

Section 401/Clean Water Act: U.S. Environmental Protection Agency Announces Final Rule Addressing Certification



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On June 1st the United States Environmental Protection Agency (“EPA”) announced issuance of a final rule that it denominates the:

Clean Water Act Section 401 Certification Rule (“Rule”)

EPA characterizes the *Rule* as establishing:

... procedures that promote consistent implementation of CWA Section 401 and regulatory certainty in the federal licensing and permitting process.

Section 401 of the Clean Water Act prohibits federal agencies from issuing permits or licenses that result in exceedance of water quality 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 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.

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 application.

EPA describes the final *Rule* as establishing procedures that promote:

- Consistent implementation of Section 401 of the Clean Water Act
- Regulatory certainty in the federal licensing and permitting process

The final *Rule* is likely to be controversial with a number of states. The Association of Clean Water Administrators expressed concerns in comments on the proposed version of the *Rule* that clarifications in the federal agency recommendations may fundamentally alter the state/federal relationship in managing the nation’s water resources. The organization was also opposed to the proposal to the extent it impeded states’ ability to regulate and manage the water resources within their borders (i.e., they may be severely limited).

EPA describes the final *Rule* as addressing certain aspects of the Clean Water Act Section 401 certification process. They include:

- Timelines for Review and Action – takes the position that it reaffirms the statutory requirement that action on a certification request must be taken within a reasonable period of time, but in no case later than one year after receipt of a certification request.
- Initiating Certification – takes the position that it is reaffirming that certification is required for federally licensed or permitted activities that may result in a discharge from a point source into a water of the United States.
- Scope of Certification Review – states that it is clarifying that the scope of a certifying authority's Section 401 certification review and action is limited to assuring that the discharge from a point source into a water of the United States resulting from a federally licensed or permitted activity will comply with “water quality requirements,” as defined in the rule.
- Technical Assistance – states that it is EPA's statutory responsibility to provide technical assistance to any party involved in a Section 401 water quality certification process
- Early Engagement – states it is promoting early engagement and coordination among project proponents, certifying authorities (the regulating entity responsible for acting on Section 401 certification), and federal licensing and permitting agencies.

As expected, different stakeholders are taking opposite views of the merits of the final *Rule*.

The Waterkeeper Alliance issued the following statement:

This dangerous federal power grab is a blatant and unlawful attempt to weaken state authority to protect waterways and wetlands from damage and destruction caused by projects such as dams and pipelines. Section 401 of the Clean Water Act clearly gives states and tribes the power to decide whether a planned activity or project would hurt its waters. In most cases, Section 401 requests are granted and projects are completed, occasionally with more protective conditions required by the state. It is extremely rare for a state's Section 401 decision to block a project from being completed.

The American Gas Association stated that the *Rule*:

. . . should end abuse of Section 401 of the Clean Water Act by several states trying to block natural gas pipelines needed to provide safe, affordable, and reliable services to millions of Americans. The American Gas Association (AGA) supports this new regulation because it protects water quality and allows families and businesses access to clean natural gas.

A link to the *Rule* can be found [here](#).