Section 401 Water Quality Certification/Clean Water Act: U.S. Environmental Protection Agency Issues Questions and Answers Document Addressing 2020 Rule Vacatur

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The United States Environmental Protection Agency ("EPA") issued on December 17th a document titled:

Clean Water Act Section 401 Water Quality Certification

Questions and Answers on the 2020 Rule Vacatur ("Q&A")

The Q&A was drafted to provide questions and answers in response to what would constitute the applicable Clean Water Act Section 401 requirements and procedures following the United States District Court (Northern District of California) October 21st remand with vacatur of the 2020 Clean Water Act Section 401 Certification Rule that had been promulgated during the Trump Administration.

Section 401 of the Clean Water Act prohibits federal agencies from issuing permits or licenses that result in exceedance of water quality standards, or other applicable authorities, of the state. This provision of the Clean Water Act requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable water quality standards. If not provided, the federal permit or license may not be granted. Further, states can impose certain conditions upon federal permits or licenses as a prerequisite to granting the permit or license. If a state fails or refuses to act on a request for certification in a timely manner, certification requirements are waived with respect to such federal application.

EPA promulgated revisions in 2020 during the Trump Administration to the regulations implementing Section 401. The agency argued at that point that the revisions promoted:

- Consistent implementation of Section 401 of the Clean Water Act
- Regulatory certainty in the federal licensing and permitting process

The 2020 revisions were supported and opposed by different sets of states and stakeholders.

EPA subsequently stated, during the early part of the Biden Administration, concern that the 2020 revisions eroded state and tribal authority under the Clean Water Act. As a result, it noted its intent to review this rule.

The United States District Court (Northern District of California) remanded with vacatur the 2020 Section 401 revisions on October 21st. In issuing the Q&A in regards to this vacatur, EPA states that the document does not represent a regulation nor substitute for applicable regulations.

The questions answered in the Q&A document include:

1. Which EPA regulations now govern the CWA Section 401 certification processes?
2. Is EPA continuing the rulemaking process?
3. When will EPA propose a new rule?
4. Where can I find a copy of the 1971 Rule?
5. In light of the district court's vacatur of the 2020 Rule, does EPA expect to revisit certification actions completed between September 11, 2020 (the 2020 Rule's effective date) and October 21, 2021 (the 2020 Rule's vacatur date)?
6. What is the effect of vacatur on pending certification requests?
7. Are certification modifications allowed under the 1971 Rule?
8. Are the 2020 Rule's requirement for a pre-filing meeting request and a 30-day wait period still in effect?
9. Is there a definition of the term "certification request" that applies to submissions to states and tribes under the 1971 Rule?
10. Are states and tribes required to provide public notice on certification requests?
11. When does the "reasonable period of time" begin under the 1971 Rule?
12. Under what circumstances is the certification requirement waived under the 1971 Rule?
13. What are the components of a certification decision under the 1971 Rule?
14. To what extent may a Federal agency review a state certification under the 1971 Rule?
15. Do federal agencies still have to notify EPA pursuant to section 401(a)(2)?
16. Do section 401(a)(2) notifications get sent to EPA if the certification decision was a waiver?

A copy of the Q&A document can be downloaded here.