



August 4, 2022

Via email: OW-Docket@epa.gov

Via Federal eRulemaking Portal: <https://www.regulations.gov/>

Re: Comments on Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule, Docket ID No. EPA–HQ–OW–2022–0128

Dear Assistant Administrator Fox,

The New Mexico Environment Department (NMED) is pleased to provide the following comments in support of the U.S. Environmental Protection Agency's (EPA) proposed rule that will establish greater consistency with the 1971 401 certification rule and long-standing past practice. NMED supports a clear, implementable rule that fosters an efficient and predictable certification process that is consistent with the water quality protection and cooperative federalism principles central to Section 401 of the Clean Water Act (CWA).

In the preamble to the proposed rule, EPA requests comment on several issues related to the Section 401 certification process. NMED supports clear federal rules and guidance that allow states and authorized tribes to work cooperatively with federal agencies to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, which, under 20.6.4.7 New Mexico Administrative Code, are also surface waters of the state of New Mexico.

Comment 1. The Agency requests comment on an alternative approach, under which a project proponent may submit either a copy of its officially submitted license or permit application or a copy of the draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project.

NMED's preferred approach includes the alternative where a project proponent must submit a copy of the draft permit application, *and* a copy of the draft permit, *and* any existing and readily available data or information related to potential water quality impacts from the proposed project, *and a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge* as included in the 2020 Rule. The proposed provision at 40 C.F.R. § 121.5(c)(3) only requires the applicable Federal license or permit, including permit type. This is inadequate and does not fully support cooperative federalism or efficient predictable certification processes because the certifying authority may not have all the information it needs to adequately and efficiently certify a permit. When states and authorized tribes are involved from the beginning of the process, costly and timely delays to projects can be avoided.

Comment 2. EPA requested comment on whether the Federal agency, as opposed to the project proponent, should provide a copy of the draft license or permit to the certifying authority when it is not otherwise already publicly available.

It is common for project proponents to not know what type of permit their project requires, particularly for the Nationwide Permits and Regional General Permits under CWA section 404. Therefore, the Federal Agency should provide the certifying authority the copy of the draft

license or permit to ensure that the project proponent does not provide the wrong draft permit or license. The efficiency and predictability of the certification process would be significantly reduced if a project proponent did not submit the correct draft permit or license to the certifying authority. For example, precious time during the reasonable period of time could be lost while the certifying authority reviews the wrong draft permit or license.

Comment 3. The Agency also requests comment on an alternative approach where the project proponent would be required to submit:

- (1) a federal license or permit application instead of a copy of the draft license or permit,
- (2) any existing and readily available data or information related to potential water quality impacts from the proposed project, and
- (3) an additional set of contents, referred to as “proposed activity information,” with six components, including the following: 1. A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity; 2. The specific location of any discharge(s) that may result from the proposed activity; 3. A map and/or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, highways; 4. A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation; 5. The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) on which any discharge(s) will take place; and 6. Any additional information to inform whether any discharge from the proposed activity will comply with applicable water quality requirements. This additional information incorporates some of the information requirements from the 1971 Rule and 2020 Rule and adds other items to “*reflect the additional information that the Agency views necessary to initiate its analysis of a certification request on a federal license or permit application*” [emphasis added].

NMED supports this alternative approach that includes an additional set of contents. In the final rule, EPA should require, at a minimum, any information that EPA has already identified as necessary to initiate the certification process. A final rule that does not require information necessary to inform a certification is inadequate to protect water quality. EPA’s proposal to allow states and authorized tribes to define their own additional requirements for a certification request does not provide “a clear backstop for those states or authorized tribes who do not choose to define any additional requirements in regulation.” A clear backstop in the federal rule helps ensure that the certification process does not proceed with less information than what EPA has determined to be necessary.

Comment 4. EPA requests comment on a proposed collaborative approach to setting the reasonable period of time, the 30-day timeframe for the Federal agency and certifying authority to determine the length of the reasonable period of time, and the 60-day default. EPA also requests comment on alternative approaches, such as whether the default reasonable period of time should be shorter or longer depending on when certification is requested during the licensing or permitting process.

NMED supports the proposed collaborative approach. However, NMED strongly encourages the Agency to reconsider why “EPA believes that a default reasonable period of time of 60 days is a sensible and practical interpretation of the reasonable period of time concept” when the “Economic Analysis for the Proposed Rule, based on pre-proposal input and website

information, has determined most states issue certification decisions in *60–90 days [emphasis added]*.” The final rule should accommodate the amount of time that most states require. A default time that is set for less than this will decrease predictability in the 401 process and shift an unnecessary burden onto states and federal agencies to routinely extend the default reasonable period of time. In addition, NMED’s public participation policy requires incorporating an environmental justice screening and limited-English proficiency analysis. Furthermore, given that the proposed rule is written such that the default of 60 days would kick in if the certifying authority and federal agency fail to reach agreement in 30 days, this default would give a certifying authority only 30 days remaining after unsuccessfully negotiating a longer period of time, unless an automatic extension applies. It is unreasonable for EPA to expect certifying authorities to be able to complete the certification process in what would really amount to 30 days in any scenario where the entities fail to reach agreement on a longer reasonable period of time. For these reasons, a default reasonable period of time of 60 days is not adequate or practicable for New Mexico and other states and certifying authorities. NMED recommends that EPA establish the default to be six months, which is consistent with the 1971 Rule that “provide[s] that the period shall generally be six months...”

NMED appreciates the extensive efforts EPA is making to provide meaningful opportunities to hear critical input from states, tribes, and stakeholders. We support your commitment to improve the Clean Water Act Section 401 Water Quality Certification Rule and urge a thorough and expeditious final rulemaking process.

Sincerely,

Rebecca Roose
Deputy Cabinet Secretary of Administration

cc: Courtney Kerster, Senior Advisor, Office of Governor Michelle Lujan Grisham
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