

**TESTIMONY OF  
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OFFICE OF WETLANDS, OCEANS AND WATERSHEDS  
OFFICE OF WATER  
U.S. ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE  
COMMITTEE ON ENERGY AND COMMERCE  
SUBCOMMITTEE ON ENERGY  
UNITED STATES HOUSE OF REPRESENTATIVES**

**June 7, 2018**

Good morning Chairman Upton, Ranking Member Rush and members of the Subcommittee. I am John Goodin, Acting Director for the Office of Wetlands, Oceans and Watersheds in the Office of Water, at the U.S. Environmental Protection Agency (EPA). Thank you for the opportunity to appear before you today to discuss Clean Water Act (CWA) section 401 water quality certification authority, as it relates to federal permits and licenses.

Section 401 of the CWA provides states with an opportunity to evaluate and address aquatic resource impacts of federally-issued licenses and permits. It is a direct grant of authority from Congress to the states. The statute does not provide the EPA with the authority to review, approve, or deny state section 401 certification programs or individual state certification decisions.

Under section 401(a)(1), a state determines whether any discharge that may result from a federally licensed or permitted activity “will comply with” certain specified sections of the CWA, including state water quality standards approved by the EPA pursuant to section 303.

Under section 401(d), a state's certification shall set forth "any effluent limitations and other limitations, and monitoring requirements" necessary to assure compliance with those same sections of the CWA, as well as "any other appropriate requirements of State law." A federal agency cannot issue a license or permit for an activity that may result in a discharge to waters of the United States until the state where the discharge would originate has granted or waived section 401 certification.<sup>1</sup> Congress sought to ensure that section 401 did not unduly delay the issuance of federal licenses or permits by providing that states complete their section 401 certification analysis and decision within "a reasonable period of time (which shall not exceed one year)."<sup>2</sup> Tribes with "treatment as a state" (TAS) status may exercise section 401 certification authority.

Among the licenses and permits subject to section 401 certification are the U.S. Army Corps of Engineers section 404 permits for discharge of dredged or fill material, section 402 National Pollutant Discharge Elimination System (NPDES) permits issued by the EPA in states that have not been authorized to administer the NPDES program, and Federal Energy Regulatory Commission licenses for non-federal hydroelectric dams.

States or tribes make their decisions to grant, deny, certify, condition, or waive their certification of a federal licenses or permits based, in part, on whether a discharge from the proposed project will comply with water quality standards developed under CWA section 303. In addition, state

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<sup>1</sup> CWA § 401(a)(1); 40 CFR Part 121.

<sup>2</sup> CWA § 401(a)(1).

certifying agencies consider whether any discharge resulting from the licensed or permitted activity will comply with any applicable effluent limitations under CWA sections 301 and 302, new source performance standards under section 306, and toxic pollutant restrictions under section 307.<sup>3</sup> Conditions imposed on a licensed or permitted activity pursuant to section 401(d) “assure” compliance with “any other appropriate requirement of State law” and must “relate to water quality in one manner or another.”<sup>4</sup> Such conditions must become a term of the permit or license should it be issued.<sup>5</sup>

The EPA has two primary roles under section 401. First, the Agency acts as the certifying agency where the proposed discharge would originate within a jurisdiction without section 401 authority;<sup>6</sup> most typically that is on tribal lands without TAS status. Second, where the EPA has determined the proposed discharge “may affect” neighboring jurisdictions, the CWA requires the EPA to notify those other jurisdictions whose water quality may be affected as well as the licensing or permitting agency and the applicant, and provide an opportunity to comment on or object to the license or permit.<sup>7</sup> Administrative regulations, which pre-date the establishment of the EPA, describe the process of certification and the process for notifying neighboring jurisdictions.<sup>8</sup>

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<sup>3</sup> CWA § 401(a)(1).

<sup>4</sup> *American Rivers v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-111 (2d Cir 1997).

<sup>5</sup> CWA § 401(d).

<sup>6</sup> CWA § 401(a)(1), “[i]n any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator.”

<sup>7</sup> CWA § 401(a)(2).

<sup>8</sup>40 C.F.R. Part 121.

In addition to its two primary roles laid out in the CWA, the EPA has helped states and authorized tribes better understand how they can use section 401 certification to address water quality concerns while not unduly delaying proposed projects. For example, in 2010 the EPA developed a handbook, “Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes.”<sup>9</sup> The 2010 Handbook is not formal guidance, but instead summarizes section 401 statutory provisions and caselaw, and provides examples of ways that states and tribes have used available information to make informed and timely section 401 certification decisions.

The President’s Infrastructure Initiative seeks to increase the efficiency and effectiveness of environmental review for new roads, dams, pipelines, and other critical infrastructure.<sup>10</sup> The EPA strongly supports the Infrastructure Initiative’s emphasis on the use of advance coordination, and thinks such coordination can play an important role in ensuring states and tribes complete their section 401 certification process on a timeframe consistent with other planning and review activities. For example, advance coordination can identify potential water quality concerns and information needs early in the process, thereby helping ensure that project sponsors are able to provide information necessary to inform the certifying agency’s decision within the statutorily allotted timeframe. The Agency has heard concerns of stakeholders regarding the section 401 process and we support the President’s recommendations regarding clarification of those provisions in statute. Moreover, the Agency has identified a potential action in its most recent regulatory agenda and may consider updates to the 2010 Handbook.

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<sup>9</sup> [https://www.epa.gov/sites/production/files/2016-11/documents/cwa\\_401\\_handbook\\_2010.pdf](https://www.epa.gov/sites/production/files/2016-11/documents/cwa_401_handbook_2010.pdf)

<sup>10</sup> <https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf>

In conclusion, I would like to thank you, Chairman Upton, Ranking Member Rush and members of the subcommittee for the opportunity to testify before you today. The EPA looks forward to continuing our work with this Subcommittee to foster protection of America's waterways and the public's health and well-being. I will be happy to answer any questions you may have.