

WSSI 2021 Regulatory Updates  
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# **Clean Water Act § 401 Water Quality Certification**

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# **1. What Is 401 Water Quality Certification?**

# State Water Quality Standards



## 💧 Water Quality Standards

- ~ Designate uses for all state waterbodies (e.g., swimming, drinking, fishing)
- ~ Criteria to attain the uses (e.g., max pollutant concentrations)
- ~ Antidegradation

## 💧 CWA 401: Federal Permitting Actions Should Not Allow Violations of State Water Quality Standards\*

\*Among other things!

# CWA 401: The Law

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“Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of [the Clean Water Act]. . . . If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.”

# Key Concepts

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- 💧 **When is 401 certification needed?**
  - ~ Application for a **federal** license or permit...
  - ~ For an activity that “**may result in a discharge**” to waters
- 💧 **What is it?**
  - ~ **Determination** by state that proposed activity will comply with state water quality standards
- 💧 **How long does it take?**
  - ~ State has “**reasonable period of time**” to act
  - ~ Not to exceed **one year**

# Key Concepts

- ◆ What are the State's options?
  - ~ **Grant** certification (with or without conditions)
  - ~ **Deny** certification
  - ~ **Waive** certification (expressly or by default)
- ◆ What does certification do?
  - ~ No federal permit without a **certification** or **waiver**
  - ~ State 401 conditions become **conditions of federal permit**
  - ~ Federal agency entitled to rely on state determination
- ◆ Different types of certifications?
  - ~ “Blanket” certifications for general permits (e.g., NWP)
  - ~ Individual certifications for individual permits (e.g., 404 IPs)

An aerial photograph of a river system. A large dam is visible in the upper right, with a reservoir behind it. The river flows through a dense forest. The text is overlaid on the center of the image.

## **2. Why did EPA need to update its 401 Rule?**



- CWA 401
  - ~ Enacted 1970 (pre-CWA!)
  - ~ Incorporated into 1972 CWA
- EPA's Original 401 Rule
  - ~ Published Thanksgiving Day 1971
- EPA in 1979:
  - “The existing State certification regulations predate the Federal Water Pollution Control Act Amendments of 1972 and have never been updated. However, because of the impact of State certification of non-NPDES permits on a myriad of Federal programs, it will be necessary to consult with the affected agencies in some detail before changes are made.”
  - 44 Fed. Reg. 32856 (June 7, 1979)



# Many Unanswered Questions...

## ◆ Application?

- ~ How does applicant request 401 certification?
- ~ What information must be submitted by applicant?

## ◆ Timeline?

- ~ Who determines the “reasonable period of time”?  
Fed agency or State?
- ~ When does clock start? On request? **Complete**  
application?
- ~ Can applicant reset the clock? Can State deny to  
reset?



# And the Tougher Issues...

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## 💧 Scope of Certification?

- ~ Can State base decision on impacts **other than water quality**?
- ~ Any limit on information State can request?
- ~ Can State deny if it doesn't receive information requested?
- ~ Can federal agency reject certification or conditions?

## 💧 Does 401 give State ongoing role in federal permit?

- ~ Can State revoke or amend certification after federal permit issued?
- ~ Can State enforce 401 certification conditions?

## 💧 Existential Question: **Does CWA 401 gives States a veto over federal permits?**

# Hodgepodge of Rules

## 💧 50 States = 50+ Processes for 401

### ~ E.g., Virginia

- ~ Virginia Water Protection Permit (most individual 404 permits)
- ~ “Blanket” 401 letter (NWP)
- ~ Upland 401s (Pipelines)

### ~ E.g., North Carolina

- ~ Individual 401 (most individual permits)
- ~ General 401s (NWP & other specified activities)

## 💧 Various Federal Agency Rules

### ~ E.g., USACE 401 Rules

- ~ Individual 404 permits – 33 CFR 325.2
- ~ NWP - 33 CFR 330.4
- ~ USACE dredging operations – 33 CFR 336.1

### ~ E.g., FERC 401 Rules

- ~ Hydropower licenses - 18 CFR 4.34(b)(5)(iii)
- ~ Natural gas pipelines – None! First rule takes effect June 28, 2021



An aerial photograph of a river system. A large dam is visible in the upper right, with a reservoir behind it. The river flows through a lush green forest. The text is overlaid on the center of the image.

# **3. What's in EPA's updated 401 Rule?**

# Status of Revised 401 Rule

## 💧 Rulemaking

- ~ Proposed by EPA August 29, 2019
- ~ Finalized July 13, 2020
- ~ Effective September 11, 2020
- ~ Codified at 40 CFR Part 121

42210 Federal Register / Vol. 85, No. 134 / Monday, July 13, 2020 / Rules and Regulations		
<p><b>ENVIRONMENTAL PROTECTION AGENCY</b></p> <p><b>40 CFR Part 121</b></p> <p>[EPA-HQ-OW-2019-0405; FRL-10009-80-OW]</p> <p>RIN 2040-AF86</p> <p><b>Clean Water Act Section 401 Certification Rule</b></p> <p><b>AGENCY:</b> Environmental Protection Agency (EPA).</p> <p><b>ACTION:</b> Final rule.</p> <p><b>SUMMARY:</b> The Environmental Protection Agency (EPA) is publishing this final rule to update and clarify the substantive and procedural requirements for water quality certification under Clean Water Act (CWA or the Act) section 401. CWA section 401 is a direct grant of authority to States (and Tribes that have been approved for "treatment as a State" status) to review for compliance with appropriate federal, State, and Tribal</p>	<p><b>Table of Contents</b></p> <p><b>I. General Information</b></p> <p>A. How can I get copies of this document and related information?</p> <p>B. What action is the Agency taking?</p> <p>C. Under what legal authority is this final rule issued?</p> <p><b>II. Background</b></p> <p>A. Executive Summary</p> <p>B. Executive Order 13868: Promoting Energy Infrastructure and Economic Growth</p> <p>C. Summary of Stakeholder Engagement</p> <p>D. Guidance Document</p> <p>E. Effect on Existing Federal, State, and Tribal Laws</p> <p>F. Legal Background</p> <p>1. The Clean Water Act</p> <p>2. The EPA's Role in Implementing Section 401</p> <p>3. The EPA's 1971 Certification Regulations</p> <p>4. Judicial Interpretations of Section 401</p> <p>5. Administrative Law Principles</p> <p>6. Response to Comments on the Legal Background</p> <p>G. Legal Construct for the Final Rule</p> <p>1. Scope of Certification</p> <p>2. Timeline for Section 401 Certification</p>	<p>Minority Populations and Low-Income Populations</p> <p>L. Congressional Review Act</p> <p><b>I. General Information</b></p> <p><b>A. How can I get copies of this document and related information?</b></p> <p>1. <b>Docket.</b> An official public docket for this action has been established under Docket ID No. EPA-HQ-OW-2019-0405. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202-566-2426. A reasonable fee will be charged for copies.</p> <p>2. <b>Electronic Access.</b> You may access</p>

## 💧 Litigation (of course)

- ~ Appeal filed by 21 States, 3 Tribes, & environmental groups
- ~ 8 states and industry groups defending
- ~ Case presently on hold while EPA considers the rule

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA	
<p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA AND THE STATE WATER RESOURCES CONTROL BOARD, STATE OF WASHINGTON, STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF RHODE ISLAND,</p>

Case No.: 3:20-cv-4869

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

(Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*)

# Application Process



## 💧 Pre-Filing Meeting Request

- ~ Applicant **must** submit notice to State certifying agency
- ~ Must request a pre-filing meeting
- ~ State has no obligation to hold meeting

## 💧 Certification Request

- ~ Submitted **at least 30 days** after pre-filing meeting request
- ~ Specific list of information that must be included
- ~ Request submitted concurrently to State and federal agency

# “Reasonable Period of Time”

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## 💧 Deadline for State to Act on Request

- ~ Set by **federal agency**
  - ~ By regulation (e.g., FERC – fixed at one year)
  - ~ **Or** case-by-case basis (e.g., USACE – 60-day guideline)
- ~ Federal agency notifies State of deadline within 15 days of request
- ~ Federal agency must consider:
  - ~ Complexity of project
  - ~ Nature of potential discharge
  - ~ Potential need for additional study or evaluation
- ~ State **or** applicant may request extension
- ~ Deadline cannot exceed one year (statutory maximum)

# State Action on Request

## 💧 Grant 401 Certification

- ~ If State determines discharge will comply with WQS
- ~ Must be in writing and **may** include conditions
- ~ Must provide water quality-based explanation for each condition

## 💧 Waive 401 Certification

- ~ Expressed in writing
- ~ By default if State fails to act by deadline or comply with 401 Rule

## 💧 Deny 401 Certification

- ~ Must provide written explanation for denial
- ~ May be based on insufficient information (but must specify what information is needed)



# Federal Agency Response

## 💧 If State Denies Certification

- ~ Federal Agency cannot issue permit **unless** ...
- ~ It determines State did not comply with 401 Rule – **WAIVER**

## 💧 If State Waives Certification


- ~ Federal Agency can issue permit

## 💧 If State Grants Certification

- ~ Unconditionally – Federal agency can issue permit
- ~ Conditionally – Will review each condition
  - ~ Conditions that comply with 401 Rule will be incorporated into federal permit
  - ~ Conditions that do not comply will be deemed **waived**

# Takeaways

- ◆ **More Predictable Permitting Timelines for Applicants**
  - ~ Fixed/written start and end to timeline
  - ~ No more summary denials to reset clock
- ◆ **Limited Ongoing State Role After Certification Decision**
  - ~ Right to inspect facility after construction; one shot to modify 401
  - ~ Federal agency solely responsible for enforcing 401 conditions (**but State may have authority under State law**)
  - ~ State may **not** revoke or amend 401 certification
- ◆ **Cabins States' Influence on Federal Permits**
  - ~ No State "**Veto**" over federal permits for public policy reasons
  - ~ Focuses certification decision on water quality impacts



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