Changes in Sec. 401 & Implications for State Programs

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Section 401 Clean Water Act

No federal permit/license can be issued that may result in a discharge to waters of the U.S.

- Unless
  
That state or authorized tribe certifies that the discharge is consistent with standards and other water quality goals or waives certification

No certification or waiver means no federal permit or license
“State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution:

These are the very reasons that Congress provided the States with power to enforce ‘any other appropriate requirement of State law,’ 33 U.S.C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge,”
§401(d) thus allows the State to impose ‘other limitations’ on the project in general to assure compliance with various provisions of the Clean Water Act and with ‘any other appropriate requirement of State law’…

And §401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.
What is driving talk of change?

➢ Administration’s Infrastructure Push Includes Permit Streamlining Language
  ➢ Corps Memo
  ➢ EPA Consultation

➢ Legislation
  ➢ Water Quality Certification Improvement Act
  ➢ Vessel Incidental Discharge Act
  ➢ Hydropower Modernization Act

➢ High profile denials
Implications of Change

$401$ certification by itself is not a comprehensive water quality program for states and tribes, it can nevertheless be an effective water quality protection tool. EPA Handbook

Consider proposed activities and discharges in light of designated uses and related water quality standards; balance competing water uses and other resource management priorities.
Process Improvements

Strengthen the efficiency and efficacy of § 401 programs by clarifying responsibilities regarding consultation and better defining information required by project proponents in the application process.

The recommendations also address several aspects of cooperative federalism and offer significant opportunities to strengthen the state-federal relationship.
Process Improvements

- Preservation of Cooperative Federalism
- Timelines for State Review / Waiver of State Authority
- Increased Early Coordination and Communication Between Applicants and State/Federal Officials
- Scope of State Review
- Data and Staffing
Questions?

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