



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Environmental
Conservation

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August 2, 2021

Lauren Kasparek
Oceans, Wetlands and Communities Division
Office of Water (4502-T),
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
Via [regulations.gov](https://www.regulations.gov):

Re: Docket ID No. EPA-HQ-OW-2021-0302 Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule

Dear Ms. Kasparek:

As a state rich in energy and natural resources, Alaska presents the United States with tremendous economic opportunity. Alaska has mineral resources, including copper, graphite, and rare earths that will be critical in transitioning to a clean energy future for transportation and infrastructure. Alaska stands ready to develop these opportunities and recognizes the connection between the resources and the permitting/review processes that authorize these activities. Developing the state's resources to support the national clean energy goals will be most successful with a stable and predictable regulatory environment that investors can trust.

We do not see a need for the Environmental Protection Agency (EPA) to revise the Clean Water Act (CWA) Section 401 regulations. The most recent rule revision has been in place for a short period of time for experience in implementation to make well-informed recommendations for change. Moreover, many of the adjustments made in the last rulemaking appropriately limited the scope and timeframes associated with 401 certifications – if EPA does choose to reopen these regulations, those improvements should not be lost.

Any changes EPA does make should promote efficiency and certainty in the certification process as well as cooperative federalism. In addition, any rulemaking should adhere to the following principles:

1. Growth of the economy and jobs relies on regulatory efficiency and certainty.

This is especially true in Alaska where a large percentage of our land base is categorized as wetlands and projects located therein may require a §404 permit from the United States Army Corps of Engineers (Corps) and a corresponding §401 certification. Our permittees expect a fair and timely permitting process that is efficient and flexible depending on the nature and complexity of the permitted discharge. We take our responsibility to expeditiously certify federal permits seriously, and to date, DEC §401 certifications of §404 permits have been issued in a timely manner and have not been delayed in Alaska. DEC has conditioned and approved thousands of §401 certifications for a CWA §404 project, and in fact typically renders a §401 certification decision within 60 days or coordinates with the permitting agency for additional time to render a decision.

2. The scope of the §401 certification must be limited to “discharges” rather than “activities.”

EPA should avoid confusing the comprehensive environmental review contemplated by the National Environmental Policy Act (NEPA) and the more limited consideration of impacts of dredge and fill activity on water quality. The NEPA process requires a “hard look” at potential effects that are

reasonably foreseeable and have a reasonably close causal relationship to the proposed action. In contrast, a §401 certification should focus much more narrowly on the impacts of the dredge and fill activity under the CWA §404 permit on water quality. In most cases, including most small projects requiring a §404 permit, the certifying authority is reviewing specifically the placement or removal of fill material in waters of the United States (WOTUS). By limiting the §401 certification scope to the discharge and associated impacts, the certifying authority can more readily address that specific decision and eliminate endless speculation on tangential impacts of the broader activity for the life of the project. The broader slate of potential impacts can appropriately be evaluated under a NEPA analysis – with support and involvement from states and other stakeholders as cooperating agencies or commenters. In addition to the NEPA analysis, states and other federal agencies have other tools to address potential impacts arising from the broader scope of activity contemplated by the project needing a 401 certification. The §401 certifications should be limited to recognized discharges as outlined in the existing (2020) rule.

3. If states wish to address the impacts of a project beyond those authorized under a §404 permitted discharge, they should promulgate state rules to do so and not attempt to expand the scope of review to manage those impacts through the §401 process.

The congressional intent of §401 certification was for states to apply specific water quality standards. Any proposed rules, policy, and guidance should clearly state that any approval, conditional approval, or denial of a §401 certification must be based on the state’s water quality standards and regulatory authority. The potentially expansive scope of “associated activities” should not be leveraged to regulate other impacts beyond a state’s enacted water quality standards and regulations. Any condition for approval or denial should be required to specifically identify which state water quality standard is at play.

4. Cooperative federalism requires communication, collaboration, and respectful coordination.

Applications received by the certifying authority should be administratively and technically complete prior to initiating the timelines for state action. Current regulations provide for applications to include:

- the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters; and
- a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge. 40 C.F.R. § 121.5.

If appropriately implemented, these requirements for an application, together with appropriate consultation and coordination with state certifying agencies, should be adequate to ensure applications are complete and well-supported before the application is submitted and the timeline for state action is initiated.

Consultation and coordination with state certifying agencies is a key element of implementation to ensure the current rules work well. For example, the reasonableness of a 60-day period can also be impacted by unanticipated changes in approach by partner agencies or the applicant. We have seen a number of instances where the EPA has determined that a particular water body is an Aquatic Resource of National Importance (ARNI) and has elevated permit decisions to the Corps in the late stages of the NEPA process. If a water body truly is an ARNI, this issue should be identified much earlier. It is not clear how a state agency can be expected to conduct an antidegradation assessment and then find out at the 11th hour that a water body under consideration should be subject to higher level protections.

The pre-application meeting, as provided for in the current §401 rules, is an important opportunity for all the reviewing entities to raise issues and questions early in the process. This can go a long way to reducing regulatory uncertainties and avoiding the kind of surprises that ultimately cause delay.

5. A one-size-fits-all approach to timelines may not be adequate for large, complex projects.

DEC typically renders a §401 certification within 60 days for a small project; however, in very rare and limited circumstances that period may not be sufficient for large and complex projects. Large projects can include a variety of construction and operation dredge and fill activities over an extended period of time as well as a voluminous administrative record. The relevant material for that type of project may not be fully and appropriately evaluated within 60 days.

While we appreciate and support clearly defined and limited timelines that provide greater regulatory certainty, a well-articulated process for reasonable extensions to the period for a 401 review should be implemented to address the needs associated with large projects. Such a process will be dependent upon prompt responses from our federal partners, but does not require a change to the current rule.

Thank you for the opportunity to comment on the proposal to revise CWA Section 401 regulations. While we continue to support the 2020 rule, we look forward to a constructive dialogue regarding any changes EPA may propose. If you have any questions, please contact Randy Bates, Director, Division of Water, at phone (907) 465-5307 or email randy.bates@alaska.gov.

Sincerely,



Jason W. Brune
Commissioner

cc: The Honorable Lisa Murkowski, United States Senate
The Honorable Dan Sullivan, United States Senate
The Honorable Don Young, United States House of Representatives
The Honorable Corri Feige, Commissioner, Department of Natural Resources
The Honorable Doug Vincent-Lang, Commissioner, Department of Fish and Game
The Honorable John Mackinnon, Commissioner, Department of Transportation & Public Facilities
Michael Regan, Administrator, EPA
Benita Best-Wong, Deputy Assistant Administrator, Office of Water, EPA
Lieutenant General Scott Spellmon, 55th Chief of Engineers and Commanding General, United States Army Corps of Engineers
Colonel Damon Delarosa, Alaska District Commander, United States Army Corps of Engineers