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EPA's Proposed CWA 401 Rule Narrows Scope of State Reviews, Reins in Timelines

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On January 15, 2026, the Environmental Protection Agency (EPA) published the long-awaited proposed rule Updating the Water Quality Certification Regulations (Proposed Rule), which, if adopted, would largely reinstate the previous Trump administration's 2020 Clean Water Act Section 401 Certification Rule (2020 Rule). EPA's proposal seeks to limit the scope of state-issued water quality certifications (WQCs) under Section 401 of the Clean Water Act (CWA) to water quality impacts associated with discharges authorized by federal agency actions. The Proposed Rule also addresses concerns raised by applicants for federal licenses and permits (including for hydroelectric projects, natural gas pipelines, and other energy and infrastructure projects) that certain states have overstepped their Section 401 authority to impose onerous terms and conditions unrelated to water quality and artificially extended the statutory time limits for issuing WQCs.

CWA Section 401 requires any applicant for a federal license or permit that may result in any discharge to waters of the United States (WOTUS) to obtain a state certification that "any such discharge will comply with the applicable provisions" of sections 301, 302, 303, 306, and 307 of the CWA — all of which relate to effluent limitations. States may impose conditions on such certifications, including to comply with "any other appropriate requirement of State law" as provided in CWA Section 401(d). Over time, however, many states have used this conditioning authority to address issues unrelated to water quality.

EPA's Proposed Rule, similar to the 2020 Rule, would narrow the scope of WQC conditions and provide predictable timelines for projects to receive their WQCs. In so doing, the Proposed Rule rolls back significant portions of the current rule, issued in 2023 under the Biden administration (2023 Rule).

Following is an overview of key changes in the Proposed Rule:

- **Scope of Certification** – EPA notes the current 2023 Rule "provides States with sweeping authority to decide the fate of nationally important infrastructure projects, such as natural gas pipelines and hydropower dams, based on potentially speculative water quality impacts not linked to a point source discharge into waters of the United States." To correct this, and consistent with the 2020 Rule, the Proposed Rule would scrap the 2023 Rule's provision that the WQC can relate to the "activity as a whole" and instead limit state certifications to addressing discharges "from a point source into waters of the United States." This, in turn, would prevent states from using Section 401 to address nonpoint source impacts, impacts to purely state waters that are not considered WOTUS, and non-water quality policy concerns such as land use, endangered species, and climate change. The preamble to the Proposed Rule describes in detail how limiting WQCs in this way is consistent with the legislative history and plain language of the CWA, relying heavily on the Supreme Court's landmark 2024 decision in *Loper Bright Enterprises v. Raimondo* curtailing judicial deference to agencies' statutory

interpretations.

- **Request for Certification** – The Proposed Rule would create a uniform, national standard for what a permit applicant must submit in a "request for certification" to establish, with certainty, the start of the one-year statutory period for states to act on a WQC request. Conversely, the Proposed Rule would bar states from imposing their own "completeness" criteria that control when the clock starts — although they may still request additional information from applicants.
- **Timing of Review** – The Proposed Rule reiterates that the failure of a state to act on a WQC request within one year results in a waiver, while imposing several restrictions on states' ability to extend the one-year certification deadline. Extensions would require the approval of the federal agency and only be allowed for specified reasons, and state certifying authorities would be barred from orchestrating withdrawal and resubmittal of requests to extend the one-year "reasonable period of time" cap — a maneuver that has long been criticized by applicants as gamesmanship that further facilitates the injection of non-water quality policy priorities into the certification process. Notably, the Proposed Rule does *not* foreclose another form of gamesmanship: denial of WQC applications without prejudice.
- **Contents of Certifications** – Among other changes, the Proposed Rule would require states to explain how each condition of a certification relates to a CWA effluent limitation and would mandate any WQC denial to cite the specific water quality requirement at issue, which may deter certain states' efforts to prolong the WQC process by denying applications without prejudice. Notably, EPA explains that WQC conditions should be limited to "water quality requirements" defined as applicable provisions of sections 301, 302, 303, 306 and 307 of the CWA, and any applicable and appropriate state water quality-related regulatory requirements for discharges. In explaining what water quality-related requirements are "applicable and appropriate," EPA expressly provides that it is not limiting state regulatory provisions to only EPA-approved provisions — although it requests comment on this point. The Proposed Rule continues to allow states to incorporate narrative water quality standards and other regulatory requirements that apply to point source discharges, declining to limit conditions to just "numeric water quality criteria."
- **Modifications** – The Proposed Rule would allow states to modify a previously granted WQC only when the federal permitting agency and the applicant agree to the modification, including the content of that modification.
- **Neighboring Jurisdictions** – The Proposed Rule would streamline the process by which other states may object to a discharge that "may affect" their water quality under CWA Section 401(a)(2), including establishing a 60-day deadline for the other state to file an objection and a 90-day deadline for the permitting agency to act on a valid state objection.

In aggregate, the proposed amendments would create a WQC process that is more predictable, provides long-term certainty for WQC holders, and significantly constrains states' ability to bootstrap other policy concerns onto their Section 401 authority. However, EPA notes in the preamble that if a state imposes conditions in a WQC that exceed the scope outlined in the 401 Rule, the remedy would be found in court. This means litigation of both the Proposed Rule and individual WQCs is likely to continue.

EPA did not include several regulatory changes suggested by industry during past comment periods in the Proposed Rule, indicating that there are still opportunities for further improvement before EPA adopts a final rule. For example, the Proposed Rule is silent on the issue of who (states and/or action agencies) has the authority to enforce WQC conditions incorporated into the federal license or permit, as well as the extent to which EPA or the federal permitting agencies can serve as a "gatekeeper" for WQC conditions that exceed the scope of CWA Section 401.

Comments on the Proposed Rule are due by February 17, 2026. For questions or to discuss its implications on specific projects and industries, we encourage you to contact Troutman Pepper Locke's attorneys in our Energy and Environmental + Natural Resources practice groups.

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