



US Army Corps
of Engineers®

REGULATORY GUIDANCE LETTER

No. 19-02

Date: 07 August 2019

SUBJECT: Timeframes for Clean Water Act Section 401 Water Quality Certifications and Clarification of Waiver Responsibility

1. Purpose, Applicability, and Definitions

Purpose. The purpose of this guidance is to clarify timeframes and improve efficiency for receiving Section 401 Water Quality Certification (401 WQC) decisions from the certifying agency pursuant to 33 U.S.C. § 1341 as promulgated at 33 CFR 325.2(b)(1). This guidance will also clarify the Corps' 401 WQC waiver determination process and responsibilities when the Corps is not the lead federal agency when multiple federal licenses or permits are needed for a proposed project.

Applicability. This guidance applies to both individual permits and general permits that require a 401 WQC. This guidance shall apply prospectively, and pertains to, permit applications that the Corps receives after the date this Regulatory Guidance Letter (RGL) is issued; permit modifications that warrant reconsideration of the 401 WQC; and instances where a 401 WQC expires prior to the permittees completing the discharges authorized by the Corps permit.

This guidance is based on regulations that contain legally binding requirements. This guidance is not a substitute for those regulations, does not create legally binding requirements, and is not a regulation itself. The Corps retains the discretion to adopt approaches on a regional or case-by-case basis that differ from those provided in this guidance, as appropriate and consistent with statutory and regulatory requirements. This RGL updates and supersedes guidance for provisional permits for actions pending receipt of 401 WQCs as described within RGL 93-01, Provisional Permits. If the Corps revises its regulations at 33 CFR 325.2(b)(1), this RGL and other existing guidance will be reviewed to determine if any revisions are needed.

Definitions. For the purposes of this guidance:

- a. "401 WQC" means the certification required to be provided by the applicant to the licensing or permitting agency, pursuant to 33 U.S.C. § 1341 (Section 401), before a permit may be granted, unless it is determined by the licensing or permitting agency that the certifying agency has waived its Section 401 authority.
- b. "Act" means to certify a discharge pursuant to Section 401 through the issuance of a 401 WQC, to deny certification of a discharge pursuant to Section 401 by explicitly denying an application for a 401 WQC, or to provide a written statement

that the certifying agency is waiving the requirement for a 401 WQC.

- c. “Certifying agency” means the entity responsible for issuing the 401 WQC, which may be a state, tribe, interstate agency, or the U.S. Environmental Protection Agency (EPA).
- d. “District engineer” refers to the Corps official(s) authorized to issue or deny permits consistent with 33 CFR 325.8, or to issue general permits including regional general permits and programmatic general permits. The district engineer may also issue verifications of nationwide permit authorization as codified at 33 CFR 330.6.
- e. “Lead federal agency” means the federal agency that leads and coordinates the federal license, permit, or action. If multiple federal agencies are involved, the “lead federal agency” would be the federal agency with the most authority, funding, or involvement in the project. In most circumstances, the “lead federal agency” is the lead agency for purposes of compliance with the National Environmental Policy Act (see 33 CFR 325, Appendix B(8)(a-c), 40 CFR 1501.5-6 and 1508.16).
- f. “Permit” means a permit issued by the Corps pursuant to its authority under Section 404 of the Clean Water Act (CWA), Section 103 of the Marine Protection, Research, and Sanctuaries Act (MPRSA), and/or Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA).
- g. “WQC timeframe” means within 60 days after receipt of a valid request for certification, unless a shorter or longer timeframe has been determined by the district engineer to be reasonable (either on a case-by-case basis or through a formal agreement between the district engineer and the certifying agency), but not to exceed one year as required by 33 U.S.C. § 1341(a)(1).

2. Background

The Corps has the authority to issue permits under Section 404 of the CWA, Section 103 of the MPRSA, and Sections 9 and 10 of the RHA. Section 401 of the CWA requires that any applicant for a federal license or permit for an activity that may result in any discharge into waters of the United States must obtain a certification from the certifying agency specifying that the activity will comply with all applicable CWA requirements, unless a waiver has occurred.

3. Guidance

A. Water Quality Certification (WQC) Timeframes

The Corps regulation at § 325.2(b)(1)(ii) states that “[n]o permit will be granted until the required certification has been obtained or has been waived.” Section

325.2(b)(1)(ii) further states that “[a] waiver may be explicit or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such request unless the district engineer determines that a shorter or longer period is reasonable for the [certifying agency] to act.” In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a request for certification (§ 325.2(b)(1)(ii)).

The regulations also specify that if it appears that circumstances may reasonably require a period of time that is lesser or greater than 60 days, so long as it does not exceed one year, the district engineer will determine a reasonable period of time for the certifying agency to act. If the district engineer determines that the circumstances reasonably require less than 60 days, the district engineer will advise the certifying agency of the need for action by a particular date, and that a waiver will occur if the certifying agency does not act by such date. Similarly, the district engineer will also advise the certifying agency when it determines that the circumstances reasonably require more than 60 days (§ 325.2(b)(1)(ii)).

The one-year period set forth in the Section 401 of the CWA is the maximum allowable time period for a decision by the certifying agency and should not be used as the default timeframe by district engineers when determining whether a waiver has occurred. In other words, the 60 days identified in § 325.2(b)(1)(ii) should generally be considered the default reasonable time period for 401 WQCs associated with Corps’ permitting actions. Any additional time granted should be the minimum amount of time necessary for the certifying agency to act on a 401 WQC request and should not default to one year from receipt of such request. If the certifying agency’s request for additional time to act is not received before the 60 day period (or other reasonable time period established for the action) ends, the requirement to obtain a 401 WQC is waived and the district engineer should proceed with the permit evaluation. The district engineer should notify the applicant and the certifying agency in writing when a waiver has occurred.

When a certifying agency has promulgated requirements mandating timeframes for 401 WQC review that are different from the default timeframe set forth in Corps regulations (i.e., 60 days), it may be appropriate for districts to develop formal programmatic agreements with such certifying agencies to identify alternative timeframes for issuing or waiving 401 WQCs. This flexibility is recognized in the preamble to *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 FR 41206, 41211 (Nov. 13, 1986). For example, a formal programmatic agreement between the Corps district and the certifying agency may be necessary if the certifying agency’s 401 processing timeframe, as defined in law or regulation, exceeds 60 days. District engineers should re-evaluate any existing 401 WQC agreements with certifying agencies that are inconsistent with this guidance, and should work with certifying agencies to establish new written agreements that are consistent with this guidance and existing federal law. Informal or unwritten arrangements should not be used to establish

alternative timeframes for 401 WQC processing.

(1) Considerations for Supporting Timeframe Extensions. District engineers may use their own discretion in extending timeframes, as long as it does not exceed the maximum one-year timeframe under the statute; however, the following are examples of considerations for supporting timeframe extensions:

(i) *Type and Complexity of Proposed Activity.* One factor for considering timeframe extensions is the type of activity proposed. For example, a minor fill authorized by nationwide permit (NWP) 18 that will use clean fill should not require substantial 401 WQC analysis. On the other hand, a proposed new industrial facility with complex operational functions and components potentially affecting water quality may require more analysis and additional time to determine compliance with applicable effluent limitations and water quality standards.

(ii) *Certifying Agency Public Hearing Requirements.* Certifying agencies may request that timeframes be extended in cases where a public hearing will be held by the certifying agency for a request for a 401 WQC. As required by 33 U.S.C. § 1341(a), certifying agencies may establish procedures for public hearings. The certifying agency may require additional time to address comments received during the public hearing, to determine whether the proposed activities and discharges would comply with applicable effluent limitations and water quality standards.

(iii) *Non-Typical Activity.* Certifying agencies may need additional time to review the 401 WQC request for activities or industries that are relatively new or substantially expanded in a region and have not been previously evaluated, in order to determine compliance with applicable effluent limitations and water quality standards.

(iv) *Unique or Complex Site Conditions.* District engineers may consider the complexity of the project site when evaluating requests for extended timeframes for unique or complex site conditions. For example, some project sites may have various aquatic resource types, contaminants, or other water quality concerns that may require additional time for the certifying agency to act on the request for 401 WQC. Also, it might be appropriate to give certifying agencies more time if the request for 401 WQC includes a proposed discharge into a water body with a special designation (e.g., a critical resource water or an outstanding resource water).

(v) *Magnitude of Impact to Aquatic Resources.* It may be appropriate to extend timeframes for projects that are expected to impact a substantial acreage of aquatic resources or involve a discharge of substantial size, because the certifying agency may need additional time to determine compliance with applicable effluent limitations and water quality standards.

(2) Considerations Not Supporting Timeframe Extensions. The Corps recognizes the importance of a certifying agency's independent authority for evaluating

proposed discharges to determine compliance with its 401 WQC requirements. However, the following reasons should generally be considered as not supporting timeframe extensions:

(i) *Public Notice Requirements.* Pursuant to 33 U.S.C. § 1341(a)(1), certifying agencies are required to establish procedures for public notices. The procedures should provide sufficient time within the 60 day period to issue such notices. Consequently, as a general rule the Corps should not grant time extensions to allow the certifying agency to publish a public notice.

(ii) *Workload Issues.* The district engineer should not grant additional time if the state or tribal certifying agency's request is based solely on workload issues, such as a backlog of 401 WQC requests.

(iii) *Certifying Agency Office Resource Issues.* The district engineer should not grant additional time if the state or tribal certifying agency's request is based on fiscal resource issues, such as insufficient staffing levels, or funding constraints.

(3) Permit Authorizations. The procedures described below are intended to facilitate a formal communication between the Corps, the applicant, and the certifying agency to clearly indicate that the applicant should be in contact with the appropriate certifying agency to satisfy the requirements for 401 WQCs. In addition, the procedures described herein should allow for a more accurate measurement of the Corps permit evaluation timeframes.

(i) *Individual Permits:* In determining the reasonable time period or whether a waiver has occurred, the district engineer should coordinate with the certifying agency to verify if they have received a 401 WQC request (see § 325.2(b)(1)(ii)). If a certifying agency issues a conditioned, activity-specific 401 WQC, the district engineer will include those conditions as special conditions of the individual permit. In cases where the district engineer has made a decision that an individual permit should be issued, and the only action preventing issuance of the individual permit is that the certifying agency has not issued a 401 WQC, the district engineer may send a provisional permit to the applicant. A provisional permit is a process used by the Corps to notify the permit applicant that the district engineer has decided to issue the individual permit provided the certifying agency issues a 401 WQC (or a waiver occurs). A provisional permit has no legal effect and does not authorize the applicant to undertake the activities for which the permit is sought until such time the 401 WQC is issued or waived. In cases where an applicant proceeds with the project upon receipt of the provisional permit, the Corps has discretion to initiate an enforcement action and should proceed as the district engineer determines appropriate.

The provisional permit should include a transmittal sheet that clearly indicates the following: a provisional permit is enclosed; the applicant must still obtain the 401 WQC before undertaking the activities that require a permit; the 401 WQC must be sent to the Corps; and the Corps will issue the legally binding, effective permit upon receipt of the

required materials. The provisional permit should contain a statement indicating that the applicant is required to comply with the 401 WQC, including any conditions. The transmittal letter to the applicant should specify that no final Department of the Army authorization can be issued until a 401 WQC has been issued or waived. Upon receipt of the 401 WQC, the district engineer should then provide the applicant with the permit following the process described at 33 CFR part 331. If the applicant accepts the terms and conditions of the permit then he or she may sign the permit and return it to the district engineer who may then countersign the permit. If the applicant objects to the terms and conditions of the permit, he or she may ask the district engineer to reconsider those terms and conditions (except for conditions in a 401 WQC, since the district engineer does not have the authority to change those conditions).

Alternatively, if the certifying agency has not acted on the 401 WQC request within the WQC timeframe, the district engineer should consider the 401 WQC requirement to be waived, inform the applicant and the certifying agency that the waiver has occurred, and proceed with making a permit decision.

The Corps' regulations at § 320.4(j)(1), in addressing other Federal, state, or local requirements set forth procedures for circumstances where the certifying agency has denied the requested 401 WQC. The Corps regulations at § 320.4(j)(1) state where the required 401 WQC has been denied for activities which also require a Department of the Army permit before final action has been taken on the permit application, the district engineer will, after considering the likelihood of subsequent approval of the certification and the time and effort remaining to complete processing the permit application, either immediately deny the permit without prejudice or continue processing the application to a conclusion. If the district engineer continues processing the application, the district engineer may conclude by either denying the permit as contrary to the public interest, or denying it without prejudice, indicating that except for the 401 WQC denial the permit could, under appropriate conditions, be issued.

In instances where the district engineer has determined that the 401 WQC requirement has been waived, and after the district engineer has issued the individual permit, the certifying agency denies the request for 401 WQC, the individual permit will remain valid and in effect.

(ii) Activities covered by Regional General Permits (RGPs) requiring 401 WQCs: When the district engineer issues an RGP for activities that may result in discharges into waters of the United States, the certifying agency may issue a general 401 WQC for that RGP, with or without special conditions. The certifying agency may also expressly waive the requirement to obtain 401 WQC for that RGP. Alternatively, the certifying agency may deny a general 401 WQC for that RGP (either by expressly denying the 401 WQC or by failing or refusing to take any action on the request for general 401 WQC), in which case applicants seeking authorization under that RGP will need to obtain individual 401 WQCs in addition to meeting the terms and conditions of that RGP.

When a proposed activity authorized by a RGP requires an individual 401 WQC, and the proposed activity requires notification to the district engineer, the district engineer should issue the RGP verification within the timeframes specified in the RGP if the proposed activity complies with the terms and conditions of the RGP, except for the need to obtain an individual 401 WQC. The activity is not authorized by the RGP until the certifying agency issues the 401 WQC or until the district engineer has determined a waiver has occurred. If the proposed activity requiring authorization under the RGP does not require notification to the district engineer, the project proponent is responsible for obtaining an individual 401 WQC from the certifying agency. If the certifying agency issues a conditioned activity-specific 401 WQC, the district engineer will include those conditions as activity-specific conditions of the RGP verification. If the certifying agency has not acted on the 401 WQC request within the WQC timeframe, the district engineer should consider the 401 WQC requirement waived. The district engineer should inform the applicant and the certifying agency that the waiver has occurred then proceed with verifying the RGP.

If the certifying agency denies the individual 401 WQC within the reasonable timeframe determined by the district engineer, the district engineer should inform the applicant in writing whether the proposed activity complies with the terms and conditions of the RGP, that the verification request is denied without prejudice, and that an individual 401 WQC must be furnished to the district engineer before the activity is authorized by the RGP. If the certifying agency denies the 401 WQC request after the district engineer has determined a waiver has occurred, notified the applicant and certifying agency that a waiver has occurred, and verified the use of the general permit, the RGP verification will remain valid.

(iii) Nationwide Permits (NWP) without general 401 WQCs: For activities covered by a NWP for which the certifying agency has denied 401 WQC, in response to a NWP pre-construction notification the district engineer will issue a response stating (where appropriate) that the proposed activity meets the terms and conditions for authorization under the NWP with the exception of the need for an activity-specific 401 WQC (see § 330.6(a)(3)(iii)). The district engineer's response will also indicate that NWP authorization for the activity is denied without prejudice and cannot be authorized until the requirements of § 330.4(c)(3) and § 330.4(c)(6) have been satisfied. The district engineer's response will also indicate that the discharge or other activity can proceed under the NWP authorization only subject to the terms and conditions of the 401 WQC. If the certifying agency issues a conditioned activity-specific 401 WQC, the district engineer will include those conditions as activity-specific conditions of the NWP authorization (see § 330.4(c)(2)).

The Corps' regulations at § 330.4(c) set forth procedures for individual 401 WQCs associated with NWPs. As stated in § 330.4(c)(6), instances where a certifying agency has denied 401 WQC for discharges under a particular NWP (i.e., where the certifying agency has not issued a general 401 WQC for an NWP and/or has failed to or refused to act thereby waiving the 401 WQC requirement for that NWP), permittees

must furnish the district engineer with an individual 401 WQC or a copy of the request for an individual 401 WQC sent to the certifying agency.

The regulations further state that for NWPs where the certifying agency has denied the 401 WQC, the district engineer will determine a reasonable period of time after receipt of the request for an activity-specific individual 401 WQC (generally 60 days), upon the expiration of which the district engineer will presume waiver of the certification for the individual activity covered by the NWPs. However, as described in § 330.4(c)(6), the district engineer and the certifying agency may negotiate for additional time for the certifying agency to act on requests for 401 WQCs, but in no event shall the period exceed one year (see § 325.2(b)(1)(ii)). Such negotiations should be documented in writing. If the certifying agency fails to act on the request for 401 WQC within either the statutory timeframe, within the reasonable timeframe determined by the district engineer, or the timeframe established in a formal agreement between the Corps and the certifying agency under § 325.2(b)(1)(ii) (and the timeframe is not modified by the district engineer), then the requirement for the WQC has been waived. Under these circumstances district engineers should notify the applicant and the certifying agency that a waiver has occurred.

B. Clarification of Waiver Responsibility

Pursuant to § 325.2(b)(1)(ii), when the Corps is the lead federal agency, it is the District Engineer's responsibility to verify a request has been received, and determine whether or not a waiver has occurred due to the certifying agency failing to act on a request for certification within a reasonable period of time. For proposed discharges where the Corps is not the lead federal agency, the Corps should attempt to communicate with the lead federal agency early in the process to coordinate the Corps' timeframe for 401 WQC waiver period and to determine if a 401 WQC is required. However, it is important to note that when the lead federal agency's proposed Federal action requires a 401 WQC, it is the lead federal agency's responsibility to determine whether a waiver of the 401 WQC requirement has occurred in accordance with their regulations, policies, and/or guidance. The Corps should document when such waivers occur in its administrative record when the lead federal agency has determined the requirement for a 401 WQC has been waived. Reliance on the lead federal agency's determination for WQC timeframes should eliminate duplication of effort and create a more predictable process for the applicant. If the lead federal agency's proposed Federal action does not require 401 WQC, the district engineer would then determine whether a waiver has occurred, as described in this guidance.

4. **Duration.** This guidance remains effective unless revised or rescinded.

A handwritten signature in black ink, appearing to read "Scott A. Spellmon". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

SCOTT A. SPELLMON
Major General, USA
Deputy Commanding General
for Civil and Emergency Operations