

EPA Proposes New Water Quality Certification Rule in Response to Trump Administration’s 2020 Regulatory Changes



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On June 1, 2022, the U.S. Environmental Protection Agency (“EPA”) released a [Proposed Rule](#) aimed at modifying the Clean Water Act (“CWA”) Section 401 Certification Process in response to regulatory changes made by the Trump Administration in 2020. [EPA’s intent](#) in issuing the Proposed Rule is “...to be more consistent with the statutory text of the 1972 [Clean Water Act] and clarify elements of the Section 401 certification practice.”

Background

Under Section 401 of the CWA, an applicant seeking a federal license or permit for any activity that may result in a discharge into navigable waters must first obtain a Section 401 Water Quality Certification from the entity with

authority over the location where the discharge would occur (generally, EPA, a state or a tribe; the “Certifying Authority”). This requirement ensures that all federally permitted activities also remain in compliance with applicable federal, state, or tribal water quality standards.

In 2020, the Trump administration amended the existing regulations governing water quality certifications and promulgated a [Final Rule](#) (“2020 Rule”) that significantly curtailed a Certifying Authority’s ability to evaluate and impose conditions in connection with water quality certification requests.

The Proposed Rule

The Proposed Rule seeks to broaden (as compared to the 2020 Rule) a Certifying Authority’s ability to review and impact federally licensed or permitted projects with the following primary changes:

- Broadening a water quality certification scope of review by allowing a Certifying Authority to examine whether the requested activity “as a whole” will adversely affect water quality. The 2020 Rule required that a Certifying Authority only consider the potential water quality impacts from the specific project discharge, and not whether the project itself might adversely affect water quality. This change would also allow a Certifying Authority to consider, as part of the “activity as a whole,” the impact that a requested activity would have on waters outside of Section 401’s federal jurisdiction, *i.e.*, those waters that fall outside the definition of “waters of the United States”.
- Allowing the Certifying Authority to impose any conditions on their water quality certifications that would protect the water quality of the state or tribe waters. In contrast, the 2020 Rule only allowed a certifying authority to include conditions on their certifications if the conditions were enumerated in the CWA or state law.
- Directing Certifying Authorities to work jointly, on a project-by-project basis with the federal permitting agencies to set a timeline for certification, relieving them of the strict time limits the 2020 Rule implemented.
- Allowing Certifying Authorities to determine the required documentation to submit for a request for certification so long as the request for certification includes (1) a copy of a draft license or permit; and (2) any existing and readily available information related to potential water quality impacts from the proposed project.

While the Proposed Rule does not explicitly state that a Certifying Authority may consider climate change when evaluating a certification request, it also does not categorically restrict Certifying Authorities from weighing climate change as a factor. The Proposed Rule also seems to implicitly allow states to look at climate change-related impacts by permitting Certifying Authorities to impose conditions on a certification that would require the project proponent to undertake remediation measures for pre-existing water quality conditions that have been exacerbated by climate change. This expansive language could embolden Certifying Authorities to deny certification requests based on climate change concerns.

It is important to note, however, that allowing Certifying Authorities to undertake more expansive and individualized reviews of water quality certification requests could lead to a longer permitting process, additional costs associated with supplementary documentation, and more restrictions on developers.

The EPA is accepting comments on this Proposed Rule until August 8, 2022, under [Docket ID No. EPA-HQ-OW-](#)

[2022-0128](#) and has various dates for virtual public hearings with states and territories, tribes, project proponents and the public to discuss the Proposed Rule. For assistance in drafting and submitting comments, or for questions regarding this Client Alert, please contact Lippes Mathias' Environment & Energy Team Practice Leader, Ian Shavitz at ishavitz@lippes.com or Senior Associate, Christina Bonanni at cbonanni@lippes.com.