

2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule Final 2023 Rule Questions & Answers

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Disclaimer: The purpose of this Questions and Answers (Q&A) document is to provide stakeholders with answers to frequently asked questions regarding the current regulatory requirements of the Clean Water Act (CWA) section 401 water quality certification process. These questions and answers do not constitute regulations, nor do they change or substitute for applicable regulations. This document does not modify or substitute for CWA Section 401 (33 U.S.C. 1341), the 2023 CWA Section 401 Certification Improvement Rule, 88 FR 66558 (September 27, 2023) (codified at 40 CFR part 121), or any other applicable law. It does not impose any legally binding requirements on the EPA, states, territories, Tribes, other Federal agencies, or the regulated community. This document neither alters legal rights or obligations nor changes or creates law. In the event of a conflict between this document and any statute or regulation, this document would not be controlling.

Questions? Please email cwa401@epa.gov to submit additional questions or follow up on any questions and answers in this document.

For more resources and information on the 2023 Rule, please visit <https://www.epa.gov/cwa-401>

Key Participants in the Section 401 Process (acronyms used in this document):

- **Certifying Authority (CA)** means the entity responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act section 401, such as a state, a territory, a Tribe with “treatment in a similar manner as a state” for section 401, or EPA where no state, territory, or Tribe has section 401 authority.
 - **EPA** means the U.S. Environmental Protection Agency.
 - **Federal Agency (FA)** means any agency of the Federal Government to which application is made for a Federal license or permit to conduct any activity which may result in any discharge into waters of the United States.
 - **Neighboring Jurisdiction** means any state, territory, or Tribe with treatment in a similar manner as a state for section 401 in its entirety or only for section 401(a)(2), other than the jurisdiction in which the discharge originates or will originate.
 - **Project Proponent (PP)** means the applicant for a Federal license or permit, or the entity seeking section 401 certification.
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2023 CWA Section 401 Water Quality Certification Improvement Rule Questions and Answers Document

a. General Rulemaking Questions

Overview: On September 13, 2023, the EPA Administrator signed a final rule to improve the Clean Water Act (CWA) section 401 certification process. See [88 FR 66558-66666](#). The final [2023 CWA Section 401 Water Quality Certification Improvement Rule](#) (2023 Rule) replaced the previous regulations at 40 CFR § 121 and 40 CFR § 124.53-124.55, to be more consistent with the statutory text of the 1972 CWA ([33 U.S.C. § 1341](#)).

Question: Why did EPA finalize a new rule regarding CWA Section 401? Why not just leave the 2020 Rule in place?

Answer: After reviewing the statutory text, legislative history, case law, and public comments, the Agency found it appropriate to revise the 2020 Rule for several reasons. First, the 2020 Rule does not represent the best statutory interpretation of fundamental concepts, such as the scope of certification. Further, the 2020 Rule did not align with the broader water quality protection goals of the CWA or Congressional intent behind development and passage of Section 401. The 2020 Rule also failed to appropriately address adverse impacts to state and Tribal water quality, as evidenced in public comment. Please see the Final Rule Preamble for further discussion on the Agency's findings regarding the 2020 Rule. The Agency is also finalizing conforming amendments to the water quality certification regulations for EPA-issued NPDES permits.

Question: When does the rule take effect?

Answer: The final [2023 Rule](#) went into effect on November 27, 2023.

Question: Does this rule apply to certification decisions that were already issued under the 2020 Rule (i.e., retroactively)?

Answer: No, the final rule does not apply retroactively to certification decisions made under the 2020 Rule. For instance, if a certifying authority issued a certification decision under the 2020 Rule in accordance with the 2020 Rule's scope of certification, that certification decision is not invalidated by this final rule going into effect, even if the relevant Federal license or permit has not yet been issued.

Question: Does this rule apply to ongoing certification actions (e.g., pending certification decisions that started the certification process while the 2020 Rule was in effect)?

Answer: As of the effective date of this final rule, which will be 60 calendar days after publication of the final rule in the *Federal Register*, all actions taken as part of the section 401 certification process must be taken pursuant to the final rule. However, the final rule does not apply retroactively to actions already taken under the 2020 Rule. For example, if a certifying authority received a request for certification prior to the effective date of this final rule, and the certifying authority has not acted on the request for certification as of the effective date, any decision issued by the certifying authority after the effective date of this final rule must comply with the requirements in the final rule. However, the validity of the request for certification would be determined under the 2020 Rule and the project proponent would not need to re-request certification consistent with the final rule. The approach the Agency adopts here regarding the applicability of the final rule to ongoing certification actions is consistent with the approach taken by the Agency after a court vacatur of the 2020 Rule in 2021 and the Supreme Court's stay of that vacatur in 2022. Please see [Section IV.M](#) of the Final Rule Preamble for further discussion. See 88 FR 66655.

Question: Can certifying authorities modify certifications issued under the 2020 Rule?

Answer: After the effective date, a certifying authority and Federal agency can apply the final rule's modification process at section 121.10 to any certification decision, even if that decision was provided while a prior rule (e.g., 1971 Rule or 2020 Rule) was in effect. See 88 FR 66655.

Question: Was there any public outreach before the 2023 Rule went into effect?

Answer: Further details about the Agency’s implementation efforts, including information regarding outreach and training, can be found here: <https://www.epa.gov/cwa-401/upcoming-outreach-and-engagement-cwa-section-401-certification>.

Question: How can stakeholders contact EPA to ask additional questions about this rulemaking?

Answer: Please use the email box at cwa401@epa.gov to submit additional questions regarding CWA section 401.

Question: Can the public access the public comments the Agency received? Where is the Response to Comments document? Is there an opportunity for public comment at this point?

Answer: On June 9, 2022, the Agency published the proposed rulemaking in the *Federal Register*, 87 FR 35318, which initiated a 60-day public comment period that lasted through August 8, 2022. Public comments and the Agency’s Response to Comments may be found in Docket ID No. EPA-HQ-OW-2022-0128 at <https://www.regulations.gov>.

Question: How does the ruling in *Sackett v EPA* affect the final rule?

Answer: Comments regarding other rulemakings, including rulemakings on defining “waters of the United States” were outside the scope of this rulemaking. Similarly, the Agency notes that comments regarding the *Sackett* Supreme Court case were outside the scope of this rulemaking. As discussed in [Section IV.A](#) of the Final Rule Preamble, the final rule provides that section 401 certification is required for Federal licenses or permits that authorize any activity which may result in any discharge from a point source into waters of the United States. 40 CFR 121.2. Therefore, any changes in the scope of waters of the United States will impact the scope of waters in which federally licensed or permitted activities must seek section 401 certification.

Question: How is the final section 401 rule related to the proposed rule for baseline tribal water quality standards?

Answer: The 2023 Rule and the Federal Baseline Water Quality Standards for Indian Reservations, 88 FR 29496 (May 5, 2023), are separate rulemaking efforts. On April 27, 2023, the EPA Administrator signed a proposed rule to promulgate federal baseline water quality standards (WQS) for waters on over 250 Indian reservations that do not have WQS in effect under the CWA. This proposed rulemaking would extend the same framework of water quality protection to these tribal waters that currently exists for most other waters of the United States. The baseline WQS would safeguard water quality until tribes adopt their own WQS for these waters under the CWA. For example, in acting on a certification request for a federally licensed or permitted activity which may result in a discharge that originates in Indian reservation waters covered by the baseline WQS, an authorized Tribe would determine whether any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA, which would encompass the baseline WQS once finalized and in effect under the CWA. See 88 FR 29516.

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b. When is CWA Section 401 Water Quality Certification Required

Overview: Under Section 401 of the Clean Water Act (CWA), a Federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a Section 401 water quality certification is issued, or certification is waived.

References: [33 U.S.C. 1341](#); [Final Rule Preamble section IV.A](#); 88 FR 66567-71

Question: When is a CWA section 401 certification or waiver of certification required?

Answer: Certification or waiver is required for any Federal license or permit that authorizes any activity which may result in any discharge from a point source into waters of the United States. See 40 CFR 121.2.

Question: What are some examples of Federal licenses or permits subject to section 401 certification?

Answer: The most common examples of Federal licenses or permits that may be subject to section 401 certification are CWA section 402 NPDES permits issued by EPA in jurisdictions where the EPA administers the NPDES permitting program; CWA section 404 permits for the discharge of dredged or fill material permits issued by the Army Corps of Engineers as well as Rivers and Harbors Act sections 9 and 10 permits issued by the Army Corps of Engineers; and hydropower and interstate natural gas pipeline licenses issued by the Federal Energy Regulatory Commission (FERC). See [Section IV.A.3](#) of the Final Rule Preamble for further discussion on the types of Federal licenses or permits subject to section 401.

Question: Are Corps' civil works projects (*e.g.*, harbor deepening/widening projects by the Corps) subject to section 401 even though they do not require a Federal license or permit?

Answer: The Corps also requires section 401 certification for its civil works projects, even though there is no Federal license or permit associated with those projects. The Corps' current regulations require the Corps to seek section 401 certification for dredge and fill projects involving a discharge into waters of the United States, regardless of whether the Corps issues itself a permit for those activities. See 33 CFR 336.1(a)(1) ("The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S."); 33 CFR 335.2 ("[T]he Corps does not issue itself a CWA permit to authorize Corps discharges of dredged material or fill material into U.S. waters but does apply the 404(b)(1) guidelines and other substantive requirements of the CWA and other environmental laws."). In these instances, EPA understands that the Corps will follow the certification process as described in the final rule. 88 FR 66567; Footnote 31.

Question: Do general licenses or permits require section 401 certification?

Answer: Yes. Section 401 is not limited to individual Federal licenses or permits, but also extends to general Federal licenses and permits such as CWA section 404 general permits (including Nationwide General Permits, Regional General Permits, and State Programmatic General Permits) and CWA section 402 general permits (including the Pesticide General Permit, Multi-Sector General Permit for stormwater discharges associated with industrial activity, and the Construction General Permit for stormwater discharges associated with construction activity). General Federal licenses or permits that may result in a discharge into waters of the United States are subject to the same requirements under section 401 as an individual Federal license or permit. See [Section IV.A](#) of the Final Rule Preamble for further discussion.

Question: Does a project proponent need to obtain section 401 certification for use of a Federal general permit (*e.g.*, Nationwide Permits) if the general permit was already certified by the certifying authority in the jurisdiction?

Answer: If a certifying authority grants or waives certification for either a CWA section 402 or 404 general permit, then entities seeking coverage under that general permit do not need to separately seek certification before doing so.

When a certifying authority denies certification on a section 402 general permit, EPA can issue the general permit for the jurisdictions that granted or waived certification but cannot issue the permit for jurisdictions that denied certification. If a certifying authority grants certification with conditions on an EPA-issued general permit,

then the certification with conditions becomes part of the general permit applicable within the certifying authority's jurisdiction.

When a certifying authority denies certification for a CWA section 404 Nationwide or Regional General Permit, the Corps allows specific projects to be covered by the Nationwide or Regional General Permit if the project proponent obtains certification from the certifying authority for that project. In that instance, a project proponent would submit a request for certification in accordance with final rule section 121.5 for individual Federal licenses or permits. When a certifying authority grants certification with conditions on a Nationwide or Regional General Permit, the Corps may either incorporate the conditions into a state- or Tribe-specific version of the general permit or require the project proponent to obtain certification from the certifying authority for that project to qualify for the general permit. 88 FR 66571.

Question: Is a section 401 certification required for a state or Tribally issued license or permit?

Answer: No. Section 401 certification is not required for licenses or permits issued by a state or Tribe that administers a federally approved permit program. For example, states and Tribes may be authorized to administer the section 402 NPDES permitting program, 33 U.S.C. 1342(b), or the section 404 dredge and fill permitting program, 33 U.S.C. 1344(g). Permits issued by states or Tribes pursuant to their authorized or approved program are not subject to section 401 of the CWA as the programs operate in lieu of the Federal program, under state or Tribal authorities. The state or Tribal permit is not a "Federal" permit for purposes of section 401. 88 FR 66567.

Question: Does the project proponent need to request a separate section 401 certification for every Federal license or permit that the project is subject to?

Answer: A certifying authority may opt to provide one certification of the activity that specifically covers multiple Federal licenses or permits, but that does not obviate the need for a project proponent to request certification for each Federal license or permit. Depending on the requirements of the applicable certifying authority, a project proponent may be able to submit multiple requests for certification in a single document covering multiple Federal licenses or permits. The only circumstance in which a project proponent may not need to request a separate certification for different Federal licenses or permits for the same activity is in accordance with section 401(a)(3). Under section 401(a)(3), a project proponent may rely on the same certification obtained for the construction of a facility for any Federal operating license or permit for the facility if 1) the Federal agency issuing the operating license or permit notifies the certifying authority, and 2) the certifying authority does not within 60 calendar days thereafter notify the Federal agency that "there is no longer reasonable assurance that there will be compliance with applicable provisions of sections [301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. 1341(a)(3). Accordingly, a project proponent may not be able to rely on the same certification for each and every Federal license or permit for the same activity.

Question: Is a new certification required for a Federal license or permit renewal or reissuance?

Answer: Yes, a certification does not carry over to any future permit renewal or reissuance. For purposes of section 401, a certification (and its conditions) cannot live on past the expiration of the Federal license or permit to which they attach.

Question: What is a point source discharge? What are examples of point source discharges?

Answer: The CWA defines point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." 33 U.S.C. 1362(14). For example, courts have concluded that bulldozers, mechanized land clearing machinery, and similar types of equipment used for discharging dredge or fill material are "point sources" for purposes of the CWA. *See, e.g., Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *United States v. Larkins*, 657 F. Supp. 76 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1988).

Question: Does a point source discharge need to add pollutants?

Answer: No, a point source discharge triggering section 401 does not require the addition of pollutants. 88 FR 66568.

Question: Is the withdrawal or diversion of surface water considered to be a point source discharge?

Answer: No, courts have concluded that a water withdrawal is not a point source discharge and therefore does not require a water quality certification. 88 FR 66569.

Question: Does section 401 require an actual discharge into a water of the United States?

Answer: No. A certification or waiver is required for any Federal license or permit that authorizes any activity which *may* result in any discharge from a point source into waters of the United States. 40 CFR 121.2. The phrase “may result” contemplates that both the presence of, and/or potential for, any discharge triggers the requirement for a section 401 certification. 88 FR 66568.

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c. Pre-filing Meeting Request Process

Overview: The project proponent must request a pre-filing meeting with the certifying authority at least 30 calendar days prior to submitting a request for certification in accordance with the certifying authority's applicable submission procedures, unless the certifying authority waives or shortens the 30-day requirement for a pre-filing meeting request.

References: 40 CFR 121.4; [Final Rule Preamble section IV.B](#); 88 FR 66571-73

Question: Can a certifying authority waive the pre-filing meeting request requirement for a category of projects or can the certifying authority only waive the pre-filing meeting request requirement on a case-by-case basis?

Answer: This final rule provides certifying authorities with the flexibility to waive or shorten the requirement on a case-by-case or categorical basis. For example, certifying authorities could either require or waive the pre-filing meeting request requirement for all projects, specific types of projects (*e.g.*, projects under 300 linear feet), or types of Federal licenses or permits (*e.g.*, general permits). 88 FR 66573.

Question: How will a project proponent know if a pre-filing meeting request is required or not?

Answer: EPA recommends that certifying authorities clearly communicate to project proponents their expectations for pre-filing meetings requests and waivers (*e.g.*, whether they may grant waivers, either categorically or on an individual basis, and any procedures and/or deadlines for submission of requests and the grant of waivers) so that project proponents may clearly and efficiently engage in the certification process. EPA also recommends that certifying authorities make this information readily available to project proponents in an easily accessible manner to allow for a transparent and efficient process (*e.g.*, posting a list of project types that require a pre-filing meeting request on the certifying authority's website). 88 FR 66573.

Question: What should a project proponent do if a certifying authority does not communicate if/when pre-filing meeting requests are required? Can the project proponent submit a request for certification at any point 30 calendar days after submitting the pre-filing meeting request, even if the project proponent has not heard from the certifying authority and no pre-filing meeting has occurred?

Answer: If a certifying authority does not communicate whether it wants to waive or shorten the pre-filing meeting request requirement, then the project proponent must wait 30 days from requesting a pre-filing meeting to submit its request for certification. 88 FR 66571.

Question: If a certifying authority chooses to require a pre-filing meeting request, can they shorten and/or lengthen the period between the pre-filing meeting request and the request for certification?

Answer: This final rule provides certifying authorities with the flexibility to shorten the requirement on a case-by-case or categorical basis. However, the final rule does not provide the certifying authority with the ability to lengthen the period between submission of a pre-filing meeting request and the request for certification.

Question: What information is required in a pre-filing meeting request?

Answer: The final rule does not define the required contents of a pre-filing meeting request. Instead, the final rule allows certifying authorities to determine appropriate submission procedures for pre-filing meeting requests. However, the Agency recommends that project proponents include the following information, as available, in any request for a pre-filing meeting:

1. A statement that it is "a request for CWA section 401 certification pre-filing meeting,"
2. The name of the project proponent and appropriate point of contact,
3. The name of the Tribe or jurisdiction for which EPA is serving as the certifying authority,
4. The planned project location (including identification of waters of the United States into which

any potential discharges would occur),

5. A list of any other necessary licenses/permits (*e.g.*, state permits, other Federal permits, etc.),
6. The project type and a brief description of anticipated project construction and operation activities, and
7. The anticipated start work date.

88 FR 66573.

Question: Can a certifying authority choose to require a pre-filing meeting request, but not hold a pre-filing meeting?

Answer: Yes. This final rule does not require certifying authorities to grant or respond to a pre-filing meeting request. 88 FR 66572.

Question: Does the project proponent have to attend the pre-filing meeting? What happens if the project proponent does not show up to the meeting?

Answer: No. The final rule requires the project proponent to request a pre-filing meeting, but it does not require a project proponent to attend the pre-filing meeting, if there is one. However, the pre-filing meeting offers several potential benefits to project proponents, including an opportunity to discuss the proposed project, as well as determine what information or data is needed (if any) as part of the request for certification to enable the certifying authority to take final action on the request for certification within the reasonable period of time.

Question: If the project proponent's activity is subject to multiple Federal licenses or permits that will require certification from the same certifying authority, can the project proponent submit one pre-filing meeting request to the certifying authority?

Answer: Yes, if the certifying authority allows the project proponent to submit a singular pre-filing meeting request. For example, when EPA acts as the certifying authority, EPA would find a singular pre-filing meeting request would be appropriate, as long as the project proponent clearly notes that the request applies to multiple Federal licenses or permits.

Question: What if the project proponent does not submit the pre-filing meeting request in accordance with the certifying authority's applicable submission procedures (*e.g.*, fails to submit the pre-filing meeting request to the appropriate point of contact)?

Answer: If the certifying authority is EPA (or a state or Tribe that has not identified additional contents for a request for certification), then the project proponent will not be able to submit a request for certification. This is because under final rule section 121.5(b)(7), a project proponent must submit documentation that a pre-filing meeting was requested in accordance with the certifying authority's applicable submission procedures, unless the pre-filing meeting request requirement was waived. If the project proponent failed to submit a pre-filing meeting request in accordance with the certifying authority's applicable submission procedures, then the project proponent will be unable to satisfy this component of a request for certification. This is also applicable in instances where a state or Tribal certifying authority identifies a similar additional content for a request for certification.

Question: Does the Federal licensing or permitting agency need to be involved with/attend the pre-filing meeting?

Answer: No, the Federal licensing or permitting agency does not need to be involved with or attend the pre-filing meeting. However, certifying authorities should consider including the Federal agency in the pre-filing meeting process for early coordination where the Federal agency is not otherwise legally precluded. Additionally, the final provision provides flexibility for the certifying authority to determine whether the pre-filing meeting request requirements are fulfilled by any pre-application meetings or application submissions to the Federal licensing or permitting agency. 88 FR 66573.

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d. Requests for Certification

Overview: Once a project proponent has requested a pre-filing meeting (unless waived by the certifying authority), the project proponent may submit a request for certification, as defined at 40 CFR 121.5, in accordance with the certifying authority's applicable submission procedures.

Reference: 40 CFR 121.5; [Final Rule Preamble section IV.C](#); 88 FR 66573-83

Question: When can a project proponent submit a request for certification to the certifying authority during the Federal licensing or permitting process?

Answer: Once a project proponent has requested a pre-filing meeting and waited 30 calendar days (unless waived or shortened by the certifying authority), the project proponent may submit a request for certification, as defined at 40 CFR 121.5, in accordance with the certifying authority's applicable submission procedures. A project proponent should coordinate with the certifying authority and/or Federal agency to determine whether there are any timing considerations that may inform the best time to submit a request for certification (e.g., National Environmental Policy Act timelines).

Question: What must a project proponent include in a request for certification?

Answer: All requests for certification must be in writing, signed, and dated and include the defined minimum contents at section 121.5(a) and any additional contents identified by the certifying authority, as discussed in detail below.

Minimum contents:

All requests for certification for an *individual Federal license or permit* must be in writing, signed, and dated and include defined minimum contents at 40 CFR 121.5(a)(1), which includes:

- (i) A copy of the Federal license or permit application submitted to the Federal agency; and
- (ii) Any readily available water quality-related materials that informed the development of the application.

All requests for certification for the *issuance of a general Federal license or permit* must be in writing, signed, and dated and include defined minimum contents at 40 CFR 121.5(a)(2), which includes:

- (i) A copy of the draft Federal license or permit; and
- (ii) Any readily available water quality-related materials that informed the development of the draft Federal license or permit.

Additional contents:

The default list of additional contents that a project proponent must include in a request for certification, if not already included in the request for certification, as applicable:

- (1) A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity;
- (2) The specific location of any discharge(s) that may result from the proposed activity;
- (3) A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways;
- (4) A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;
- (5) The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence;
- (6) A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and
- (7) Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing meeting request requirement was waived.

However, this default list does not apply if a state or Tribal certifying authority identifies its own additional contents prior to when the request for certification is made that are relevant to the water quality-related impacts from the activity.

Question: What types of additional information may a certifying authority identify for inclusion in a request for certification?

Answer: A certifying authority may only require additional contents that are relevant to the water quality-related impacts from the activity. However, these additional contents must be identified by a state or Tribal certifying authority prior to when the request for certification is made. See 40 CFR 121.5(c).

Question: Does a certifying authority need to define additional components for a request for certification in regulation?

Answer: No. A state or Tribal certifying authority may define the additional contents of a request for certification in regulation or another appropriate manner, such as an official form used for requests for certification, in lieu of relying on EPA's default list of additional contents. 88 FR 66574.

Question: Is the project proponent required to submit application materials that contain confidential business information (CBI)?

Answer: No. Project proponents may redact or exclude personally identifiable information (e.g., personal addresses, personal finance information) and/or other sensitive information. 88 FR 66576.

Question: What are some examples of "any readily available water quality-related materials that informed" the application or draft general license or permit?

Answer: The term "readily available water quality-related materials that informed the development of" either the application or the draft license or permit refers to existing water quality-related materials that are in the project proponent's possession or easily obtainable and informed the project proponent's development of the application or draft license or permit. These materials for either request may include, but are not limited to, water quality baseline conditions from the project site, sediment and erosion control plans, restoration plans, alternatives analyses, mitigation plans, modeling, and/or other materials that have already been developed for the Federal license or permit application or draft license or permit and would help inform the certifying authority of the water quality-related impacts from the activity. 88 FR 66575.

Easily obtainable, existing water quality-related material could also include maps, studies, or a reference to a website or literature that contain information that informed the development of the application or draft license or permit. 88 FR 66575; Footnote 43.

These examples are not intended to be exhaustive, nor does EPA expect that all of the example materials listed will be readily available and/or materials that informed the develop of the application or draft Federal license or permit in all cases. Rather, EPA is providing these examples because these are materials that EPA has previously asked for and found informative when conducting its reviews of requests for certification. 88 FR 66575; Footnote 44.

Question: If the certifying authority were to express the need for specific information or data during the pre-filing meeting and that information or data was not included in the request for certification, would that render the request for certification incomplete?

Answer: A request for certification is incomplete if it is missing any of the minimum contents defined at section 121.5(a) or any of the additional contents defined at section 121.5(b) (or as defined by the certifying authority in accordance with section 121.5(c)). If the missing data or information was not defined *in writing* prior to when the request for certification was received, then it cannot render the request for certification incomplete.

Question: Can a certifying authority ask for additional information after a request for certification is made?

Answer: Yes, but such additional information cannot alter the required contents of a request for certification after it is received. 88 FR 66577.

Question: Who is required to sign and date the request for certification?

Answer: The project proponent. 88 FR 66573.

Question: What should a project proponent include in a request for certification on Corps' civil works projects, which have neither an application nor a draft license or permit?

Answer: For Corps' civil works projects, the Agency expects the project proponent to provide documents in lieu of the application that are similar in nature, such as a "project study," when requesting certification. The project proponent should also include any additional contents in such a request for certification, consistent with section 121.5(b) through (d), as applicable. 88 FR 66582.

Question: Who determines whether a request for certification is "complete"?

Answer: The certifying authority is responsible for determining when it has received a request for certification in accordance with its applicable submission procedures. See 40 CFR 121.6(a).

Question: Are the applicable submission procedures determined by the certifying authority?

Answer: Yes. 88 FR 66581.

Question: If a project proponent applies for a project-specific (or "individual") section 401 certification for a Clean Water Act section 404 Nationwide General Permit authorization, what must be included in the request for certification?

Answer: With regards to project proponents seeking project-specific certification to obtain authorization under a Corps general permit, project proponents must submit the minimum contents defined at section 121.5(a)(1). For example, if a state or authorized Tribe denied certification on the issuance of a Corps' general permit, then to obtain authorization under that general permit, the project proponent would need to obtain a project-specific certification or waiver from the state or authorized Tribe. In those cases, the "application" part of the request for certification may take the form of a pre-construction notification (PCN), along with any readily available water quality-related materials that informed the development of the application (*e.g.*, the general permit). 88 FR 66582.

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e. Reasonable Period of Time

Overview: When a certifying authority receives a request for certification, the certifying authority must act on that request within a “reasonable period of time (which shall not exceed one year).”

Reference: 40 CFR 121.6; [Final Rule Preamble section IV.D](#); 88 FR 66583-91

Question: When does the reasonable period of time begin?

Answer: The reasonable period of time begins on the date that a request for certification is received by the certifying authority in accordance with its applicable submission procedures. *See* 40 CFR 121.6(a); 88 FR 66583.

Question: If the certifying authority receives a request for certification that the project proponent submitted in accordance with the certifying authority’s applicable submission procedures on March 1, but the certifying authority sends the written confirmation on March 5 that the request for certification was received, when does the reasonable period of time begin?

Answer: In this hypothetical example, the reasonable period of time began on March 1 (the date the certifying authority received the request for certification in accordance with its applicable submission procedures).

Question: Who sets the reasonable period of time?

Answer: Federal agencies and certifying authorities may jointly set the reasonable period of time on a case-by-case basis or categorically, provided it does not exceed one year from the date that the request for certification was received. 88 FR 66583.

Question: What factors must a certifying authority and Federal agency consider in setting the reasonable period of time?

Answer: The final rule does not define factors that a Federal agency and certifying authority must consider establishing the reasonable period of time. However, the Agency notes that Federal agencies and certifying authorities might consider factors such as project type, complexity, location, and scale; the certifying authority’s administrative procedures; other relevant timing considerations (e.g., Federal license or permit deadlines and/or associated National Environmental Policy Act deadlines; anticipated timeframe for neighboring jurisdictions process); and/or the potential for the licensed or permitted activity to affect water quality. 88 FR 66583-84.

Question: What is the reasonable period of time in instances where the Federal agency has set a one-year reasonable period of time (e.g., FERC) in its regulations?

Answer: In such instance, the reasonable period of time is one year, and it is unnecessary for the certifying authority and Federal agency to negotiate an alternate reasonable period of time. 88 FR 66588.

Question: Does the reasonable period of time need to be set on a case-by-case basis, or may the reasonable period of time be set on a categorical basis (e.g., by project type)?

Answer: Federal agencies and certifying authorities might elect to establish joint reasonable period of time procedures and/or agreements through a memorandum of agreement (MOA) or similar. Such MOAs could apply to all federally licensed or permitted activities or only to specific types of activities (e.g., activities covered by general permits). The requests for certification that fall under these MOAs would not require individual written agreements confirming the reasonable period of time between the Federal agency and certifying authority for each Federal license or permit. 88 FR 66584.

Question: What is the default reasonable period of time in instances where the certifying authority and Federal agency fail to reach an agreement on the reasonable period of time?

Answer: If the Federal agency and certifying authority do not agree upon a reasonable period of time, the default reasonable period of time will be six months from the date that the request for certification was received. 88 FR 66583.

Question: If the reasonable period of time expires on a weekend or Federal holiday, does the reasonable period of time extend to the end of the next business day?

Answer: No. However, the Federal agency and certifying authority can take these details into account when setting the reasonable period of time to avoid the expiration occurring on a weekend or a holiday.

Question: Would the reasonable period of time automatically restart if a project changes during the reasonable period of time such that additional time is needed by the certifying authority for review?

Answer: No. However, Federal agencies and certifying authorities may agree to extend the reasonable period of time, provided it does not exceed the statutory one-year limit. 88 FR 66588.

Questions: In what instances does the reasonable period of time automatically extend?

Answer: The final rule provides automatic extensions to accommodate public notice procedures or due to force majeure events, provided it does not exceed the statutory one-year limit. In these two circumstances, the reasonable period of time is extended by the time needed by public notice procedures or the force majeure event, which would be communicated in the written justification by the certifying authority to the Federal agency. However, to be clear, such extensions only apply to public notice procedures in effect at the time the written notification for an extension is received. 88 FR 66588.

Question: May a Federal agency deny a request for an extension to the reasonable period of time to accommodate public notice procedures or due to a force majeure event?

Answer: No. 88 FR 66588.

Question: Does the project proponent have a role in setting or extending the reasonable period of time?

Answer: No. 88 FR 66589.

Question: Can the reasonable period of time be delayed or paused where a project proponent fails to provide requested additional information?

Answer: No. 88 FR 66655.

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f. Public Notice

Overview: Section 401(a)(1) requires a certifying authority to establish procedures for public notice, and a public hearing where necessary, on a request for certification.

Reference: 33 U.S.C. 1341(a)(1); [Final Rule Preamble section IV.F](#); 88 FR 66613

Question: Does every request for certification require public notice?

Answer: Section 401 provides that certifying authorities “shall establish procedures for public notice in the case of all applications for certification.” 33 U.S.C. 1341(a)(1). Whether a request for certification requires public notice will depend on the certifying authority’s public notice procedures. For example, when EPA is the certifying authority, EPA must provide public notice of the request for certification within 20 calendar days of the date that the request for certification was received. 88 FR 66624.

Question: Can a certifying authority provide public notice on a request for certification through joint public notice with the Federal agency?

Answer: Yes, if it is in accordance with the certifying authority’s public notice procedures for requests for certification.

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g. Scope of Certification

Overview: When a certifying authority reviews a request for certification, the certifying authority shall evaluate whether the activity will comply with applicable water quality requirements. The certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation.

Reference: 40 CFR 121.3; [Final Rule Preamble section IV.E](#); 88 FR 66591-66606

Question: What is the "activity" subject to a certifying authority's review?

Answer: A certifying authority shall evaluate the water quality-related impacts of the entire activity subject to the Federal license or permit, including the construction and operation, and not solely the aspect of the activity directly authorized by a given Federal license or permit. Certifying authorities may address not only adverse water quality impacts caused exclusively by the federally licensed or permitted activity, but also adverse impacts contributed to by a federally licensed or permitted activity. For example, a certifying authority may deny or condition an activity that will contribute to ongoing noncompliance with water quality requirements. However, a certifying authority's analysis of any given activity is limited to adverse water quality-related impacts that may prevent compliance with water quality requirements. Certifying authority cannot condition an activity for the purpose of protecting waters that are not impacted by the activity or include conditions that do not otherwise affect compliance with the applicable water quality requirements in the waters impacted by the activity. 88 FR 66600.

Question: Can a certifying authority consider non-water quality-related impacts when it acts on a request for certification?

Answer: No. 88 FR 66601.

Question: Is the scope of certification review limited to the activities directly authorized by the Federal license or permit that triggered the need to obtain a section 401 certification? For example, for a request for certification on a CWA section 404 permit, is the scope of certification review limited to the discharge of dredge or fill material authorized by that permit?

Answer: No. 88 FR 66599.

Question: Is the certifying authority limited to considering only those aspects of the activity that will occur before the Federal license or permit expires?

Answer: No. When a certifying authority considers whether to grant or deny certification, the certifying authority is not limited to considering only those aspects of the activity that will occur before the expiration of the Federal license or permit. For example, if the certifying authority determines that no conditions could assure that the activity, including post-expiration aspects of the activity, will comply with water quality requirements, denial of certification would be appropriate. However, EPA emphasizes that—for purposes of section 401—certification conditions cannot "live on" past the expiration of the Federal permit to which they attach. Section 401(d) requires certification conditions to be incorporated into the Federal license or permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. 88 FR 66600.

Question: Which aquatic resources can a certifying authority consider when acting on a request for certification?

Answer: A certifying authority is limited to considering "navigable waters" as defined in the CWA, except where a state or authorized Tribe has state or Tribal laws that apply to waters of the state or Tribe. 88 FR 66593.

Question: What are water quality requirements?

Answer: Water quality requirements include any limitation, standard, or other requirement under sections 301, 302, 303, 306 and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing

those sections, and any other water quality-related requirement of state or Tribal law. *See* 40 CFR 121.1(j); 88 FR 66601.

Question: Can wetland or stream mitigation be required as a condition, if necessary, to ensure the activity will comply with applicable water quality requirements?

Answer: Yes, if the condition is for the purpose of protecting waters that are impacted by the activity in a way that affects compliance with the applicable water quality requirements.

Question: Can a certifying authority condition an activity to ensure its compliance with any component of applicable water quality standards (water quality criteria, designated uses, and antidegradation requirements)?

Answer: Yes, a certifying authority could condition an activity to ensure its compliance with any and all components of applicable water quality standards (water quality criteria, designated uses, and antidegradation requirements). 88 FR 66606.

Question: Is the scope of review for a certification decision different than the scope of conditions that could be added to a certification?

Answer: No. The same “activity” standard applies to a grant of certification, a grant of certification with conditions, and a denial of certification.

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h. Certification Decisions

Overview: A certifying authority may act on a request for certification in one of four ways: grant certification, grant certification with conditions, deny certification, or expressly waive certification.

Reference: 40 CFR 121.7; [Final Rule Preamble section IV.F](#); 88 FR 66606-16

Question: Does the final rule require specific contents in a certification decision?

Answer: No. Although the final rule requires certification decisions to be in writing, the final rule does not require specific contents in a certification decision. However, the final rule defines recommended contents for a grant of certification (section 121.7(c)), a grant of certification with conditions (section 121.7(d)), a denial of certification (section 121.7(e)), and an express waiver (section 121.7(f)). 88 FR 66607.

Question: Can certifying authorities issue “general,” “blanket,” or “programmatic” section 401 certifications prior to receiving a request for certification?

Answer: No. For purposes of section 401, a CWA section 401 certification cannot be issued in the absence of a project proponent requesting certification for a Federal license or permit that may result in any discharge into waters of the United States. Similarly, if the certifying authority never received a request for certification or if the request for certification or Federal license or permit application was withdrawn, then the certifying authority is no longer responsible for acting on the request for certification because the pre-requisite “request” is absent. 88 FR 66583.

Question: Can a certification condition extend the duration of a Federal license or permit?

Answer: No. EPA emphasizes that—for purposes of section 401—certification conditions cannot “live on” past the expiration of the Federal permit to which they attach. Section 401(d) requires certification conditions to be incorporated into the Federal license or permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. 88 FR 66600.

Question: Is there a limit to the number of times a project proponent may request section 401 certification after denial?

Answer: EPA continues to interpret section 401 as allowing denials without prejudice. Section 401 provides that a Federal license or permit may not be granted if certification is denied, but it does not speak to new requests for certification following a denial of certification. Nothing in section 401, nor this final rule, prohibits a project proponent from re-applying for certification if a certifying authority denies its initial request. 88 FR 66608.

Question: Who is responsible for providing a copy of the section 401 certification to the Federal agency?

Answer: The project proponent.

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i. Federal Agency Review

Overview: To the extent a Federal agency verifies compliance with the requirements of CWA section 401, its review is limited to whether: the appropriate certifying authority issued the certification decision; the certifying authority confirmed it complied with its public notice procedures established pursuant to CWA section 401(a)(1); and the certifying authority acted on the request for certification within the reasonable period of time.

Reference: 40 CFR 121.8; 40 CFR 121.9; [Final Rule Preamble section IV.G](#); 88 FR 66616-24

Question: Does a Federal agency have to review a certifying authority's decision for compliance with section 401?

Answer: No. The final rule confirms that Federal agencies may review a certification decision only for the limited purpose of verifying compliance with the requirements of CWA section 401, including verifying (1) whether the appropriate certifying authority issued the certification decision, (2) whether the certifying authority confirmed it complied with its public notice procedures established pursuant to section 401(a)(1), and (3) whether the certifying authority acted on the request for certification within the reasonable period of time. The final rule does not require Federal agencies to undertake this review. 88 FR 66617-18.

Question: Can a Federal agency change a certification condition or exclude a certification condition from its license or permit?

Answer: No. Federal circuit courts have routinely held that Federal agencies may not question or criticize the substance of a state's water quality certification or conditions. 88 FR 66607.

Question: How can a certifying authority demonstrate compliance for purposes of federal agency review (*i.e.*, the appropriate certifying authority issued the certification decision; the certifying authority confirmed it complied with its public notice procedures established pursuant to CWA section 401(a)(1); and the certifying authority acted on the request for certification within the reasonable period of time)?

Answer: In the final rule, the Agency is declining to define the specific information a certifying authority must include in a certification decision to demonstrate that it has met the facial requirements of section 401. Certifying authorities are the entities most familiar with their certification process, and certifying authorities, and not EPA or other Federal agencies, are in the best position to determine how to demonstrate compliance. EPA expects that it should only take minimal effort by a certifying authority to demonstrate compliance for Federal agency verification. However, the Agency is providing recommendations for how certifying authorities can demonstrate compliance with these requirements. For example, to support a streamlined review of whether a certifying authority complied with its public notice procedures, EPA is finalizing a recommendation for a certifying authority to indicate such compliance in its certification decision. By doing so, the Federal agency should be able to simply look at the certification decision and quickly and easily determine whether the certifying authority indicated that it followed its public notice procedures. 88 FR 66620-21.

Question: If a Federal agency chooses to verify whether the certifying authority confirmed it complied with its public notice procedures (established pursuant to CWA section 401(a)(1)), does that mean the Federal agency must look into the certifying authority's public notice procedures?

Answer: No. This inquiry does not require the Federal agency to research or inquire about the particulars of a state or Tribal laws and regulations regarding public notice, but rather merely verify that the certifying authority confirmed it complied with its public notice procedures. 88 FR 66621.

Question: If the Federal agency determines that the certifying authority failed or refused to act on a request for certification within the reasonable period of time, and a waiver occurs, can the certifying authority challenge that decision?

Answer: Yes, the certifying authority may challenge that decision in a court of competent jurisdiction.

Question: What documentation does a Federal agency need to provide the certifying authority when it determines a waiver has occurred?

Answer: If a Federal agency determines that the certification decision was not issued within the reasonable period of time, the Federal agency shall promptly notify the certifying authority and project proponent in writing that a waiver has occurred. 88 FR 66621.

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j. Neighboring Jurisdictions Process under Section 401(a)(2)

Overview: Section 401(a)(2) provides a mechanism for a notified neighboring jurisdiction to object to the issuance of a Federal license or permit when it determines that discharge from a project originating in another jurisdiction will affect the quality of its waters so as to violate its water quality requirements. EPA provides notification to a neighboring jurisdiction in circumstances where it has determined, following appropriate notification from the federal licensing or permitting agency, that discharge from a project may affect its water quality.

Reference: 40 CFR 121.12-121.15; [Final Rule Preamble section IV.K](#); 88 FR 66635-51

Question: When should the Federal agency notify EPA pursuant to section 401(a)(2)?

Answer: The Federal agency must notify the appropriate EPA region, in writing, within five calendar days of the date that it has received both the application and either a certification or waiver for a Federal license or permit.

Question: Does the Federal licensing or permitting agency need to notify EPA of every certification within five calendar days of receipt of an application and certification, even on the issuance of a general license or permit?

Answer: Yes. All certifications or waivers will trigger the neighboring jurisdictions process, even those for minor or remote projects. The requirement to notify EPA under section 401(a)(2) depends on the Federal agency's receipt of a Federal license or permit application and certification or waiver; it does not depend on the location of the project or the nature of the Federal license or permit. 88 FR 66651.

Question: What is the process for Corps civil works projects that are issued certifications or waivers?

Answer: EPA expects Federal agencies to determine how best to comply with all section 401 requirements, including section 401(a)(2). For example, on a Corps civil works project, compliance may involve the Corps sending a project study in conjunction with a certification or a waiver of certification. 88 FR 66651.

Question: What happens if the Federal agency fails to notify EPA pursuant to section 401(a)(2)?

Answer: A Federal agency cannot issue a license or permit pending the conclusion of the neighboring jurisdictions process. 88 FR 66651.

Question: What should the Federal agency include in its section 401(a)(2) notice to EPA?

Answer: The Federal agency's notification must include a copy of the certification or waiver and the application for the Federal license or permit and a general description of the proposed project, including but not limited to the Federal license or permit identifier, project location (e.g., latitude and longitude), a project summary including the nature of any discharge and size or scope of activity, and whether the Federal agency is aware of any neighboring jurisdiction providing comment about the project. If the Federal agency is aware that a neighboring jurisdiction provided comment about the project, it shall include a copy of those comments in the notification. 88 FR 66641-42.

Question: How long does EPA have to make a "may affect" determination after receiving notice from a Federal agency?

Answer: EPA must make a "may affect" determination within 30 calendar days of receiving notice from a Federal agency in compliance with the regulatory requirements.

Question: What information or criteria does EPA consider while conducting their "may affect" evaluation under section 401(a)(2)?

Answer: Factors that EPA may consider include, but are not limited to: the type of project and discharge covered in the Federal license or permit, the proximity of the project and discharge to neighboring jurisdictions, certification conditions and, as applicable, other conditions already contained in the draft Federal license or permit, the neighboring jurisdiction's water quality requirements, the views of the neighboring jurisdiction on the effect of discharge from the project on its water quality, and the current water quality and characteristics of the water receiving the discharge in making a "may affect" determination. However, EPA reiterates that it is neither limited to considering, nor required to consider, the factors identified here. 88 FR 66645.

Question: What is the scope of EPA’s review under section 401(a)(2)?

Answer: The scope of EPA’s review under section 401(a)(2) is limited to considering potential effects from a “discharge” from an activity. 88 FR 66637.

Question: If EPA determines that a discharge “may affect” a neighboring jurisdiction’s water quality, will the neighboring jurisdiction be notified? If EPA does not find that a discharge “may affect” a neighboring jurisdiction’s water quality, will the neighboring jurisdiction be notified?

Answer: If EPA determines that a discharge from a project may affect a neighboring jurisdiction’s water quality, section 401(a)(2) requires EPA to notify the neighboring jurisdiction, Federal agency, and the project proponent within 30 calendar days from notice provided by the Federal agency in accordance with section 401(a)(2). However, Section 401(a)(2) does not require EPA to provide notification in circumstances where it has completed its “may affect” determination but has not found that a discharge from the project may affect a neighboring jurisdiction’s water quality (i.e., has not made a “may affect” finding). 88 FR 66645.

Question: How long does a notified neighboring jurisdiction have to review a “may affect” notification from EPA, complete its “will violate” determination, and provide written notification of an objection and a request for hearing?

Answer: Sixty (60) calendar days after receipt of EPA’s “may affect” notification pursuant to section 401(a)(2).

Question: If a notified neighboring jurisdiction objects to the issuance of a license or permit and requests a public hearing, who is responsible for holding the public hearing?

Answer: The Federal licensing or permitting agency.

Question: Is there a timeframe in which the Federal agency must hold the public hearing after the neighboring jurisdiction objects to the issuance of a license or permit and requests a hearing?

Answer: No. Section 401(a)(2) does not provide for a specific process for the public hearing conducted by the Federal licensing or permitting agency. It merely states that the hearing is public and shall be held by the Federal licensing or permitting agency. However, the Federal agency cannot hold with public hearing immediately after receiving the objection because pursuant to 40 CFR 121.15(b), the Federal agency shall provide public notice at least 30 days in advance of the hearing to interested parties, including but not limited to the notified neighboring jurisdiction, the certifying authority, the project proponent, and the Regional Administrator. 88 FR 66636.

Question: Can a notified neighboring jurisdiction withdraw its objection?

Answer: Yes, a notified neighboring jurisdiction may withdraw its objection before the public hearing. If the neighboring jurisdiction withdraws the objection, the Federal agency will not need to proceed with a public hearing and can move forward with issuing the Federal license or permit. 88 FR 66636.

Question: What happens during the public hearing?

Answer: EPA is responsible for submitting its evaluation and recommendations concerning the objection to the Federal agency at the public hearing. Otherwise, the final rule does not define the type of public hearing that the Federal agency must hold. However, EPA recommends that the Federal agency accept comments and additional evidence on the objection at the public hearing. 88 FR 66650.

Question: What happens after the public hearing?

Answer: After the public hearing, the Federal licensing or permitting agency must consider the recommendations of the neighboring jurisdiction and EPA Administrator as well as any additional evidence presented at the hearing and, based on that information, must condition the Federal license or permit as may be necessary to ensure compliance with applicable water quality requirements. If additional conditions cannot ensure compliance with applicable water quality requirements, the Federal agency shall not issue the license or permit. 88 FR 66650.

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k. Modification to Certifications

Overview: Provided that the Federal agency and the certifying authority agree in writing that the certifying authority may modify a grant of certification (with or without conditions), the certifying authority may modify only the agreed-upon portions of the certification.

Reference: 40 CFR 121.10; [Final Rule Preamble section IV.I](#); 88 FR 66628-33

Question: When can a certifying authority modify a grant of certification?

Answer: The final rule authorizes modifications to a grant of certification (issued within the reasonable period of time) provided that the Federal agency and the certifying authority agree in writing. 88 FR 66630-31.

Question: Can a denial or waiver be modified into a grant of certification?

Answer: No. 88 FR 66630.

Question: Can a certifying authority unilaterally modify its certification?

Answer: No. The cooperative approach in the final rule does not allow for unilateral modifications by certifying authorities, including through any “reopener” clauses included in a grant of certification. 88 FR 66631.

Question: Can a certifying authority modify its grant of certification (with or without conditions) into a denial or waiver, or revoke the certification?

Answer: No. A modification to a certification means a change to an element or portion of a certification or its conditions—it does not mean a wholesale change in the type of certification decision or a reconsideration of the decision whether to certify (*e.g.*, changing a grant of certification to a denial of certification). 88 FR 66629.

Question: Does the project proponent have a defined role in modifications?

Answer: No. However, the Agency does not expect the process described in section 121.10 to prevent engagement with the project proponent before or after the certifying authority and Federal agency have agreed that the certifying authority may modify the previously granted certification. EPA recommends that certifying authorities engage with the stakeholders who will be impacted by a modification to the certification; some certifying authorities may even be required under their regulations to make any modifications to their certification decisions available for public notice and comment. 88 FR 66631.

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I. Enforcement and Inspections

Overview: Section 401(a)(4) identifies one set of circumstances where the certifying authority may review the manner in which a facility or activity will operate once the facility or activity has received certification. EPA's final rule does not include any regulatory text on inspections or enforcement, but the Final Rule Preamble includes discussion of some issues that have been identified regarding enforcement of the requirement to obtain section 401 certification and enforcement of certification conditions.

Reference: 33 U.S.C. 1341(a)(4); [Final Rule Preamble section IV.J](#); 88 FR 66633-35

Question: Can Federal agencies enforce certification conditions?

Answer: Section 401 certification conditions that are incorporated into the Federal license or permit are enforceable by Federal licensing or permitting agencies. Section 401(d) provides that if a grant of certification includes any conditions, those conditions "shall become a condition on any Federal license or permit." As a result, the Federal agency can enforce any such conditions in the same manner as it can enforce any other conditions of its license or permit. 88 FR 66634.

Question: Can certifying authorities enforce certification conditions?

Answer: Nothing in section 401 precludes states and authorized Tribes from enforcing certification conditions when so authorized under state or Tribal law (and not precluded by other Federal law besides section 401). 88 FR 66634.

Question: What is the scope of a certifying authority's inspection authority under section 401? Does section 401 limit the certifying authority's ability to inspect facilities or activities in accordance with the certifying authority's laws and regulations? Does section 401 limit the Federal agency's ability to inspect facilities or activities during the life of the license or permit in accordance with the Federal agency's laws and regulations?

Answer: Section 401(a)(4) identifies one set of circumstances where the certifying authority may review the manner in which a facility or activity will operate once the facility or activity has received certification. The certifying authority's review is limited to determining if the post-construction operation of the facility or activity will ensure that applicable effluent limitations, other limitations, or other applicable water quality requirements will not be violated. EPA emphasizes that section 401(a)(4) does not necessarily limit the certifying authority's ability to inspect facilities or activities before or during operation in accordance with the certifying authority's laws and regulations. The Agency is aware that states and Tribes may have their own authority to inspect a facility or activity to determine compliance with conditions set forth in a section 401 certification. Similarly, section 401(a)(4) does not necessarily limit a Federal agency's ability to inspect a facility during the life of the permit or license pursuant to that Federal agency's laws and regulations. 88 FR 66634-35.

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m. Treatment in a Similar Manner as a State (TAS)

Overview: Under this final rule, Tribes may obtain treatment in a similar manner as a state (TAS) solely for section 401 or obtain TAS for the limited purpose of participating as a neighboring jurisdiction under section 401(a)(2).

Reference: 40 CFR 121.11; [Final Rule Preamble section IV.L](#); 88 FR 66651-55

Question: What is the difference between TAS solely for section 401 and TAS for section 401(a)(2)?

Answer: Upon receiving TAS for section 401, Tribes have two roles. First, Tribes that receive section 401 TAS are responsible for acting as a certifying authority for projects that may result in a discharge into waters of the United States on their Indian reservations. As certifying authorities, Tribes with TAS may grant, grant with conditions, deny, or waive certification based on whether a federally licensed or permitted project will comply with sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirements of Tribal law. Second, Tribes that receive section 401 TAS are accorded the status of “neighboring jurisdiction” for purposes of section 401(a)(2). 88 FR 66652.

Upon receiving TAS for section 401(a)(2), a Tribe is accorded the status of “neighboring jurisdiction” for purposes of section 401(a)(2).

Question: What are the criteria for a Tribe to apply for TAS for section 401 or section 401(a)(2)?

Answer: Consistent with the requirements provided in CWA section 518, the final rule requires that four criteria must be met for Tribes to obtain TAS for section 401, including section 401(a)(2). First, the Tribe must be federally recognized by the U.S. Department of the Interior and meet the definitions finalized in sections 121.1(d) and (e). Second, the Tribe must have a governing body that carries out “substantial governmental duties and powers” over a defined area. Third, the Tribe must have appropriate authority to regulate and manage water resources within the borders of the Tribe’s reservation. Lastly, the Tribe must be reasonably expected, in the Regional Administrator’s judgment, to be capable of administering a section 401 water quality certification program. 88 FR 66652.

Question: Is there an application for TAS for section 401 and section 401(a)(2)?

Answer: Yes. The application for TAS for section 401 can be found on EPA’s website: <https://www.epa.gov/cwa-401>.

Question: Can a Tribe apply for TAS for CWA section 401 or section 401(a)(2) authority without applying for CWA section 303(c) authority?

Answer: Yes.

Question: If a Tribe is approved for TAS for section 401 or section 401(a)(2) but has no federally approved water quality standards, what parameters can the Tribe use to support certification decisions as a certifying authority or “will violate” determinations as a notified neighboring jurisdiction?

Answer: Authorized Tribes can base their section 401 certification decisions, or section 401(a)(2) “will violate” determinations, on compliance with water quality requirements other than Tribal water quality standards approved under section 303(c). Examples include Tribal ordinances or other Tribal laws related to water quality, or, if present, Federal water quality standards promulgated by EPA for reservation waters. 88 FR 66653.

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