Section 401/Clean Water Act: National Rural Electric Cooperative Association/American Public Power Association Joint Comments Addressing U.S. EPA Proposed Certification Rule



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The National Rural Electric Cooperative Association and American Public Power Association (collectively, "NRECA") submitted February 17th joint 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 Regulation*, Docket No. EPA-HQ-OW-2025-2929.

The two organizations describe themselves as national trade associations representing rural electric cooperatives and public power utilities nationwide.

Together they provide power to one in four Americans and represent not-for-profit electric utilities that are actively working to address rising electricity demand by building and maintaining critical energy infrastructure, from power plants to substations. Their members are also stated to own or operate numerous hydroelectric facilities and therefore have a significant interest in the proposed rule since the construction of new infrastructure and the re-licensing of existing infrastructure like hydroelectric facilities often requires certification under Section 401. The certification process is noted to have significant implications for many proejcts.

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.

Points that NRECA argue include:

- Recognition and support for the Clean Water Act framework for shared responsibilities among the federal government, states, and Tribes.
- Most states have acted in good faith to certify, wave certification, or request conditions under Section 401, but some "bad actors" have sought to weaponize the program by going beyond the parameters established by Congress to either block projects for concerns having little to do with water quality or weigh down projects with costly conditions that project proponents often have no choice but to accept.
- The above-referenced actions can delay or block important projects that NRECA members are undertaking to respond to the United States' surging energy demand.
- The above-referenced actions can add unnecessary costs that are ultimately passed down to consumers.

NRECA states that EPA's proposed rule establishes:

… an appropriate scope for the factors that may be considered by states and tribes under the statute and makes other important changes to the CWA § 401 certification process that will provide APPA and NRECA members with regulatory clarity and facilitate their continued goal of providing reliable and affordable energy.

Recommendations suggested by the two organizations include:

- Clarify exclusions from CWA § 401 certification to confirm that activities resulting only in incidental fallback do not constitute a discharge requiring certification, consistent with existing Corps regulations, in order to prevent unnecessary delays, costs, and misapplication of CWA § 401 authority.
- Establish an administrative appeals process allowing applicants to challenge improper CWA § 401 certification decisions—such as overly broad scope determinations or misapplied water quality standards—through a limited, timely federal review before resorting to litigation, improving transparency, consistency, and regulatory certainty.
- Maintain CWA § 401 certification at the general permit level, particularly for Nationwide Permits, as upfront certification is far more efficient than project-by-project review and is essential to preserving routine maintenance, repair, and reliability work critical to electric service, especially for public power utilities and rural electric cooperatives.

A copy of the comments can be found here.