INSIDE EPA

Rejecting Criticism, EPA Touts CWA 401 Rule's 'Cooperative Federalism'

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EPA is defending its final Clean Water Act (CWA) rule limiting the scope of state reviews of federally permitted projects' water quality impacts as defining the appropriate parameters of the agency's "cooperative federalism" policy balancing EPA and states' regulatory powers, rejecting calls from critics that the rule undercuts states' authority.

"[T]he final rule does not infringe upon the roles of States as co-regulators, nor does it undermine cooperative federalism," EPA says in the rule, **signed June 1** by EPA Administrator Andrew Wheeler ahead of its upcoming publication in the *Federal Register*.

Wheeler told reporters June 1 that while many states conduct their CWA section 401 permit certifications in accordance with the water law, some states do not and have been "trapping projects in a bureaucratic Groundhog Day" to prevent them from moving forward by raising concerns about climate change and other non-water quality issues. The new rule supports a state's right to ensure its water quality standards are protected but it does not allow one state to dictate to others what they should do, Wheeler said. While the rule is drawing praise from GOP lawmakers and others who have said the prior 401 permit process stymied major pipeline and other fossil fuel projects, it is likely to draw a lawsuit from environmentalists and Democratic-led states. "This rule defies Congressional intent and flies in the face of cooperative federalism--a concept, we're reminded, that's merely a pretense in this administration." Sen. Tom Carper (D-DE), the top Democrat on the Senate environment committee, said in a statement.

His comments echo concerns raised by a number of commenters, who asserted that the earlier **proposed version** of the rule was inconsistent with the concept of cooperative federalism and the important role of states as co-regulators. As a result, these commenters believed that the proposed rule undermines the cooperative federalism structure established by Congress in the CWA in section 101(b) and section 101(g), EPA says.

Most of these commenters noted that the CWA recognizes states' primary authority over their water resources, designates states as co-regulators under a system of cooperative federalism, and expresses intent to preserve and protect states' responsibilities and rights, the rule says.

The commenters stated that EPA should not dictate what states can and cannot do, with another commenter asserting that the proposed rule would unduly limit states' authority and autonomy to protect their water resources. A few commenters asserted that the proposed rule would harm Congress' division of authority between certifying authorities and federal licensing and permitting agencies.

But EPA says the final rule "does not and cannot alter the basic scope of authority granted by Congress to States and Tribes for the review of potential discharges associated with federal licenses and permits for compliance with water quality standards."

"Accordingly, this rule neither diminishes nor undermines cooperative federalism. Rather, the final rule clearly identifies when a certification is required and the permissible scope of such a certification -- including conditions of that certification -- and reaffirms that certifying authorities have a reasonable period of time to act on a certification request, which cannot exceed one year. This clarity helps define the appropriate parameters of cooperative federalism contemplated by section 401, and does not undermine it," the final rule says.

Early Reaction

Some Republican-led states are praising the final rule, saying the regulation will streamline the permitting process for essential energy infrastructure and close loopholes in the CWA section 401 certification process to prevent some states from inappropriately extending their jurisdiction beyond their own boundaries.

But the final rule is largely unchanged from the proposed version and is unlikely to satisfy concerns raised by numerous state regulators and Democratic attorneys general. For example, the Association of Clean Water Administrators **was highly critical** of the proposed rule, arguing it would diminish state authority, unlawfully reduce the scope of CWA section 401 reviews, create a role Congress never intended for federal agencies and present implementation challenges for states.

Under section 401, states are generally authorized to review any proposed activity that requires a federal license or permit and may result in a discharge to ensure compliance with appropriate state water quality requirements. These actions include CWA section 402 discharge permits in states where EPA administers the permitting program, CWA section 404 permits issued by the Army Corps of Engineers, hydropower and pipeline licenses issued by the Federal Energy Regulatory Commission (FERC), and Rivers and Harbors Act sections 9 and 10 permits issued by the Corps.

The final rule, like the proposal, stipulates that states have no more than one year to act on a request for 401 certification and that certifications can only apply to activities that may result in a discharge from a point source into a water of the United States.

However, EPA says it amended provisions in the final rule to increase clarity and regulatory certainty, including clarifying the definition of "water quality requirements," adding elements required in a party's request for certification, and refining the information that must be included in a decision document.

Additionally, the final rule requires a party that will need a 401 certification to request a pre-filing meeting with state officials in order to promote early coordination. An EPA official told reporters that states are not required to grant the request for a pre-filing

meeting, but the agency believes “this is a really great tool” to ensure states can meet the one-year deadline for a decision.
Furthermore, the final rule clarifies that federal agency review of a state’s 401 decision document is focused on procedural requirements of section 401 and the final rule, rather than substantive issues in the document, as the proposed rule would have allowed.

The final rule explains that as a general matter, federal agencies may not readily possess the expertise or detailed knowledge concerning water quality and state law matters that would be necessary to make substantive determinations.

“EPA has determined that other provisions of this final rule, such as the definitions of ‘water quality requirements,’ ‘discharge,’ and ‘certification,’ and the information requirements for certification conditions and denials listed in section 121.7(d) and section 121.7(e) [of the rule], will help ensure that certifying authorities have the information and necessary tools to act on a certification request within the scope of certification as provided in this rule.”

EPA officials said if parties have concerns about the substantive issues in the decision document, those will be left for the courts to decide.
The rule says this limited review function may be new to some federal agencies but is consistent with EPA’s own longstanding practice under its National Pollutant Discharge Elimination System regulations implementing section 401.

“Under the final rule, if a certification, condition or denial meets the procedural requirements of section 401 and this final rule, the federal agency must implement the certifying authority’s action, irrespective of whether the federal agency may disagree with aspects of the certifying authority’s substantive determination.”

EPA’s Defenses

But the final rule defends other provisions left unchanged from the proposed rule despite state opposition.

For example, some commenters raised concerns that the proposed rule would be inconsistent with existing state requirements, such as state statutes or regulations regarding notice and comment, completeness, impact and degradation avoidance, and mitigation that may require more information and time for the certification process than the rule provides.

The final rule says one commenter asserted that if states were not provided additional time to assess the new rule’s impact on their state laws and regulations, the new rule could require the states to either violate their own laws or deny more section 401 certifications, which could result in litigation and further delay for projects subject to section 401.

Other commenters asserted the proposed rule would make state 401 programs less efficient and would lead to national inconsistency, and several commenters asserted that EPA's interpretation of the CWA and case law will result in legal challenges to the final rule, which would in in turn lead to confusion and delays in its implementation. Additionally, several commenters indicated that because states may need to change their statutes and regulations in response to the final rule, litigation will ensue over those state changes resulting in further regulatory uncertainty, defeating the intent of the proposal to make the section 401 process more efficient.

EPA acknowledges that some states may need to update their regulations to be consistent with the procedural and substantive elements of the final rule, and while such updates may have an initial burden on states, they will ultimately result in more efficient certification and federal permitting processes.

Typically, this type of CWA rule would become effective 30 days after publication in the *Federal Register*, but EPA says it is making the rule effective 60 days after publication in order to give the agency additional time to develop implementation materials for states and federal agencies.

Additionally, EPA says most if not all states have emergency rulemaking authorities and the agency remains reading and willing to provide any necessary technical assistance. –

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