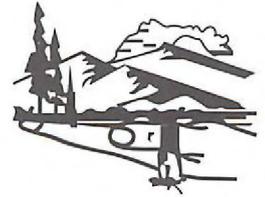




Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.



Mark Gordon, Governor



Todd Parfitt, Director

August 2, 2021

United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Submitted online via: <http://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

To Whom It May Concern,

Please accept the following comments in response to the June 2, 2021 Federal Register notice that announced the U.S. Environmental Protection Agency's (EPA) intent to reconsider and revise the Clean Water Act (CWA) Section 401 water quality certification rule at 40 CFR §121. As a co-regulator in implementing the CWA, the Wyoming Department of Environmental Quality (WDEQ) is responsible for many CWA programs in Wyoming, including the issuance of water quality certifications under Section 401.

Section 401 is an essential tool granted by Congress to the states for ensuring discharges under consideration for a federal license or permit are in compliance with the CWA and state surface water quality standards. The CWA allows states a great deal of discretion in reviewing and conditioning 401 certifications to ensure compliance with the CWA and state surface water quality standards. The current CWA Section 401 Certification Rule that was adopted on July 13, 2020 brought much needed consistency in interpretation and implementation of the statute among states and federal agencies. We strongly support the scope of certification and definition of "water quality requirements" among other elements of the current rule at 40 CFR §121, which include pre-filing meeting requests, requirements to incorporate statute or rule citations for certification conditions and denials, and recognition that certification conditions are enforced by the federal permitting agency.

However, we believe there are some procedural components of the current rule that would benefit from revision to increase efficiency, improve consistency and clarity, and minimize federal overreach. Specifically, the EPA should revise the current rule pertaining to the minimum 30-day time period between the pre-filing meeting request and submission of the certification request, the minimum elements of a certification request, and quantifying the reasonable period of time for a state to act on a certification request. We also request that the definition of "discharge" is clarified and language that grants federal agencies authority to waive a state's certification decisions or any of a certification's conditions is removed from the rule. Lastly, we request revisions to the rule allowing states to inspect all phases of a certified project, adding a certification re-opener clause, and streamlining EPA's "neighboring jurisdiction" review process.

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Our following comments and recommended revisions have been organized according to the key issues identified in the June 2, 2021 Federal Register notice.

Pre-filing meeting requests

1. We support the current requirement for applicants to submit pre-filing meeting requests. Though granting a pre-filing meeting should remain at the discretion of the certifying authority, it is our experience that simply the request for a pre-filing meeting (whether or not its granted) has both improved and increased early stakeholder engagement in the certification process. This early collaboration among all parties provides applicants the time and flexibility to develop solutions to potential water quality concerns that ensure compliance with state water quality standards before the formal submittal of the 401 certification request.
2. We support the intent of the required minimum 30-day time period though we recommend revisions to increase efficiency. The current rule under 40 CFR §121.4(a) requires the applicant to request a pre-filing meeting at least 30 days prior to submitting the certification request. Though we support the intent of this requirement in that it provides advanced notification to the certifying authority that a certification request is forthcoming and promotes early coordination with the applicant, the minimum 30-day requirement is not always necessary. In our experience and in many instances, the applicant has already secured all the materials that meet the minimum requirements of the certification request under 40 CFR §121.5 prior to the pre-filing meeting request. In other cases, the applicant can provide the required elements for a certification request shortly after the pre-filing meeting. Under these situations, requiring an applicant to wait 30 days from the pre-filing meeting request to submit their formal 401 certification request adds unnecessary permitting delays and can increase costs for the applicant. To increase efficiency in the review and processing of 401 certifications while retaining the intent of the 30-day requirement, we recommend the following revision at 40 CFR §121.4(a): “The project proponent shall request a pre-filing meeting with the certifying authority at least 30 days prior to submitting the certification request, unless waived by the certifying authority.”

Certification requests

3. We recommend revisions to the existing elements of the certification request. Consistent with our previous recommendations, we do not agree that the required minimum elements of a certification request under 40 CFR §121.5(b) and (c) are appropriately inclusive of all the information necessary for a certifying authority to determine whether the discharge complies with state water quality standards – the fundamental purpose of a 401 certification. To address this, we recommend an additional element is added that requires the applicant to “include information that addresses all applicable project-specific information required by the certifying authority to ensure compliance with water quality requirements under 40 CFR §121.1(n).” Implicit within this language is a responsibility for certifying authorities to develop clear guidance that describes the types of information that would be required to determine compliance with water quality requirements.

Reasonable period of time

4. We recommend the reasonable period of time is quantified in the rule. The current rule under 40 CFR §121.6 gives the federal permitting agencies the authority to establish the reasonable period of time a certifying authority has to act on a certification request, but shall not exceed one year from receipt of the request per statute. The U.S. Army Corps of Engineers (Corps) recently updated their rules under 33 CFR §336.1(b)(8)(iii) that establishes their default reasonable period of time as 60 days, though the Corps has the discretion to lengthen or shorten this time period, provided that the total reasonable time period cannot exceed six months. The Federal Energy Regulatory Commission (FERC) also recently amended their regulations at 18 CFR §157.22(b) to establish the reasonable

period of time as one year from receipt of the certification request. The absence of a quantified reasonable period of time in 40 CFR §121 has not only created inconsistencies between the Corps and FERC's rules that pertain to 401 certifications, but adds an unnecessary bureaucratic process in consulting and awaiting a response from the federal permitting agencies, which adds to permitting delays. Moreover, the Corps' ability to establish different reasonable periods of time other than their default 60 days introduces regulatory uncertainties for both the certifying authority and applicants. To address these concerns, we recommend that EPA establish 60 days as the *minimum* benchmark for the reasonable period of time that certifying authorities have to act on a certification request. A certifying authority may request an extension of this minimum reasonable period of time though it would be subject to approval by the federal permitting agency and shall not exceed one year in accordance with the CWA. Establishing this 60-day quantified benchmark also maintains consistency with 40 CFR §124.53(c), which requires a state to act on a certification request for EPA-issued NPDES permits within a 60-day reasonable period of time. An established minimum 60-day period in the rule provides certainty to certifying authorities to appropriately manage their resources in reviewing and processing 401 certifications.

Notwithstanding our recommendations under item 2, we believe that a 60-day reasonable period of time to act on a certification request is generally achievable, provided that certifying authorities take advantage of pre-filing meetings. For example, Wyoming has been successful in acting on the vast majority of 401 certification requests well within a 60-day time period. This success has been accomplished by encouraging applicants to submit pre-filing meeting requests at the conceptual or 30% design phase; scheduling pre-filing meetings that each cover multiple projects for larger entities like state or federal agencies; involving federal permitting agencies and other stakeholders in pre-filing meetings; and for certain projects, participating in the early stages of the NEPA review process to address any water quality issues. Through these steps, projects have been thoroughly evaluated and the most outstanding questions or issues have been addressed with both the certifying authority and federal permitting agency prior to submittal of the 401 certification request and the official start for the reasonable period of time.

5. We recommend revisions to the factors used to establish the reasonable period of time. 40 CFR §121.6(c) establishes three factors that the Corps or FERC can use to establish the reasonable period of time. With the addition of our recommended minimum 60-day reasonable period of time under item 4, we recommend that these factors are instead used by certifying authorities to request time extensions beyond the benchmark 60 days but not to exceed one year. However, neither of these existing factors considers administrative procedures for 401 certifications required under state law. Therefore, we recommend inclusion of a fourth factor that describes "the potential for administrative review, public notice or public hearing required by state law." Finally, we encourage EPA to incorporate a dispute resolution process in the event the federal permitting agency were to deny the certifying authority's time extension request.

Scope of certification

6. We support the current 'scope of certification' and definition of 'water quality requirements'. 40 CFR §121.3 states that the scope of certification is "limited to assuring that the discharge from a federally licensed or permitted activity will comply with water quality requirements." Water quality requirements is defined under 40 CFR §121.1(n) as "applicable provisions of §§ 301, 302, 303, 306 and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States." This language in the rule focuses and clarifies the intent of the CWA as the protection of *water quality* and avoids inclusion of conditions unrelated to water quality that go beyond the outer limits of power Congress established under the CWA.
7. We recommend clarification for the definition of 'discharge'. Consistent with our previous recommendations, we contend that the definition of 'discharge' at 40 CFR 121.1(f) remains narrow

and should include equipment and construction activities associated with the discharge of dredged or fill material that have an immediate and direct potential water quality impact to be consistent with Supreme Court decisions. Though the preamble of the current rule confirms this statement, we believe this conclusion needs to be added to the definition of 'discharge' to provide clarity and regulatory certainty.

Certification actions and federal agency review

8. We support that certifying authorities must provide a basis for certification conditions and denials. 40 CFR §121.7(d) and (e) require certifying authorities to provide reasons and statute or rule citations for each condition when certification is granted as well as when a certification is denied. It is entirely appropriate and incumbent upon certifying authorities to provide a clear and objective basis for each certification condition and for any certification denial. This not only provides transparency and regulatory certainty but also provides assurances to applicants and federal permitting agencies that the conditions or denials are rooted in the protection of surface water quality and fall within the scope of 401 certification. Removal of this requirement in a new rule would be tantamount to supporting a non-transparent process in the issuance or denial of water quality certification.
9. We do not support granting federal permitting agencies authority to waive certification decisions. 40 CFR §121.9 grants federal permitting agencies the ability to waive a certifying authority's decision or any of a certification's conditions if found inconsistent with the procedural requirements of the rule. While it's allowable for a federal permitting agency to review issued certifications, it is not in their purview to waive a certifying authority's decision to grant or deny the certification, nor any of its certification conditions. Section 401 of the CWA only allows for the waiver of the certification request if 1) the certifying authority issues the waiver or 2) the certifying authority fails to act on the request within the established reasonable period of time. The statute does not allow a federal permitting agency to waive a certifying authority's decision or any of its conditions if acted on within the reasonable period of time. Thus, the current language at 40 CFR §121.9 goes beyond Congress' intent and allows federal agencies to nullify denials or any certification decisions issued by a state that do not comport with the procedural requirements of the rule.

Therefore, we request that the language under 40 CFR §121.9 be recast to accurately preserve states' waiver authority reflected in statute while also ensuring that procedural requirements of the rule are met. We recommend language be included in the rule that 1) remands the granting of certification or denial back to the certifying authority if the federal agency determines that a certification decision, or its conditions, do not satisfy the procedural requirements of 40 CFR §121 to address deficiencies; 2) provides a reasonable but finite time period for the certifying authority to address deficiencies; and 3) establishes a streamlined dispute and resolution process in the event the identified deficiencies cannot be resolved to the satisfaction of both the certifying authority and federal agency.

Enforcement

10. We recommend revisions to certifying authority inspection requirements. 40 CFR §121.11(a) only requires that a certifying authority be afforded the opportunity to conduct an inspection of the facility prior to the initial operation of a certified project. 40 CFR §121.11(b) requires that if the certifying authority, following an inspection pursuant to 40 CFR § 121.11(a), determines the discharge will violate the certification, the certifying authority shall notify the federal agency in writing and recommend remedial measures necessary to bring the certified project into compliance with the certification. 40 CFR § 121.11(c) requires the federal agency be responsible for enforcing certification conditions in a federal license or permit. We contend that the rule language at 40 CFR §121.11(a) should be revised to require that certifying authorities be afforded the opportunity to

conduct inspections of a facility prior, during, and after the certified project has commenced. Furthermore, we recommend adding language to the rule that clarifies certifying authorities, based on the inspection findings, may enforce their *state surface water quality standards*. However, the federal permitting agency remains responsible for enforcing certification conditions.

11. We support that certification conditions are enforced by the federal agency. The rule at 40 CFR §121.11(c) makes clear that the federal permitting agency is responsible for enforcing certification conditions as they are incorporated as conditions of the federal permit. This has been our understanding for years. However, this does not limit a certifying authority from pursuing enforcement under its own surface water quality standards.

Modifications

12. We recommend adding certification re-opener provisions to the rule. The 2020 401 rule explicitly removed the long-standing ability of a certifying authority to re-open and modify an issued certification under the 1971 rule. The current rule's prohibitions on re-opening certifications limits the flexibility and need for certifying authorities to modify existing certification conditions to ensure surface water quality is protected when new information or situations indicate the project has materially changed from what was originally certified. We request that the EPA insert language in the rule that allows states to re-open certifications, make it clear that such modifications can only be made by a certifying authority, and develop reasonable criteria that would warrant re-opening the certification though conforming to provisions for the reasonable period of time and requests for extensions not to exceed one year from the date of the certification request.

Neighboring Jurisdictions

13. We recommend revisions to federal neighboring jurisdiction reviews. To comply with Section 401(a)(2), the rule under 40 CFR §121.12 requires EPA to perform a review of every certifying authority's individual certification to determine potential water quality impacts to a neighboring jurisdiction (state or tribe). The EPA can take up to 30 days to conduct their neighboring jurisdiction review and the federal permitting agency cannot issue the dredge/fill permit until this review is complete. Requiring EPA to conduct a neighboring jurisdiction review on every individual certification introduces unnecessary permitting delays, inefficiencies, and increased economic burden. It is our experience that EPA has not been issuing 401(a)(2) decisions on our individual certifications but is instead simply letting the 30-day time periods expire without notification to the federal permitting agency or certifying authority on whether a neighboring jurisdiction may be affected. Section 401(a)(2) requires EPA to decide on whether a discharge 'may affect' the quality of waters in a neighboring jurisdiction, though it appears that EPA has concluded through their inactions that every individually certified discharge qualifies for a neighboring jurisdictional review. Congress never intended EPA to exert the 401(a)(2) requirement on every individual certification issued, but rather as a discretionary added level of oversight to be used when appropriate and necessary to protect the water quality in a neighboring (i.e., bordering) state or tribal nation. To align with statute, we recommend reasonable and practical criteria are inserted into the rule that defines when a neighboring jurisdiction review is appropriate and necessary. Candidate criteria may include whether a downstream state or tribe has requested a neighboring jurisdictional review and proximity of the discharge to a neighboring jurisdiction. To avoid unnecessary permitting delays, we also request insertion in the rule of a minimum period of time (e.g., 7 days) from receipt of the individual certification for the EPA to determine and notify whether a neighboring jurisdictional review is necessary.

Data and other information

14. Regarding specific impacts of the current 401 rule on processing and issuing certifications in Wyoming, please refer to our previous responses.

Implementation coordination

15. To reconsider and potentially revise the 401 rule will require meaningful state and federal partner collaboration prior to any rule-making. Because the interests and perspectives of 401 certification vary across the nation, we recommend that regional 1-2 day in-person state/federal partnership meetings are offered where discussions and constructive feedback on substantive content are encouraged in a fair and balanced environment. It is also critical that outcomes of these meetings are communicated through the Western Governors' Association (WGA) as well as professional organizations like the Association of Clean Water Administrators (ACWA) and Environmental Council of States (ECOS), among others.

Closing Statement

In closing, the WDEQ appreciates EPA's efforts to solicit feedback on the benefits and potential revisions to the current 401 rule. The current 401 rule was a significant step forward in bringing clarity that a proposed project for a federal license or permit must comply with, and only with, *water quality* requirements set forth in a 401 water quality certification. The transparency of the certification process has been further improved in the current rule by requiring certifying authorities to provide the basis and legal citations for certification conditions and denials. However, we believe there are some aspects of the rule that would benefit from further revision to improve efficiency, most notably case-specific waivers for the minimum 30-day wait period to submit a certification request following a pre-filing meeting, quantifying a reasonable period of time in the rule, and allowing for certification modifications within reasonable bounds. To avoid federal overreach and misalignment with cooperative federalism principles, we also recommend removing the language that grants authority to federal agencies to waive a state's certification decisions or denials.

With WDEQ's suggested revisions, we believe the updated rules for water quality certification will support national water quality goals, preserve the powers granted to states by Congress under Section 401, improve state certification and federal permitting processes, and allow states to continue to fulfill their role as co-regulators of water quality.

We look forward to continuing our federal/state partnership to develop a clearer rule that increases predictability and timeliness of water quality certifications, focuses the scope of certification and conditions, and clarifies the role of the federal government and states in protecting the quality of our nation's waters under Section 401. If you have any questions or comments, please contact David Waterstreet (david.waterstreet@wyo.gov, 307-777-6709) or Eric Hargett (eric.hargett@wyo.gov, 307-777-6701).

Sincerely,



Todd Parfitt, Director

TP/JZ/DW/EGH/cf

cc: Jennifer Zygmunt, Interim Administrator, Water Quality Division, WDEQ
Beth Callaway, Governor's Office