CWA Section 401
Water Quality Certification

EPA Clean Water Act Tribal Workshop
August 20, 2009
Outline

• What is a 401 cert and when is it required
• Basic 401 Process
• EPA Application requirements
• Evaluation Process
• 401 certs and 404 permits
401 Certification: Overview

Clean Water Act (CWA) § 401 says:

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

Unless

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

➢ No 401 cert or waiver means no federal permit or license
401 Certification: Protecting Water Quality

- Provides for the protection of the physical, chemical, and biological integrity of waters
- Allows EPA/Tribes/States to address impacts to water quality from federal permits
- Helps insure that federal actions will not violate Tribe/State water quality standards
What Actions Trigger a 401 Cert?

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

Not limited to CWA Actions
- Federal Powers Act
- Atomic Energy Act

➢ Look for a federal permit/license authorizing discharge into waters of the US
Who Issues 401 Certs?

- EPA regional offices on behalf of tribes not yet authorized

- Indian tribes authorized to administer the Water Quality Standards (WQS) program

- All States where the discharge originates
 Authorized Tribes in Region 9

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

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

California:
- Hoopa Valley Tribe, Bishop Paiute Tribe, Big Pine Paiute Tribe, Twenty-Nine Palms Band
Basic 401 Process

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

- Contact information
- Tribal contact information (for non-tribal applicants)
- Description of proposed activity
- List of other permits needed
- Purpose and need statement
- Location of watercourse
- Vicinity Maps
What does EPA require in a 401 application?

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

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

- **Tribes/States may have different timeframes**
What is considered when evaluating a 401 application?

All potential water quality impacts
  – Direct and indirect
  – For the life of the project

Decision can be based on:
  – Data/information provided by the applicant
  – Any other available and reliable data
What Must Be Determined?

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

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

PLUS
– Any more stringent tribal/state requirements
  (e.g. effects on cultural laws or non-federal waters)
What can the EPA/Tribe/State do under a 401 cert?

- Grant Certification
- Grant Certification with Conditions
- Deny Certification
- Waive Certification
What can the EPA/Tribe/State do under a 401 cert?

**Grant:** indicates activity consistent with standards and other provisions

- **Effect of granting:**
  - Federal agency can proceed with permit action and evaluate whether or a permit/license should be issued
What can the EPA/Tribe/State do under a 401 cert?

Grant with conditions: indicates activity consistent only if listed conditions are met

- Scope of potential conditions can be quite broad

- Every 401 condition must become a term of the permit. Federal agency can’t pick and choose or change conditions
Typical Conditions

- Construction stormwater management
- Post-construction stormwater treatment
- Vegetated buffers around waters
- Erosion control measures
- Seasonal constraints
- Restoration of disturbed areas
- Mitigation of permanent impacts
What can the EPA/Tribe/State do under a 401 cert?

**Deny:** indicates activity is not consistent with water quality standards and goals
  – Implies that no conditions would be adequate to ensure standards and goals would be met if permit issued

- Effect of denying:
  – Federal agency cannot issue permit or license
What can the EPA/Tribe/State do under a 401 cert?

**Waive:** EPA/Tribe/State decides not to act on 401 application request
- Waiver can be passage of time or explicit

**Effect of Waiving:**
- 401 cert is not required for federal agency to issue permit/license
What can the EPA/Tribe/State do under a 401 cert?

Grant
Grant with Conditions
Deny
Waive

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

Most 401 certs are tied to a 404 permit

- **Individual 404 Permits**
  - Follow application process outlined above

- **404 Nationwide Permits**
  - EPA, Region 9 has programmatically certified the NWPs for tribal lands.
  - Need to contact the Tribe for the 7 authorized tribes
404 Permits

NWPs and EPA issued 401 certs

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

- No 401 cert or waiver means no federal permit or license.

- If you do not meet the conditions of the 401 cert, then you are not in compliance with the permit.
Send 401 Applications To:

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

* For authorized tribes, contact the tribe directly
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