

Section 401/Clean Water Act: Association of Clean Water Administrators Comments Addressing U.S. EPA Proposed Certification Rule



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The Association of Clean Water Administrators (“ACWA”) submitted February 17th comments to the United States Environmental Protection Agency (“EPA”) on the agency’s proposed rule addressing the certification process under Section 401 of the Clean Water Act. *See Updating the Water Quality Certification Regulations*, Docket ID No. EPA-HQ-OW-2025-2929.

ACWA describes the organization as:

... the national voice of State and Interstate water programs and as a national, nonpartisan professional organization whose members are responsible for the implementation of surface water protection programs throughout the nation.

Section 401 of the Clean Water Act prohibits federal agencies from issuing permits or licenses that result in exceedance of Clean Water 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.

EPA stated in proposing the rule that it would:

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

EPA argues that states were not limiting their reviews to consideration of whether a Clean Water Act National Pollutant Discharge Elimination System (“NPDES”) point source discharge would comply with relevant Water Quality Standards.

ACWA argues by way of background in its February 17th comments that its members:

... have a unique and important interest in any national regulatory updates or policy positions affecting implementation of the CWA, including water quality certification under Section 401.

Additional initial points raised in the organization's comments include:

- State clean water agencies generally support EPA's stated goals of regulatory clarity, administrative efficiency, and timely decision-making in the Section 401 certification process.
- States have a long history of working collaboratively with EPA, federal permitting agencies, project proponents, and other stakeholders to ensure that federally licensed or permitted activities comply with state water quality standards and other applicable state water quality requirements.
- Congress expressly affirmed that its policy is to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.
- Section 401 water quality certification is a cornerstone of this cooperative federalism framework, ensuring that states can apply their water quality standards, designated uses, and other state-adopted requirements to federally licensed or permitted activities that may affect state waters.
- For more than fifty years, states have exercised this authority responsibly and effectively, using Section 401 to:
 - Address site-specific conditions.
 - Protect drinking water sources.
 - Safeguard aquatic habitat.
 - Prevent degradation of water quality that would otherwise go unaddressed by federal permitting programs alone.
- EPA's proposed revisions to the Section 401 regulations would significantly recalibrate how many states administer water quality certification.
- The proposed rule preserves the basic statutory framework, but the cumulative effect of the proposed changes would meaningfully constrain state discretion, narrow long-standing certification practices, and shift key procedural and substantive determinations toward a more federally prescribed model.
- Many states believe the proposed rule would unnecessarily curtail states' historic authority and autonomy under Section 401, create new implementation challenges, and undermine states' ability to protect water quality within their borders.
- The previously referenced concerns are particularly acute with respect to:
 - Narrowing the scope of water quality certification review;
 - New certification application requirements and limitations on state input;
 - Narrowing the definition of "other appropriate state laws";
 - Changes to certification modification processes; and,
 - Potential limitations on certification conditions to numeric water quality criteria.

Key components of the ACWA comments include:

- Federalism Consultation and State Feedback.
- Scope of Certification Review.
- Certification Application Requirements and Limitations on State Input.
- New Requirements for Certification Decision Contents.
- Narrowing the Definition of "Other Appropriate State Laws."
- Changes to Certification Modification Procedures.
- Effects of Changing "Project Proponent" to Applicant.
- Applicability of Water Quality Certification to General Permits.
- Preservation of State Authority to Extend the Reasonable Period of Time.
- Potential Limitation of Certification Conditions to Numeric Water Quality Criteria.
- Request for Delayed Effective Date.

ACWA also circulated a survey to its state members regarding the proposed rule whose results are found in an attachment to the comments.

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

