



FAQs: Clean Water Act Section 401 Water Quality Certification

A Fact Sheet for Tribal Wetland Programs



December 2023

Q: What is Water Quality Certification Under Clean Water Act (CWA) Section 401?

A: Clean Water Act (CWA) §401 provides Tribes with “treatment in a similar manner as a state” (TAS) authority and states with a powerful tool to protect their wetlands and other waters from adverse effects resulting from federally licensed or permitted projects. Under §401, a federal agency may not issue a license or permit that may result in a discharge into waters of the United States (WOTUS) on reservation lands, unless a tribe with TAS either grants a certification or waives its opportunity to certify. For waters on reservation lands of Tribes without TAS, the EPA Regional Office will certify on behalf of the Tribe.

Q: What Licenses and Permits are Subject to Section 401?

A. The CWA does not provide a list of licenses or permits requiring §401 certification, but instead indicates characteristics that trigger the requirement for water quality certification. A license or permit subject to §401 must be issued by a federal agency, have the potential to result in a discharge (even if not certain), and the discharge would be into a WOTUS. Some of the types of federal licenses and permits that typically meet these criteria and so are subject to section 401 certification include: Rivers and Harbors Act §10 permits and CWA §404 permits issued by the U.S. Army Corps of Engineers, CWA §402 permits issued by the U.S. Environmental Protection Agency (EPA), licenses for hydropower facilities and natural gas pipelines issued by the Federal Energy Regulatory Commission, among others.

Q: What Does a §401 Certification Analysis Involve?

A. A decision to grant §401 certification indicates the licensed or permitted project will be consistent with certain CWA programs, including water quality standards, toxics provisions, and effluent guidelines for new and existing sources, as well as consistent with other appropriate requirements of tribal law. A tribal certification authority should consider the potential impacts of the proposed project on these CWA and tribal requirements. If the project description and available data make consistency with requirements uncertain, the tribal certifying authority may request additional information, but the need for more information does not necessarily extend the analysis period. The certifying authority may also develop conditions for its certification necessary to help ensure consistency with requirements.

Q: How Long does a Tribe Have to Complete Its §401 analysis?

A. CWA §401 certification provides that a certifying authority has “a reasonable period of time (which shall not exceed one year)” to act on a request for §401 certification. Note that a maximum of one year does not guarantee a full year will be available. EPA’s 2023 Section 401 Certification Rule provides that the tribal certifying authority and the federal agency may jointly establish what is a “reasonable period” provided it does not exceed one year. If the tribal certifying authority and federal agency are unable to agree on a “reasonable period,” the default is six months. The Army Corps of Engineers generally prefers sixty days for certification actions, while the Federal Energy Regulatory Commission provides a full year.

Q: What can a Tribe Decide Under Section 401?

A. Tribes with TAS can choose to grant a certification with or without conditions, deny certification, or waive. If the certification includes conditions, the federal agency must include all conditions as a term of the resulting license or permit.

Q: Have Provisions and Processes for CWA Section 401 Certification Changed Recently?

A. Yes, due to ongoing litigation and rulemaking addressing §401 certification. In 1971, EPA promulgated implementing regulations for CWA §401. In July 2020, EPA substantially revised those regulations and established several procedures for and limitations on tribal and state certification programs. Many Tribes and states believed that EPA’s 2020 401 certification rule narrowed §401 in a manner inconsistent with the CWA, and that EPA did not have authority to dictate tribal and state §401 certification processes. Several tribes and states sued EPA, arguing that the 2020 Certification Rule was inconsistent with the text of CWA §401 and with the Act’s reliance on cooperative federalism. Concerns with the 2020 Certification Rule included the scope of appropriate considerations for a 401 certification analysis, the appropriate scope of certification conditions, relevance of non-regulatory water quality-related issues, input from neighboring jurisdictions, and enforcement, among other issues. In October 2021, a court vacated and remanded the 2020 Certification Rule, reinstating the 1971 regulation. In April 2022, the U.S. Supreme Court reinstated the 2020 Certification Rule that had been vacated, pending completion of appeals before the Ninth Circuit Court of Appeals or promulgation of a new EPA certification regulation. On November 27, 2023, EPA’s new 401 certification regulation took effect. The new rule responds to many of the concerns raised in the litigation. It is less prescriptive than the 2020 rule, leaving several substantive and procedural decisions up to the certifying authority, such as what constitutes a certification request. The new rule also provides details for how Tribes may receive “treatment in a similar manner as a state” (TAS) authority to act as a certifying agency or have input as a neighboring jurisdiction.

For Additional Information

EPA’s Section 401 Certification Website: [Overview of CWA Section 401 Certification | US EPA](#)

To see EPA materials on the new rule, including a table comparing the 1971 Rule, 2020 Rule, and the 2023 Rule, go to [Final 2023 CWA Section 401 Water Quality Certification Improvement Rule | US EPA](#)

NAWM’s fact sheet on “[Treatment in a Similar Manner As a State \(TAS\) for Clean Water Act Programs](#)”