

CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATIONS CHECKLIST

The Section 401 state water quality certification process varies from state to state and tribe to tribe. Additionally, EPA's regulations that govern the process are in flux. Final rules are expected sometime in 2023. Advocates should carefully review the applicable rules. The scope of what a state may consider in the 401 certification process varies depending on what EPA regulations apply.

NOTES	STATE WATER QUALITY CERTIFICATION	GUIDE
	<p>1st Stage: Gather Information & Develop Relationships</p> <ul style="list-style-type: none"> <input type="checkbox"/> Identify the certifying authority(s): (1) the state/tribe in which the discharge(s) from the proposed project would originate; and (2) any states/tribes that may be impacted by the discharge(s) <input type="checkbox"/> Develop relationships with staff of the certifying authority. <ul style="list-style-type: none"> <input type="checkbox"/> There is no need to wait for the official request for certification—early communication and strong relationships will help you hit the ground running once the certification process formally begins <input type="checkbox"/> Educate certifying authority staff about the importance of timely exercising their certification authority—encourage the certifying authority to exercise its certification authority. <ul style="list-style-type: none"> • Explain your concerns about the project. • Provide supporting documentation whenever possible. • <u>Remember:</u> States/tribes “waive” their certification authority when they do not timely act on a request <input type="checkbox"/> Ask the certifying authority how to best engage, e.g.: <ul style="list-style-type: none"> <input type="checkbox"/> Where to look for public notices; <input type="checkbox"/> Information about the project; <input type="checkbox"/> Anticipated certification timeline; <input type="checkbox"/> Opportunities for public comment and engagement <input type="checkbox"/> Stay in touch with the Corps about your concerns with how a project may degrade water quality and impair the water’s “designated uses” <ul style="list-style-type: none"> <input type="checkbox"/> Such advocacy can influence the Corps’ decision on the Clean Water Act Section 404 permit for the project 	pp. 135-137
	<ul style="list-style-type: none"> <input type="checkbox"/> Identify attorneys experienced with the certifying authority(s). Ask them how to best work with the certifying authority and about any peculiar state/tribal rules 	pp. 138-139

	<ul style="list-style-type: none"> □ Review all applicable rules for each certifying authority. Look for: <ul style="list-style-type: none"> • Must the certifying authority adhere to a particular certification standard? • Do the rules limit the types of conditions that the certifying authority may impose on a project? • May the certifying authority “waive” certification? • Must the certifying authority notify the public before moving ahead with certification? If so, how long is the comment period? 	
	<ul style="list-style-type: none"> □ Review the applicable EPA rules. Pay close attention to <ul style="list-style-type: none"> □ How much time does the state have to review a certification request? When does that “clock” start? □ What information must an applicant include with its certification request? □ What types of impacts may the certifying authority consider? 	p. 139
	<ul style="list-style-type: none"> □ Learn as much as possible about the project and the area: <ul style="list-style-type: none"> □ Any special aquatic areas that might be impacted, e.g., wetlands? □ How do people use the water? □ What types of species rely on the water? □ What types of impacts might the project have on water quality and ecosystems? □ Begin identifying experts who could opine on topics like: <ul style="list-style-type: none"> □ Water quality; □ Wetlands delineation; □ Biological systems; □ “Designated uses” of the affected waters □ Compile evidence about the harm the project may cause to water quality and provide that information to both the certifying authority and the Corps □ Begin developing an outline for the key issues you’d like to cover in comments 	p. 140
	<ul style="list-style-type: none"> □ Team up with allies and work with experts to identify the project’s impacts including those that might be overlooked or underappreciated □ In identifying allies, consider: (1) those you might collaborate with directly on comments and outreach; and (2) those who might be able to help apply pressure on the certification authority to act, e.g., state and local politicians □ Educate the public and the press about the harms the proposed project might cause to water quality, including designated uses 	pp. 136-137

	<ul style="list-style-type: none"> □ In developing comments, consider: <ul style="list-style-type: none"> □ Does the harm to water quality violate the state’s “antidegradation policy”?; □ Are the designated uses of “Tier 2” waters – such as fishing or swimming – fully protected despite the project’s impacts? □ What should the certifying authority require the applicant to do to protect against degradation and designated uses? <ul style="list-style-type: none"> □ E.g., should monitoring with “triggers” be required such that certain steps must be taken when specified pollution thresholds are reached? 	pp. 138-139
	<ul style="list-style-type: none"> □ Watch for the certification request and share it with allies □ Watch for the public notice setting participation deadlines (e.g., public comment, hearings, requests to extend deadlines, etc.). <ul style="list-style-type: none"> □ It may be a joint notice by the federal licensing authority. 	pp. 141-142
2nd Stage: Draft & Submit Public Comments		
	<ul style="list-style-type: none"> □ Track deadlines for comment and hearings 	pp. 141-142
	<ul style="list-style-type: none"> □ If there is a public comment period, draft and submit comments to the certifying authority before the deadline. <ul style="list-style-type: none"> □ Attach all evidence and expert opinions—don’t rely on URLs! □ Even if there is not an official public comment period, continue engaging with the certifying authority and providing evidence of your concerns □ Submit a copy of your 401 comments with evidence attached to the federal licensing authority at the same time, e.g., the Corps 	pp. 145-148
3rd Stage: Certification Decision		
	<ul style="list-style-type: none"> □ Watch for the certification decision and review it □ Consult with experts and experienced attorneys to determine if there are substantive or procedural flaws that should be appealed to court or before an agency 	p. 142