

EPA Limits State and Tribal Authority With Final Clean Water Act Section 401 Certification Rule

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On June 1, 2020, the U.S. Environmental Protection Agency (EPA) finalized the “Clean Water Act Section 401 Certification Rule.” Issued in response to President Trump’s Executive Order 13868 “Promoting Energy Infrastructure and Economic Growth,” which directed the EPA to review the Clean Water Act (CWA) Section 401 certification process, the final rule seeks to clarify the role of states and authorized tribes in ensuring that activities subject to federal CWA permitting requirements comply with established water-quality standards. While streamlining the water-quality certification process in the name of promoting energy infrastructure, this rule also restricts the scope of state and tribal review under Section 401.

Overview of CWA Section 401

Under Section 401 of the CWA, applicants for a federal permit to conduct any activity that may result in a discharge to navigable waters must first obtain a water-quality certification from the applicable state or tribal authority, which verifies that such activity will comply with the established water-quality standards, or a certification waiver. Although the CWA provides that states and authorized tribes waive the certification by default if they fail to act “within a reasonable period of time (which shall not exceed one year)” after receiving a request for certification, in practice, many states exceed this one-year deadline. Moreover, some states have used concerns beyond direct impacts to water quality, such as potential climate-change impacts, to delay or block fossil-fuel projects.

Final Rule Clarifies Timing and Limits Scope of Review

Executive Order 13868 directed the EPA to focus on the timing and scope of the water quality certification process under Section 401. EPA’s final rule addresses each of these areas, and key aspects include:

- **Timing of Review:** A one-year deadline is placed on states and authorized tribes to act on water-quality certification requests. This one-year timeline starts as soon as a certification request is received, regardless of whether the request provides the certifying authority with sufficient information. Moreover, federal permitting agencies can determine what is a “reasonable” time period on a case-by-case basis. In other words, the final rule

does not guarantee a state or tribal authority a year to act on a certification request, as federal agencies may institute shorter time frames.

- **Scope of Water-Quality Review:** State and tribal certifying authorities may only assure that a discharge from a federally licensed or permitted activity complies with water-quality requirements. Importantly, “water quality requirements” is defined as “§§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.” Therefore, states and authorized tribes cannot consider indirect impacts to water quality, such as greenhouse gas emissions, in their certification decision.
- **Conditions for Water Quality Certification:** In order to place conditions on a water-quality certification, a state or tribal certifying authority must explain why the condition is necessary to assure the discharge from the proposed project will comply with water-quality requirements. In an effort to increase transparency, citations to state, tribal, or federal law authorizing such a condition are also required.
- **Federal Oversight:** Federal permitting agencies have the authority to review the state’s certification decision to ensure it complies with the procedural requirements of Section 401. In this role, federal agencies may find that a state or authorized tribe waived its authority to (1) deny a certification or (2) issue certain conditions with a certification if the certifying authority fails to identify the specific water-quality requirement with which the project will fail to comply or fails to include the necessary rationale for issuing a certification condition. Thus, state and tribal certifications based on rationales outside of water quality may be set aside and treated as a waiver.

What Does This Mean for Energy Infrastructure Projects?

The final rule will become effective 60 days after the date of publication in the Federal Register. Although this final rule streamlines permitting for energy infrastructure projects and may allow projects to obtain Section 401 water-quality certification decisions more quickly in some states, critics have argued that the new timing restrictions may actually force states and tribes to deny certification requests. Moreover, certain states and environmental groups have voiced opposition and plan to challenge the final rule in court.

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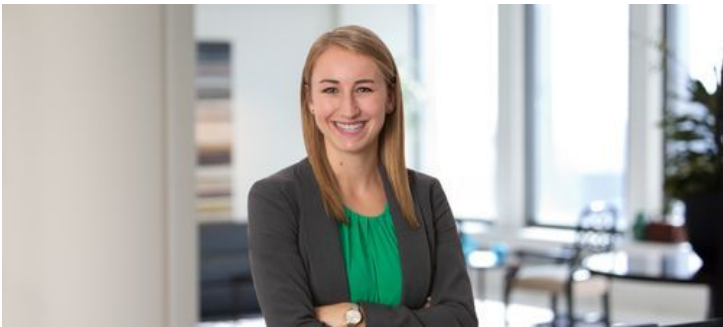
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