

# Clean Water Act Section 401

## ISSUE SUMMARY:

Under Clean Water Act (CWA) section 401, Congress provides Tribes, states, and territories, with the authority to grant, deny, or waive certification on proposed federal licenses or permits that may result in a discharge into waters of the United States. CWA section 401 is often part of the permitting process for approving infrastructure projects, including those associated with transportation, development, and energy production and transmission. The final 2023 CWA Section 401 Water Quality Certification Improvement Rule (2023 Rule) went into effect on November 27, 2023. (40 CFR part 121) See <https://www.epa.gov/cwa-401/final-2023-cwa-section-401-water-quality-certification-improvement-rule>.

## UPCOMING MILESTONES:

Continued outreach and implementation of the final 2023 CWA Section 401 Water Quality Certification Improvement Rule to assist states and Tribes, federal agencies, and stakeholders to comply with the new regulation.

## BACKGROUND:

Under CWA section 401, Congress provides Tribes, states, and territories with a tool to protect their waters from adverse impacts that could result from federally licensed or permitted projects. As required by CWA section 401, an applicant for a federal license or permit that may result in a discharge into waters of the United States must obtain a water quality certification or waiver from the certifying authority. Certifying authorities are typically a Tribe with treatment in a similar manner as a state (TAS) or a state (which includes territories). The EPA acts as the certifying authority where a Tribe or state does not have authority to issue certifications. Currently, the EPA acts as the certifying authority in two scenarios: (1) on behalf of Tribes without TAS and (2) on lands of exclusive federal jurisdiction in relevant respects.

Federal licenses and permits that may require section 401 water quality certification include, but are not limited to, CWA section 404 dredge and fill permits from the Army Corps of Engineers, hydroelectric licenses from the Federal Energy Regulatory Commission, and CWA section 402 pollutant discharge permits from the EPA. A broad range of individuals and entities seek section 401 certification for projects requiring these kinds of permits, including businesses, federal and state agencies (e.g., state departments of transportation), contractors, and individual citizens. Thousands of water quality certifications are granted each year for a wide range of projects.

- CWA section 401(a)(2) establishes a process for Tribes with TAS, states and territories to participate in the federal licensing or permitting process in circumstances where a discharge originating in another jurisdiction may affect their water quality. This section 401(a)(2) process is referred to as the neighboring jurisdictions process. The EPA is responsible for notifying other Tribes with TAS or states that may be affected by a discharge from a federally licensed or permitted activity, and where required, for providing an evaluation and recommendations on such notified Tribe with TAS or state's objections.

The EPA first implemented regulations for water quality certification in 1971, which remained in effect until the Agency finalized the 2020 CWA Section 401 Certification Rule (2020 Rule). Executive Order 13990 directed the EPA to review and, as appropriate and consistent with applicable law, take action to revise or replace the 2020 Rule. Following this review, the Agency announced its intention to revise the 2020 Rule to better uphold the role of Tribes, states, and

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territories under section 401. The Agency also revised the regulations in 40 CFR part 124 concerning section 401 certification of EPA-issued CWA section 402 permits.

- There is currently one pending lawsuit against the Agency challenging the 2023 Rule in the Western District of Louisiana. Plaintiffs include Louisiana, Alaska, Arkansas, Kentucky, Mississippi, Missouri, Montana, Oklahoma, South Carolina, West Virginia, Wyoming, American Petroleum Institute, Interstate Natural Gas Association of America, and National Hydropower Association. Intervenor include California, the California Water Resources Control Board, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, the District of Columbia, National Wildlife Federation, and American Whitewater.

## KEY EXTERNAL STAKEHOLDERS:

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|--|---|--|--|---|--|
| <input checked="" type="checkbox"/> Congress | <input checked="" type="checkbox"/> Industry          | <input checked="" type="checkbox"/> States           | <input checked="" type="checkbox"/> Tribes | <input checked="" type="checkbox"/> Media | <input checked="" type="checkbox"/> Other Federal Agency |
| <input checked="" type="checkbox"/> NGO      | <input checked="" type="checkbox"/> Local Governments | <input type="checkbox"/> Other (name of stakeholder) |  |   |  |

## MOVING FORWARD:

In 2025, the EPA will continue to implement the final rule through outreach, training and technical assistance to:

- promote consistent practices in the EPA headquarters and regional offices,
- help ensure Tribes, states, and territories understand final rule requirements, and
- help federal agencies understand their obligations under Section 401.

The EPA will continue to coordinate with DOJ on ongoing litigation.

