

Updating Regulations on Water Quality Certification

Public Webinar

Office of Water
U.S. Environmental Protection Agency

August 20, 2019

Overview

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- Executive Order 13868
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Clean Water Act Section 401

- Section 401 of the Clean Water Act (CWA) requires that:
 1. any applicant for a federal license or permit
 2. which may result in a discharge into waters of the United States
 3. must obtain a water quality certification from the certifying authority
 4. that the discharge complies with all applicable water quality requirements.

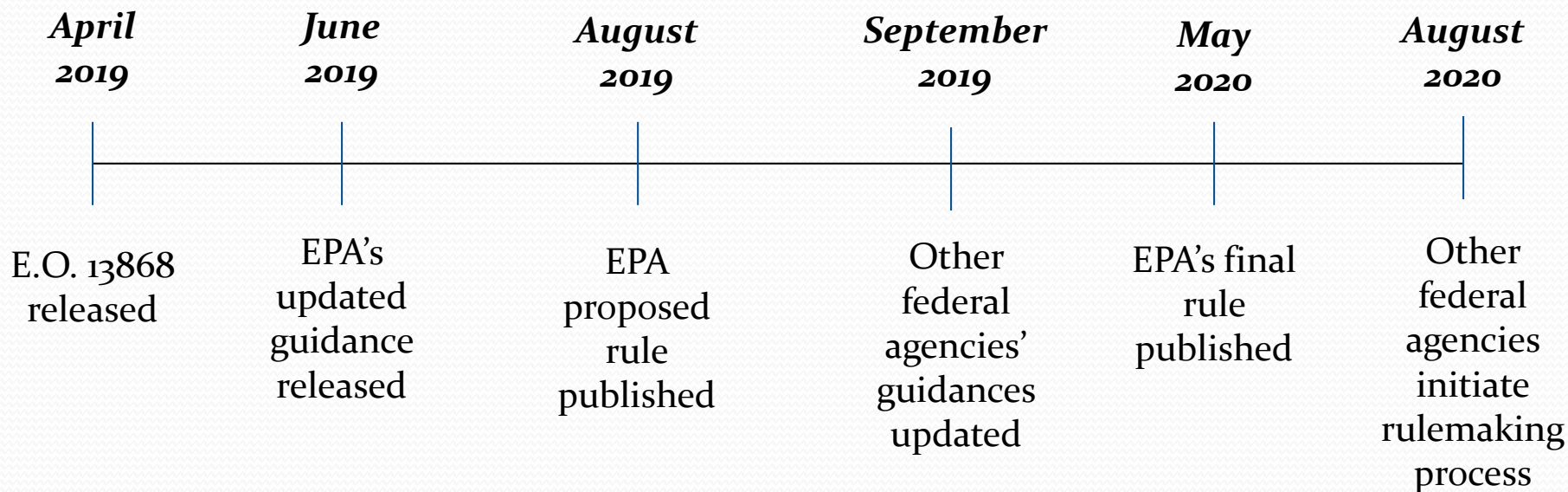
Clean Water Act Section 401

- **Project proponent:** applicant for a federal license or permit
- **Federal licensing and permitting agency:** any agency of the Federal Government to which application is made for a license or permit that is subject to Clean Water Act section 401
- **State:** a state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands
- **Authorized tribes:** tribes with “treatment as a state” for section 401

Executive Order 13868

- On April 10, 2019, President Trump issued Executive Order 13868, “Promoting Energy Infrastructure and Economic Growth,” which directed the EPA to propose a new rule that modernizes the agency’s water quality certification regulations (40 CFR Part 121).
- The main water quality certification regulation for all stakeholders is located at 40 CFR 121.
 - Some federal agencies have additional implementation regulations on section 401.

Executive Order 13868



“Updating Regulations on Water Quality Certification”

- On August 8, 2019, the EPA Administrator signed the proposed rule “Updating Regulations on Water Quality Certification” to modernize the EPA’s existing regulations at 40 CFR 121 and make them consistent with the current CWA.
- The existing regulations were promulgated in 1971, prior to the 1972 Clean Water Act.

Proposed rule: Overview

- I. Certification timeframes
- II. Scope of analysis
- III. EPA's roles in Section 401



Proposed rule: Certification Timeframes

When would Section 401 certification be required?

- **Proposed rule:** A project proponent must request section 401 certification from the certifying authority where the discharge originates when there is the:
 - *potential for*
 - *the federally licensed or permitted activity*
 - *to result in a discharge from a point source*
 - *into a water of the United States*
- **Existing rule and practice:** Similar; however, the proposal clarifies that a discharge must be from a point source into a water of the United States.

What would a certification request include?

- **Proposed rule:** A certification request is a *written, signed, and dated* communication from a project proponent to the certifying authority that contains *seven* components.
- **Existing rule and practice:** 40 CFR 121.22 lists five components that must be included in a certification request when EPA is the certifying authority; however, some states and tribes use a “complete application” to constitute the certification request.

When would the reasonable period of time begin?

- **Proposed rule:** When a certifying authority receives a certification request from a project proponent in writing.
- **Existing rule and practice:** The waiver provision at 40 CFR 121.16(b) notes the reasonable period of time begins after the receipt of a request; however, some certifying authorities require a “complete application” to start the reasonable period of time.

What would be the timeline for certification decision-making?

- **Proposed rule:** A certifying authority may act on a request for certification within the *reasonable period of time*, which *shall not exceed one year*, as determined by the federal licensing or permitting agency.
- **Existing rule and practice:** Same; however, under current practice, some certifying authorities act beyond the original one year time period.

Could the reasonable period of time stop or pause?

- **Proposed rule:** No, the reasonable period of time does not stop or pause for any reason once the certification request is received.
- **Existing rule and practice:** Not specified; however, in practice, some certifying authorities have requested or allowed project proponents to withdraw applications to stop or pause the clock.

How would the federal agency determine the reasonable period of time?

- **Proposed rule:** Federal agencies must consider the following:
 - Complexity of the project;
 - Potential for any discharge; and
 - Potential need for additional study or evaluation of water quality effects from the discharge
- **Existing rule and practice:** Not specified.

How would a certifying authority know the reasonable period of time?

- **Proposed rule:** The project proponent must notify the federal agency when it submits a request for certification and the federal agency has 15 days to communicate the reasonable period of time to the certifying authority.
- **Existing rule and practice:** Not specified; however, some federal agencies include a standardized reasonable period of time in their water quality certification implementation regulations.

Could a federal agency modify the reasonable period of time?


- **Proposed rule:** Yes, as long as it is reasonable and does not exceed one year from original receipt of the request for certification.
- **Existing rule and practice:** Not specified; however, some federal agencies include procedures for modifying the reasonable period of time in their water quality certification implementation regulations.



Proposed rule: Scope of Analysis

What could a certifying authority do when it receives a request for certification?

- **Proposed rule:** A certifying authority may grant, grant with conditions, deny, or waive certification.
- **Existing rule and practice:** Same.



How would a certifying authority let the project proponent and federal agency know what decision it makes on a request?

- **Proposed rule:** The certifying authority will notify the project proponent and federal agency in writing about its decision.
- **Existing rule and practice:** The existing rule specifies contents of a certification, but the rule does not identify required recipients of a certification decision.

What would the scope of a certifying authority's review include?

- **Proposed rule:** The scope of certification is limited to assuring that the discharge from a federally licensed or permitted project will comply with water quality requirements.
- **Existing rule and practice:** The scope of certification includes assuring that the activity will comply with water quality requirements. In addition, some certification authorities have included non-water quality related factors in their decision-making.

What would a certifying authority need to include when granting certification?


- **Proposed rule:** The certification must be in writing and include a statement that the discharge will comply with applicable water quality requirements.
- **Existing rule and practice:** The existing rule includes five elements that must be included in a certification, including "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards."

What would a certifying authority need to include when denying certification?

- **Proposed rule:** The denial must include the reasons for denial, a statement explaining why the project will not comply with water quality requirements, and the specific information that would be needed to determine that the discharge will comply with water quality requirements (if any).
- **Existing rule and practice:** Not specified.

Who would determine whether the denial meets the requirements of this proposal?

- **Proposed rule:** Federal agencies would have the ability to determine whether the denial complies with Section 401 and the proposed rules.
- **Existing rule and practice:** Not specified.



What would happen if a certifying authority denies a certification for reasons beyond the scope of section 401?

- **Proposed rule:** The federal agency must provide written notification to the certifying authority and project proponent indicating which provision(s) of section 401 the certifying authority failed to meet.
- **Existing rule and practice:** Not specified.

What would happen if a certifying authority denies a certification request?

- **Proposed rule:** If a federal agency determines that the denial meets the requirements of the proposal, the federal agency will notify the certifying authority and project proponent that the license or permit may not be granted.
- **Existing rule and practice:** Not specified.

How would a certifying authority waive a certification request?

- **Proposed rule:** A certifying authority may waive a certification request expressly or by failing or refusing to act within the reasonable period of time or in accordance with section 401.
- **Existing rule and practice:** Similar; however the proposal introduces a new definition for “fail or refuse to act.”

Who would determine whether a waiver has occurred?


- **Proposed rule:** The federal agency determines whether a waiver has occurred.
- **Existing rule and practice:** Same.

What would a certifying authority need to include in a written notification granting certification with conditions?

- **Proposed rule:** A certification with conditions must include a statement that the discharge will comply with applicable water quality requirements and specific supporting information for each condition.
- **Existing rule and practice:** Similar; the existing rule includes five elements that must be included in a certification, including "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards."

What types of conditions could a certifying authority include in a certification?

- **Proposed rule:** A certifying authority may include conditions that are necessary to assure that the discharge from a proposed federally licensed or permitted project will comply with water quality requirements.
- **Existing rule and practice:** The existing rule says the certifying authority should include "[a] statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity...."



Who would determine whether a certifying authority's conditions meet the requirements, as proposed?

- **Proposed rule:** Federal agencies.
- **Existing rule and practice:** Not specified. In practice, all certification conditions are included in the federal license or permit.

What would happen if a certifying authority includes a deficient condition in a certification?

- **Proposed rule:** If a condition does not meet the proposed definition for condition, it will not be included in the federal license or permit.
- **Existing rule and practice:** Not specified.

What would happen if a certifying authority grants certification with condition(s)?

- **Proposed rule:** If the federal agency determines that the condition meets the requirements of the proposal, it must be included in the federal license or permit and the federal agency would be responsible for enforcing the condition.
- **Existing rule and practice:** Not specified.



Proposed rule: EPA's Roles in Section 401

What are the EPA's roles under CWA section 401?

- **Proposed rule:** The EPA has three 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 determine whether a discharge will impact the water quality of a neighboring jurisdiction; and (3) to provide technical expertise to project proponents, certifying authorities, or federal agencies upon request.
- **Existing rule and practice:** Same.

How are the requirements for certification under the proposed rule different when EPA acts as the certifying authority?

- **Proposed rule:** The proposal adds three additional requirements when EPA acts as the certifying authority: (1) the project proponent must request a pre-meeting with the EPA at least 30 days before submitting a certification request; (2) the EPA must issue public notice within 20 days of receipt of certification request; and (3) the EPA must seek additional information from a project proponent within 30 days of the certification request.
- **Existing rule and practice:** Not specified.



What is the EPA's role in determining the water quality impacts of a potential discharge on a neighboring jurisdiction?

- **Proposed rule:** EPA has a discretionary authority to determine if a certified federal license or permit may impact the water quality of a neighboring jurisdiction. If EPA determines that the license or permit may affect the water quality of a neighboring jurisdiction, the EPA shall notify the jurisdiction, coordinate input, and make recommendations to the federal agency.
- **Existing rule and practice:** Same.

How to Comment

- The public comment period will be **60 days** from the date of publication in the *Federal Register*.
- Comments on the proposal should be identified by **Docket ID No. EPA-HQ-OW-2019-0405** and may be submitted online.
 - Go to **<https://www.regulations.gov>** and follow the online instructions for submitting comments to the docket.
 - For additional information on submitting public comments, including the full EPA public comment policy, please visit **<https://www.epa.gov/dockets/commenting-epa-dockets>**.

Additional Input Opportunities

- Public hearing sessions in Salt Lake City, Utah and the Salt Lake City Public Library:
 - **September 5, 2019** from **2 pm to 8 pm** (local time)
 - **September 6, 2019** from **9 am to 12 pm** (local time)
- You may register for a three-minute speaking slot on the CWA 401 website.

Contact Us

- For more information on CWA section 401 and this proposed rulemaking, please visit **<https://www.epa.gov/CWA-401>**.
- If you have any questions, please send an e-mail to **cwa401@epa.gov**.