

Uncooperative Federalism: Proposed Changes to CWA 401 WQC Regulations



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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

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.”

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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.mainerailfinder.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' and 'The Daily Journal of the United States Government'. Below that, it says 'Proposed Rule'. The title of the rule is 'Updating Regulations on Water Quality Certification'. It was proposed by the Environmental Protection Agency on 08/22/2019. A comment period of 48 days ends on 10/21/2019. There is a button to 'SUBMIT A FORMAL COMMENT' and a link to 'Read the 18 public comments'. The document details section on the right lists the agency as the Environmental Protection Agency, the publication date as 08/22/2019, and the document type as 'Proposed Rule'. The summary section on the left states that the EPA is publishing for public comment a proposed rule providing updates and clarifications to the substantive and procedural requirements for water quality certification under the Clean Water Act (CWA or the Act) section 401. CWA section 401 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 401 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures. The dates section states that comments must be received on or before October 21, 2019.

FEDERAL REGISTER
The Daily Journal of the United States Government

Proposed Rule

Updating Regulations on Water Quality Certification

A Proposed Rule by the Environmental Protection Agency on 08/22/2019

This document has a comment period that ends in 48 days. (10/21/2019)

SUBMIT A FORMAL COMMENT

Read the 18 public comments

PUBLISHED DOCUMENT

Start Printed Page 44060

AGENCY:
Environmental Protection Agency (EPA).

ACTION:
Proposed rule.

SUMMARY:
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 401. CWA section 401 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 401 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures.

DATES:
Comments must be received on or before October 21, 2019.

DOCUMENT DETAILS

Printed version:
PDF

Publication Date:
08/22/2019

Agency:
Environmental Protection Agency

Deliver:
Comments must be received on or before October 21, 2019

Comments Close:
10/21/2019

Document Type:
Proposed Rule

Document Citation:
84 FR 44060

Page:
44060-44122 (43 pages)

CFR:
40 CFR 121

Agency/Docket Numbers:
EPA-HQ-CAN-2019-0493
FRL-9887-32-CWA

RIN:
2043-AP06

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 ...

