

TOPIC TITLE: LANDS OF EXCLUSIVE FEDERAL JURISDICTION

Division: Water

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ISSUE SUMMARY

A Land of Exclusive Federal Jurisdiction (LEFJ) is an area where states lack legislative jurisdiction absent specific congressional action. In the preamble of the 2023 Clean Water Act Section 401 Water Quality Certification Rule, the EPA noted, following consultation with the National Park Service (NPS), that 16 U.S.C. Chapter 1 identifies certain national parks as having lands of exclusive federal jurisdiction, including four in Region 8: Yellowstone National Park, Glacier National Park, Rocky Mountain National Park, and Mesa Verde National Park. After consultation with the Office of General Counsel in Headquarters, Region 8 has begun efforts to implement Clean Water Act programs in these parks. This includes issuing 401 certifications for federal permits (e.g., 404 permits for dredge or fill activities) and issuing National Pollutant Discharge Elimination System (NPDES) permits. Under Section 401 of the Clean Water Act, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a Section 401 water quality certification is issued, or certification is waived. The EPA is the certifying authority where no state or Tribe has authorization, which includes lands of exclusive jurisdiction. In a multistate challenge to the 401 Certification Rule, plaintiffs (which include Wyoming and Montana) assert that the 2023 Rule “exceeds EPA’s statutory authority by requiring the EPA to issue section 401 certifications for certain national parks specified in the 2023 Rule” and note that “States, such as Wyoming, have a longstanding history of issuing 401 certifications for discharges originating within national parks located within the state’s boundaries, including the national parks specified in the 2023 Rule.”

KEY POINTS

- Region 8 has obtained information about multiple construction projects in Lands of Exclusive Federal Jurisdiction (LEFJs) through 401 certification prefilings and related communications with our federal partners. The U.S. Army Corps of Engineers, which issues Section 404 dredge and fill permits, has been directing project proponents to Region 8 for 401 certifications. In Yellowstone, this includes a road construction project, a fish barrier project, a new drinking water treatment plant, and three wastewater treatment plant replacements/upgrades, one of which has an existing NPDES permit from the Wyoming Department of Environmental Quality (WDEQ). The Montana Department of Environmental Quality has issued a NPDES permit for a wastewater treatment facility in Glacier. Region 8 has also identified multiple construction stormwater permittees with state issued NPDES permits in Yellowstone and Glacier.
- Since late November 2023, Region 8 has been making 401 certification determinations in Rocky Mountain, Yellowstone, Glacier and Mesa Verde. Region 8 also requested NPDES construction stormwater permit applications be submitted to Region 8 for all construction projects, including

Federal Highway Administration (FHWA) road construction projects and construction of the drinking water and wastewater treatment plants in Yellowstone. The new drinking water plant in Yellowstone received a 401 certification from WDEQ prior to the new 401 Certification Rule going into effect, and Region 8 requested the NPS submit a 401 certification and construction stormwater permit to the EPA. Region 8 already issues NPDES permits in Rocky Mountain and Mesa Verde, because Colorado has not sought or received authorization to implement the NPDES program for federal facilities in Colorado.

- Wyoming commented on the 401 Certification Rule asserting their role as the certifying authority in Yellowstone. In a multistate challenge to the 401 Certification Rule, plaintiffs (which include Wyoming and Montana) assert that the 2023 401 Certification Rule “exceeds EPA’s statutory authority by requiring the EPA to issue section 401 certifications for certain national parks specified in the 2023 Rule.” The plaintiffs noted that “States, such as Wyoming, have a longstanding history of issuing 401 certifications for discharges originating within national parks located within the state’s boundaries, including the national parks specified in the 2023 Rule.” However, the 401 Certification Rule did not create LEFJs or the EPA’s authority within them, and the lack of state authority in LEFJs existed prior to this rule. This litigation is ongoing.

ONGOING/UPCOMING REVIEWS FOR FY25

- EPA is considering ways to enable construction operators in LEFJ, including FHWA and NPS, to efficiently obtain NPDES coverage for all future stormwater discharges.
- In Yellowstone, Region 8 anticipates receiving an application for renewal of an NPS wastewater treatment plant NPDES permit in early 2025.
- Region 8 expects to issue 401 certifications for several projects, including 6 in Yellowstone (drinking water treatment facility, 3 wastewater treatment facility upgrades, Federal Highways road, and restoration projects); Rocky Mountain (Federal Highway road project and restoration project); Glacier (road culvert replacement) and Mesa Verde (restoration project).
- Region 8 recommended the NPS submit a 401 certification request as soon as possible for the drinking water treatment plant project and is looking at ways to move the 401 certification quickly. For example, as allowed under the Part 121 regulations, Region 8 waived a prefilings meeting request, which would have required the NPS to wait 30 days after that meeting request to submit a 401 certification request.
- Region 8 has met with Glacier NPS representatives in a similar fashion to Yellowstone to ensure that permit applications and 401 certification requests for planned projects are routed to the appropriate federal contacts.

REGION 8 LEADS AND KEY HQ CONTACTS

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KEY EXTERNAL STAKEHOLDERS

- ☐ Congress ☒ Industry ☒ States ☐ Tribes ☐ Media
☒ Other Federal Agency ☐ NGO ☐ Local Governments ☐ Public

MOVING FORWARD

Region 8 will continue to implement the 401 Certification and National Pollutant Discharge Elimination System (NPDES) programs in Lands of Exclusive Federal Jurisdiction regardless of budgets. However, budget reductions could slow Region 8's ability to issue 401 certifications and NPDES permits quickly, which could delay construction projects. Changes in focus areas would not change the EPA's regulatory obligations.