

EPA Finalizes Updates to CWA Water Quality Certification Requirements

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On July 13, 2020, the Environmental Protection Agency (EPA) published the Clean Water Act Section 401 Certification Rule. The rule is set to become effective on September 11, 2020 and will introduce comprehensive changes to the regulations governing how states and authorized tribes certify water quality under Section 401 of the Clean Water Act (CWA).

Under CWA Section 401, a federal agency may not issue permits which might result in discharge into United States waters without certification or waiver from the state or tribe where the discharge originates. Section 401 thus equips states and tribes to protect federally regulated waters within their borders by authorizing them to certify that proposed discharges into United States waters comply with the CWA.

Historically, many have complained that the regulations governing how states and tribes certify water quality lacked clarity. The EPA promulgated regulations in 1971 for certification pursuant to section 21(b) of the Federal Water Pollution Control Act of 1948 (FWPCA). But the EPA did not update the rules to reflect the 1972 FWPCA amendments, commonly known as the CWA.

Recent litigation over high-profile infrastructure projects revealed uncertainty in the regulatory framework and led to criticism that states were using their Section 401 power to delay or block major infrastructure projects. As a result, on April 10, 2019, President Trump issued Executive Order 13868, directing the EPA to work with states, tribes, and federal agencies to update the 1971 certification framework.

Some of the key changes include:

- **Limited scope of review.** Authorities can only review whether direct discharges comply with regulations. Indirect impacts on water quality such as emissions are not considered.
- **Clarified definition of discharge.** A discharge does not need to include pollutants; rather, any unqualified discharge will trigger Section 401.
- **Limited conditions.** Authorities can only ask for conditions necessary to assure a discharge is in compliance. Conditions mitigating other types of damage are not permitted.
- **Limited timelines.** The statutory reasonable period of time cannot exceed one year from the certification application.
- **Expanded federal agency review.** Federal agency review is procedural, but the agency may make determinations regarding whether certifying authority acted in a reasonable period of time, which arguably gives the agency a de facto veto power.

Defenders of the rule argue it is a necessary clarification of the water quality certification requirements, whereas opponents view it as an assault on the environment and environmental protections. The rule will very likely lead to litigation as states and tribes challenge the restriction of their Section 401 authority.