



Oregon

Kate Brown, Governor

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August 2, 2021

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20004

RE: Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (86 FR 29541) EPA Docket Number: EPA-HQ-OW-2021-0302

Dear Administrator Regan,

For decades, Oregon's Department of Environmental Quality (ODEQ) has carried out the authorities and responsibilities that Congress reserved to the states when it enacted the federal Clean Water Act (CWA). The CWA Section 401 Rule that went into effect in September of 2020 (2020 Rule) purports to override Congress, and transfer significant aspects of this authority to federal agencies, including the federal agencies approving licenses and permits for actions affecting state waters that Congress intended to continue being subject to state review.

ODEQ welcomes the actions of EPA to replace the ill-conceived 2020 Rule with a new rule that respects Congressional direction. However, ODEQ continues to urge EPA to *repeal* the 2020 Rule as soon as possible, as a first step. Development of a new CWA 401 rule would then occur as a second step, carried out with close consultation between states, Tribes, other federal agencies (particularly the U.S. Army Corps and the Federal Regulatory Energy Commission (FERC)), as well as other partners and stakeholders.

The 2020 Rule introduced a wide range of significant changes to implementation of the CWA. First, the 2020 Rule attempted to limit the scope of what a state or Tribe may review -- to impacts directly associated with a "discharge." The 2020 Rule also limited the requirements that states may consider in determining conditions to place on certifications to "water quality requirements" of the CWA. Limiting states' review and conditioning authorities in this manner is clearly contrary to Congress' intent in reserving authority to the states – authority that in many cases *predates* the CWA. To carry out our obligations to protect public health and the environment, states must be able to consider all project impacts in determining whether to certify a proposed activity requiring a federal license or permit, including consideration of conditions that may allow an activity to proceed. The scope of review of states must include both the direct and indirect effects of the construction *and* operation of the proposed activity, including the activity's impacts to hydrology and water quality, such as through the addition of impervious surface that alters both the volume and characteristics of stormwater runoff.

The 2020 Rule imposed a 30-day pre-filing notice and other limitations and modification on a state's review process. This new requirement has reduced flexibility and created uncertainty, confusion, and

delay for applicants. The procedural changes mandating a 30-day pre-filing notification by the applicant and opportunity for a pre-filing meeting became very clearly problematic for Oregon in the recovery efforts associated with the widespread wildfires in the state in the fall of 2020. Once fires were contained, and individuals and communities focused on recover, the CWA 2020 Rule process became a major obstacle to conducting wildfire recovery activities before fall and winter rains began in earnest. The 2020 Rule contains no provisions for emergency permitting requests. Instead of being able to issue a certification within days, ODEQ and applicants were forced to wait out a 30-day pre-filing notice period. Since the 2020 Rule went into effect, ODEQ has received emergency requests for work related to collapsed roads, compromised water supply intakes, eroding stream banks, and failing cofferdams. Extreme weather events result in urgent permitting needs related to flood and wildfire response. The 2020 Rule does not allow us to manage these requests in a timely fashion, potentially compromising recovery efforts and endangering public safety.

At the other end of the certification process under the 2020 Rule, the new requirements around waiver and time deadlines has forced ODEQ to deny many certification request that were incomplete, rather than working with applicants to file information necessary to complete reviews. As we predicted in our comments on the draft 2020 Rule, there has been a substantial increase in the percentage of certification request denied by ODEQ because of the ill-conceived procedural and timing provisions of the rule.

In summary, Oregon experience has shown that the 2020 Rule:

- Introduces inconsistent and incompatible procedures: The revisions introduced by the 2020 Rule have greatly affected how ODEQ processes applications. The 2020 Rule places a significant burden on applicants by requiring submittal of a pre-filing meeting request to DEQ 30 days prior to application submission, which adds a layer of complexity in terms of meeting scheduling. As stated above, there is no emergency exception provided. In addition, the 2020 Rule includes a short list of required information to be submitted in order for an application to be deemed a “valid request for certification.” The “valid request for certification” elements are confusing to applicants, and do not coincide with what ODEQ would request of an applicant to demonstrate compliance with our state water quality requirements, leading to confusion for both the applicant and reviewers.

Attempts to limit states’ review scope and constrain agency oversight: The 2020 Rule attempts to limit a state’s authority to review impacts to water quality that may arise from the project through a very narrow use of the term “discharge.” Limiting review in this manner is contrary to Congressional intent and ignores the reality that many activities significantly affect both the quantity and quality of water in waterbodies in ways that are independent of a direct point source discharge, including stormwater flows and impacts to temperature from changes to riparian vegetation.

- Creates arbitrary and inefficient timelines: The 2020 Rule requires action agencies to set limits on the time the state certification agency has to issue a certification or waive review, which often results in challenges for agency-applicant coordination. Oregon has already issued 15

denials without prejudice of certifications in the year since the 2020 Rule became effective, due to the lack of time to receive and review information from applicants to ensure compliance with water quality requirements. In contrast, in the prior 7-year period of 2011-2018, Oregon issued a total of 11 denials. In circumstance where an application is missing relevant information or the project has unavoidable changes after the regulatory process begins, the 2020 Rule forces applicants to re-start the entire certification application process by refiling their application and resetting the clock. The 2020 Rule contains no process or options for modifying a certification request. The lack of a certification modification options also raises significant challenges for managing and appropriately addressing adaptive management for long-lived activities, such as the 50-year period of authorization under licenses issued by the Federal Regulatory Energy Commission (FERC).

- Weakens compliance and enforcement, and endangers public health and the environment: The 2020 Rule limits compliance and enforcement tools for 401 certifications, limiting state opportunities to inspect facilities to construction completion, and allowing federal action agencies to block state enforcement. When combined with the fact that federal action agencies often lack resources and water quality expertise necessary to effectively carry out compliance and enforcement responsibilities, these aspects of the 2020 Rule also threaten our collective ability to protect public health and the environment.

Finally, Oregon has relied on Section 401 certifications to meet other federal CWA responsibilities, including the development and implementation of Total Maximum Daily Loads (TMDLs) for waterways that are not meeting federally-approved water quality standards. This tool has been particularly important for activities requiring a permit from the U.S. Army Corps under Section 404 of the CWA where the activities have significant impacts on stormwater and/or temperature in waterways that are not meeting water quality standards. In these cases, buffer zones and post-construction stormwater controls are the only practicable means to allow activities to go forward in a manner that is consistent with meeting standards – through appropriate mitigation via section 401 conditions. The limitations in the 2020 Rule regarding state conditioning authority obstruct this effort to approach federal CWA requirements holistically, and as a result may end up increasing the regulatory burdens for others, including local governments and private landowners.

In short, the 2020 Rule is a failure on numerous fronts—it has resulted in an inefficient and confusing process for applicants, for state certification agencies, and for federal action agencies. EPA should immediately proceed to repeal the 2020 Rule and then begin development of a Section 401 rule that respects states' authorities and responsibilities to protect public health and the environment from the adverse effects of activities permitted or licensed by federal agencies. EPA's rule development must also include close coordination and collaboration between EPA and the federal licensing and permitting agencies including the U.S. Army Corps of Engineers and the Federal Energy Regulatory Commission that have their own Section 401 rules (another failure of the 2020 rule). Our nation deserves a transparent and effective Section 401 rule. ODEQ supports this work as an important element in our collective efforts to protect public health and the environment.

Administrator Regan
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Sincerely,

A handwritten signature in blue ink, appearing to read "Richard Whitman".

Richard Whitman
Director

cc: Michelle Pirzadeh, US EPA Region 10 Acting Administrator
Dan Opalski, US EPA Region 10 Water Division Administrator
Bill Abadie, US Army Corps Portland District Regulatory Branch Chief
Jason Miner, Oregon Natural Resources Policy Manager, Office of the Governor

Attachment

State of Oregon: specific comments on EPA 10 issues/questions:

1. Pre-filing

EPA is interested in the utility of the pre-filing meeting process to date, including but not limited to, whether the pre-filing meetings have improved or increased early stakeholder engagement, whether the minimum 30 day timeframe should be shortened in certain instances (e.g., where a certifying authority declines to hold a pre-filing meeting), and how certifying authorities have approached pre-filing meeting requests and meetings to date.

- Oregon has found that the pre-filing requirement has greatly impacted how ODEQ processes applications, in ways that generate redundancy and reduce flexibility. In many smaller projects, a pre-application meeting is not necessary. If this requirement remains in place in a subsequent rule, the state should have the ability to waive the meeting and continue the review process. For example, while ODEQ issues individual 401 certifications for Nationwide Permits, the impacts of these projects are within known categories and quantities and the additional review time is not needed.
- A Section 401 rule should include a process by which 401 certifications can be issued via an expedited or emergency procedure to ensure the ability to respond to natural disaster-related recovery projects.
- Oregon has an existing cooperative permitting review process with its state and federal agency partners, which encourages early outreach and engagement among applicants and permitting agencies. Understanding that approaches to applicant engagement may differ by state, Oregon would support a revision that removes the requirement to hold a pre-filing meeting, but would support guidance that encourages the intent of these meetings in bringing applicants and regulatory agencies together to discuss project plans and potential impacts on water quality and other elements of aquatic habitat.

2. Certification request

EPA is concerned that the rule constrains what states and tribes can require in certification requests, potentially limiting state and tribal ability to get information they may need before the CWA Section 401 review process begins. EPA is interested in stakeholder input on this definition and the elements of a certification request contained at [40 CFR 121.5](#), including but not limited to, the sufficiency of the elements described in [40 CFR 121.5](#)(b) and (c), and whether stakeholders have experienced any process improvements or deficiencies by having a single defined list of required certification request components applicable to all certification actions.

- The prescriptiveness of the 2020 Rule presents constraints for states and Tribes to obtain relevant information. The elements of a certification request contained in the 2020 Rule differ from the elements that Oregon has identified in its own state rules on 401 certifications, found in OAR 340 division 48. The 2020 Rule has resulted in process deficiencies due to lack of consistency with existing Oregon state rules and resulting lack of clarity and certainty for applicants.

- Project scope often changes after an initial application, and each project 401 certification differs based on project specifics. Therefore, the conditions states may require vary based on project details, and would need to change if the project changes and evolves during the regulatory review process over time. This particular issue has resulted in DEQ issuing more than 15 denials without prejudice since the 2020 Rule was finalized, in order to ensure that applicants can submit relevant information to inform the contents of the certification. In prior years, DEQ rarely issued denials of certification, with a total of only 11 being issued in a 7-year period from 2011-2018.
- Oregon supports a rule that promotes transparency in the information required and process to define a complete application, but believes this is best accomplished through outlining those requirements at the state level. A part of the 401 certification process, states should have authority to determine what constitutes a “complete application.” If retained, the 9 elements for a “valid request for certification” in the 2020 Rule could be a general guide for applicants, but should not be used to constitute the start of a review timeline by any means.

3. Reasonable Period of Time

The rule requires the federal licensing or permitting agency to determine the reasonable period of time using a series of factors, provided that the time does not exceed one year from the date a certifying authority receives a certification request. *Id.* at 121.6. Additionally, the rule allows federal agencies to extend the reasonable period of time within that one year time period at a certifying authority or project proponent's request, but does not allow certifying authorities to take any other action to extend or modify the reasonable period of time. *Id.* Among other issues, EPA is concerned that the rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests and limits the factors that federal agencies may use to determine the reasonable period of time. EPA is seeking stakeholder input on the process for determining and modifying the reasonable period of time, including but not limited to, whether additional factors should be considered by federal agencies when setting the reasonable period of time, whether other stakeholders besides federal agencies have a role in defining and extending the reasonable period of time, and any implementation challenges or improvements identified through application of the rule's requirements for the reasonable period of time.

- The 2020 Rule allows Federal agencies to select and impose arbitrary timelines that are often insufficient to address complex issues posed by projects. The Federal agency should not take the lead in identifying timelines for review of state standards and laws. Oregon supports a rule revision that would give authority to states to determine appropriate timelines, or revert back to the standard of one year.
- The CWA establishes timeline requirements, and the 2020 Rule includes arbitrary timelines uninformed by understanding of project details. The 2020 Rule has created additional work for ODEQ certification staff to coordinate among State and Federal Agency and the Applicant. ODEQ staff workload for 401 certifications has increased by

adding several hours just on process/procedure duties, with no environmental benefit or benefit to the applicant.

- Withdrawal of an application and resubmittal of application materials need not trigger reinitiating the entire process. States should have the authority to re-start the timeline for reviews to provide sufficient time for staff to consider significant and substantive new information and determine potential changes to impacts associated with project revisions.

4. Scope of Certification

Among other issues, EPA is concerned that the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality. EPA is seeking stakeholder input on the rule's interpretation of the scope of certification and certification conditions, and the definition of "water quality requirements" as it relates to the statutory phrase "other appropriate requirements of state law," including but not limited to, whether the agency should revise its interpretation of scope to include potential impacts to water quality not only from the "discharge" but also from the "activity as a whole" consistent with Supreme Court case law, whether the agency should revise its interpretation of "other appropriate requirements of State law," and whether the agency should revise its interpretation of scope of certification based on implementation challenges or improvements identified through the application of the newly defined scope of certification.

- The constrained 2020 Rule definition of "discharge" as limited to a discharge from a point source, illegally attempts to reduce the scope of the 401 and Oregon supports return to the previously established scope. The previous rule rightfully allowed states to consider impacts of the project as a whole (both direct and indirect impacts), and not limited to construction but extending to impacts that may occur as a result of project operations, including impacts that may occur both upstream and downstream of project site. Projects with a relatively small nexus of discharge activity that triggers a 404 permit from USACE may still have significant and broad impacts to the surrounding waterways via indirect impacts such as stormwater and impervious surface generation, or modifications to existing riparian areas that would result in water quality impacts, such as reduced shading of temperature-impaired waterways. States must be able to certify based on all "applicable state water quality requirements."
- As part of a 401 certification, there are additional state-law based requirements , such as a determination of land use compatibility and payment of appropriate fees. These requirements need to be accommodated. EPA should ensure that these are also acknowledged as part of the overview of state permitting requirements.
- The 2020 rule requires that the certifying agency must provide a written reason for every condition in the certification. This is an unnecessary requirement of the federal rule as a state would need authority and reasoning to include conditions regardless of the federal requirement.

5. Certification actions and federal review

The rule provides that certifying authorities may take one of four actions on a certification request, including granting certification, granting certification with conditions, denying certification, or waiving certification. *See id.* at 121.7, 121.9. The rule requires that certifying authorities include specific information when granting certification, granting certification with conditions or denying certification. *Id.* at 121.7(c)-(e). Additionally, the rule requires federal agencies to review certifying authority actions to determine whether they comply with the procedural requirements of CWA Section 401 and the 401 Certification Rule. *Id.* at 121.9. Among other issues, EPA is concerned that a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of nonsubstantive and easily fixed procedural concerns identified by the federal agency. EPA is seeking stakeholder input on the certification action process steps, including but not limited to, whether there is any utility in requiring specific components and information for certifications with conditions and denials, whether it is appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose, and if so, whether there should be greater certifying authority engagement in the federal agency review process including an opportunity to respond to and cure any deficiencies, whether federal agencies should be able to deem a certification or conditions as "waived," and whether, and under what circumstances, federal agencies may reject state conditions.

- The federal actions agencies should not have the authority to determine whether the certifying agency complied with the procedural requirements of the CWA. This rule provision effectively delegates CWA oversight to the federal action agency, which is completely inappropriate. The goal of 401 rules should be to support states' implementation of their reserved implementation authority, to ensure federal actions and approvals avoid impacts to water quality and meet state water quality requirements. Federal agencies should not be able to reject state conditions; this presents a significant constraint around states' abilities to take action, to implement their existing rules and regulations, and assure they are met. Oregon shares the concern expressed by EPA that a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of non-substantive and easily fixed procedural concerns identified by the federal agency.

6. Enforcement

The rule provides that federal agencies are responsible for enforcing certification conditions that are incorporated into a federal license or permit. *Id.* at 121.11(c). The rule does not provide a role for certifying authorities to enforce certification conditions under federal law. Additionally, the rule restates the statutory provision that provides certifying authorities with the ability to inspect certified projects prior to their initial operation. *Id.* at 121.11(a). EPA is interested in stakeholder feedback on enforcement of

CWA Section 401, including but not limited to, the roles of federal agencies and certifying authorities in enforcing certification conditions, whether the statutory language in CWA Section 401 supports certifying authority enforcement of certification conditions under federal law, whether the CWA citizen suit provision applies to Section 401, and the rule's interpretation of a certifying authority's inspection opportunities.

- State regulators should be allowed reasonable opportunities for inspection of projects prior to initial operation. States and not just the federal agencies, should be allowed to enforce certification conditions consistent with state and federal laws. This is required for state certifications to be effective in preventing water quality impacts, and prohibitions on the ability for states to enforce conditions and conduct inspections are unlawful attempts to infringe upon state authority.

7. Modifications

Among other issues, EPA is concerned that the rule's prohibition of modifications may limit the flexibility of certifications and permits to adapt to changing circumstances. EPA is interested in stakeholder feedback on modifications and "reopeners," including but not limited to, whether the statutory language in CWA Section 401 supports modification of certifications or "reopeners," the utility of modifications (*e.g.*, specific circumstances that may warrant modifications or "reopeners"), and whether there are alternate solutions to the issues that could be addressed by certification modifications or "reopeners" that can be accomplished through the federal licensing or permitting process.

- Any updated 401 rule must clarify that modifications are allowed. It is not uncommon for changes to projects to occur after 401 certification has been issued. Oregon supports a rule that ensures flexibility for the agency to issue and modify certifications without establishing an entirely new certification process. State authority should be clarified to allow issuance of modifications based on changing circumstances or project details, as well as to provide opportunities to implement adaptive management approaches to meeting water quality conditions where appropriate.
- The 2020 rule takes authority away from state agencies in addressing changes to existing projects. ODEQ's 401 hydro program previously issued modifications for certifications in which the project has changed (*e.g.* turbines were added to the project, a fish ladder was added to a project) or water quality standards were changed. According to the 2020 Rule preamble, the states have no discretion to modify a certification, removing the states' ability to address these modifications in the activity, or changes to water quality standards. The 2020 Rule requires that instead of modifications to an existing certification, a request for a new certification is the appropriate mechanism to address changes in the project. However, this approach takes authority away from ODEQ as it relies on the project operator to request a new certification.

- Additionally the 2020 Rule doesn't address whether a request for a new certification by the project operator is limited to the point sources associated with the project, as defined under the 2020 Rule. In other words, if a project operator applies for a new certification because a project operation changes, is the certifying agency then limited to review on the point source discharge? There is uncertainty regarding how previous conditions from the original certification would be addressed, which would have addressed the entire activity's effect on water quality.
- DEQ believes that a modification option is a necessary tool to address changes to the project design, operations and changes to water quality standards or other appropriate water quality rules. The 2020 Rule limits states' authority.

8. Neighboring jurisdictions

The rule addresses the so-called “neighboring jurisdiction” process in CWA Section 401(a)(2), including interpreting the timeframe in which a federal agency must notify EPA for purposes of Section 401(a)(2) and providing process requirements for the agency's analysis and the neighboring jurisdictions' review and response. EPA is interested in stakeholder feedback on the neighboring jurisdiction process, including but not limited to, whether the agency should elaborate in regulatory text or preamble on considerations informing its analysis under CWA Section 401(a)(2), whether the agency's decision whether to make a determination under CWA Section 401(a)(2) is wholly discretionary, and whether the agency should provide further guidance on the Section 401(a)(2) process that occurs after EPA makes a “may affect” determination.

- No comments.

9. Data and other information

EPA is interested in receiving any data or information from stakeholders about the application of the 401 Certification Rule, including but not limited to, impacts of the rule on processing certification requests, impacts of the rule on certification decisions, and whether any major projects are anticipated in the next few years that could benefit from or be encumbered by the 401 Certification Rule's procedural requirements.

Additionally, EPA is interested in stakeholder feedback about existing state CWA Section 401 procedures, including whether the agency should consider the extent to which any revised rule might conflict with existing state CWA Section 401 procedures and place a burden on those states to revise rules in the future.

- Oregon issued a record number of certification denials (without prejudice) as a result of insufficient application review timelines – 15 over the period between the September 2020 and June 2021 implementation time of the 2020 Rule. ODEQ did not regularly use the denial without prejudice option until USACE guidance on 401 certification review

timelines was issued in 2019. For example, between 2011 – 2018, ODEQ issued 11 total denials.

- Staff at ODEQ noted significant increase in frustration among applicants on the impact of new processes on the timeline to obtain decisions on certification requests, particularly for nationwide permits.
- Oregon has existing state regulations based on previous 401 procedures; Oregon would have a significant regulatory burden to address in making modifications to match the scope of new or revised rules into the future.

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10. Implementation Coordination

EPA is interested in hearing from stakeholders about facilitating implementation of any rule revisions. For example, given the relationship between federal provisions and state processes for water quality certification, should EPA consider specific implementation timeframes or effective dates to allow for adoption and integration of water quality provisions at the state level. Similarly, EPA is interested in receiving feedback on whether concomitant regulatory changes should be proposed and finalized simultaneously by relevant federal agencies (*e.g.*, the Army Corps of Engineers, Federal Energy Regulatory Commission) so that implementation of revised water certification provisions would be more effectively coordinated and would avoid circumstances where regulations could be interpreted as inconsistent with one another.

- To the extent that interrelated regulatory changes could be efficiently proposed and finalized simultaneously, Oregon would support efforts to develop coordinated updates or revisions to 401 requirements and provisions issued by EPA, USACE and FERC.