

**EPN Comments on EPA's Proposed Rule: Clean Water Act Section 401  
Water Quality Certification Improvement Rule**

Docket No: EPA-HQ-OW-2022-0128

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Founded in 2017, the [Environmental Protection Network](https://www.epn.org/) (EPN) harnesses the expertise of more than 550 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators with decades of historical knowledge and subject matter expertise.

EPN is pleased to comment on EPA's proposed Clean Water Act (CWA) Section 401 Water Quality Certification Improvement Rule. EPN finds that this proposed rule, revising and replacing the 2020 rule, is more consistent with the statutory text of the 1972 CWA and supports an improved certification process that better protects water quality and cooperative federalism principles. We support the major elements of the proposed rule and provide reasons for our support in the following comments.

**Pre-filing Meeting Requests**

EPN supports EPA's retention of the 2020 rule's requirement for project proponents to participate in pre-filing meetings with the certifying authority; this early communication will result in improved preparation of requests for certification that will speed certification decisions. We also support the proposed new provision giving certifying authorities the ability to waive or shorten the minimum 30-day pre-filing time period to further speed certification decisions when the authority determines that additional time is not needed.

**Requests for Certification**

EPN is very supportive of the proposed rule's new requirement that all requests for certification include the draft federal permit/license and all available information on the project's water quality impacts. EPN believes that this information is essential for a certifying authority to make a decision about a project's impacts. EPN commends EPA for proposing that state/tribal certifying authorities be allowed to define additional information requirements "necessary to make an informed decision regarding protecting their water quality" in their regulations. The 2020 rule did not allow these authorities to develop their own information requirements, a restriction that prevented state and tribal authorities from having critical information before facing deadline pressure to grant or deny certification.

**Reasonable Period of Time**

EPN supports EPA's proposal to replace the 2020 rule's provision that federal agencies unilaterally set the reasonable time period for review of certification requests with a process in which the federal agency and certification authority collaboratively set the time period. EPN supports the proposed provision that the federal agency and certifying authority can agree to extend the reasonable time period after it is set, provided that it does not exceed one year from receipt of the request for certification. EPN is also supportive of the 60-day default review time if the federal agency and certification authority do not reach agreement on the review time within 30 days of the certification authority's receipt of the request.

### **Scope of Review**

EPN commends EPA for proposing to reinstate the broader scope of review for the project “as a whole” that had been agency practice for 25 years and confirmed by the Supreme Court in 1994, until the 2020 rule replaced it with the narrower “discharge only” approach. This proposed broader review allows states and tribes to look beyond the pollution discharged into waterways and holistically evaluate the impact of a project on water quality.

### **Certification Decisions & Federal Agency Review**

EPN commends EPA for finally proposing definitions of certification decisions, which the 1971 and 2020 rules failed to do. The proposed rule describes the information required to document the decision to grant certification; grant certification with conditions; deny certification; or expressly waive certification. EPN commends EPA for proposing to eliminate the 2020 rule restrictions on incorporating certification conditions into permits/licenses and instead requiring all conditions to be included. EPN supports the proposed rule eliminating the ambiguity in the 2020 rule and making it clear that federal agency review is limited to determining whether: 1) the certification authority has indicated the nature of the decision; 2) the proper authority has issued the decision; 3) the authority provided public notice on the request for certification; and 4) the decision was issued within the reasonable time period. The 2020 rule stated only that the federal agencies were allowed to review certification decisions for compliance with the 2020 rule and deem non-compliant decisions to be waived.

### **Neighboring Jurisdiction Process**

EPN supports the proposed rule’s requirement that EPA must determine whether a neighboring state or tribe is impacted by a project, eliminating the discretion the 2020 rule gave EPA to make that determination. EPA should be required to make that determination since Section 401 makes EPA responsible for notifying other states or tribes that may be affected by a discharge from a federally licensed or permitted activity and for providing an evaluation and recommendations on the objections of such other states or tribes.

### **Tribal TAS for 401 Certification**

EPN supports the proposed rule’s provision for Tribes to obtain Treatment in a Similar Manner as a State (TAS) in order to act as the 401 certifying authority or as a neighboring jurisdiction for federally permitted/licensed projects. We recommend that Tribes be allowed to exercise this Section 401 authority without being required to have TAS for water quality standards under Section 303c.

### **EPA as Certifying Authority**

EPN members with years of experience in the 401 program have identified a problem which is not addressed in this proposed rule. Section 401 gives EPA the authority to provide certification when a state or tribe cannot do so, despite the fact that a project affects the waters of their state or reservation. This happens when the federally permitted/licensed project occurs on reservations where the Tribe lacks TAS or on lands exclusively under federal jurisdiction. Our members’ experience is that EPA rarely uses this certification authority in these situations. We urge EPA to investigate this issue and take appropriate action to ensure this authority is used appropriately.

**Conclusion**

EPN is very supportive of the proposed CWA Section 401 Water Quality Certification Improvement Rule and urges EPA to finalize this rule as quickly as possible. The 2020 rule currently in effect does not provide protection from the adverse holistic effects of federally permitted or licensed projects and fails to achieve the CWA goal of ensuring states, territories, and tribes are empowered to protect their water resources.