



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 121

[EPA-HQ-OW-2025-0272; FRL-12813-01-OW]

Establishment of Public Docket and Listening Sessions on Implementation Challenges

Associated with Clean Water Act Section 401

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public listening sessions; request for public comment.

SUMMARY: The U.S. Environmental Protection Agency (EPA) will initiate a series of stakeholder listening sessions and invite written feedback on regulatory uncertainty or implementation challenges associated with the Clean Water Act (CWA) section 401 certification process as defined in the 2023 Water Quality Certification Improvement Rule. The Agency will use this input to determine whether guidance or rulemaking are necessary to address identified areas of regulatory uncertainty or implementation challenges regarding the scope of certification. The Agency also seeks stakeholder input related to CWA section 401(a)(2) implementation.

DATES: Written feedback must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may send written feedback, identified by Docket ID No. EPA-HQ-OW-2025-0272, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method).
Follow the online instructions for submitting written feedback.
- Email: OW-Docket@epa.gov. Include Docket ID No. EPA-HQ-OW-2025-0272 in the subject line of the message.

Instructions: All submissions received must include the Docket ID No. EPA-HQ-OW-2025-0272. Written feedback received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending written

recommendations and additional information on the forthcoming listening sessions, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Lauren Kasparek, Oceans, Wetlands and Communities Division, Office of Water (4502-T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202)-564-3351; email address: *cwa401@epa.gov*.

SUPPLEMENTARY INFORMATION: Section 401 of the Federal Water Pollution Control Act (FWPCA, also commonly known as the Clean Water Act or CWA) authorizes States¹ and authorized Tribes² to play a specific role in Federal licensing or permitting processes. Under CWA section 401, a Federal Agency may not issue a license or permit to conduct any activity that may result in any discharge into navigable waters, unless the State or Tribe where the discharge would originate either certifies “that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307” of the CWA or waives certification. 33 U.S.C. 1341(a)(1). When granting a CWA section 401 certification, States and Tribes may 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).

Congress originally established the water quality certification requirement in section 21(b) of the Water Quality Improvement Act of 1970. The EPA promulgated regulations implementing this water quality certification requirement in 1971. Congress subsequently enacted CWA section 401 in 1972 amendments to the FWPCA that borrowed from the text of

¹ The CWA defines “state” as “a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.” 33 U.S.C. 1362(3).

² Authorized Tribes refers to Tribes that have been approved for treatment in a manner similar to a State status for CWA section 401. *See* 33 U.S.C. 1377(e).

the earlier statutory provision but also differed in material respects.³

In 2020, the EPA amended its regulations regarding water quality certification at 40 CFR part 121 for the first time since enactment of CWA section 401. Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020). The EPA promulgated revisions to the 2020 Rule in September 2023. Clean Water Act Section 401 Water Quality Certification Improvement Rule (2023 Rule), 88 FR 66558 (September 27, 2023). The 2020 Rule and 2023 Rule differed in material respects, including on several of the issues set out below.

One central aspect of water quality certification is the scope of certification. The scope of certification refers to the extent of a certifying State or authorized Tribe's analysis when it evaluates a request for certification to determine whether it will deny certification, waive certification, or grant certification, including any conditions to include in a grant of certification. The 2023 Rule provides that when a certifying authority reviews a request for certification, the certifying authority "shall evaluate whether the activity will comply with applicable water quality requirements." 40 CFR 121.3. The 2023 Rule defined "water quality requirements" broadly as "any limitation, standard or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act," as well as "any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law." 40 CFR 121.1(j). It further provides that the certifying authority's evaluation is "limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation." Finally, it provides that a certifying authority "shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements." 40 CFR 121.3.

³ 36 FR 22487 (November 25, 1971), redesignated at 37 FR 21441 (October 11, 1972), further redesignated at 44 FR 32899 (June 7, 1979).

Recently, some stakeholders have raised questions about applications of the 2023 Rule’s scope of certification.⁴ The Agency recently released a memorandum titled *Clarification regarding Application of Clean Water Act Section 401 Certification* to reiterate the EPA’s longstanding position that States and Tribes must utilize CWA section 401 only for its statutory purpose – to protect water quality. Memorandum from Peggy S. Browne, Acting Assistant Administrator for Water, *Clarification regarding Application of Clean Water Act Section 401 Certification*, May 21, 2025. As noted in the Memorandum, the Agency is interested in State, Tribal, project proponent, and public input regarding any regulatory uncertainty and implementation challenges related to the 2023 Rule. The Agency intends to use input received through the listening sessions and the recommendations docket announced in this notice to inform future guidance or rulemaking efforts to address regulatory uncertainty or implementation challenges. The Agency will not be providing specific written responses to input received through the listening sessions or recommendations docket.

Questions for Consideration

To assist the Agency in addressing implementation challenges and regulatory uncertainty related to the 2023 Rule’s scope of certification as well as in considering experiences related to CWA section 401 implementation, the Agency is seeking input on the following issues:

1. *Defining the scope of certification generally and the scope of certification conditions.*

The rule defines the scope of certification, which includes both the scope of certification review under CWA section 401(a) and the scope of certification conditions under CWA section 401(d), as requiring a certifying authority to “evaluate whether the activity will

⁴ See, e.g., America Builds: Clean Water Permitting and Project Delivery Hearing before Subcommittee on Water Resources and Environment, 119th Cong. (2025) (statement of Robert D. Singletary, Executive Director, Oklahoma Department of Environmental Quality; statement of Noah Hanners, Executive Vice President, Nucor Corporation, on behalf of the National Association of Manufacturers).

comply with applicable water quality requirements.” 40 CFR 121.3. However, CWA section 401(a)(1) refers specifically to “discharge into the navigable waters” and requires that “such discharge will comply with the applicable provisions of sections 301, 302, 306, and 307 of this Act.” Public Law 92-500, 401(a)(1), 86 Stat. 816 (Oct. 18, 1972).

Therefore, the Agency is seeking stakeholder input on the 2023 Rule’s interpretation of the scope of certification and certification conditions, including but not limited to, the legal rationale for interpreting scope as applicable to the “discharge” versus the “activity” and whether the Agency should clarify or revise its interpretation of scope of certification. The Agency also seeks input on whether justification is necessary to demonstrate that certification conditions included in a certification decision are within the appropriate scope, and whether further clarification is needed on the waters considered in acting on a request for certification, also known as applicable waters. Submission of any examples of specific legal vulnerabilities, implementation challenges, or regulatory uncertainty related to the 2023 Rule are encouraged.

2. Water quality requirements. The rule defines “water quality requirements,” as “any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.” 40 CFR 121.1(j). The Agency is seeking stakeholder input on the definition of “water quality requirements” including but not limited to, whether the Agency should further clarify or revise its interpretation of the statutory phrase “other appropriate requirements of State law” from CWA section 401(d), whether the Agency should clarify or revise the definition of “water quality requirements,” and any legal rationale for such clarifications or revisions.

3. Neighboring Jurisdictions. The Agency seeks data or information from stakeholders about how the Agency should consider whether a neighboring jurisdiction’s water quality

may be affected by discharge for purposes of 401(a)(2) and whether there are parameters to consider in making this determination.

4. Categorical Determinations under 401(a)(2). The Agency requests data or information from stakeholders on whether there are specific types of activities, geographic regions, types of waterbodies, or other types of circumstances, etc., which may support the Agency establishing a categorical determination that the quality of no neighboring jurisdiction's waters may be affected by discharge in such circumstances.

5. Stakeholder Input on 401 Certification Experiences. The Agency seeks data and information from stakeholders on their experiences with the 2023 Rule, including certification procedures, the 401(a)(2) process, and the application of treatment in a similar manner as a state (TAS) solely for section 401, in particular related to areas where challenges were identified, areas for improvement, areas for increased transparency, areas of positive engagement, and best practices or lessons learned from the stakeholder perspective which may assist the Agency in identifying any areas for simplifying certification procedures or improving Agency business processes.

6. Data and Other Information. The Agency requests data or information from stakeholders about the application of the 2023 Rule's scope of certification, including but not limited to, examples of certification decisions issued under the 2023 Rule that are believed to exceed the 2023 Rule's scope of certification.

Outreach

In addition to the solicitation of public comments through the docket, the Agency intends to host two webinar-based listening sessions to solicit feedback on the questions identified above. Stakeholders will have the opportunity to provide input to the Agency on the questions provided above for the Agency's consideration. Information on the listening session dates, times, and registration instructions will be made available at a later date on the EPA's website, located at <https://www.epa.gov/cwa-401>. Persons or organizations wishing to provide verbal input during

a listening session will need to pre-register. Due to the expected number of participants, individuals will be asked to limit their oral presentation to three minutes. Supporting materials and written feedback from those who do not have an opportunity to speak may be submitted to the docket as described above.

Peggy S. Browne,

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Office of Water,

Environmental Protection Agency.

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