

MJB&A Summary ■ June 2, 2020

Summary of EPA's Clean Water Act Section 401 Certification Final Rule

On June 1, 2020, the Environmental Protection Agency (EPA) released its Clean Water Act Section 401 Certification Rule (Final Rule) to update and clarify the substantive and procedural requirements for water quality certification under section 401 of the Clean Water Act (CWA). Section 401 grants authority to states and authorized tribes to review compliance with federal, state, and tribal water quality requirements for any proposed project that requires a federal license or permit and that may discharge to waters of the United States in the jurisdiction of that state or tribe. EPA makes clear in the Final Rule that it intends to increase the predictability and timeliness of CWA section 401 certification actions by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures. The Final Rule is largely consistent with the rule EPA released in August 2019 (Proposed Rule), including provisions to ensure that a state or authorized tribe acts on section 401 certification requests within the one-year statutory timeline starting from receipt of a certification request. The Final Rule replaces the 1971 certification regulations at 40 CFR part 121, and coincident with this Final Rule, EPA is also rescinding its June 2019 Section 401 guidance.

The Final Rule will be effective 60 days after publication in the Federal Register.

Background

Under section 401 of the CWA, any applicant applying for a federal license or permit for an activity that may result in a discharge into waters of the United States must first obtain certification from a certifying authority (e.g., a state or authorized tribal authority) in the jurisdiction in which the discharge originates. The federal government cannot issue the license or permit before the applicant has a certification from, or the certification is waived by, the appropriate state or tribal authority. Under section 401, the certifying authority determines whether the proposed activity will comply with the applicable provisions of the CWA and any other appropriate requirement of state law.

The Final Rule stems from President Trump's April 2019 Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*. The Executive Order directed EPA to engage with states, tribes, and federal agencies and update the outdated guidance and regulations, including EPA's 1971 certification framework; issue new guidance to states, tribes, and federal agencies within 60 days of the Order; and propose new section 401 regulations within 120 days.

Final Rule Provisions

Consistent with the Proposed Rule, EPA states that it intends the Final Rule to increase efficiencies and clarify aspects of CWA section 401 that have been unclear or subject to differing legal interpretations in the past. The following summarizes the key aspects of the Final Rule.

When Section 401 Certification is Required

Under the Final Rule, the requirement for a section 401 certification is triggered based on the *potential* for any federally licensed or permitted activity to result in a discharge from a point source into waters of the United States. In the Final Rule, the term “discharge” is defined as “a discharge from a point source into a water of the United States,” and the term “license or permit” is defined as “any license or permit granted by an agency of the Federal Government to conduct any activity which may result in a discharge.” The definition of “discharge” in the Final Rule is consistent with the Proposed Rule; however, EPA replaces the term “navigable waters” in the proposed definition with “waters of the United States” in the final definition to provide clarity and consistency across other CWA programs. In the Final Rule, EPA also clarifies that potential discharges into state or tribal waters that are not waters of the United States do not trigger the requirement to obtain section 401 certification, as states and tribes retain the authority to regulate these waters in accordance with state and tribal laws where not preempted by federal law.

Consistent with the Proposed Rule, the Final Rule reflects that section 401 is triggered by the potential for a discharge to occur, rather than an actual discharge. Furthermore, EPA clarifies that while the discharge is limited to point sources, it includes releases regardless of whether they contain pollutants. EPA notes that if a certifying authority or project proponent determines after the certification process is triggered that there is no actual discharge and no potential for discharge, there is no longer a need to request certification.

Pre-filing Meeting Request

In the Proposed Rule, EPA proposed to establish a pre-filing meeting process when EPA is the certifying authority. In the Final Rule, EPA expanded this requirement for all projects, including federal agencies seeking certification for general licenses or permits. Thus, all project proponents must submit a request for a pre-filing meeting with the appropriate certifying authority at least 30 days prior to submitting a certification request, and the certifying authority has the discretion on whether to hold the meeting. The Final Rule also encourages the certifying authority to take actions to initiate coordination with the federal agency after receiving the pre-filing meeting request.

In addition to requiring the pre-filing meeting request, the Proposed Rule included a requirement for EPA to respond to the request within a certain period of time, as well as requirements related to the topics to be discussed and information to be shared during the meeting. However, the Final Rule did not adopt those additional procedures. Rather, the Final Rule encourages certifying authorities to develop pre-filing meeting procedures tailored to identify information that may be needed to review and act on a certification request.

Certification Request/Receipt

Under the CWA, certifying authorities must act upon a request for certification “within a reasonable period of time, which shall not exceed one year.” In order to address ambiguity as to what action on the part of a project proponent triggers the one-year statutory timeline, the Final Rule lists the components for a certification request and defines “receipt.”

Specifically, based on public comments, EPA revised the definition of “certification request” to be “a written, signed, and dated communication that satisfies the requirements of section 121.5(b) or (c).” Section 121.5(b) of the Final Rule lists the documents and information that must be included in a certification request for an individual license or permit, including seven components from the Proposed Rule and two new components (#7

and #8 below). EPA also includes a list of documents and information for the issuance of general licenses or permits in section 121.5(c).¹

The Final Rule also modifies the fourth factor to make clear that project proponents identify the “nature” of any potential discharge to reflect the potential volume, extent, or type of discharge associated with the proposed project. Additionally, the Final Rule includes the word “manage” in the fifth factor to broaden the scope of the information provided.

Thus, under the Final Rule, a certification request submitted for an individual license or permit must:

- 1) identify the project proponent(s) and a point of contact;
- 2) identify the proposed project;
- 3) identify the applicable federal license or permit;
- 4) identify the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;
- 5) include a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge;
- 6) include a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received;
- 7) include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
- 8) contain the following statement: *‘The project proponent hereby certifies that all information contained herein is true, accurate, and complete, to the best of my knowledge and belief’*; and
- 9) contain the following statement: *‘The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.’*

Consistent with the Proposed Rule, the Final Rule makes clear that a reasonable period of time for a certifying authority to act on a certification request is triggered when the certifying authority is in “receipt of such request.” The Final Rule defines “receipt” as “the date that a certification request is documented as received by a certification authority in accordance with applicable submission procedures.” Project proponents must submit certification requests to the appropriate certifying authority and the federal licensing or permitting agency concurrently, and the federal agency must then communicate the reasonable period of time to the certifying authority within 15 days of receiving the certification request from the project proponent.

EPA notes that many states and tribes have established their own requirements for section 401 certification that may differ or be more extensive than the list above, and EPA states that certifying authorities may “update their existing section 401 certification regulations to ensure consistency with the EPA regulations.”

¹ Requirements and considerations for individual licenses and permits will be the focus of the remainder of this summary, unless otherwise noted.

Certification Actions

Consistent with the Proposed Rule, the Final Rule notes that a certifying authority can take one of the following four actions when considering section 401 certification:

- 1) grant certification if it has concluded that the potential point source discharge into waters of the United States from the proposed project will be consistent with “water quality requirements;”
- 2) grant certification with conditions if it determines that the potential discharge from a proposed project would be consistent with “water quality requirements” only if certain conditions are met, and those conditions become an enforceable part of the subsequent federal license or permit;
- 3) deny certification if it is unable to certify that the potential discharge from a proposed project would be consistent with “water quality requirements;” or
- 4) waive certification: (1) expressly by issuing a written statement that it is waiving certification, or (2) implicitly or constructively by failing or refusing to act on a certification request within the reasonable period of time (not to exceed one year). EPA notes that if a certification grant, grant with conditions, or denial does not satisfy the procedural requirements of this final rule, it is also considered waived.

If a certifying authority takes action to deny a certification, the Final Rule requires that the following information be included in the denial:

- 1) the specific water quality requirements with which the discharge will not comply;
- 2) a statement explaining why the discharge will not comply with the identified water quality requirements; and
- 3) 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.

The Final Rule reaffirms the ability of a project proponent to submit a new certification request if a previous request is denied.

Regarding the federal agency’s review of the certification action, the Final Rule limits that review to determining whether the action was taken in accordance with procedural requirements and whether the certification, condition, or denial includes all of the required information. EPA states that federal agency review under the Final Rule does not include a substantive evaluation of the sufficiency of that information.

Appropriate Scope for Section 401 Certification Review

Consistent with the Proposed Rule, the Final Rule contains the following statement of the scope of certification: “The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.”

Water Quality

The Final Rule defines the term “water quality requirements” as “applicable provisions of sections 301, 302, 303, 306, and 307 of the [CWA], and state or tribal regulatory requirements for point source discharges into waters of the United States.” EPA states that the Final Rule uses this term to define the universe of provisions that certifying authorities may consider under sections 401(a) and 401(d) of the CWA.

Consistent with the Proposed Rule, EPA notes in the Final Rule that certifying authorities must limit their evaluation to only water quality-related impacts of the discharge from a project and cannot consider non-water quality-related impacts in the certification review process. In the Final Rule, EPA concludes that “interpreting the scope of section 401 to allow States and Tribes to regulate and consider effects of an activity rather than a discharge would invoke the outer limits of power that Congress delegated to the Agency under the CWA.” EPA states that there is nothing in the statutory text or legislative history signaling that Congress intended to impose, using section 401, federal requirements on licensed or permitted activities beyond those addressing water quality-related impacts.

EPA also notes that, under section 401, a certifying authority determines whether the potential discharge from the proposed activity will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA and “any other appropriate requirement of state law.” Consistent with the Proposed Rule, the Final Rule limits the scope of section 401 and the term “appropriate requirements of State law” to those requirements directly related to water quality.

Activity versus Discharge

As outlined above, the Final Rule defines “discharge” as “a discharge from a point source into a water of the United States.” Consistent with the Proposed Rule, EPA focuses the scope of section 401 on the discharge associated with the federally licensed or permitted project, as opposed to the activity as a whole. Additionally, EPA notes that nonpoint source discharges and discharges to other non-federal waters are not within the scope of certification and are not included in the definition of “water quality requirements.”

Scope of Conditions for Certifications

Under the Final Rule, certification conditions must be within the scope of certification. EPA clarifies this to mean that a condition can only be imposed to assure that the discharge from a proposed federally licensed or permitted project will comply with water quality requirements.

The Final Rule requires that the following information be included in a certification to support each condition:

- 1) a statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements; and
- 2) a citation to federal, state, or tribal law that authorizes the condition.

Consistent with the Proposed Rule, deficient certification conditions do not invalidate the entire certification, nor do they invalidate the remaining conditions in the certification; instead, conditions that do not meet these requirements will be deemed waived.

In the Final Rule, EPA decided not to finalize a definition for “condition,” stating that together, the “scope of certification” and “water quality requirements,” as well as the rule’s language specifying the elements required in a certification with conditions, appropriately limit what can be properly considered a condition under the Final Rule, such that defining the term is not necessary.

Under the Proposed Rule, EPA would have allowed federal agencies to provide certifying authorities with the opportunity to remedy deficient conditions and denials. However, in response to public comments and to increase clarity in the Final Rule, EPA states that if a federal licensing or permitting agency wishes to create procedures whereby certifying authorities may remedy deficient conditions or denials, it may do so in its own water quality

certification regulations, provided such procedures cannot be used to exceed the one-year statutory limit on the reasonable period of time.

Timeframe for Certification Analysis and Decision

In the Final Rule, EPA reaffirms that section 401 requires certifying authorities to act on a request for certification within a reasonable period of time, which shall not exceed one year, and federal agencies are responsible for determining the reasonable period of time. In setting the reasonable period of time for a certification, the Final Rule requires agencies to consider:

- 1) the complexity of the proposed project;
- 2) the nature of any potential discharge; and
- 3) the potential need for additional study or evaluation of water quality effects from the discharge.

Consistent with the Proposed Rule, the Final Rule requires that the federal agency, within 15 days of receiving the certification request from the project proponent, provide, in writing, the following information to the certifying authority: the date of receipt, the applicable reasonable period of time to act on the certification request, and the date upon which waiver will occur if the certifying authority fails or refuses to act. Additionally, the Final Rule states that section 401 does not prohibit a federal agency from extending an established reasonable period of time, provided that the extended time period does not exceed one year from receipt. The reasonable period of time cannot be shortened once it is established.

EPA also notes that the CWA does not include a tolling provision; thus, EPA concludes in the Final Rule that the period of time to act on a certification request does not pause or stop for any reason once the certification request has been received. EPA notes that if a project proponent withdraws its certification request, the clock would not be tolled or paused. Additionally, the Final Rule makes clear that a certifying authority's request that an applicant withdraw and resubmit the same section 401 request, or a request for additional information, does not restart the one-year timeline. EPA notes that any resubmitted request would be subject to the pre-filing meeting request requirement and, after receipt by the certifying authority, the new request would initiate a new reasonable period of time as determined by the federal agency.

Neighboring Jurisdictions

EPA explains that section 401(a)(2) provides a mechanism for EPA to coordinate input from states and authorized tribes where EPA has determined that the discharge from a proposed federally licensed or permitted project may affect their water quality. Under the Final Rule, if EPA in its discretion determines that a neighboring jurisdiction may be affected by a discharge from a federally licensed or permitted project, EPA must notify the affected jurisdiction, the certifying authority, and the federal agency within 30 days of receiving the notice of the certification from the federal agency. EPA notes that its duty to notify is triggered only when it has made a determination that a discharge "may affect" a downstream state or tribe. If EPA does not provide the required notification within 30 days of receiving notification from a federal agency, the federal agency may resume processing the federal license or permit.

Enforcement of Certification Conditions under Section 401

The CWA requires that all certification conditions issued by a state or tribal authority "become a condition for the Federal license or permit." Under the Final Rule, the federal agency issuing the federal license or permit is responsible for enforcing certification conditions that are incorporated into that license or permit. Under the Final

Rule, while certifying authorities are not responsible for enforcement, they are provided the opportunity to inspect the facility or activity prior to initial operations to determine whether it is in compliance with the certification. If the certifying authority determines that the discharge will violate the certification, they must notify the project proponent and federal agency in writing and specify recommendations concerning measures that may be necessary to achieve compliance.

Modifications to an Existing Certification

Consistent with the Proposed Rule, EPA is removing its oversight role for modifications to an existing certification. The Final Rule does not authorize or include any procedure for certifying authorities to modify certifications after issuance. Instead, EPA notes that circumstances that may necessitate modifications will often be linked to “other actions” that have “established procedures” to address modifications (e.g., a project modification that necessitates a new certification, or a court vacating or remanding a certification for review).

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