

THE NEW SECTION 401 WATER QUALITY CERTIFICATION RULE

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Background

- On July 13, 2020, the Environmental Protection Agency (EPA) published a final rule for implementing Section 401 of the Clean Water Act
- EPA stated that the purpose of the rule was to update and clarify the substantive and procedural requirements for water quality certifications (WQC)
- Final rule supersedes the implementing regulations promulgated in 1971
- Effective date of the new 401 Certification Rule was September 11, 2020



Definition

- Project proponent: applicant for a federal license or permit or the entity seeking certification
- Federal licensing or permitting agency: any agency of the Federal Government to which application is made for a license or permit that is subject to Clean Water Act section 401
- What are we a “Project Proponent or a Permitting Agency???”

We are BOTH!

USACE doesn't issue itself a permit, but we conduct 404(b)(1) evaluations (like USACE Regulatory as a Permitting Agency) AND we also function as the Project Proponent

License or Permit application is the trigger for requiring a WQC



Definition

What's a certifying authority??

- Certifying authority is defined as “...the agency responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act section 401”. (40 CFR 121.1(e))
- Certifying Authority can be a state agency, tribe or EPA



Pre-filing WQC Meeting

- Districts must notify certifying authority (i.e., state or tribe) 30 days prior to filing a WQC and must request a pre-filing meeting
 - Certifying authority does not have to accept invitation for a pre-filing meeting
 - Purpose of pre-filing meeting is for certifying authority to receive early notification of anticipated project, to discuss information needed and reasonable period of time to issue WQC
 - Should be one of the first meetings, **NOT** the only meeting to discuss WQC
 - Subsequent meetings are anticipated to discuss and resolve issues.

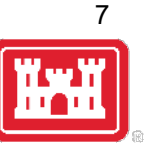


Pre-filing WQC Meeting

- HQUSACE recommends Districts invite certifying authority to the 90-day interagency meeting (as required by Section 1001 WRRDA 2014), which will meet pre-filing notification requirement
- Letter inviting the certifying authority to meeting should identify the meeting as a 90-day interagency meeting and as WQC pre-filing meeting
- The WQC can be issued during PED, but the District ***MUST*** still notify the certifying authority and request a pre-filing meeting 30 days before submitting the WQC request
- ***EARLY ENGAGEMENT IS CRITICAL to ensure meeting schedules and avoiding delays toward the end of feasibility!***



NEPA Scoping and WQC



- Districts must invite the certifying authority, potential neighboring jurisdiction and EPA to be a cooperating agency
- Districts notify the certifying authority, potential neighboring jurisdiction and EPA of the initiation of scoping and any scoping meetings for National Environmental Policy Act (NEPA) documents
- During Scoping meeting, discuss any preliminary water quality impact findings and solicit feedback from certifying authority



Reasonable Period of Time

- Reasonable period of time is defined as, “...time period during which a certifying authority may act on a certification request...” (40 CFR 121.1(l))
- Districts should first consult with the certifying authority to establish the reasonable period of time (40 CFR 121.6)
- Districts must notify the certifying authority (in writing) of the applicable reasonable period of time to act on the WQC request (40 CFR 121.6(b))
- The clock starts for the reasonable period of time when the certifying authority receives the WQC request (40 CFR 121.1(m))



Reasonable Period of Time

- Considerations when determining reasonable period of time:
 - Complexity of the proposed project, the nature of any potential discharges, and the potential need for additional study or evaluation of water quality effects from the discharges (40 CFR 121.6(c))
 - CAP projects and smaller GI studies the reasonable period of time could be 60 days
 - Larger GI studies might take longer
 - Consider certifying authority's state statutory time requirements when determining the reasonable period of time
- Extensions are allowed but total cannot exceed 1 year from receipt



Reasonable Period of Time

- HQUSACE recommends using a collaborative approach with certifying authority when determining the reasonable period of time
- Districts should start discussions with the certifying authority about the reasonable period of time as early as the 90-day meeting and NEPA scoping

EARLY ENGAGEMENT IS CRITICAL!!



Certifying Authorities Actions

- Certifying authorities may grant, grant with conditions or deny certification request (40 CFR 121.7)
- Certifying authorities may also waive certification



Certifying Authorities Actions (WQC w/no conditions)

- If certifying authority determines that any discharge from the proposed project will comply with water quality requirements, it may issue or waive certification (40 CFR 121.7(b))
- If certifying authority determines that no water quality requirements are applicable to the waters receiving the discharge from the proposed project, the certifying authority shall grant certification (40 CFR 121.7(f))
- Issues WQC without any conditions
 - Examples: De minimis amount of discharge going into the receiving water and receiving water meeting water quality standards
 - Most Corps projects may not fit this category



Certifying Authorities Actions (WQC w/conditions)

- Certifications with conditions must be in writing and each condition must include (40 CFR 121.7(d)):
 - Statement explaining why the condition is necessary to assure the project's discharge will meet water quality requirements of the receiving water body
 - Citation to a federal, state or tribal law



Certifying Authorities Actions (WQC Denial)

- Denials of certification by certifying authority must be in writing and must include (40 CFR 121.7(e)):
 - Specification of water quality requirement that the project will not comply with and Statement of why it will not comply **OR**
 - Can deny based on insufficient information
 - Districts can request a new WQC when they provided the additional needed information to the certifying authority
 - Can be avoided by requesting needed information from certifying authority at the at the 90-day interagency/pre-filing meeting and other subsequent meetings early in process



Certifying Authorities Actions (WQC waived)

- Certifying authority expressly waives its authority to act on a certification request in writing (40 CFR 121.9(a)(1))
- Certifying authority waives based on its failure or refusal to act on a certification request (40 CFR 121.9(a)(2))



Federal Agency Determination of Waivers

- Districts may waive a WQC if the certifying authority fails or refuses to act on a certification request, including:
 - Failure/refusal by certifying authority to provide WQC within reasonable period of time
 - A condition can be waived (but not the entire WQC) for failure/refusal by certifying authority to comply with 40 CFR 121.7
 - Provide statement why condition is necessary and state, federal or tribal citation
 - When certifying authority issues certification denial, certifying authority fails or refuses to satisfy the requirements of 40 CFR 121.7
 - Specify water quality requirement that the project will not comply with and Statement of why it will not comply



Federal Agency Determination of Waivers



- Determinations of waivers must be in writing in accordance with 40 CFR 121.9(c)
- Determinations of waivers that the certifying authority has not met any of the requirements of 40 CFR 121.7 must be approved by the appropriate decision-making authority (i.e., GI studies would be Vertical Team, CAP would be District or MSC, etc.)



Federal Agency Determination of Waivers

- Determination of waivers ***should be the LAST resort!***
 - Every effort should be made by the District to resolve issues with the certifying authority
 - Can be avoided by engaging certifying authority during 90-day meeting, scoping meeting and other coordination points, and by reviewing a draft WQC before the end of the reasonable period of time
- District ***MUST*** document:
 - Proactively communicated with certifying authority by calling, emailing, and formally writing the certifying authority
 - Elevated to both District senior leadership and certifying authority senior leadership



Documentation of WQC Conditions



- 40 CFR 121.10 requires that conditions within the WQC be documented in the license or permit
- USACE Civil Works Planning doesn't issue a license or permit so what does that mean???



Documentation of WQC Conditions

- To comply with 40 CFR 121.10, HQUSACE has determined that for:
 - WQC issued in feasibility:
 - Conditions that the District determines are necessary (in accordance with 121.7(d)(1)) to assure that the discharge from the project will comply with water quality requirements must be documented in the NEPA decision document (FONSI or ROD)
 - Conditions should also be summarized in the Water Quality Section and/or env compliance section of main report
 - WQC should be in an appendix of the integrated feasibility report/NEPA document



Documentation of WQC Conditions

- To comply with 40 CFR 121.10, HQUSACE has determined that for:
 - WQC not issued in feasibility:
 - Document letter of confirmation from certifying authority within the integrated feasibility report/NEPA document as required by ER 1105-2-100, Appendix C (pre-publication)
 - Commit to complying with any future WQC that the District determines are necessary (in accordance with 121.7(d)(1)) to assure that the discharge from the project will comply with water quality requirements must be documented in the NEPA decision document (FONSI or ROD)
 - NOTE: USACE continues to hold the right to waive any future WQC condition issued in PED that is **NOT** compliant with 121.7(d)(1) in accordance with 40 CFR 121.9



Documentation of WQC Conditions

- Nationwide and General Permits (Section 404):
 - Where the certifying authority has granted WQC for one or more general permits that cover the activities involved in a proposed project, this WQC can be used in lieu of project specific WQC
 - Examples-NWP 27 Aquatic Habitat Restoration, Establishment, and Enhancement Activities



Documentation of WQC Conditions

- Nationwide and General Permits (Section 404):
 - Districts MUST determine:
 - The project fits within the description of the activity authorized by a Nationwide (NWP) or General Permit (GP)
 - Meets the terms and conditions of the NWP or GP
 - Complies with the 404 (b)(1) analysis completed for the NWP or GP
 - Can then utilize the associated blanket WQC if one was issued by the relevant certifying authority – not all NWPs receive blanket WQCs
 - District will still need to coordinate with the WQC agency
 - Some certifying authorities require that they be notified prior to beginning work on any and all NWP authorized projects



Documentation of WQC Conditions



- Nationwide and General Permits (Section 404):
 - If a blanket WQC for a GP is being used for a Civil Works project, all conditions accepted by the Corps during the promulgation of the GP (refer to the District's public notice) need to be incorporated into the project and must be documented in the NEPA decision document (FONSI or ROD)
 - Conditions should also be summarized in the Water Quality Section and/or env compliance section of main report
 - Nationwide or General Permit WQC should be in an appendix of the integrated feasibility report/NEPA document



Letter of Confirmation



- What exactly is a letter of confirmation???
- What if the certifying authority doesn't have enough info in feasibility to issue the WQC?
- Current version of Appendix C-pre-publication, says if you can't get WQC in feasibility, then you must have the certifying authority give you a "letter of confirmation"
- Letter of Confirmation from the certifying authority should provide assurances that there are not any currently-known roadblocks to the certifying authority issuing WQC pending review of detailed information received during PED
 - Provide information needed by the certifying authority in PED (that is not available in feasibility so they can issue the WQC in PED)
 - Knowing what studies are needed is important to cost out additional studies not planned for in the report



Letter of Confirmation

- Example language that should be in Letter of Confirmation:
 - “The proposed federal activities are conditionally consistent with and are not likely to exceed state water quality standards.”
 - “The [state or tribe] is likely to issue the WQC once sufficient detail is provided.”
 - “The [state or tribe] has no significant issues or major concerns.”
 - “The [state or tribe] does not foresee any problems that would preclude issuance of a WQC.”
- HQUSACE can provide example letters



WQC Policy Exceptions



- When do I have to get a policy exception from ASA(CW)???
- No documented project specific WQC
- No coverage by a blanket WQC for an applicable nationwide or general permit
- No letter of confirmation from the certifying authority

POLICY EXCEPTIONS TAKE TIME!



What is a Neighboring Jurisdiction???

- Defined as, “Neighboring jurisdiction means any other state or authorized tribe whose water quality the [EPA] Administrator determines may be affected by a discharge for which a certification is granted pursuant to Clean Water Act section 401...” (40CFR 121.1(i))
- Because of importance of the neighboring jurisdiction determination by EPA to the project schedule, HQUSACE recommends Districts engage EPA and potentially impacted neighboring jurisdictions early in the process

EARLY ENGAGEMENT IS CRITICAL!!



Neighboring Jurisdiction Determination:



- Upon receipt of **ALL** WQC (whether in feasibility or PED), District should notify EPA Regional Office in writing within 5 days (40 CFR 121.12)
- The purpose of this notification is to give EPA an opportunity to determine if the project may affect any neighboring jurisdiction's (i.e., downstream or adjacent state or tribe's) water quality
- EPA has 30 days to determine if the discharge from the project may affect water quality in neighboring jurisdictions
- If EPA determines that the discharge may affect water quality of the neighboring jurisdiction, then they will notify that neighboring jurisdiction and District in writing
- Neighboring jurisdiction has 60 days to notify EPA and District (in writing) whether it has determined that the discharge will violate any of its water quality requirements, to object to the project and request a public hearing



Neighboring Jurisdiction Public Hearing:

- If the neighboring jurisdiction requests a public hearing, then the District ***MUST*** hold a public hearing
- Must notify vertical team that neighboring jurisdiction requests public hearing
- District must notify EPA at least 30 days before the hearing takes place
- At the hearing, EPA will discuss their evaluation and recommendation(s) concerning the objection
- District must consider recommendations from neighboring jurisdiction and EPA
- Based on recommendations:
 - Determine whether additional certification conditions are necessary to assure that the discharge from the project will comply with the neighboring jurisdiction's water quality requirements



Collaboration

- Because of the important role of the Certifying Authority, applicable neighboring jurisdictions and EPA in the certification process, Districts should:
 - Inviting them to become a Cooperating Agency
 - Inviting them to NEPA Scoping Meetings
 - Inviting them to participating on PDT
 - Continue to remain engaged throughout project development (feasibility through construction)
 - Consider annual or quarterly status meetings with Certifying Authority to go over status of requested WQC

EARLY ENGAGEMENT IS CRITICAL!!



Milestone Meetings

- Status of WQC should be discussed during each milestone meeting
- Issues related to WQC should be discussed with the vertical team to ensure timely resolution
- Vertical team engagement and communication is essential to ensure meeting project schedules

QUESTIONS?



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