



Information Alert

State-Federal Relations Division

EPA Releases Clean Water Act Section 401 Guidance for States

June 12, 2019

On June 7, the Environmental Protection Agency (EPA) issued [revised guidance](#) on implementing 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 newly issued guidance alters 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.

Timelines: EPA took a significant departure from its 2010 guidance in this new guidance, stating that the timeline for action on a Section 401 certification begins “upon receipt of a written request for certification,” rather than on the receipt of a “complete application.” The agency puts onus on states and tribal entities to “establish a process to ensure appropriate and sufficient information is submitted,” as the clock starts immediately. If a state does not grant, deny, or waive its Section 401 authority within “the established reasonable timeline, or seek an extension of time” the applicable federal permitting agency is authorized to issue the federal permit—if the certification requirement is waived, any “subsequent action by a state or tribe to approve, condition, or deny Section 401 certification has no legal force or effect.” An “established reasonable timeline,” is one that is defined by specific federal permitting agencies. For example, EPA’s [Section 401 certification regulations](#) provide that “six months should be considered a reasonable timeline,” and specifically for [National Pollutant Discharge Elimination System permits](#) “provide 60 day unless a finding is made that unusual circumstances require more time.” The U.S. Army Corps of Engineers has a [timeline for certification](#) of “60 days, unless special circumstances require a shorter or longer timeline,” and the Federal Energy Regulatory Commission requires the “certifying authority to act within one year.”

Scope of 401 Conditions: The updated guidance also recommends a “scope of a Section 401 certification review, and the decision whether to issue or deny a Section 401 certification, be limited to an evaluation of potential water quality impacts.” The agency also goes onto update

guidance to suggest that if a state or authorized tribe issues a Section 401 certification with conditions that exceed the “scope of 401,” that “federal permitting agencies should work with their Office of General Counsel and the EPA to determine whether a permit or license should be issued with those conditions, or if waiver has occurred.” It also states that because some courts have found that the CWA does not authorize federal permitting agencies to reject conditions of a state or tribal Section 401 certification and that “a federal license or permit must contain all conditions of a certification,” that the agency may consider providing “clarity” within its proposed rulemaking to revise Section 401 regulations, moving to preempt states and narrowly define the scope of Section 401.

Information Related to 401 Review: The revised guidance acknowledges that there is both no “provision that requires specific information to be submitted with a Section 401 certification request,” nor any “statutory provision that prohibits a state or tribe from requesting specific information, or additional information, to help inform its decision,” to issue, issue with conditions, deny or waive certification. It also goes on to encourage project proponents and federal permitting agencies to provide requested information in a timely manner. However, EPA states that “an outstanding or unfulfilled request for information or documents does not pause or toll the timeline for action on a certification request,” and that any effort to delay action due to “insufficient information,” may be inconsistent with CWA and Section 401. The agency may consider providing “clarity” within its proposed rulemaking to revise Section 401 regulations.

EPA also states in the guidance that the “current federal regulations may not provide clear and comprehensive procedures for implementation” of Section 401, and intends to address them within its forthcoming proposed rule by Aug. 8, 2019. NCSL has written to EPA, stating that the agency has not yet consulted in a meaningful or timely manner and strongly believes that any regulatory change to the Section 401 certification process should be developed through genuine consultation with state and local governments and 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](#), or for more information on the administration’s actions, please contact NCSL staff [Kristen Hildreth](#) or [Ben Husch](#).