



[Visit our COVID Client  
Help Center](#)

## EPA Issues Final Rule to Streamline CWA Section 401 Review

JUNE 2, 2020

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

On June 1, 2020, the U.S. Environmental Protection Agency (EPA) released a [Final Rule](#) that significantly revises its regulations implementing section 401 of the Clean Water Act (CWA). The Final Rule is EPA's first comprehensive effort to promulgate federal rules governing the implementation of CWA section 401. EPA [describes](#) the rule as "establish[ing] procedures that promote consistent implementation of CWA section 401 and regulatory certainty in the federal licensing and permitting process." EPA acknowledges criticism of its proposed rule as infringing on state authority and contradicting U.S. Supreme Court precedent, but asserts that its interpretation of section 401 is based on a reasonable and "holistic" reading of the statute, legislative history, and relevant case law. The Final Rule will become effective 60 days after publication in the *Federal Register*.

### 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 as well as "any other appropriate requirement of State law." Any such condition "shall become a condition" on the federal license or permit.

Over time, section 401 has become a major source of delay and controversy in permitting energy infrastructure projects, including interstate natural gas pipeline and hydropower projects authorized by the Federal Energy Regulatory Commission. 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 EPA's updated section 401 guidance document (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 required 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 President Obama's Administration. In August 2019, EPA issued a proposed rule to revise its section 401 regulations. EPA indicates that it received over 125,000 comments from interested parties on the proposed rule.

### FINAL RULE

EPA finalizes most of its major reforms to the current section 401 process in the Final Rule without significant change. Notable changes from the proposed rule are described below.

**Scope of Section 401 Certification and Conditioning Authority:** EPA adopts its proposal that the state's review and action under section 401 "must be limited to considerations of water quality" from point source "discharges," rather than the entire activity associated with a federally licensed or permitted project. EPA declined to provide examples of what considerations would be outside the scope of certification in the rule itself, but notes that if Congress had intended section 401 to authorize conditions based on air quality, public access to waters, energy policy, or non-water quality impacts, it would have provided a clear statement to that effect.

EPA did not adopt its proposal to provide federal agencies with the authority to determine whether a state's certification condition is beyond the scope of section 401. Under the Final Rule, a federal agency is authorized only to determine whether the state complied with the procedural requirements of section 401. Project proponents must challenge conditions that they believe are substantively outside the scope of section 401 before courts of competent jurisdiction.

In response to comments solicited by EPA on the use of reopener provisions in section 401 certifications, EPA notes in the Final Rule that section 401 does not grant states authority either to unilaterally modify a certification after it is issued or to include "reopener" clauses in a certification.

**Time Limits for State Action:** EPA adopts its proposal that "there is no tolling provision to stop the clock at any time" in section 401, including to request or receive additional information from the project proponent. EPA codifies a provision in its regulations that a state "is not authorized to request the project proponent to withdraw a certification request and is not authorized to take any action to extend the reasonable period of time" under section 401. The Final Rule explicitly prohibits states from requesting additional information that cannot be generated within the reasonable period of time under the CWA, such as multi-year studies or National Environmental Policy Act documents.

**Enforcement of Section 401 Conditions:** EPA adopts its proposal that the federal agency is responsible for enforcing section 401 conditions once they are incorporated into a federal license or permit. Under the Final Rule, 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, because states have no independent enforcement authority for conditions included in a federal license.

**Other Changes and Clarifications from the Proposed Rule:**

- EPA now requires all project proponents to request a pre-filing meeting with the state at least 30 days prior to submitting a 401 application.
- In addition to the seven required components of a certification request articulated in the proposed rule, EPA also now requires: (1) a statement that all information contained in the request is true and accurate, and (2) documentation that a pre-filing meeting request was submitted at least 30 days prior to submission of the 401 application.
- EPA notes that if certain elements of a proposed project (e.g., location of the project or nature of any potential discharge that may result) change materially while a 401 request is pending, it may be reasonable to submit a new request for certification, but minor changes that do not alter the project footprint in a material way should not warrant a new request for certification.
- EPA disagrees with multiple commenters who argued that shortened timeframes and limits on collecting additional information under the Final Rule may force states to deny certification rather than risk a waiver determination. EPA states that the Final Rule neither shortens the timeframe for certification nor limits a state's ability to collect additional information, and notes that there are a number of provisions in the Final Rule that should reduce the need for states to deny a certification based on insufficient information.
- EPA did not adopt its proposal that a state must describe whether and to what extent a less stringent 401 condition could satisfy water quality requirements, finding that the requirement would be too burdensome on the state.
- EPA did not adopt its proposal to allow states to remedy deficient conditions and denials within the one-year period, but encourages federal agencies to create such procedures in their own water quality certification regulations.
- The Final Rule rescinds the 2019 Updated Guidance because the Final Rule is more comprehensive and renders the guidance unnecessary.

EPA indicates that certification requests that have been submitted and are currently pending before states should continue to be processed in accordance with existing law. Certification requests submitted to a state after the Final Rule becomes effective should be processed consistent with the Final Rule.

### **FUTURE OF THE FINAL RULE**

EPA's Final Rule is controversial and certain states have already announced their intention to challenge it in court. If the Final Rule goes into effect and survives judicial and Congressional challenge, it promises to provide significant regulatory relief to a process that has caused substantial delays and litigation in energy infrastructure project permitting.

### **FOR MORE INFORMATION**

Van Ness Feldman's hydroelectric, gas, public lands, natural resources, and land use practices provide comprehensive legal, policy, and business advisory services for the full range of issues affecting these matters. Van Ness Feldman's decades of experience cover every aspect of these matters, ranging from transactions and land use planning to licensing, permitting, regulatory compliance, and litigation.

If you would like additional information about the Section 401 process, please contact any member of our hydroelectric, gas, public lands, natural resources, and land use practices, including:

Brent Carson	206.623.9372	<a href="mailto:brc@vnf.com">brc@vnf.com</a>
Duncan Greene	206.623.9372	<a href="mailto:dmg@vnf.com">dmg@vnf.com</a>
Matt Love	206.829.1809	<a href="mailto:mal@vnf.com">mal@vnf.com</a>
Jenna Mandell-Rice	206.829.1817	<a href="mailto:jrm@vnf.com">jrm@vnf.com</a>
Susan Olenchuk	202.298.1896	<a href="mailto:sam@vnf.com">sam@vnf.com</a>
Mike Pincus	202.298.1833	<a href="mailto:mrp@vnf.com">mrp@vnf.com</a>
Mike Swiger	202.298.1891	<a href="mailto:mas@vnf.com">mas@vnf.com</a>
Sharon White	202.298.1871	<a href="mailto:slw@vnf.com">slw@vnf.com</a>
Julia Wood	202.298.1938	<a href="mailto:jsw@vnf.com">jsw@vnf.com</a>

© 2020 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.