

# THE IMPORTANCE OF STATE AUTHORITY UNDER CLEAN WATER ACT SECTION 401

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# Western Governors' Association

- 19 Western States & 3 U.S.-flagged islands
- Bipartisan policy development, information sharing, and collective action
- Policy Resolutions
  - *Water Resource Management in the West*
  - *Water Quality in the West*
  - *Building a Stronger State-Federal Relationship*

# Clean Water Act Section 101: Congressional Goals and Policy

- Restoration and maintenance of the **chemical, physical, and biological integrity of the nation's waters**
- **Recognition, preservation, and protection of the primary responsibilities of states** to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources and to consult with the Administrator in the EPA's exercise of authority
- **Cooperation between federal agencies and state and local agencies** to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources.

# Clean Water Act Section 401

- Requires state certification of any federal license or permit for any activity that may result in a discharge into any water of the United States
  - Gives states their own congressionally-delegated authority over federal projects
  - State decisions generally receive judicial deference
- Applies to a wide scope of activities
  - Hydroelectric power
  - Natural gas pipelines
  - NPDES Permitting
  - Dredge/Fill Permitting

# State Certification Under CWA Section 401

Under Section 401, State Review May Result In:

- **Certification** – Federal license/permit may be granted
- **Denial** – Federal license/permit cannot be granted
- **Certification with State-Imposed Conditions** – Conditions must be included in the associated federal license/permit (or license/permit cannot be granted)
- **Waiver of State Authority** – May be express or due to state's failure to act within a reasonable amount of time

# Historic Issues Involving Implementation of Section 401

- **Timeline for State Certification**
  - Determined by Federal Licensing Agency
  - “Reasonable” but not to Exceed One Year
  - When Does the Timeline for Review Commence?
    - State Determinations of Completeness of Application
    - Receipt of Request for Certification
  - Practice of “Withdraw and Refile”
- **Scope of State Review and Conditioning**
  - Nexus to Water Quality
  - Discharge vs. Activity
  - Appropriate Requirements of State Law

# Clean Water Act Section 401 (a): State Water Quality Certification

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.

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# Clean Water Act Section 401 (d): State-Imposed Conditions

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.

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# Current Regulatory Policies and Positions: Environmental Protection Agency

- “States and tribes often establish their own specific requirements for a complete application for water quality certification. Generally, the state or tribe’s §401 certification review timeline begins once a request for certification has been made to the certifying agency, **accompanied by a complete application.**”
- “A complete application for §401 certification **typically includes the completed application for a federal license or permit**, including detailed descriptions of the proposed project and anticipated resource impacts.”

# Current Regulatory Policies and Positions: Environmental Protection Agency

- “It is important to note that, while EPA-approved state and tribal water quality standards may be a major consideration driving §401 decision, **they are not the only consideration.**”
- “Considerations can be **quite broad so long as they relate to water quality.** The SCOTUS has stated that, once the threshold of a discharge is reached (necessary for §401 certification to be applicable), the conditions and limitations included in the certification **may address the permitted activity as a whole.** Certification may address concerns related to the integrity of the aquatic resource and **need not be specifically tied to a discharge.**”

# Current Regulatory Policies and Positions: Environmental Protection Agency

**Jan. 18, 1991 Letter from EPA Assistant Administrator LaJuana S. Wilcher to FERC:**

**FERC asserts that “Section 401 certification conditions on FERC licenses related to “fish, wildlife, vegetation, and recreation” are inappropriate.** However, protection of water quality involves far more than just addressing water chemistry. Rather, **protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands, and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system.** Relevant water quality issues include the toxicity and bioaccumulation of pollutants, the diversity and composition of the aquatic species, entrapment of pollutants in sediment, stormwater and nonpoint source impacts, habitat loss, and hydrologic changes. A State may need to address any one or combination of these factors in particular circumstances in order to meet the mandates of the [CWA] articulated in Section 101 (a) “to restore and maintain the chemical, physical, and biological integrity of the nation’s water.”

# White House Legislative Outline for Rebuilding Infrastructure in America

## Clarify Time Frames and Reduce Delays for Section 401 Certification Decisions

- In spite of the statutory time frame, **States increasingly do not issue permits within the applicable time frames**, or they require applicants to re-file prior to the one-year lapse, which produces a loop of repeated lack of issuance and re-filing.
- Amending the Clean Water Act to change the time period for issuance of a State 401 Certification **by addressing the time periods for making a completeness determination and the time for a State decision** would reduce this delay.

# Natural Gas Council Letter to the White House (Apr. 10, 2018)

- ▶ Recent implementation of Section 401 has created much confusion and frustration and has resulted in significant delays to infrastructure projects. Moreover, some states are **improperly using Section 401 to hijack the permitting process** for pipelines that transport natural gas in interstate commerce.
- ▶ These actions **undermine the Federal Energy Regulatory Commission's exclusive authority** to approve interstate natural gas pipelines, and deny other states the opportunity to benefit from this infrastructure. These state actions are **a disservice to the cooperative federalism** central to the efficient and predictable permitting of infrastructure.

# October 2018 Letter from U.S. Senators to EPA

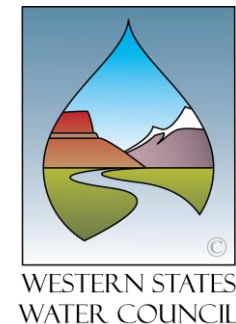
- ▶ “In the last few years, a troubling trend directed at fossil energy projects has arisen. **A select number of states have hijacked Section 401** to delay or block the development of natural gas pipelines and a coal export terminal. While the focus of these abuses today is fossil energy, the approach could be used to target any type of project that is disfavored politically.”
- ▶ “To our knowledge, the most recent EPA document regarding Section 401 is a 2010 interim ‘handbook’ issued by the prior administration. EPA did not ask for public comment on the handbook, and it contains clear misstatements of law. For example, the handbook suggests that a state’s ‘reasonable period’ of time to act on a request for water quality certification begins to run when an application is complete. This is incorrect. **That period begins to run when the state receives the application.**”



# Recent Administrative Announcements

- Potential Executive Order
- EPA Rulemaking / Handbook “Revision”
- USACE Policy Guidance

# Coalition of Associations of State Officials



# Communications with the Federal Government

- ▶ Aug. 2018 Letter to Congressional Leadership
- ▶ Dec. 2018 Letter to EPA
- ▶ Jan. 2019 Letter to President Trump
- ▶ Feb. 2019 Letter to EPA and USACE with Process Improvements

# Communications with the Federal Government

- ▶ Urge Congress and EPA to reject any legislative or regulatory changes that may diminish, impair, or subordinate states' ability to protect water quality within their boundaries.
- ▶ Emphasize state-federal partnership and “cooperative federalism” model of Clean Water Act implementation.
- ▶ Legislative or regulatory efforts to streamline environmental permitting should be developed through meaningful and timely consultation with states and must not interfere with states' sovereign or statutory authorities.

# Recommended Process Improvements

- ▶ Preservation of State Authority and Cooperative Federalism
- ▶ Timelines for State Review and Waiver of State Authority
- ▶ Increased Early Coordination and Communication
- ▶ Scope of State Review
- ▶ Data and Staffing

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