

# Uncooperative Federalism: Proposed Changes to CWA 401 WQC Regulations



Royal C. Gardner  
Professor of Law and Director  
Institute for Biodiversity Law and Policy  
Stetson University College of Law



ASWM Hot Topics Webinar  
September 20, 2019



# Outline

- History of state water quality certifications
- Key U.S. Supreme Court CWA cases
  - PUD No.1
  - S.D. Warren
- Casus belli: recent actions by states
- Proposed rule's restrictions on states
  - Decision-making timeframe
  - Scope of state review
  - Federal agency review of state decision

# History of state water quality certifications

- FWPCA (1948), amended in 1956, 1961, 1965
- Water Quality Improvement Act of 1970 introduces WQCs
- EPA issues WQC regulations in 1971
- Clean Water Act (1972)



# PUD No.1 of Jefferson County v. Washington Department of Ecology (1994)

- FERC license for hydroelectric facilities
- Washington imposes minimum stream flow requirement in WQC
- Supreme Court rules 7-2 that the minimum stream flow requirement is a WQC permissible condition



[https://en.wikipedia.org/wiki/Dosewallips\\_River](https://en.wikipedia.org/wiki/Dosewallips_River)

# PUD No.1 of Jefferson County v. Washington Department of Ecology (1994)

- Majority conducted textual analysis: “§ 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole”
- Majority then observed that the Court’s “view of the statute is consistent with EPA’s regulations implementing § 401” and cited *Chevron*



# PUD No.1 of Jefferson County v. Washington Department of Ecology (1994)

➤ Justice Stevens one-paragraph concurrence:

“For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards.”

# PUD No.1 of Jefferson County v. Washington Department of Ecology (1994)

➤ Justice Thomas dissenting:

“[T]he text and structure of § 401 indicate that a State may impose under § 401(d) only those conditions that are related to discharges.”



Contact

Outages

Smart Hub

News

Calendar

Search...



MY PUD ▼

ELECTRIC ▼

WATER/SEWER ▼

SUSTAINABILITY ▼

BROADBAND ▼

ABOUT US ▼

ARCHIVE ▼

A photograph of an electrician wearing a white hard hat and safety glasses, working on a large, cylindrical electrical transformer. The transformer is mounted on a wooden structure. The word 'ELECTRIC' is overlaid in large, white, sans-serif capital letters on the left side of the image.

ELECTRIC

# S.D. Warren Co. v. Maine Board of Environmental Protection (2006)

- FERC renewal licenses for hydroelectric dams
- Maine imposed minimum stream flow requirement in 401 WQC
- Supreme Court ruled 9-0 that discharge of water (from a dam) is a discharge triggering the need for a WQC



<https://www.mainetrailfinder.com/trails/trail/presumpscot-river-paddling-trail>



## S.D. Warren Co. v. Maine Board of Environmental Protection (2006)

- The Court noted that “Section 401 recast pre-existing law and was meant to ‘continu[e] the authority of the State ... to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source with such State.’ S.Rep. No. 92-414, p. 69 (1971).”

# Casus belli: recent actions by states

- Washington 401 denial related to Millennium Coal Terminal
- New York 401 denial related to Constitution Pipeline
- Oregon 401 denial related to LNG facilities and pipeline



<https://naturalgasnow.org/why-isnt-the-constitution-pipeline-approved-by-now/>

President Trump: “State level abuse”

# The proposed rule ...

- Published in the Federal Register on August 22, 2019
- Comments due by October 21, 2019
- Limits state authority to deny WQCs
  - timing
  - scope
  - veto

The screenshot shows the Federal Register website for a proposed rule. At the top, it says 'FEDERAL REGISTER The Daily Journal of the United States Government' with the National Archives logo on the left and the EPA seal on the right. A blue banner indicates 'Proposed Rule'. The title of the rule is 'Updating Regulations on Water Quality Certification', published by the Environmental Protection Agency on 08/22/2019. A notice states that the comment period ends in 48 days (10/21/2019) and provides a 'SUBMIT A FORMAL COMMENT' button. Below this, there is a 'PUBLISHED DOCUMENT' section with a 'Start Printed Page 44060' indicator. The document details are as follows:

AGENCY:	ACTION:	SUMMARY:	DATES:
Environmental Protection Agency (EPA).	Proposed rule.	The Environmental Protection Agency (EPA) is publishing for public comment a proposed rule providing updates and clarifications to the substantive and procedural requirements for water quality certification under Clean Water Act (CWA or the Act) section 404. CWA section 404 is a direct grant of authority to states (and tribes that have been approved for "treatment as a state" status) to review for compliance with appropriate federal, state, and tribal water quality requirements any proposed activity that requires a federal license or permit and may result in a discharge to waters of the United States. This proposal is intended to increase the predictability and timeliness of section 404 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures.	Comments must be received on or before October 21, 2019.

Additional document details on the right side of the page include:

- Printed version: PDF
- Publication Date: 08/22/2019
- Agency: Environmental Protection Agency
- Comments Close: 10/21/2019
- Document Type: Proposed Rule
- Document Citation: 84 FR 44060
- Pages: 44060-44122 (43 pages)
- CFR: 40 CFR 121
- Agency/Docket Numbers: EPA-HQ-CAN-2018-0405, FHL-9997-82-CW
- RIN: 2040-AP05
- Document Number: 2019-17555

# Timing

- Clock starts upon receipt of certification request
- Limits on requests for additional information
- Federal agency will establish reasonable time for state to decide, not to exceed one year





# Scope of state review

- Water quality
- Activity versus discharge (*Chevron*)
- Discharges from point sources

# Federal agency review of state decision

- If the federal agency determines that the state WQC denial satisfies the regulations, the federal license or permit will not be granted
- If the federal agency determines that the state WQC denial does not satisfy the regulations, the state WQC is treated as a waiver
- The same approach is applied to conditions in the state WQC: if the condition complies with the regulations, it is incorporated into the federal license or permit; if not, the condition is not incorporated

# Looking forward to your questions ...

