

**State and Tribal Concerns**  
**Section 401 Water Quality Certification of the 2021 Section 404 Nationwide Permit Package**

Association of State Wetland Managers  
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**Issue Overview:** In September 2020, the U.S. Army Corps of Engineers (Corps) published for public comment a set of Nationwide Permit (NWP), which proposed to renew the existing NWPs and associated general conditions and definitions, several with modifications, and proposed to create five new NWPs. The final NWPs issued in January 2021 replaced twelve of the existing NWPs, modified some general conditions and definitions, and issued four new NWPs. The Corps required state and tribal Clean Water Act (CWA) section 401 certification authorities to certify the proposed NWPs instead of the final permits even though the proposed permits were subject to change, which was a departure from longstanding practice, and provided 60 days was the “reasonable period” for certification decisions despite requests for extensions to accommodate mandatory state public processes. The Corps has indicated they will not initiate a new certification process when they renew and revise the remaining NWPs in March 2022, but instead will rely on the certification of the September 2020 proposed NWPs. The Corps has indicated they are following the U.S. Environmental Protection Agency’s (EPA) 401 Water Quality Certification Rule finalized in 2020 and suggested states and tribes talk to EPA if they had concerns.

**State and Tribal Concerns:** The Association of State Wetland Managers (ASWM) and the Association of Clean Water Administrators (ACWA) have heard several concerns about the CWA section 401 certification of the Nationwide General Permits (NWPs) finalized in January 2021, as part of our ongoing project and workgroup interactions with states and tribes. These issues include:

- Many Corps Districts are interpreting inappropriate “reopener clauses” broadly. The preamble to EPA’s 401 Certification Rule says that reopener clauses are inconsistent with CWA section 401 because reopeners indicate the certifying authority intends to take an action to reconsider or otherwise modify a previously issued certification at some unknown point in the future, extending certification deliberations beyond the statutory limit of one year (Preamble at 42,280). The Corps appears to be considering reopener clauses broadly, even where they are specific as to trigger and timeframe. For example, the Corps has considered as an impermissible reopener clause a certification provision for the NWPs indicating the certification applies to the proposed NWPs and might not apply without modification to final NWPs if the final NWPs differ markedly from the proposal. States have noted such conditions were intended merely to clarify the permits covered by the certification and not as an unbounded reopener clause.
- The Corps appears to be making substantive judgements about certification conditions, even though the 401 Certification Rule preamble says the federal licensing or permitting agency will review certifications only to ensure certain required elements are present and procedures were followed. Regardless, some states have indicated Corps districts have rejected some certification conditions because they have a substantive disagreement with the condition.
- The Corps waived certifications when time limit was exceeded due to state mandatory public involvement processes which required more time than allowed by the 60-day 401 review time limit in at least two states.
- Notification practices vary widely among Corps districts. States and tribes have said it would be helpful to have a consistent and transparent process for notifying certification authorities of the status of their certification. Corps notifications about the status of 401 certifications have been made by phone, by email, by letter, and some notifications not happening at all. Some notifications have been informal with minimal specifics followed later by a more formal notification letter.

- Some states have not heard the status of their certifications, even though the NWP have been in effect since March 15, 2021. While some states have received Corps letters that accept or “decline to rely” on all or part of the certification, others have received no specific information about certification status. As a result, several states and tribes may not know if the NWPs are available in their jurisdiction and with which conditions. Washington State, for example, heard initially the Corps district was rejecting one condition, and later heard that perhaps all conditions would be rejected because of a perceived reopener.
- The NWPs provide that if certification is denied for any of the NWPs a project proponent can request an individual 401 certification to make an NWP available. States and tribes do not know if they should prepare to receive requests for individual 401 certifications if status of their NWP package certification is uncertain.
- The Corps does not plan to seek certifications for reissuance of the March 2022 NWPs, instead relying on the certification from December 2020. Water quality effects of a subset of the NWP package may be different from effects envisioned in the 2020 certification. States and tribes believe that the Corps should seek a new certification for those additional forty NWPs.

**Status of NWP 401 Certifications:** Anecdotal information offered by twenty-one states and one tribe show that certification status varies widely. Other states and tribes have not contacted ASWM about their experience.

- Corps accepted state’s denial of all NWPs: OR, NJ
- Corps approved state’s certifications (had no reopener): IN, NY
- Corps approved state’s certifications (had provision interpreted as reopener – likely removed by Corps): MT
- Corps rejected one or a few of state’s certifications conditions: FL, UT, WA
- Corps requires changes in the state’s CZM certifications submission to get approval: GA
- Corps allowed supplementary document after deadline to support denial: Fond du Lac
- Corps waived 401 certifications because state public processes exceeded time limit: OH, NC
- Corps rejected most or all of state’s certification conditions: MD (incl. CZM), NM, NV, SC (6 denied), VA (most), WV
- Uncertain of certification status: MN
- Still to share *final* outcome with ASWM: LA, MI, and WI

**Requested Improvements:** States and tribes identified potential improvements to the certification review process for the NWPs:

**Strong need for:**

- EPA interpretation of what constitutes a “reopener” clause
- Consistent treatment for Corps response to certifications
- Consistent review and implementation
- A consistent, timely, transparent process for notifying states and tribes as to their certification status

**Need to know:**

- The status of the state certification, including for each condition
- If the Corps districts are telling project proponents a NWP is available provided that they get an individual certification from the state or tribe, requiring the state or tribe to establish a process for individual certification requests.

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