Section 401/Clean Water Act: National Association of Home Builders Comments Addressing U.S. Environmental Protection Agency Proposed Certification Revisions



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

09/01/2022

The National Association of Home Builders ("NAHB") submitted August 5th comments to the United States Environmental Protection Agency ("EPA") addressing proposed revisions to the Section 401 Clean Water Act certification process. See Docket ID No. EPA-HQ-OW-2022-0128.

The proposed rule would replace the 2020 regulatory requirement for Water Quality Certification under Section 401 of the Clean Water Act.

Section 401 of the Clean Water Act prohibits federal agencies from issuing permits or licenses that result in exceedance of water quality standards, or other applicable authorities, of the state. This provision of the Clean Water Act requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable 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.

If a state fails or refuses to act on a request for certification in a timely manner, certification requirements are waived with respect to such federal application.

During the Trump Administration, EPA revised certain aspects of the Section 401 certification process. The 2020 Trump Administration revisions were stated to be intended to establish procedures that promote consistent implementation of Section 401 and regulatory certainty in the federal licensing and permitting process. Opponents argued that the revisions fundamentally altered the state/federal relationship in managing the nation's water resources.

The Biden Administration characterizes the June 9th proposed revisions as:

. . . more consistent with the statutory text of the 1972 Clean Water Act and clarifies elements of Section 401 certification practice that has evolved over the 50 years since the 1971 regulation was promulgated.

The Biden Administration expressed concern that the revisions during the Trump Administration eroded state and tribal authority under the Clean Water Act. As a result, it had published on June 2, 2020, its Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 certification rule. See 86 Fed. Reg. 29541.

The NAHB describes itself as a Washington, D.C. based trade association representing over 140,000 residential land developers, builders, and associate member firms organized in approximately 700 affiliated state and local associations located in all 50 states, the District of Columbia, and Puerto Rico. Its members are stated to include those who design, construct, and supply single-family homes; build and manage multifamily, light commercial and industrial structures; develop land; and remodel existing homes.

By way of summary, NAHB opposes:

- Requirement that federal agencies obtain a final draft permit before requesting required 401 Water Quality Certification (concern expressed regarding potential delays)
- Proposed rule's failure to address certifying authorities' ability to delay certification process with strategic tactics
- Proposed rule's expansion of scope for certifying authorities to review certification requests
- Rescission of the Trump Administration 2020 version of the 401 certification rule

NAHB's interest in the rule is stated to be driven by its development work involving subdivisions, building lots, etc., which involves a substantial amount of earth-moving activities. Consequently, the organization states that it regularly seeks coverage under both Section 404 of the Clean Water Act and Section 402 NPDES National Pollutant Discharge Elimination System Stormwater Construction General Permits issued by the United States Corps of Engineers and EPA.

A copy of the NAHB comments which detail its concerns can be downloaded here.