

COMPARISON OF KEY 401 CERTIFICATION PROVISIONS

National Association of Wetland Managers (NAWM)

June 7, 2022

Note: Review rule text for additional details.

Issue	1971 Rule and Practice	2020 Rule	Thoughts and Concerns about 401 Certification Raised by NAWM Members	2022 Proposed Rule
When 401 Certification is Triggered	<p>Where a federal license or permit may result in a discharge into a water of the US (WOTUS).</p> <p>In practice, EPA has implemented the 9th Circuit 1998 holding in <i>OND v. Dombeck</i> that only a point source discharge triggers 401.</p>	<p>Same as 1971 Rule.</p> <p>Defines “discharge” for purposes of 401 as discharge from a point source into a WOTUS.</p>	<p>Requiring a point source discharge to trigger 401 means more diffuse water quality discharges may go unaddressed.</p>	<p>Same as 1971 practice; proposed rule explicitly provides that certification or waiver is required for any federal license or permit that may result in a point source discharge into WOTUS.</p>
Pre-Filing Meeting Requests	<p>Not addressed in rule.</p> <p>Some certifying authorities encouraged pre-filing meetings.</p>	<p>Project proponents must request pre-filing meeting at least 30 days before requesting a certification. Certifying authorities are not required to grant the meeting.</p>	<p>Pre-filing meeting requests on 30-day timeframe might delay the process and require additional administrative resources.</p> <p>Sharing project information prior to starting the certification clock will help identify additional data needs early in the process.</p>	<p>Project proponents must request pre-filing meeting at least 30 days before requesting a certification, unless the certifying authority has waived or shortened the timeframe. Certifying authorities are not required to grant the meeting.</p>
Requests for Certification	<p>Certification request must include five elements when EPA is the certifying authority. Does not define a certification request for other certifying authorities.</p>	<p>A certification request must include listed elements, either nine for individual permits or seven for general permits. Elements include items such as: location and nature of any</p>	<p>The elements in the 2020 rule do not require a certification request to include sufficient data on water quality implications and other certification considerations.</p>	<p>A request for certification includes (1) copy of draft license/permit, (2) any “existing and readily available data or information related to</p>

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		potential discharge, and description of methods for monitoring discharge, among others.	<p>Information required for a certification analysis will vary geographically and from project to project.</p> <p>Some state and tribal certifying authorities considered a “complete application” as a certification request.</p>	<p>water quality impacts from the proposed project.”</p> <p>States and tribes may define in regulation additional contents of a certification request.</p>
Reasonable Period of Time (RPT) for Certification Analysis				
What starts the RPT clock?	<p>The RPT starts upon receipt of a certification request.</p> <p>In practice, some certifying authorities view the RPT as starting upon receipt of a “complete application.”</p>	RPT starts on the date a certification request with the required elements is received by the certifying authority.	The 2020 rule’s definition of a certification request may start the RPT clock before the certifying authority has information necessary to do a certification analysis.	RPT starts when the certifying authority receives a request for certification, as defined by the certification authority.
Length of RPT	<p>The RPT is set by the federal agency but may not exceed one year. Rule sets a default RPT of six months.</p> <p>Some federal agencies’ 401 cert regulations allow certifying authorities to request a longer RPT, not to exceed one year.</p>	The RPT is set by the federal agency but may not exceed one year. Certifying authorities and project proponents may request a longer RPT, not to exceed one year. Rule does not provide a default RPT.	The RPT set by federal agencies might be too short to accommodate required state public comment processes, and to gather data for a scientifically informed analysis.	<p>The RPT is set by the federal agency and certifying authority within 30 days of receiving a request for certification, and may not exceed one year. Proposed rule does not specify factors to be considered when setting the RPT. If the federal agency and certifying authority are unable to agree on an RPT, the RPT will default to 60 days.</p> <p>RPT is automatically extended when certifying authority notifies the federal agency either of a force majeure</p>

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				event or that more time is needed to satisfy public notice requirements.
Stopping the RPT clock	Not addressed in rule. Some certifying authorities allow or request project proponents to withdraw their applications to stop, pause, or reset the RPT clock.	Withdrawing and resubmitting of a 401 certification request as a means of stopping the RPT clock is expressly prohibited.	If information necessary for a 401 certification analysis has not yet been provided, certifying authorities may need to deny certification if the RPT cannot be paused.	Does not address legality of the practice of withdrawal/resubmit.
Scope of Review				
Generally	Not addressed in rule.	Analysis limited to assuring a discharge from a federally licensed or permitted facility will comply with water quality requirements. “Water quality requirements” is defined as CWA provisions listed in section 401, and state or tribal regulatory requirements for point source discharges into WOTUS.	“Water quality requirements” in the 2020 rule is too narrowly focused, and does not allow consideration of non-regulatory practices such as those addressing nonpoint sources.	Analysis focuses on whether the activity as a whole will comply with all applicable water quality requirements, including: CWA sections listed in section 401; any federal, state, or tribal laws or regulations implementing those CWA sections; and any other water quality-related requirement of state or tribal law.
Activity as a Whole versus Discharge	Not addressed in rule. In 1994, U.S. Supreme Court held in <i>Jefferson County PUD</i> that 401 review should consider if any potential discharge and the project as a whole will comply with CWA provisions listed in section 401.	Certification should consider only the discharge. Expressly repudiates <i>Jefferson County PUD</i> holding that the project as a whole is an appropriate consideration.	Focusing a 401 certification analysis solely on the discharge, not considering effects from the project as a whole, will prevent certifying authorities from addressing a number of water quality-related concerns.	May consider any aspect of the project as a whole.
Certification Decisions				
Potential Actions	Grant, grant with conditions, deny, or waive.	Grant, grant with conditions, deny, or waive.		Grant, grant with conditions, deny, or waive.

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Required Explanation and Documentation	If granting certification, must include a statement there is a reasonable assurance that the activity will not violate applicable water quality standards.	If granting certification, must include a statement that the proposed project discharge will comply with water quality requirements. If granted with conditions, needs a statement on why the condition is necessary, and citation to law authorizing the condition. If denying certification, must specify which water quality requirements the project will not comply with, and why missing information is necessary.	Identifying a specific legal citation can be time-consuming.	If granting certification, must include a statement that the activity as a whole will comply with water quality requirements. If granting with conditions, needs a statement why each condition is necessary to ensure compliance with water quality requirements. If denying, needs a statement explaining why the certifying authority cannot certify the activity as a whole will comply with water quality requirements.
Waiver	Waiver can be expressly stated or occurs when certifying authority fails or refuses to act within the RPT.	Waiver can be expressly stated in writing, or when the certifying authority fails or refuses to act within the RPT. Failure or refusal to act can result by failing to act, or by failing to satisfy either required documentation or procedural requirements.	Denial should not be converted to a waiver if procedural requirements have not been met. Certifying authorities should be given an opportunity to remedy the problem.	Waiver can be expressly stated in writing, or occurs where the certifying authority fails or refuses to act within the RPT.
Federal Agency Review of Certifications	Not addressed in rule. In practice, a federal agency determines whether a certifying authority failed to act within the RPT.	A federal agency reviews action by the certifying authority to determine whether it complied with the procedural requirements for those actions, and whether action was completed within the RPT. Federal agency review does not include a substantive evaluation of the sufficiency	Federal agencies might make substantive decisions about the adequacy of a certification, overriding that of the certifying authority. Certifying authorities should be given an opportunity to remedy problems identified by a federal agency.	Federal agency reviews a certification to see it reflects four elements: (1) specifies the action (grant with or without conditions, deny, waive), (2) proper certification authority issued the decision, (3) public notice requirements for the certification were met, and (4) decision is issued within the RPT. Federal

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		<p>of information provided in the certification.</p> <p>A federal agency is not required to provide the certifying authority an opportunity to remedy any deficiency.</p>		<p>agency review cannot go beyond these four elements.</p> <p>The federal agency will defer to the certification authority how to demonstrate it met the four required elements.</p>
Modifications	Modifications allowed upon agreement of federal agency, certifying authority, and EPA.	Modifications are not allowed.	Modifications to 401 certifications are necessary to reflect changing conditions, scientific understanding of water quality effects, changes to the project, etc.	Certifying authority and federal agency may agree to modify a grant of certification (with or without conditions), but scope of modification is limited to what was in the agreement. Unilateral modifications are prohibited.
§401(a)(2) Neighboring Jurisdiction Process	<p>Federal licensing or permitting agency notifies EPA upon receipt of an application and certification, or a waiver. EPA at its discretion may decide if the project “may effect” waters of a neighboring jurisdiction, and if so, EPA “shall” notify the neighboring jurisdiction and provide an opportunity to comment. Federal agency holds a public hearing. CWA and rule provide specific timeframes for §401(a)(2) actions.</p> <p>One district court has held that EPA’s consideration if a project “may affect” waters</p>	Similar to 1971 rule, while providing the federal agency has five days to notify EPA. CWA and rule provide specific timeframes for §401(a)(2) actions.	The regulations do not provide sufficient detail to make the 401(a)(2) process transparent. For example, no criteria for an EPA “may affect” determination have been developed. Some believe EPA’s “may affect” determination is mandatory, not discretionary.	<p>The federal licensing or permitting agency has five days to notify EPA after receipt of an application and certification, or waiver. EPA must make a “may affect” determination; it is not discretionary. CWA and rule provide specific timeframes for §401(a)(2) actions.</p> <p>Provides more details for the neighboring jurisdiction consultation process. Expressly provides that the federal agency must hold a public hearing if the neighboring state or tribe requests one. CWA and rule</p>

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	in a neighboring jurisdiction is mandatory, not discretionary. <i>Fond du Lac Band v EPA</i> (2021).			provide specific timeframes for §401(a)(2) actions.
Tribal Treatment as a State for Section 401	Does not provide tribes with an opportunity to get TAS solely for 401.	Does not provide tribes with an opportunity to get TAS solely for 401.	Some tribes may wish TAS for 401 before developing water quality standards under §303.	Tribes may receive TAS for 401 without also obtaining TAS for water quality standards.