

CWA Section 401 Water Quality Certification

EPA Clean Water Act Tribal Workshop
August 14, 2008

Outline

- What is a 401 cert and when is it required
- Basic 401 Process
- EPA Application requirements
- Evaluation Process
- 401 certs and 404 permits

401 Certification: Overview

Clean Water Act (CWA) § 401 says:

- No federal permit or license can be issued that may result in a discharge to waters of the United States

Unless

- The EPA/Tribe/State certifies that the discharge is consistent with standards and other water quality goals, or waives certification

➤ No 401 cert or waiver means no federal permit or license

401 Certification: Protecting Water Quality

- Provides for the protection of the physical, chemical, and biological integrity of waters
- Allows EPA/Tribes/States to address impacts to water quality from federal permits
- Helps insure that federal actions will not violate Tribe/State water quality standards

What Actions Trigger a 401 Cert?

CWA permits

- §404 dredge/fill permits
- §402 NPDES permits

Not limited to CWA Actions

- Federal Powers Act
- Atomic Energy Act

- Look for a federal permit/license authorizing discharge into waters of the US

Who Issues 401 Certs?

- EPA regional offices on behalf of tribes not yet authorized
- Indian tribes authorized to administer the Water Quality Standards (WQS) program
- All States where the discharge originates

Authorized Tribes in Region 9

- EPA, Region 9 issues the 401 cert on behalf of other tribes in AZ, CA, and NV

Arizona:

- Navajo Nation, Hualapai Nation, and White Mountain Apache Tribe

California:

- Hoopa Valley Tribe, Bishop Paiute Tribe, Big Pine Paiute Tribe, Twenty-Nine Palms Band

Basic 401 Process

- Applicant applies to the EPA/Tribe/State for certification
- EPA/Tribe/State reviews
 - Public Notice
 - Public Hearing possible
- Applicant provides 401 cert with application to federal permit/licensing agency

What does EPA require in a 401 application?

- Contact information
- Tribal contact information (for non-tribal applicants)
- Description of proposed activity
- List of other permits needed
- Purpose and need statement
- Location of watercourse
- Vicinity Maps

What does EPA require in a 401 application?

- Scale plan-view and cross section diagrams of the pre-project and pos-project conditions
- Estimated acreage of impacted waters
- Source and quantity of fill material
- Description of impacts
- Any proposed mitigation
- 404 (b)(1) Alternatives Analysis for 404 related cert applications

Timeframes for Review

➤ EPA:

- Usually complete within 30 days
- For 404 permits Corps assumes waiver if no action after 60 days
- CWA provides up to one year

➤ Tribes/States may have different timeframes

What is considered when evaluating a 401 application?

All potential water quality impacts

- Direct and indirect
- For the life of the project

Decision can be based on:

- Data/information provided by the applicant
- Any other available and reliable data

What Must Be Determined?

EPA/Tribe/State must conclude that the permitted activity will be consistent with:

- Effluent limitations for pollutants
- Water quality standards
- Toxic pollutant limitations

PLUS

- Any more stringent tribal/state requirements
(e.g. effects on cultural laws or non-federal waters)

What can the EPA/Tribe/State do under a 401 cert?

- Grant Certification
- Grant Certification with Conditions
- Deny Certification
- Waive Certification

What can the EPA/Tribe/State do under a 401 cert?

Grant: indicates activity consistent with standards and other provisions

➤ **Effect of granting:**

- Federal agency can proceed with permit action and evaluate whether or a permit/license should be issued

What can the EPA/Tribe/State do under a 401 cert?

- Grant with conditions:** indicates activity consistent only if listed conditions are met
 - Scope of potential conditions can be quite broad
- **Effect of Granting with conditions:**
 - Every 401 condition must become a term of the permit. Federal agency can't pick and choose or change conditions

Typical Conditions

- Construction stormwater management
- Post-construction stormwater treatment
- Vegetated buffers around waters
- Erosion control measures
- Seasonal constraints
- Restoration of disturbed areas
- Mitigation of permanent impacts

What can the EPA/Tribe/State do under a 401 cert?

- Deny:** indicates activity is not consistent with water quality standards and goals
- Implies that no conditions would be adequate to ensure standards and goals would be met if permit issued
- **Effect of denying:**
- Federal agency cannot issue permit or license

What can the EPA/Tribe/State do under a 401 cert?

Waive: EPA/Tribe/State decides not to act on 401 application request

- Waiver can be passage of time or explicit

➤ **Effect of Waiving:**

- 401 cert is not required for federal agency to issue permit/license

What can the EPA/Tribe/State do under a 401 cert?

Grant

Grant with Conditions

Deny

Waive

- If you do not meet the conditions of the 401 cert, then you are not in compliance with the permit

404 Permits

Most 401 certs are tied to a 404 permit

➤ Individual 404 Permits

- Follow application process outlined above

➤ 404 Nationwide Permits

- EPA, Region 9 has programmatically certified the NWP for tribal lands.
- Need to contact the Tribe for the 7 authorized tribes

404 Permits

NWP and EPA issued 401 certs

- You may not need an individual 401 cert
- Follow the conditions in the programmatic certification
- Conditions may include:
 - preconstruction notification
 - submittal of an alternatives analysis
 - compensatory mitigation
- Conditions may be different from the requirements of the Corps for the 404 permit
 - Check the 401 certification before you start work

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401 Certification: Review

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- If you do not meet the conditions of the 401 cert, then you are not in compliance with the permit

Send 401 Applications To:

USEPA, Region 9
Wetlands Office (WTR-8)
75 Hawthorne St
San Francisco, CA 94105

* For authorized tribes, contact the tribe directly

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404/401 Case Studies

- New School
 - Impacts: Filling 2.5 acres of waterways all on tribal land
 - Need 404? 401? To whom do you apply?
- New Road
 - Impacts: Crosses two washes and directly impacts 0.1 acres of waterways, one of the washes is not on tribal land
 - Need 404? 401? To whom do you apply?