



401 Certification Survey Summary May 2019

On April 10, 2019, the White House issued the *Executive Order on Promoting Energy Infrastructure and Economic Growth*. Part of the executive order called for reforms to Clean Water Act (“CWA”) Section 401 certification processes. Therefore, EPA announced that the Agency would engage with states, authorized tribes, and relevant federal agencies to identify provisions requiring clarification within CWA Section 401 and related federal regulations and guidance. EPA is taking pre-proposal recommendations on the issue.

To assist in responding to EPA’s efforts, ACWA released a survey to states inquiring into state Section 401 certification processes including the average number of state certification requests and denials, certification timeliness, application completeness, and best practices.

ACWA received thirty-one (31) responses to the survey. The results show that states work hard to issue Section 401 certifications in a timely manner and very rarely issue denials of certification. Specifically, for the thirty-one (31) states that responded the median of the average number of requests for certification received per state per year is approximately seventy (70) (the survey found a large range of average annual number of certification requests. At the high end, Michigan has approximately 5000 requests and New York approximately 4000 annual requests. At the low end, New Hampshire has approximately ten (10) annual requests and South Dakota approximately fifteen (15) requests). The average length of time it takes these states to complete a certification once a complete application is received is approximately 132 days (under 4.5 months). Seventeen (17) states average zero (0) denials per year. The rest of the states very rarely issue denials of certification.

Regarding certification delays, states cited many reasons. The most common reason for certification delays cited by states was incomplete requests. Other reasons for delays cited by multiple states included slow responses from applicants, time taken responding to public comments, negotiating conditions necessary to protect water quality, and staff workload issues.

Though delays sometimes occur, states have taken significant steps to ensure timely Section 401 certifications. Most states either require or encourage pre-submittal meetings with applicants. States have also adopted electronic submittal and hired additional staff to assist with making certifications. Regulatorily, states have clarified “completeness” of requests and set hard time limits for review in state regulations.

Because it is the most common reason for certification delays, states have taken significant steps to inform applicants what constitutes a “complete” request. Twenty-one (21) states either have regulations that explain completeness, accept the federal Army Corps of Engineers application, or clearly list requirements on the application. Many states work with applicants through early engagement to ensure applicants are aware of request requirements.

States also employ a series of “best practices” to ensure complete requests and timely certifications. Twenty-seven (27) states require or encourage pre-request meetings with applicants or their consultants or have clear application instructions. State websites often have guidance documents and other materials to assist applicants. States also reach out directly to applicants when requests are incomplete.

ACWA purposely kept this survey simple. Therefore, there may be nuance to specific state 401 certification programs and efforts not reflected in the survey results or in this summary.

For more information on this survey, contact ACWA’s Mark Patrick McGuire at mpmcguire@acwa-us.org.