NEW EPA PROPOSAL SEEKS TO ADOPT A MORE RESTRICTIVE SECTION 401 FRAMEWORK

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On 13 January 2026, the US Environmental Protection Agency (EPA) proposed a new Clean Water Act (CWA) Section 401 Water Quality Certification Rule (the Proposed Rule) that would narrow state and tribal authority to review and condition federally regulated projects.[1] The Proposed Rule would affect project proponents that rely on federal permits—such as real estate developers, energy and utility companies, transportation agencies, ports, and industrial facilities—by altering the timing and scope of the Section 401 water quality certification process. Comments on the Proposed Rule must be received by 17 February 2026.

Section 401 requires state or tribal certification of compliance with water quality standards before federal agencies may issue licenses or permits for activities that may discharge into waters of the United States; if the certifying authority does not act within a reasonable time, certification is waived. Historically, states and tribes have also attached conditions to certifications, which then become prerequisites for federal authorization.

EPA's approach to Section 401 has swung sharply in recent years—first with a rule in 2020 that tightened timelines and limited conditioning authority (the 2020 Rule),[2] then with a rule in 2023 that restored broader state and tribal discretion (the 2023 Rule).[3] The 2026 Proposed Rule would largely return to the 2020 framework, as outlined below.

SCOPE OF CERTIFICATION

Largely returning to the 2020 Rule, the Proposed Rule would replace the broad activity-based scope of review under the 2023 Rule—which allowed states to consider whether the "activity as a whole" would comply with water quality requirements—with the following:

> *The scope of a Clean Water Act section 401 certification is limited to assuring that a **discharge** from a federal licensed or permitted activity will comply with applicable and appropriate water quality requirements. (emphasis added)*

EPA proposes adding a definition of "discharge," clarifying that it refers only to discharges "from a point source into waters of the United States" and does not include nonpoint source discharges. Furthermore, the Proposed Rule would define "water quality requirements" as "applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and applicable and appropriate state or triable water quality-related regulatory requirements for discharges."

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Finally, EPA also seeks comments regarding whether "water quality requirements" should be restricted solely to numeric criteria.

EXTENSIONS OF REVIEW TIME

Generally, under the 2023 Rule, certification decisions must be made within the default period of six months; however, that period may be extended up to one year after submission. While the Proposed Rule does not alter these periods, it proposes to eliminate automatic extensions for public notice procedures and force majeure events, requiring certifying authorities to rely on joint extension processes agreed upon with the federal agency and the applicant when necessary.

Additionally, the Proposed Rule would prohibit certifying authorities from requesting that applicants withdraw and resubmit certification requests to reset the review clock to avoid exceeding a reasonable period of time.

CONTENTS OF REQUESTS FOR CERTIFICATION

The Proposed Rule introduces a standardized list of required documents at 40 C.F.R. § 121.5(c) that constitutes a complete certification request and prohibits certifying authorities from amending this list. It also makes the submission of the standardized documents—not the materials states or tribes may request—start the statutory review clock.

CONTENTS OF A CERTIFICATION AND MODIFICATIONS

The Proposed Rule would require that a certification (a decision to grant, grant with conditions, deny, or waive a request for certification) must be accompanied by specific information and a statement indicating whether the discharge will comply with water quality requirements. Additionally, any imposed condition must be accompanied by a justification demonstrating the condition is necessary to ensure compliance with water quality requirements.

Finally, before a certifying authority could modify a certification, the Proposed Rule would require a trilateral agreement among the federal agency, certifying authority, and applicant agreeing to the modification.

SECTION 401(A)(2) "MAY AFFECT" PROCESS

Under the current 401(a)(2) process, a federal agency must notify EPA when it receives a license or permit application and either a certification or waiver from the certifying authority. EPA then has 30 days to determine whether a discharge associated with the permit or license may affect a "neighboring jurisdiction." If the EPA finds that it will, it notifies the potentially affected jurisdiction, who then has 60 days to object to the certification. Once the neighboring jurisdiction objects, a hearing may be conducted by the issuing federal agency, after which the issuing federal agency must attach relevant conditions to "ensure compliance with applicable water quality requirements."

The Proposed Rule would alter this process in a few important respects. First, EPA proposes to introduce categorical determinations alongside the current case-by-case process. Under this proposal, if certain criteria are present, EPA will or will not find that a discharge may affect another jurisdiction. Second, all objections by other states must identify the likely violations of water quality requirements that the certification would produce. Finally,

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EPA proposes adding a requirement that the issuing federal agency hold a public hearing within 90 days of the objection.

TRIBES

Finally, the Proposed Rule would eliminate the process allowing tribes to obtain "treatment as a state" (TAS) solely for Section 401 certification purposes. Instead, tribes would pursue TAS status through CWA Section 303(c) (water quality standards). Once a tribe obtains TAS status for water quality standards, it would likewise be eligible for certification authority.

If finalized, the Proposed Rule would represent a substantial shift back toward the more restrictive 2020 Rule framework, diminishing state and tribal authority over federally permitted projects within their jurisdictions. Interested stakeholders should consider submitting comments on the Proposed Rule in advance of the 17 February 2026 deadline and continue to monitor developments related to the rulemaking process.

FOOTNOTES

[1] The Proposed Rule's preamble and associated information can be found here: https://www.epa.gov/cwa-401/cwa-section-401-regulatory-requirements.

[2] We published a client alert on the 2020 Rule here: https://www.klgates.com/no-more-delay-epa-rulemaking-clarifies-timelines-and-scope-of-state-authority-in-the-clean-water-act-section-401-certification-process-06-09-2020.

[3] We published a client alert on the 2023 Rule here: https://www.klgates.com/EPA-Finalizes-Section-401-Water-Quality-Certification-Improvement-Rule-9-27-2023.

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