



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

Section 401/Clean Water Act: Delaware Riverkeeper Network Files Judicial Challenge to U.S. Environmental Protection Agency Rule Addressing Certification

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The Delaware Riverkeeper Network (“Riverkeeper”) filed a Complaint in the United States District Court for the Eastern District of Pennsylvania challenging the United States Environmental Protection Agency’s (“EPA”) recent issuance of a final rule addressing Clean Water Act Section 401 certification.

EPA had issued what it denominates as the Clean Water Act Section 401 Certification Rule (“Rule”) on June 1st. (See previous post [here](#).)

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 described 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 controversial with both a number of states and environmental organizations. For example, 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).

The Riverkeeper judicial Complaint argues that the Rule:

- Fails to provide an analysis of how the rule will impact water quality

- Illegally narrows a certifying authority's review to the effects of a point source discharge only (i.e., excluding nonpoint sources)
- Narrows the scope of Section 401 certification to make it duplicative of Section 402
- Deprives certifying authorities of the ability to determine when an application is complete for review
- Limits the legal authorities that can be used by a certifying authority to approve, deny, or condition a certification
- Vests the power of enforcement with the federal agency

The Complaint can be downloaded [here](#).