

WSSI 2022 Regulatory Updates

May 24, 2022

Clean Water Act § 401 Water Quality Certification

Justin W. Curtis

AQUALAW

An aerial photograph of a coastline, showing a large body of water on the right and a sandy beach on the left. The water is a deep blue, and the beach is a light tan color. The coastline is irregular, with several small inlets and peninsulas. The text is overlaid on the water area.

1. What Is 401 Water Quality Certification?

State Water Quality Standards



💧 Water Quality Standards

- ~ Designate uses for all state waterbodies (e.g., swimming, drinking, fishing)
- ~ Criteria to attain the uses (e.g., max pollutant concentrations)
- ~ Antidegradation

💧 CWA 401: Federal Permitting Actions Should Not Allow Violations of State Water Quality Standards*

*Among other things!

CWA 401: The Law



“Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of [the Clean Water Act]. . . . If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.”

Key Concepts



- 💧 When is 401 certification needed?
 - ~ Application for a **federal** license or permit...
 - ~ For an activity that “**may result in a discharge**” to waters
- 💧 What is it?
 - ~ **Determination** by state that proposed activity will comply with state water quality standards
- 💧 How long does it take?
 - ~ State has “**reasonable period of time**” to act
 - ~ Not to exceed **one year**

Key Concepts

- 💧 What are the State's options?
 - ~ **Grant** certification (with or without conditions)
 - ~ **Deny** certification
 - ~ **Waive** certification (expressly or by default)
- 💧 What does certification do?
 - ~ No federal permit without a **certification** or **waiver**
 - ~ State 401 conditions become **conditions of federal permit**
 - ~ Federal agency entitled to rely on state determination
- 💧 Different types of certifications?
 - ~ “Blanket” certifications for general permits (e.g., NWP)
 - ~ Individual certifications for individual permits (e.g., 404 IPs)



2. Why Do We Need an Updated 401 Rule?

Yes!

- 💧 EPA's Original 401 Rule
 - ~ Published Thanksgiving Day 1971

- 💧 EPA in 1979:

“The existing State certification regulations predate the Federal Water Pollution Control Act Amendments of 1972 and have never been updated. However, because of the impact of State certification of non-NPDES permits on a myriad of Federal programs, it will be necessary to consult with the affected agencies in some detail before changes are made.”

44 Fed. Reg. 32856 (June 7, 1979)

Announcing:
New Pinto
3-door Runabout.

(Packs more fun
than any import.)



PINTO Ford

Now you can pack more fun and games into a little car than you ever thought possible.
Because now there's Ford's new Pinto 3-door Runabout—in addition to the fast-selling Pinto 2-door.
Just flip down the Runabout's rear seat, open the big back door and the big back room makes the packing easy.
Pack in your golf clubs. Groceries. Those big pieces of luggage. Pack it all in. There's big room in your little Pinto.
But that's not all. You get the regular Pinto goodies like a gas-saving 75-horsepower engine for more "go" on hills and freeways. And a wider stance than any little import so Pinto hugs the road better.
The servicing? It couldn't be easier. And Pinto is still priced down with the little import cars.
Take a good look at the new Pinto 3-door Runabout and the Pinto 2-door. See your Ford Dealer. Put a little kick in your life.



Pinto
Better idea for safety: Buckle up.

...also published in 1971;
just as relevant today.

Many Unanswered Questions...

◆ Application?

- ~ How does applicant request 401 certification?
- ~ What information must be submitted by applicant?

◆ Timeline?

- ~ Who determines the “reasonable period of time”?
Fed agency or State?
- ~ When does clock start? On request? **Complete**
application?
- ~ Can applicant reset the clock? Can State deny to
reset?



And the Tougher Issues...



💧 Scope of Certification?

- ~ Can State base decision on impacts **other than water quality**?
- ~ Any limit on information State can request?
- ~ Can State deny if it doesn't receive information requested?
- ~ Can federal agency reject certification or conditions?

💧 Does 401 give State ongoing role in federal permit?

- ~ Can State revoke or amend certification after federal permit issued?
- ~ Can State enforce 401 certification conditions?

💧 Does CWA 401 give States a veto over federal permits?



3. 401 Rule Issued in 2020 In Effect (For Now)


2020 401 Rule: We Hardly Knew Ye

💧 Rulemaking

- ~ Effective September 11, 2020
- ~ Codified at 40 CFR Part 12

💧 Rule Vacated

- ~ Appeal filed by numerous States, tribes, & environmental groups
- ~ Rule vacated October 21, 2021
- ~ Result: 1971 401 Rule reinstated



42210

Federal Register / Vol. 85, No. 134 / Monday, July 13, 2020 / Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 121

[EPA-HQ-OW-2019-0405; FRL-10009-80-OW]

RIN 2040-AF86

Clean Water Act Section 401 Certification Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is publishing this final rule to update and clarify the substantive and procedural requirements for water quality certification under Clean Water Act (CWA or the Act) section 401. CWA section 401 is a direct grant of authority to States (and Tribes that have been approved for "treatment as a State" status) to review for compliance with appropriate federal, State, and Tribal

Table of Contents

I. General Information

- A. How can I get copies of this document and related information?
- B. What action is the Agency taking?
- C. Under what legal authority is this final rule issued?

II. Background

A. Executive Summary

- B. Executive Order 13868: Promoting Energy Infrastructure and Economic Growth
- C. Summary of Stakeholder Engagement
- D. Guidance Document
- E. Effect on Existing Federal, State, and Tribal Laws

F. Legal Background

1. The Clean Water Act
2. The EPA's Role in Implementing Section 401
3. The EPA's 1971 Certification Regulations
4. Judicial Interpretations of Section 401
5. Administrative Law Principles
6. Response to Comments on the Legal Background
- G. Legal Construct for the Final Rule
1. Scope of Certification
2. Timeline for Section 401 Certification

Minority Populations and Low-Income Populations

I. Congressional Review Act

I. General Information

A. How can I get copies of this document and related information?

1. **Docket.** An official public docket for this action has been established under Docket ID No. EPA-HQ-OW-2019-0405. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202-566-2426. A reasonable fee will be charged for copies.

2. **Electronic Access.** You may access this Federal Register document

| IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA | |
|---|--|
| STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA AND THE STATE WATER RESOURCES CONTROL BOARD, STATE OF WASHINGTON, STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF RHODE ISLAND, | Case No.: 3:20-cv-4869 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Administrative Procedure Act, 5 U.S.C. § 551 <i>et seq.</i>) |

2020 401 Rule:



2020 401 Rule: Reinstated

💧 Supreme Court

- ~ Reinstated 2020 401 Rule on April 6, 2022
- ~ 5-4 vote with vigorous dissent

💧 Will Remain in Effect Until:

- ~ Appeal is complete (if the decision to vacate the rule is upheld), OR
- ~ EPA issues a new 401 Rule

Cite as: 596 U. S. ____ (2022)

1

KAGAN, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 21A539

LOUISIANA, ET AL. *v.* AMERICAN RIVERS, ET AL.

ON APPLICATION FOR STAY

[April 6, 2022]

The application for a stay presented to JUSTICE KAGAN and by her referred to the Court is granted. The district court's October 21, 2021 order, insofar as it vacates the current certification rule, 40 C.F.R. Part 121, is stayed pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such a writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

Application Process (For Now)

💧 Pre-Filing Meeting Request

- ~ Applicant **must** submit notice to State certifying agency
- ~ Must request a pre-filing meeting
- ~ State has no obligation to hold meeting

💧 Certification Request

- ~ Submitted **at least 30 days** after pre-filing meeting request
- ~ Specific list of information that must be included
- ~ Request submitted concurrently to State and federal agency



“Reasonable Period of Time” (For Now)



💧 Deadline for State to Act on Request

- ~ Set by **federal agency**
 - ~ By regulation (e.g., FERC – fixed at one year)
 - ~ Or case-by-case basis (e.g., USACE – 60-day guideline)
- ~ Federal agency notifies State of deadline within 15 days of request
- ~ Federal agency must consider:
 - ~ Complexity of project
 - ~ Nature of potential discharge
 - ~ Potential need for additional study or evaluation
- ~ State **or** applicant may request extension
- ~ Deadline cannot exceed one year (statutory maximum)

State Action on Request (For Now)

💧 Grant 401 Certification

- ~ If State determines discharge will comply with WQS
- ~ Must be in writing and **may** include conditions
- ~ Must provide water quality-based explanation for each condition

💧 Waive 401 Certification

- ~ Expressed in writing
- ~ By default if State fails to act by deadline or comply with 401 Rule

💧 Deny 401 Certification

- ~ Must provide written explanation for denial
- ~ May be based on insufficient information (but must specify what information is needed)

Federal Agency Response (For Now)

💧 If State Denies Certification

- ~ Federal Agency cannot issue permit **unless** ...
- ~ It determines State did not comply with 401 Rule – **WAIVER**

💧 If State Waives Certification

- ~ Federal Agency can issue permit

💧 If State Grants Certification

- ~ Unconditionally – Federal agency can issue permit
- ~ Conditionally – Will review each condition
 - ~ Conditions that comply with 401 Rule will be incorporated into federal permit
 - ~ Conditions that do not comply will be deemed **waived**



4. New 401 Rulemaking in Progress

Development of New 401 Rule


💧 EPA Notice of Intent Issued June 2, 2021

~ 86 Fed. Reg. 29541

💧 Ten “Questions for Consideration”

- ~ Pre-filing meeting requests needed?
- ~ What must a certification request include?
- ~ How is “reasonable period of time” determined?
- ~ Scope limited to “discharges” or entire project/activity?
- ~ Should federal agency be empowered to review a state 401?
- ~ Should states be able to enforce 401 certification conditions?
- ~ Can a 401 certification be reopened/modified?
- ~ How/when are neighboring states notified (401(a)(2) notice)?
- ~ How have procedural requirements affected applicants and states?
- ~ How should existing state and federal 401 requirements be coordinated?

New 401 Rule Status

 An official website of the United States government



OFFICE of INFORMATION and REGULATORY AFFAIRS
OFFICE of MANAGEMENT and BUDGET
EXECUTIVE OFFICE of the PRESIDENT

Reginfo.gov

U.S. General
Services
Administration 

Search: ☐ Agenda ☒ Reg Review ☐ ICR

Home | Unified Agenda | Regulatory Review | Information Collection Review | FAQs / Resources | Contact Us

Pending EO 12866 Regulatory Review

| | |
|---|--|
| RIN: 2040-AG12 View EO 12866 Meetings | Received Date: 03/25/2022 |
| Title: Clean Water Act Section 401: Water Quality Certification | Stage: Proposed Rule |
| Agency/Subagency: EPA / OW | Economically Significant: No |
| Legal Deadline: None | Affordable Care Act [Pub. L. 111-148 & 111-152]: No |
| International Impacts: No | Dodd-Frank Wall Street Reform and Consumer Protection Act, [Pub. L. 111-203]: No |
| Pandemic Response: No | |

About Us | Related Resources | Disclosure | Accessibility | Privacy Policy | Contact Us

💧 Next Steps

- ~ Proposed 401 Rule published in Federal Register (date TBD)
- ~ Public comment period
- ~ Final 401 Rule published
- ~ New round of litigation?

Takeaways


💧 For the Time Being

- ~ 2020 401 Rule likely to remain in effect for another year (give or take)
- ~ Be careful about overlooking procedural requirements in 2020 401 Rule

💧 Regulatory Certainty Please!

- ~ Valid concerns on both sides of issue
- ~ Flip-flopping rules in no one's interest
- ~ Need a **durable** rule that strikes a balance between interests



An aerial photograph of North America, showing the United States and parts of Canada and Mexico, in a light blue color. The map is centered and serves as the background for the text.

Justin Curtis
Justin@AquaLaw.com
804.716.9021

AQUALAW
www.AquaLaw.com