

Section 401 Water Quality Certification Background

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Statute: 33 USC 1341

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any [effluent limitations](#) and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable [effluent limitations](#) and other limitations, under section [1311](#) or [1312](#) of this title, standard of performance under [section 1316 of this title](#), or prohibition, effluent standard, or pretreatment standard under [section 1317 of this title](#), and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

Regulations

[Clean Water Act Section 401 Certification Rule](#), 85 Federal Register 42210, July 13, 2020. Trump Rule challenged in multiple cases. Del. Riverkeeper Network v. EPA, No. 2:20-CV-3412 (E.D. Pa. filed July 13, 2020); American Rivers v. Wheeler, No. 20-04636 (N.D. Cal. filed July 13, 2020); California v. Wheeler, No. 4:20-cv-04869 (N.D. Cal. filed July 21, 2020); S.C. Coastal Conservation League v. Wheeler, No. 2:20-cv-03062 (D.S.C. filed Aug. 26, 2020); Suquamish Tribe v. Wheeler, No. 3:20-cv-06137 (N.D. Cal. filed Aug. 31, 2020). On the Biden “hit list.”

FERC Waiver Rule, 18 CFR Part 157

A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification.

Cases

- PUD No. 1 of Jefferson Cty. v. Wash. Dep’t of Ecology, 511 U.S. 700, 710 (1994). (“A State may impose conditions on certifications insofar as necessary to enforce a designated use contained in the State's water quality standard.”)

- *S. D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370, 387 (2006). (“State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution.”)
- *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1101 (D.C. Cir. 2019), *reh’g denied*, No. 14-1271, 2019 WL 3928669 (D.C. Cir. 2019), *cert. denied sub nom.* *California Trout v. Hoopa Valley Tribe*, 140 S. Ct. 650 (2019) (States must act within 12 months of request for certification or be deemed to have waived their authority under 401. No extensions can be negotiated).
- *Sierra Club v. US Army Corps*, No. 18-1173 (4th Cir., Nov. 27, 2018) (Corps cannot unilaterally change conditions of a certification for a portion of the Mountain Valley Pipeline even in the context of streamlined nationwide permits (NWP)).
- *Deschutes River Alliance v. Portland General Electric Company*, 331 F.Supp.3d 1187 D OR 2018) (Conditions in certification are enforceable through the citizen suit provision) (9th Circuit appeal pending)
- *Fond du Lac Band of Lake Superior Chippewa v. Wheeler*, Case No. 19-CV-2489 (D MN, Feb. 16, 2021) (EPA has a duty to make a “may affect” determination under 401 (a)(2) when requested by a downstream Tribe objecting to a 404 permit for the upstream PolyMet Mine)
- *Mountain Valley Pipeline LLC v North Carolina DEC*, No. 20-1971, (4th Cir. March 11, 2021) (authority to require buffer strips as condition of certification upheld but case remanded for fuller explanation of reasons for denying certification based on uncertainties regarding viability of the project)
- *FERC, In Re Morrisville Hydro, Declaratory Order on Waiver of Water Quality Certification*, Nov. 19, 2020 (Unilateral withdrawal of application for certification restarts the 12-month clock. Distinguishing *Hoopa Valley*).

Takeaways

- States and Tribes should adopt or strengthen their water quality standards for wetlands and include habitat protection measures to fully support designated and existing uses (e.g., endangered species). Standards should be tied to the ecological functions and values of specific wetlands.
- States and Tribes must be vigilant when they receive requests for certification and be sure to decide whether to grant, deny, or condition the

license or permit within the 12-month period allowed by the statute. If an application is incomplete it should be denied without prejudice to refile. See [Jordan Cove](#) 401 certification denial by Oregon DEQ.

- Certifications should be based on water quality standards. Climate resilience can be incorporated into the standards but attempts to base certification decisions on reduction of GHG emissions, as New York DEC has done, is problematic from a legal standpoint. The scope of things covered by the “other appropriate requirements of state law” provision in 401 (d) is an unresolved issue at this point. The expected new Biden rule may clarify.