



## EPA Expands Conditions for 401 Water Quality Certifications

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The Clean Water Act (CWA) section 401 Water Quality Certification (401 WQC) is a big deal. The certification is required for all direct discharge permits and CWA section 404 Permits to dredge or fill waters of the United States. Because most local publicly owned treatment works (POTW) are likely a direct discharger, 401 WQC restrictions on their discharge potentially affects the pretreatment requirements for the indirect discharger into the POTW as well as direct dischargers subject to NPDES permits.

EPA issued proposed revisions to the 401 WQC process on August 22, 2019. On September 27, 2023, EPA issued a final rule rewriting the 401 WQC process for all states (2023 Rule). According to EPA, the changes are necessary to "better align with the statutory text and purpose of the CWA; to clarify, reinforce, and provide a measure of consistency with elements of section 401 certification practice that have evolved over the more than 50 years"; and to support an efficient and predictable certification process that is consistent with the water quality protection and cooperative federalism". Industry and permitting experts are not so sure.

### **PROCEDURAL BACKGROUND**

A federal agency may not issue a license or permit to conduct any activity that may result in any discharge into "waters of the United States" unless the state or authorized tribe where the discharge would originate either issues a 401 WQC that any such discharge will comply with the applicable provisions of the CWA or waives certification. When granting a 401 WQC, the CWA directs states and tribes to include conditions, including "effluent limitations and other limitations, and monitoring requirements," necessary to assure that the applicant for a federal license or permit will comply with applicable CWA requirements and "any other appropriate requirement of state law" and the final WQC must be made within one year of the permit application date.

### **CONCERNS WITH 2020 401 WQC RULE**

It is the language allowing for states to incorporate any other appropriate requirement of state law into

the 401 WQC, which is the focus of the 2023 Rule. The 2023 Rule removes limits on states under the prior regulation. In 2020, the Trump administration took steps to rein in states using the 401 WQC process to regulate activities not related to the pollutant discharges covered by the CWA permitting scheme. (?2020 Rule?). EPA believes now that effort went too far.

## **FINAL 2023 401 WQC RULE**

The final 2023 Rule strives to correct perceived deficiencies in the 2020 Rule. Here is how EPA addresses each category of concern.

### **Pre-Filing Meetings**

The 2020 Rule required proponents of 401 WQC to submit a ??pre-filing meeting request?? to the state or EPA for a detailed accounting of those conditions necessary under the 401 WQC process. This reduced delays in the WQC process (which risked violation of the one year limit on 401 WQC decisions) and allowed the parties to resolve insignificant issues. While the new 2023 Rule continues the pre-filing meeting process, it is a much more muted process.

Importantly, the pre-filing meeting is no longer a defined process. The meeting may be waived by the WQC authority, and requests no longer must be submitted 30 days prior to filing the application for a permit triggering 401 WQC. EPA elected not to define ??applicable submission procedures?? or other procedural aspects of a pre-filing meeting process, removing the guts of the 2020 Rule recommendations.

Because the 2023 Rule does not compel specific action by the certifying authority as part of the pre-filing process, an applicant does not have significant opportunity to review conditions for the 401 WQC outside of final decision; this will result in less opportunity to review specifics during the permitting/401 WQC process.

### **Certification Request**

Under the new 2023 Rule, states are given substantial latitude to add conditions to the 401 WQC. This allows states to add conditions to 401 WQCs that were prohibited under the 2020 Rule.

EPA?s new 2023 Rule gives a green light for states to add conditions to the 401 WQC, which are not included in the CWA list of conditions. ?[W]here a project proponent is requesting certification?and that certifying authority has identified additional required contents of a request for certification beyond the minimum contents outlined in 40 CFR 121.5(a), then the request for certification must include those additional required contents.? Notably, EPA cannot add to the list of terms set out in the regulations, so this liberates states to potentially act on behalf of EPA or on their own to expand WQC conditions.

For projects involving 401 WQC from EPA and where a state ?does not specify additional contents of a request for certification (e.g., through regulation, forms, etc.)?, the 401 WQC request must include a newly specified set of data. According to the final rule, the new project must submit [at least] seven classes of information, not previously required: (1) a description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed

activity; (2) the specific location of any discharge(s) that may result from the proposed activity; (3) a map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways; (4) a description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation; (5) the date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence; (6) a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and (7) documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing meeting request requirement was waived.

The 2023 Rule also suggests states should enforce conditions in the 401 WQC that skirt the rulemaking process. As part of the Preamble, EPA noted that states have "the ability" to define "additional contents of a request for certification in regulation or another appropriate manner, such as an official form used for requests for certification, in lieu of relying on EPA's default list of additional contents." Since this "another appropriate manner" and "official form" may not have to go through the rulemaking process, the suggested approach raises questions about compliance with state administrative procedure statutes and rulemaking procedures.

The scope of components considered as part of the application process is concerning under the new 2023 Rule. It authorizes states to substantially expand those items necessary for approval of 401 WQC within their jurisdiction—even potentially beyond those components relating to water quality.

### **Reasonable Period of Time for WQC**

Every 401 WQC decision must be made within a "reasonable period of time (which shall not exceed one year)" under the CWA. The new 2023 Rule clarifies how this timeline will now be implemented.

The "reasonable period of time" will now start on a specific date in all jurisdictions. The timeline will begin on the date that a request for certification is actually received by the certifying authority in accordance with its applicable submission procedures. The trigger date was often up for debate under the old regulations.

The final rule now allows for EPA and the certifying authority to determine (together) how long within that year the state or EPA will have to make the WQC decision, as part of the pre-filing meeting. If the federal agency and certifying authority do not agree upon a reasonable period of time, the 2023 401 WQC Rule establishes a "default" time period of six months from the date that the request for certification was received.

After the reasonable period of time is set, the 2023 Rule does allow for extensions. Any extension may not exceed one year from the date that the request for certification was received, of course, in order to not violate the CWA limitations period. The 2023 Final Rule allows for automatic extensions "due to force majeure events (including, but not limited to, government closure or natural disasters) and when state or Tribal public notice procedures necessitate a longer reasonable period of time."

As a result of pressure from court decisions across the country, the 2023 Rule removes a proposed provision which prohibited the certifying authority from asking the project proponent to withdraw the certification request to reset the reasonable period of time. Instead, the Agency is taking no position on the legality of withdrawing and resubmitting a request for certification.

### **Scope of Certification**

The 2023 Rule expands the scope of conditions which may be placed on the 401 WQC issued to any applicant. The new regulation gives permission for the certification authority to consider whether the whole activity subject to the federal license or permit will comply with applicable water quality requirements and not just the pollutant discharge.

The 2023 Rule requires the certifying authority evaluate whether *the activity* will comply with applicable water quality requirements, not the discharge. It further provides that the certifying authority's evaluation should assess the water quality-related impacts from *the activity* subject to the federal license or permit, including the activity's construction and operation. The Preamble expressly states 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.

The final regulatory text does require the water quality related impacts to be more than speculative. The 2023 Rule removes the word "potential" from the phrase "water quality related" in response to comments questioning the breadth of the term, but that does not necessarily narrow the application of restrictions.

This expanded scope of 401 WQC under the final rule cannot be underestimated. According to EPA, the 401 WQC process should include evaluation of the activity's construction and operation. This suggests any environmental impact from operating the project subject to the federal license or permit triggering 401 WQC may be restricted as any other appropriate requirement of State [or Tribal] law without limitation.

### **CONCLUSION AND RECOMMENDED ACTION**

Facilities applying for or renewing NPDES permits and/or 404 fill permits may be at a disadvantage under the new regulations governing 401 WQCs. Pre-filing meetings now are not required, the WQC request is expanded, timing for a final decision is less defined, and the WQC may include restrictions or limitations on more than just the discharge of pollutants.

To best prepare for the new guidelines, it is recommended facilities evaluate all potential water quality impacts (including impacts from construction projects, operation of the business, storm water runoff, and land application processes) to minimize the risk restrictions on those practices may become part of the permits necessitating a 401 WQC decision.

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