



MEMORANDUM

TO: Regional Administrators, Surface Water Managers, 401 WQ Certification Staff

FROM: Mary Anne Nelson, Surface & Wastewater Division Administrator, Idaho Department of Environmental Quality

DATE: 5/6/24

SUBJECT: Scope Directive for 2023 Clean Water Act Section 401 Water Quality Certifications for Section 404 Permits

Background: The Clean Water Act (CWA) Section 401 is a direct grant of authority to states (and authorized tribes) to review compliance with applicable federal and state (and tribal) water quality requirements for any discharge from a point source into waters of the United States that may result from a proposed activity that requires a federal license or permit.

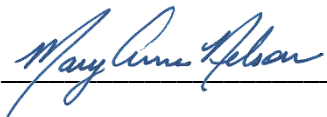
The US Environmental Protection Agency (EPA) published the [Final 2023 CWA § 401 Water Quality Certification Improvement Rule](#) (2023 Rule) in the *Federal Register* on September 14, 2023 (40 CFR 121), and it took effect on November 27, 2023. Under CWA § 401, a certifying authority, such as the Idaho Department of Environmental Quality (DEQ), may grant with conditions, deny, or waive certification in response to a water quality certification request.

EPA finalized its approach to the scope of certification at 40 CFR 121.3 with modifications to the regulatory text to better clarify the extent of the activity subject to certification and the water quality limitations. The final rule at 40 CFR 121.3 provides that when a certifying authority reviews a request for certification, the certifying authority “shall evaluate whether the activity will comply with applicable water quality requirements.” It further provides that the certifying authority’s evaluation is “limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity’s construction and operation.” Finally, it provides that a certifying authority “shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements.”

Scope of 401 Certification: DEQ’s evaluation of project activities seeking certification of CWA § 404 permit authorization from the Army Corps of Engineers has been and will remain focused on the potential water quality impacts from the proposed project’s activity and not the operation. Potential adverse effects from a proposed project’s activity on water quality may include evaluation of direct and indirect, short and long term, upstream and downstream water

quality-related impacts. DEQ will not expand the scope of review to include the operation that may be subject to a different federal or state license or permit.

DEQ will evaluate Federal Energy Regulatory Commission (FERC) projects with a similar focus to ensure all readily available water quality-related information needed to inform the application is submitted to facilitate the environmental review process.

APPROVAL:  _____ May 6, 2024
Mary Anne Nelson Date
Surface & Wastewater Division Administrator
Idaho Department of Environmental Quality