

Clean Water Act Section 401 Water Quality Certification *Tribal Informational Webinar*

Office of Water
U.S. Environmental Protection Agency

May 7, 2019 and May 15, 2019

Overview

- Quick overview of CWA 401 certification basics
- Concerns with current 401 regulations and practice
- Outreach feedback
- Discussion and comments

CWA Section 401 Certification

Clean Water Act (CWA) §401 provides:

- No federal permit or license can be issued that may result in a discharge to waters of the United States

Unless:

- The authorized tribe or states certifies that the discharge is consistent with water quality requirements or waives certification

What is Determined When Certifying?

A §401 certification indicates the activity would be consistent with:

- Effluent limitations for existing and new sources (CWA §§301, 302, 306)
- Water quality standards and implementation plans (§303)
- Toxic and pretreatment effluent standards (§307)
- Any other appropriate tribal/state requirements (§401(d))

Potential Considerations for CWA 401 Cert

- **Grant** – federal agency proceeds to issue permit or license
- **Grant with conditions** – federal agency proceeds, but must include listed 401 cert conditions in resulting permit or license
- **Deny** – federal agency may not issue the permit or license
- **Waive explicitly or fails or refuses to act**– federal agency proceeds to issue permit or license

CWA 401 Cert Timeframes

CWA 401(a)(1) provides any reasonable period not to exceed one year

- EPA regulations indicate the reasonable period determined by the permitting or licensing agency, generally considered as “6 months” (40 CFR 121.20)
 - ❑ Corps allows up to 6 months (33 CFR 336.1(b)(8)(iii))
 - ❑ FERC allows up to 1 year (18 CFR 4.34(b)(5)(iii))
 - ❑ EPA’s NPDES specific regulations provide up to 60 days from the date the draft permit is mailed to the certifying state agency for EPA-issued NPDES permits (40 CFR 124.53(c)(3))

Treatment as States (TAS)

- Tribes may request “Treatment in a similar manner As a State” (TAS) for section 401 certification authority
 - Typically accompanies TAS for water quality standards under Section 303(c)
 - Under 40 CFR 131.4(c), a tribe that receives TAS for water quality standards is eligible for section 401 TAS
- TAS grants tribes the same certification authority and responsibilities as states

Treatment as States (TAS) (cont.)

- There are currently 59 tribes with TAS for 401 certification
 - For more information about TAS, please visit: <https://www.epa.gov/wqs-tech/tribes-and-water-quality-standards>
- If a tribe does not have 401 certification authority, the EPA regional office acts as the certifying agency

EPA Roles Regarding CWA 401

- EPA is charged with administering the CWA, including Section 401
 - General 401 certification regulations at 40 CFR part 121
 - Coordination with other federal agencies whose permits or licenses may be subject to section 401
- EPA issues NPDES permits subject to 401
 - 401 certification and EPA-issued NPDES permits regulations at 40 CFR 124

EPA Roles Regarding CWA 401 (cont.)

- Certification on behalf of jurisdictions that do not have section 401 authority, including tribes
- Oversees CWA 401(a)(2) review by neighboring jurisdictions to raise issues on proposed permits or licenses that may affect their water quality
- Training and Guidance

CWA 401 Certification Concerns

- EPA has heard from stakeholders about a number of CWA 401 certification concerns, including for example:
 - ❑ length of time for CWA 401 certification
 - ❑ scope of issues appropriately considered under CWA 401
 - ❑ availability of necessary information
 - ❑ enforcement of CWA 401 conditions
- Recently the Administration has raised the role of CWA 401 certification in the context of infrastructure projects

Executive Order 13807

- Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (August 2017)
 - ❑ Established framework known as “One Federal Decision” for federal agency cooperation on environmental review and permitting for major infrastructure projects
 - ❑ Directs federal agencies to use a single, coordinated process for compliance with the NEPA and other federal environmental laws, including preparation of a single EIS and a single record of decision (ROD)
 - ❑ Directs that the NEPA process be completed within an average of two years
 - ❑ Directs that all federal permits for the project approved in the ROD be issued within 90 days after issuance of the ROD
 - ❑ Emphasis on early coordination and coordinated review procedures

Executive Order 13868

- Promoting Energy Infrastructure and Economic Growth (April 2019)
 - Directs the EPA to review existing regulations and guidance and coordinate with states, tribes and relevant federal agencies to:
 - Issue new guidance for federal permitting agencies and state and tribal authorities;
 - Initiate rulemaking to clarify section 401 to allow for efficient permitting processes and increased regulatory certainty.

Outreach Efforts Prior to E.O.

- August 6th – Letter from David Ross sent to state associations and tribal organizations
- August 13th – Association of Clean Water Administrators meeting
- August 28-29th – Environmental Council of the States meeting
- September 10th – Association of State Wetland Managers call
- September 12th – National Tribal Water Council and National Tribal Caucus calls
- October 10th – Big Ten Intergovernmental Associations meeting
- October 24th – National Tribal Water Council call
- April 2nd, 2019 – Association of State Wetland Managers meeting
- Throughout, multiple letters from states, tribes, and related organizations

Outreach Efforts Post E.O.

- April 17th – States and Tribes Webinar
- April 23rd – Big Ten Intergovernmental Associations meeting
- April 24th – Initiate federalism and tribal consultation
- May 7th – First Tribes-only Informational Webinar
- May 8th – Follow-up States and Tribes Webinar
- May 15th – Second Tribes-only Informational Webinar
- May 24th – Close of the pre-proposal recommendations docket

Feedback Received: Tribes and Tribal Organizations

- Recognize CWA 401 certification is an important water quality tool available for tribes, and reflect this importance in EPA actions
- Additional clarity regarding the timing of CWA 401 review

Feedback Received: Tribes and Tribal Organizations (cont.)

- Much needed clarity regarding CWA 401(a)(2) neighboring jurisdiction consultation, including process and decision criteria for EPA
- Increased training and information regarding CWA 401 certification generally, including clear statements about how tribes may receive TAS for CWA 401 certification

Feedback Received: States and State Associations

- Similar concerns to the tribes (e.g., respect state authorities, more training and guidance on CWA 401)
- Better integration with other environmental review and permitting processes
- Enhanced communication and coordination among Federal agencies, project applicants, and states/tribes
- Proportional federal response; CWA 401 is not a significant issue in many states

Potential Key Issues to Address

- Substance
 - ❑ Proper scope of CWA 401 considerations, including relevance of water quality and discharge
 - ❑ Information needs of states/tribes to process a request
- Process
 - ❑ Timing requirements/deadlines
 - ❑ Responsibilities of federal agencies, permittees, and states/tribes
 - ❑ Information coordination among involved parties

Discussion and Comments

1. What are ways to increase coordination/information sharing between tribes and states, federal agencies, and project proponents? Are there any tribes or states that currently have a process in place that facilitates early information sharing?
2. What factors play a role in slowing down certification decision-making? What factors help speed up certification decision-making?
3. What federal permits and licenses are subject to 401 certification beyond CWA Section 402, 404, Rivers and Harbors Act, and FERC licenses?

Discussion and Comments

- You may submit pre-proposal recommendations to **EPA-HQ-OW-2018-0855** until **May 24th, 2019**
- Link to the docket:
<https://www.regulations.gov/docket?D=EPA-HQ-OW-2018-0855>