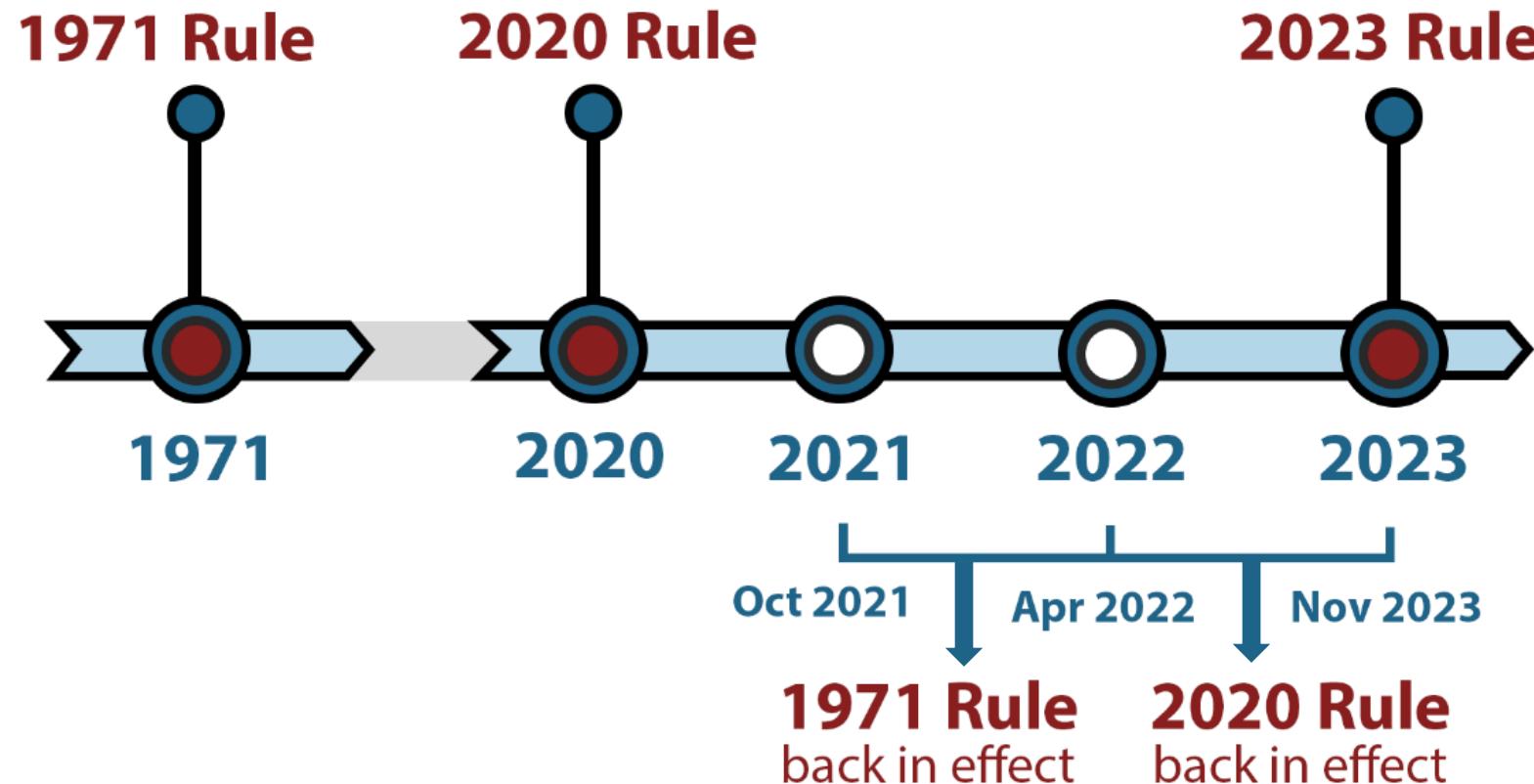
Section 401(a)(1) provides certifying States and Tribes must act on a request for certification within a "reasonable period of time (which shall not exceed **one year**)."

Certifying authorities may take one of four actions on a request for certification:



- Grant certification
- Grant certification with conditions
- Deny certification
- Waive certification

## BACKGROUND: PREVIOUS REGULATORY ACTIONS



# AGENDA

- CWA Section 401 Background
- Overview of Pre-Proposal Outreach
- Proposed Revisions
- Public Input Opportunities and Outreach

# OVERVIEW OF PRE-PROPOSAL OUTREACH



- 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** – Initiated Federalism and Tribal consultation.
- August 6, 2025** – Docket closed.
- September 7, 2025** – Consultation ended.

The Agency requested input, data, and other information on six topics to determine **whether guidance or rulemaking are necessary to address identified areas of regulatory uncertainty or implementation challenges.**

Received over **170 letters** in the docket and hosted **two** listening sessions.

# AGENDA

- CWA Section 401 Background
- Overview of Pre-Proposal Outreach
- Proposed Revisions
- Public Input Opportunities and Outreach

# PROPOSED RULE *TOPICS*



**Scope of Certification**



**Request for Certification**



**Extending the Reasonable Period of Time**



**Contents of Certification Decisions**



**Modifications**



**Section 401(a)(2) Process**



**Treatment as a State (TAS) Provisions**

# SCOPE OF CERTIFICATION

## Core Concept

The purview (or **scope**) of a certifying State's or authorized Tribe's analysis and review of a request for certification.

## Proposed Approach

Certifying authority evaluates whether a point source discharge will comply with appropriate and applicable water quality requirements in waters of the United States (WOTUS).

## Current Approach

Certifying authority evaluates whether an “activity” will comply with applicable water quality requirements in WOTUS (and non-WOTUS for certain circumstances).

*Why? To align with the best reading of the statutory text and structure, legislative history, and Supreme Court case law.*

# REQUEST FOR CERTIFICATION

## Core Concept

The clock for a State or Tribal certifying authority to review and act on a **request for certification** begins when a project applicant submits a request for certification.

## Proposed Approach

All requests for certification must include a defined list of components. State and Tribal certifying authorities may *not* define additional components for inclusion in the request for certification.

## Current Approach

All requests for certification must include a defined list of minimum components. Any additional components defined by the State or Tribe must be provided to project proponents in advance of their request and related to water quality.

*Why? To provide greater certainty for certifying authorities, federal agencies, and applicants regarding the start of the reasonable period of time.*

# EXTENDING THE REASONABLE PERIOD OF TIME (RPT)

## Core Concept

A certifying authority must act upon a request for certification within a **“reasonable period of time** (which shall not exceed one year).”

### Proposed Approach

Removes automatic extensions to the RPT and instead relies on federal agency and certifying authority to collaboratively extend the RPT, if needed. Also prohibits certifying authority from requesting the applicant to withdraw and resubmit a request for certification.

### Current Approach

Allowed the RPT to automatically extend due to force majeure events and certifying authority public notice procedures. Declined to take a regulatory position on the practice of withdrawal and resubmission.

*Why? To ensure certification actions do not extend beyond the one year statutory limit.*

# CONTENTS OF CERTIFICATION DECISIONS

## Core Concept

Certifying authorities must communicate their **decision** on a request for certification to the project proponent (*i.e.*, grant, grant with conditions, denial, waiver).

## Proposed Approach

Defines the contents of certification decisions for all certifying authorities in regulatory text.

## Current Approach

Encouraged certifying authorities to include certain information in a certification decision in regulatory text.

*Why? To ensure applicants, federal agencies, and the public understand the rationale behind certification decisions.*

# MODIFICATIONS

## Core Concept

Certifying authorities may **modify** grants of certification if there are future changes to the project, as opposed to restarting the certification process.

## Proposed Approach

Certifying authority may only modify grants of certification (with or without conditions) with agreement from the Federal agency and applicant. Certifying authority must obtain the applicant's agreement for the exact language of the modification.

## Current Approach

Certifying authority may only modify grants of certification (with or without conditions) with agreement from the Federal agency. Applicant does not have a formal role in the modification process.

*Why? To provide applicants with an explicit role in the modification process.*

# SECTION 401(a)(2) PROCESS

## Core Concept

EPA determines whether a discharge from a certified or waived project may affect the water quality of **another State**, and if so, notifies the other State, which initiates additional procedural steps.

## Proposed Approach

Provides Federal agencies with 90 days to hold a public hearing on a notified State's objection and make a determination on the objection.

## Current Approach

Did not place a timeline on the Federal agency to host a public hearing and make a determination on the notified State's objection.

*Why? To ensure a transparent and timely conclusion to the section 401(a)(2) process.*

# TREATMENT AS A STATE (TAS)

## Core Concept

**Treatment as a State (TAS)** allows Tribes to administer the Section 401 program instead of EPA.

### Proposed Approach

Does not include regulatory text for Tribes to obtain standalone TAS for Section 401 or 401(a)(2); Tribes may continue to obtain TAS for Section 401 through Section 303(c) (water quality standards).

### Current Approach

Includes regulatory text for Tribes to obtain TAS for Section 401 as a whole or obtain TAS only for neighboring jurisdiction process (Section 401(a)(2)), without obtaining TAS for Section 303(c) (water quality standards or WQS).

*Why? To reduce duplication across regulations and encourage Tribes to develop appropriate tools (i.e., WQS) to protect their water resources as envisioned by the Clean Water Act.*

# AGENDA

- CWA Section 401 Background
- Overview of Pre-Proposal Outreach
- Proposed Revisions
- Public Input Opportunities and Outreach

# PUBLIC INPUT OPPORTUNITIES AND OUTREACH

Visit <https://www.regulations.gov> to view the docket for this rulemaking and submit comments, identified by **Docket ID No. EPA-HQ-OW-2025-2929**.

Once the proposed rule is published in the *Federal Register*, comments may be submitted for **30 days**.

EPA will be hosting a public meeting on **January 28, 2026**. Please visit <https://www.epa.gov/cwa-401> for more information on how to register to provide oral comments.

*If you have any questions, please send an e-mail to [cwa401@epa.gov](mailto:cwa401@epa.gov).*

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