Section 401/Clean Water Act: U.S. EPA Issues Proposed Rule Addressing Certification



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The United States Environmental Protection Agency ("EPA") announced on January 13th a proposed rule addressing the certification process under Section 401 of the Clean Water Act.

The proposed rule narrows the Section 401 scope with the EPA stating that it would:

… return Clean Water Act (CWA) Section 401 to its proper statutory purpose, protecting water quality while eliminating regulatory overreach that has imposed unnecessary burden on critical infrastructure projects.

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, 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 Biden Administration had expressed concerns that revisions during the first Trump Administration eroded state and tribal authority in the Clean Water Act.

The January 13th proposed rule argues that it corrects a:

... fundamentally flawed 2023 Biden EPA rule that allowed delay tactics and protracted certification timelines inconsistent with the Clean Water Act.

The proposed rule puts forth similar concepts to a Memorandum issued early in the second Trump Administration that states were not limiting their reviews to consideration of whether a Clean Water Act

National Pollutant Discharge Elimination Standards point source discharge would comply with relevant Water Quality Standards.

The Memorandum stated in part:

… 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).

The January 13th proposed rule states that it will:

- Clarify the scope of the state or tribe's rule as limited to determining whether point source discharges into Waters of the United States will comply with applicable and appropriate water quality requirements.
- Establish clearer procedures by defining one of a list of contents needed for all certification requests in order to begin review for a project.
- Improve certainty in the process by prohibiting certifying authorities from asking an applicant to withdraw and resubmit a request for certification.
- Increase transparency by defining certain contents that must be included in all certification directions.
- Enhance engagement by providing applicants an explicit role in the certification modification process.
- Make the process more predictable by defining a time period for federal agencies to hold a public hearing and resolve a neighboring judication's objections to a federal license or permit.
- Reduce regulatory duplication by leveraging existing regulations.

The National Resources Defense Council expresses concern that the proposed rule would dramatically curtail state and Tribal authority under Section 401 of the Clean Water Act, preventing them from looking at the whole proposed project and forcing them to ignore project-related pollution risks that threaten downstream communities' ecosystems.

A copy of the proposed rule can be found here.