

Current Events and Roiling Waters: A Series Update on Recent Clean Water Act Developments

Part 3: New Restrictions on State and Tribal Water Quality Certifications

This is Part 3 in a five-part series addressing the recent changes in legal standards regulating water resources in the United States. Part 3 examines the requirements and limitations on water quality certifications to be issued by states and Native American tribes under a new rule published on July 13, 2020. This new rule implements Section 401 of the Clean Water Act, which is a point of intersection between federal authority and state or tribal authority over the same project and has often become a flash point of conflict between agencies on controversial projects.

To view Part 2 of this series, [click here](#).

Section 401 of the Clean Water Act (CWA) gives states and authorized tribes (Certifying Authority(s)) authority to assess potential water quality impacts of discharges from federally permitted or licensed projects that may affect navigable waters within their borders. Under Section 401, federal agencies cannot issue their approvals for those projects unless the Certifying Authority affirmatively issues this “water quality certification” (WQC) or waives the requirement. Section 401’s certification provision and water quality concerns refer to navigable waters, which the CWA defines as “waters of the United States” (WOTUS), a term recently redefined by another new federal rule discussed in [Part 2](#) in this series.

The framework established by Section 401 has commonly resulted in significant project delays, particularly for interstate pipeline projects, because of the lengthy reviews (or inaction) by Certifying Authorities issuing the WQC decision. Furthermore, Section 401 empowers Certifying Authorities to deny a WQC altogether, thereby blocking a project over which federal authorities have primary permitting jurisdiction. Federal agencies and the regulated community have long voiced frustrations with the inefficiencies and obstacles they perceive in this process, while the Certifying Authorities have considered their Section 401 WQC power an important tool to protect water quality within their borders.

Because of these concerns, the Section 401 WQC process landed on the Trump Administration’s deregulatory agenda. On April 10, 2019, President Trump issued Executive Order 13868, “Promoting Energy Infrastructure and Economic Growth,” which directed the U.S. Environmental Protection Agency (EPA) to consider whether existing policies on Section 401 WQCs should be updated or clarified. The Executive Order focused on Section 401’s impacts for the energy sector—whose pipeline or hydropower projects often were a source of WQC contention—but CWA Section 401 and EPA’s reassessment of its rules apply broadly to any industry activity requiring a federal license or permit that may discharge into a WOTUS.

EPA finalized the new “Clean Water Act Section 401 Certification Rule” on June 1, 2020 and published the final rule in the Federal Register on July 13, 2020 (the Section 401 Rule). The stated intent of the new rule is to “increase the predictability and timeliness of CWA section 401 certifications” by clarifying procedures that promote “consistent implementation” and “regulatory certainty in the federal licensing and permitting process.” EPA acknowledged that it has not updated its regulations concerning WQCs since the 1970s, instead operating off guidance documents and court rulings, and that EPA has not previously “established robust internal procedures for implementing its roles under section 401.” The Section 401 Rule purports to resolve this gap and the rule is scheduled to take effect on September 11, 2020.

When is a Section 401 WQC Required?

A WQC is required for any federal license or permit authorizing an activity that could result in a discharge, and the Section 401 Rule defines a “discharge” for these purposes to mean a discharge from a “point source” into a WOTUS. Point sources are things like pipes, ditches, and other discernible and discrete conveyance points into a WOTUS. This provides helpful clarification for the regulated community about when their projects will, and will not, trigger the WQC scheme.

What is the Timeline for WQC Review and Action?

CWA Section 401 has always provided that if the Certifying Authority “fails or refuses to act” on a certification request within a “reasonable period of time (which shall not exceed one year) after receipt of such request,” the WQC requirements are waived for that federal application. However, because the CWA does not define what qualifies as the “request,” the timeframes for Certifying Authorities’ WQC reviews have extended well past one year in many cases.

The Section 401 Rule reaffirms that a Certifying Authority must act on a Section 401 certification within a “reasonable” period of time but in no case later than one year after receiving the certification request. This clock begins running on the date that the Certifying Authority receives a “certification request,” which the Section 401 Rule now expressly defines to mean a “written, signed and dated communication” that must contain all the information specified under the new rule, such as identification of the proposed project, the applicant, the federal licensing or permitting authority, the location and nature of the potential discharge and an explicit certification request statement.

The federal permitting or licensing agency is tasked with establishing what will constitute the “reasonable period of time,” either categorically or on a case-by-case basis. The federal agency must give written notice to the Certifying Authority about the time period that applies to a certification request and the date upon which waiver will occur if the Certifying Authority fails or refuses to act on the WQC beforehand. If that date passes without action (denial or grant of the WQC with or without conditions), then the certification requirement is waived, and the federal agency is authorized to proceed with license or permit issuance. That date may be extended by the federal agency upon the Certifying Authority’s request, but the overall time period for their WQC review cannot be stopped or tolled beyond the one-year limit for any reason, including to request or receive additional information from the applicant.

At least 30 days before submitting a certification request, the Section 401 Rule now requires applicants to request a pre-filing meeting with the Certifying Authority, though the Certifying Authority is not in turn required to respond or grant that meeting request. If the meeting does occur, the applicant and Certifying Authority are “encouraged” to discuss the project and its potential water quality effects. The pre-filing meeting process is a new obligation imposed on project applicants.

What is the Certifying Authority Allowed to Consider?

The Section 401 rule clarifies that the scope of a Certifying Authority’s review and action on a certification request “is not unbounded” and instead is limited only to considerations of water quality. Specifically, the Certifying Authority must focus on assuring the discharge from a point source associated with the proposed federally permitted project will comply with “water quality requirements,” not whether the activity to be permitted would more broadly have impacts unrelated to waters or unrelated to water quality (e.g., quantity or flow). The Section 401 Rule defines “water quality requirements” as “applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.”

If the Certifying Authority determines to grant the WQC subject to conditions, the Certifying Authority must explain why the conditions are necessary to assure compliance with water quality requirements and cite the federal or state law that authorizes the conditions. To deny certification, the Certifying Authority must identify the specific water quality requirement(s) that the project will not meet and explain why the project will not comply with the requirement(s).

Who is Challenging the Section 401 Rule?

On paper, EPA's comments in adopting the Section 401 Rule reaffirm the collaboration required between the federal and state counterparts through the WQC process, and EPA contends that the new rule does not alter the basic scope of authority conveyed to Certifying Authorities under the CWA. Reading between the lines (and remarks from the EPA Administrator), however, the Section 401 Rule operates to reassert and reclaim the federal agency's primary role in the field and to reign in Certifying Authorities to a more limited function in the certification process. Many state and tribal authorities predictably take issue with restrictions placed on their authority to guard against projects they perceive as damaging to their water resources.

On July 13, 2020, an environmental group called the Delaware Riverkeeper Network sued EPA in the District Court for the Eastern District of Pennsylvania to challenge the Section 401 Rule as arbitrary, capricious and violative of the CWA, the Administrative Procedures Act, and the Tenth Amendment to the U.S. Constitution. The strongly worded complaint alleges the new rule "eviscerates" the ability of states and tribes to protect their water quality in the face of federally approved projects and that the rule demonstrates a "reckless" approach to rulemaking. They request the Section 401 Rule be declared unlawful and vacated in its entirety.

Other environmental groups raised similar claims in a separate proceeding filed on the same date in the District Court for the Northern District of California, though the relief they request includes either setting aside the Section 401 Rule wholesale or declaring certain discrete portions of the rule unlawful and vacated.

Lastly this week, on July 21, 2020, a coalition of twenty states and the District of Columbia filed compliant in the District Court for the Northern District of California seeking to strike down the Section 401 Rule, alleging it violates the CWA and unlawfully usurps state authority to protect the water quality within their borders.

As these lawsuits proceed through the courts, applicants for federal permits and licenses involving discharges to WOTUS should be aware that a new patchwork of Section 401 requirements could arise across different jurisdictions. However, until a court stays the new rule or issues an adverse decision on it, after September 11, 2020 those applicants can generally expect a more certain timeline for their project approvals.

If you have questions about this series, please contact any [attorney](#) in the [Environmental and Energy practice](#) or the attorney at the firm with whom you are regularly in contact.

To continue to Part 4 of this series, [click here](#).



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