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6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 121

[EPA-HQ-OW-2021-0302; FRL-10023-97-OW]

Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification

Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intent.

SUMMARY: In accordance with Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Executive Order 13990), the U.S. Environmental Protection Agency (EPA) announces its intention to reconsider and revise the Clean Water Act Section 401 Certification Rule. In addition, EPA will initiate a series of stakeholder outreach sessions and invite written feedback on how to revise the requirements for water quality certifications under the Clean Water Act. EPA intends to revise the Clean Water Act Section 401 Certification Rule in a manner that is well informed by stakeholder input on the rule's substantive and procedural components; is better aligned with the cooperative federalism principles that have been central to the effective implementation of the Clean Water Act; and is responsive to the national objectives outlined in President Biden's Executive Order 13990.

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DATES: Written feedback must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may send written feedback, identified by Docket ID No. EPA-HQ-OW-2021-0302, 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-2021-0302 in the subject line of the message.

Instructions: All submissions received must include the Docket ID Number. Written feedback received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit written feedback via <https://www.regulations.gov/> or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

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

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SUPPLEMENTARY INFORMATION: Clean Water Act (CWA) Section 401 provides states¹ and tribes² 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 activity that may result in 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 Sections 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).

EPA promulgated implementing regulations for water quality certification (1971 regulation)³ prior to the 1972 amendments to the Federal Water Pollution Control Act (commonly known as the Clean Water Act or CWA), which created Section 401. In 2020, EPA revised these regulations found at 40 CFR part 121. Clean Water Act Section 401 Certification Rule (“401 Certification Rule”), 85 FR 42210 (July 13, 2020).

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 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).

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

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On January 20, 2021, President Biden signed Executive Order 13990 directing federal agencies to review rules issued in the prior four years that are, or may be, inconsistent with the policy stated in the order. Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Executive Order 13990, 86 FR 7037 (published January 25, 2021, signed January 20, 2021). The order provides that “[i]t is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.” *Id.* at 7037, Section 1. The order “directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.” *Id.* “For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions.” *Id.* at 7037, Section 2(a). The 401 Certification Rule was identified for review under the Executive Order. *See* Fact Sheet: List of Agency Actions for Review, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/> (last visited on April 26, 2021).

EPA has completed its initial review of the 401 Certification Rule and determined that it will propose revisions to the rule through a new rulemaking effort. The agency has considered

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the following factors in making this determination, including but not limited to: the text of CWA Section 401; Congressional intent and the cooperative federalism framework of CWA Section 401; concerns raised by stakeholders about the 401 Certification Rule, including implementation related feedback; the principles outlined in the Executive Order; and issues raised in ongoing litigation challenges to the 401 Certification Rule. As described below, the agency has identified substantial concerns with a number of provisions of the 401 Certification Rule that relate to cooperative federalism principles and CWA Section 401's goal of ensuring that states are empowered to protect their water quality.

Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("Fox"); *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983) ("State Farm"). Importantly, such a revised decision need not be based upon a change of facts or circumstances. A revised decision based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion" *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-15).

EPA does not intend to replace the 401 Certification Rule with the 1971 regulation. Instead, EPA plans to reconsider and revise the 401 Certification Rule consistent with the principles outlined in the Executive Order and the agency's legal authority. Additionally, EPA seeks to revise the rule in a manner that promotes efficiency and certainty in the certification process, that is well-informed by stakeholder input on the 401 Certification Rule's substantive and procedural components, and that is consistent with the cooperative federalism principles central to CWA Section 401.

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Questions for Consideration

The issues EPA intends to reconsider include, but are not limited to, whether the rule appropriately considers cooperative federalism principles central to CWA Section 401. EPA has substantial concerns about whether portions of the rule impinge on those principles. EPA also intends to reconsider whether certain procedural components of the rule improve, or impede, the certification and licensing/permitting processes. To assist in its development of a proposed revision, EPA is considering specific provisions of the rule for potential revision. EPA welcomes feedback related to key issues identified during implementation of the 401 Certification Rule, including but not limited to, the following:

1. *Pre-filing meeting requests.* The rule requires project proponents to submit a “pre-filing meeting request” to certifying authorities at least 30 days prior to submitting a certification request. 40 CFR 121.4. EPA is interested in the utility of the pre-filing meeting process to date, including but not limited to, whether the pre-filing meetings have improved or increased early stakeholder engagement, whether the minimum 30 day timeframe should be shortened in certain instances (e.g., where a certifying authority declines to hold a pre-filing meeting), and how certifying authorities have approached pre-filing meeting requests and meetings to date.

2. *Certification request.* The rule defines a certification request as “a written, signed, and dated communication that satisfies the requirements of [section] 121.5(b) or (c).” *Id.* at 121.1(c). Among other issues, EPA is concerned that the rule constrains what states and tribes can require in certification requests, potentially limiting state and tribal ability to get information they may need before the CWA Section 401 review process begins. EPA is interested in stakeholder input on this definition and the elements of a certification request contained at 40 CFR 121.5, including but not limited to, the sufficiency of the elements described in 40 CFR 121.5(b) and

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(c), and whether stakeholders have experienced any process improvements or deficiencies by having a single defined list of required certification request components applicable to all certification actions.

3. Reasonable period of time. CWA Section 401 requires a certifying authority to act on a certification request within a defined time period known as the “reasonable period of time.” The rule requires the federal licensing or permitting agency to determine the reasonable period of time using a series of factors, provided that the time does not exceed one year from the date a certifying authority receives a certification request. *Id.* at 121.6. Additionally, the rule allows federal agencies to extend the reasonable period of time within that one year time period at a certifying authority or project proponent’s request, but does not allow certifying authorities to take any other action to extend or modify the reasonable period of time. *Id.* Among other issues, EPA is concerned that the rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests and limits the factors that federal agencies may use to determine the reasonable period of time. EPA is seeking stakeholder input on the process for determining and modifying the reasonable period of time, including but not limited to, whether additional factors should be considered by federal agencies when setting the reasonable period of time, whether other stakeholders besides federal agencies have a role in defining and extending the reasonable period of time, and any implementation challenges or improvements identified through application of the rule’s requirements for the reasonable period of time.

4. Scope of certification. The rule limits 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), to “assuring that a discharge from a Federally licensed or

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permitted activity will comply with water quality requirements.” *Id.* at 121.3. The rule defines “water quality requirements,” as the “applicable provisions of [sections] 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.” *Id.* at 121.1(n). Among other issues, EPA is concerned that the rule’s narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality. EPA is seeking stakeholder input on the rule’s interpretation of the scope of certification and certification conditions, and the definition of “water quality requirements” as it relates to the statutory phrase “other appropriate requirements of state law,” including but not limited to, whether the agency should revise its interpretation of scope to include potential impacts to water quality not only from the “discharge” but also from the “activity as a whole” consistent with Supreme Court case law, whether the agency should revise its interpretation of “other appropriate requirements of State law,” and whether the agency should revise its interpretation of scope of certification based on implementation challenges or improvements identified through the application of the newly defined scope of certification.

5. Certification actions and federal agency review. The rule provides that certifying authorities may take one of four actions on a certification request, including granting certification, granting certification with conditions, denying certification, or waiving certification. *See id.* at 121.7, 121.9. The rule requires that certifying authorities include specific information when granting certification, granting certification with conditions or denying certification. *Id.* at 121.7(c)-(e). Additionally, the rule requires federal agencies to review certifying authority actions to determine whether they comply with the procedural requirements of CWA Section 401 and the 401 Certification Rule. *Id.* at 121.9. Among other issues, EPA is

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concerned that a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of nonsubstantive and easily fixed procedural concerns identified by the federal agency. EPA is seeking stakeholder input on the certification action process steps, including but not limited to, whether there is any utility in requiring specific components and information for certifications with conditions and denials, whether it is appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose, and if so, whether there should be greater certifying authority engagement in the federal agency review process including an opportunity to respond to and cure any deficiencies, whether federal agencies should be able to deem a certification or conditions as "waived," and whether, and under what circumstances, federal agencies may reject state conditions.

6. *Enforcement.* The rule provides that federal agencies are responsible for enforcing certification conditions that are incorporated into a federal license or permit. *Id.* at 121.11(c). The rule does not provide a role for certifying authorities to enforce certification conditions under federal law. Additionally, the rule restates the statutory provision that provides certifying authorities with the ability to inspect certified projects prior to their initial operation. *Id.* at 121.11(a). EPA is interested in stakeholder feedback on enforcement of CWA Section 401, including but not limited to, the roles of federal agencies and certifying authorities in enforcing certification conditions, whether the statutory language in CWA Section 401 supports certifying authority enforcement of certification conditions under federal law, whether the CWA citizen suit provision applies to Section 401, and the rule's interpretation of a certifying authority's inspection opportunities.

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7. Modifications. The rule removed the 1971 regulation’s provision that allowed for modifications where agreed upon by the certifying authority, federal agency, and EPA. See 85 FR 42220 (July 13, 2020). Additionally, the rule prevents certifying authorities from extending the reasonable period time unilaterally, including but not limited to, the use of conditions intended to reopen a certification (“reopeners”). Among other issues, EPA is concerned that the rule’s prohibition of modifications may limit the flexibility of certifications and permits to adapt to changing circumstances. EPA is interested in stakeholder feedback on modifications and “reopeners,” including but not limited to, whether the statutory language in CWA Section 401 supports modification of certifications or “reopeners,” the utility of modifications (e.g., specific circumstances that may warrant modifications or “reopeners”), and whether there are alternate solutions to the issues that could be addressed by certification modifications or “reopeners” that can be accomplished through the federal licensing or permitting process.

8. Neighboring Jurisdictions. The rule addresses the so-called “neighboring jurisdiction” process in CWA Section 401(a)(2), including interpreting the timeframe in which a federal agency must notify EPA for purposes of Section 401(a)(2) and providing process requirements for the agency’s analysis and the neighboring jurisdictions’ review and response. EPA is interested in stakeholder feedback on the neighboring jurisdiction process, including but not limited to, whether the agency should elaborate in regulatory text or preamble on considerations informing its analysis under CWA Section 401(a)(2), whether the agency’s decision whether to make a determination under CWA Section 401(a)(2) is wholly discretionary, and whether the agency should provide further guidance on the Section 401(a)(2) process that occurs after EPA makes a “may affect” determination.

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9. Data and Other Information. EPA is interested in receiving any data or information from stakeholders about the application of the 401 Certification Rule, including but not limited to, impacts of the rule on processing certification requests, impacts of the rule on certification decisions, and whether any major projects are anticipated in the next few years that could benefit from or be encumbered by the 401 Certification Rule's procedural requirements. Additionally, EPA is interested in stakeholder feedback about existing state CWA Section 401 procedures, including whether the agency should consider the extent to which any revised rule might conflict with existing state CWA Section 401 procedures and place a burden on those states to revise rules in the future.

10. Implementation Coordination. EPA is interested in hearing from stakeholders about facilitating implementation of any rule revisions. For example, given the relationship between federal provisions and state processes for water quality certification, should EPA consider specific implementation timeframes or effective dates to allow for adoption and integration of water quality provisions at the state level. Similarly, EPA is interested in receiving feedback on whether concomitant regulatory changes should be proposed and finalized simultaneously by relevant federal agencies (e.g., the Army Corps of Engineers, Federal Energy Regulatory Commission) so that implementation of revised water certification provisions would be more effectively coordinated and would avoid circumstances where regulations could be interpreted as inconsistent with one another.

Outreach

EPA is aware that CWA Section 401 and the 401 Certification Rule are of interest to many states, tribes, federal agencies, project proponents, and the public because of the relationship between water quality certifications and federal licensing and permitting processes.

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As a result, EPA wants to ensure that it has the opportunity to consider stakeholder input prior to revising the 401 Certification Rule. EPA intends to have multiple webinar-based listening sessions to solicit feedback on potential approaches to revise the 401 Certification Rule. During these listening sessions, EPA will provide background information on the prior rulemaking effort. Stakeholders will have the opportunity to provide input to EPA on the topics provided above and any other relevant information on the 401 Certification Rule for the agency's consideration. Information on the listening session dates, times, and registration instructions will be made available on EPA's website, located at <https://www.epa.gov/cwa-401>. Persons or organizations wishing to provide verbal input during a listening session will be selected on a first-come, first-served basis, with consideration given to hearing from different stakeholder groups. Due to the expected number of participants, individuals will be asked to limit their oral presentation to three minutes. Further instructions on signing up and participating in listening sessions will be made available on EPA's website above at a later date. Supporting materials and written feedback from those who do not have an opportunity to speak can be submitted to the docket as described above.

Michael S. Regan,
Administrator.