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Comments

U.S. Environmental Protection Agency Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule

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North Dakota Department of Environmental Quality

Docket ID No. EPA-HQ-OW-2021-0302

Submitted through the Federal eRulemaking Portal:

<https://www.regulations.gov/>

Summary: The North Dakota Department of Environmental Quality (department) appreciates the opportunity to comment on and propose revision to the Clean Water Act Section 401 Certification Rule (CWA § 401). The department has Clean Water Act Section 401 authority for the state of North Dakota (state). These comments are aligned with the objectives of cooperative federalism and supported by President Biden's Executive Order 13990.

Comment 1 [§121.4 Pre-filing meeting request]: The procedural requirements of the Prefiling Meeting Request, has two fundamental flaws.

One, the pre-filing meeting request is timed incorrectly. The CWA § 401 is a limited grant of federal authority to the states to certify and condition federal permits/licenses that may result in a discharge to a water of the U.S. If a federal permit or license is not required or waters of the U.S. would not be impacted, the activity is not subject to CWA § 401. Requiring a CWA § 401 meeting, prior to a federal permitting/licensing agency assessing the need for a permit/license puts the cart in front of the horse and ignores that the federal permitting/licensing agencies are better position to determine what additional steps/actions/information would be required to obtain a federal license (i, e., alternative actions, mitigation).

Two, the 30-day minimum delay after making the request is an arbitrary time burden that assumes all project are similar in complexity and potential discharges to waters of the U.S.. Federal permits/licenses that are subject to CWA § 401 certification do not lend themselves to a one-size-fits-all approach. Many are small and the impacts easily addressed, and others are large complex and have multiple avenues to and amounts of discharge.

To improve the process and still preserve the opportunity for a pre-filing meeting, the pre-filing request needs to be timed in the most efficient and logical sequence. This would be to contact the federal permitting/licensing agency first, and only if a permit or license is required is a pre-filing meeting with the certifying agency initiated. Secondly, EPA needs to work with federal licensing and permitting agencies and with state and tribal certifying authorities to develop procedures and practices that will facilitate timely certification decisions based on the best information available. Lastly, the state needs the authority to waive the pre-filing meeting and any arbitrary time-period associated with it.

Comment 2 [§121.5 Certification request]: Clearly defining the certification request procedure and requiring a concurrent application to the federal and certifying authority is an appreciated improvement.

Comment 3-A [§121.6 Establishing the reasonable period of time]: A positive and appreciated improvement is the requirement that the federal permitting/licensing agency CFR 40 121.6(b) will within 15 days of receiving notice of the certification request from the project proponent, shall provide in writing to the certifying authority: (1) The date of receipt, (2) The reasonable period of time to act, and (3) The date upon which waiver will occur if the certifying authority does not act.

Comment 4-B [§121.6 Establishing the reasonable period of time]: The process for determining the “reasonable period of time” is Federally heavy handed. It does not adequately involve the certifying agency in setting a “reasonable period of time”. This lack of required cooperative leaves a state or tribe only the option of denying certification if the information needed or the time involved to review it will exceed the Federally imposed “reasonable period of time”.

A straight-forward solution is under CFR 40 §121.6(c) add: (1) An additional consideration to State or tribal laws [i. g., public notices, comment periods, workload restrictions], and (2) a process that gives the state or tribe an option to extend the reasonable period of time not to exceed 1 year if it is for additional information and reasonable time for review.

Comment 5 [§121.3 Scope of certification]: The current scope of certification (water quality requirements as applicable in section 301, 302, 303, 206, and 307 of the clean water act) limits the state from protecting water resources from a project as a whole.

The CWA § 401 was enacted to prevent a federally permitted or licensed action from being an active source of pollution. Incorporated into the 1972 Clean Water Act, § 401 was a tool to stop a federal action that would prevent a state or tribe from protecting their waters. The state and tribes will base the certification on a list of CWA authorities including “any other appropriate requirements of state or tribal law (CWA § 401(d)). This is clearly stated § 401(b) allowing ‘any applicable effluent limitations and other limitations’ on a project to meet other limitation [i.e., 301, or 302).

An easy fix is to return the state’s authority [as intended in the CWA § 401] to address the project as a whole and all potential water quality impacts of the action.

Comment 5 [§121.7 Certification actions and federal agency review]: It is a conflict with the intent of section 401 for a federal agency to review a state's section 401 certification armed with the authority to deem a certification or condition as "waived". "State certifications under § 401 are essential in the scheme to preserve state authority to address a broad range of pollution" (Senator Edmund S. Muskie, Maine, 1970).

Remove this authority from all federal permitting and licensing agencies.

Comment 6 [§ 121.11 Enforcement of and compliance with certification conditions]: Clearly defining the certifying authority's option to inspect the certified action and the federal responsibility to enforce the certification is an appreciated improvement.

Comment 7 [Modification]: The option to modify a certification is needed to ensure full support of water quality requirements and state law. Modification is only applied when the action, conditions, or circumstances substantially change the potential for impacts to water quality.

Please reinstate the provision to allow modification where the certifying authority, federal agency, and US EPA are in agreement.

Comment 8 [§ 121.12 Neighboring jurisdiction]: The state requests removing the US EPA Administrator from having 30 discrete days for a 401(a)(2) review. The current process is an arbitrary bureaucratic delay used by a federal agency to get it ducks in a row. Instead, under §121.12 require the Administrator to complete the neighboring review in 15 days running concurrently with the federal permitting/licensing agencies application review.

Comment 9 [Data and other information]: No comment.

Comment 10 [Implementation coordination]: No Comment.