

# EPA Proposes to Update Clean Water Act Section 401 Regulations

by Steven A. Weiler

On August 9, 2019, the Environmental Protection Agency (EPA) proposed to update its regulations implementing Section 401 of the Clean Water Act (CWA). Section 401 allow state and tribal regulators to “veto” a federal permit by finding the construction and operation of the permitted project would violate state water quality standards. The Section 401 certification creates an inherent tension between preventing water pollution and developing infrastructure. Recently, that tension has become more pronounced and it is unclear whether the proposed rule, if adopted, will mitigate or exacerbate the tension.

## Background

The CWA authorizes states to establish water quality standards, review those standards at least every three years, and submit changes to EPA. EPA then determines whether the proposed state water quality standards satisfy requirements established under the CWA. Under Section 401, a federal agency may not issue a license or permit to conduct any activity “that may result in any discharge into navigable waters” unless the state or authorized tribe where the discharge would originate finds compliance with water quality requirements or waives the certification requirement. Upon receipt of an application for a Section 401 certification, the state has a “reasonable time” not to exceed one year to issue the certification. If a state does not act within one year, it waives its right to evaluate the certification request and issue a certification under Section 401.

EPA's regulations implementing Section 401 actually predate the 1972 enactment of CWA Section 401. EPA promulgated the regulations in 1971 under an earlier version of the statute but never revised them. Recently, climate change activists focused on the Section 401 certification process as a way to prevent natural gas pipeline development. Some states have embraced these arguments and have recently “weaponized” the Section 401 certification process to defeat pipeline projects authorized by the Federal Energy Regulatory Commission (FERC). Federal permit holders have complained that some certifying authorities: (1) extended the one-year deadline by requiring the applicant

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to withdraw and refile its application; (2) denied or threatened to extend Section 401 certifications to activities other than those affecting water quality standards; or (3) imposed more than just water quality conditions in Section 401 certifications.

Against this backdrop, earlier this year President Trump issued an executive order directing EPA to propose new rules to modernize the Section 401 process and issue guidance to clarify Section 401 requirements. In June, EPA issued the guidance. On August 9, 2019, EPA issued the proposed rule, a companion economic analysis for the proposed rule, and a one-page fact sheet.

## **Proposed Rule**

According to EPA, the proposed rule is intended to clarify the scope of the state or tribal regulators' authority to act on a certification request and the time in which the regulatory authority may act. Perhaps the most controversial "clarification" is the proposal that a Section 401 certification is only required for the discharge of a statutorily defined set of "pollutants" (e.g., soil, waste, sewage) into the waters of the United States from a "point source" (i.e., "any discernible, confined and discrete conveyance," such as a pipe or ditch). The proposal eliminates Section 401 certifications for "activities" such as "non-point source" discharges (e.g., fertilizer runoff from agricultural lands or oil and grease from urban runoff). Significantly, interpreting Section 401 to apply only to discharges diverges from past EPA positions and at least one Supreme Court opinion, which found Section 401 certifications apply to "activities—not merely discharges." Nevertheless, EPA states that the Supreme Court opinion does not foreclose the agency from applying Section 401 certifications only to discharges because "the Supreme Court did not analyze section 401 under the *Chevron* Step 1 or rely on unambiguous terms in the CWA" to support the Court's interpretation. So, according to EPA, the agency may adopt another different reasonable interpretation of Section 401.

Additionally, EPA proposes to limit the certifying authority's (i.e., state or tribe) Section 401 review by

- requiring consideration of water quality only, which would eliminate the ability of states to incorporate non-water issues into the review or impose conditions other than those related to the discharge of pollutants;
- mandating any conditions for a certification be imposed not in the certification but in a CWA discharge permit issued for the facility;
- limiting the time to act to no more than one year from the date of the application for a Section 401 is received, with the ability of federal agencies to shorten the one-year period and with no ability of the certifying authority to toll the period once the application is received; and
- allowing federal agencies to "veto the veto" if the certifying authority does not provide a certification decision satisfying the rule's requirements, thereby treating the certifying authority's action as a waiver of the certification under Section 401.

EPA describes these proposals as mere filling in "gaps" left by Congress under the CWA and contends that these gap-fillers are entitled to *Chevron* deference by the courts. *Chevron* deference provides the courts defer to agency interpretations of a statute

administered by that agency where the statute is silent or ambiguous regarding the issue in question. Some may find EPA's invocation of *Chevron* deference ironic, given many conservatives' general skepticism for *Chevron*.

### **Next Steps**

EPA will accept public comments on the proposed rule for 60 days following its publication in the *Federal Register*. If you have any questions about EPA's proposed rule or how it might affect your business, please contact Thad Lightfoot at [lightfoot.thad@dorsey.com](mailto:lightfoot.thad@dorsey.com) or (612) 492-6532 or Steve Weiler at [weiler.steve@dorsey.com](mailto:weiler.steve@dorsey.com) or (202) 442-3533.