

## Focus on: Section 401 Water Quality Certifications



### The Clean Water Act

Since it passed Congress in 1972, the U.S. Clean Water Act has granted states and tribal governments the authority to certify federal water quality permits. This authority, granted under Section 401 of the Clean Water Act, empowers states to protect their waters – federal agencies cannot issue a license or permit before the state certifies a Section 401 request.

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#### Special accommodations

To request ADA accommodation including materials in a format for the visually impaired, call Ecology at 360-407-6068, or visit <https://ecology.wa.gov/accessibility>. People with impaired hearing may call Washington Relay Service at 711. People with speech disability may call TTY at 877-833-6341.

### State's water quality workload soars due to shellfish ruling, federal regulatory rollbacks

In June 2020, a federal court vacated the nationwide permit the U.S. Army Corps of Engineers (Corps) used to authorize shellfish farms. Under the ruling, shellfish farmers seeking to operate in the state of Washington, will now need to receive individual Corps permits *and* certification from the Department of Ecology under Section 401 of the federal Clean Water Act.

Washington's \$270 million commercial shellfish industry is the largest in the nation, and approximately 900 shellfish farms will now be required to obtain state Section 401 reviews before their Corps permits can be issued. Typically, Ecology gets 400 water quality certification requests a year. Adding up to 900 new requests from state shellfish farmers will triple Ecology's existing Section 401 workload. Ecology's ability to review these requests in a thorough and timely manner is essential to protecting our state's environment and our economy.

### New EPA rule to restrict state authority

At the same time Ecology deals with the court ruling, EPA has adopted a new rule that attempts to severely restrict state authority under Section 401, and – should the rule stand – will make state review of Section 401 applications vastly more difficult. The new rule allows federal agencies to drastically shorten the time states have to review Section 401 decisions – from a full year down to, as the Corps has proposed, 60 days.

The Corps may implement this 60-day timeframe now that the new EPA rule took effect in September 2020. The rule also gives federal agencies the ability to decide that a state has waived its Section 401 authority if a decision isn't made during this timeframe. In July 2020, Washington Attorney General Bob Ferguson joined 19 other state attorneys general and the District of Columbia to challenge the new EPA Section 401 rule. This challenge is still pending.

## Section 401 today

Ecology uses its Section 401 authority to set conditions for projects, actions, and activities that could harm water quality.

For example, when a port seeks permission to dredge a channel or waterway, Ecology outlines where sediment spoils can go.

We set standards to protect wetlands during site development, and determine what mitigation and enhancement are necessary.

Shoreline property owners wanting new piers and other structures follow our 401 certification conditions to minimize water quality impacts.

Federal 401 rollbacks

**April 2019:** A presidential executive order initiates efforts to shorten the time and scope state and tribal governments have to make decisions about energy projects.

**August 2019:** The Corps issues a Regulatory Guidance Letter, reducing state Section 401 review period for a project from a year to 60 days.

**June 2020:** The Corps and EPA adopt new rule redefining “waters of the United States.” About 29% of Washington wetlands no longer have federal regulatory protection.

**Sept. 11, 2020:** EPA’s new Section 401 rule took effect, allowing federal agencies to adopt shorter review periods, and narrowing state legal standing for projects.

To protect Washington’s ability to review and condition federal water quality permits, Ecology will hire five additional positions, funded in the 2020 Supplemental Operating Budget. Since EPA’s new Section 401 rule has taken effect, we anticipate our review window will shrink significantly once the Corps officially notifies Ecology its review timeframe for projects has been compressed from one year to 60 days.

## Ecology’s proposal

Together, the June 2020 court decision and new EPA rule will require Ecology to significantly increase its resources devoted to Section 401 certifications.

These challenges come at an already difficult time for Washington, as it deals with a massive health pandemic and wrestles with economic fallout from the crisis. However, if our state is to maintain its rights under the federal Clean Water Act, we will need to act quickly.

Currently, Ecology relies on a staff of five environmental specialists to review and issue Section 401 decisions. They also are charged with developing and supporting our aquatics database and making federal coastal zone management program consistency determinations.

To deal with Section 401 certification requests from as many as 900 Washington shellfish farmers in a timely manner, Ecology is proposing to expand its Section 401 staff by:

- Hiring 5.0 additional FTEs dedicated to applications for shellfish farms. Ecology will use \$600,000 in one-time identified agency cost savings to fund these project positions in Fiscal Year 2021.
- Submitting a 2021-23 Decision Package requesting additional funding to support new staff beginning in Fiscal Year 2022 to support this new workload, and ensure we are responsive to the needs of this important state industry.



An oyster boat on Willapa Bay - (CC BY-NC-SA 2.0)