



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

Section 401/Clean Water Act: Association of Clean Water Administrators Comments on U.S. Environmental Protection Agency Proposed Rule

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The Association of Clean Water Administrators (“ACWA”) submitted October 21st comments on the United States Environmental Protection Agency (“EPA”) proposed rule titled:

Updating Regulations on Water Quality Certification

The proposed rule addresses Section 401 of the Clean Water Act.

EPA had previously issued a June 7th guidance document addressing the same issues titled:

Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes

The agency previously stated in issuing the guidance that it was doing so 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 ACWA comments initially cite Section 101 of the CWA which states:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

The comments also quote Clean Water Act legislative history noting that Senator Edmund Muskie stated:

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. Citing 116 Cong. Rec. 8984 (1970).

ACWA, in addressing potential revisions, contends in a detailed discussion that the proposed rule neglects “state interests contrary to the express policy of Congress regarding the role of states in preventing,

reducing, and eliminating pollution associated with federally permitted activities.” Specific concerns detailed in the comments include:

- Diminishment of State Authority
- Unlawful reduction of the scope of Section 401 reviews
- Creation of a role never intended by Congress for federal agencies in the review and approval of Section 401 decisions and conditions
- Implementation challenges for the states are created
- Insufficient EPA engagement and collaboration during the drafting phase of the proposed rule has occurred

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