



Chapter 7

401 CERTIFICATION

CHAPTER SEVEN: CLEAN WATER ACT SECTION 401 STATE WATER QUALITY CERTIFICATIONS

Overview

What is a Section 401 Water Quality Certification?

Clean Water Act (CWA) Section 401 provides states and tribes with a powerful tool to protect the quality of their waters from adverse impacts resulting from federally licensed or permitted projects.

Specifically, Section 401 of the Clean Water Act lets states enforce their water quality standards, a floor for acceptable water quality, and other requirements of state law to ensure that federally licensed projects are consistent with the state’s or tribe’s goals for a healthy environment. Any applicant for a federal license or permit—such as a FERC license (see Chapter 4), Clean Water Act § 404 permit (see Chapter 6), section 10 Rivers and Harbors Act permit (see Chapter 6 Section F), or federal NPDES⁸⁶⁸ permit (not covered in this guide; usually delegated to the states so not a “federal” permit anyway)—seeking to conduct activity that may result in a discharge into the state’s inland waters or territorial seas, **must** obtain a Clean Water Act § 401 “Water Quality Certification” (401 WQC) or waiver from the state or tribe with authority over the proposed project site.⁸⁶⁹ (Whether a DOE license also requires a certification or waiver is discussed in Section 7.D.1) In this way, the state’s power to protect its waters and communities is preserved.

The State (or tribal authority if relevant),⁸⁷⁰ has the direct authority to **grant, deny, condition or waive** its approval of these licenses and permits. If a state fails to act on a Section 401 application in a timely manner, it will have **waived** its authority under the Clean Water Act, and the project may seek federal permits without a Section 401 certification.⁸⁷¹ (Section 7.B.7 discusses waiver, which can create uncertainty and cascading problems for applicants.)

CAUTION

Of all of the certifications and permits covered in this guide, the Clean Water Act section 401 water quality certifications are the most *in flux* as of January 2022.

Before challenging a 401 certification, make sure to refer to the latest rules; this guide focuses on past experience and the Clean Water Act statute itself, which is not expected to change.

EPA’s new rules are expected in 2023!

In the meantime, as of Dec. 2021, EPA has provided additional guidance as to the status quo for Section 401:

<https://www.epa.gov/cwa-401/qa-2020-rule-vacatur>.

⁸⁶⁸ National Pollutant Discharge Elimination System permit.

⁸⁶⁹ See 33 U.S.C. § 1341 (can be accessed for free here: <https://www.law.cornell.edu/uscode/text/33/1341>).

⁸⁷⁰ If EPA has not delegated Clean Water Act authority to a tribe, EPA itself will make the Clean Water Act Section 401 certification for lands controlled by the tribe. Most locations for LNG terminals will just involve state actors; references to the state in this chapter should be understood to include tribal authorities or EPA where relevant.

⁸⁷¹ 33 U.S.C. § 1341(a)(1).

If the state **denies** the application for a 401 Water Quality Certification, the federal agency cannot issue the permit or license.⁸⁷² If the state chooses to **condition** its approval, then the federal agency can either accept and incorporate those conditions into the federal permit or deny the permit.⁸⁷³

Thus, through Section 401 certifications, states could prevent or modify proposed LNG projects located onshore or near shore that may affect the achievement or maintenance of their water quality goals. The efficacy of challenging an applicant's 401 WQC is highly state-dependent but in all cases a challenge can help raise public and political awareness of a project and its flaws.

What is in flux about the 401 WQC rules and why does it matter?

The rules implementing Clean Water Act section 401 are in flux.⁸⁷⁴ This makes it difficult to predict the best avenues for advocate involvement. However, section 401 itself is unlikely to be amended by an act of Congress any time soon—and EPA has already hinted the direction it will take in updating the implementing rules—meaning that understanding history of section 401 and the longstanding federal rules is still helpful:

The Clean Water Act (with section 401 included) was made into law by Congress in 1972. Section 401 describes the broad contours of rights and responsibilities that the states, tribes, federal government and private actors have in policing water quality, but a lot of the substance of those powers was left to EPA to decide how to implement. EPA originally simply used the rules it had adopted in a similar context one year earlier (“the 1971 rules,” codified at 40 C.F.R. Part 121) as a framework for state’s implementation of section 401. EPA continued to use these rules for almost half a century—until, in 2020, EPA replaced them with a new set of rules (“the 2020 rules”).

The 2020 rules were challenged in court as soon as they were finalized, and in October 2021, a court held that they should be vacated. This made the 1971 rules operational again. But even before the court vacated the 2020 rules, EPA announced that it intended to rethink them—and to issue new rules in 2023 that are not simply a return to the 1971 scheme.⁸⁷⁵ These rules are addressed in more detail in Section 7.B.3.

Although EPA has given some hints on the new rule’s scope, has solicited one round of public comments already, and has published a set of questions & answers about the interim scheme,⁸⁷⁶ the legal landscape of 401 law will continue to be unsettled until at least the new round of rules is finalized.

⁸⁷² 33 U.S.C. § 1341(a).

⁸⁷³ 40 C.F.R. § 124.55(a). The Clean Water Act allows a state granting a § 401 certification to set requirements necessary to ensure that the project complies with both federal Clean Water Act requirements and “any other appropriate requirement of State law.” 33 U.S.C. § 1341(d).

⁸⁷⁴ There is a bill in Congress to amend section 401 but it is not expected to pass. See “S. 1761 — 117th Congress: Water Quality Certification Improvement Act of 2021,” GovTrack. <https://www.govtrack.us/congress/bills/117/s1761> (predicting a 3% chance of being enacted into law).

⁸⁷⁵ EPA, *Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule*, 86 Fed. Reg. 29,541, 42 (June 2, 2021) (“Reconsideration of 401 Rule Notice”), <https://www.federalregister.gov/documents/2021/06/02/2021-11513/notice-of-intention-to-reconsider-and-revise-the-clean-water-act-section-401-certification-rule> (“EPA does not intend to replace the 401 Certification Rule with the 1971 regulation.”).

⁸⁷⁶ EPA, *Clean Water Act Section 401 Water Quality Certification Questions and Answers on the 2020 Rule Vacatur*, Dec. 17, 2021, <https://www.epa.gov/system/files/documents/2021-12/questions-and-answers-document-on-the-2020-cwa-section-401-certification-rule-vacatur-12-17-21-508.pdf>.

Why challenge a 401 WQC?

No matter what the new rules say, there are two main benefits that will remain and that come from paying attention to and challenging 401 WQCs:

- The addition of a state actor to check federal action. The 401 WQC requirement allows the state to protect its water quality when federal permitting agencies fail or refuse to address the unique environmental concerns at each site. Advocates who are finding it difficult to convince federal regulators of their environmental concerns may find state regulators more understanding, and more likely to scrutinize potential projects and ensure that neighboring communities and the environment are protected by adding necessary conditions to a permit, or by stopping bad projects entirely by declining to certify the project.
- Broader availability of conditions on permits. Section 401 authorizes states to include conditions on its certifications. These conditions then must become conditions on the federal permit.⁸⁷⁷ These conditions can include “effluent limitations and other limitations, and monitoring requirements’ that are necessary to assure that the applicant for a federal license or permit will comply with applicable provisions of CWA Sections 301, 302, 306, and 307, and with ‘any other appropriate requirement of State law.’”⁸⁷⁸ The final phrase “any other appropriate requirement of State law” gives states substantial power to condition permits—if states are so inclined to protect their citizens and environment.

Of course, successful 401 WQC advocacy requires a state regulator willing to protect human health and the environment—which is not always present at the same level of enthusiasm in all states. In addition, although some issues that can be raised about the certification process do not require an in-depth knowledge of the water quality standards in place near the proposed site, because of the highly technical and site-specific nature of water quality standards, there can be a significant barrier to entry for the typical commentor in raising technical concerns. A water quality expert is recommended if funds allow. Regardless, participating can help educate those that are still reticent, raise public awareness, and motivate public and political scrutiny of a project.

Who issues 401 WQCs?

Section 401 authorizes the state or tribe with jurisdiction over the location of the proposed discharge to issue 401 WQCs. If no state or tribe has jurisdiction, EPA steps in. For almost all LNG projects, the state (acting through a state agency) will be the relevant decisionmaker.



In Louisiana this is the **Louisiana Department of Environmental Quality** (LDEQ), whose 401 certification powers are most often triggered by Corps permits.⁸⁷⁹ Louisiana’s regulations on 401 certifications can be found at LAC

⁸⁷⁷ 33 U.S.C. § 1341(d).

⁸⁷⁸ Reconsideration of 401 Rule Notice, 86 Fed. Reg. 29,541, 42 (June 2, 2021), <https://www.federalregister.gov/documents/2021/06/02/2021-11513/notice-of-intention-to-reconsider-and-revise-the-clean-water-act-section-401-certification-rule> (quoting 33 U.S.C. § 1341(d)). The Clean Water Act sections at issue are as follows: Sections 301 (Effluent Limitations), 302 (Water Quality Related Effluent Limitations), 303 (Water Quality Standards and Implementation Plans), 306 (National Standards of Performance) and 307 (Toxic and Pretreatment Effluent Standards).

⁸⁷⁹ LDEQ’s 401 WQC splash page can be found here: <https://deq.louisiana.gov/page/quality-certifications>.

33: IX. Chapter 15.⁸⁸⁰ LDEQ typically treats an application for a Corps permit as an application for 401 certification. LDEQ publishes WQCs it has issued to LNG terminals online.⁸⁸¹ As of January 2022, the point person at LDEQ for questions about the Water Quality Certification process is Elizabeth Hill at (225) 219-3225, DEQ-WaterQualityCertifications@la.gov.

In Texas, **the Railroad Commission (RRC)** and **the Texas Commission on Environmental Quality (TCEQ)** share responsibility for issuing WQCs.⁸⁸² Their jurisdiction is divided based on whether the activity being permitted is related to oil and gas operations, meaning that for most LNG activities, the RRC is the responsible agency.⁸⁸³ The RRC's online 401 WQC guidance is far less robust and the process is much less transparent than TCEQ's or LDEQ's.⁸⁸⁴



Note that even though these state organizations decide on certifications for a given project, EPA is the federal agency that issues the guidelines the states must follow for certifications. (Federal guidelines which, as mentioned, are currently in flux.)

What are avenues for advocate involvement?

The lack of transparency in state 401 certification processes can make it difficult for advocates to participate, and 401 law in general gives states a lot of discretion to avoid including the public in its process. Despite these barriers, there are several avenues for involvement:

- Read and research your specific state's procedures. This guide highlights the relevant actors and some procedures for Texas and Louisiana but is not designed as an all-encompassing guide. Read the statute, rules, and guidance the state certifying office has, and reach out early to the contacts at the state in charge of the process and in charge of public involvement for guidance.
- Comment.⁸⁸⁵ If there is a public notice and comment period for certifications, advocates should timely comment. If it is unclear when the public and notice comment period is, include 401

⁸⁸⁰ LDEQ publishes its regulations as word documents and posts links to its website. LDEQ, *Water Quality Certifications*, <https://deq.louisiana.gov/page/quality-certifications> (linking to "Regulations for issuing Water Quality Certifications can be found at LAC 33:IX.Chapter 15:" https://deq.louisiana.gov/assets/docs/Legal_Affairs/ERC/33v09WQ.docx); See also <https://casetext.com/regulation/louisiana-administrative-code/title-33-environmental-quality/part-ix-water-quality/subpart-1-water-pollution-control/chapter-15-water-quality-certification-procedures>.

⁸⁸¹ LDEQ, *EDMS Advanced Search*, <https://edms.deq.louisiana.gov/edmsv2/advanced-search>. Search by the project's AI number, then "WQC" in "Description" should return most if not all documents.

⁸⁸² 16 TAC § 3.30 (Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ)); 16 TAC § 3.30(a) ("This rule is a statement of how the agencies implement the division of jurisdiction.") See also 16 TAC § 3.93 (RRC's WQC rules); 30 TAC Chptr. 279 (TCEQ's WQC rules).

⁸⁸³ One LNG developer, NextDecade, indicated that TCEQ has jurisdiction over 401 certifications for return water for dredged material placement. See Rio Grande LNG FEIS Volume I at 4-55 – 4-56, April 2019, <https://www.energy.gov/sites/default/files/2019/04/f62/eis-0519-final-rio-grande-lng-2019-vol-1.pdf>. (Return water is the excess water that drains from saturated dredged soils once they have been removed from water and are placed on land.) This appears to be separate from the certifications Texas LNG developers request from RRC, as neither NextDecade (with Rio Grande LNG) nor Texas LNG has appeared to report requesting a 401 certification from TCEQ for these projects. If a Texas applicant proposes dredge sites, it is worth pressing the applicant and regulators (FERC, TCEQ, and RRC) on whether the applicant needs to request a 401 certification from TCEQ for return waters as well, or whether some general certification already covers this activity.

⁸⁸⁴ For example, TCEQ has a 401 Certification tracker (<https://www6.tceq.texas.gov/cmpts/index.cfm>) as does LDEQ (<https://edms.deq.louisiana.gov/edmsv2/advanced-search>); RRC does not.

⁸⁸⁵ The appendix includes example comments: e.g., App. 57, Jordan Cove Comments (Aug. 8, 2018) <https://oregonshores.org/sites/default/files/sites/default/files/media->

comments during the comment period for each federal permit or license that is sought. These comments can be drafted as a separate section of the comments on the federal permit.

- Request and participate in any hearing. The 401 certification procedures for many states do not require that a hearing be held but make it discretionary. For a hearing request to be successful, it is important to mobilize a lot of public and private support for one and to request one during the comment period for the federal license and any comment period that has been specifically set for the certification.
- Appeal administratively, if able. Some state agencies allow only the applicant to appeal a denied or conditioned certification (e.g., Texas). That may not be the case in all states and it may be a necessary step before litigating in a federal court. Review the process in your state early to avoid surprises.
- Litigate. Litigating a state agency's decision will require that you follow the state-specific process for appeals. Because of the Natural Gas Act's rules giving appellate jurisdiction of LNG orders to the federal courts, it is likely that appeals of agency action will need to be filed in the relevant federal circuit court, not the state courts.⁸⁸⁶
- Participate in the drafting of EPA's new 401 certification rule. EPA is revising its rules on the responsibilities states have in reviewing certification requests. The first comment period closed in 2021, but comments will be taken on the draft rule once it issues.
- Advocate politically for improved processes. States that do not have transparent 401 procedures may need state-level changes to be pushed. For example, in Texas, the RRC has authority over certifications for LNG projects. Its process is woefully deficient compared to even TCEQ's, despite the fact that LNG projects can have a large impact on water quality and the environment. One important area for advocacy is with the public and political branches to align the best of TCEQ's processes (the steps that provide the most transparency) with that of the RRC's.

Unless a state is opposed to a project, it is not very likely that a challenge to 401 WQCs will absolutely stop a project.⁸⁸⁷ An advocate should participate timely in the process, but if resources are very scarce, more value is likely to be found elsewhere.

How is this chapter organized?

Section 7.A overviews 401 certifications. Section 7.B describes the requirements of the Clean Water Act itself and the federal rules that are currently in place and identifies resources that advocates can use to learn more about water quality standards. Section 7.C provides information about the state

[library/miscellaneous/401_coalition_comments_8.6.18.pdf](#); App. 58, Cameron LNG comments by Gulf Restoration Network (May 27, 2016) <https://edms.deq.louisiana.gov/app/doc/view?doc=10211686> (includes 404 comments as well).

⁸⁸⁶ See 15 U.S.C. § 717r(b) & (d). To determine which circuit court has jurisdiction, experienced legal counsel should be consulted. For example, the regional circuit court where the facility is proposed would have jurisdiction to review a 401 certification that was issued, conditioned or denied. 15 U.S.C. § 717r(d)(1) (the Fifth Circuit for Louisiana and Texas). But questions of waiver might first be appealed to FERC before going to a circuit court. See e.g., *N.Y. State Dep't of Env'tl. Conservation v. Fed. Energy Regulatory Comm'n*, 991 F.3d 439, 444-46 (2d Cir. 2021). Any adverse order from FERC could then be appealed to **either** the regional circuit court **or** the D.C. Circuit. 15 U.S.C. § 717r(b). But if FERC's appeal process was not used, it might be argued that the D.C. Circuit is the only court that would have jurisdiction if the certification was waived (through 717r(d)(2), for a state agency's failure to act on a permit required under federal law). This is why it is important to consult with experienced legal counsel for each new set of facts.

⁸⁸⁷ States that have blocked projects with their 401 powers include: "**Washington** denied certification for a proposed coal export terminal in 2017, **New York** denied certification for a natural gas pipeline in 2018, and **Oregon** denied certification for a liquefied natural gas export facility in 2019." (emphasis added) <https://eelp.law.harvard.edu/2021/01/section-401-of-the-clean-water-act-from-trump-to-biden/>. Gulf Coast states, with their heavy support for industry, are likely less sympathetic.

certification processes in Texas and Louisiana. Section 7.D discusses issues that will likely be relevant no matter what the scope of new federal regulations and provides links to sample comments.

What are the applicant and the state’s responsibilities to comply with federal law on Section 401 WQCs?

What an applicant and a state must do to comply with its section 401 responsibilities is shaped by the Clean Water Act, but the details depend on the state and federal regulations in place. As of January 2022, the federal regulations are in flux. Some aspects of certifying agencies’ responsibilities are clear, however. For example, the CWA requires that water quality certifications certify that the licensed activity protects water quality and complies with state laws. Section 7.B.1 describes the water quality standards that must be reviewed; Section 7.B.2 addresses some activities that might impact water quality.

What are the water quality standards that a state certifies (or waives) compliance with?

Water quality standards include three elements: (1) one or more “**designated uses**” of a waterway;⁸⁸⁸ (2) numeric and narrative “**criteria**” specifying the water quality conditions, such as maximum amounts of toxic pollutants, maximum temperature levels, and the like, that are necessary to protect the designated uses;⁸⁸⁹ and (3) an **antidegradation policy** that ensures that uses dating to 1975 are protected and high quality waters will be maintained and protected.⁸⁹⁰ Compliance with water quality standards requires protection of all three of these components.

Typical *designated uses* include:
 (1) Protection and propagation of fish, shellfish and wildlife; (2) Recreation;
 (3) Public drinking water supply;
 (4) Agricultural, industrial, navigational and other purposes.

Note that LNG terminals and associated dredge and fill activities likely will affect waters used for recreation and aquatic life, more so than for drinking, but each project is different.

Water quality standards are very site-specific, and can at first glance seem difficult to navigate. However, that should not dissuade advocates from diving in or commenting. To help the public and state agencies navigate this technical topic, EPA created the Water Quality Standards Academy: a series of online course and occasional webinars designed to teach the basics of water quality standards: <https://www.epa.gov/wqs-tech/water-quality-standards-academy>. EPA also publishes a more formal handbook of water quality standards guidance that explains water quality standards: <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>. Advocates should review these materials before contemplating a certification

⁸⁸⁸ The water quality standards regulation requires states, territories and authorized tribes to specify goals and expectations for how each water body is used (“designated uses”). Typical designated uses include: (1) Protection and propagation of fish, shellfish and wildlife; (2) Recreation; (3) Public drinking water supply; (4) Agricultural, industrial, navigational and other purposes. See EPA, *What are Water Quality Standards?*, <https://www.epa.gov/standards-water-body-health/what-are-water-quality-standards> (last visited Mar. 31, 2022).

⁸⁸⁹ States, territories and authorized tribes adopt water quality criteria to protect the designated uses of a water body. Water quality criteria can be numeric (e.g., the maximum pollutant concentration levels permitted in a water body) or narrative (e.g., a criterion that describes the desired conditions of a water body being “free from” certain negative conditions). States, territories and authorized tribes typically adopt both numeric and narrative criteria.

⁸⁹⁰ See 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

challenge; because EPA already provides these and other training materials, this guide does not include an in-depth explanation of the water quality standards that a state must certify will be met.

In addition to the Water Quality Standards Academy, EPA has compiled lists online of the standards that it has approved for all states.⁸⁹¹ Many waterbodies have explicit standards set for them; advocates should be able to find this information by searching the state’s lists for specific water bodies or conducting a web search.⁸⁹² Water quality standards are set for parameters like dissolved oxygen, temperature, pH, turbidity, toxics, and pathogens, and often have different acceptable values for acute and chronic levels. Numeric criteria for a parameter might be measured in micrograms per liter; narrative criteria are more descriptive and tend to be used when numeric criteria are insufficient, e.g., requiring surface waters to be free from floating oils, discoloration, and odor.⁸⁹³

Although commentors do not need to be experts on water quality to raise valid concerns about how an LNG project’s construction and operation could affect water quality, it can be helpful to consult with a local water quality expert. That expert should be familiar with the water quality standards in the area (uses and criteria), or at a minimum be familiar with the state’s standards where the project is located.

How might water quality be affected by the project?

There are many parts of an LNG project that might affect water quality. For example, discharges of pollutants or soil could occur during construction of the terminal, pipelines, and temporary construction roads or piles. Runoff from built structures may enter wetlands or point-source discharges may enter waterways. Discharges and runoff often increase how turbid (cloudy) the water is and how many toxics and pathogens are in the water. High turbidity can also cause dissolved oxygen levels to decrease as the suspended solids block light to underwater vegetation, which photosynthesize less and release less oxygen into the water. All of these factors can make it more difficult for fish and shrimp to survive—these creatures need clear, non-toxic water with sufficient oxygen levels to live!⁸⁹⁴ And if the waterways being affected by these discharges have a *designated use of protection* and propagation of fish and shellfish, then these impacts are even more relevant for the state to review. These are the sorts of concerns that commentors can and should raise—even without seeking an expert’s help.

A state should also consider the potential water quality impacts of the proposed project **as a whole** in its 401 certification analysis, not just the significant effects of a discharge itself.⁸⁹⁵ For example, if a terminal’s operation will degrade the ability of surrounding waters to serve as fish and shrimp habitat because of the increased dredging and ballast water discharge, that might be considered in a section 401 review as it impacts the use of the waterway. The dredging activities at an LNG terminal will

⁸⁹¹ EPA, *State-Specific Water Quality Standards Effective under the Clean Water Act (CWA)*, <https://www.epa.gov/wqs-tech/state-specific-water-quality-standards-effective-under-clean-water-act-cwa> (last visited Mar. 31, 2022).

⁸⁹² For example, standards have been set for the waters near the Rio Grande LNG and Texas LNG sites. See 2018 Texas Surface Water Quality Standards (Updated Mar. 18, 2021)(Lower Laguna Madre and Brownsville Ship Channel), 97, <https://www.epa.gov/sites/default/files/2020-01/documents/txwqs-2018.pdf>.

⁸⁹³ EPA, *Key Concepts Module 3: Criteria*, <https://www.epa.gov/wqs-tech/key-concepts-module-3-criteria> (providing examples of numeric and narrative criteria).

⁸⁹⁴ Interstate Commission on the Potomac River Basin, *Water Ways: Stream Ecology and Monitoring: High School Version*, Aug. 2017, <https://www.potomacriver.org/wp-content/uploads/2017/09/WaterWays-ChemistryInfoCardsHS.pdf>.

⁸⁹⁵ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994); 40 C.F.R. § 121.2(a)(3) (requiring the state to find “a reasonable assurance that the **activity** will be conducted in a manner which will not violate applicable water quality standards”) (emphasis added).

likely affect dissolved oxygen and turbidity when underwater soils are disturbed. Especially if the channel has a history of heavy industrial use, toxins may be dislodged from the soil when dredging takes place.

What federal regulations are in place interpreting Section 401 and its requirements?

On-going revision of the regulations means that this is a complicated question—an advocate will need to check the Administration’s current position, which is typically updated on EPA’s website about 401 certifications: <https://www.epa.gov/cwa-401/overview-cwa-section-401-certification>. The current regulations in place were drafted in 1971; new regulations are expected in 2023.⁸⁹⁶

It’s generally agreed that the 1971 rules grant the states significant leeway in issuing, conditioning, denying, or waiving certifications. The 1971 rule is codified at 40 C.F.R. Part 121 and sets out: (i) the minimum procedural content of a certification to facilitate EPA’s administrative processes; (ii) the procedures for determining the effects of a license upon other, non-certifying states; (iii) the procedures the EPA Administrator employs to certify an application for a project under exclusive federal jurisdiction; and (iv) the procedures for EPA consultations on obtaining a license or permit. The 1971 rules can be found here: <https://www.govinfo.gov/content/pkg/CFR-2010-title40-vol21/pdf/CFR-2010-title40-vol21-part121.pdf> (because of the recent changes, normal public sources of the rules may still reference the now-defunct 2020 rules). EPA’s Q&A guidance on this interim set of rules (as of December 2021) is found here:

<https://www.epa.gov/system/files/documents/2021-12/questions-and-answers-document-on-the-2020-cwa-section-401-certification-rule-vacatur-12-17-21-508.pdf>.

The 1971 rules define “license[s] or permit[s]” that require certifications to be “any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into the navigable waters of the United States.”⁸⁹⁷ It leaves the contents of the application and the contents of the certification largely up to the discretion of the states and federal permitting agencies.⁸⁹⁸ The 1971 rules do not require that the certifying agency look at the underlying application for the federal permit—as long as it can state that there is “a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards,” it may rely on “other information” furnished by the applicant.⁸⁹⁹ The takeaway from this is that until the new rules are implemented, each state and federal agencies’ regulations will dictate what the certification process requires.

Note that other federal agencies, like FERC and the Corps, have their own rules about compliance with section 401.⁹⁰⁰ Rules that agencies other than EPA make about section 401 will **not** receive deference from a reviewing court, because EPA is charged with administering the Clean Water

⁸⁹⁶ Thomas E. Santoro, *et al.*, *EPA Asks Court to Leave Controversial Clean Water Act Section 401 Rule in Place Until New Rule Expected in Spring 2023*, Arnold & Porter, Jul. 8, 2021, <https://www.arnoldporter.com/en/perspectives/blogs/environmental-edge/2021/07/epa-asks-court-to-leave-controversial-cwa-rule>.

⁸⁹⁷ 40 C.F.R. § 121.1(a) <https://www.govinfo.gov/content/pkg/CFR-2010-title40-vol21/pdf/CFR-2010-title40-vol21-part121.pdf>.

⁸⁹⁸ 40 C.F.R. § 121.2 (certification) § 121.3 (application), <https://www.govinfo.gov/content/pkg/CFR-2010-title40-vol21/pdf/CFR-2010-title40-vol21-part121.pdf>.

⁸⁹⁹ 40 C.F.R. § 121.2(a)(2) & (3), <https://www.govinfo.gov/content/pkg/CFR-2010-title40-vol21/pdf/CFR-2010-title40-vol21-part121.pdf>.

⁹⁰⁰ See e.g., 18 C.F.R. § 157.22(b) (defining the reasonable request period for 401 certifications for FERC licenses to be “one year from the certifying agency’s receipt of the request”); 33 C.F.R. § 325.2(b)(1) (Corps procedures for section 401 water quality certifications).

Act.⁹⁰¹ In the event of a conflict, EPA’s rules will prevail. These other federal rules are helpful in understanding how best to challenge the certification for each federal license. As part of its rulemaking process that will culminate in its own new rules EPA is considering whether it should suggest updates to other federal agencies’ 401 rules as well.

What federal rules have been in place previously?

For almost 50 years, the 1971 regulations were unchanged. But in 2020, the first update to the certification rules were made (“the 2020 rules”): the Trump Administration overhauled the rules and regulations implementing Section 401 to curtail state authority to condition its certification orders. This “Certification Rule” went into effect on September 11, 2020. These rules were challenged in the United States District Court for the Northern District of California and vacated on October 21, 2021.⁹⁰²

This decision was in part due to the fact that earlier in the year, the Biden EPA stated that it planned to revise the 2020 regulations and requested that the court remand the rule, citing a number of concerns about its legitimacy.⁹⁰³ EPA indicated that it does not intend to return to the prior regulations, but that it instead will issue new regulations.⁹⁰⁴ (As mentioned previously, the scope of those new regulations will likely continue to be unclear until at least 2022, when a draft proposal is published for comment.)

What should I know about the now-defunct 2020 rules?

The 2020 rule solidified the one-year deadline to certify or reject projects and restricted what a state could consider when judging whether to certify: namely only water quality effects from specific discharges, not issues like climate change impacts or water quantity.⁹⁰⁵ The 2020 rule also restricted the conditions that states and tribes may impose, limiting them to point source discharges into waters of the United States and no longer allowing conditions related to nonpoint source discharges or discharges into nonfederal waters.⁹⁰⁶

The 2020 rule contained other limitations on state power—but the main takeaway for advocates is how the anticipated 2023 rule is a reaction away from the 2020 version. Comparing the 2020 incarnation with EPA’s new proposal can be helpful in predicting the scope of the 2023 version, as Section 7.B.6 summarizes.

⁹⁰¹ See e.g., *NY State Dept. of Environmental Conserv. v. FERC*, 884 F.3d 450, 455 (2nd Cir. 2018) (“We review FERC’s interpretation of the Clean Water Act, a statute that it does not administer, *de novo*.”)

⁹⁰² *In re Clean Water Act Rulemaking*, No. C 20-04636 WHA (consolidated) (Order re motion for remand without vacatur) (N.D. Cal. Nov. 11, 2021) <https://coastalreview.org/wp-content/uploads/2021/11/401-decision.pdf>.

⁹⁰³ Thomas E Santoro, et al., *EPA Asks Court to Leave Controversial Clean Water Act Section 401 Rule in Place Until New Rule Expected in Spring 2023*, Arnold & Porter, July 8, 2021, <https://www.arnoldporter.com/en/perspectives/blogs/environmental-edge/2021/07/epa-asks-court-to-leave-controversial-cwa-rule>.

⁹⁰⁴ *Supra*.

⁹⁰⁵ Brad Plumer, *E.P.A. to Modify Trump-Era Limits on States’ Ability to Oppose Energy Projects*, New York Times, May 27, 2021, <https://www.nytimes.com/2021/05/27/climate/epa-clean-water-act.html>; see also Peter Kalicki, *Section 401 of the Clean Water Act from Trump to Biden*, Harvard Environmental & Energy Law Program, Jan. 25, 2021, <https://eelp.law.harvard.edu/2021/01/section-401-of-the-clean-water-act-from-trump-to-biden/>.

⁹⁰⁶ Kalicki, *supra*.

What might the 2023 rules look like?

As of December 2021, the best clues about the new rule come from EPA's notice of intent to review the rules. In that notice, EPA highlighted several key issues it wants to explore, including:⁹⁰⁷

- Efficacy of pre-filing meetings that the 2020 rule required and whether those should be made a permanent feature of the rules;
- The 2020 definition of a "certification request," which may be too limiting on state and tribal ability to get information they may need before the CWA Section 401 review process begins;
- The definition of a "reasonable period of time" for state action. EPA has expressed concern that the 2020 rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests and limits the factors that federal agencies may use to determine the reasonable period of time. EPA also has indicated it is considering whether other stakeholders besides federal agencies (e.g., advocates commenting on a project) have a role in defining and extending the time period for state action;
- The scope of certification. The 2020 rule limits the scope of certification, which includes both the scope of certification review under CWA Section 401(a) and the scope of certification conditions under CWA Section 401(d), to: "assuring that a **discharge** from a Federally licensed or permitted activity will comply with water quality requirements." 40 C.F.R. § 121.3. (emphasis added). The rule defines "water quality requirements," as the "applicable provisions of [sections] 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." *Id.* at 121.1(n) (emphasis added). EPA is concerned that the 2020 rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality if they are only allowed to consider discharges;
- The need for federal review of certification actions. The 2020 rule prescribed that all certification actions must include specific information and that **federal** agencies were required to review these actions for compliance. EPA has expressed concern with these requirements, specifically whether it is appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose. EPA appears to be concerned that these requirements would result in a state or tribe's certification or conditions being permanently waived as a result of non-substantive and easily fixed procedural concerns identified by the federal agency;
- Enforcement roles of state and federal agencies, including whether the Clean Water Act citizen suit provision applies to section 401;
- Modifications and "reopeners" of certifications. EPA is concerned that the 2020 rule's prohibition of modifications may limit the flexibility of certifications and permits to adapt to changing circumstances;
- Neighboring jurisdictions process (Section 401(a)(2)); including whether additional guidance is needed for agencies to implement this section of the statute, which allows neighboring states to

⁹⁰⁷ EPA, Reconsideration of 401 Rule Notice, 86 Fed. Reg. 29,541, 29,543-44 (June 2, 2021), <https://www.federalregister.gov/documents/2021/06/02/2021-11513/notice-of-intention-to-reconsider-and-revise-the-clean-water-act-section-401-certification-rule>.

get conditions placed on a federal permit or license that would violate the water quality of those neighboring states; and

- Whether other agencies need to update their 401 regulations: Whether concomitant regulatory changes should be proposed and finalized simultaneously by relevant federal agencies (e.g., the Army Corps of Engineers, Federal Energy Regulatory Commission) so that implementation of revised water certification provisions would be more effectively coordinated and would avoid circumstances where regulations could be interpreted as inconsistent with one another.

What happens if the state fails to act within a one-year period or otherwise waives its rights?

One of the disadvantages of a 401 certification challenge is that states are not compelled to weigh in on whether a project will impact state water quality—states may simply decline to act on a certification request (“waiving” its rights) and then an applicant can proceed with its project without obtaining a certification. However, there are nuances about waivers that may still give advocates grounds to challenge under 401, as discussed below.

Waiver can be express or by the passage of time. For example, a state that has not acted on a certification request “within a reasonable period of time (which shall not exceed one year) after receipt of such request”⁹⁰⁸ will be deemed to have waived its right to certify. Exactly when this time period begins (e.g., what qualifies as “receipt” or “request”) has been heavily litigated and is subject to different interpretations by courts—some construe it strictly, even if the initial request is incomplete, and others suggest that an applicant could withdraw and resubmit an application to increase the one-year period.⁹⁰⁹ EPA may weigh in on this question when it releases its new rules in 2023.

Waiver and the one-year clock—at least for certification of the FERC license—cannot happen without the applicant’s active request for a certification **for the activities covered by the particular federal license**. FERC addressed this issue in the Jordan Cove LNG challenge. The applicant only applied for a 401 certification from ODEQ (the state agency) in support of the federal section 404 and section 10 permits from the Corps, which only concerned dredge and fill activities related to the terminal. The applicant never specifically applied for a 401 certification for its FERC license. FERC found that the state agency “could not have waived its authority to issue certification for a request it never received”—in other words, for the FERC license at least, the one-year clock for state action had not begun.⁹¹⁰

In addition, states that waive 401 certification authority may create problems for the Corps permitting process. Some Corps districts rely on the 401 certification to show that its permits will comply with state water quality standards (under 33 C.F.R. § 320.4(d)), and do not conduct any substantive review of their own. If the Corps does this when a state has **waived** its rights, the Corps permits may be vulnerable to challenge. For more information, see Chapter 6, Section B.9 “*Will there be a violation of State Water Quality Standards?*”

⁹⁰⁸ 33 U.S.C. § 1341(a)(1).

⁹⁰⁹ Beveridge & Diamond PC., *New Interpretation of Shot Clock Rules? Fourth Circuit Weighs In On Clean Water Act’s One Year Deadline for State Water Quality Certifications Under Section 401* (July 13, 2021), <https://www.jdsupra.com/legalnews/new-interpretation-of-shot-clock-rules-4695641/> (explaining the different conclusions the Second and Fourth Circuits have on what this time period is, and whether it can be extended by the applicant resubmitting an application).

⁹¹⁰ *Jordan Cove Order Denying Petition for Declaratory Order*, 174 FERC ¶ 61,057 at ¶ 35 (Jan. 19, 2021) <https://www.ferc.gov/sites/default/files/2021-01/C-16-CP17-494-003.pdf>.

Because waiver is a particularly nuanced aspect of section 401 challenges, advocates working on projects in states where waiver might be an issue should consult with experienced counsel to determine the best strategies for these challenges. If you decide it is best for a state to affirmatively act on a certification request, it can be helpful to work with the state to determine precisely when the applicant requested certification and then encourage the state to act on the request well before the “reasonable period of time” has elapsed.

What are state-specific rules on WQCs for LNG projects in Texas and Louisiana?

In addition to navigating the federal requirements for 401 certifications, the state agencies that certify projects have their own rules they must follow that govern public participation and the application and appeals process. This guide highlights some high-level points to consider when working with Louisiana and Texas certifications. An experienced 401 practitioner from the relevant state should be consulted before beginning any 401 challenge. Section 7.C.1 overviews Louisiana’s process; section 7.C.2 overviews Texas’s process.

What is Louisiana’s DEQ’s process for certification?

Louisiana’s 401 WQC rules are found at LAC 33: IX. Chapter 15.⁹¹¹ In general, LDEQ (which has responsibility for certifications for Corps permits and NPDES permits) is fairly transparent about its 401 process,⁹¹² but as a state heavily invested in oil and gas Louisiana’s agencies should not be expected to be as sympathetic to environmental concerns as a state like Oregon.

In addition to reading Louisiana’s official rules on water quality certification cited above, advocates are encouraged to review the National Renewable Energy Laboratory’s summary of Louisiana’s certification process, which can be found here: <https://openei.org/wiki/RAPID/Roadmap/14-LA-d> (updated in 2020).

Some takeaways from Louisiana’s 401 WQC rules are that:

- **Applications.** Applicants may submit a duplicate of the proposed federal permit application in lieu of a separate application for state certification *Id.* § 1507. There is no separate 401 online application; in the New Orleans district, the district forwards the applicant’s Corps application to LDEQ on behalf of the applicant; LDEQ treats this application as a request for 401 certification.
- **Procedural review of Application.** An application is deemed complete if the administrative authority (LDEQ) does not indicate otherwise by a written response to the applicant within 30 days. *Id.* § 1507(C)(1)
- **Substantive Review of Applications.** All applications are reviewed for compliance with State Water Quality Standards, the approved Water Quality Management Plan for the water body affected by the activity, and applicable state water laws, rules, and regulations. *Id.* § 1507(C)(3).
- **Public Notice.** Within 10 days after the review process is completed by the administrative authority (LDEQ), the applicant will be sent a public notice to publish. The applicant must publish the public notice once in the official journal of the state (*the Advocate*) and once in at least one or

⁹¹¹ An online copy of these regulations are available here: https://deq.louisiana.gov/assets/docs/Legal_Affairs/33v09-201605-Water-Quality.pdf.

⁹¹² Its website contains a FAQ and summary page, with links to an online portal of documents. See e.g., <https://deq.louisiana.gov/page/quality-certifications>; <https://deq.louisiana.gov/faq/category/14> (last visited Mar. 31, 2022).

more (as directed by LDEQ) local newspapers or journals of general circulation in each parish in which the activity is to be conducted. *Id.* § 1507(D).

- Comment Period. A period of **only 10 calendar days** after the date of publication is typically allowed for public comment. *Id.* § 1507(D)(1)(b). A request for public hearing should be made during this time.
- Other Public Notice Requirements. The administrative authority (LDEQ) must send a copy of the public notice to any person who requests one. *Id.* § 1507(D)(2).
- Public Hearings. Public hearing(s) are appropriate when there is significant public opposition to a proposed certification and the case involves significant economic, social, or environmental issues. LAC 33: IX. § 1507 E(1)(c). They may be held when the original certification is requested or if it is proposed to be modified or revoked. *Id.* § 1507(E)(1)(a). If a hearing is granted, LDEQ must publish public notice in *the Advocate* and in a newspaper or journal that circulates in the parish where the activity will take place at least 30 days before the hearing. *Id.* § 1507(D)(3). Hearings are held before the administrative authority at a location convenient to the nearest population center affected by the proposed certification, unless the administrative authority specifically designates some other location. *Id.* § 1507(E)(3)&(4).
- Post-Hearing Comment Period. Following any hearing will be a 30-day period for written comments, which will become part of the official record.
- Certification Denial. If the certification is denied, the applicant typically may make a request for a hearing, in writing, to the administrative authority (LDEQ) within 10 days after notification of denial, unless it was decided at a prior hearing that the proposed activity would violate the Clean Water Act, the Louisiana Environmental Quality Act, or any regulations thereof. *Id.* § 1507(E)(2).
- Overall Timing. The timing from application to certification decision may be as short as 60 days. *Id.* § 1507(F)(1)
- Memorialization of the Outcome. A grant of certification must be memorialized in a letter of no objection sent to the applicant and to the applicable federal agency. A denial, modification or revocation must also be sent to the applicant and appropriate federal agency. § 1507(F)(3)

Historically, the LDEQ has declined to exercise its waiver authority, instead reviewing certification requests on the merits.⁹¹³ LDEQ has a system to track 401 WQC requests and certifications: the Electronic Document Management System (EDMS). EDMS can be accessed through the following link: <http://edms.deq.louisiana.gov>. The EDMS system is searchable by Agency Interest (AI) number.

An example certification that LDEQ has issued for an LNG project can be found here: <https://edms.deq.louisiana.gov/app/doc/view?doc=8826955> (Cameron LNG Rationale for Decision (Water Quality Certification) (May 2, 2013)).

⁹¹³ As of 2011, that is. Association of State Wetland Managers, *401 Certification Program Summary, Louisiana*, (July 2011), 2, https://www.aswm.org/pdf_lib/401_cert/louisiana_case_study.pdf.

What is Texas's RRC's process for certifications?

In general, advocates should expect the RRC to be very lenient in issuing certifications; historically Texas has either granted or waived certification.⁹¹⁴ The RRC's rules on 401 certifications for Corps and NPDES permits are codified at 16 TAC § 3.93.⁹¹⁵ Its website provides little additional guidance for advocates, beyond the following:⁹¹⁶

Public Notice. For certifications underlying Corps permits (like section 404 and section 10), the Corps generally provides public notice of the certification process in the same document as the underlying Corps permit (e.g., the 404 permit). But that “public notice” has not been very clear in the past that comments on the 401 certification are being solicited at the same time as the Corps permit.⁹¹⁷ Advocates should just presume that the 401 comment period is identical to the 404 comment period, and submit certification comments at that stage to the RRC, the agency issuing the notice for the federal license (e.g., the Corps or EPA for the NPDES permit), and in the FERC docket, for good measure.

Notice for requests for certifications for other federal permits (like a FERC license) is not expressly contemplated by the RRC's rules at 16 TAC § 3.93. It is likely that an applicant would be required to provide public notice itself (instead of relying on the agency), which then must be sent to a number of recipients, including:

(A) the owners of land adjacent to the tract upon which the activity is proposed to take place, and where the activity may result in a discharge to a watercourse other than the Gulf of Mexico or a bay, the surface owners of each waterfront tract between the potential discharge point and 1/2 mile downstream of the potential discharge point, excluding owners of those waterfront tracts within the corporate limits of an incorporated city, town, or village;

LESSONS FROM THE OTHER TEXAS AGENCY CERTIFYING UNDER 401

TCEQ is responsible for reviewing requests for 401 WQCs that don't involve oil and gas project. It is more transparent in its process and review, publishing guidance documents online whereas RRC has published none readily accessible. One point of advocacy could be pushing RRC to become at least as transparent as TCEQ when issuing certifications.

Not everything TCEQ does is ideal, however. For example, TCEQ doesn't necessarily provide notice when it expects to *wave* its certification rights. That circumvents public participation and should not be copied!

⁹¹⁴ As of 2011, that is. Association of State Wetland Managers, *401 Certification Program Summary*, Texas, July 2011, 2. https://www.aswm.org/pdf_lib/401_cert/texas_case_study.pdf (lumping TCEQ and RRC certifications together).

⁹¹⁵ An online version of the code can be found here, just notice that it continues onto the next page (“Cont'd”): [https://texreg.sos.state.tx.us/public/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=16&pt=1&ch=3&rl=93](https://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=16&pt=1&ch=3&rl=93).

⁹¹⁶ The National Renewable Energy Laboratory's summary of Texas's RRC's certification process is similarly sparse, <https://openei.org/wiki/RAPID/Roadmap/14-TX-d> (last visited Mar. 31, 2022).

⁹¹⁷ See U.S. Army Corps of Engineers, *Rio Grande LNG 404 public notice*, Oct. 18, 2018, <https://www.swg.usace.army.mil/Portals/26/docs/regulatory/PN%20Oct/PN.201500114.pdf?ver=2018-10-18-164107-543> (mentioning 401 only once in passing that the “Texas Railroad Commission will determine if the project is consistent with the goals and policies of the CMP and will review this application under Section 401 of the CWA to determine if the work would comply with State water quality standards” without providing guidance on where to submit 401 comments or that that the RRC is soliciting comments at all).

*(B) the mayor and health authorities of any city or town in which the proposed activity will be located or that is within 1/2 mile downstream of the potential discharge;*⁹¹⁸

This is a long list of recipients; it is unclear whether Texas applicants have ever complied with these requirements in the past—advocates challenging projects are encouraged to reach out to these individuals and entities to determine if notice is being properly served.

Comments and Public Meetings. The RRC acknowledges the public’s right to submit comments regarding a request for certification, setting the comment period as 30 days after the notice is mailed.⁹¹⁹ Barring other directions on the notice, comments should be submitted to the Assistant Director of Environmental Services, Railroad Commission, 1701 North Congress Avenue, P.O. Box 12967, Austin, Texas 78711-2967.⁹²⁰ The RRC **is required to** consider all written comments related to the water quality impacts of the proposed activity that are timely submitted.⁹²¹ The Commission must also hold a public meeting on the request for certification if the Commission determines that a public meeting is in the public interest.⁹²² The RRC is directed to consider applicable water quality standards, including the enforceable goals and policies of the Texas Coastal Management Program (CMP), and potentially include monitoring requirements as conditions if it certifies the request.

Outcome of Certification. A final determination on a request for certification of an NPDES or Corps permit typically is issued within 15 days of the close of the public comment period unless the federal agency and RRC find that a longer time is appropriate. If the RRC doesn’t act within the time set (15 days or longer, if agreed to) then the RRC will be deemed to have waived certification. The RRC must provide the final notification to any person who requests it,⁹²³ meaning advocates should be able to confirm if a 401 certification has been issued. The final determination should include a statement of basis explaining the RRC’s decision (including in cases of waiver).⁹²⁴ If certification is denied, the operator may request a hearing. In addition, if the certification is granted with conditions, but the operator disagrees with the conditions, the operator can request a hearing. Any request for a hearing must be filed within 15 days after the commission issues its final determination.⁹²⁵ On its website, RRC states that a protestant cannot request a hearing on a water quality certification,⁹²⁶ meaning an advocate’s next step would be litigation in federal court.

Note that it can be very difficult to find the RRC’s documentation of its certifications; as such, no example of a certification LNG project is included in this guide. Advocates in Texas are encouraged to push the RRC to increase its transparency—the TCEQ has a tracking system for 401 certifications, which the RRC could adopt at a minimum:

https://www.tceq.texas.gov/permitting/401certification/401certification_tracking.html.

⁹¹⁸ 16 TAC Part 1 § 3.93(d)(2)(A)&(B).

⁹¹⁹ 16 TAC Part 1 § 3.93(d)(3)(D).

⁹²⁰ 16 TAC Part 1 § 3.93(d)(3)(D).

⁹²¹ 16 TAC Part 1 § 3.93(e)(1).

⁹²² Texas Railroad Commission, *State Water Quality Certification*, <https://www.rrc.texas.gov/oil-and-gas/applications-and-permits/environmental-permit-types/discharges/water-quality/>.

⁹²³ 16 TAC Part 1 § 3.93(g)(2).

⁹²⁴ 16 TAC Part 1 § 3.93(g)(2)(E) and § 3.93(g)(3).

⁹²⁵ 16 TAC Part 1 § 3.93(g)(5).

⁹²⁶ That language is not in the administrative code. Compare 16 TAC Part 1 § 3.93(g)(5) with RRC, *Rule 93 Questions and Answers*, <https://www.rrc.texas.gov/about-us/faqs/oil-gas-faqs/swr-93-faqs/>.

What are possible issues to raise in a 401 WQC challenge?

The success of a 401 WQC challenge depends largely on which state has jurisdiction because section 401 itself places few requirements on states to actively review a project’s impact on water quality—waiver is usually an option.⁹²⁷

DOES A DOE LICENSE REQUIRE CERTIFICATION?

As of January 2022, there has been little official guidance (either from agencies or from courts) as to whether DOE’s license triggers the need for a 401 certification or waiver, and to-date there are no known instances of applicants requesting certifications for DOE licenses. However, it may be that certification for the DOE license must be requested, under the following logic:

Clean Water Act § 401 requires an applicant to provide the federal agency licensing a project a water quality certification when the activity “may result in any discharge into [] navigable waters.” 33 U.S.C. § 1341(a).

If DOE’s license to export gas “may result in any discharge into [] navigable waters,” then it too would require a state certification or waiver, even if the activities licensed by DOE overlap with another federal license (much as they are needed for both the Corps and FERC permits). And in fact, DOE does authorize such activities: DOE licenses the export—*i.e.*, transport via vessel—of gas overseas—during which there is potential for routine discharges (*e.g.*, vessel greywater, sewage, bilge water, cooling water, weather deck runoff, ballast water, etc.) or accidents that could potentially discharge gas or other pollutants.

Advocates interested in this should consult with experienced section 401 attorneys to determine if, when, and how this issue should be raised.

In Oregon, the Jordan Cove challengers had success using 401 WQCs to challenge that project in two ways—first, Oregon denied the Section 401 certification that the applicant requested; and second, FERC found that the applicant had failed to apply for other 401 WQCs that would have covered the remainder of the project, and thus the applicant failed to apply for all necessary certifications.⁹²⁸ However, Oregon is more sympathetic to environmental interests than other states. Meanwhile, the Department of Environmental Quality (LDEQ) in Louisiana and the Railroad Commission (RRC) in Texas exercise this power and may be less sympathetic to environmental concerns.

Regardless, if there are resources to challenge 401 certifications, make the challenge. There are a few common issues that may arise across LNG projects, some of which are summarized below:

⁹²⁷ Some states’ section 401 regulations, like Louisiana’s, do not list waiver as an option when the state agency is presented with a certification request. See LAC 33: IX. § 1507(F)(1) (“[a]ll applications for the certification shall be granted or denied within 60 days after the application is deemed complete . . .”). Whether the lack of a waiver option is enforceable is a matter of state law. If a state has waived its rights and you suspect state law might prohibit such an action, consult with an attorney experienced with the water quality laws in your state to determine the next best steps.

⁹²⁸ Alex Schwartz, *Procedural error spells serious setback for Jordan Cove*, H&N, Jan. 19, 2021, https://www.heraldandnews.com/news/local_news/procedural-error-spells-serious-setback-for-jordan-cove/article_c02f3a86-89ea-5cc2-82b5-3a605c622e83.html.

Has the applicant requested all 401 WQCs necessary?

Check to see if the applicant has requested 401 certifications for all federal licenses required for the project. FERC has held that LNG project applicants are “required to request section 401 water quality certification for **both** the Corps authorization **and** the Commission authorizations.”⁹²⁹ Yet at least one project has failed to do so—with big consequences. The applicant in Jordan Cove failed to request 401 certifications for all aspects of the project. The applicant only applied for a 401 certification through ODEQ (the state agency) in support of the federal section 404 and section 10 permits from the Corps, which only concerned dredge and fill activities related to the terminal. The applicant never specifically applied for a 401 certification for its FERC license. FERC found that the applicant’s failure to do so meant that the applicant had not met its 401 certification requirement.⁹³⁰ ODEQ had not waived its right to certification simply because it was aware that the applicant was also seeking a FERC license.⁹³¹

Scrutinize the WQCs that have been issued for a project. Do they cover just the activities that the Corps permits? Or do they include the licenses needed for the whole project, e.g., from FERC (and potentially DOE, see text box)? If not, point that out. If they do, is the agency’s decision based either on the actual federal application and project analysis (e.g., FERC’s EIS documents) or “sufficient information” for the agency to have a “reasonable assurance” that the project will not violate water quality standards? If not, the state’s decision may be vulnerable to challenge on the grounds that it is arbitrary and capricious.

Is the agency interpreting its 401 responsibilities correctly?

Most state agencies charged with 401 responsibilities act as if it is the state agency’s burden to find a likely violation of state law before it can deny a 401 WQCs. However, this flips the burden—it is the applicant who should show that it merits the WQCs. Oregon is one state whose state regulations explicitly place the burden on the applicant, as the advocates challenging the Jordan Cove project’s 401 certification explained in their comments.⁹³²

Does the application contain the mandatory minimum information?

Each state and federal agency describes the minimum information that an applicant must include in its application. Review the applicable state and federal regulations on 401 certifications; if anything is missing, point this out (see Section 7.C for Louisiana and Texas regulations). If other information relevant to water quality is missing, raise that as a concern.

Is there a “reasonable assurance” that the project will comply with the state’s antidegradation implementation policy?

EPA’s 1971 regulations require that each certifying agency make a “reasonable assurance” that water quality standards will be met—keep in mind that this standard may change in the future. But in general, question whether the project will degrade the quality of state waters. If monitoring is not

⁹²⁹ *Jordan Cove Order Denying Petition for Declaratory Order*, 174 FERC ¶ 61,057 at ¶ 35 (Jan. 19, 2021), <https://www.ferc.gov/sites/default/files/2021-01/C-16-CP17-494-003.pdf> (emphasis added).

⁹³⁰ *Jordan Cove Order*, *supra*.

⁹³¹ *Jordan Cove Order*, *supra*, ¶ 34.

⁹³² See App. 57 (Jordan Cove comments) at 9 (relying on the 1971 rules and Oregon’s regulations) https://oregonshores.org/sites/default/files/sites/default/files/media-library/miscellaneous/401_coalition_comments_8.6.18.pdf.

proposed, point that out—section 401 requires that certifications must include monitoring necessary to ensure that water quality is maintained.⁹³³ A water quality expert can be helpful here.

Is there a “reasonable assurance” that the narrative and numeric criteria will not be violated?

EPA’s 1971 regulations require that each certifying agency make a “reasonable assurance” that water quality standards will be met—keep in mind that this standard may change in the future. But in general, question whether the project will not violate the numeric and narrative criteria set to protect the waterways and wetlands around the proposed project site, both during construction and operation. There will likely be acute and chronic standards for each water quality parameter. A local water quality expert can be helpful here, especially in examining the assumptions underlying the application. Monitoring should also be suggested as a condition to ensure water quality is protected,⁹³⁴ with the data made publicly and easily accessible.

Are there other conditions that should be in place?

Section 401 grants broad powers to the state to condition its certifications.⁹³⁵ It is possible that the state will grant the certification no matter what the project’s effects are, so it is important to recommend conditions that can add protections for nearby communities and the environment. This could be anything that protects water quality or ensures that any other appropriate requirement of state law is met (e.g., monitoring, methods of construction and maintenance to reduce discharges). A water quality expert can help identify additional conditions that could be useful.

Is there a potential that the federal agency granting the permit or license will act before the certification is completed?

Section 401 states that: “no [federal] license or permit shall be granted until the certification required by this section has been granted or waived.” 33 U.S.C. § 1341(a)(1) (emphasis added). Yet FERC routinely ignores this mandate, issuing its own certification order before the state has an opportunity to exercise its 401 powers. When the FERC-certified project is a pipeline, this can result in real harm to communities that may have their lands acquired through the eminent domain powers a FERC certificate bestows, even if the state would have eventually stopped the project by denying the 401 certification.⁹³⁶ Even though 401 comments will be directed to the state agency (with no authority over FERC), it can be worth it to raise this issue in 401 comments, since these comments should be filed with the federal permitting agency as well. (In this way, this issue isn’t overlooked.)

Where can I find examples of 401 WQC comments filed against an LNG terminal?

Section 401 is an under-utilized tool for challenging LNG projects so there are not very many examples of comments addressed to LNG terminals specifically. Jordan Cove is one such project (see comments below). It can be helpful to consider 401 comments on other infrastructure projects

⁹³³ 33 U.S.C. § 1341(d) (“Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification[.]”).

⁹³⁴ 33 U.S.C. § 1341(d) (requiring that monitoring be a part of certifications).

⁹³⁵ See *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013); PUD No. 1, 511 U.S. at 723 (Stevens, J., concurring) (“Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State’s power to regulate the quality of its own waters more stringently than federal law might require.”).

⁹³⁶ See Delaware Riverkeeper, *People’s Dossier of FERC Abuses: Undermining State Authority* (2019), <https://www.delawareriverkeeper.org/ongoing-issues/peoples-dossier-ferc-abuses-undermining-state-authority>.

in the coastal zones of the relevant state. The most helpful will likely be those from the directed to the same state agency with certifying authority as will be implicated in the proposed project.

- Jordan Cove Energy Project (Oregon)

Oregon Shores Conservation Coalition and others filed Section 401 comments in their challenge to the Jordan Cove LNG export plant proposed for Coos County, Oregon. The groups succeeded in convincing the Oregon Department of Environmental Quality that the project should not be certified. Their comments are found here:

- March 13, 2015: <https://law.lclark.edu/live/files/19121-2015-03-13-coalition-comments-jordan-cove-lng-401> (Also included in App. 56)
- August 8, 2018 comments filed with the Oregon Department of Environmental Quality: https://oregonshores.org/sites/default/files/sites/default/files/media-library/miscellaneous/401_coalition_comments_8.6.18.pdf (Also included in App. 57)