



New EPA Section 401 Guidance Clarifies Timelines for and Scope of Certification Reviews

Prepared by:
Jamie Auslander, Parker Moore and Katrina Krebs
Beveridge & Diamond

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Published on www.lorman.com - October 2019

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New EPA Section 401 Guidance Clarifies Timelines for and Scope of Certification Reviews

Written by Jamie Auslander, Parker Moore, Katrina Krebs – 6/18/19

On June 7, 2019, the U.S. Environmental Protection Agency (EPA) issued nonbinding [guidance](#) clarifying and providing recommendations regarding the implementation of Section 401 of the Clean Water Act, 33 U.S.C. § 1341. Most notably, the guidance states that Section 401 certification reviews are to be completed within a reasonable period not to exceed one year and that the scope of certification reviews is limited to water quality impacts.

EPA issued the Section 401 guidance pursuant to [Executive Order 13868](#), which directs the agency to review and revise the procedures by which states and tribes verify that a permit or license for a project within their borders complies with established water quality standards. States and tribes have increasingly used Section 401 certification reviews to delay, condition, or deny permits and licenses, and the guidance is the first of several steps identified in the executive order aimed at addressing this issue.

Consistent with *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), the Section 401 guidance clarifies that states and

tribes are to complete their Section 401 certification reviews within a reasonable period not to exceed one year. Otherwise, the federal permitting agency may determine that the state or tribe has waived the certification requirement. The Section 401 guidance does not affect shorter time periods for review established by agencies, such as the 60-day timeline for certification provided by the U.S. Army of Corps of Engineers. See 33 C.F.R. § 325.2(b)(ii).

The clock for certification reviews begins running when states and tribes receive a request—states and tribes cannot delay their review simply because the request is incomplete. Similarly, states and tribes cannot pause or stop the certification review period unless the federal permitting agency agrees and the certification review period will not exceed a year. Withdrawing and resubmitting a certification request, for example, does not restart the timeline.

EPA also recommends in its Section 401 guidance that states and tribes limit the scope of certification reviews and the conditions placed on certification to potential water quality impacts. When a state or tribe acts beyond the scope of Section 401, the federal permitting agency is directed to work with EPA to determine whether waiver occurred or whether the permit or license should be issued with the conditions.

The Section 401 guidance further recommends that states and tribes act on a certification request even where National Environmental Policy Act review is incomplete. Outstanding

information requests do not toll the time period for acting on a certification request.

Additionally, EPA's Section 401 guidance encourages early collaboration between federal permitting agencies and states and tribes in discussing timelines for certification reviews, setting milestones, and establishing other best practices. Federal permitting agencies are directed to provide technical assistance to states and tribes, to seek guidance from EPA when questions arise about implementing Section 401, and to encourage project proponents to request all necessary Section 401 certifications at the same time consistent with the One Federal Decision policy.

While not legally enforceable, the Section 401 guidance demonstrates EPA's commitment to streamlining certification procedures. EPA is continuing to conduct outreach to states, tribes, and federal agencies on certification reviews and intends to next revise its regulations implementing Section 401, which will provide opportunities for public input.

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