

EPA Proposed Regulations Aim to Further Clarify CWA Section 401 Certification Reviews



On August 8, 2019, the U.S. Environmental Protection Agency (EPA) published a [proposed rule](#) to revise its regulations (40 C.F.R. Part 121) implementing Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341. The proposed rule is the latest in a series of initiatives identified in [Executive Order 13868](#) aimed at streamlining the procedures by which states and tribes verify that a federally licensed or permitted project within their borders complies with water quality standards.

The rule formalizes the substantial change in current practice proposed by EPA in [nonbinding Section 401 guidance](#) that the agency issued in June 2019, which sought to address the increasing use of Section 401 to delay, condition, or deny permits and licenses. Consistent with that guidance, the proposed rule limits the scope of Section 401 certification reviews to water quality impacts from a potential point source discharge and establishes a more rigorous process to ensure that certification reviews are completed within a reasonable period not to exceed a year from the date a certification request is received.

The proposed rule addresses other aspects of the Section 401 certification process. States and tribes must ensure that a discharge “will comply” with water quality requirements under the proposal, rather than the “reasonable assurance” required by the existing rule. EPA encourages interested parties to seek the agency’s technical expertise at any point in the certification process. Furthermore, the proposed rule clarifies that a federal agency becomes responsible for enforcing conditions included in a certification that are incorporated into a federal license or permit.

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AUTHORS

Richard Davis

Principal
+1.202.789.6025
rdavis@bdlaw.com



Allyn Stern

Of Counsel
+1.206.620.3027
astern@bdlaw.com



Katrina Krebs

Associate
+1.202.789.6072
kkrebs@bdlaw.com



Drew Silton

Associate
+1.202.789.6078
asilton@bdlaw.com



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The proposed rule will be open for a 60-day comment period after publication in the Federal Register. This is an excellent opportunity for project proponents to provide input to enable greater certainty on projects triggering Section 401. To submit any comments, visit the [docket \(EPA-HQ-OW-2019-0405\)](#) and follow the online instructions for submitting comments. A final rule is not expected until May 2020.

Scope of Certification Review

EPA proposes to limit the type of restrictions states and tribes can place on projects by narrowing the scope of Section 401 certification reviews to water quality requirements. Conditions on certification that are not related to water quality impacts—such as requirements to create public access to waters or to reduce the effects of air emissions—would fall outside the scope of certification reviews. Under the proposed rule, states and tribes are directed to provide some justification for each condition that explains why it is necessary and how it relates to established water quality standards. Conditions that are not related to water quality impacts would need to be modified by the state or tribe, assuming that a reasonable period of time has not expired, and deficiencies in the condition do not make the entire certification invalid.

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The proposed rule extensively analyzes the Supreme Court's analysis in *PUD No. 1 of Jefferson County. v. Washington Department of Ecology*, 511 U.S. 700 (1994), resulting in the agency finding that the decision has historically been applied too broadly. EPA proposes limiting Section 401 certification reviews to assuring that only a discharge from a licensed or permitted activity—rather than the activity as a whole—complies with water quality requirements. EPA further proposes limiting Section 401 certification reviews to discharges from point sources to [waters of the United States](#), stepping back from a suggestion in its 2010 interim guidance that Section 401 extended to nonpoint source discharges to other surface waters.

Timeline for Review

Consistent with *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), the proposed rule clarifies that states and tribes must complete their Section 401 certification reviews within a reasonable period of time not to exceed one year. To encourage timeliness, the proposed rule emphasizes and clarifies the use of EPA's waiver authority, which the agency does not currently use with frequency. The proposed rule also encourages agencies to establish shorter time periods, such as the 60-day timeline for certification provided by the U.S. Army of Corps of Engineers (Corps). See 33 C.F.R. § 325.2(b)(ii). Where an agency does not specify a shorter time period, it may consider:

1. The complexity of the proposed project.
2. The potential for any discharge.
3. The potential need for additional study or evaluation of water quality effects from the discharge in setting a reasonable period through rulemaking or on a project-by-project basis.

The proposed rule further redefines when the clock starts to run for issuing a certification, defining its trigger as when a state or tribe receives the Section 401 certification request. A certification request must identify the proposed project and project proponent, describe any methods of monitoring or controlling the

discharge, and list all other authorizations required for the proposed project, among other requirements defined in the proposal.

Adding an additional measure to ensure timeliness, the period for Section 401 certifications does not toll or pause at any time under the proposed rule, even when the state or tribe requests additional information from the project proponent. Withdrawing and resubmitting a certification request to restart the clock on the one-year statutory deadline, for example, is not permitted. This change could pose a challenge for states and tribes as they struggle to evaluate the project within the deadline. As a result, EPA encourages project proponents to discuss the Section 401 certification process and data needs early on with states and tribes. EPA also recognizes that it may be desirable to extend the one-year period where the project proponent and state or tribe are working collaboratively; EPA is considering whether there is any legal basis to extend the reasonable period of time beyond a year in these circumstances.

According to the proposed rule, waiver results when states or tribes take no action within a reasonable period of time or act outside of the scope of Section 401 certification reviews.

Next Steps

Project proponents should also expect other regulatory agencies that issue permits or licenses to conform their regulations and guidance documents to EPA's actions. On August 7, 2019, for instance, the Corps issued a [regulatory guidance](#) letter clarifying the time period for Section 401 certifications and when extensions to that time period are appropriate.

Many will welcome this proposed rule, particularly where states or tribes have used their Section 401 certification authority to block infrastructure projects, but expect litigation as this proposed rule significantly limits the current practice in some areas.

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