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EPA Pre-Publication Version: Updating Regulations on Water Quality Certification

The Environmental Protection Agency (EPA) is publishing for public comment a proposed rule providing updates and clarifications to the substantive and procedural requirements for water quality certification under Clean Water Act (CWA or the Act) section 401. According to EPA, the proposed rule would replace and modernize the existing water quality certification regulations at 40 CFR Part 121. Additionally, the proposed rule would provide greater clarity and regulatory certainty for the water quality certification process, consistent with the April 2019 Presidential Executive Order entitled “Promoting Energy Infrastructure and Economic Growth.” The Executive Order directed the EPA to review and issue this new guidance in 60 days and to propose new section 401 regulations in 120 days.

EPA states that within 90 days of issuing its final regulations, 401 implementing agencies should ensure their own regulations are consistent with EPA’s. This is to provide a consistent national and state approach in line with the goals of the Executive Order and to streamline the 401 process.

Reasonable Time to Act & Waiver

CWA section 401 allows the state a reasonable time – up to 1 year, to act on a request. Under this new rule, there will be no tolling provision or pauses in the certifying agency’s time to act. The proposed rule seeks a clearer understanding of when that reasonable time starts and proposes that the review phase starts upon receipt of a written, signed, and dated “certification request.” If a state fails to review the request in a “reasonable time,” they waive the opportunity to provide a certification and the federal agency may issue the license or permit. EPA acknowledges that many states and tribes have their own requirements in place and recommends that EPA’s requirements be adopted to ensure consistency.

While “reasonable time, no longer than 1 year” has been the standard, EPA is looking at alternative approaches, potentially reducing that to 6 months, with a 1-year cap. If a State fails or refuses to act, the requirement for certification would be waived.

Scope of Review

Regarding the scope of the certifying authority’s review, EPA is looking to clarify and set boundaries on undefined terms such as “discharge,” “condition,” and “any other appropriate requirements of State law.”

For instance, under this proposed rule, “discharge” will refer only to discharges from point sources into navigable waters. EPA proposes that the scope of certification “is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.” This definition removes any reference to “reasonable assurance.”

Conditions

EPA is proposing that each condition listed in a certification come with an explanation of its necessity to meeting CWA compliance.

Comments

The EPA is soliciting comments from state and tribal governments, and the public at large regarding the need for, and potential benefits of, a consistent, national and state regulatory approach to section 401 and how the EPA may best promote such consistency.

The following is a shortened list of specific comments found throughout the proposed rule. Please reference the full proposal as necessary for full context and to review all of the areas where the agency is seeking comment.

The EPA is soliciting specific comments on the following:

- Whether its proposed regulations appropriately balance the scope of state authority under section 401 with Congress' goal of facilitating commerce on interstate navigable waters, and whether they define the scope in a manner that would limit the potential for states to withhold or condition certifications such that it would place undue burdens on interstate commerce (page 28).
- The EPA interprets "appropriate requirements" to mean the regulatory provisions of the CWA, it follows that those would necessarily be EPA-approved provisions. The EPA requests comment on whether this interpretation is a reasonable and appropriate reading of the statute and related legal authorities (page 59).
- EPA is also seeking comment on an alternate interpretation of the text of the CWA that would allow imposition of effluent limitations and other similar conditions that address the water quality-related effects of "the activity as a whole," and not just "the discharge," provided such effluent limitations and other conditions are based on "water quality requirements" as defined in this proposal (page 67).
- On all aspects of this effort to modernize and clarify its section 401 regulations, including any specific suggestions on how any of the proposed definitions or other requirements might be modified to implement Congress' intent in enacting section 401 (page 74).
- Whether the Agency should include additional procedures in its final regulations to ensure that the public is appropriately informed of proposed federally licensed or permitted projects, potential discharges, and related water quality effects (page 74).
- On how project proponents may establish for regulatory purposes that there is no potential discharge and therefore no requirement to pursue a section 401 certification (page 76).
- EPA seeks comment identifying other federal licenses or permits that may trigger the section 401 certification requirement (page 78).
- Whether this list of documents and information (for a certification request) is appropriately inclusive, whether it is specific enough to inform project proponents of the submittal requirements, and whether it is clear enough to avoid subjective determinations by a certifying authority of whether submittal requirements have been satisfied (page 81).
- Whether it's appropriate to require certifying authorities to submit 401 procedures to EPA.
- Whether a standard request for should be created and whether federal agencies should be required to use it (page 82).

- Whether federal agencies should be subject to the same "certification request" submittal requirements as proposed, or if they require different considerations and procedures than section 401 certification requests by other non-federal agency project proponents. Specifically, the Agency requests comments on an alternative approach for federal agencies that issue general federal license or permits whereby "certification request for a general permit or license" would mean a written, signed, and dated communication from a Federal agency to the appropriate certifying authority (page 84)
- Whether these new definitions will provide sufficient clarity and regulatory certainty or if additional procedures or requirements may be necessary, and if so, what those procedures or requirements might be (page 85).
- Whether the proposed definition of "discharge" is necessary, whether it provides appropriate clarification, or whether the EPA's proposed regulations would be sufficiently clear without including this new definition.
- Whether this proposed definition for "water quality requirement" is clear and specific enough to provide regulatory certainty for certifying authorities and project proponents. The EPA also solicits comment on whether additional specificity should be added to the proposed definition, for example that the term does not include non-water quality related state or local laws (page 92).
- The Agency solicits comment on the proposed information needed to support each condition, particularly on the utility of such information for the certification process (page 97).
- Whether the proposed opportunity to remedy deficient conditions would be helpful and an appropriate use of federal agency resources, whether it should be mandatory for federal agencies to provide this opportunity, and whether it is within the scope of EPA authority to establish through regulation (page 100).
 - The EPA also solicits comment on an alternative approach where certifying authorities would not have the opportunity to remedy deficient conditions, even if the reasonable period of time has not expired.
- Whether the proposed approach appropriately captures the scope of authority for granting, conditioning, denying, and waiving a section 401 certification (page 101).
- EPA solicits comment on what it means for a certification or its conditions to be "related to water quality" and how direct that relationship to water quality must be to properly define a certification or condition as within the appropriate scope of section 401 (page 102).
- EPA solicits comment on its interpretation of the phrase "any other appropriate requirements of State law" as limited to requirements in EPA-approved state and tribal CWA regulatory programs. In particular, EPA solicits comment on whether EPA should interpret that phrase more broadly to include any requirement of State law, any water quality-related requirement of State law (regardless of whether it is part of an EPA-approved program), or any different universe of state or tribal requirements (reflecting, or not, CWA sections or programs) that might be broader or narrower in scope than this proposal (page 102).
- Whether EPA's interpretation of sections 401(a) and 401(d) as limiting the scope of state and tribal section 401 review and conditions to impacts from potential "discharges," or whether the state or tribe may also consider a different and broader

- universe of impacts, such as impacts from the licensed project or activity as a whole, or some other universe of potential impacts to water quality (page 102).
- Whether this proposal will facilitate enforcement of certification conditions by federal agencies, or whether there are other approaches the Agency should consider beyond requiring a citation to state, tribal, or federal law or explaining the reason for a condition (page 102).
 - Whether there is any legal basis to allow a federal agency to extend the reasonable period of time beyond one year from receipt (page 106).
 - Whether the pre-filing meeting process would be helpful for other certifying authorities, whether it is an appropriate mechanism to promote and encourage early coordination between project proponents and certifying authorities, and if there are other options that may also be appropriate from a regulatory perspective (page 106).
 - The Agency solicits comment from certifying authorities on the extent to which section 401 programs are funded by states and tribes and the number of full or part time employees that are assigned to evaluate and take action on certification requests (page 106).
 - Whether factors listed on page 108 are appropriate and whether there are other factors that a federal agency should consider when establishing the reasonable period of time (page 108).
 - Whether the Agency should establish reasonable periods of time for different federal permit types on a categorical basis in its final rule (page 108).
 - EPA is soliciting comment on an alternate approach that it is considering taking whereby the EPA would retain the language in its existing certification regulations that specifies a reasonable period of time "shall generally be considered to be 6 months, but in any event shall not exceed 1 year." 40 CFR 121.16(b) (page 109).
 - In the event the EPA pursues this alternate approach, the Agency requests comment on whether six months is an appropriate general rule, if a longer or shorter period of time would be more appropriate as a general rule, and whether having such a general rule is appropriate (page 109).
 - EPA seeks comment on an approach that would not define "fails or refuses to act" as a separate term (page 114).
 - In the event the Agency pursues this approach, the Agency solicits comment on other tools or mechanisms to encourage certifying authorities to act timely and within the scope of certification, consistent with the text of the CW A as defined in this proposal (page 114).
 - Whether the opportunity to remedy deficient certifications or conditions would be helpful and appropriate, or if it could create additional delays in the federal licensing or permitting process (page 114).
 - The EPA also solicits comment on an alternative approach where certifying authorities would not have the opportunity to remedy deficient denials, even if the reasonable period of time has not expired (page 114).
 - The Agency also solicits comment on whether there are other mechanisms that may also promote timely and appropriate action on certification requests (page 114).
 - Whether providing public notice within 20 days of receipt is appropriate or whether more or less time would be appropriate (page 123).

- Whether 30 days would be too long in cases with a 60-day reasonable period of time for a certifying authority to act on a request. The EPA also solicits comment on other appropriate timelines for requesting additional information that would be consistent with the reasonable period of time established by the federal agency (page 131).
- Whether nationally consistent procedures for requesting and receiving additional information to support a certification request would provide additional clarity and regulatory certainty for certifying authorities and project proponents (page 131).
- Whether this proposal is tailored for the EPA to provide appropriate technical assistance to certifying authorities, federal agencies and project proponents, or if the EPA should offer or provide assistance in other specific or additional circumstances (page 135).
- EPA seeks comment on the appropriate scope of the EPA's general oversight role under section 401, whether the EPA should play any role in oversight of state or tribal certifications or modifications, and, if so, what that role should be (page 138).
- Whether and to what extent states or tribes should be able to modify a previously issued certification, either before or after the time limit expires, before or after the license or permit is issued, or to correct an aspect of a certification or its conditions remanded or found unlawful by a federal or state court or administrative body (page 138).

EPA will accept comments on the proposed rule for 60 days after the date of publication in the Federal Register. You may submit your comments, identified by Docket ID No. **EP A-HQ-OW-2019-0405**, at <https://www.regulations.gov>.