Section 401/Clean Water Act: U.S. Environmental Protection Agency Issues Memorandum Addressing Scope of the Certification Process



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The United States Environmental Protection Agency ("EPA") issued a May 21st memorandum titled"

Clarification regarding the Application of Clean Water Act Section 401 Certification ("Memorandum").

The Memorandum is transmitted from EPA Office of Water Acting Assistant Administrator Peggy Browne.

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, the 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 applications.

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.
- Natural Gas Pipeline Certificates issued by the Federal Energy Regulatory Commission.

The stated purpose of the May 21st EPA Memorandum is to address questions the federal agency states have been raised in regard to a rule promulgated in September 2023 (during the Biden Administration), addressing Section 401 certifications. It states that stakeholders raised questions about potential applications of the 2023 Rule's scope of certification.

By way of introduction, the Memorandum states in part:

…The purpose of this document is to reiterate the EPA's longstanding position that states and Tribes must utilize CWA Section 401 only for its statutory purpose – to protect water quality – and not as a weapon to shut down projects for reasons with no basis in the statute or applicable regulations. A certifying authority's evaluation is limited to considering adverse impacts to water quality, and only such impacts insofar as they prevent compliance with applicable water quality requirements.

This position arguably constitutes a narrowing of the activities that were potentially subject to the 401 certification process under the Biden Administration's 2023 Rule promulgated by EPA.

The Memorandum also states in part:

…the regulations do not authorize a certification condition based on generalized concerns about water quality untethered to noncompliance with a specific applicable water quality requirement or requirements. It would be inconsistent with CWA Section 401 to deny or condition a certification based on potential impacts not connected to water quality (e.g., based solely on potential impacts to air quality, traffic, noise, project preference, or economic impacts that have no direct connection to water quality). If a certifying authority imposes certification conditions or denies certification for a reason or reasons such as these, then that certification decision would not comply with CWA Section 401 or the EPA's regulations.

The Memorandum states that EPA will promulgate in the future a Federal Register notice a recommendations docket to identify additional areas of implementation challenges and regulatory uncertainty relate to the 2023 Rule's scope of certification.

A copy of the Memorandum can be downloaded here.