



EPA Proposes to Expand State and Tribal Authority Over Section 401 Water Quality Certifications, Reversing Trump Era Rule

JUNE 15, 2022

[Duncan Greene](#), [Jenna Mandell-Rice](#) and [Sophia Amberson](#)

On June 9, 2022, the Environmental Protection Agency (“EPA” or “Agency”) published its proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule (“Improvement Rule”). The Improvement Rule is intended to revise and replace the Trump Administration’s 2020 401 Rule (“2020 401 Rule”), which clarified and narrowed the scope of state and tribal authority under Section 401 of the Clean Water Act (“CWA”). The EPA states that the Improvement Rule is “more consistent with the statutory text of the CWA” and will “clarify, reinforce, and provide a measure of consistency with respect to elements of section 401 certification practice.” The Improvement Rule is a significant departure from the 2020 401 Rule, defining state and tribal authority more expansively than even the EPA’s pre-2020 regulations and practice.

Comments on the Improvement Rule must be received on or before August 8, 2022.

Background

Under Section 401, any applicant seeking a federal permit or license to conduct an activity that may result in discharges into navigable waters must first obtain a water quality certification from the state or authorized tribe (the “Certifying Authority”) where the discharge occurs. The Certifying Authority must act on a certification request within a reasonable time not to exceed one year. The federal agency may not issue a permit or license until the Certifying Authority either issues a water quality certification or waives its authority to issue a certification. Any conditions imposed on Section 401 water quality certifications become conditions of the federal permit or license. Conditions may include effluent limitations, other water quality standards, and “any other appropriate requirement of state law.”

The Improvement Rule follows President Biden’s 2021 Executive Order 13990, “Protecting Public Health and the Environmental and Restoring Science to Tackle the Climate Crisis.” The Order directed the EPA to review the 2020 401 Rule to determine whether it is consistent with CWA section 401. VNF discussed the 2020 401 Rule in a prior alert found [here](#).

The Improvement Rule

The Improvement Rule gives the Certifying Authority more power to control both the timing and outcomes of federal permitting processes:

Scope of Section 401 Certification Rule

- The 2020 401 Rule limited the scope of the Certifying Authority’s review to “considerations of water quality” that relate specifically to point source “discharges,” rather than the entire activity associated with a federally licensed or permitted project, which amounted to a change in EPA’s pre-2020 interpretation (as given deference by the Supreme Court). The Improvement Rule reverts to the EPA’s regulations and practice prior to the 2020 401 Rule. It allows a Certifying Authority to consider the proposed “activity as whole” and evaluate whether the federally licensed or permitted project would adversely affect the quality of a Certifying Authority’s waters—not just those identified as Waters of the United States under the CWA. For example, a Certifying Authority reviewing a proposed dam may consider not only impacts from point source discharges at the dam’s powerhouse or tailrace, but also impacts from nonpoint source pollution from erosion caused by the dam’s reservoir and other upstream and downstream impacts of project operations and hydromodification.

State or Tribal Authority to Impose Conditions

- The Improvement Rule also expands what constitutes “other appropriate requirements of state law,” which may form the basis for the imposition of conditions in the 401 certification. The 2020 401 Rule codified a narrow interpretation of that phrase, the effect of which was to allow

a Certifying Authority to impose only those conditions necessary to assure compliance with specifically enumerated sections of the CWA and state or tribal regulatory requirements for point source discharges into [Waters of the United States](#). The Improvement Rule expands the interpretation of “other appropriate requirements of state law” to include any condition related to the project’s water quality effects. The EPA does not define what constitutes an appropriate condition, but suggests that the authority to impose conditions is as broad as the Certifying Authority’s adopted water quality standards and is not just limited to the federal definition of Waters of the United States but could include state identified “waters of the state.” For example, the Improvement Rule suggests that conditions requiring fish passage and recreation may be appropriate so long as they are tied to the waterway’s designated uses under the Certifying Authority’s adopted water quality standards. However, the Improvement Rule affirms that conditions imposed on 401 certifications must have at least some connection to water quality, stating that “it would be inconsistent with the purpose of CWA section 401 to deny or condition a section 401 certification based solely on potential air quality, traffic, noise, or economic impacts that have no connection to water quality.”

Receipt of Request for Certification

- A Certifying Authority has a reasonable period of time, not to exceed one year, to act on request for certification. Courts have confirmed that this period begins to run after “receipt” of a request, rather than when the certifying agency deems the request to be a “complete” request. While the 2020 401 Rule proposed a definition of “receipt of request,” the Improvement Rule eliminates that definition, instead stating that “receipt” occurs when the Certifying Authority receives a certification request that meets the Certifying Authority’s definition for a certification request and complies with the Certifying Authority’s submission procedures. This change allows each Certifying Authority to establish its own list of requirements that constitute a request for certification. The EPA declined to define a set of standard submission procedures for Certifying Authorities and recognized that “certifying authorities may have different procedures for receiving certification requests (e.g., receiving certification in different formats or requiring the payment of fees).”
- In order to trigger the one-year period for the Certifying Authority to act, the Improvement Rule also requires each request for certification to include a draft federal license or permit. This change forces applicants to delay the water quality certification until near the end of the federal process, adding at least a year to the process. However, where the agency does not issue a draft license or permit as a matter of practice, or the proponent is otherwise legally precluded from obtaining a copy of a draft license or permit, the project proponent is not required to provide a copy.
- The Improvement Rule would also allow a Certifying Authority to modify a 401 Certification after expiration of the one-year period and after the federal license or permit is issued, if the federal agency agrees.

Acting on a Request for Certification

- Prior to the Improvement Rule, it was unclear what it meant for a Certifying Authority to “act on a request for certification.” In an effort to clarify this ambiguity, the Improvement Rule explicitly defines four decisions that a certifying authority may make in response to a certification request: to grant, to grant with conditions, to deny, or to expressly waive.
- The 2020 401 Rule stated that Federal agencies could unilaterally determine whether a certifying authority had failed or refused to act and thereby waived certification. Additionally, under the 2020 401 Rule, if a certification condition was procedurally improper, a federal agency was permitted to determine that the condition was waived. The Improvement Rule rejects that approach, instead stating that a “constructive waiver” only occurs if a certifying authority fails or refuses to take one of the four actions discussed above within a reasonable period of time or one year.

Contents on a Certification Decision

- The 2020 401 Rule required that the Certifying Authority explain why each of the conditions imposed on a 401 certification was necessary, with a citation to an applicable federal, state, or

tribal law. The Improvement Rule modifies this requirement, stating that the Certifying Authority must explain why each condition is necessary to assure that the activity as whole will comply with water quality requirements, without requiring citation to an applicable law.

Pre-Filing Meeting Requests

- The Improvement Rule retains the 2020 401 Rule's pre-filing meeting requirement, which must occur at least 30 days prior to submitting a water quality certification request. However, the EPA is modifying this requirement by allowing certifying authorities as well as the EPA the discretion to waive the meeting request requirement or shorten the timeframe.

Implications and Next Steps

The Improvement Rule, if implemented as proposed, would have far-reaching implications for project proponents seeking federal permits and licenses. It grants state and tribal authorities more power to influence federal permitting and licensing processes and their substantive outcomes than both under and prior to the implementation of the 2020 401 Rule. In particular, the Improvement Rule provides for more expansive conditioning authority than the 2020 401 Rule and includes the authority to condition (or even potentially deny) certification based on impacts to state waters as opposed to just Waters of the United States, thereby potentially extending beyond waters regulated by the CWA.

Prior to the 2020 401 Rule, many states used the 401 certification process to stop or stymie projects based on concerns that were, at times, unrelated to water quality. The Improvement Rule's re-expansion of Certifying Authorities' power to condition projects is likely to lead to an increased burden on applicants. Although the Improvement Rule indicates that conditioning or denying a project based on potential air quality, traffic, noise, or economic impacts is inconsistent with Section 401, the Improvement Rule nevertheless gives Certifying Authorities broader conditioning authority than allowed under the 2020 401 Rule.

The Improvement Rule also appears to give Certifying Authorities greater ability to extend their 401 certification process to longer than the intended one-year period through defining when a request is deemed received. This is likely to strengthen a Certifying Authority's ability to avoid waiver of their section 401 certification authority by arguing that they did not receive a request.

In the hydropower context, the Improvement Rule gives certifying authorities the power to dictate the federal licensing schedule—something that Section 401 was arguably designed to avoid.

Even if the Improvement Rule is finalized as written, there is likely to be continued uncertainty regarding the 401 certification process going forward. The 401 certification pendulum could swing back in the other direction in response to future judicial, executive, or legislative action. Industry groups are likely to challenge EPA's final rule in court. Future administration changes may result in further rule-making on this topic. Ongoing project-specific 401 certification judicial challenges may provide additional gloss on how to interpret section 401 that may either reinforce or contradict EPA's position in the Improvement Rule. Continued uncertainty over the 401 certification process is causing delays and other complications for a wide variety of projects, particularly larger infrastructure projects involving phased construction over 10 years or more.

Public comments on the Improvement Rule are due by August 8, 2022. The Improvement Rule requests comment on a variety of substantive and procedural topics. The EPA intends to finalize the rule in Spring 2023.

FOR MORE INFORMATION

Van Ness Feldman attorneys provide comprehensive legal, policy, and business advisory services for the full range of issues involving the Clean Water Act. If you would like additional information about the Section 401 process, please reach out to [Duncan Greene](#), [Jenna Mandell-Rice](#), [Michael Pincus](#) or [Mike Swiger](#).

Follow us on Twitter [@VanNessFeldman](#)