

# EPA Limits State Authority in New 401 Certification Final Rule

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EPA issued its Clean Water Act Section 401 Certification Final Rule on June 1, 2020 in an effort to comply with the directives of Executive Order 13868 promoting efficient permitting and timely agency actions. Section 401 grants states and tribes the authority to review any action that may result in a discharge to waters of the United States for consistency with water quality requirements when that action requires a federal license or approval permit. EPA's new rule reaffirms that states and tribes must act within a reasonable time (which can be defined by the federal agency authorizing the activity) not to exceed one year, and that there is no tolling provision in Section 401. The new rule also provides a more precise explanation for when the review period begins by defining a "certification request." Historically, state and tribal agencies have had disparate criteria for triggering a 401 review, often based on the receipt of what those agencies considered an "administratively complete" application. EPA also narrowed the scope of the certifying authority's review to "applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States."

The 401 Certification Final Rule is intended to go into effect sixty (60) days from issuance, but is likely to face legal challenges delaying implementation. Environmental groups are likely to argue the changes strip certifying authorities of the ability to holistically review water quality impacts from projects requiring federal licenses and permits. The rule's attempt to create a bright-line one-year review period is also at odds with the so-called "withdraw-and-resubmit" practice of many certifying authorities for large and complex projects. That widespread practice has also been called into question by recent federal court decisions, including *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, where the D.C. Circuit Court of Appeals found that a certifying authority had waived its power under Section 401 where its withdraw-and-resubmit practice had extended the review beyond one year. The U.S. Supreme Court denied cert on *Hoopa Valley* in December 2019, leaving its decision intact. Effectively, the rule will codify what is now already a legal precedent.

While EPA's rulemaking is ostensibly intended to provide greater certainty to permit applicants and industry, it is unclear what the reality on the ground will look like even if the rule holds up under likely litigation. The limited scope and timeline for review under the new rule places certifying authorities in the position of making decisions on significant projects that are more likely to be litigated, regardless of which way agencies decide.

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