

This table is an appendix from the Economic Analysis for the final 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule.

For more information regarding the final 2023 Rule, please see the final 2023 Rule and the Economic Analysis for the Final Rule available at <https://www.epa.gov/cwa-401>

Appendix A. Rule Provision Comparison

Table A-1 compares major rule provisions, in plain language, under the 1971 Rule, the 2020 Rule, and the final rule.

Table A-1. Comparison of rule provisions under the 1971 Rule, the 2020 Rule, and the final rule		
1971 Rule and Practice	2020 Rule	Final Rule
When certification is required		
<ul style="list-style-type: none"> A project proponent must request section 401 certification from the appropriate certifying authority if a federally licensed or permitted activity may result in a discharge into waters of the United States. While not addressed in 1971 Rule, case law from the 9th Circuit held that only a point source discharge triggers section 401 (<i>ONDA v. Dombeck</i>, 172 F.3d 1092 (9th Cir. 1998)). 	<ul style="list-style-type: none"> Same as 1971 practice, but the regulatory text explicitly provided that certification is required for any license or permit that authorizes an activity that may result in a discharge. Defined “discharge” for purposes of section 401 as a discharge from a point source into a water of the United States, consistent with <i>ONDA</i>. 	<ul style="list-style-type: none"> Same as 1971 practice, but the regulatory text explicitly provides that a certification or waiver is required for any license or permit that authorizes any activity which may result in a point source discharge into waters of the United States. Preamble provides that a discharge for purposes of section 401 is a discharge from a point source into waters of the United States, consistent with <i>ONDA</i>.
Pre-filing meeting request		
<ul style="list-style-type: none"> Pre-filing meeting requests were not required by rule but were encouraged by some certifying authorities. 	<ul style="list-style-type: none"> Project proponents were required to request a pre-filing meeting from a certifying authority at least 30 days before requesting certification. 	<ul style="list-style-type: none"> Project proponents are required to request a pre-filing meeting with a certifying authority at least 30 days prior to requesting certification, unless waived or shortened by the certifying authority.
Request for certification		
<ul style="list-style-type: none"> Included five components that must be in a certification request when EPA is the certifying authority. Did not define a certification request for other certifying authorities. In practice, some states and authorized Tribes said a “complete application” constituted a certification request. 	<ul style="list-style-type: none"> Required all certification requests to be written, signed, and dated and include either seven or nine components, which are based on whether the certification request was for an individual license or permit, or the issuance of a general license or permit. 	<ul style="list-style-type: none"> Requires all requests for certification to be in writing, signed, and dated. If the request for certification is for an individual license or permit, it must include a copy of the license or permit application submitted to the federal agency and any readily available water quality-related materials that informed the development of the application.

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		<ul style="list-style-type: none"> • If the request for certification is for the issuance of a general license or permit, it must include a copy of the draft license or permit and any existing and readily available water quality-related materials that informed the development of the draft license or permit. • Requires all requests for certification to EPA to include seven additional items, as applicable; this requirement also applies to requests for certification to states or authorized Tribes that do not identify additional contents for a request for certification. • States and authorized Tribes are free to identify additional contents for a request for certification that are relevant to the water quality-related impacts from the activity prior to when the request for certification is made.
Reasonable period of time (RPT)		
<i>When the RPT starts:</i>		
<ul style="list-style-type: none"> • The RPT began after the receipt of a certification request. • In practice, some certifying authorities required a “complete application” to start the RPT. 	<ul style="list-style-type: none"> • A project proponent was required to submit a certification request to the certifying authority and Federal agency concurrently. • The RPT began on the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures. 	<ul style="list-style-type: none"> • The RPT begins on the date that the certifying authority receives a request for certification as discussed in the section above and in accordance with the certifying authority’s applicable submission procedures. • Certifying authority must notify the Federal agency and project proponent, in writing, of the date that the request for certification was received.

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<i>Timeline for acting:</i>		
<ul style="list-style-type: none"> • A certifying authority must act on a request for certification within the RPT, which shall not exceed one year, as determined by the Federal agency. • Rule provided for a default RPT of generally six months. 	<ul style="list-style-type: none"> • A certifying authority had to act on a request for certification within the RPT, which shall not exceed one year, as determined by the Federal agency. • Rule did not provide a default RPT. 	<ul style="list-style-type: none"> • A certifying authority must act on a request for certification within the RPT, which shall not exceed one year, as determined by the Federal agency and certifying authority. • If the certifying authority and Federal agency do not come to an agreement on the RPT, it will default to six months.
<i>How the RPT is set:</i>		
<ul style="list-style-type: none"> • Federal agency expected to set the RPT; process not specified in rule. • In practice, Federal agencies specified default RPT in regulations. 	<ul style="list-style-type: none"> • Federal agency was required to set the RPT either categorically or on a case-by-case basis within 15 days of receiving a certification request. • Preamble provided that the RPT will default to a categorical RPT (if specified in a Federal agency's regulations) or one year (if the Federal agency did not have a categorical RPT in its regulations) if the Federal agency failed to set an RPT within 15 days of receiving a certification request. • Rule provided factors that the Federal agency must consider when establishing the RPT. 	<ul style="list-style-type: none"> • Certifying authority and Federal agency may jointly set the RPT. • If the certifying authority and Federal agency do not reach an agreement on the RPT in writing, the RPT defaults to six months. • Final rule does not specify factors that the Federal agency and certifying authority must consider when setting the RPT.
<i>Extending the RPT:</i>		
<ul style="list-style-type: none"> • Not specified in rule, but some Federal agencies included procedures for modifying the RPT in their water quality certification implementation regulations. 	<ul style="list-style-type: none"> • Certifying authorities and project proponents could request an extension to the RPT, but the Federal agency was not required to grant the extension request. • The extension may not extend the RPT beyond one year from receipt of the certification request. 	<ul style="list-style-type: none"> • RPT is automatically extended upon notification by the certifying authority prior to the end of the reasonable period of time in two scenarios: need to meet public notice procedures and force majeure events. • RPT may be extended upon certifying authority and Federal agency agreement for any reason, as long as it does not extend

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		beyond one year from the date that the request for certification was received.
<i>Stopping/pausing the RPT:</i>		
<ul style="list-style-type: none"> Not specified in rule. In practice, some certifying authorities requested or allowed project proponents to withdraw their applications to stop/pause/restart the clock. 	<ul style="list-style-type: none"> The withdrawal/resubmit practice was prohibited in regulatory text. 	<ul style="list-style-type: none"> Declines to take a position on validity of the withdrawal/resubmit practice.
Scope of review and scope of conditions		
<ul style="list-style-type: none"> Not specified in regulatory text. In 1994, the Supreme Court stated that the scope of a jurisdiction’s certification review includes assuring that any potential point source discharge, as well as the licensed/permitted activity as a whole, will comply with sections 301, 302, 303, 306, and 307 of the Clean Water Act and “any other appropriate requirements of State or tribal law.” (<i>PUD No. 1 of Jefferson County v. WA Dept. of Ecology</i>, 511 U.S. 700 (1994)) 	<ul style="list-style-type: none"> The scope of certification was limited to assuring that a discharge from a federally licensed or permitted activity will comply with water quality requirements. Water quality requirements were defined as the applicable provisions of CWA sections 301, 302, 303, 306, and 307, and state or Tribal regulatory requirements for point source discharges into waters of the United States. 	<ul style="list-style-type: none"> The scope of certification is based on whether the activity will comply with applicable water quality requirements. The certifying authority’s evaluation is limited to the water quality-related impacts from the activity subject to the license or permit, including the activity’s construction and operation. Water quality requirements are defined as any limitation, standard, or other requirement under CWA sections 301, 302, 303, 306, and 307, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law. Scope of review for a certification decision is the same as the scope of permissible conditions that may be added to that certification.
Certification decisions		
<i>Granting certification:</i>		
<ul style="list-style-type: none"> A grant of certification included five elements that must be included in a certification, 	<ul style="list-style-type: none"> A grant of certification was required to be in writing and include a statement that the 	<ul style="list-style-type: none"> A grant of certification must be in writing and should include (1) identification of the

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including "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards."	discharge from the proposed project will comply with water quality requirements.	decision as a grant of certification (2) identification of the applicable Federal license or permit, (3) a statement that the activity will comply with water quality requirements, and (4) an indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).
<i>Granting certification with conditions:</i>		
<ul style="list-style-type: none"> • A grant of certification with conditions included the same elements as a grant of certification, including "a statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity." • No further information required with the certification condition. 	<ul style="list-style-type: none"> • A grant of certification with conditions for an individual license or permit was required to be in writing and include (1) a statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements, and (2) a citation to Federal, state, or Tribal law that authorizes the condition. • Included a similar requirement for a grant of certification with conditions on issuance of a general license or permit. 	<ul style="list-style-type: none"> • A grant of certification with conditions must be in writing and should include (1) identification of the decision as a grant of certification with conditions, (2) identification of the applicable Federal license or permit, (3) a statement explaining why each of the included conditions is necessary to assure that the activity will comply with water quality requirements, (4) an indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).
<i>Denying certification:</i>		
<ul style="list-style-type: none"> • Not specified. 	<ul style="list-style-type: none"> • A denial of certification on an individual license or permit was required to be in writing and include (1) the specific water quality requirements with which the discharge will not comply, (2) a statement explaining why the discharge will not comply with the identified water quality 	<ul style="list-style-type: none"> • A denial of certification must be in writing and should include (1) identification of the decision as a denial of certification, (2) identification of the applicable Federal license or permit, (3) a statement explaining why the certifying authority cannot certify that the activity will comply with water quality

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	<p>requirements, and (3) if the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements.</p> <ul style="list-style-type: none"> • Included a similar requirement for a denial of certification on issuance of a general license or permit. 	<p>requirements, including but not limited to a description of any missing water quality-related information if the denial is based on insufficient information, and (4) an indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).</p>
<i>Waiving certification:</i>		
<ul style="list-style-type: none"> • A certifying authority could waive certification (1) expressly or (2) by failing or refusing act, which was not defined in the regulation, although in practice Federal agencies sometimes determined waiver occurred by passage of time. 	<ul style="list-style-type: none"> • A certifying authority could waive certification (1) expressly or (2) by failing or refusing to act. • An express waiver was required to be in writing. • A certifying authority could fail or refuse to act on a request for certification by (1) failing or refusing to act on a certification request within the RPT, (2) failing or refusing to satisfy the requirements for a grant of certification (described above), (3) failing or refusing to satisfy the requirements for a denial of certification (described above), or (4) failing or refusing to comply with other procedural requirements of section 401. • A certifying authority could also waive a certification condition by failing or refusing to satisfy the requirements for a grant of certification with conditions (described above). 	<ul style="list-style-type: none"> • A certifying authority may waive certification (1) expressly or (2) by failing or refusing to act. • An express waiver must be in writing and should include (1) identification of the decision as an express waiver of certification, (2) identification of the applicable Federal license or permit, (3) a statement that the certifying authority expressly waives its authority to act on the request for certification, (4) an indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1). • A certifying authority fails or refuses to act on a request for certification by failing to make a certification decision within the RPT.

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Federal agency review		
<i>Scope of Federal agency review</i>		
<ul style="list-style-type: none"> Not addressed in rule but, in practice, a Federal agency determined whether a certifying authority failed to act within the RPT. Some case law provided Federal agencies with the ability to review for compliance with facial section 401 statutory requirements, including public notice provision, RPT, and appropriate certifying authority. 	<ul style="list-style-type: none"> A Federal agency was required to review a grant of certification, grant of certification with conditions, or denial of certification to determine whether it complied with the procedural requirements for those actions (e.g., denial of certification element requirements), whether the actions were issued within the RPT, and whether the actions followed the other procedural requirements of section 401 (e.g., public notice). 	<ul style="list-style-type: none"> A Federal agency may verify compliance with three requirements of section 401: (1) whether the appropriate certifying authority issued the decision, (2) whether the certifying authority confirmed it complied with its public notice procedures established pursuant to section 401(a)(1), and (3) whether the certifying authority acted on the request for certification within the RPT. Explicitly limits Federal agency review to the three factors above. Defers to certifying authorities to determine how to demonstrate that it met the three listed facial elements.
<i>Consequences of Federal agency review</i>		
<ul style="list-style-type: none"> Not addressed in rule. In practice, a waiver occurred if Federal agency determined the certifying authority failed to act within the RPT. 	<ul style="list-style-type: none"> A Federal agency could waive a state's or authorized Tribe's certification decision or condition for failure to act within the RPT, and failure to comply with the procedural requirements of section 401 (e.g., public notice) or the 2020 Rule (e.g., denial of certification element requirements). Federal agencies were not required to provide the certifying authority with the opportunity to remedy any deficiency. 	<ul style="list-style-type: none"> A waiver may only occur for failure to act within the RPT.
Modifications		
<ul style="list-style-type: none"> The 1971 Rule allowed modifications upon agreement by the Federal agency, certifying authority, and EPA. 	<ul style="list-style-type: none"> Removed the 1971 modification provision. 	<ul style="list-style-type: none"> Clarifies that unilateral modifications to granted certifications are not allowed.

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	<ul style="list-style-type: none"> The 2020 Rule relied on other Federal agency regulations to address certification modifications instead. 	<ul style="list-style-type: none"> A certifying authority and a Federal agency may agree to modify a grant of certification (with or without conditions). The modification is limited to the scope of the agreement (<i>e.g.</i>, if they agree that the construction timeframe needs to be extended, only that aspect of the certification may be modified); however, the certifying authority is not required to obtain the Federal agency’s agreement on the text of the modification. EPA is removing itself from the list of entities in the 1971 Rule that must reach agreement for modifications to occur. Clarifies that the modification process cannot be used to revoke or change a grant of certification into a denial or waiver.
Neighboring Jurisdictions Process		
<i>Notice from Federal agency to EPA</i>		
<ul style="list-style-type: none"> Required Federal agency to notify EPA upon receipt of an application and a certification or waiver. Notification included a copy of the certification or waiver, and the portions of the Federal license or permit application related to water quality considerations. EPA could ask Federal agency to procure additional information from the project applicant. 	<ul style="list-style-type: none"> Required the Federal agency to notify EPA within five days of receiving a license or permit application and the related certification. Did not define the contents of a Federal agency’s notification to EPA. Allowed EPA to request copies of the certification and the Federal license or permit application. 	<ul style="list-style-type: none"> Requires the Federal agency to notify EPA within five days of receiving the application and either a certification or waiver. Defines the contents of a Federal agency’s notification to EPA, but also provides EPA with the option of entering into agreements with Federal agencies regarding the manner and contents of notification. Allows EPA to request supplemental information.

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<i>EPA's "may affect" evaluation and notice to neighboring state/authorized Tribe</i>		
<ul style="list-style-type: none"> • Rule did not define what "may affect" means; in practice, EPA interpreted section 401(a)(2) as providing EPA with the discretion to determine whether the discharge from a project may affect the water quality in a neighboring jurisdiction; however, one district court found that EPA is required to make a determination about whether a discharge may affect a neighboring state/authorized Tribe (<i>Fond du Lac Band of Lake Superior Chippewa v. EPA</i>, 519 F.Supp.3d 549 (D. Minn. 2021)). • Rule provided that if EPA determines that the discharge from a project may affect water quality in a neighboring jurisdiction, EPA shall notify the neighboring jurisdiction, certifying authority, Federal agency, and applicant. • Required EPA to send any materials it reviews to the neighboring state/authorized Tribe. 	<ul style="list-style-type: none"> • Provided that the Administrator at his or her discretion may determine that the discharge from the certified project may affect water quality in a neighboring jurisdiction. • Defined what EPA would have to provide to neighboring states and authorized Tribes when it determines that a discharge may affect a neighboring state or authorized Tribe. • Required EPA to notify the neighboring state or authorized Tribe, Federal agency, project proponent, and the certifying authority. • Clearly stated that a Federal license or permit may not be issued until the neighboring jurisdictions process concludes. 	<ul style="list-style-type: none"> • Clarifies that EPA must determine whether a discharge "may affect" water quality in a neighboring state or authorized Tribe. • Defines what EPA provides to neighboring states and authorized Tribes when it determines that a discharge from the project may affect a neighboring state or authorized Tribe. • Requires EPA to notify the neighboring state or authorized Tribe, Federal agency, and project proponent. • Clearly states that a Federal license or permit shall not be issued until the neighboring jurisdictions process concludes.
<i>Neighboring state/authorized Tribe "will violate" objection</i>		
<ul style="list-style-type: none"> • Not specified in rule. 	<ul style="list-style-type: none"> • Required the neighboring jurisdiction to notify EPA and the Federal agency if it objected to the issuance of the Federal license or permit. • Defined what the neighboring jurisdiction must provide in its notification to EPA and the Federal agency. 	<ul style="list-style-type: none"> • Requires the neighboring jurisdiction to notify EPA and the Federal agency if it objects to the issuance of the Federal license or permit. • Defines what the notified neighboring jurisdiction must provide in its notification to EPA and the Federal agency.
<i>Objection and hearing process</i>		
<ul style="list-style-type: none"> • Required the Federal agency to notify EPA at least 30 days before the public hearing. • Required EPA to provide its evaluation and recommendations at the public hearing, including recommendation as to whether and 	<ul style="list-style-type: none"> • Required the Federal agency to notify EPA at least 30 days before the public hearing. • Required EPA to provide its evaluation and recommendations at the public hearing. 	<ul style="list-style-type: none"> • Allows the notified neighboring jurisdiction to withdraw its objection prior to the public hearing. • Explicitly reiterates that the Federal agency must hold a public hearing if the notified

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<p>under what conditions the license/permit should be issued.</p>	<ul style="list-style-type: none"> Clarified that the license or permit may not be issued if additional license or permit conditions cannot ensure that the discharge from the certified project will comply with the neighboring jurisdiction’s water quality requirements. 	<p>neighboring state or authorized Tribe requests one.</p> <ul style="list-style-type: none"> Requires the Federal agency to provide public notice to interested parties at least 30 days prior to the hearing. Requires EPA to provide its evaluation and recommendations at the hearing. Clarifies that the license or permit may not be issued if additional license or permit conditions cannot ensure that the discharge from the project will comply with the notified neighboring jurisdiction’s water quality requirements.
Treatment in a Similar Manner as a State for Section 401		
<ul style="list-style-type: none"> Rule did not provide Tribes with the opportunity to receive TAS solely for section 401. In practice, Tribes received TAS for section 401 by receiving TAS for water quality standards. Tribes without TAS were unable to participate as a neighboring jurisdiction under the section 401(a)(2) neighboring jurisdictions process. 	<ul style="list-style-type: none"> Rule did not provide Tribes with the opportunity to receive TAS solely for section 401. In practice, Tribes received TAS for section 401 by receiving TAS for water quality standards. Tribes without TAS were unable to participate as a neighboring jurisdiction under the section 401(a)(2) neighboring jurisdictions process. 	<ul style="list-style-type: none"> Provides Tribes with a new section 401-specific alternative option for obtaining section 401 TAS without also obtaining TAS for water quality standards. Provides Tribes with an option to obtain TAS solely for participating as a neighboring jurisdiction in the section 401(a)(2) neighboring jurisdictions process.
EPA as a Certifying Authority		
<ul style="list-style-type: none"> Specified how/to whom EPA must provide public notice on a certification request when it is the certifying authority. Limited the subject matter of a public hearing to whether EPA should grant or deny a request for certification. 	<ul style="list-style-type: none"> Clarified when EPA acts as the certifying authority on behalf of a jurisdiction. Required EPA to provide public notice within 20 days of receiving a certification request to parties known to be interested in the proposed project or in the receiving waters into which the discharge may occur. 	<ul style="list-style-type: none"> Clarifies when EPA acts as the certifying authority on behalf of a jurisdiction. Requires EPA to provide public notice within 20 days of the date that the request for certification was received, but enables EPA to determine the best methods/means to provide the public notice.

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	<ul style="list-style-type: none"> • Did not limit the scope of a public hearing on a certification request. • Allowed EPA to request additional information from a project proponent on a request for certification, but only if the initial request is made within 30 days of receipt of the certification request. • Limited EPA's request for additional information to only that which was within the scope of certification, directly related to the discharge from the proposed project and its potential effects on receiving waters, and able to be collected or generated in the reasonable period of time. 	<ul style="list-style-type: none"> • Clarifies that EPA must provide an opportunity for public comment after providing notice. • Does not limit the scope of a public hearing on a request for certification.
Technical Assistance		
<ul style="list-style-type: none"> • EPA may, and upon request shall, provide Federal agencies with determinations, definitions, and interpretations with respect to the meaning and content of federally approved water quality standards, and findings with respect to the application of all applicable water quality standards. • EPA may, and upon request shall, advise Federal agencies as to the status of compliance by dischargers with the conditions and requirements of applicable water quality standards. • EPA may advise Federal agencies with respect to conditions to achieve compliance with the CWA's purpose where there are no applicable water quality standards. 	<ul style="list-style-type: none"> • EPA may, and upon request shall, provide Federal agencies, certifying authorities, and project proponents with relevant information and assistance regarding the meaning of, content of, application of, and methods to comply with water quality requirements. 	<ul style="list-style-type: none"> • Upon request, EPA must provide Federal agencies, certifying authorities, and project proponents with any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any Federal agency, certifying authority, or project proponent, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.