Section 401/Clean Water Act: National Wildlife Federation Comments Addressing U.S. EPA Proposed Certification Rule



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The National Wildlife Federation ("NWF") 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; EPA–HQ–OW–2025–2929.

The comments are joined by a number of NWF's state affiliates including Arkansas.

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.

NWF states that the organization and its state affiliates are opposed to:

… the EPA's proposal to again revise regulations related to Section 401 of the Clean Water Act ("CWA"), a tool used by states and Tribes to protect state and Tribal water resources from the impacts of federally permitted or licensed projects.

NWF argues that the proposed rule:

… largely recycles an ill -conceived rule issued in 2020 that upended almost fifty years of strong state and Tribal authority to ensure that projects such as dams, pipelines, highways, and data centers are protective of state and Tribal waters and the important services they provide to both people and wildlife.

NWF cites support for the rule promulgated in 2023 that replaced the 2020 rule.

Concerns expressed by NWF include:

- The proposed rule is unnecessary and will harm waters while undermining state and Tribal rights and sovereignty.
- Violates the CWA by rejecting its clear meaning and overturning Supreme Court precedent by limiting the scope of certification from the activity as a whole to the "discharge from a point source" of a project.
- Dramatically limits the ability of states and Tribes to look at the totality of potential impacts and harms to waters from a project.
- Undercuts the0 ability of states and Tribes to ensure that they have the information they need in a timely manner to allow them to assess how various projects may impact their waters.
- Removes the ability of states and Tribes to protect non -federal waters with 401 certification.
- Limits the ability of states and Tribes to protect "other water quality -related requirements of state law" by narrowing the definition of these requirements to applicable and appropriate state or tribal wat er-quality related requirements for discharges only.

NWF also argues that the proposed rule must be seen in relation to recent significant changes to the scope of Clean Water Act protections, citing Sackett v. EPA.

A copy of the comments can be found here.