

Clean Water Act §401 Key Principles

In 2020, the Environmental Protection Agency (EPA) published a final rule (FR) that significantly changes the way states and tribes with treatment as states (TAS) may manage their natural resources under §401 of the federal Clean Water Act (CWA). Section 401 is an essential component of the nation’s resource management scheme, impacting directly everything from the siting and construction of major infrastructure like methane/natural gas pipelines, hydropower dams, nuclear plants, bridges, causeways, to sewage treatment and manufacturing facilities. This FR has illegally, fundamentally, and negatively, upended the ways in which states and TAS tribes have managed water, fish and wildlife, recreation, and historical and cultural resources for almost fifty years. A replacement Rule that lives up to the mission of the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” while facilitating the role that states and tribes were intended by Congress to play, should hew to the following guidelines, determined after a review of their submissions to the docket for the Advance Notice of Proposed Rulemaking that concluded in August 2021.

Organizations Whose Comments Were Reviewed

Appalachian Trail Conservancy (“ATC”)	Delaware Riverkeeper Network (“DRN”)
National Wildlife Federation (“NWF”)	Southern Environmental Law Center (“SELC”)
Theodore Roosevelt Conservation Partnership (“TRCP”)	Waterkeeper Alliance (“WA”)
Trout Unlimited (“TU”)	Earthjustice (“EJ”)
American Whitewater (“AW”)	Hydropower Reform Coalition (“HRC”)

Key Principles, Propositions & Recommendations Identified

- (1) The certifying authorities should have the authority to determine when the project proponent has provided adequate information for a certification request and when the one-year clock starts for determination of a reasonable period of time.
 - Organizations which support: NWF, TRCP, TU, ATC, AW, DRN, SELC, EJ, HRC
- (2) The limitation that the scope of certification applies only to discharges, rather than the activity as a whole, should be repealed. Additionally, the definition that “discharge” means only a discharge from a point source should be repealed.
 - Organizations which support: NWF, TRCP, TU, ATC, AW, DRN, SELC, WA, EJ, HRC
- (3) The narrow interpretation of water quality requirements should be repealed and a certifying authority’s ability to broadly account for state law requirements it deems applicable should be restored.

- Organizations which support: NWF, TRCP, TU, ATC, AW, DRN, SELC, WA, HRC
- (4) Provisions which permit federal agency review of state and tribal certifications and certification conditions are too broad and should be repealed; federal agencies should have no authority to veto, ignore, or waive the provisions of a certification.
 - Organizations which support: NWF, TRCP, TU, ATC, AW, DRN, SELC, WA, EJ, HRC
- (5) The EPA cannot regulatorily limit who has the ability to seek relief from the courts, and enforcement authority should not be limited to federal agencies; citizens, states, and tribes should have the ability to engage in enforcement proceedings.
 - Organizations which support: NWF, TRCP, TU, ATC, AW, DRN, SELC, WA, EJ, HRC
- (6) Re-openers and modifications to certifications should be allowed to accommodate changing circumstances and new information as it arises.
 - Organizations which support: NWF, TRCP, TU, ATC, AW, DRN, EJ, HRC
- (7) EPA must take its obligations with respect to tribal engagement and environmental justice seriously and ensure that meaningful consultation takes place.
 - Organizations which support: NWF, TRCP, TU, SELC, WA, EJ

Other Principles, Propositions & Recommendations Identified

- (8) The decision for a non-EPA certifying authority to offer pre-filing consultation, and in what manner, must be its own decision, rather than required by the EPA.
 - Organizations which support: NWF, TRCP, TU, ATC, EJ
- (9) Agencies must update their policies to comport with the new rules, must comply with such new policies, and should work together to ensure effective implementation coordination.
 - Organizations which support: ATC, EJ, HRC
- (10) EPA should revise provisions relating to neighboring jurisdictions to provide clarity as to EPA's internal processes and to ensure neighboring states and tribes have had the opportunity to protect water quality within their jurisdiction.
 - Organizations which support: DRN, EJ