

Clean Water Act: Water Quality Certification



Section 401 of the Clean Water Act provides states the authority to certify that any discharges to regulated waters from infrastructure projects will comply with applicable water quality standards. However, in several states, the Section 401 process has led to extreme delays or obstacles to the development of energy infrastructure, including interstate natural gas pipelines.

In Section 401 of the Clean Water Act, the current statutory scheme reflects a commitment to “cooperative federalism” in which federal and state governments have distinctive roles appropriate to each. Recently, some states have ignored the statutory time period or have strongly encouraged project applicants to withdraw and resubmit their application in order to “restart” the time period.

Some states have also used the Section 401 process to block or constrain interstate natural gas pipelines for reasons other than protection of water quality. For example, the State of New York recently attempted to deny a Section 401 water quality certification because the state believed that downstream greenhouse gas emissions had not been properly assessed.

Because the judicial remedy for such state action is to remand the matter back to the same state permitting authority, the outcome from the state often does not change. When states step out of the role defined by Congress under Section 401, it disrupts the roles of federal and state authorities, undermines the actions and interests of other states and damages cooperative federalism.

A state’s use of Section 401 to dictate national energy policy directly undermines the role Congress defined for the Federal Energy Regulatory Commission as the exclusive authority to decide whether an interstate gas pipeline project is to be authorized in the public interest.

A state’s actions to thwart the construction of an interstate pipeline has many negative consequences, such as:

- Denying producing states, like Pennsylvania and its citizens, the benefits of a downstream market for their natural gas production.
- Denying potential consuming states, like New England states and their consumers, the benefits of the lower energy costs made possible by additional natural gas supplies.
- Setting precedent for the unilateral prevention of other types of infrastructure projects. Given that Section 401 is not specific to interstate natural gas pipelines, a state could improperly use Section 401 to prevent the construction or maintenance of other infrastructure projects, such as roads, electric transmission, hydroelectric facilities or flood controls.

Respecting the rights of other states and federal authorities is essential for cooperative federalism. Restoring the balance of federal and state authorities under Section 401 is critical to rebuilding and maintaining this infrastructure.

