



EPA Wants to Change the Scope of the Clean Water Act's Rule 401 Certification Process. The Review Process Landscape Changes Dramatically.

On January 13, 2026, the U.S. Environmental Protection Agency (EPA) issued an [announcement](#) for a proposed rule that would, according to the agency, “return Clean Water Act (CWA) Section 401 to its proper statutory purpose, protecting water quality while eliminating regulatory overreach that has imposed unnecessary burden on critical infrastructure projects.”

The [press release](#) states in part:

This action would correct a fundamentally flawed 2023 Biden EPA rule that allowed delay tactics and protracted certification timelines inconsistent with the Clean Water Act. The [Biden] 2023 rule's expansion of Section 401's scope enabled certain states to abuse this provision, creating substantial regulatory burdens that unnecessarily delayed or blocked vital energy, infrastructure, and development projects critical to America's economic and national security. The Trump EPA's proposal would eliminate these regulatory hurdles, restoring the law to its intended function while removing impediments to responsible development.

Rule 401 Certification. [Section 401 of the CWA](#) provides states and authorized Tribes with an important tool to help protect the water quality of federally regulated waters within their borders, in collaboration with federal agencies.

Under Section 401 of the CWA, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the U.S. unless a Section 401 water quality certification is issued, or certification is waived. States and

authorized Tribes where the discharge would originate are generally responsible for issuing water quality certifications. In cases where a state or Tribe does not have authority, EPA is responsible for issuing certification. See [33 USC 1341](#).

Some of the major federal licenses and permits subject to Section 401 include:

- Clean Water Act Section 402 and 404 permits issued by EPA or the Corps of Engineers;
- Bridge Act of 1946 permits issued by the U.S. Coast Guard;
- Federal Energy Regulatory Commission licenses for hydropower facilities and natural gas pipelines; and
- Rivers and Harbors Act Section 9 and 10 permits.

What is the Current Scope of the Review Process? Under [existing regulations](#), the current approach that has been used by states and Tribes for many years authorizes the certifying authority to evaluate whether an “activity” will comply with “applicable water quality requirements” in Waters of the U.S. (WOTUS) (as well as non-WOTUS in certain circumstances).

How Will the New Rule Change the Scope of the Review? The [new rule](#) will change the scope of review dramatically. In its review, the certifying authority will now focus solely on federal waters (*i.e.*, WOTUS), to the exclusion of any non-WOTUS and will only evaluate whether a “point source discharge” will comply with appropriate and applicable water quality requirements. The new rule eliminates any reference to non-WOTUS. The proposed rule states at page 2040 of the Fed Reg notice:

§ 121.3 **Scope of certification.** The scope of a Clean Water Act section 401 certification is **limited** to assuring that a discharge from a federally licensed or permitted activity will comply with applicable and appropriate water quality requirements. [Emphasis added.]

An article by [Inside Climate News](#) states, in part:

Under the proposal, states and authorized tribes would be limited to reviewing only the direct water-quality impacts of a project’s discharges into federally protected waters and would no longer be able to consider broader water-quality effects caused by the project as a whole, said Nancy Stoner, a senior attorney at

the Environmental Law & Policy Center,

That shift could weaken oversight of projects such as dams, she said, noting that water released from a dam may meet quality standards while the structure itself blocks fish migration and disrupts river flows – impacts the [U.S.] Supreme Court has previously ruled that states may consider when making certification decisions.

Stoner also warned the proposal would further limit state authority to waters still covered by the Clean Water Act, a shrinking category after the Supreme Court's 2023 Sackett decision, and later efforts by EPA and the Army Corps to narrow which waterways qualify for federal protection.

As a result, states could lose the ability to use Section 401 to protect many smaller streams, wetlands and headwaters within their borders, leaving state regulators powerless to block, or place conditions on, federally permitted projects that could damage those waters, even if they are vital to local drinking water supplies, fisheries, recreation or flood control.

As written, if there is no related discharge from a point source to federal waters, the proposed rule may effectively eliminate any consideration by the states or tribes of a variety of impacts from a project such as climate change, impacts to wetlands downstream of a dam, or impacts of the construction and operation of a proposed pipeline.

Indeed, that is exactly the purpose of the proposed rule. The [EPA Fact Sheet](#) states in part:

This action would correct a fundamentally flawed 2023 EPA rule that allows delay tactics and protracted certification timelines inconsistent with the Clean Water Act. The 2023 rule's expansion of Section 401's scope enabled certain states to abuse this provision, creating substantial regulatory burdens that unnecessarily delayed or blocked vital energy, infrastructure, and development projects critical to America's economic and national security. This proposal would eliminate these regulatory hurdles, restoring the law to its intended function while removing impediments to responsible development.

Comments Are Due by February 13, 2026. Interested parties should visit [the EPA website](#) to view the docket for this rulemaking and submit comments, identified by **Docket ID No. EPA-HQ-OW-2025-2929**. Comments will be received until February 13, 2026. In addition, EPA will be hosting a public meeting on **January 28, 2026**. Visit [the EPA](#) for more information on how to register to provide oral comments.

Next steps? Comment period; finalize the rules, quickly; and to the courts, of course.

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