Section 401/Clean Water Act: Arkansas/Louisiana/Mississippi/Wyoming Attorneys General Comments Addressing U.S. EPA Proposed Certification Rule



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

03/05/2026

The Arkansas, Louisiana, Mississippi, and Wyoming Attorneys General (collectively, "AG") submitted February 17th comments to the United States Environmental Protection Agency ("EPA") on the federal agency's proposed rule addressing the certification process under Section 401 of the Clean Water Act. *See Updating the Water Quality Certification Regulations*, Docket No. EPA-HQ-OW-2025-2929.

Section 401 of the Clean Water Act prohibits federal agencies from issuing permits or licenses that result in exceedance of Clean Water Act Water Quality Standards, or other applicable authorities, of the state.

The provision 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.

The AG in their February 17th comments state that they support:

… EPA's goals of improving regulatory clarity, administrative efficiency, and timely decision-making. Clear, administrable rules benefit States, federal permitting agencies, and regulated entities alike.

Points/arguments raised in the AG comments include:

- Congress tied certification to “discharges” while preserving the States’ primary authority to apply and enforce water quality standards within their borders.
- Maintaining this balance—clear federal limits paired with meaningful State implementation—honors congressional intent, protects State sovereignty, and promotes consistent water quality protection.
- Because of repeated changes to Section 401 regulations in recent years, regulatory stability is critical.
- Agree that Section 401 is a discharge-focused provision which provides necessary limiting principles, promotes national consistency, and reduces litigation risk by ensuring certification is not used to regulate matters untethered to the water quality impacts of a discharge.
- Asks that EPA retain a clear and workable approach to certification of general permits and federally authorized projects where discharges are subject to Section 401, noting unduly narrowing certification risks creating regulatory gaps and shifting discharge compliance issues to later permitting stages, resulting in duplicative review, inconsistent requirements, and uncertainty.
- Agree that the one-year statutory deadline is mandatory and that clarity regarding when the review period begins is important, however, meaningful review depends on sufficient information to evaluate compliance with applicable water quality requirements.
- Agree that certification conditions must be tied to compliance with applicable water quality requirements and should not be used to regulate matters unrelated to water quality.
- Seeks preservation of the ability of certifying authorities to modify certifications when necessary to protect water quality, while allowing for appropriate procedural safeguards that promote transparency and fairness.
- Requests a delayed effective date for any final rule because changes will require updates to State regulations, guidance, and procedures, as well as coordination with federal agencies and regulated entities.

A copy of the AG comments can be found here.