



2023-2024 General Assembly

# SENATE BILL 607: Regulatory Reform Act of 2024, Sec. 11: Expand Requirements for Issuance of 401 Certifications by the Department of Environmental Quality to Projects Located at an Existing or Former Electric Generating Facility

**Committee:**  
**Introduced by:**  
**Analysis of:** Sec. 11 of S.L. 2024-45

**Date:** August 27, 2024  
**Prepared by:** Jennifer McGinnis  
Staff Attorney

**OVERVIEW:** *Section 11 of S.L. 2024-45 extends statutory requirements applicable to the Department of Environmental Quality's (DEQ) handling of 401 certifications for certain projects to electric generation projects located at an existing or former electric generating facility.*

*This section became effective July 9, 2024, and applies to applications for 401 certifications pending or submitted on or after that date.*

## BACKGROUND:

Under [Section 401 of the Clean Water Act](#), a federal agency can not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a state where a discharge from the activity would originate issues or waives a Section 401 water quality certification, which concerns whether the discharge will comply with applicable water quality standards, effluent limitations, toxic pollutants restrictions and other appropriate water quality requirements under state and federal law. Section 401 provides that if a state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year)" after receipt of a certification request, the certification is deemed waived by the State. A state may not only waive, deny, or grant certification, but also grant certification with conditions.

Examples of permits for activities that trigger 401 certification requirements include:

- Clean Water Act Section 404 permits issued by the United States Army Corps of Engineers involving the discharge of dredged or fill material.
- Federal Energy Regulatory Commission (FERC) licenses for hydropower facilities and natural gas pipelines.

In 2023, legislation was enacted to establish statutory requirements for DEQ's handling of applications for 401 certifications for maintenance dredging projects partially funded by the Shallow Draft Navigation Channel Dredging and Aquatic Weed Fund and projects involving the distribution or transmission of energy or fuel, including natural gas, diesel, petroleum, or electricity, including requiring DEQ to:

- Within 30 days of filing of an application, determine whether or not the application is complete and notify the applicant, accordingly; and, if the Department determines an application is incomplete, specify all such deficiencies in the notice to the applicant. If DEQ fails to issue a notice

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as to whether the application is complete within the requisite 30-day period, the application will be deemed complete.

- Within 5 days of the date the application is deemed complete, issue a public notice soliciting comment on the application. Within 60 days of the filing of a completed application, DEQ must either approve or deny the application. Failure of DEQ to act within the requisite 60-day period will result in a waiver of the certification requirement by the State, unless the applicant agrees, in writing, to an extension of time, not to exceed one year from the State's receipt of the application for certification. The 60-day review period established will constitute the "reasonable period of time" for State action on an application for purposes of federal law, absent a negotiated agreement with the United States Environmental Protection Agency (USEPA) to extend that timeframe for a period not to exceed one year.
- Issue a certification upon determining that the proposed discharge into navigable waters will comply with State water quality requirements. DEQ must include as conditions in a certification any applicable effluent limitations or other limitations necessary to assure the proposed discharges into navigable waters will comply with State water quality requirements. DEQ cannot impose any other conditions in a certification.
- Deny a certification application only if DEQ determines that no reasonable conditions will provide assurance that the proposed discharges will comply with State water quality requirements and include in the denial a statement explaining the determination.