



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

Section 401/Clean Water Act: Arkansas Attorney General and 10 Other States Challenge U.S. Environmental Protection Agency Revisions to Water Quality Certification Process

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Arkansas Attorney General Tim Griffin and 10 other states filed in the United States District Court for the Western District of Louisiana ("Court") a Complaint for Declaratory and Injunctive Relief ("Complaint") against the United States Environmental Protection Agency ("EPA") challenging regulations it promulgated on September 27th revising the Section 401 Clean Water Act water quality certification process.

The other Attorneys General joining the Complaint include the following states:

- Louisiana
- Alaska
- Kentucky
- Mississippi
- Missouri
- Montana
- Oklahoma
- South Carolina
- West Virginia
- Wyoming

The Complaint was also executed by the following trade associations:

- American Petroleum Institute
- Interstate Natural Gas Association of America
- National Hydropower Association

(collectively, "Plaintiffs")

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, the certification requirements are waived with respect to such federal application.

Examples of federal licenses and permits that may require Section 401 water quality certifications include (but are not limited to):

- Clean Water Act Section 404 dredge and fill permits
- Federal Energy Regulatory Commission hydroelectric licenses
- Clean Water Act Section 402 pollutant discharge permits

During the Trump Administration EPA revised by rulemaking certain aspects of the Section 401 certification process.

EPA stated, early in the Biden Administration, concern that the revisions during the Trump Administration eroded state and tribal authority under the Clean Water Act. Consequently, the federal agency promulgated a final rule on September 27th (“2023 Rule”) which made a number of revisions. See 88 Fed. Reg. 66,558.

EPA took the position in the preamble to the 2023 Rule that it better reflected the cooperative federalism framework and the intent of the 1972 and 1977 Clean Water Act statutory amendments. Issues it intended to clarify included:

- Scope of certification
- Reasonable period of time for a certifying authority to act

The Plaintiffs’ Complaint alleges that the 2023 Rule makes “sweeping and unlawful changes” to the federal regulations governing the process by which states issue “water quality certifications under the federal Clean Water Act.”

The Complaint states in part:

- Section 401 authority is powerful – when triggered state certification or waiver is an essential requirement for the federally licensed activity to proceed
- To preserve the Clean Water Act’s federal and state balance, the authority is also limited and circumscribed
- Section 401 only authorizes states to address water quality/and only within reasonable time limits that can never exceed one year
- Under earlier regulations some states abused the authority by improperly using procedural gimmicks to extend the time the Clean Water Act provides to make certification decisions
- Some states improperly relied on Section 401 to effectively deny projects based on non-water quality considerations
- EPA’s rule issued in 2020 during the Trump Administration undertook a wholistic analysis of the statutory text, legislative history, and relevant case law and clarified the limits Section 401 placed on state agency by giving effect to Congress’s decision to limit the scope of state review to water quality determinations (citing 85 Fed. Reg. 42,210 [July 13, 2020])
- EPA sharply shifted course after the Administration changed and no longer stood by its interpretation of the Clean Water Act, legislative history, and relevant case law and promulgated a rule that imposes mandatory standards on states that exceed their statutory obligations under the Clean Water Act and disrupts the cooperative federalism framework
- The states are required under the 2023 Rule to regulate the entire “activity” proposed, including construction and operation of project, not simply discharges in the navigable waters to determine whether it will comply with applicable water quality requirements
- Requirements of the 2023 Rule apply retroactively to all certification requests pending as of November 27th
- The workload of state environmental agencies is expanded, complicating, and lengthening the Section 401 review process

The Plaintiffs seek an Order from the Court:

- Declaring that the 2023 rule violates the Clean Water Act and the Administrative Procedures Act
- Vacating and setting aside the 2023 Rule
- Enjoining EPA from applying or enforcing the 2023 Rule

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