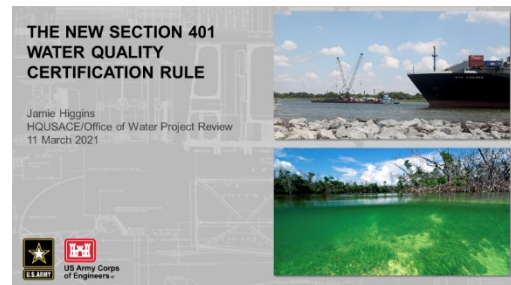


The New Section 401 Water Quality Certification Rule
March 11, 2021
Q&A Session

This webinar provided an overview of the new Clean Water Act (CWA) Section 401 Water Quality Certification Rule and its requirements for USACE Civil Works feasibility studies/project development, presented by Jamie Higgins (Environmental policy reviewer, HQUSACE Office of Water Project Review). The [new rule was published by the U.S. Environmental Protection Agency \(USEPA\) in July 2020](#) and came into effect on 11 September 2020. Districts must



request a water quality certification from the appropriate certifying authority to ensure compliance of a water resources development project with relevant water quality requirements. The presentation focused on changes to the Section 401 rule and how they should be implemented in USACE feasibility studies and documented in decision documents, including National Environmental Policy Act (NEPA) documents.

This summary of the Question / Answer session of the webinar is not a transcription; questions and responses have been edited and reordered for clarity.

Clarifying Clean Water Act (CWA) Section 401 Triggers

Since USACE does not issue permits or licenses to itself, which is the trigger for requiring a Section 401 water quality certification, does that mean USACE is not required to confirm its compliance with [CWA Section 404\(b\)\(1\) guidelines related to disposal sites for dredged material](#) or confirm use of [USACE Nationwide Permit 27 - Aquatic Habitat Restoration, Enhancement, and Establishment Activities](#) with the appropriate Regulatory Division?

Although USACE does not issue itself permits or licenses, the agency is required to comply with the substantive requirements of the CWA, including Section 401, if applicable, as USACE is required to comply with all federal laws and regulations. If the project in question has a Section 404 activity, a Section 401 water quality certification is required.

USACE does not “self-permit” and would not obtain a nationwide permit or general permit, but rather follows the terms and conditions of the relevant permit and any attached general water quality certification. While coordination with Regulatory is advisable with respect to nationwide or general permits, USACE can use the terms and conditions of the permit, as determined by the District Engineer.

For more information on the use of nationwide or general permits in a feasibility study, see the [Planning Guidance Notebook, Appendix C – Environmental Evaluation and Compliance \(pre-publication\)](#).

For operations and maintenance dredging or breakwater repairs, what is the specific trigger for a Section 401 certification, given that there is no regulated discharge (i.e., dredge effluent is de minimis discharge not regulated under the CWA Section 404 requirements, nor is breakwater repair within the authorized fill footprint)?

For operations and maintenance dredging discharges, it is recommended that the study team consult with MSC or Headquarters Operations staff, or with Office of Counsel for guidance regarding application of the 401 certification rule.

Required Coordination with USEPA

When USACE completes an evaluation of the effects of a proposed discharge consistent with the Section 404(b)(1) guidelines, is USEPA invited to review the evaluation?

Yes. The 404(b)(1) analysis should be included as part of the environmental compliance process and included in the proposed project's final report, and study teams should coordinate with USEPA on the review of the project via the environmental impact statement/environmental assessment review as required by NEPA.

Not every project requiring a Section 401 water quality certification goes through the NEPA process (e.g., dredging or breakwater repair projects); 401 certifications for those projects take place during the preconstruction engineering and design (PED) phase. For such a project, is USACE required to coordinate with USEPA, or only with the state that has primacy?

USEPA acts as the certifying authority (in some instances) and also makes a neighboring jurisdiction determination. There are a couple of instances in which the District must coordinate with USEPA as a "certifying authority." Districts must coordinate with USEPA as a certifying authority when USEPA certifies on behalf of a state or Tribe (i.e., when the jurisdiction in which the discharge will originate does not itself have certification authority). The other example of USEPA acting as a certifying authority is when the discharge originates on lands of exclusive federal jurisdiction.

Regardless of who the certifying authority is (state, Tribe or USEPA), the neighboring jurisdiction provision (40 CFR 121.12(a)) requires notification of the USEPA Regional Office within 5 days of receipt for ALL water quality certifications. USEPA's neighboring jurisdiction provision applies to any situation where a state issues a water quality certification, to include operations and maintenance dredging activities and water quality certifications issued in PED.

Regarding the NEPA part of the question, NEPA isn't the triggering mechanism for issuance of a Water Quality Certification. The issuance of a license or permit is the triggering mechanism for the Certification.

Water Quality Certification Issuance Requirements, including "Reasonable Period of Time"

Is there a uniform definition of "reasonable period of time" for USACE as it relates to the amount of time the certifying authority has to issue a certification?

HQUSACE decided that the definition of a "reasonable period of time" should be left up to the discretion of the Districts, particularly because of the varying levels of complexity of USACE projects requiring Section 401 water quality certifications. Districts should be familiar with the water quality certification process time frames in their states and confirm that this is the reasonable time frame based on the scale of the project and potential impacts.

How does USACE interpret the "reasonable period of time" set out in [33 CFR 336.1\(b\)\(8\), Discharges of dredged or fill material into waters of the U.S.](#)? Does it only apply to operations and maintenance and/or dredging activities?

HQUSACE has determined that this regulation (33 CFR 336.1(b)(8), Discharges of dredged or fill material into waters of the U.S.) does not apply to USACE feasibility studies. Questions regarding the application of the 401 rule to regulatory activities should be directed to MSC or Headquarters Regulatory staff.

The HQUSACE Regulatory Division issued [Regulatory Guidance Letter 19-02, Timeframes for Clean Water Act Section 401 Water Quality Certifications and Clarification of Waiver Responsibility](#) in August 2019, which established 60 days as the default “reasonable period of time” after receipt of a valid request for a certification and states that the District Commander should only agree to a longer period of time in exceptional circumstances, per 33 CFR 336.1(b)(8). Shouldn’t USACE therefore use a 60-day period as its standard definition?

The requirements in 33 CFR 336.1(b)(8) only apply to operations and regulatory projects and not to feasibility studies. Questions regarding the application of the 401 rule to regulatory activities should be directed to MSC or Headquarters Regulatory staff.

Per 33 CFR 336.1(b)(8)(iii), USACE should assume concurrence by the certifying authority after six months for a USACE Civil Works project. How does this impact the permit review process?

This rule only applies to Operations and Navigation projects. Any questions about this rule should be discussed with the appropriate District Office of Counsel and/or Regulatory Division points of contact.

For feasibility studies, Districts should establish a reasonable period of time in collaboration with the certifying authority. The certifying authority may request an extension, but it cannot extend past one year from initial receipt of the water quality certification request. Should the certifying authority not provide the water quality certification within the reasonable period of time, every effort should be made and documented to obtain a decision on the water quality certification. If the “reasonable period of time” requirement is not being met because a lack of information, then the District should work with the certifying authority to provide that additional information.

Additionally, teams should not assume concurrence by the certifying authority after any amount of time, nor should they consider a non-response from the certifying authority as a valid reason to waive the water quality certification. To waive the certification, concurrence is required from the vertical team and the justification provided by the District will be examined closely. In general, it is in the best interest of USACE for teams to make every effort to contact and work with the certifying authority to obtain a certification to minimize project risk during PED and Construction. To avoid these types of issues, HQUSACE recommends early and constant communication with the certifying authority, to include inviting them to be a cooperating agency and participating in the interagency meeting required within the first 90 days of study initiation.

Can the notification of the "reasonable period of time" determined by USACE occur in the application cover letter to the certifying authority?

Yes, the official notification of the period can be included in the application cover letter. However, the period should be discussed and agreed upon beforehand with the certifying authority.

Is HQUSACE planning to issue guidance regarding how a waiver determination is coordinated?

Because the Biden Administration issued an Executive Order stating that it will be reviewing numerous environmental regulations, including the Section 401 rule, HQUSACE has paused its work on issuing Section 401 guidance.

If there are two separate states impacted by a project, and therefore two separate Section 401 certifications required, should the District consult with each appropriate state agency separately to establish the “reasonable period of time”?

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HQUSACE recommends that Districts invite both state certifying authorities to participate as a cooperating agency and participate in the interagency meeting required within the first 90 days of study initiation. Each state might have different requirements and resource needs for processing the water quality certification, so their reasonable periods of times might be different.

What procedure should the certifying authority use to request more time?

Per 40 CFR 121.6, the certifying authority may request (in writing) to extend the reasonable period of time, and Districts may grant the extension (in writing). However, the total reasonable period of time cannot exceed one year. Should the certifying authority extension request cause project schedule delays, then the study's vertical team should be consulted before granting the request.

How should a District handle a certification denial based on "insufficient detail" if the required detail will not be available during the feasibility phase?

Denial of a water quality certification based on insufficient detail is a "denial without prejudice." HQUSACE recommends the District first consult with the certifying authority to find out what additional information is needed to adequately complete the water quality certification request. The District can then re-submit the certification request when the details required are available (per Section 121.8 (a)).

Is USACE required to pay a state's fees related to a Section 401 certification?

District study teams are encouraged to discuss the payment of state fees related to Section 401 certifications with their Office of Counsel.

If the water quality certification has been issued in a public notice as a part of a nationwide permit or general permit, is USACE still required to coordinate with the appropriate certifying authority?

Yes. To avoid potential enforcement actions, Districts must notify the certifying authority of the intent to use the general water quality certification that certifies the discharges associated with the activity covered by the nationwide permit or general permit. When certifying authorities require advance notice for work covered by the general water quality certification associated with nationwide permit or general permit, notifying the water quality agency of the intent to use it should satisfy that requirement. Even if it is not a certifying authority requirement, HQUSACE recommends that the District still coordinate or at a minimum notify the certifying authority in advance that District intends to use a specific general water quality certification for the implementation of the project. Since study teams are expected to coordinate with the certifying authority throughout the planning process, this should not be a problem.

Should the water quality certification application be signed by the District Commander?

The application may be signed by the District Commander or anyone delegated such authority by the District Commander.

State Water Quality Requirements

When a certifying authority references "water quality requirements" in its decision regarding whether to grant, grant with conditions, deny, or waive a water quality certification, does the referenced "water quality requirement" have to be a requirement stated in the authority's approved 401 process, or can it be any state water quality requirement?

The "requirements" referred to in the Section 401 rule are state water quality standards. USEPA reviews and approves the water quality standards of states with delegated authority every three years. The teams should expect to be held to the published state water quality standards.

Notification of Neighboring Jurisdictions

The neighboring jurisdiction procedures under the Section 401 rule apply to the federal agency which “receives a license or permit application and the related certification.” Technically, no application is made to USACE for its own projects. Does this mean USACE has decided for policy reasons to comply with these procedures?

All federal laws and regulations apply to USACE, to include the CWA. HQUSACE has determined that USACE is both a project proponent (i.e., applicant) and a permitting agency. USACE does not issue itself a permit, but it does conduct 404(b)(1) analysis (like USACE Regulatory as a Permitting Agency) AND the agency also functions as the project proponent.

Does the requirement to notify the appropriate USEPA Regional Office within five days of receipt of a water quality certification apply if there are no neighboring jurisdictions (e.g., coastal breakwater repair projects, projects in the Pacific Islands)?

It is always a good idea to notify USEPA about the receipt of a water quality certification, even if there is a potential that there are no neighboring jurisdictions. This is especially true because the requirements may differ from office to office (e.g., USEPA Region 10 requires that all water quality certifications are reported, even if they are for projects in Hawaii). It may be possible to explore programmatic options related to certain situations (e.g., projects on Pacific Islands or within the interior of a state) with the various USEPA Regional Offices, but for the time being it is best to notify the appropriate USEPA Regional Office of all certifications received.

Are there examples of notification letters sent to USEPA regarding neighboring jurisdiction requests available for study teams to reference?

OWPR does not have examples of neighboring jurisdictions letters sent to USEPA. However, if any Districts have any examples they would like to share, OWPR would be happy to facilitate distribution to the Planning Community.

How should Districts handle possible project impacts to Canada?

Section 121.12 of the Section 401 rule (Determination of effects on Neighboring Jurisdictions) does not specifically address impacts to foreign countries. Districts are recommended to consult with their respective Office of Counsel regarding this type of question.