



USEPA Significantly Revises Section 401 Water Quality Certification Process

The United States Environmental Protection Agency (USEPA) has pre-published a final rule that streamlines the water quality certification requirements under Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341 (the 401 Rule). Section 401 requires any applicant for a federal license or permit which will, or may, result in a discharge to [waters of the United States \(WOTUS\)](#) to obtain a certification that the discharge will comply with applicable water quality requirements from the applicable state, authorized tribe or interstate agency (Certifying Authority).

The rulemaking, found at 40 CFR Part 121, is in response to President Donald Trump's April 10, 2019 Executive Order 13868, which identified Section 401 as "one source of confusion and uncertainty hindering the development of energy infrastructure" and directed USEPA to update its regulations and guidance. USEPA characterizes the 401 Rule as the agency's first "holistic" analysis of Section 401 since the 1972 Federal Water Pollution Control Act amendments (i.e., the CWA).

The 401 Rule is expected to benefit applicants for federal permits or licenses which will, or may, result in a discharge from a point source to WOTUS, including applicants seeking National Pollutant Discharge Elimination System (NPDES) and Section 404 permits, as well as hydropower and pipeline licenses issued by the Federal Energy Regulatory Commission (FERC) by (1) narrowing and streamlining the certification process, (2) limiting the scope of Certifying Authority review/response, and (3) capping the amount of time that Certifying Authorities can review a certification. The Rule comes in response to state attempts to delay natural gas pipelines and other energy-related facilities through extended Section 401 certification processes, requiring applicants to address a number of considerations unrelated to water quality, including climate change.

Key takeaways from the 401 Rule include the following:

The scope of Certifying Authority review has been significantly restricted.

The 401 Rule restricts a Certifying Authority to determining whether the discharge will comply with "water quality requirements" (limited to only certain enumerated sections of the CWA or state water quality requirements for point source discharges to WOTUS) and prohibits consideration of: (1) impacts from the activity as a whole, (2) state requirements unrelated to water quality, and (3) compliance with water quality requirements for waters that are not WOTUS. This provision specifically restricts a Certifying Authority's ability to impede projects by requesting information on climate change, "air quality or transportation concerns, public access to waters, energy policy, or other multi-media or non-water quality impacts," or to deny certifications based on such considerations.

Appropriate responses to certification requests have been clarified. The Certifying Authority must take one of four actions in response to a certification request: (1) grant; (2) grant with conditions necessary for the discharge to meet

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water quality requirements; (3) deny; or (4) waive the certification requirement. If the Certifying Authority denies the request, it must identify the specific water quality requirements with which the discharge will not comply, explain why the discharge will not comply, and, if the denial is due to insufficient data or information, identify what data or information would be needed to assure the discharge will comply.

While Section 401(d) allows the Certifying Authority to grant the certification with conditions necessary for the applicant to comply with water quality requirements or “any other appropriate requirement of state law,” the 401 Rule clarifies that a Certifying Authority may only impose conditions related to state water quality requirements for point source discharges into WOTUS. In addition, when imposing such conditions, a Certifying Authority must explain why the conditions are necessary to assure the discharge will comply with water quality requirements and include a citation to the law that authorizes the condition. This provision will require Certifying Authorities to be very clear in their response to certification requests.

The time frame for review has been capped at one year. Section 401 requires the Certifying Authority to act on a certification request within a “reasonable” time not to exceed one year. The 401 Rule clarifies that the one-year limit is an absolute deadline, after which the Certifying Authority will be deemed to have waived certification. The time frame may not be tolled for any reason, including the Certifying Authority requesting the applicant to provide additional information or to withdraw and resubmit the request. However, an applicant voluntarily withdrawing and resubmitting a request restarts the time frame.

It is important to note that the required review time frame can be less than one year. Within 15 days of receiving an applicant’s request for certification, the federal permitting agency will prescribe the “reasonable” time for the Certifying Authority to act on the request by issuing one of the four decisions discussed above.

The certification will be deemed waived if the Certifying Authority: (1) does not act on the request, (2) does not issue one of the four required decisions, or (3) issues a decision that does not comply with the requirements of the 401 Rule. Imposing a one-year (or shorter) time frame for responding to certification requests will assure that the Section 401 certification process will not unnecessarily delay federal projects for extended time frames.

A meeting with the Certifying Authority must be requested prior to submitting a request for certification. The 401 Rule requires an applicant to request a meeting with the Certifying Authority a minimum of 30 days prior to submitting a request for certification. However, the Certifying Authority can decline such a request.

Next Steps

The final rule will be effective 60 days after publication in the *Federal Register*. NGO and state challenges to the final rule are expected.

Babst Calland’s [environmental attorneys](#) are closely monitoring this rulemaking. If you have questions about the final rule, please contact Lisa M. Bruderly at 412.394.6495 or lbruderly@babstcalland.com or Daniel P. Hido at 412.394.6580 or dhido@babstcalland.com.

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