

ICR Supporting Statement
Information Collection Request for
Updating Regulations on Water Quality Certification
Proposed Rule

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Justification.

1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection.

This Information Collection Request (ICR) describes the cost and burden associated with the proposed revisions to 40 CFR 121 included in the *Updating Regulations on Water Quality Certification* proposed rule. These proposed revisions are intended to modernize the EPA’s existing regulations at 40 CFR 121 and make them consistent with the current text and structure of the Clean Water Act (CWA). These proposed revisions are also intended to provide additional regulatory procedures that the EPA believes will promote consistent implementation of section 401 and streamline the federal licensing and permitting process.

Congress enacted CWA section 401 to provide certifying authorities (states, authorized tribes, and in limited circumstances, the EPA) with an important tool to help protect water quality within their borders in collaboration with federal agencies. Under section 401, a federal agency may not issue a permit or license that may result in any discharge into waters of the United States unless the certifying authority where the discharge would originate issues a section 401 water quality certification verifying that the discharge will comply with certain water quality requirements or waives the certification requirement.

CWA section 401 requires project proponents to submit project specific information to certifying authorities. Certifying authorities may act on project specific information by either granting, granting with conditions, denying, or waiving section 401 certification. All states and tribes with treatment as a state (TAS) authorization for section 401 have authority to implement section 401 certification programs. The EPA has authority to implement section 401 certification programs on behalf of tribes without TAS for section 401 and on lands of exclusive federal jurisdiction. The EPA is also responsible for coordinating input from neighboring or downstream states and tribes affected by a discharge from a federally licensed or permitted project under section 401(a)(2). CWA section 401 requires certifying authorities to submit information to the relevant federal licensing or permitting agency to indicate the action taken on a request for certification.

The revisions in the proposed rule clarify the information that project proponents must provide to request a section 401 certification, introduce a preliminary meeting requirement for project proponents where the EPA acts as the certifying authority, and remove the information requirement for project proponents in a section 401(a)(2) evaluation. The proposed revisions also clarify the information a certifying authority must provide in order to act on a request for section 401 certification and remove any information requirement in the certification modification context. The EPA expects these proposed revisions to provide greater clarity on section 401 requirements, reduce the overall preparation time spent by a project proponent on certification requests, and reduce

the review time for certifying authorities. See Error: Reference source not found for a list of the proposed revisions.

Table 1: Proposed changes in 40 CFR 121 that will affect information collection by respondents

Requirement	Existing Regulation	Proposed Regulation	Effected Respondent	Change
Information in a request for certification	40 CFR 121.3 and 121.22	40 CFR 121.1(c)	Project proponent	Burden reduction
Pre-request meeting where EPA acts as certifying authority	N/A	40 CFR 121.12	Project proponent	Incremental burden increase
Supplemental information for neighboring jurisdiction determinations	40 CFR 121.12	N/A	Project proponent	Incremental burden reduction
Granting, granting with conditions, or denying a certification request	40 CFR 121.2(a)	40 CFR 121.5(b)-(d)	Certifying authority	Burden reduction
Expressly waiving a certification request	40 CFR 121.16(a)	40 CFR 121.7(a)(1)	Certifying authority	No change
Modification of a certification	40 CFR 121.2(b)	N/A	Certifying authority	Incremental burden reduction

2. Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.

The information collected under section 401 is used by the certifying authorities for reviewing proposed projects for potential water quality impacts from discharges from activities that requires a federal license or permit. Except for the case when the EPA acts as a certifying authority, information collected under section 401 is not directly collected by or managed by the EPA. The primary collection of information is performed by licensing or permitting federal agencies and certifying authorities. Information collected directly by the EPA under section 401 in support of the section 402 permit program is already captured under existing EPA ICR No. 0229.22 and is therefore not included in this analysis.¹

¹ Section A.1.9.1, EPA ICR No. 0229.22.

- 3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration of using information technology to reduce burden.**

The certifying authority collecting the information determines the information collection technique and may require either physical or electronic submission of information. The proposed rule specifically notes the use of electronic means (i.e., email) for certification requests.

- 4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purpose(s) described in item 2 above.**

The information collected under this section will generally be project specific and the information is not available elsewhere. Project proponents may reference documents that already exist and submit the documents as attachments as part of the 401 certification process.

The project proponent is the best source of information about the proposed project. The project proponent knows what the purpose of the project is and what is planned. The project proponent must submit the information listed at proposed rule 40 CFR 121.1(c) to the appropriate certifying authority. This information is used by the certifying authority to evaluate the impact of the proposed project and by the federal licensing or permitting agency when they develop the license or permit. There is no duplication of information collection.

- 5. If the collection of information impacts small businesses or other small entities (item 5 of the OMB form 83-1), describe the methods used to minimize burden.**

Because this proposed rule promotes consistent implementation of section 401 and streamlines the federal licensing and permitting process, small businesses who request 401 water quality certifications will benefit from such efficiency stemming from the proposed rule update. Although information collected under Section 401 could be furnished by small entities, small entities are more likely to qualify for general permit authorizations for which section 401 certification is already granted (e.g., CWA section 404 nationwide general permits). EPA cannot further minimize the burden to small entities because section 401 requires all project proponents to submit a certification request and the proposed rule lists the information at proposed rule 40 CFR 121.1(c) that is required to receive 401 certification.

6. Describe the consequence to federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.

If the collection is not conducted, the certifying authorities will be unable to meet the statutory mandate under CWA section 401. To satisfy the requirements of the statute, certifying authorities must collect information necessary to determine whether a potential discharge from a federally licensed or permitted activity into a water of the United States will comply with water quality requirements. Federal agencies will also be impacted if the information collection is not conducted. Under section 401, a federal agency may not proceed with issuing a license or permit before a certifying authority grants, denies, or waives a request for certification.

7. Explain any special circumstances that would cause an information collection to be conducted in a manner inconsistent with 5 CFR 1320.6:

There are no special circumstances that would cause an information collection to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.6.

8. Efforts to consult with persons outside the agency to obtain their views.

The EPA conducted pre-proposal outreach with certifying authorities and other federal agencies to solicit input on the development of the rule. The EPA opened a docket for pre-proposal recommendations from April 24, 2019 to May 24, 2019 (Docket ID No. EPA-HQ-OW-2018-0855). Pre-proposal input represents a diverse range of interests, positions, and suggestions. The EPA received several specific recommendations regarding process improvements for section 401, including support for pre-application meetings and information sharing among project proponents, certifying authorities, and federal licensing and permitting agencies. Stakeholder input also highlighted the lack of clarity on the information requirements in the section 401 certification process. The EPA also received input from other federal agencies during the development of the rule.

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

No payments or gifts are provided to respondents.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.

Federal licensing and permitting agencies are responsible for following statutory, regulatory and agency policy regarding the collection and handling of any confidential business information. EPA and other federal agencies will handle requests from the public for release of information under standard Freedom of Information Act procedures.

11. Provide additional justification for any information of a sensitive nature.

This information collection request does not require the collection of any information of a sensitive nature.

12. Provide estimates of the hour burden of the collection of information.

The EPA expects that the revisions to 40 CFR 121 included in *Updating Regulations on Water Quality Certification* proposed rule will provide no change in information collection burden. The proposed revisions in the proposed rule clarifies the information project proponents must provide to apply for section 401 certification, removes the information requirement for project proponents in a section 401(a)(2) evaluation, and introduces a preliminary meeting requirement for project proponents where the EPA acts as the certifying authority. The proposed revisions also clarify the information a certifying authority must provide to act on a request for section 401 certification and remove any information collection requirement in the certification modification context. The EPA expects these proposed revisions to provide greater clarity for project proponents and certifying authorities.

In the interest of transparency and public understanding, the EPA has provided here relevant portions of the burden assessment associated with the existing regulations governing section 401 certification because the EPA does not expect any measurable change in information collection burden associated with the proposed changes.

a. Project Proponents

The EPA expects no change in the number of project proponents requesting section 401 certification per year in response to the changes contained in the proposed rulemaking. The annual average number of federal license and permit applications was estimated based on data from five (5) licensing/permitting category types and is presented in Error: Reference source not found.

Table 2: Federal License/Permit Summary

License/Permit Type	Annual Average # Licenses/Permits Issued
CWA Section 404	50,159 general; ² 2,511 individual ^a
Rivers and Harbors Act Section 10	8,607 general; 1,670 individual ^b
Rivers and Harbors Act Section 9	30-35
Federal Energy Regulatory Commission license	47 ^c
Nuclear Regulatory Commission license	3 ^d
Estimated Total Annual Average # Licenses/Permits Issued	63,032

- a. Estimate based on the annual average number of 404 permits from 2013-2018
- b. Estimate based on the annual average number of section 10 permits from 2013-2018
- c. Estimate based on annual average license issuance for hydropower facilities/major natural gas pipelines from 2013-2018
- d. Estimate based on annual average number of licenses for operating nuclear power reactors from 2013 to 2018

The EPA assumed one project proponent per license/permit issued because 401 certification is dependent on a federal license or permit action. However, these figures likely overestimate the number of project proponents (and thus the burden) because general permit authorizations often permit multiple discharges from multiple permittees, whereas individual authorizations typically permit a single discharge by one permittee. General permit authorizations often permit multiple discharges from multiple permittees, which suggests that 63,032 is an upper bound estimate of license and permit responses. Based on subject matter expertise, the EPA estimates that under the EPA’s existing certification regulations 25% of general permit certification requests could ultimately require re-submission for an individual certification. The EPA estimates that the annual average responses will remain unchanged and range from 19,000 to 63,000, with a midpoint of 41,000 responses per year.

Table 3: General and Individual Permit Range Estimates

Permit Type	Low Estimate	High Estimate	Midpoint
General Permits	15,000	59,000	37,000
Individual Permits	4,000	4,000	4,000
Total	19,000	63,000	41,000

In its recently issued emergency ICR 2603.01, the EPA assumed an average per-certification request baseline burden estimate for the section 401 requirements similar to what is presented in EPA ICR No. 0229.22. An average burden on project proponents related to submission of information to EPA under the existing regulation is four (4) hours per certification request³. The EPA estimates that a project proponent’s hour burden associated with these information submissions will not change based on the changes proposed in this rulemaking.

2 An individual 404 permit covers one discharge with more than minimal adverse effects; a general 404 permit covers discharges that have only minimal adverse effects based on activity category.

3 Section A.1.9.1, EPA ICR No. 0229.22

The specific revisions in the proposed rule at 40 CFR 121.1(c) clarify the specific information a project proponent is required to submit to the certifying authority when applying for section 401 certification. The information listed in the proposed rule is similar to the information expected under current practice in 40 CFR 121.3 and 121.22, but provides project proponents with greater certainty by specifically listing certification request requirements. The existing regulations at 121.3 require project proponents to submit information related to water quality requirements as part of their federal license or permit application. This information related to water quality requirements is most reasonably read to include the information required for a certification request under the proposed 121.1(c). Similarly, the existing regulations at 121.22 list the information a project proponent must submit when the EPA acts as the certifying authority. The proposed requirements for a certification request are similar to those listed at 121.22. The proposed information required under 121.1(c)(6) is not contemplated as part of the existing information required to satisfy 121.3 and 121.22. However, the EPA believes this new information collection to be a negligible burden on project proponents, because they will have to determine the information as part of the licensing and permitting process. Furthermore, the EPA expects the process clarity provided through the proposed 121.1(c) would result in a net burden reduction for project proponents. The EPA notes that this information collection does not capture information that may be requested by the certifying authority during the certification process after an initial request is received. The Agency does not mandate what further information, if any, may be necessary for a certifying authority to act on a request for certification.

The specific revisions in the proposed rule require project proponents to request a meeting with the EPA prior to submitting a request for certification where EPA acts as the certifying authority. Although this would be a new requirement under the section 401 regulations, the EPA believes this will add an incremental burden on project proponents. Currently, project proponents can request meetings with the Army Corps of Engineers (Corps) for any Corps permits and must request meetings with the Federal Energy Regulatory Commission (FERC) for FERC hydroelectric licenses. 33 CFR 325.1(b); 18 CFR 5.1(d)(1). Error: Reference source not found demonstrates that Corps permits and FERC licenses make up the vast majority of permits or licenses that trigger section 401 certification. Because most of the federal licenses and permits that trigger section 401 certification contain a similar preliminary meeting requirement, the EPA predicts this burden is already accounted for in other information collections. At most, the proposed regulation at 40 CFR 121.12 will represent an incremental burden shift.

The specific revisions in the proposed rule remove the information requirement for project proponents for section 401(a)(2) neighboring jurisdiction evaluations. Under the existing regulations at 40 CFR 121.12, the EPA may ask a federal license or permit agency to request additional information from a project proponent to determine whether a discharge will impact a neighboring jurisdiction's water quality. The proposed rule would remove this supplemental information collection. This proposed revision represents an incremental decrease in project proponent burden because it was rarely used by the EPA.

The EPA estimates, for the purposes of this supporting statement, that the marginal burden associated with the proposed changes discussed above will remain unchanged, resulting in an information collection burden of four (4) hours per certification request. Based on this information, the average marginal estimated burden associated with certification requests for project proponents under the proposed changes to certification regulations remains unchanged and ranges from 76,000 to 252,000 hours per year, with a midpoint of 164,000 hours per year.

Table 4: Total Estimated Existing Annual Hour Burden for Project Proponents

Low Estimate	High Estimate	Midpoint
76,000	252,000	164,000

In the proposed changes to the EPA’s existing certification regulations there are no specific recordkeeping requirements for project proponents.

e. Certifying Authorities

The specific revisions in the proposed rule clarify the information certifying authorities must provide when acting on a request for certification. The requirements for a certification under the existing regulations at 40 CFR 121.2 are substantively similar to the requirements proposed under 121.5(b)-(d). Although the existing regulations do not explicitly discuss a denial of certification, current practice and the most reasonable interpretation of the existing regulation suggest that certifying authorities provide the information proposed at 121.5(e) to substantiate a denial of certification. The proposed regulation at 121.5(d) also provides greater structure to a grant of certification with conditions, although current practice and the most reasonable interpretation of the existing regulation suggest that certifying authorities provide such information to substantiate a certification with conditions. The EPA also predicts a reduction in review time because the proposed regulations provide a clear, predictable scope of information for review. The EPA notes that this information collection does not capture information that may be requested by the certifying authority during the certification process after an initial request is received. The Agency does not mandate what further information, if any, may be needed for a certifying authority to act on a request for certification.

The specific revisions in the proposed rule retain the requirement that certifying authorities must provide an express waiver of certification in writing. The proposed regulation at 121.7(a)(1) is substantially identical to the existing regulation at 121.16(b). The EPA predicts no change in burden when a certifying authority opts to expressly waive certification.

The specific revisions in the proposed rule remove the existing requirement at 121.2(b) that allows a certifying authority to modify a certification. The existing regulation requires certifying authorities to modify certifications as agreed upon by the certifying authority, federal agency, and the EPA. The proposed rule removes this modification opportunity. This proposed revision represents a negligible decrease in certifying authority burden because it was rarely used by certifying authorities.

In its recently issued emergency ICR 2603.01, the EPA estimated the hourly burden for a certifying authority reviewing a certification request under the EPA’s existing certification regulations to be four (4) hours per certification request⁴. The EPA estimates that the burden associated with certification review will be unchanged based on the changes proposed in this rulemaking.

The average estimated burden associated with certification request review for certifying entities remains unchanged and ranges from 76,000 to 252,000 hours per year, with a midpoint of 164,000 hours per year.

Table 5: Estimated Existing State/U.S. Territory/Authorized Tribe Annual Hour Burden

Low Estimate	High Estimate	Midpoint
76,000	252,000	164,000

Not all certification reviews necessitate the same associated burden. The certifications for small projects can be reviewed by the certifying authority with relatively little associated burden. The certifications for larger, more complex projects may require significantly more associated burden to review. Certifying authorities may also choose to waive certification for a project without incurring any associated burden. Waiver may or may not involve review by the certifying authority.

In the proposed changes to the EPA’s existing certification regulations there are no specific recordkeeping requirements for certifying authorities.

13. Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information.

a. Project Proponents

Certification request documents are likely prepared by a team of employees with a range of skills. For the purposes of this burden estimate, the EPA consulted the Bureau of Labor Statistics website for wage information related to engineering services⁵. The median hourly wage for all occupations under engineering services for May 2018, the most recent available, is \$37. Adding a 1.6 overhead factor results in a median hourly wage of \$59. The EPA multiplied this hourly wage by the existing hourly burden to arrive at the existing estimated cost burden. The average estimated existing cost burden associated with certification requests for project proponents ranges from \$4.0 million to \$15.0 million per year, with a midpoint of \$10.0 million per year.

Table 6: Estimated Existing Project Proponent Annual Cost Burden (Millions)

Low Estimate	High Estimate	Midpoint
\$4.0	\$15.0	\$10.0

In the proposed changes to the EPA’s existing certification regulations there are no

⁴ Section A.1.9.1, EPA ICR No. 0229.22

⁵ https://www.bls.gov/oes/current/naics5_541330.htm, accessed July 2019.

specific record keeping requirements.

b. Certifying Authorities

The EPA estimates that \$29.82 (starting pay rate of a GS-11 “Rest of U.S.” locality⁶) is an average hourly wage for a state/U.S. territory/tribal employee. Adding a 1.6 overhead factor results in an estimated hourly wage for a state/U.S. territory/tribal employee of \$48. The EPA multiplied the hourly wage of \$48 by the annual existing estimated hourly burden range discussed in question 12 (Part b) to arrive at an estimated annual existing dollar burden range of \$4.0 million to \$12.0 million per year, with a midpoint of \$8.0 million per year.

Table 7: Estimated Existing State/U.S. Territory/Authorized Tribe Annual Cost Burden (Millions)

Low Estimate	High Estimate	Midpoint
\$4.0	\$12.0	\$8.0

Not all certification reviews necessitate the same associated burden. The certifications for small projects can be reviewed by the certifying authority with relatively little associated burden. The certifications for larger, more complex projects may require significantly more associated burden to review. Certifying authorities may also choose to waive certification for a project without incurring any associated burden. Waiver may or may not involve review by the certifying authority.

14. Provide estimates of annualized cost to the federal government.

Under existing regulations at 40 CFR 121.21 and proposed regulations at 121.11, the EPA acts as a certifying authority on behalf of federally recognized tribes that lack TAS and lands of exclusive federal jurisdiction. On average, the EPA estimates it performs 54 CWA section 401 water quality certification decisions per year for projects on tribal lands where the tribe does not have TAS. The EPA rarely performs section 401 water quality decisions on lands of exclusive federal jurisdiction. This frequency is not expected to change in response to the proposed regulation.

Under the existing regulations at 40 CFR 121.11 and the proposed regulations at 121.10, the EPA will notify a neighboring jurisdiction when it determines that a discharge originating in another jurisdiction may impact its water quality. The proposed regulations will not change the burden and subsequent cost on the EPA in the neighboring jurisdiction context. This frequency is not expected to change in response to the proposed regulation.

On average, federal review of certification requests is estimated at one (1) hour per request, based on similar certification request review burdens in existing EPA ICR No. 0229.22. Multiplying the 54 estimated annual decisions per year by the estimated one (1) hour to review an application results in an existing hourly burden for certification request

⁶ https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/19Tables/html/RUS_h.aspx, accessed July 2019

review by the federal government of 54 hours per year. The 54 CWA section 401 water quality certification decisions per year, multiplied by the estimated one (1) hour review time and an estimated hourly wage of \$68 provides an estimated existing annual cost burden of \$3,700.

Table 8: Estimated Existing Federal Government Annual Hour and Cost Burden

Total Estimated Annual Hour Burden	Total Estimated Annual Dollar Burden
54	\$3,700

15. For collections of information whose results will be published, outline plans for tabulation, and publication.

The information collected under section 401 may be published provided that it is not proprietary or confidential business information. The determination as to whether to publish or not are made by the certifying authority or federal licensing or permitting agency collecting the information.