



MEMORANDUM

DATE: August 19, 2021

SUBJECT: Clean Water Act Section 401 Certification Implementation

FROM: Radhika Fox
Assistant Administrator, Office of Water

Jaime Pinkham
Acting Assistant Secretary of the Army (Civil Works)

TO: EPA Regional Administrators, Region 1-10
LTG Scott A. Spellmon, Chief of Engineers, U.S. Army Corps of Engineers

Clean Water Act (CWA) Section 401 provides states and tribes with a powerful tool to protect the quality of their waters from adverse impacts resulting from federally licensed or permitted projects. Under CWA Section 401, a federal agency may not issue a license or permit to conduct any discharge into navigable waters, unless the state or tribe where the discharge would originate either issues a CWA Section 401 water quality certification finding “that any such discharge will comply with the applicable provisions of Section 301, 302, 303, 306, and 307” of the CWA, or certification is waived. 33 U.S.C. 1341(a)(1). When granting a CWA Section 401 certification, states and tribes are directed by CWA Section 401(d) to include conditions, including “effluent limitations and other limitations, and monitoring requirements” that are necessary to assure that the applicant for a federal license or permit will comply with applicable provisions of CWA Sections 301, 302, 306, and 307, and with “any other appropriate requirement of State law.” *Id.* at 1341(d).

The Environmental Protection Agency (EPA) promulgated regulations on CWA Section 401 certifications in June 2020 (2020 Rule).¹ These regulations provide process and substantive requirements for the certification process that applies to project proponents, certifying authorities, and federal licensing or permitting agencies. The U.S. Army Corps of Engineers (Corps) is responsible for administering certain federal permitting programs subject to CWA Section 401, including the CWA Section 404 program.

States, tribes and stakeholders have expressed significant concerns over implementation of the 2020 Rule as applied to the Corps’ Section 404 permits, including but not limited to: the length of the

¹ Clean Water Act Section 401 Certification Rule. 85 FR 42210 (July 13, 2020), available at https://www.epa.gov/sites/production/files/2020-07/documents/clean_water_act_section_401_certification_rule.pdf (hereinafter, the 2020 Rule).

reasonable period of time²; procedural deficiencies identified in federal agency review³; and the length of the neighboring jurisdiction process.⁴ Additionally, EPA and Army have highlighted a need for national direction on various implementation topics and challenges.

This memorandum provides guidance on one area that states and tribes have expressed concerns – Section 401 certifications related to the 41 Nationwide Permits (NWP) proposed in September 2020 which have not yet been finalized. In addition, further guidance is provided in an Enclosure related to the Section 401 certification process associated with Corps permits, in general, to promote improved implementation of EPA’s 2020 Rule in the field and address additional implementation challenges which have been identified. EPA and the Department of Army (Army) will consider additional guidance, as appropriate, to facilitate implementation of the 2020 Rule, including the disposition of the 16 NWP finalized in January 2021. This memorandum is limited to the Corps’ implementation of the EPA’s 2020 Rule; this memorandum does not apply to other federal agencies or stakeholders. This memorandum concerns EPA’s 2020 Rule; it does not directly interpret CWA Section 401. The contents of this memorandum do not have the force and effect of law and are not meant to bind the public in any way. This memorandum is intended only to provide clarity regarding existing requirements under the law or agency policies.

In May 2021, EPA announced its intention to reconsider and revise the 2020 Rule, 86 FR 29541 (June 2, 2021). This memorandum provides guidance on implementation of the 2020 Rule and will be superseded when EPA promulgates a new rule.

Section I: Nationwide Permits

A. Background

In October 2020, the Corps requested certification from certifying authorities on all proposed Nationwide Permits (NWP). Many certifying authorities requested an extension to the 60-day reasonable period of time to review and certify the proposed NWP. Commenters noted various reasons for such extension requests, including that certifying authorities could not comply with the 60-day reasonable period of time⁵ due to public participation requirements and the need for more time to review in light of recent changes to the EPA’s regulation for CWA Section 401 and the issuance of the final Navigable Waters Protection Rule. Of the then-proposed NWP, 16 of the NWP were finalized in January 2021 and 41 NWP await finalization.

This section discusses the Corps’ next steps on the NWP for Section 401 certification on the remaining 41 NWP which have not yet been finalized.

B. Certification on the Remaining 41 NWP

In light of concerns noted by commenters and extensive recent feedback received from certifying authorities regarding the Corps’ actions on certifications, including the Corps’ application of EPA’s 2020 Rule, **the Corps will extend the reasonable period of time to the one-year statutory maximum for certification on the remaining 41 NWP.** Although the Corps’ regulatory default 60-day reasonable period of time has passed, as discussed in the Enclosure, neither the Corps’ nor EPA’s

² 40 CFR 121.6.

³ 85 FR 42269; *see also* 40 CFR 121.9.

⁴ 40 CFR 121.12.

⁵ 33 CFR 325.2(b)(1)(ii).

regulations limit the Corps to granting extensions only before the end of the regulatory default reasonable period of time.⁶

Army believes that the extension will provide for further opportunities for cooperation between certifying authorities and the Corps. The extension will end at the one-year statutory limit for Section 401 certifications⁷. The Corps will send a notification to certifying authorities indicating the new certification deadline for the remaining 41 NWP's. To expedite the process, the Corps will provide certifying authorities with a draft final version of the 41 NWP's. Because the Corps is simply extending the reasonable period of time (and not re-requesting certification) certifying authorities are not required to reinitiate the certification process.

As noted in the Enclosure, EPA's view is that, when authorized by the Corps, submission of new or revised certifications during this extended reasonable period of time is permissible and not inconsistent with EPA's 2020 Rule, codified at 40 CFR 121.6(e). During the extended reasonable period of time, certifying authorities may clarify conditions and/or remedy any procedural deficiencies in their certifications previously identified by the Corps that might have resulted in a waiver of a condition(s) or the certification itself, or a determination to decline to rely on the certification by the Corps. Certifying authorities that do not want to take the opportunity to issue a new or revised certification during the extended reasonable period of time may confirm their earlier certification affirmatively by sending confirmation to the Corps prior to the expiration of the extended reasonable period of time. The previous certification decisions will govern in the absence of an updated certification or affirmative confirmation; inaction will not waive certification.

EPA and Army are aware of prior implementation issues surrounding the application of the Corps' regulation at 33 CFR 330.4(c)(2). In the interest of promoting effective cooperation between certifying authorities and federal agencies, Corps field staff should contact Corps headquarters (HQ) before making a determination under 33 CFR 330.4(c)(2) using the EPA's 2020 Rule as a basis, or regarding any questions or concerns with respect to the application of the 2020 Rule and 33 CFR 330.4(c)(2) to certification conditions. Corps HQ will coordinate any issues which require policy-level decisions or interpretations with Army and EPA HQ.

EPA is planning to provide technical assistance to the Corps and certifying authorities pursuant to 40 CFR 121.16 during this extended reasonable period of time. See EPA's webpage⁸ for the EPA Regional Contacts; if the appropriate EPA Regional point of contact cannot be identified, requests for technical assistance should be sent to CWA401@epa.gov.

Section II: Coordination

EPA and the Corps HQ managers and staff will continue to work together to support transparency and communication around implementation of EPA's 2020 Rule to the field. In addition, Corps District and EPA Regional staff are encouraged to reach out to Corps and EPA HQ Section 401 staff to identify areas for improvement or opportunities for further engagement on the 2020 Rule with stakeholders and field staff.

Consistent with section 121.16, EPA is available to provide technical assistance as requested by project proponents, certifying authorities, and other federal agencies. EPA and Army intend to provide

⁶ See Enclosure Section B for further discussion on the reasonable period of time. The federal agency is responsible for setting the reasonable period of time. 40 CFR 121.6.

⁷ 33 U.S.C. 1341(a)(1).

⁸ Clean Water Act Section 401 Certification EPA Contacts List: https://www.epa.gov/sites/default/files/2020-12/documents/cwa_section_401_epa_contact_list_508.pdf

additional guidance as appropriate to ensure efficient and timely response to implementation issues in the field.

For any questions, please contact Stacey Jensen, Office of the Assistant Secretary of the Army, stacey.m.jensen.civ@mail.mil and Brian Frazer, US EPA Office of Water, Oceans, Wetlands, and Communities Division, frazer.brian@epa.gov.

To the extent any other federal agencies have questions or interest in this memorandum, please contact the EPA staff listed above.

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Encl.

ENCLOSURE

This Enclosure provides background information on various aspects of the Clean Water Act Section 401 Certification Rule (hereinafter, 2020 Rule) and provides implementation direction to the Corps field to support improved national implementation by the Corps of EPA's 2020 Rule⁹. This section covers the following implementation topics: (A) certification requests; (B) reasonable period of time; (C) federal agency review of certification decisions; (D) incorporation of certification conditions in federal permits; (E) modification of certification conditions; and (F) notification under Section 401(a)(2).

A. Certification Requests

Background: A project proponent submits a certification request to a certifying authority to initiate an action under CWA Section 401. A certification request is defined by the 2020 Rule as “a written, signed, and dated communication that satisfies the requirements of [40 CFR] 121.5(b) or (c).” 40 CFR 121.1(c).

Corps field staff should advise project proponents that they may not submit a certification request before submitting a permit application to the Corps.

- Section 121.5(b)(2) requires a project proponent to identify the “proposed project,” which is defined in the 2020 Rule as “the activity or facility for which the project proponent has applied for a license or permit.” 40 CFR 121.1(k). If a project proponent has not applied for a federal permit, then the project proponent cannot identify the proposed project as defined in section 121.1(k) nor satisfy the certification request requirement at section 121.5(b)(2).

Corps field staff should verify with the certifying authority that the certifying authority received a certification request.

- The certifying authority is responsible for determining whether the request contains all the components listed in section 121.5 of the 2020 Rule. If the certification request includes all the elements listed in section 121.5, then the reasonable period of time will begin once it is received¹⁰ by the certifying authority in accordance with any applicable submission procedures set by the certifying authority. The phrase in the 2020 Rule “in accordance with applicable submission procedures” is intended to recognize that certifying authorities may have varying procedures for submitting materials (such as a Section 401 certification request) established in state or tribal law. It is up to the state or tribe to establish its submission procedures.
- Section 121.5(a) of the 2020 Rule requires a project proponent to submit a certification request to the certifying authority and federal agency concurrently. Within 15 days of receiving notice of the certification request from the project proponent, the federal agency is required to provide the following information, in writing, 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 on the certification request. 40 CFR 121.6(b).
- In light of the certifying authority's role in determining whether it received a certification request, when the project proponent submits a certification request concurrently¹¹ to the Corps, the Corps should verify with the certifying authority that the certification request meets the requirements of the 2020 Rule and was received in accordance with the certifying authority's

⁹ Clean Water Act Section 401 Certification Rule. 85 FR 42210 (July 13, 2020), available at

https://www.epa.gov/sites/production/files/2020-07/documents/clean_water_act_section_401_certification_rule.pdf.

¹⁰ Receipt is defined as “the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures.” 40 CFR 121.1(m).

¹¹ See section 121.5(a).

applicable submission procedures. This verification will allow the Corps to accurately reflect the date of receipt when setting the reasonable period of time and providing the date waiver will occur. *See* section 121.6(b).

B. Reasonable Period of Time

Background: Once a certifying authority receives a certification request in accordance with applicable submission procedures, the “reasonable period of time” begins. The reasonable period of time is the period during which a certifying authority may analyze a certification request and determine whether and which action it will take.

Corps field staff should work with certifying authorities to identify factors and circumstances that may be relevant for setting reasonable periods of time longer than the Corps regulatory default.

- The federal agency is responsible for setting the reasonable period of time. 40 CFR 121.6(a). The 2020 Rule requires federal agencies to consider the following factors when setting the reasonable period of time: the complexity of the proposed project, the nature of any potential discharge, and the potential need for additional study or evaluation of water quality effects from the discharge. *Id.* at 121.6(c).
- Corps Districts are encouraged to work with certifying authorities to identify other factors that may be relevant for setting a longer reasonable period of time¹², such as the time required for state public notice procedures. To increase predictability and transparency, Corps field staff are encouraged to develop Memorandums of Understanding with certifying authorities, including with respect to setting longer reasonable periods of time, as appropriate.
- Per the 2020 Rule, the reasonable period of time may be extended at the certifying authority or project proponent’s request, as long as the extension does not go beyond one year from the start of the reasonable period of time. Corps Districts are encouraged to provide additional time as long as the extension does not go beyond the statutory one-year period of time. Corps Districts should consider the factors at section 121.6(c) and any other relevant factors flagged by the certifying authority or project proponent.
- The reasonable period of time may be extended by the Corps at any point prior to one year from the start of the reasonable period of time.¹³ EPA’s 2020 Rule does not limit federal agencies to granting extensions only before the end of the regulatory default reasonable period of time, as long as the federal license or permit has not been issued.
- EPA’s 2020 Rule does not limit certifying authorities from issuing an updated certification within the reasonable period of time when this is authorized by the federal permitting agency. After a certifying authority acts on a certification request, if the reasonable period of time has not yet expired, and if authorized by the federal permitting agency, the certifying authority may submit a new or revised certification decision. EPA’s view is that this is not inconsistent with 40 CFR 121.6(e). When authorized by the federal permitting agency, these new or revised certification decisions would not be “unilateral” modifications of the kind EPA counseled against in the preamble to the 2020 Rule. 85 FR 42279-80. Any new or revised certification decision submitted during the reasonable period of time would supersede the earlier certification decision. In EPA’s view, this outcome does not change if the new or revised certification is issued during

¹² The Corps default reasonable period of time is 60 days. 33 CFR 325.2(b)(1)(ii).

¹³ The Corps’ regulation at 33 CFR 325.2(b)(1)(ii) provides that “if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.”

an extended reasonable period of time. Such circumstances should be documented as appropriate by the federal agency and the certifying authority in any subsequent new or revised submission.

C. Federal Agency Review of Certification Decisions

Background: Certifying authorities may act on a certification request in one of four ways: granting certification, granting certification with conditions, denying certification, or waiving certification. The 2020 Rule requires federal agencies to determine whether a certifying authority's certification, certification condition(s), or denial includes the information requirements in sections 121.7(c), 121.7(d), or 121.7(e) and whether the certification action was taken in accordance with procedural requirements of Section 401 and the 2020 Rule. Per the 2020 Rule, if a certifying authority fails or refuses to act in accordance with the procedural requirements of Section 401 or within the reasonable period of time, or fails or refuses to provide the information required to support certifications (section 121.7(c)) or denials (section 121.7(e)), the certification may be waived. 85 FR 42265. If a certifying authority fails or refuses to provide the information required to support a certification condition (section 121.7(d)), then the condition may be waived. *Id.* at 42265-66.

Corps field staff should confirm that a certification condition or denial includes the requirements listed at 121.7(d) and (e), respectively, but should not substantively analyze the sufficiency of such information supplied to meet those requirements, consistent with the 2020 Rule preamble.

- In the 2020 Rule, federal agency review is purely procedural and does not include a substantive evaluation of the sufficiency of that information. 85 FR 42268.
- For example, if a certifying authority decides to grant certification with conditions for an individual permit, the federal agency will determine whether each certification condition includes the information listed in section 121.7(d)(1), including a statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements and a citation to the federal, state, or tribal law that authorizes the condition. The federal agency does *not* analyze whether the condition is within the scope of the rule, whether the citation is accurate, or whether the statement sufficiently explains why the condition is necessary to assure that the discharge will comply with water quality requirements. Instead, the federal agency confirms that a citation and explanation for each condition are included in the certification decision document.

Corps field staff should work with certifying authorities to resolve procedural deficiencies if there is still time left in the reasonable period of time or an extension would not extend the reasonable period of time beyond one year.

- Per the 2020 Rule, if a federal agency reviews a certification decision and determines that it does not comply with the procedural requirements of the rule and Section 401, then the certification decision is waived. 40 CFR 121.9(a)(2). Additionally, if a federal agency reviews a certification condition and determines that it does not comply with the procedural requirements of section 121.7(d), then the certification condition is waived. *Id.* at 121.9(b).
- Corps field staff are encouraged to work with certifying authorities during the certification review process to ensure procedural components are met. EPA Regional offices are available to assist Corps counterparts in educating and supporting certifying authorities during the certification process.
- Although the 2020 Rule does not provide a mechanism for remedying deficient certification decisions, the preamble notes that federal agencies may create their own procedures to allow certifying authorities to remedy deficient certification decisions. 85 FR 42269. For example, in addition to more informal communications where an ambiguity may be readily clarified, Corps

field staff could provide a process whereby within a certain number of days of receiving a certification decision, Corps field staff would communicate with the certifying authority in writing whether there are any procedural deficiencies; in such communication, the Corps could note which aspect of the decision appears deficient or is unclear regarding deficiency, relay the 2020 Rule requirement, and provide a timeframe for the certifying authority to clarify the deficiency as appropriate (within the one-year statutory maximum reasonable period of time). Corps staff could offer to meet with the certifying authority to discuss the deficiency. Corps staff may also engage EPA Regional staff, as appropriate, to provide technical assistance.

D. Incorporation of Certification Conditions in Federal Permits

Background: If a federal agency determines that a certification with conditions complies with the procedural requirements of the 2020 Rule and Section 401, the conditions must be incorporated into the license or permit. 40 CFR 121.10(a). If a condition meets the procedural requirements of Section 401 and includes the elements listed in section 121.7(d), then the condition must be incorporated into the federal permit in its entirety, as drafted by the certifying authority.

Corps field staff should include or make certification documents available to project proponents for transparency and educational purposes.

- Section 121.10 of the 2020 Rule provides that all certification conditions that meet the procedural requirements of the rule must be incorporated into the federal permit, and the permit must clearly identify the certification conditions.
- The 2020 Rule does not discuss how certification documents, as a whole, should be included with a federal license or permit. However, Corps Districts are encouraged to include or make certification documents available to project proponents for transparency and educational purposes.

E. Modifications of Certification Conditions

Background: The preamble to the 2020 Rule provides that Section 401 does not provide authority for certifying authorities to unilaterally modify a certification. 85 FR 42279. However, the preamble notes that modifications to certifications may be addressed through other established procedures. *Id.* Changes to the underlying project or modifications to the federal license or permit may trigger the requirement for a new certification, depending on the federal agency's procedures. *Id.*

Corps field staff should work with certifying authorities to identify and address circumstances that may appropriately require permit modifications, including modifications to certification conditions incorporated into the permit, through the Corps' permit modification procedures.

- As noted above, the 2020 Rule provides that certification conditions that comply with section 121.7(d) must be incorporated into the federal permit. 40 CFR 121.10(a). The certification conditions become a condition of the federal permit, and as such, may be modified as a permit condition consistent with Corps' regulations. *See* 33 CFR 325.7(b) (providing a process for modification on individual permits); 33 CFR 330.5(b)-(d) (providing a process for nationwide permit (NWP) modification at three separate levels of delegation; noting that modifications to the NWPs issued by the Chief of Engineers require rulemaking under the Administrative Procedure Act and Executive Order 12866 process). Corps field staff should consider utilizing Corps permit modification procedures as one avenue to address concerns raised by certifying authorities regarding the need to update certification conditions incorporated into a Corps permit.

F. Notification under CWA Section 401(a)(2)

Background: Once the federal agency receives a certification and a federal license or permit application, the federal agency is required to notify the EPA Region within 5 days. 40 CFR 121.12(a). Within 30 days of notification, pursuant to section 121.12(b), EPA may determine that the certified discharge may affect the water quality of a neighboring jurisdiction. This applies for either an individual permit or general permit. Under the 2020 Rule, EPA notification under the Section 401(a)(2) process does not occur when the federal agency receives a denial.

Corps field staff should work with EPA Regional staff to identify the most efficient method to notify EPA Regions under Section 401(a)(2).

- The 2020 Rule does not describe what a federal agency should include in its notice to EPA. Corps Districts are encouraged to collaborate with EPA Regions to determine the most efficient method to notify the Region to initiate the process (e.g., delivery method, information in the notice). For example, EPA Regions may ask for a copy of the certification and application pursuant to section 121.12(b); the Corps District and EPA Region could agree to include the certification and application as part of the notice to expedite the review process where the Region indicates an intent to ask for these materials under section 121.12(b).