

Uncooperative Federalism: Proposed Changes to CWA 401 WQC Regulations



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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/Do_sewallips_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)

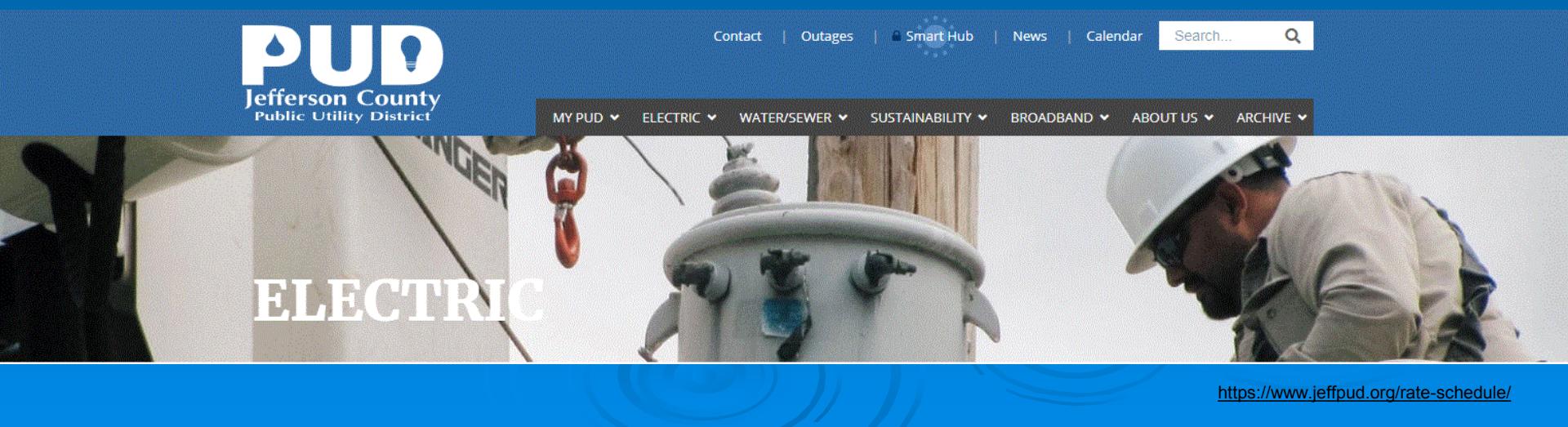
- Justice Stevens one-paragraph concurrence:

“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.”



The image shows a screenshot of the Jefferson County PUD website. The header features the PUD logo with a lightbulb icon, the text "Jefferson County Public Utility District", and a navigation bar with links for Contact, Outages, Smart Hub, News, Calendar, and a search bar. Below the header is a navigation menu with dropdowns for MY PUD, ELECTRIC, WATER/SEWER, SUSTAINABILITY, BROADBAND, ABOUT US, and ARCHIVE. The main content area contains three images: a close-up of a utility pole with the word "ELECTRIC" overlaid, a close-up of utility equipment, and a worker in a hard hat and safety harness working on a structure.

<https://www.jeffpud.org/rate-schedule/>

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

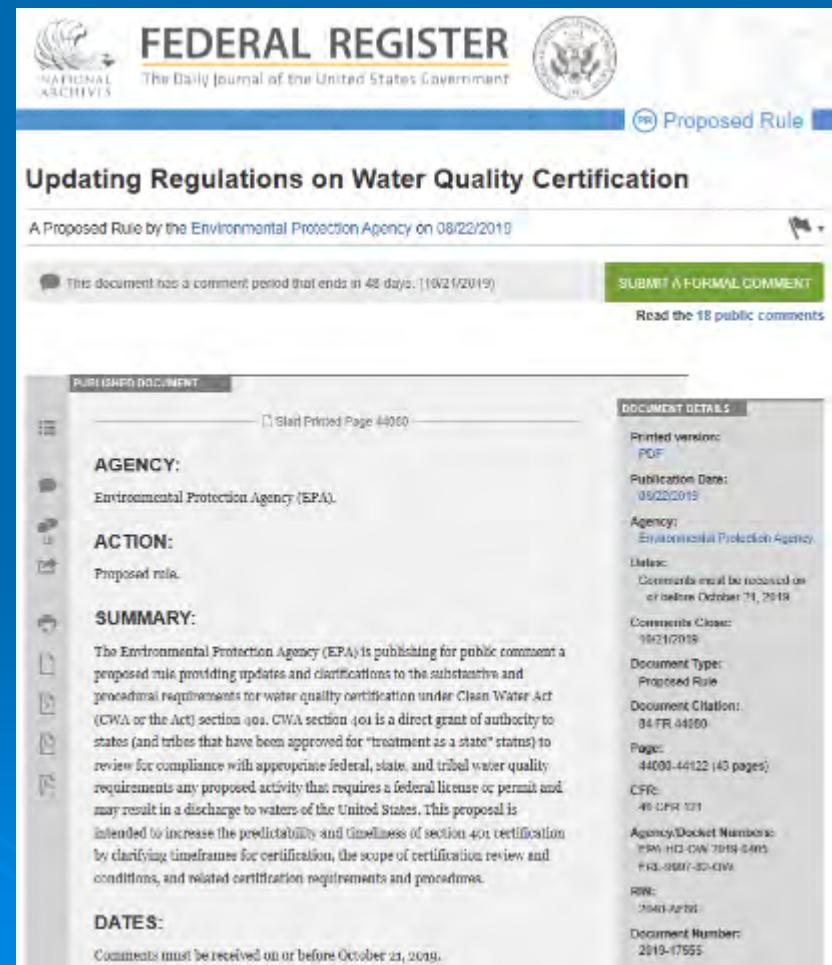


<https://naturalgasnow.org/why-isnt-the-constitution-pipeline-approved-by-now/>

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 a page from the Federal Register. At the top, the 'FEDERAL REGISTER' logo is displayed, along with the seal of the United States. A green banner on the right says 'Proposed Rule'. Below the logo, the title 'Updating Regulations on Water Quality Certification' is shown. A sub-header indicates it's a 'Proposed Rule by the Environmental Protection Agency on 08/22/2019'. A message box says 'This document has a comment period that ends in 48 days. (10/21/2019)'. A green button says 'SUBMIT A FORMAL COMMENT' and another button says 'Read the 18 public comments'. The main content area is titled 'PUBLISHED DOCUMENT' and shows 'Start Printed Page 44060'. It details the 'AGENCY' (Environmental Protection Agency (EPA)), 'ACTION' (Proposed rule), and a 'SUMMARY' of the rule's purpose. The 'SUMMARY' text states that the EPA is publishing a proposed rule to provide updates and clarifications to the procedural requirements for water quality certification under the Clean Water Act (CWA). The rule aims to increase predictability and timeliness of section 401 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures. The 'DATES' section notes that comments must be received by October 21, 2019. On the right, a 'DOCUMENT DETAILS' sidebar lists various metadata: Printed version (PDF), Publication Date (08/22/2019), Agency (Environmental Protection Agency), Date (Comments must be received on or before October 21, 2019), Comments Close (10/21/2019), Document Type (Proposed Rule), Document Citation (44 FR 44060), Page (44060-44122 (45 pages)), CFR (40 CFR 121), Agency Docket Number (EPA-HQ-CW-2018-0405), FRL-9807-20-CW, RIN (2041-AFWI), and Document Number (2019-17565).

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



<https://www.splashmath.com/math-vocabulary/time/month>

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 ...

