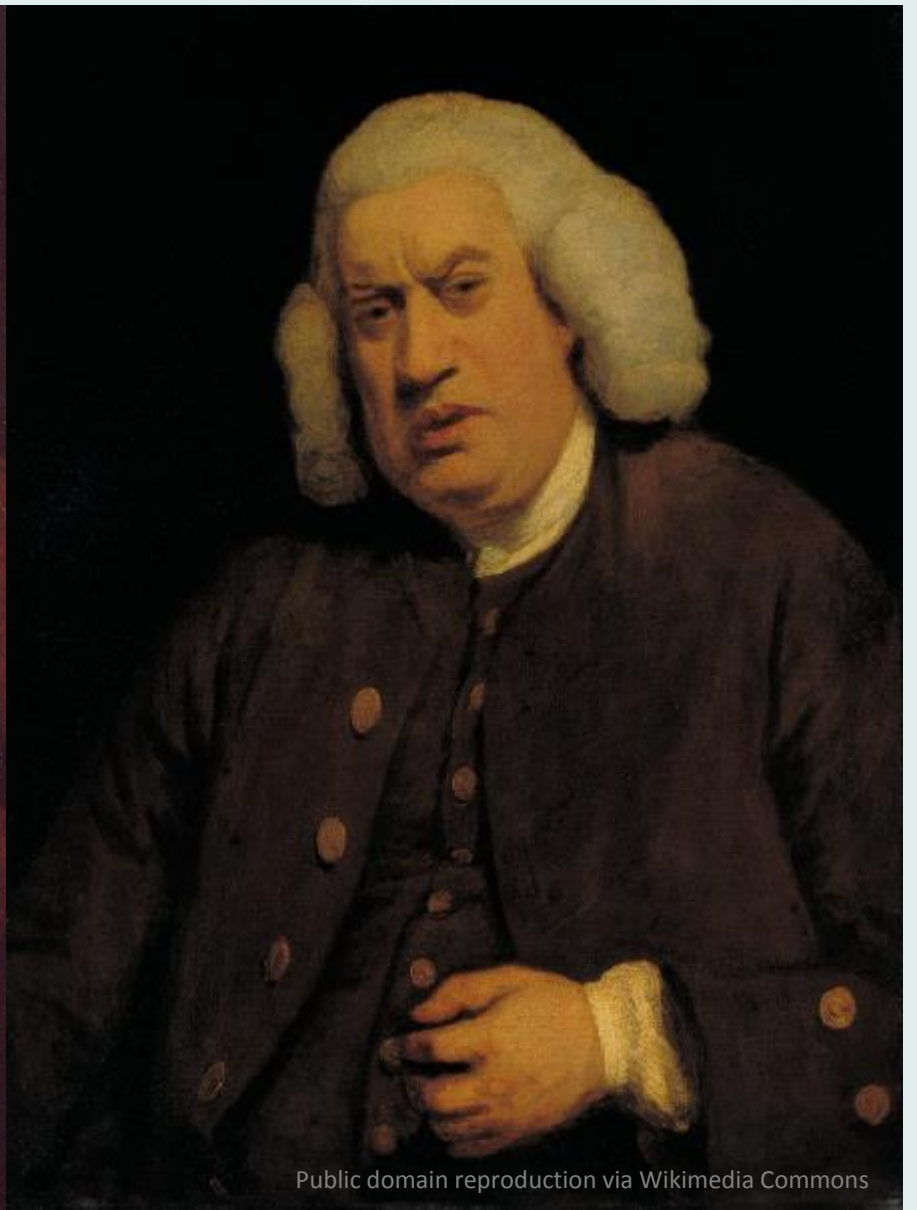
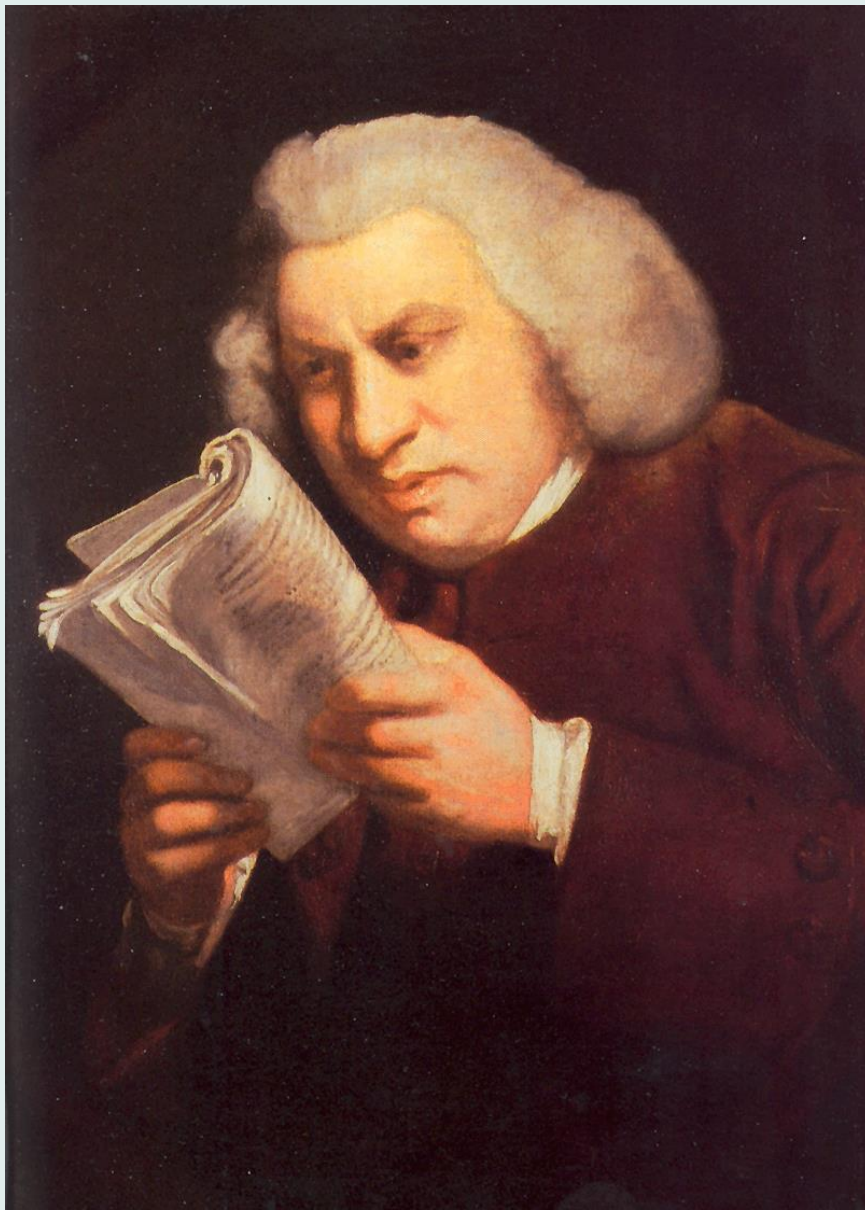


Pipeline Permitting 101

Clean Water Act Section 401:
State Water Quality Certification

Association of State Wetland Managers
ASWM Pipeline Permitting Webinar Series
November 7, 2018



“What did I just read!”

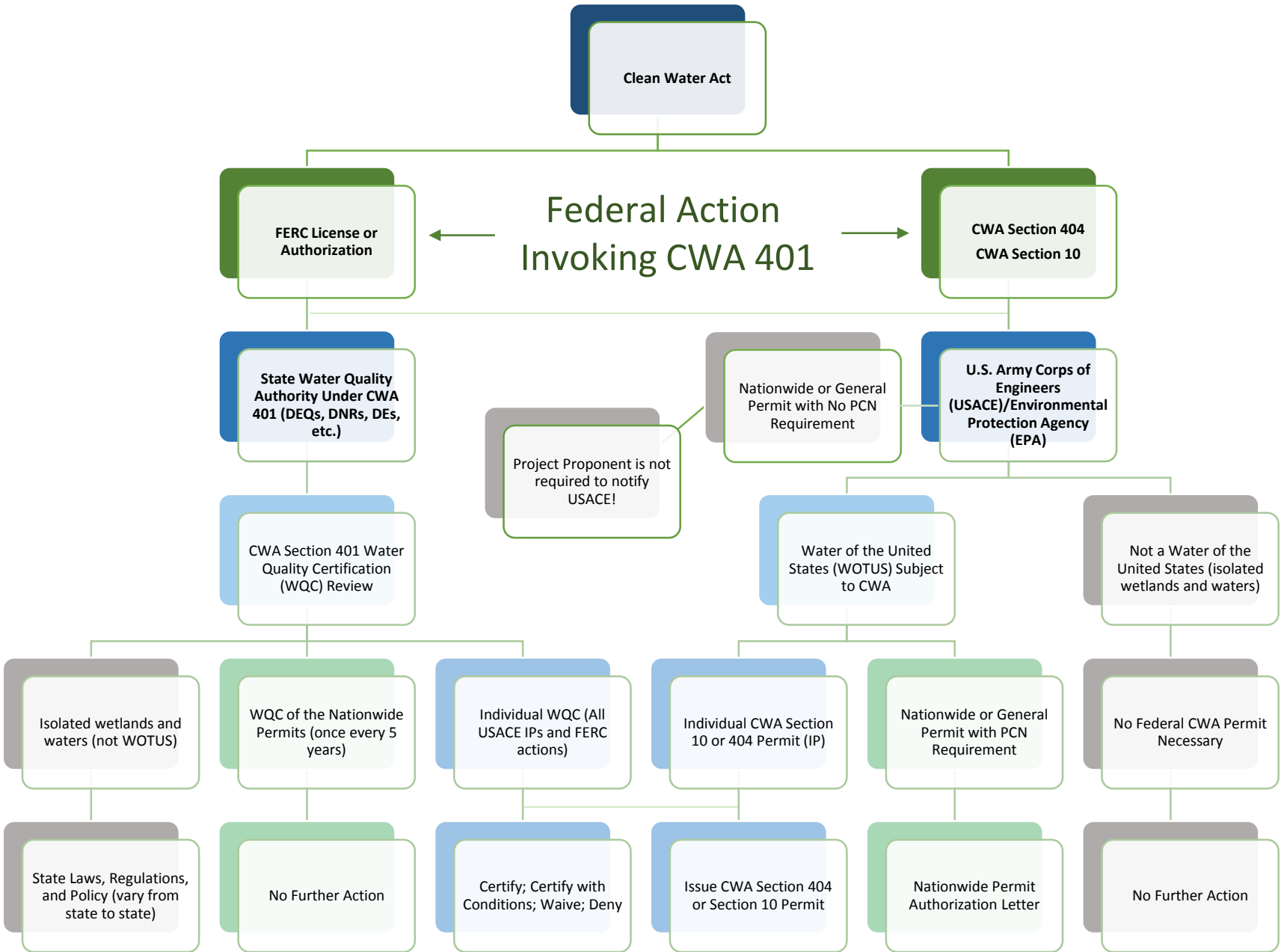
Section 401 of the Clean Water Act is one of the most powerful tools in a state's regulatory options to ensure the protection of wetlands, streams, and other waters.

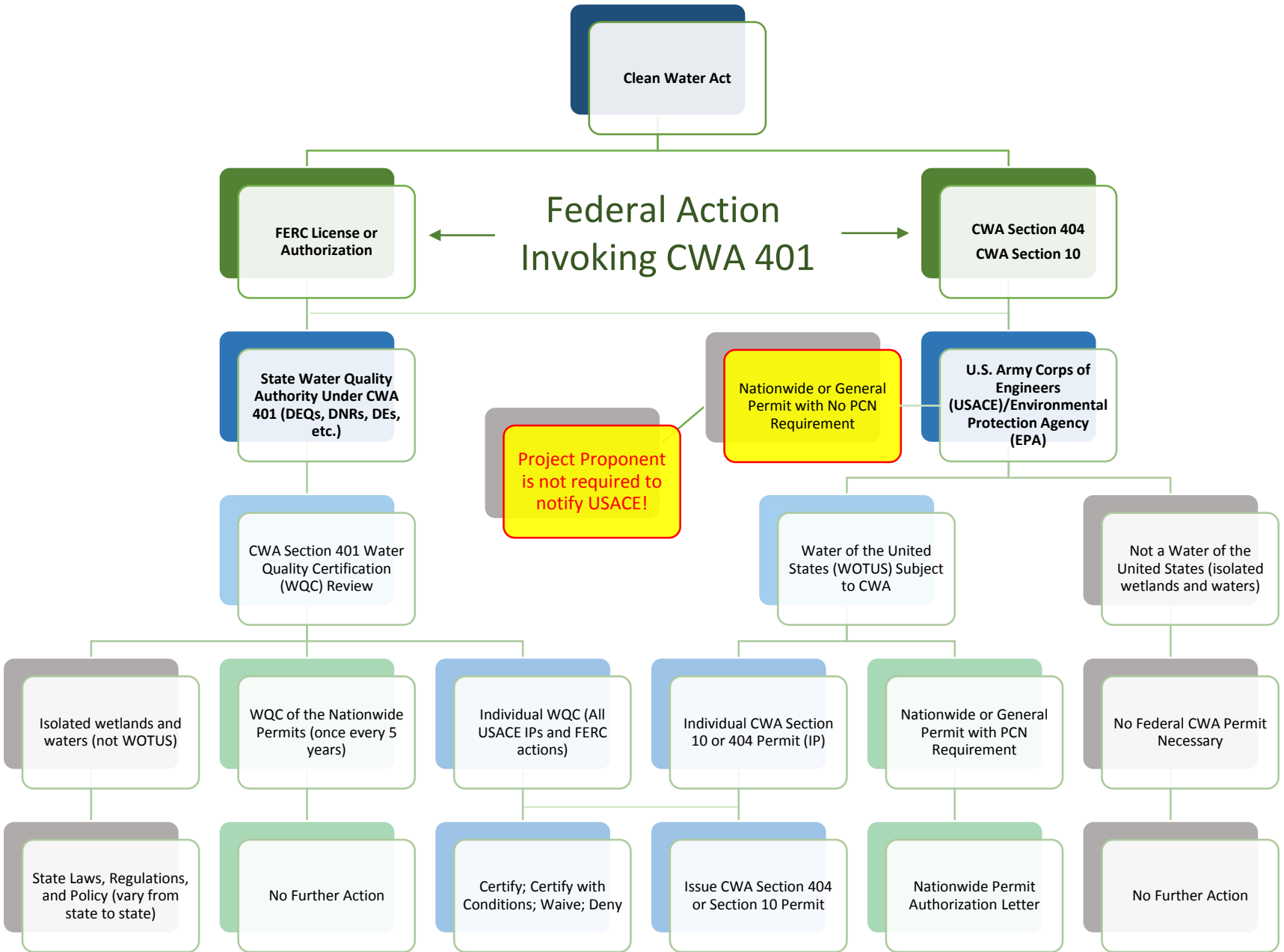


Photo: Robert Parker



Photo: Robert Parker





Clean Water Act

Federal Action
Invoking CWA 401

FERC License or
Authorization

CWA Section 404
CWA Section 10

State Water Quality
Authority Under CWA
401 (DEQs, DNRs, DEs,
etc.)

Nationwide or General
Permit with No PCN
Requirement

U.S. Army Corps of
Engineers
(USACE)/Environmental
Protection Agency
(EPA)

Project Proponent is not
required to notify
USACE!

CWA Section 401 Water
Quality Certification
(WQC) Review

Water of the United
States (WOTUS) Subject
to CWA

Not a Water of the
United States (isolated
wetlands and waters)

Isolated wetlands and
waters (not WOTUS)

WQC of the Nationwide
Permits (once every 5
years)

Individual WQC (All
USACE IPs and FERC
actions)

Individual CWA Section
10 or 404 Permit (IP)

Nationwide or General
Permit with PCN
Requirement

No Federal CWA Permit
Necessary

State Laws,
Regulations, and
Policy (vary from
state to state)

No Further Action

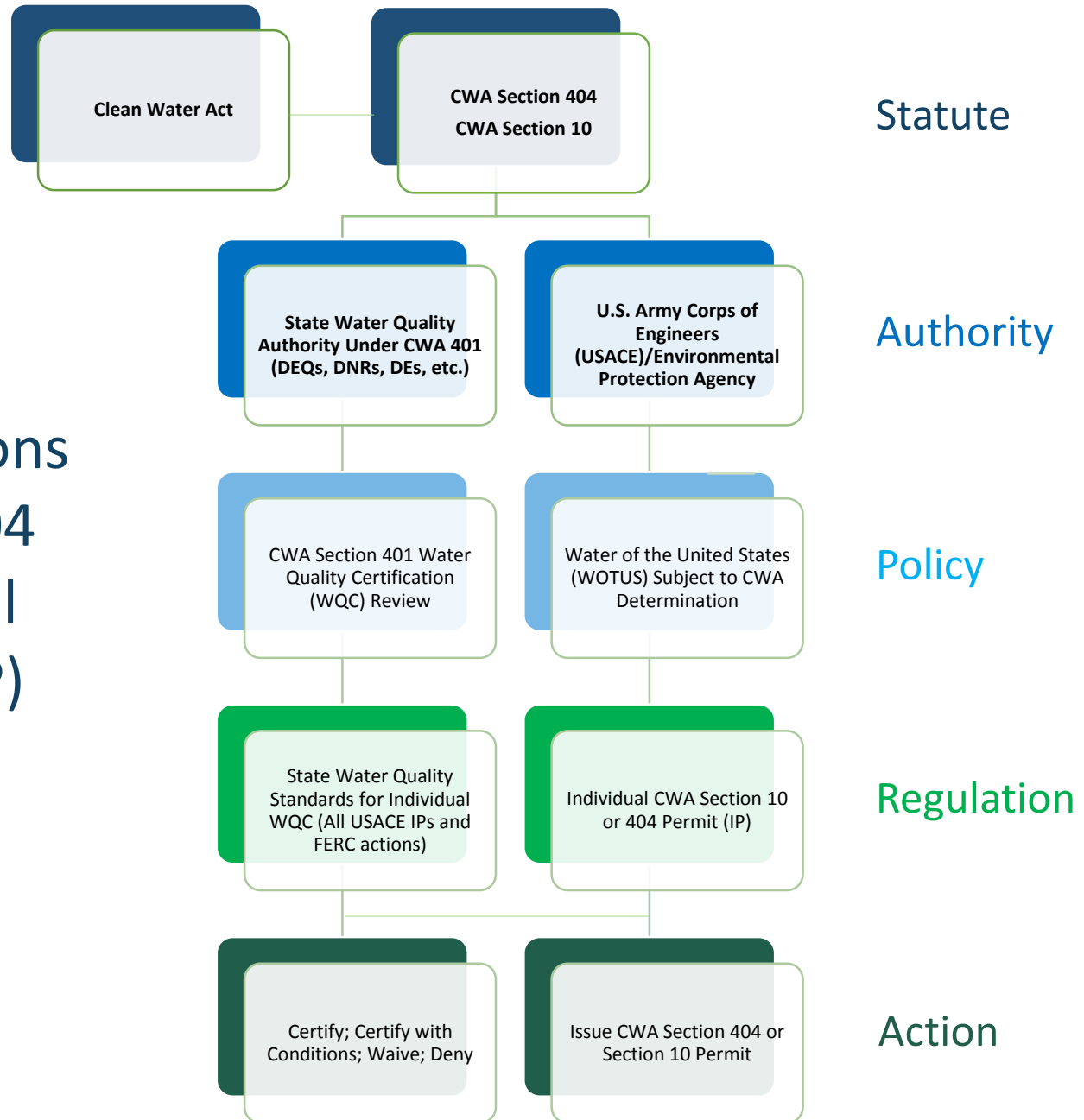
Certify; Certify with
Conditions; Waive; Deny

Issue CWA Section 404
or Section 10 Permit

Nationwide Permit
Authorization Letter

No Further Action

CWA Sections 10 and 404 Individual Permits (IP)



Best Practices for Individual Permits

- Encourage pre-application meetings and engage in the permitting process early!
- Define what needs to be reviewed (due diligence):
 - State Water Quality Standards.
 - Related regulations or policy.
 - State listed sensitive species.
 - Historical and/or archeological sites.
 - State and regional watershed planning.
 - State lands, conservation areas, special designations, and easements.
 - What coordination with other state and local agencies may be required?

Best Practices for Individual Permits

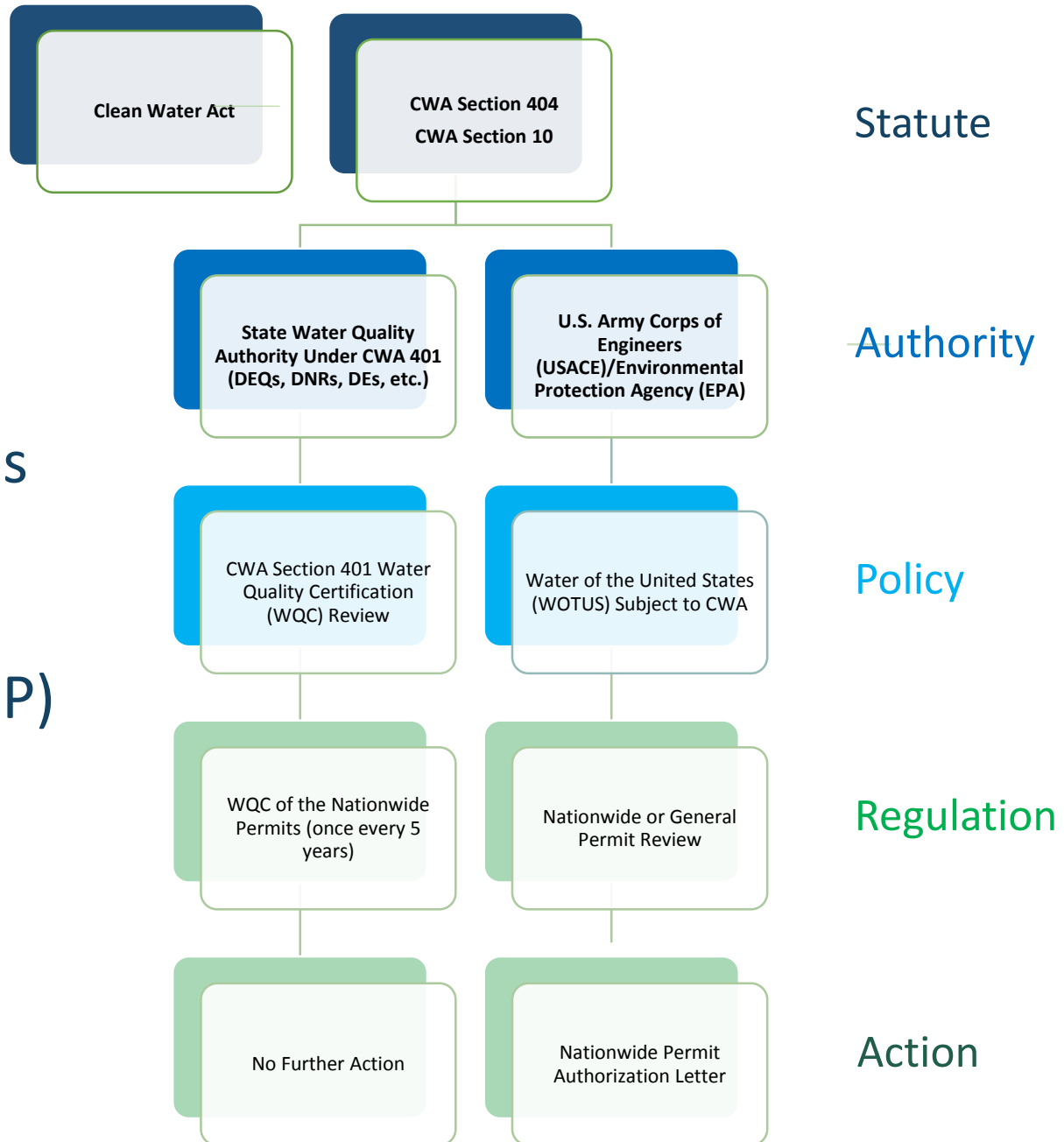
- Define what is required to complete the review (complete application):
 - The simplest method is to require a copy of everything submitted for the federal permit application, either a hardcopy or in digital form.
 - Keep lines of communication open with USACE and consultants working for the regulated community.
- Conditional WQC
 - WQC conditions vary widely from state to state.
 - Apply conditions consistently.
 - Conditions should not be weaker than federal regulations, but can mirror and reinforce conditions required by USACE, or can be broader and stronger.
 - How will WQC conditions be tracked for compliance and enforced?



Photo: Heather Rousseau via ProPublica; Creative Commons License

For Clean Water Act permits, most crude, tight oil, natural gas, and HGL pipeline crossings of WOTUS are individually authorized under Nationwide Permit 12 – Linear Transportation Projects as “single and complete projects”.

CWA Sections 10 and 404 Nationwide Permits (NWP)



Best Practices for Nationwide Permits

- Policy Development

- “Single and Complete” projects vs. “End to End” (cumulative).
- Federal impact thresholds for NWP eligibility and notification (PCN Requirement).
- Federal definition of “Temporary Impacts”.
- Consider the effects of climate change.
- Does the state have (or is developing) comprehensive wetland regulations?

- Think Ahead

- WQC must be effective for 5 years, for any project that may be proposed under the permit.

- Education

- Engineering 101
- Do agency Administrators and state decision makers understand CWA 401 and NWPs?

Best Practices for Nationwide Permits

- Data and Decision Making
 - Maintain complete and current datasets:
 - National Wetlands Inventory;
 - National Hydrography Dataset;
 - EIA Data;
 - Local and regional datasets.
- Conditional WQC
 - WQC conditions vary widely from state to state.
 - One Chance every five years!
 - Think ahead, considering rate of development, emerging technology, and changing political landscapes. Will the conditions in place now be effective in one year? In three?
 - Who is enforcing WQC conditions?
 - Develop effective conditions per NWP to meet state water quality needs over a long-term scale.
 - Anticipate pushback.

Example WQC Conditions for Nationwide Permit 12

The applicant must provide proof of compensatory mitigation (as outlined in Standard Condition 19 below) to WV DEP DWWM prior to construction for a project with cumulative permanent stream impacts greater than 300 linear feet or causing the loss of greater than 1/10 acre of wetlands. This cumulative permanent impact determination specifically includes the total of all permanent impact from separate and complete crossings for linear transportation or utility projects.

Example WQC Conditions for Nationwide Permit 12

The applicant must provide proof of compensatory mitigation (as outlined in Standard Condition 19 below) to WV DEP DWWM prior to construction for a project with cumulative permanent stream impacts greater than 300 linear feet or causing the loss of greater than 1/10 acre of wetlands. This cumulative permanent impact determination specifically includes the total of all permanent impact from separate and complete crossings for linear transportation or utility projects.

NWP 12 Utility Line Activities. Nebraska Department of Environmental Quality shall be notified within 24 hours in the event of release of muds and drilling fluids into surface waters, that occur via sub-surface fissures or fractures during horizontal directional drilling activities. The following telephone numbers are available for notification; during regular business hours please call 1-877-253-2603 (toll free) or (402) 471-4220; after hours, or on weekends and holidays, please call Nebraska State Patrol Dispatch (402) 471-4545.

Example WQC Conditions for Nationwide Permit 12

The applicant must provide proof of compensatory mitigation (as outlined in Standard Condition 19 below) to WV DEP DWWM prior to construction for a project with cumulative permanent stream impacts greater than 300 linear feet or causing the loss of greater than 1/10 acre of wetlands. This cumulative permanent impact determination specifically includes the total of all permanent impact from separate and complete crossings for linear transportation or utility projects.

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State Resource Waters – Class A. No individual action shall be allowed under a nationwide permit prior to the issuance of an individual WQC when such an action may result in a discharge into water bodies designated as State Resource Waters – Class A pursuant to Title 117 - Nebraska Surface Water Quality Standards (Ch. 5 -6). Additional information and maps regarding State Resource Waters can be acquired by contacting the NDEQ.

Example WQC Conditions for Nationwide Permit 12

The applicant must provide proof of compensatory mitigation (as outlined in Standard Condition 19 below) to WV DEP DWWM prior to construction for a project with cumulative permanent stream impacts greater than 300 linear feet or causing the loss of greater than 1/10 acre of wetlands. This cumulative permanent impact determination specifically includes the total of all permanent impact from separate and complete crossings for linear transportation or utility projects.

NWP 12 Utility Line Activities. Nebraska Department of Environmental Quality shall be notified within 24 hours in the event of release of muds and drilling fluids into surface waters, that occur via sub-surface fissures or fractures during horizontal directional drilling activities. The following telephone numbers are available for notification; during regular business hours please call 1-877-253-2603 (toll free) or (402) 471-4220; after hours, or on weekends and holidays, please call Nebraska State Patrol Dispatch (402) 471-4545.

State Resource Waters – Class A. No individual action shall be allowed under a nationwide permit prior to the issuance of an individual WQC when such an action may result in a discharge into water bodies designated as State Resource Waters – Class A pursuant to Title 117 - Nebraska Surface Water Quality Standards (Ch. 5 -6). Additional information and maps regarding State Resource Waters can be acquired by contacting the NDEQ.

Utility Line activities that cross multiple waterbodies or cross the same waterbody at multiple locations, while viewed as multiple “single and complete” projects for the purposes of the Nationwide Permit program, will be considered by the Department as a single project for all crossings for the entire length of the project in New York State for the purpose of obtaining Water Quality Certification from New York State and determining the disturbance threshold of 300 linear feet or ¼ acre.

When the System Fails



Photo: Public Domain Image via Ohio EPA

What Happens When a Pipeline Runs Afoul of Government Rules?



Appeal: 18-1173 Doc: 113 Filed: 10/02/2018 Pg: 1 of 3

FILED: October 2, 2018

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1173 (L)
(LRH-2015-382-GBR)

SIERRA CLUB; WEST VIRGINIA RIVERS COALITION; INDIAN CREEK
WATERSHED ASSOCIATION; APPALACHIAN VOICES; CHESAPEAKE
CLIMATE ACTION NETWORK

Petitioners

v.

UNITED STATES ARMY CORPS OF ENGINEERS; MARK T. ESPER, in his
official capacity as Secretary of the U.S. Army; TODD T. SEMONITE, in his official
capacity as U.S. Army Chief of Engineers and commanding General of the U.S.
Army Corps of Engineers; PHILIP M. SECREST, in his official capacity as District
Commander of the U.S. Army Corps of Engineers, Huntington District; MICHAEL
E. HATTEN, in his official capacity as Chief, Regulatory Branch, U.S. Army Corps
of Engineers, Huntington District

Respondents


MOUNTAIN VALLEY PIPELINE, LLC

Intervenor

ORDER

Photo: Heather Rousseau via ProPublica; Creative Commons License

Useful Links

- **Association of State Wetland Managers:**
<https://www.aswm.org/>
- **EPA's CWA Section 401 Water Quality Certification Handbook:**
https://www.epa.gov/sites/production/files/2016-11/documents/cwa_401_handbook_2010.pdf
- **Open EI Energy Information – Data, Analysis, People:**
https://openei.org/wiki/Main_Page
- **U.S. Energy Information Administration (EIA):**
<https://www.eia.gov/>
- **EIA Annual Energy Outlook 2018:**
<https://www.eia.gov/outlooks/aeo/>
- **EIA U.S. Energy Mapping System (resource for maps and GIS data):**
<https://www.eia.gov/state/maps.php>
-  **Connect with me on LinkedIn:**
<https://www.linkedin.com/in/parker-wetlandspolicy/>

