

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



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The United States Environmental Protection Agency (“EPA”) issued a pre-publication version of a proposed rule that it denominates the:

Clean Water Act Section 401 Water Quality Certification Improvement Rule (“Proposed Rule”)

EPA characterizes the Proposed Rule as replacing and updating the existing regulations at 40 CFR 121:

... to be more consistent with the statutory text of the 1972 Clean Water Act and clarify elements of Section 401 certification practice that has evolved over the 50 years since the 1971 regulation was promulgated.

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.

During the Trump Administration EPA revised certain aspects of the Section 401 certification process.

Opponents of this rule had argued that it diminished state authority and unlawfully reduced the scope of Section 401 reviews.

Proponents of the rule argued that the rule clarified the scope of Section 401 as limited to a project’s actual potential impacts on waters and specified statutory and regulatory timelines for a state’s review and action on Section 401 certification.

EPA stated, during the early part of the Biden Administration, concern that the revisions during the Trump Administration eroded state and tribal authority under the Clean Water Act. The agency published on June 2, 2021, its Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 certification rule. See 86 Fed. Reg. 29541. Further, the United States District Court (Northern District of California) remanded with vacatur the 2020 Section 401 revisions.

EPA states that the June 1, 2022, Proposed Rule was developed after considering feedback and recommendations from various stakeholders which it lists as:

- Tribes
- State and local governments
- Project proponents
- Non-governmental organizations

EPA argues that the Proposed Rule will promote a more efficient and predictable certification process that is:

. . . consistent with the water quality protection and cooperative federalism principles central to the Clean Water Act.

Some of the issues addressed by the Proposed Rule include:

- Pre-filing engagement (Pre-application meeting)
- Scope of state authority (What effects related to a discharge are encompassed?)
- Timing changes:
 - For seeking certification
 - Reasonable period of time for state to act
 - What constitutes a state waiver?
 - Water quality certification modification

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