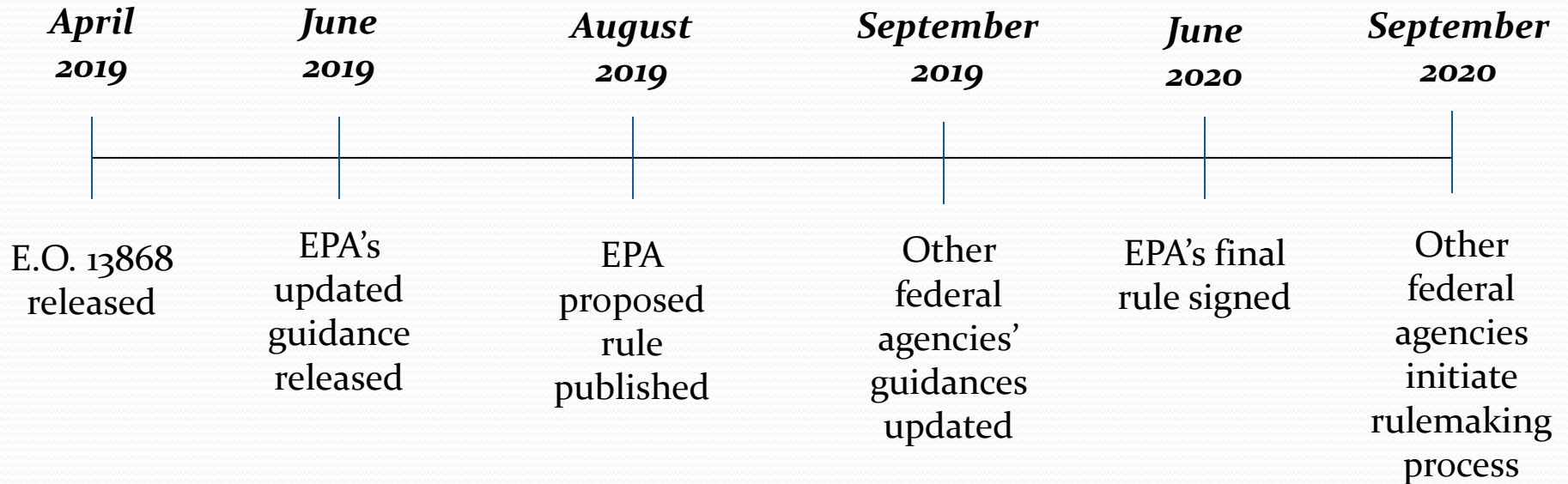


# Clean Water Act Section 401 Certification Rule

Final Rule Overview

June 16, 2020

# Executive Order 13868



# When is Section 401 certification required?

- **Final rule:** A project proponent must request section 401 certification from the certifying authority where the discharge originates when there is the:
  - *potential for*
  - *the federally licensed or permitted activity*
  - *to result in a discharge from a point source*
  - *into a water of the United States*
- **1971 rule and practice:** Similar; however, the final rule clarifies that a discharge must be from a point source into a water of the United States.

# What is required prior to submitting a certification request?

- **Final rule:**
  - All project proponents must submit a request for a meeting with the appropriate certifying authority at least 30 days prior to submitting a certification request.
  - The certifying authority may accept the request at its discretion.
  - The rule also includes recommendations for additional meeting procedures and engagement across agencies.
- **1971 rule and practice:** Pre-filing meetings were not required by the 1971 rule but were encouraged by some certifying authorities.

# What is required in a certification request?

- **Final rule:**
  - A certification request is a written, signed, and dated communication from a project proponent to a certifying authority.
  - A certification request must include the components listed in final rule section 121.5(b) for individual licenses and permits or 121.5(c) for the issuance of general licenses and permits.
- **1971 rule and practice:** 40 CFR 121.22 lists five components that must be included in a certification request when EPA is the certifying authority; however, in practice some states and tribes used a “complete application” to constitute the certification request.

# When does the reasonable period of time for review begin?

- **Final rule:** The reasonable period of time begins when a certifying authority receives a certification request from a project proponent in writing.
- **1971 rule and practice:** The waiver provision at 40 CFR 121.16(b) notes the reasonable period of time begins after the receipt of a request; however, in practice some certifying authorities required a “complete application” to start the reasonable period of time.

# What is the timeline for certification decision-making?

- **Final rule:** A certifying authority must act on a request for certification within the *reasonable period of time*, which *shall not exceed one year*, as determined by the federal licensing or permitting agency.
- **1971 rule and practice:** Same; however, in practice, some certifying authorities acted beyond the statutory one year time period.

# How does the federal agency determine the reasonable period of time?

- **Final rule:** Federal agencies must consider:
  - Complexity of the proposed project;
  - Nature of any potential discharge; and
  - Potential need for additional study or evaluation of water quality effects from the discharge.
- **1971 rule and practice:** Not specified.



# How does a certifying authority know the reasonable period of time?

- **Final rule:**
  - The project proponent must provide the certification request to the federal agency concurrently when it submits it to the certifying authority.
    - The federal agency has 15 days to communicate the reasonable period of time to the certifying authority.
  - Federal agencies may establish standardized timeframes in regulations.
- **1971 rule and practice:** Not specified; however, some federal agencies include a standardized reasonable period of time in their water quality certification implementation regulations.

# Can a federal agency modify the reasonable period of time?

- **Final rule:** The federal agency may extend (but not shorten) the reasonable period of time, as long as it is reasonable and does not exceed one year from original receipt of the request for certification.
- **1971 rule and practice:** Not specified; however, some federal agencies include procedures for modifying the reasonable period of time in their water quality certification implementation regulations.

# Can the reasonable period of time stop or pause?

- **Final rule:** No, the reasonable period of time does not stop or pause for any reason once the certification request is received.
- **1971 rule and practice:** Not specified; however, in practice, some certifying authorities have requested or allowed project proponents to withdraw applications to stop or pause the clock.

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

- **Final rule:**
  - The scope of certification is limited to assuring that the discharge from a federally licensed or permitted project will comply with water quality requirements.
  - Water quality requirements means “applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and *state or tribal regulatory requirements for point source discharges into waters of the United States.*”
- **1971 rule and practice:** The scope of certification includes assuring that the activity will comply with water quality requirements. In addition, some certifying authorities have relied on factors unrelated to water quality in their decision-making.

# What information is required for a grant of certification with conditions?

- **Final rule:** Each condition must include two factors for each license or permit type.
  - See section 121.7(d)(1) for individual license or permit
    - Statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements, and
    - Citation to federal, state or tribal law that authorizes the condition.
  - See section 121.7(d)(2) for issuance of a general license or permit:
    - Similar information requirements, but tailored to the information available at the time of issuance.
- **1971 rule and practice:** Not specified, but some certification authorities have relied on factors unrelated to water quality in their decision-making.

# What is required for certification denials?

- **Final rule:** Denials must include three factors for each license or permit type.
  - See section 121.7(e)(1) for individual license or permit:
    - The specific water quality requirements with which the discharge will not comply;
    - A statement explaining why the discharge will not comply with the identified water quality requirements; and
    - If the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements.
  - See 121.7(e)(2) for issuance of general licenses and permits:
    - Similar information requirements, but tailored to the information available at the time of issuance.
- **1971 rule and practice:** Not specified.

# How is certification waived?

- **Final rule:**
  - A certifying authority may waive certification expressly.
  - A certifying authority may also waive by failing or refusing to act, including:
    - failure or refusal to act on a certification request within the reasonable period of time;
    - failure or refusal to satisfy the requirements of section 121.7(c);
    - failure or refusal to satisfy the requirements of section 121.7(e); or
    - failure or refusal to comply with other procedural requirements of section 401.
- **1971 rule and practice:** In practice, certifying authorities waived expressly and federal agencies sometimes determined waiver had occurred by passage of time.

# How are conditions waived?

- **Final rule:** A condition for a license or permit shall be waived upon the certifying authority's failure or refusal to satisfy the requirements of section 121.7(d).
- **1971 rule and practice:** Not specified.



# Who determines whether a grant, grant with conditions, or denial meet the requirements of section 401 and the rule?

- **Final rule:**
  - Federal agencies review certification decision documents to determine compliance with procedural requirements in section 401 and the final rule.
  - Federal agencies do not review whether a decision is within the scope of certification, as provided in the proposed rule.
- **1971 rule and practice:** Not specified.

# What if a certification condition or denial meets requirements?

- **Final rule:**
  - Federal agency must include conditions in the federal license or permit that satisfy the procedural requirements of the final rule, including information requirements in section 121.7(d).
  - If denial meets procedural requirements, including information requirements in 121.7(e), the federal license or permit does not issue.
- **1971 rule and practice:** Not specified.

# What if a certification condition or denial does not meet requirements?

- **Final rule:**
  - Deficient conditions are considered waived and not included in the federal license or permit.
    - A deficient condition does not waive the rest of the certification.
  - Deficient denial is considered waived.
  - No opportunity to remedy deficient conditions or denials.
- **1971 rule and practice:** Not specified.

# Can a certifying authority modify a certification after it is issued?

- **Final rule:**
  - No - Section 401 does not provide authority for a certifying authority to modify a certification, either through “reopener” clauses or any other mechanism.
  - The final rule does not preclude federal agencies from establishing procedures in updated 401 regulations to clarify how modifications would be handled in certain scenarios consistent with program procedures for permit modifications.
- **1971 rule and practice:** The 1971 rule allowed federal agencies and certifying authorities to modify certifications, with EPA oversight.

# Who is responsible for enforcing certification conditions?

- **Final rule:**
  - The federal agency issuing the applicable federal license or permit is responsible for enforcing certification conditions that are incorporated into a federal license or permit.
  - The final rule does not authorize States and Tribes to independently enforce section 401 certification conditions under federal law.
- **1971 rule and practice:** In practice, it was unclear whether certifying authorities or federal agencies held enforcement authority, and depending on the state, both entities played a role in enforcement.

# EPA's roles under CWA section 401

- **Final rule:** The EPA has three roles: (1) to act as the certifying authority when a state or tribe does not have authority to act on a request for certification; (2) to provide technical assistance to project proponents, certifying authorities, or federal agencies upon request; and (3) at the Agency's discretion, to determine whether a discharge may impact the water quality of a neighboring jurisdiction.
- **1971 rule and practice:** Same.

# What is EPA's role in review and advice under section 401(b)?

- **Final rule:**
  - Federal agencies, certifying authorities, and project proponents may request assistance from the Administrator to provide relevant information and assistance regarding the meaning, content, application, and methods to comply with water quality requirements.
- **1971 rule and practice:** Also provided a review and advice role for the Administrator, but did not reflect the statutory text as closely as the final rule.

# When is the EPA notified under the section 401(a)(2) neighboring jurisdiction provisions?

- **Final rule:**
  - The federal agency must notify the EPA within 5 days of receiving the license or permit application and related certification for purposes of section 401(a)(2).
  - The 5 day requirement is EPA's interpretation of statutory language that the federal agency shall "immediately" notify EPA.
- **1971 rule and practice:** Not specified.



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

- **Final rule:**
  - The rule affirms that section 401(a)(2) establishes authority for EPA to determine in its discretion whether the discharge from a certified project may affect the water quality in a neighboring jurisdiction.
  - If EPA determines that the discharge from a certified project may affect water quality in a neighboring jurisdiction, EPA shall notify the neighboring jurisdiction, certifying authority, federal agency, and project proponent; coordinate input from the neighboring jurisdiction; and make recommendations to the federal agency if the neighboring jurisdiction requests a hearing.
- **1971 rule and practice:** Same.

# Timeline and Next Steps

- The final rule will be effective 60 days after publication in the *Federal Register*.
- Consistent with Executive Order 13868, EPA is convening a workgroup for federal agencies to assist their understanding of the final rule and facilitate rule updates they may pursue, if any.
- EPA is evaluating the need for internal guidance or procedures to assist implementation of the final rule.

# Additional Information

- Visit **<https://www.regulations.gov>** to view the docket for this rulemaking, identified by **Docket ID No. EPA-HQ-OW-2019-0405**.
- For more information on CWA section 401 and this rulemaking, please visit **<https://www.epa.gov/CWA-401>**.
- If you have any questions, please send an e-mail to **[cwa401@epa.gov](mailto:cwa401@epa.gov)**.