

# Clean Water Act Section 401 Water Quality Certification *Follow-Up State and Tribal Webinar*

Office of Water  
U.S. Environmental Protection Agency

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# Overview

- Quick recap on CWA Section 401 and the Executive Order
- Clarification questions
- Discussion questions
- Next steps

# 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

# 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.

# Section 3 of the Executive Order

This review shall also take into account federalism considerations underlying section 401 of the Clean Water Act and shall focus on:

1. The need to promote timely Federal-State cooperation and collaboration;
2. The appropriate scope of water quality reviews;
3. Types of conditions that may be appropriate to include in a certification;
4. Expectations for reasonable review times for various types of certification requests; and
5. The nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time.

# Potential Key Issues to Address

- Substance
  - ❑ Proper scope of CWA 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

# Clarification Questions

1. Is public notice required for 401 certification?
2. What starts the clock?
3. How does 401 certification align with other environmental review processes?
4. What is the timeframe for review?
5. When does a state deny a request for certification?

# Discussion Questions

1. Have any states or tribes participated in pre-coordination processes with federal agencies? If so, what worked? What did not work?
2. What are ways to increase coordination/information sharing between tribes and states, federal agencies, and project proponents?
3. Are there any tribes or states that currently have a process in place that facilitates early information sharing? What should such a process look like?
4. What federal licenses or permits are subject to 401 certification?



# Discussion Questions

5. Commenters noted deficient applications as a common problem. How do you define deficient? What deficiencies do you typically see? How do you work towards resolving deficiencies?
6. What is the average time for your state or tribe to review a 401 certification request?
7. What factors play a role in slowing down certification decision-making?
8. What factors help speed up certification decision-making?

# Timeline

- **April 17, 2019** – Initial state and tribal webinar
- **April 23, 2019** – Meeting with the Big 10 Intergovernmental associations
- **April 24, 2019** – Federalism and Tribal Consultation begin
- **May 7, 2019** – Tribes-only informational webinar
- **May 8, 2019** – Second state and tribal webinar
- **May 15, 2019** – Tribes-only informational webinar
- **May 24, 2019** – End of Federalism and Tribal Consultation; Administrative docket closes
- **June 10, 2019** – E.O. timeline for release of state and federal guidance documents
- **August 8, 2019** – E.O. timeline for proposed rulemaking

# Pre-proposal Recommendations

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