Section 401/Clean Water Act: U.S. Environmental Protection Agency Announces Final Rule Addressing Certification

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The United States Environmental Protection Agency ("EPA") announced on September 14th a final rule that it denominates Clean Water Act Section 401 Water Quality Certification Improvement Rule ("Final Rule").

EPA states that the final rule will:

. . . support clear, efficient, and focused water quality reviews of infrastructure and development projects that are key to economic growth.

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, the certification requirements are waived with respect to such federal application.

Examples of federal licenses and permits that may require Section 401 water quality certifications include (but are not limited to):

- Clean Water Act Section 404 dredge and fill permits
- Federal Energy Regulatory Commission hydroelectric licenses
- Clean Water Act Section 402 pollutant discharge permits

During the Trump Administration EPA revised certain aspects of the Section 401 certification process.

Opponents of that rule had argued that it diminished state authority and unlawfully reduced the scope of Section 401 reviews.

Proponents of the rule argued that the rule clarified the scope of Section 401 as limited to a project's actual potential impacts on waters and specified statutory and regulatory timelines for a state's review and action on Section 401 certification.

EPA stated, early in the Biden Administration, concern that the revisions during the Trump Administration eroded state and tribal authority under the Clean Water Act. The agency published on June 2, 2021, its Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 certification rule. See 86 Fed. Reg. 29541. Further, the United States District Court (Northern District of California) remanded with vacatur the 2020 Section 401 revisions.

EPA takes the position in the preamble to the September 14th Final Rule that it better reflects the cooperative federalism framework and text of the 1972 and 1977 Clean Water Act statutory amendments.

In addition, EPA states that modifications to the regulatory text implementing Section 401 support:

. . . a more efficient, effective, and predictable certifying authority-driven certification process consistent with the water quality protection and other policy goals of CWA Section 401 and Executive Order 13990.

Further rationale put forth in the preamble for the Final Rule includes the agency's belief it clarifies issues such as:

- Scope of certification
- Reasonable period of time for a certifying authority to act

Issues addressed in the Final Rule include:

- Pre-Filing Meeting Request (project proponents are required to request a pre-filing meeting from a certifying authority at least 30 days before requesting certification unless the certifying authority waives or shortens the requirement)
- Request for Certification
- All requests must include:

    1. A copy of the federal license or permit application submitted to the federal agency or a copy of a draft license or permit; and
    2. Any readily available water quality-related materials that inform the development of the application of the draft federal license or permit

- Reasonable Period of Time (provides certifying authorities with a role in determining, with the federal agency, the length of the "reasonable period of time" for the certifying authority to review the request for certification
- Scope of Review (EPA takes the position that the Final Rule realigns the scope of Section 401 certification "with nearly 50 years of established practice that preceded the 2020 rule")
- Certification Decisions
- The Final Rule provides that a certifying authority may make one of four certification decisions on a request for certification:

    1. Grant certification
    2. Grant certification with conditions
    3. Deny certification; or
    4. Expressly waive certification

A link to the Final Rule can be found here.