



Clean Water Act Section 401 Water Quality Certification Improvement Rule September 2023

EPA is finalizing a rule to support a timely and predictable water quality certification process under Clean Water Act (CWA) section 401. The final *2023 CWA Section 401 Water Quality Certification Improvement Rule (2023 Rule)* is grounded in the fundamental authority granted by Congress to states, territories, and Tribes to protect water resources that are essential to healthy people and thriving communities over the past 50 years. For more information on the 2023 Rule, see the [CWA Section 401 website](#).

Overview: Section 401 Empowers States, Territories, and Tribes to Protect Vital Waters

Under CWA section 401, Congress provides states, territories, and Tribes with a tool to protect their waters from adverse impacts that could result from federally licensed or permitted projects. As required by CWA section 401, an applicant for a federal license or permit that may result in a discharge into waters of the United States must obtain a water quality certification or waiver from the certifying authority. Certifying authorities are typically a state (which includes territories) or a Tribe with treatment in a similar manner as a state (TAS).

Federal licenses and permits that may require section 401 water quality certification include, but are not limited to, CWA section 404 dredge and fill permits from the Army Corps of Engineers (Corps), hydroelectric licenses from the Federal Energy Regulatory Commission (FERC), and CWA section 402 pollutant discharge permits from EPA. A broad range of individuals and entities seek section 401 certification for projects requiring these kinds of permits, including businesses, federal and state agencies (*e.g.*, state departments of transportation), contractors, and individual citizens. Thousands of water quality certifications are granted each year for a wide range of projects.

Stakeholders in this process include:

- **Certifying authorities.** The state, territory, or Tribe with TAS where the discharge from the proposed federally licensed or permitted project originates, or EPA if a state, territory, or Tribe does not have jurisdiction over the area.
- **Federal licensing or permitting agency.** The federal agency whose license or permit is subject to section 401 certification.
- **Project proponents.** Those seeking a section 401 certification, including project applicants and federal agencies seeking certification for the issuance of their general licenses and permits.

EPA first implemented regulations for water quality certification in 1971, which remained in effect until the Agency finalized the 2020 CWA Section 401 Certification Rule (2020 Rule). President Biden's Executive Order 13990 required EPA to review and, as appropriate and consistent with applicable law, take action to revise or replace the 2020 Rule. Following this review, the Agency announced its intention to revise the 2020 Rule to better uphold the role of states, territories, and Tribes under section 401. The Agency's rulemaking effort was grounded in robust stakeholder input.



Key Improvements under EPA's Final Rule

Pre-Filing Meeting Requests (Section 121.4)

Project proponents must request a pre-filing meeting from a certifying authority at least 30 days before requesting certification unless the certifying authority waives or shortens this requirement. This approach **encourages early engagement** between project proponents, federal agencies, and certifying authorities, while providing certifying authorities flexibility to determine if a pre-filing meeting is necessary. Providing an early opportunity (if deemed necessary) to address any issues or questions allows the certification process to move efficiently.

Requests for Certification (Section 121.5)

All requests for certification must include: (1) a copy of the federal license or permit application submitted to the federal agency (for individual licenses or permits) *or* a copy of a draft license or permit (for the issuance of general licenses or permits); and (2) any readily available water quality-related materials that informed the development of the application or the draft federal license or permit. Certifying authorities may define other contents necessary for a request for certification. Other such contents must be relevant to the water quality-related impacts from the activity and identified prior to when the request for certification is made. If they choose not to do so, the final rule includes a default list of seven elements that must be included in the request. This approach **promotes an efficient and transparent certification process** by clearly defining when a project proponent must request certification, and by allowing certifying authorities to clearly define what other information, if any, they need to start their certification review.

Reasonable Period of Time (Section 121.6)

For the first time, EPA's regulations provide certifying authorities with a role in determining, with the federal agency, the length of the "reasonable period of time" for the certifying authority to review the request for certification. The statutory "reasonable period of time" for reviewing a request for certification begins when a certifying authority receives the request for certification in accordance with its applicable submission procedures. The certifying authority may collaborate with the federal licensing or permitting agency to establish categorical reasonable periods of time *prior to* receiving a request (*i.e.*, through a memorandum of agreement or similar instrument). If the certifying authority and federal agency do not reach an agreement, the length of the reasonable period of time will default to six months. The length of the reasonable period of time is automatically extended upon notice by the certifying authority (before the end of the reasonable period of time) that the certifying authority requires more time to comply with its public notice procedures *or* if there is a force majeure event (*i.e.*, a natural disaster) – provided that the extension in either case does not cause the reasonable period of time to exceed the statutory maximum one year. This final rule **reflects the unique needs of different certifying authorities** by allowing for automatic extensions due to public notice procedures or extenuating events such as natural disasters. Further, in the event there is no agreement, the final rule establishes a default time period for review to provide stakeholders with certainty and ensure the certification process moves in a predictable and transparent manner.

Scope of Review (Section 121.3)

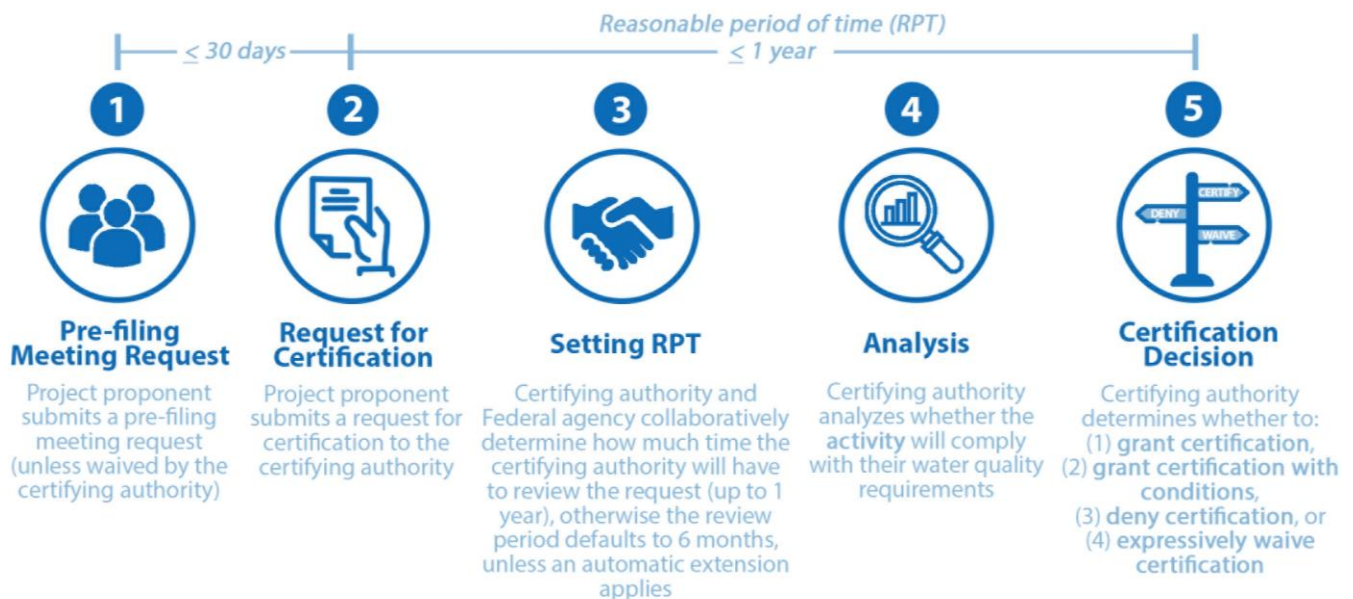
The 2023 Rule realigns the scope of section 401 certification with nearly 50 years of established practice that preceded the 2020 Rule. Simultaneously, the 2023 Rule addresses stakeholder concerns regarding past practices and provides **regulatory certainty** by clarifying important concepts such as emphasizing that states, territories, and

Tribes **may only consider the adverse water quality-related impacts from the activity subject to certification**. Certifying authorities must evaluate whether the activity, including construction and operation components, will comply with the applicable water quality requirements, including water quality-related requirements of state or Tribal laws.

Certification Decisions (Section 121.7)

A certifying authority may make one of four certification decisions on a request for certification: (1) grant certification; (2) grant certification with conditions; (3) deny certification; or (4) expressly waive certification. In the 2023 Rule, EPA recommends that each decision include minimum information, such as identification of the decision, identification of the applicable federal license or permit, an indication that the certifying authority complied with its public notice procedures, and, for any conditions, a statement explaining why each of the conditions are necessary to assure that the activity will comply with water quality requirements or, for a denial of certification, why the certifying authority is unable to certify compliance with water quality requirements. This approach gives certifying authorities the flexibility while clearly identifying recommended certification decision contents that **promote good governance and allow for stakeholder clarity and certainty**.

Figure 1:
Key components of EPA’s final CWA Section 401 Water Quality Certification Improvement Rule





Additional Provisions of EPA's Final Rule

Federal Agency Review (Section 121.8-121.9)

The final rule limits federal agency review to verifying whether: (1) the appropriate certifying authority issued the certification decision; (2) the certifying authority confirmed it complied with its public notice procedures established pursuant to CWA section 401(a)(1); and (3) the certifying authority acted on the request for certification within the reasonable period of time. Consistent with the statute, a waiver of certification may only occur if the certifying authority fails or refuses to act within the reasonable period of time. This approach clarifies the limited circumstances under which waivers occur, which **provides certainty for certifying authorities, project proponents, and federal agencies.**

Neighboring Jurisdictions (Sections 121.12-121.15)

The final rule includes more detail and explanation in the regulatory text on the neighboring jurisdiction process under section 401(a)(2), including explaining the roles of the actors involved, defining when the neighboring jurisdiction process begins, and identifying the minimal contents of a notification to EPA. This approach **clarifies a valuable tool** that allows states, territories, and Tribes with TAS status to participate in the federal licensing or permitting process where EPA has determined that a proposed project subject to section 401 certification in another jurisdiction may affect their water quality.

Modifications (Section 121.10)

Certifying authorities and federal agencies may agree to modify a grant of certification (with or without conditions). However, only the agreed-upon portions may be modified. The final rule clarifies that the certifying authority may not unilaterally modify the certification decision, and that the nature of the certification decision (*i.e.*, grant, deny, waiver) cannot be changed through the rule's modification process. This approach allows certifying authorities and federal agencies to **respond to changing circumstances in an efficient, transparent way.** At the same time, it protects project proponent interests by clarifying that **modifications may not be done unilaterally** and may not change the nature of a certification decision.

Tribes Applying for Treatment in a Similar Manner as a State (Section 121.11)

The final rule includes provisions for Tribes to obtain TAS status for purposes of section 401 certification or to obtain TAS to act as a neighboring jurisdiction under section 401(a)(2). This marks the first time Tribes will have these options without also applying for TAS for water quality standards under section 303(c). This approach **promotes Tribal autonomy** and efficiency by providing additional opportunities for Tribes to obtain TAS to participate in the water quality certification process.

Enforcement and Inspection

The final rule does not include regulatory text on enforcement and removes the previous regulatory text on inspections. Instead, the preamble provides guidance on enforcement and inspection issues to **promote good governance and clarity.**