



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

## Section 401/Clean Water Act: New England Interstate Water Pollution Control Commission Comments on U.S. Environmental Protection Agency Proposed Rule

12/02/2019

The New England Interstate Water Pollution Control Commission (“NEIWPCC”) submitted comments on the United States Environmental Protection Agency (“EPA”) proposed rule titled:

*Updating Regulations on Water Quality Certification (“Proposed Rule”)*

The *Proposed Rule* addresses Section 401 of the Clean Water Act.

EPA previously issued a June 7th guidance document addressing the same issue titled:

*Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes*

The agency stated in issuing the guidance that it was doing so pursuant to Executive Order 13868 to:

... clarify and provide recommendations concerning the implementation of the Clean Water Act (CWA) Section 401.

Section 401 of the Clean Water Act (“CWA”) requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable state water quality standards. If not provided, the federal permit or license may not be granted. Further, states can impose certain conditions upon federal permits or licenses as a prerequisite to granting the permit or license.

The NEIWPCC October 21st comments initially argue that the *Proposed Rule*:

... deviates considerably from current CWA §401 certification practice and statutory interpretation and asks for comment on a hundred items, many of which require complex legal analysis.

It further states:

... In order for states to comprehensively analyze the Proposed Rule and provide informed input, a 60-day comment period is insufficient, and we therefore request an extension of the comment period to include an additional 60 days.

The organization expresses disappointment that what is described as its pre-proposal recommendations were not heeded in the *Proposed Rule* and contends that “principles of state authority and consultation” were rejected.

As to Executive Order 13868, NEIWPCC states it is unaware of any “thorough analysis” suggesting the *Proposed Rule* will achieve the Executive Order’s objectives or protect United States’ water resources according to the objective of the Clean Water Act.

Additional arguments put forth include:

- Expanded Federal authority disregards cooperative federalism
- A restricted timeframe will lead to increased denials by States
- Implementation in consultation with States

A copy of the comments can be downloaded [here](#).