



## EPA Proposes Rule to Narrow, Streamline CWA Section 401 Review

AUGUST 12, 2019

*[Mike Swiger](#) and [Sharon White](#)*

The U.S. Environmental Protection Agency (EPA) has issued a [proposed rule](#) (Proposed Rule) that would make sweeping changes in how states (and certain tribes) implement section 401 of the Clean Water Act (CWA). EPA characterizes the Proposed Rule, issued pursuant to Executive Order [13868](#), as “the EPA’s first comprehensive effort to promulgate federal rules governing the implementation of CWA section 401.” The Proposed Rule “is intended to increase the predictability and timeliness of section 401 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures.” EPA had previewed some of these changes in its updated section 401 [guidance document](#) (Updated Guidance), issued on June 7, 2019. The Proposed Rule is the latest in a series of recent executive and judicial developments, particularly for gas pipelines, hydropower projects, and other energy infrastructure projects, that are changing the section 401 landscape.

### Background

Under section 401, any applicant seeking a federal license or permit to conduct an activity that “may result in any discharge into the navigable waters” must first seek a water quality certification from the state in which the discharge originates. The federal agency may not authorize the project unless the state water quality certifying agency has either issued a certification or waived its authority to issue a certification. Section 401 authorizes the state to impose conditions in a certification necessary to assure that the discharge will comply with applicable effluent limitations and other water quality standards. Any such condition “shall become a condition” on the federal license or permit.

Over time, section 401 has become a major source of delay in permitting energy infrastructure projects, including gas pipeline and hydropower projects. For a more detailed description of the delays caused by the section 401 process and recent judicial and congressional efforts to address these delays, see our June 10, 2019 [issue alert](#) on the Updated Guidance.

On April 10, 2019, President Trump issued Executive Order 13868 to encourage efficient permitting of energy infrastructure projects and reduce regulatory uncertainties that discourage new investment in such projects. Among other directives, the Executive Order requires EPA to review its regulations and guidance on section 401 to bring them in line with recent judicial developments and the Administration’s objective to promote the development of new energy infrastructure. As directed by the Executive Order, on June 7, 2019, EPA issued its Updated Guidance, which superseded a prior EPA guidance document issued in 2010 under the Obama Administration. The Proposed Rule fulfills the directive under the Executive Order for EPA to revise its section 401 regulations, which were originally promulgated in 1971.

### Proposed Rule

The Proposed Rule begins with what it terms “EPA’s first holistic analysis of the statutory text, legislative history, and relevant case law informing the implementation of the CWA section 401 program.” That review concludes that prior U.S. Supreme Court cases interpreting the scope of section 401 have been applied too broadly but also were based in part on an “infirm footing.” It then introduces a number of reforms that would dramatically change how section 401 is currently implemented in a number of states. Highlights of these are discussed below.

**Scope of Section 401 Certification and Conditioning Authority:** EPA proposes that the state’s review and action under section 401 “must be limited to considerations of water quality,” meaning enumerated provisions of the CWA and EPA-approved state or tribal CWA program provisions. Conditions such as construction of hiking and biking trails, payments to state agencies for improvements unrelated to the project, and public access for fishermen would exceed this scope, according to the Proposed Rule.

Further, Congress did not intend water quality certifications to address indirect impacts of a project such as air emissions and transportation effects, according to EPA.

Additionally, the Proposed Rule would limit a certifying agency's review to water quality impacts from point source "discharges," rather than the entire activity associated with a federally licensed or permitted project—or, alternatively, to review of the project as a whole but with certification conditions limited to water quality.

A limitation or requirement offered by a water quality agency that is unrelated to water quality would not be considered a "condition" that the federal agency must include in the federal permit under the Proposed Rule. EPA proposes to provide federal agencies with the authority to determine whether a certification condition is beyond the scope of certification and whether the state has provided specific information necessary to support each condition.

EPA notes concerns with section 401 conditions that authorize certifications to be reopened, and solicits comment on whether, given the explicit limitations on conditions in the Proposed Rule, there is still a need expressly to preclude these or other types of conditions that may create regulatory uncertainty.

**Time Limits for State Action:** The Proposed Rule observes that "there is no tolling provision to stop the clock at any time" in section 401. Thus, if a state agency does not act on an application for certification within a reasonable period of time, not to exceed one year from receipt of a certification request, certification is waived. EPA proposes to include in its regulations that: "The certifying authority is not authorized to request the project proponent to withdraw a certification request or to take any other action for the purpose of modifying or restarting the established reasonable period of time." More time for the state agency to seek additional information from the applicant, or to complete regulatory processes under state law, does not excuse the state's failure to act. The Proposed Rule recognizes that where applicants and state water quality agencies "are working collaboratively and in good faith," there may be a mutual interest in allowing the certification process to extend beyond one year. EPA solicits comment on whether there is any legal basis for a federal permitting agency to extend the one-year period in such cases. EPA also proposes that if a state acts within a year, but that action is outside the scope of its section 401 authority, then the state will have constructively waived certification authority. For instance, if a state denies certification for reasons outside the scope of section 401, that denial will be deemed a waiver.

**Enforcement of Section 401 Conditions:** Under EPA's Proposed Rule, the federal agency is responsible for enforcing section 401 conditions once they are incorporated into a federal license or permit. According to EPA, once the state issues the certification, section 401 does not provide an additional or ongoing role for a state to enforce a condition under federal law, as there is no independent state enforcement authority for conditions included in a federal license.

## FOR MORE INFORMATION

Comments on the Proposed Rule will be due within 60 days of publication in the Federal Register. If you are interested in filing comments or have any questions regarding the Proposed Rule or the CWA section 401 process, please feel free to contact the authors or any other member of our firm.

Follow us on Twitter [@VanNessFeldman](https://twitter.com/VanNessFeldman)