

DAILY NEWS

EPA Plans Update To CWA 401 Program But Faces Strong State Pushback

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STOWE, VT -- EPA is launching an effort to revise its Clean Water Act (CWA) section 401 program that governs states' approval of federally permitted pipelines and other projects, but is facing major pushback from state regulators, including at least one GOP official, who question the need for changes and oppose any diminution of their power.

David Ross, assistant administrator for EPA's Office of Water, told the Environmental Council of the States (ECOS) Fall Meeting here Aug. 29 that EPA is considering revising the 401 process, including clarifying the timeliness and scope of state reviews, and raised the possibility of new guidance or rulemaking.

Ross said that while industry concerns, outdated rules, and incomplete EPA guidance suggest an update to 401 rules may be necessary, EPA wants state input about what approach to take to any future 401 modernization.

"What do you need from this agency," he asked. "Updated guidance? Do we need a rulemaking? Is everything fine?" But some state officials indicated that no changes are needed and raised concerns that any EPA action could undercut state authority.

John Linc Stine, commissioner of the Minnesota Pollution Control Agency (MCPA), said that state devotes less than one full-time staff member to 401 reviews and yet has not received a complaint on its 401 process in the last seven years.

Section 401 of the CWA gives states authority to review federal actions for any adverse water quality impacts and impose conditions, including blocking projects, to address potential concerns.

Amid a natural gas production boom, some states, like [New York](#), have used their 401 powers to block construction of new pipelines approved by the Federal Energy Regulatory Commission (FERC), prompting broad concerns from industry groups and GOP lawmakers.

They have been pushing a series of [legislative fixes](#) that would limit when and how states can impose water quality conditions on federal permits, claiming some states have abused the 401 authority.

But the bills have drawn widespread opposition from Democrats and top state officials. [In letters](#) to House and Senate leaders earlier this month, governors, attorneys general and state regulators from both parties urged lawmakers to drop plans to amend the law.

State officials now say they are awaiting a [new version of a pending Senate bill](#) that they hope will include a series of changes that will make the measure more palatable. Among the key changes they are seeking is an amendment that would strip language from the bill limiting states' oversight to "discharges" from federal projects while preserving their current oversight of federal "activities."

But even before states' calls to drop the legislation, some [former FERC officials](#) who now represent energy companies have said that administrative rather than legislative changes might best address their concerns that states are improperly blocking projects by denying 401 certification.

"I think more leadership out of the executive branch from EPA with clear guidance to the states when implementing their delegated authorities is welcome," J. Curtis Moffett, a former FERC legal adviser who is now vice president and general counsel for Kinder Morgan, the pipeline company, told a Senate hearing last month.

State 401 Reviews

While Ross' remarks to ECOS suggest that EPA is picking up the energy industry calls for administrative changes, state regulators from Republican and Democratic-led states questioned the need for any changes, arguing that they have not received complaints and blaming companies' failure to provide necessary information for delays.

Ben Grumbles, secretary of the Maryland Department of the Environment and a former EPA water chief in the Bush administration, argued that states' CWA 401 authority is critical to ongoing efforts to protect the Chesapeake Bay. Grumbles pressed Ross for EPA's stance on the Senate Republicans' bill, calling it "clearly an effort in the Congress to dilute the authority of states under the 401 process."

And Catherine McCabe, commissioner of the New Jersey Department of Environmental Protection and a senior EPA official during the Obama administration, told Ross that if the Trump administration wants to speed the 401 process it should stop FERC from paying short shrift to citizens' concerns, which draws pushback and spurs delays.

"FERC is basically rubber-stamping the issue of public need," McCabe said. "If you can show a contract they don't even consider public need and this enrages citizens," leading to clashes and legal fights, she said.

She also argued that delays occur because pipeline companies fail to provide information necessary to support state reviews. Shawn Garvin, secretary of the Delaware Department of Natural Resources and Environmental Control who was also a top official in the Obama EPA, backed that concern.

But regulators from other states noted that concerns with the 401 process have arisen.

For example, Larry Hartig, commissioner of the Alaska Department of Environmental Conservation, said that environmentalists are pressing his agency to dramatically expand the scope of 401 reviews in the state, and that EPA's 2010 draft guidance lacks sufficient clarity, leaving the door open to attacks on state agency's processes. "There has to be some happy medium," Hartig said. "As we search for that, if we go too far, we could throw the baby out with the bathwater and states could lose a lot of rights here."

Keith Kawaoka, deputy director for environmental health at the Hawaii State Department of Health said that industry concerns about slow reviews prompted the state agency, along with EPA and Army Corps of Engineers officials, to conduct a Lean process improvement analysis of the 401 review process.

Many states are using Lean management tools to improve efficiency, an effort the Trump administration has backed. Kawaoka said that the exercise yielded standard operating procedures (SOPs) for each agency's role in the process and that implementing those changes has alleviated concerns about the timeliness of reviews.

In response to states' criticism, Ross said that outdated rules and guidance, along with industry concerns about the speed and scope of states' reviews, suggest a rethinking of the process is warranted. Ross said he was surprised that many states devote few employees to 401 reviews, and suggested an analysis of staffing and work flow might be worthwhile.

He told Grumbles that while EPA does not lobby, the agency would provide any technical support that lawmakers request.

Ross also asked Kawaoka for a copy of the SOPs, saying EPA could learn from Hawaii's experience.

And in response to McCabe's arguments that companies are failing to provide adequate or timely data, Ross said that available and adequate information are matters of perspective, and that generally, states and federal agencies should seek to better clarify up front the information that they will need from companies to support agency reviews.

Ross also cited other "questions I have been hearing, what's the scope of review under the water quality statute," and added that EPA is seeking to hear a variety of concerns before advancing any changes. "As I gather information, the goal is to try and identify what we should be looking at." -- *Dave Reynolds* (dreynolds@iwpnews.com)

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