



Information Alert

State-Federal Relations Division

EPA Proposes to Limit State's Authority on Clean Water Act Section 401

Aug. 15, 2019

On Aug. 9, the Environmental Protection Agency (EPA) issued a [proposed rulemaking](#) that would, if finalized, significantly limit state authority to certify, condition, or deny any activity which would result in the discharge of pollutants into waters of the United States.

Specifically, the proposed rule provides “updates and clarifications to the substantive and procedural requirements” for water quality certification under Section 401 of the Clean Water Act (CWA) as directed by executive order [13868](#), “Promoting Energy Infrastructure and Economic Growth,” which was signed by the president in April ([NCSL Info Alert](#)).

Historically, Section 401 has provided states and tribes authority to review and approve, condition or deny any federal permits or licenses that may be required if the project seeking a permit would result in a discharge of pollutants to Waters of United States. The proposed rulemaking follows revised guidance issued in June that altered the [2010 guidance](#) significantly, with revisions focusing on: statutory and regulatory timelines for review and action on a CWA 401 certification, the scope of CWA Section 401 certification conditions, and information within the scope of a state or authorized tribes CWA Section 401 review ([NCSL Info Alert](#)).

The proposal issued aims to codify many of the provisions included in the revised guidance, which itself is not legally binding. The proposal includes reductions in state timelines for review and certification, restrictions on the scope of certification reviews and conditions, and modifications of other related requirements and procedures. Comments on the proposed rule will be due 60 days after formal publication in the Federal Register.

Scope of 401 Certification: EPA is proposing that a state’s review and subsequent action under 401 “must be limited to considerations of water quality,” and that using the process for areas unrelated to water quality impacts from the project in question is “inconsistent with the authority provided by Congress.” As written, the proposed rule would also limit a state’s certifying agency’s review to water quality impacts from point source discharges only, rather than all potential sources of the pollution from a project. EPA writes that any condition placed on a project by the state certifying agency that is not directly related to water quality would NOT be considered a condition that must be included in the federal permit. These limitations are not included in the text of the CWA and would be new limitations on state authority.

Timelines: EPA is also proposing to restrict state authority concerning response to an application. In particular, the agency reiterated that if a state agency does not take action on an application for certification within a “reasonable period time,” not to exceed one year from receipt of a certification request, that certification is waived, and that the receipt of a certification request, not a complete application, would begin the one-year countdown.

The EPA also proposes to remove the ability for a state certifying agency to request a project applicant withdraw its certification request for the “purpose of modifying or restarting the established reasonable period of time,” commonly referred to as a withdraw and refile. However, the proposed rule does recognize that when a project applicant and state certifying agencies are “working collaboratively and in good faith,” that it may be of mutual benefit to allow the certification process to extend beyond one year and is seeking comment on whether or not there is a legal basis for a federal agency to extend that time period.

In addition, under the proposed rule, if a state acts within a year, but EPA determines that the action is outside of the scope of its section 401 authority—i.e. if a state denies certification for reasons other than water quality impacts—the state will, by default, have waived its certification authority.

NCSL has contacted EPA a number of times in the past year regarding changes to CWA 401 certification and raised concerns that the agency has not consulted in a meaningful or timely manner. NCSL has urged any regulatory change to the Section 401 certification process be developed through genuine consultation with state and local governments and that it must not come at the expense of state authority.

This is not the first attempt to limit state authorities under Section 401, with several attempts made in Congress, and, most recently, in January of this year when the U.S. Court of Appeals for the D.C. Circuit [held](#) that states must act on Section 401 requests within a year, and cannot enter into an agreement to withdraw and resubmit Section 401 applications to restart the one-year period for review. NCSL letters to EPA on the consultation process can be read [here](#).

More recent attempts to restrict states’ authority under Section 401 occurred Aug. 7, when the U.S. Army Corps of Engineers (the Corps) issued a [regulatory guidance letter](#) for corps districts concerning section 401—“Timeframes for Clean Water Act Section 401 Water Quality Certifications and Clarification of Waiver Responsibility.” The Corps guidance indicates that state reviews of dredge and fill permits will be constrained to 60 days rather than up to one year as written in the CWA. However, the guidance does grant limited discretion to Corps district engineers to grant additional time for review. The guidance also permits district engineers to issue “provisional permits” for a project, when a CWA 401 certification is all that is delaying the project.

NCSL letters to EPA on the consultation process can be read [here](#). For more information on the administration’s actions, please contact NCSL’s [Kristen Hildreth](#) or [Ben Husch](#).