



Information Alert

State-Federal Relations Division

EPA Restricts States' Authority to Implement Clean Water Act June 2, 2020

On June 1, the Environmental Protection Agency (EPA) [finalized](#) a rulemaking affecting the implementation of Section 401 of the Clean Water Act (CWA). The rule places significant new limits on state authority to certify, condition or deny any activity that would result in the discharge of pollutants into waters of the United States (WOTUS). Historically, Section 401 provided states and tribes authority to review and approve, condition or deny any required federal permits or licenses for projects that would discharge pollutants into WOTUS.

The rule stems from Executive Order (EO) [13868](#), "Promoting Energy Infrastructure and Economic Growth," which was signed by the president in April 2019 ([NCSL Info Alert](#)). The EO directed EPA to simultaneously review existing guidance and regulations that pertain to state implementation of Section 401 while engaging in a formal consultation process with state and tribal governments regarding any potential changes. Though the new rule codifies agency guidance issued in [June 2019](#) that significantly altered [2010 guidance](#), it was not legally binding, as this final rule is.

The final rule 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. Additionally, the final rule provides an analysis of the statutory text, legislative history and case law pertinent to implementation of CWA Section 401.

Scope of 401 Certification: Within the new rule, EPA asserts that a state's review and subsequent action under 401 "must be limited to considerations of water quality." It says using the process for areas unrelated to water quality impacts from the project in question is inconsistent with the authority provided by Congress. EPA specifically notes in the rule its interpretation that if Congress intended to go beyond water quality, it would have "provided a clear statement to that effect."

The rule also limits a state certifying agency's review to only water quality impacts from point source discharges into WOTUS. The agency concluded that the word "discharge" in the CWA refers to the "release from a point source" only. Previously, all potential sources of the pollution from a project were potentially reviewable. EPA also 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 expressly included in the text of the CWA and are new limitations to state authority.

Timelines: EPA reiterated that if a state agency does not take action on an application for certification within a “reasonable period of time (which shall not exceed one year)” from receipt of a certification request, that certification is waived and the federal agency may proceed. Further, the receipt of a certification request, not a complete application or complete request, would begin the one-year countdown for action by the certifying agency. The rule, however, does not guarantee states a year of review, as it provides federal agencies broad discretion in determining a “reasonable period of time” for certification. The agencies can decide either project by project or categorically, with a caveat allowing certifying agencies to request an extension to the defined “reasonable period of time,” so long as it does not “exceed one year from receipt.

Additionally, the rule states that the CWA does not contain any provisions for delaying the timeline for any reason, even if that reason is to request or receive additional information from the project proponent. Withdrawing and resubmitting the same certification request for the purpose of modifying or restarting the established reasonable period of time—commonly referred to as a withdraw and refile—is not allowed, and “one year is the absolute maximum time permitted for a certification.” The final rule also states that even if a certifying agency acts within the reasonable period of time, the federal agency can waive the certification action—whether it is to grant, grant with conditions or deny. The agency can waive certification if it determines the agency “failed or refused to comply with the procedural requirements of the CWA, including those of the final rule.—This means that if the certifications are based on anything other than water quality, they will be considered outside the scope of the CWA and will be waived.

NCSL has contacted EPA several times over the past two years regarding its proposed, and now finalized, changes to CWA 401 certification. NCSL raised strong concerns that the agency has not consulted with states, or their intergovernmental organizations, in a meaningful or timely manner. NCSL has urged that 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. NCSL letters to EPA on the consultation process can be read [here](#). EPA responded to state and local government concerns in the final rulemaking, stating the agency had concluded that “the final rule does not infringe upon the roles of states as co-regulators, nor does it undermine cooperative federalism” —a statement that is likely to be challenged.

This is not the first attempt to limit state authorities under Section 401, with several attempts made via the U.S. Army Corps of Engineers, Congress, and courts. The courts previously [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. It is highly probable that legal challenges to this final rule are likely to follow, particularly concerning the agency’s interpretation of the CWA.

For more information on the administration's actions, please contact NCSL's [Kristen Hildreth](#).