

August 2, 2021

Submitted via regulations.gov: EPA-HQ-OW-2021-0302
Attn: U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 FR 29541 (June 2, 2021).

Dear Administrator Regan:

The Idaho Department of Environmental Quality (IDEQ) appreciates EPA's efforts to engage with certifying authorities and seek state input during this process. We provided oral comments during the listening session and appreciate being able to provide the enclosed comments. Through our efforts to implement the 2020 401 rule, we have encountered several difficulties which are highlighted in the comments below. We encourage EPA to quickly follow up with a proposed rule to address these concerns.

As the State agency responsible for water quality certification under the Clean Water Act (CWA) section 401, IDEQ supports revising the 2020 Clean Water Act Section 401 Certification Rule (2020 Rule). IDEQ has encountered several issues with the implementation of the 2020 Rule, which we have highlighted in the comments below.

COMMENTS

IDEQ supports revising the 2020 Rule to ensure applicants submit complete certification requests that are actionable in a reasonable amount of time, and to provide additional clarity on requirements and timelines. IDEQ has reviewed the key issues EPA identified during the implementation of the 2020 Rule and offers the following comments.

1. Pre-filing meeting requests

IDEQ appreciates the opportunity that pre-filing meetings have provided to initiate early direct communication with applicants. However, the pre-filing process has caused unnecessary confusion because the pre-filing meetings are mistimed relative to the underlying federal permitting process. Before the 2020 Rule, IDEQ would receive a completed 404 application with project details from the Army Corps of Engineers (ACOE)

indicating whether the project would be covered by a nationwide permit that IDEQ had certified previously, or if the project would instead require an individual certification. Under the 2020 Rule, however, the applicant requests a pre-filing meeting before the type of permit, and thus coverage under an existing certification, is known. In cases where ACOE later determines the activity is covered under a certified permit, IDEQ expends scarce time and resources on pre-filing meetings and certification requests that prove unnecessary. This wasteful procedure can be avoided by requiring pre-filing meeting requests after the federal agency determines that the activity in question is not covered by an existing certification.

2. Certification request

A 401 Water Quality Certification ensures that a federally permitted activity meets water quality standards and other appropriate requirements of state law. This is best accomplished if a certification request comes with the baseline federal requirements that are proposed in a draft permit or license. However, the 2020 Rule's requirements for certification requests are often mistimed relative to the federal process—particularly for individual permits and licenses. For example, 40 CFR § 121.5(b)(3) currently requires that an applicant for an individual permit or license “identify the applicable federal license or permit.” By contrast, a certification request in connection with a general permit or license needs to “include the draft or proposed general license or permit.” 40 CFR § 121.5(c)(3). Accordingly, a certification request for a general permit or license comes after preliminary federal requirements are known. In IDEQ's experience, this allows certification decisions on general permits and licenses to be made in a reasonable amount of time.

Without knowledge of the federal baseline for individual permits and licenses, IDEQ may need more time and information to issue protective and defensible certifications. To address this timing issue, the definition of “receipt” or the elements of a valid “certification request” should be amended so that the certification process starts when the certifying authority verifies in writing that it has all information necessary to proceed with a certification decision.

3. Reasonable period of time

The 2020 Rule makes federal agencies responsible for setting the “reasonable period of time” for action on a certification request. This aspect of the rule ignores the reality that certifying authorities are more knowledgeable about local water quality, water quality requirements, and their certification processes. Certifying authorities are in the best position to determine how much time (up to one year) is reasonable to address local water quality in accordance with local procedures.

For example, the ACOE often receives dredge and fill permit applications at the same time IDEQ receives the minimal information that qualifies as a “certification request” under the 2020 Rule. ACOE allows 60 days of “reasonable time” and requesting an extension is, in IDEQ’s experience, difficult, discouraged, and not often successful. Federal permitting agencies should seek and defer to input from the certifying authority before establishing the reasonable period of time for any certification.

4. Scope of certification

The 2020 Rule unlawfully and unnecessarily limits the scope of certification to a narrow set of “water quality requirements.” 40 CFR § 121.1(n). Nothing in section 401’s text or controlling precedent supports this limit on the scope of certification. Revisions to the 2020 Rule should remove the “scope of certification” concept from the rule entirely.

5. Certification actions and federal agency review

It is not necessary or legally appropriate to grant federal agencies authority to review and deem waived state certification actions or specific conditions in a certification. Applicants have every right and incentive to utilize in-state legal proceedings to address any concerns with the certifying authority’s action on a certification request. Moreover, the federal courts have consistently held that federal permitting or licensing agencies have no authority to review or modify the substance of a certification decision. *E.g., Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 648 (4th Cir. 2018) (“[T]he plain language of the Clean Water Act does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, even if the Corps reasonably determines that the alternative condition is more protective of water quality.”). To the extent federal permitting or licensing agencies have procedural concerns, the appropriate course is to notify the certifying authority and provide sufficient time for the concerns to be resolved before final action on the certification request. Revisions to the 2020 Rule, therefore, should eliminate the waiver provisions in 40 CFR §§ 121.9(a)(2)(ii)–(iv) & (b).

6. Enforcement

The 2020 Rule does not recognize certifying authority’s enforcement role and may be read as impairing the enforcement authority Congress specifically preserved through CWA section 510. 33 USC § 1370. As a practical matter, certifying authorities must be involved in enforcement of their conditions because federal permitting and licensing agencies sometimes conclude they lack authority to enforce certification conditions—despite the conditions becoming part of the federal permit or license. 33 USC § 1341(d). Otherwise, the

permitting authority's decision not to enforce a condition would, for all practical purposes, nullify the certifying authority's conditions. The text of section 401 provides no reason to believe Congress intended to give Federal agencies authority to effectively veto state certification conditions. Revisions to the section 401 regulations should specifically recognize that a certifying authority may directly enforce certification conditions and that nothing in the regulations impairs that enforcement authority.

7. Modifications

Revised section 401 regulations should recognize and allow for modification of existing certifications in response to changed conditions or legal requirements. This practice was allowed under the pre-2020 section 401 regulations, and is specifically authorized in section 401(a)(3). Without a mechanism for modifying existing certifications, changed circumstances—such as new or revised water quality standards or significant changes to the certified activity or discharge—a new certification request or state enforcement action may be necessary to ensure compliance with applicable requirements. Returning the practice under the pre-2020 regulations would help to protect the resource and make the process more flexible and responsive to changed circumstances.

8. Neighboring jurisdictions

We appreciate the clarification on the timeline under 40 CFR § 121.12 for notification so that IDEQ is assured that the process for notifying the neighboring states and tribes has been completed within 30 days, and there will not be a concern later in the process.

9. Data and other information

Announced on July 13, 2020, the 2020 Rule introduced a variety of drastic changes to the existing certification process. But certifying authorities had less than two months to adjust their processes before the 2020 Rule took effect on September 11, 2020. To implement the 2020 Rule, IDEQ had to develop new forms to guide our internal processes, as well as new guidance for applicants. Implementing so many new processes on such a compressed timeline proved confusing for applicants and required IDEQ staff to devote extra time to helping applicants navigate the process. Pre-filing meetings have added time to the overall certification process, and applicants--not understanding that the pre-filing process is mandated by federal, not state, law—often ask IDEQ to waive the 30-day waiting period mandated by 40 CFR § 121.4.

We appreciate that EPA is taking time to listen to the public and certifying authorities to determine a more strategic way to implementing a clearer and logistically feasible, and hopefully more sustaining rule.

10. Implementation coordination

Section 401 requires certification for federally permitted or licensed activities that “may result in any discharge into the navigable waters.” 33 U.S.C. § 1341(a). Thus, the definition of “navigable waters”—which is established through regulations defining “waters of the United States”—affects the scope of the certification requirement. Implementation of the Navigable Waters Protection Rule has presented many issues regarding which waters in the state of Idaho are currently protected under the CWA. IDEQ therefore encourages EPA to coordinate the revision of the section 401 regulations with the planned revisions to the definition of waters of the United States.”

CONCLUSION

For the above reasons, IDEQ believes the 2020 Rule is cumbersome, difficult to administer, and lacks the flexibility long available under the pre-2020 regulations. IDEQ therefore requests that EPA make the section 401 regulations a top priority and propose revisions to the 2020 Rule as early as possible.