

# Section 401/Clean Water Act: U.S. Senator Boozman (Arkansas) and Colleagues Introduce Legislation Addressing Water Quality Certification



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United States Senator John Boozman (Arkansas) and several of his colleagues from the Environment and Public Works Committee introduced legislation that would reinstate and codify the Trump administration's 2020 Clean Water Act Section 401 Certification Rule.

The United States Environmental Protection Agency ("EPA") had announced in August its intent to revise the Trump administration's Section 401 Certification Rule.

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 discharge 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.

An example of projects subject to the Section 401 process are hydropower facilities. A Section 401 certification is required because a federal license must be obtained from the Federal Energy Regulatory Commission. However, some projects subject to 401 certification are smaller in scale and involve common and predictable activities. As a result, some states certify such projects with General Certifications. This is particularly common with the Section 404 Clean Water Act wetland permitting process.

Supporters of the previously referenced legislation note that its components include:

- Specifies statutory and regulatory timelines for a state's review and action on Section 401 certification-requiring final action to be taken within one year of receiving a certification request
- Clarifies the scope of Section 401 as limited to a project's actual potential impacts on waters
- Explains EPA's role under Section 401
- Reaffirms EPA's statutory responsibility to provide technical assistance to any party involved in a Section 401 water quality certification process
- Promotes early engagement and coordination among project proponents, certifying authorities, and federal licensing and permitting agencies

Opponents to the Trump 401 Certification Rule had argued that it:

- Diminished stated authority
- Unlawfully reduced the scope of Section 401 reviews
- Created a role never intended by Congress or federal agencies in the review and approval for Section 401 decisions and conditions
- Created implementation challenges for states

In contrast, organizations such as the American Gas Association had argued that the Trump administration 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 supports this new regulation because it protects water quality and allows families and businesses access to clean natural gas.

U.S. Senator Boozman is a member of the U.S. Senate Environment and Public Works Committee and its Fisheries, Water and Wildlife Subcommittee.

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