

Clean Water Act Section 401 Certification Rule

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Idaho Department of Transportation
Committee for Environmental Consistency

Overview presentation by
U.S. Environmental Protection Agency – Region 10

Clean Water Act Section 401

- Section 401 of the Clean Water Act (CWA) requires that:
 1. any applicant for a federal license or permit
 2. which may result in a discharge into waters of the United States
 3. must obtain a water quality certification from the certifying authority
 4. that the discharge complies with all applicable water quality requirements.

Final Rule

- **July 13, 2020** the final “Clean Water Act Section 401 Certification Rule” was published in the Federal Register
- **September 11, 2020** the final rule went into effect

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.

Certification Process



*If certification is denied, the process stops here

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.

Certification Process



*If certification is denied, the process stops here

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.

Section 121.5(b) 401 cert request requirements for individual permits

Must include the following elements:

1. Project proponent/applicant name and point of contact;
2. Project description and purpose;
3. Federal license or permit being sought;
4. Location and nature of any potential discharge(s) that may result from project project and location of receiving waters;
5. Methods and means planned to monitor the discharge; equipment or measures to treat, control or manage the discharge;
6. A list of all other authorizations required for the proposed project, including all approvals or denials already received;
7. Document that a pre-filing meeting request was submitted to the 401 certifying authority at least 30-days prior to date of 401 request;
8. The statement *“The project proponent hereby certified that all information contained herein is true, accurate, and complete to the best of my knowledge and belief”*; and
9. The 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.”*

Section 121.5(c) 401 cert request requirements for General Permits

Must include the following 7 elements:

1. Project proponent(s) and point of contact;
2. Proposed category of activities to be authorized by the general license or permit for which the certification is requested;
3. Draft proposed general license or permit;
4. Estimate of the number of discharges expected to be authorized by the proposed general license or permit each year;
5. Documentation that a pre-filing meeting was submitted to the certifying authority(ies) at least 30-days prior to submitting the 401 certification request;
6. The 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
7. The 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.”*

When does the reasonable period of time for review begin?

- **Final rule:** The reasonable period of time begins when a certifying authority receives a valid 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.

**this is 60-days for some agencies and longer for others, and provisions for extending up to the 1-year statutory limit.*

How does the federal permitting/licensing 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.

Certification Process



*If certification is denied, the process stops here

What can a certifying authority do when it receives a request for certification?

- **Final rule:** A certifying authority may grant, grant with conditions, deny, or waive certification.
- **1971 rule and practice:** Same.

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 activity 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.

Certification Process

Pre-filing
Meeting
Request

Discretionary
Pre-filing
Meeting

Certification
Request

Certifying
Authority
Analysis

**Certification
Action***



*If certification is
denied, the process
stops here

What is required for a grant of certification?

- **Final rule:** The certification must be in writing and include a statement that the discharge will comply with water quality requirements.
- **1971 rule and practice:** The 1971 rule includes five elements that must be included in a certification, including "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 121.2(a)(3)

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 for each condition, but some certification authorities have relied on factors viewed as unrelated to water quality in their decision-making. (But note **121.2(a)(4)** and **121.2(a)(5)**)

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 **section 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 (section 121.9):**
 - 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 (section 121.16) and practice:** In practice, certifying authorities waived expressly and federal agencies sometimes determined waiver had occurred by passage of time (required to notify in writing). Prior rule established 6-mos as “reasonable period of time” up to 1-year by statute.

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 waiver has occurred?

- **Final rule (section 121.9):** The federal licensing or permitting agency determines whether a waiver has occurred.
- **1971 rule (section 121.16(b)) and practice:** Same.

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

Post-Certification

**Discretionary
401(a)(2)
Determination**

Permit/
License
Issuance

Enforcement of
Any Certification
Conditions



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 their 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 (121.11):**
 - 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.



Can a certifying authority inspect a certified location after issuing certification but before operations begin?

- **Final rule (section 121.11):** Yes, all certifying authorities may inspect the facility or activity prior to initial operation in order to determine if the discharge from the certified project will violate the certification.
- **1971 rule (sections 121.26 & 121.27) and practice:** The 1971 rule provided this opportunity only to the EPA Regional Administrator (or his representative).

Additional Information

For more information please see:

- <https://www.regulations.gov> DocketID No. EPA-HQ-OW-2019-0405 for all rule making info.
- <https://www.epa.gov/CWA-401>
- <https://www.epa.gov/cwa-401/outreach-and-engagement-cwa-section-401-certification>
- Please send e-mail with questions to cwa401@epa.gov and copy to: Linda Storm, storm.linda@epa.gov