ENVIRONMENTAL AND ENERGY
INFORMATION MEMO
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EPA Proposes a Modified Water Quality Certification Rule Creating Greater Uncertainty to the Regulated Community and Agencies

On June 2, 2022, the United States Environmental Protection Agency (EPA) announced a proposed rule updating the water quality certification regulatory requirements under Section 401 of the Clean Water Act (CWA). This proposed rule was published in the Federal Register on June 9, 2022. The EPA will be hosting a public hearing on July 18, 2022, and comments are being accepted until Aug. 8, 2022.

Background

Prior to 2020, the existing regulations governing water quality certifications issued by state agencies (particularly the Department of Environmental Conservation in New York) resulted in permit denials, lengthy reviews and litigation. As a result, the Trump administration proposed changes to the water quality certification process in July 2020 (2020 Rule)[1]. The 2020 Rule sought to place certain procedural and timing restrictions on the authority of states (and tribes that have been approved for "treatment as a State" status) when reviewing any discharge into a water of the United States requiring a federal license or permit for compliance with appropriate federal, state, and tribal water quality requirements. The July 2020 Rule was challenged in court shortly after its adoption. On Oct. 21, 2021, the U.S. District Court for the Northern District of California issued an order remanding and vacating the 2020 Rule (the Vacatur Order). The Vacatur Order required a temporary return to the EPA's existing rule (originally promulgated in 1971) until a new water quality certification rule was finalized. A stay of the Vacatur Order was sought in the 9th Circuit Court of Appeals, but this was denied. A stay was then sought from the U.S. Supreme Court, which granted a stay on April 6, 2022. The effect of the Supreme Court's stay was to reinstate the 2020 Rule.

Meanwhile, during the litigation challenging the 2020 Rule, the Biden administration began a new rulemaking process in May of 2021. The proposed rule, published in the Federal Register for public comment, seeks to update existing regulations to increase consistency with the statutory text of the 1972 CWA and to provide clarification to the Section 401 certification process. Furthermore, the proposed rule strengthens the authority of states, territories and tribes to protect their water quality from adverse impacts caused by federally licensed or permitted projects.

Powers of Certifying Authorities

Under Section 401, a license or permit to conduct an activity that could generate a discharge into a water of the United States cannot be issued by a federal agency unless the state, territory or authorized tribe where the discharge would originate either issues a CWA Section 401 water quality certification or waives the certification requirement.

1 Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020) (amending 40 C.F.R. § 121).

Certifying authorities must act on a Section 401 certification request "within a reasonable period of time (which shall not exceed one year) after receipt of such request.[2]" If the certifying authority fails or refuses to act on a request for certification, the certification requirement of Section 401 is waived with respect to certain federal licenses, permits or approvals. For example, the kind of licenses or permits for which a Section 401 water quality certification would be required include permits issued under Sections 402 (NPDES program) and 404 (wetlands program) of the CWA, Federal Energy Regulatory Commission (FERC)licenses for hydropower facilities and natural gas pipelines and permits issued for the crossing of navigable waters under the Rivers and Harbors Act.

There are several key components of this proposed rule which, according to the EPA, are designed to promote consistency and clarification to the CWA Section 401 certification process.

Key Components to the EPA's Proposed Rule:

1. A project proponent would request a pre-filing meeting from a certifying authority at least 30 days prior to requesting certification. But this 30-day period may be waived or shortened by the certifying authority, providing some flexibility in comparison to the 2020 Rule which did not provide the certifying authority this option.
2. Requests for certification should include a copy of a draft license or permit, and any readily available data or information relating to potential impacts to the water quality caused by the proposed project[3].
3. The certifying authority now will have a role in determining the "reasonable period of time" needed to review the request for certification. The certifying authority may collaborate with the federal agency to establish a "reasonable period of time" with a default 60-day time period designated should an agreement not be made between the certifying authority and the federal agency.
4. During a certifying authority's review of a request for certification, the proposed rule would require that compliance with water quality requirements, including water quality-related state or tribal laws, be assessed by looking at the proposed activity as a whole. The certifying authority may holistically evaluate impacts from any aspect of the project activity. This presents a broader and more environmentally protective scope of review than the 2020 Rule. The approach is designed to reinstate the scope of review that the Supreme Court allowed in 1994[4].
5. The certifying authority can make one of four certification decisions:

    (i) grant certification;

    (ii) grant certification with conditions;

    (iii) deny certification; or

    (iv) expressly waive certification.

2 Clean Water Act §401 (a)(1)

3 Many practitioners may question this component of the proposed rule given the reticence of federal agencies to issue even a draft permit or license without first having a water quality certification from the certifying authority.

4 Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology (PUD No. 1), 511 U.S. 700 (1994). The Supreme Court of the United States held that states could condition certification of a project on any limitations necessary to ensure compliance with state water quality standards or other appropriate requirements of state law.

6. Federal agency review of certification decisions will be limited to whether:

   (i) the certifying authority has indicated the nature of the certification decision;

   (ii) the proper certifying authority issued the decision;

   (iii) the certifying authority provided public notice[5] on the request for certification; and

   (iv) the decision was issued within a reasonable period of time.

7. Portions of a grant of certification may be modified but only if agreed upon by both the certifying authority and the federal agency. The nature of the certification decision, however, may not be changed.

Enforcement and Inspections

Because enforcement was not expressly addressed in Section 401, the EPA is not proposing regulations. In the 2020 Rule, there were certain provisions relating to enforcement and inspections. For example, the 2020 Rule interpreted Section 401(a)(4) to allow all certifying authorities to conduct inspections pursuant to this section to any certified project where the license or permit were issued prior to operation, instead of only for projects where there was a construction license or permit and a subsequent operating license or permit was not required. The EPA thinks that this is an incorrect application of this section. In response, the proposed rule states that the EPA will remove §121.11(a)[6] from the current regulation.

Neighboring Jurisdiction Process

Section 401(a)(2) of the CWA governs the neighboring jurisdiction process. This process allows for "neighboring jurisdictions" to participate in the federal licensing or permitting process in circumstances where EPA has determined that a discharge from an activity subject to certification from another jurisdiction may affect their water quality. The EPA's proposed rule provides more detail and explanation to this process.

For example, the roles of involved actors, including certifying authorities, federal licensing or permitting agencies, and project proponents, is clarified. Certifying authorities are the state, territory or ribe with TAS where the discharge from the federal project will originate, or the EPA will be considered the certifying authority when a state, territory or ribe does not have jurisdiction over the area. Any federal agency whose license or permit is subject to CWA Section 401 certification is an actor considered in the process. And project proponents constitute all those seeking a Section 401 certification which includes project applicants or federal agencies seeking certification for a permit or license.

The beginning of the neighboring jurisdiction process is defined within the proposed rule, and the contents required of a federal agency's notification to the EPA is explained. The current definition of a neighboring jurisdiction suggests that a neighboring jurisdiction may only include a state or TAS tribe that the EPA determines may be affected by a discharge from another jurisdiction. In this proposed

5 CWA §401(a)(1) states that a "State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications."

6 §121.11 reads as follows: Enforcement of and compliance with certifications: (a) The certifying authority, prior to the initial operation of a certified project, shall be afforded the opportunity to inspect the facility or activity for the purpose of determining whether the discharge from the certified project will violate the certification.

rule, the EPA is revising the definition of "neighboring jurisdiction" to clarify that it includes "any state, or tribe with treatment in a similar manner as a state[7] for CWA section 401 in its entirety or only for CWA section 401(a)(2), other than the jurisdiction in which the discharge originates or will originate."

Where Do We Go From Here?

The Vacatur Order is currently on appeal to the 9th Circuit. If the Vacatur Order is affirmed, then the matter may go to the Supreme Court of the United States, where the rule, including the Supreme Court's 1994 decision in PUD No. 1 as to the breadth of the review[8] by certifying authorities, will be in play. Meanwhile, if the proposed rule is finalized, it will no doubt spawn additional litigation. All of this leaves significant uncertainty on both the part of the certifying authorities and the regulated community.

If you have questions about this information memo, please contact Kevin Bernstein, Amelia McLean-Robertson, any attorney in the Environmental and Energy practice or the attorney at the firm with whom you are regularly in contact.

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7 The statutory language limits CWA § 401(a)(2) to exclude tribes without TAS from qualifying as a "neighboring jurisdiction." But, the EPA is proposing a process for tribes to attain TAS specifically for administering a water quality certification program under §401 and for administering only the section §401 (a)(2) portion of a water quality certification program.

8 The 2020 Rule rejected the "activity as a whole" scope of certification review, and instead limited the review to a "discharge only" approach. The "activity as a whole" scope of review provides more deference to the certifying authority.

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