

EPA Final Rule Narrows State and Tribal Review Under the Clean Water Act

The U.S. Environmental Protection Agency issued a final rule on June 1, 2020, intended to limit the ability of states and tribes to block or delay projects requiring a water quality certification under Section 401 of the Clean Water Act. Section 401 requires federal permitting authorities to obtain state or tribal certification that discharges to surface water will comply with their water quality requirements. The Trump administration has criticized states for using the Section 401 process to obstruct, condition, or delay projects requiring federal licenses or permits. The rule is intended to narrow the scope of review by states and authorized tribes and speed up the process.

Background

For projects that require a federal license or permit and that will result in a discharge to water bodies that are covered by the Clean Water Act, Section 401 requires a certification from the state or authorized tribe with jurisdiction that the discharge will comply with various requirements of the act, including with state or tribal water quality standards issued under Section 303 of the act. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). The state or tribe may condition its certification by imposing limitations or monitoring requirements that are necessary to assure compliance with specified provisions of the Clean Water Act, and with "any other appropriate requirement of State law." 33 U.S.C. § 1234(d). Such limitations and requirements then become a condition of the federal license or permit.

Federal permits and licenses subject to Section 401 may not be issued if a state or authorized tribe denies certification. A state or tribe may waive the certification requirement, or federal agencies may deem the requirement waived, if the state or tribe does not act within a reasonable period of time. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1).

The Section 401 certification requirement reflects the U.S. Congress' stated intent "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources. . ." CWA § 101(b), 33 U.S.C. § 1251(b). In most cases, Section 401 certification proceeds with little controversy. However, in recent years, some states have been criticized for their expansive interpretation of Section 401 or for the length of time for completing their review.

This week's rule is the latest in a series of actions by the Trump administration to curtail state and tribal authority under Section 401. In April 2019, the president issued Executive Order 13868, which directed EPA to update the agency's 401 certification guidance and regulations. In June 2019, EPA issued a guidance document concerning the certification process. The final rule now replaces that guidance document.

EPA Administrator Andrew Wheeler stated in a press release accompanying the rule that "EPA is returning the Clean Water Act certification process under Section 401 to its original purpose, which is to review potential impacts that discharges from federally permitted projects may have on water resources, not to indefinitely delay or block critically important infrastructure."

Description of New Rule

EPA's final rule includes provisions designed to accomplish the following:

Limit the Scope of Section 401 Certification

States and authorized tribes are directed to limit their review to the water quality impacts resulting from the point source discharges associated with the project that is the subject of the federal licensing or permitting process.

States and authorized tribes may not base conditions or denials of certification on considerations other than water quality itself. Conditions must be necessary to assure that the discharge will comply with water quality requirements, and denials must be based on the inability to determine that the discharge will comply with water quality requirements. States and authorized tribes are required to document the connection between conditions or denials and state water quality requirements.

Ensure Timely Decisions

States or authorized tribes must act on certification requests within a reasonable period of time, which shall not exceed one year. Federal agencies are required to determine the reasonable period of time, either on a case-by-case basis or categorically. The clock starts when the state or authorized tribe receives the certification request and cannot be tolled once started.

EPA explains that the time limit cannot be avoided by an applicant withdrawing its request voluntarily and resubmitting it. Voluntary withdrawals should only occur when there has been a material change to the proposed project.

Establish Procedural Requirements

The rule requires an applicant to request a prefiling meeting with the certifying state or tribe at least 30 days prior to submitting its certification request. The state or tribe need not grant the request, but the request for a prefiling meeting will provide notice of an upcoming certification request.

The rule also requires that a certification request for an individual license or permit include the following elements:

1. Identify the project proponent(s) and a point of contact.
2. Identify the proposed project.
3. Identify the applicable federal license or permit.
4. Identify the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters.
5. Include a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge.
6. Include a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received.
7. Include documentation that a prefiling meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request.
8. Contain the following statement: "The project proponent hereby certifies that all information contained herein is true, accurate, and complete, to the best of my knowledge and belief."
9. Contain the following statement: "The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of

time."

What Comes Next

The rule will become effective 60 days after publication in the Federal Register. As with most significant EPA actions, litigation is anticipated. California Attorney General Xavier Becerra and Washington State's Director of the Department of Ecology Laura Watson issued statements indicating the possibility of a legal challenge. Thus, as with the definition of which water bodies and which types of discharges are covered by the Clean Water Act, the meaning and reach of the act's requirements likely will require resolution by the courts.

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