

# Clean Water Act Section 401: U.S. Environmental Protection Issues Guidance for Federal Agencies, States and Authorized Tribes



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The United States Environmental Protection Agency (“EPA”) issued a June 7th guidance document titled: *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (“Guidance”)*

EPA states that it is issuing *Guidance* pursuant to Executive order 13868 to:

... clarify and provide recommendations concerning the implementation of Clean Water Act (CWA) Section 401.

Section 401 of the Clean Water Act (“CWA”) requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable state water quality standards. If not provided, the federal permit or license may not be granted. Further, states can impose certain conditions upon federal permits or licenses as a prerequisite to granting the permit or license.

The *Guidance* references Section 401 of the Clean Water Act’s intent to provide a “robust state and tribal role in the federal permitting or licensing process.” However, it further states that Section 401 places “limitations on how that role may be implemented to maintain an efficient process that is consistent with the overall cooperative federalism construct established by the CWA.”

EPA considers itself “charged” with the responsibility for developing regulations and guidance to ensure effective implementation of all CWA programs. It cites by way of example the need for “early coordination” between federal permitting agencies and states/tribes to identify information gaps that could delay the permitting licensing process.

The *Guidance* includes the following sections:

- Clarifying Section 401 Provisions
- Statutory and regulatory timelines
- Appropriate scope of Section 401 certification review and conditions
- Scope of information relevant to a state or tribe’s Section 401 certification review
- Additional *Guidance* for Federal Permitting Agencies and states and tribes
- Early collaboration and clear written communication can reduce or eliminate concerns and minimize litigation risk
- Recommendations for federal permitting agencies
- Recommendations for States and Tribes

The *Guidance* has drawn immediate response from the Ranking Member of the United States Senate Environment and Public Works Committee, Senator Carper. The Senator's June 7th statement questioned the need for the Guidance. He and two other Senators had earlier in the week released a letter sent to EPA asking for information related to the agency's efforts to address the Section 401 process.

A copy of the *Guidance*, Senator Carper's statement, and the earlier letter to EPA can be downloaded [here](#).