

SUMMARY

EPN Comments on EPA's Proposed Update of State Water Quality Certifications Under the Clean Water Act

October 21, 2019

On October 21, 2019, EPN submitted [comments](#) objecting to elements of EPA's [proposal](#) to update regulations on water quality certification under Section 401 of the Clean Water Act (CWA). Section 401 of the CWA requires any applicant seeking a federal permit or license for activities that may result in a discharge to obtain a water quality certification from the state or states from which the discharge will originate; it gives states and authorized tribes the authority to verify compliance with the CWA and state water quality requirements.

EPN's review of the proposal found that, if finalized, it could establish requirements and standards for state water quality certification for federal permits that inappropriately restrict the scope and timing of this important avenue for states to protect their waters. EPN also found that the proposed limitations are inconsistent with the CWA.

Under the CWA, federal agencies are subject to state water pollution and water quality requirements, whether substantive or procedural. Section 401 is written broadly, authorizing states, among other things, to include conditions in certifications related to "any requirement of state law." Section 401 should be construed and applied in a manner that enables states to apply their standards as fully as the statute allows.

EPN's review specifically found that the proposal:

- Urges a reduction in what would constitute a "reasonable time" for a state to act on a certification request from six months to a year in the existing regulation to a period perhaps as short as 60 days.
- Changes and limits the scope of various considerations for 401 certifications, including what triggers an obligation to request certification, what the certifying agency can look at in determining compliance, and what conditions can be included with the certification. The proposed regulation would limit consideration to point sources, such as factories, and exclude discharges from non-point sources such as industrial runoff.
- Should specify that having inadequate or insufficient information to certify compliance with water quality requirements is an acceptable basis for denial.
- Should allow the certifying authority to deny certification in circumstances in which the state disagrees with a federal agency over the requirements of state law.
- Should require pre-request consultations with the states to apply for all certifications, or at least for major projects, rather than only when the Administrator of EPA is the certifying authority.
- Should clarify that if information necessary to determine compliance with water quality protection isn't available during the "reasonable period of time," certification may be denied.