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Clean Water Act Section 401: Overview and Recent Developments

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SUMMARY

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Clean Water Act Section 401: Overview and Recent Developments

Congress established the Clean Water Act (CWA) to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters." Under CWA Section 401, any applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters (i.e., waters of the United States) shall provide the federal licensing or permitting agency with a Section 401 certification. The certification, issued by the certifying authority—usually the state in which the discharge originates, but sometimes a tribe or the U.S. Environmental Protection Agency (EPA)—attests that the discharge will comply with applicable provisions of certain enumerated sections of the CWA. The certifying authority may grant, grant with conditions, deny, or waive certification of proposed federal licenses or permits. Activities that require such federal licenses or permits include hydropower projects licensed by the Federal Energy Regulatory Commission (FERC) and certain activities involving the discharge of dredged or fill material into waters of the United States permitted by the U.S. Army Corps of Engineers (USACE) (e.g., pipeline projects, water resource projects, mining projects, or other development).

Many observe that the certification authority under Section 401 has strong ramifications. If a certifying authority denies certification, the federal license or permit is denied. If a certifying authority grants a certification with conditions, those conditions must be included in the final license or permit. Some license and permit applicants have expressed frustration with how some states have exercised their Section 401 authority. Key concerns include timeframes for issuing certifications, the scope of states' reviews, and the type of conditions that states can impose when granting a certification. Some stakeholders have accused states of misusing Section 401 authority to block certain projects and have advocated for changes to the CWA or implementing regulations and guidance to limit states' Section 401 authority. Others assert that state implementation is too lenient and may fail to block certain projects that have the potential to degrade water quality. Many states assert that Section 401 certification allows them to manage and protect the quality of waters within their states, and any efforts to limit state Section 401 authority are contrary to the CWA's principles of cooperative federalism.

The Trump Administration criticized the manner in which some states exercised their Section 401 authority. In response to an April 2019 executive order, EPA issued updated Section 401 guidance in June 2019 and published a final rule (the 2020 Final Rule) in July 2020 to update Section 401 regulations. The 2020 Final Rule went into effect in September 2020, rescinding EPA's 2019 Guidance and replacing its existing implementing regulations for Section 401, which were promulgated in 1971. The 2020 Final Rule included numerous changes to existing regulation and practice that narrowed the authority of certifying authorities when acting on Section 401 certification requests. Several changes addressed two broad policy issues relevant to implementation of Section 401—certification timeframes and the scope of certifications. In addition, the 2020 Final Rule included changes regarding federal review of certifications and enforcement. The 2020 Final Rule garnered interest from stakeholders. Various groups, including those representing certain energy interests, generally supported the rule. Other groups, including some states and state associations, opposed the changes. Five separate groups of states, tribes, and environmental organizations filed lawsuits challenging the 2020 Final Rule.

In January 2021, President Biden issued an executive order that directed agencies to review certain Trump Administration agency actions, including the 2020 Final Rule. EPA's review of the rule identified a number of concerns, prompting the agency to issue in June 2021 a notice of intention to reconsider and revise the rule. On October 21, 2021, a federal district court vacated the 2020 Final Rule, prompting EPA to announce a temporary return to the 1971 implementing regulations. Various states and stakeholders appealed the district court's decision, and on April 6, 2022, the Supreme Court temporarily reinstated the 2020 Final Rule for the duration of the appeal. In June 2022, EPA proposed a new rule to update the regulatory requirements for Section 401 certification. EPA estimates that it will issue a final rule by March 2023, according to its Spring 2022 Regulatory Agenda.

The 117th Congress continues to show interest in Section 401. Some Members have introduced legislation proposing to codify the 2020 Final Rule (S. 3277). Others have proposed amending Section 401 regarding the scope of water quality impacts that certifying authorities may consider in their certification review, as well as the scope of conditions they may impose (H.R. 3422/S. 1761).

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Background

Section 401 of the Clean Water Act (CWA) requires that any applicant for a federal license or permit provide a certification that any discharges that may result from the licensed or permitted activity will comply with the act, including water quality standard requirements. Disputes have arisen over the states' exercise of authority under Section 401. While some stakeholders argue that states are appropriately using their Section 401 authority to manage and protect the quality of their waters, other stakeholders, including some license and permit applicants (hereinafter referred to as "project proponents"), have expressed frustration with how some states have implemented this authority. Key concerns regarding implementation include the timeframes for issuing certifications, the scope of review, and the type of conditions that certifying authorities can impose when granting a certification.

Until 2020, the Section 401 implementing regulations promulgated by the Environmental Protection Agency (EPA) in 1971 were in effect.[1] In July 2020, EPA issued a final water quality certification rule that went into effect on September 11, 2020 (hereinafter the 2020 Final Rule), replacing the 1971 regulations.[2] In January 2021, President Biden issued an executive order that directed agencies to review certain Trump Administration agency actions, including the 2020 Final Rule. EPA's review of the rule identified a number of concerns, prompting the agency to publish in June 2021 a notice of intention to reconsider and revise the rule. Further, on October 21, 2021, the U.S. District Court for the Northern District of California issued an order remanding and vacating EPA's 2020 Final Rule.[3] In response, EPA stated that the vacatur applied nationwide and required a temporary return to EPA's 1971 regulations until the agency finalized a new rule.[4] Various states and industry groups appealed the district court's vacatur order. On April 6, 2022, the Supreme Court stayed the district court's order, temporarily reinstating the 2020 Final Rule while the appeal is pending.[5] In June 2022, EPA proposed a new rule to update the regulatory requirements for Section 401 certification.[6] EPA estimates that it will issue a final rule by March 2023, according to its Spring 2022 Regulatory Agenda.[7]

This report provides an overview of CWA Section 401, selected policy issues and how they were addressed in the 2020 Final Rule, and actions taken by the Biden Administration to reconsider and revise the rule.

[1] EPA, "State Certification of Activities Requiring a Federal Permit or License" (hereinafter "1971 regulations"), 36 *Federal Register* 22487, November 25, 1971. Codified at 40 C.F.R. §121.

[2] EPA, "Clean Water Act Section 401 Certification Rule" (hereinafter "2020 Final Rule"), 85 *Federal Register* 42210-42287, July 13, 2020.

[3] Order, *In re* Clean Water Act Rulemaking, No. 3:20-cv-04636, Doc. No. 173 (N.D. Cal. October 21. 2021).

[4] EPA, *2020 Rule Implementation Materials*, https://www.epa.gov/cwa-401/2020-rule-implementation-materials, accessed November 16, 2021. See also EPA, *Clean Water Act Section 401 Water Quality Certification Questions and Answers on the 2020 Rule Vacatur*, December 17, 2021, https://www.epa.gov/system/files/documents/2021-12/questions-and-answers-document-on-the-2020-cwa-section-401-certification-rule-vacatur-12-17-21-508.pdf.

[5] Order on Application for Stay, Louisiana v. Am. Rivers, No. 21A539 (U.S. April 6, 2022).

[6] Environmental Protection Agency, "Clean Water Act Section 401 Water Quality Certification Improvement Rule," 87 *Federal Register* 35318, June 9, 2022.

[7] Office of Information and Regulatory Affairs, *Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions, EPA/Office of Water, Clean Water Act Section 401: Water Quality Certification*, RIN No. 2040-AG12.

What Is Clean Water Act Section 401?

Congress established the Federal Water Pollution Control Act (FWPCA), as amended by the CWA, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[8] Under CWA Section 401 (hereinafter Section 401), any applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters—defined in the statute as "waters of the United States, including the territorial seas"—shall provide the federal licensing or permitting agency with a Section 401 certification.[9] (See **Appendix** for the full text of CWA Section 401.) The certification, issued by the state (or other certifying authority) in which the discharge originates, attests that the discharge will comply with applicable provisions of certain enumerated sections of the CWA. These include effluent (i.e., discharge) limitations and standards of performance for new and existing discharge sources (Sections 301, 302, and 306), water quality standards and implementation plans (Section 303), and toxic pretreatment effluent standards (Section 307).

Effluent limitations establish the levels of specific pollutants that are allowable in a discharger's effluent based on either the performance of technologies for a specified level of control required by the CWA (technology-based effluent limitations) or levels necessary to attain water quality standards in the waterbody receiving the discharge (water quality-based effluent limitations). Water quality standards, which are developed by the state and submitted to EPA for approval, contain three core components that specify (1) the designated uses of a waterbody (e.g., recreation, public water supply), (2) criteria to protect those uses (i.e., numeric concentrations of pollutants or narrative descriptions), and (3) an antidegradation policy.[10] Pretreatment standards apply to indirect dischargers, who discharge to a publicly owned treatment works prior to discharge into a water of the United States.[11]

Section 401 provides states, certain tribes, and in certain circumstances, EPA[12] (hereinafter referred to collectively as "certifying authorities") the authority to grant, grant with conditions, deny, or waive certification of proposed federal licenses or permits that may result in a discharge into waters of the United States.

- If a certifying authority *grants* the certification, the federal licensing or permitting agency can proceed and evaluate whether the license or permit should be issued.
- If a certifying authority *grants the certification with conditions*, the federal licensing or permitting agency can proceed and evaluate whether the license or permit should be issued. Section 401 requires any conditions listed in the certification to become a term of the federal license or permit if one is issued.

[8] CWA §101(a); 33 U.S.C. §1251(a).

[9] 33 U.S.C. §1341. The statute defines "navigable waters" at CWA §502(7); 33 U.S.C. §1362(7), and "discharge" as a discharge of a pollutant or pollutants at CWA §502(16); 33 U.S.C. §1362(16).

[10] CWA §303(c)(2)(A), 33 U.S.C. §1313(c)(2)(A) for designated uses and criteria; CWA §§101(a) and 303(d)(4)(B), 33 U.S.C. §§1251, 1313(d)(4)(B) for antidegradation. See also 40 C.F.R. Part 131.

[11] CWA §§301 and 307; 33 U.S.C. §§1311 and 1317.

[12] Per CWA §518 (33 U.S.C. §1377), EPA is authorized to treat an Indian tribe as a state for certain sections of the CWA including CWA §401 if the tribe meets certain statutory eligibility criteria. EPA acts as the certifying authority on tribal lands where the tribe has not been granted treatment as a state, as well as on federal lands with exclusive federal jurisdiction.

- If a certifying authority *denies* certification, the federal licensing or permitting agency cannot issue the license or permit.
- If a certifying authority *waives* certification, the certification is not required for the federal licensing or permitting agency to issue the license or permit. A waiver may either be explicit or implicit. Specifically, the CWA provides that if the certifying authority "fails or refuses to act on a request for certification, within a reasonable time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived."[13]

What Activities Require a Section 401 Certification?

Any activity that (1) requires a federal license or permit and (2) may result in a discharge into waters of the United States requires a Section 401 certification.[14] Examples include hydropower projects requiring Federal Energy Regulatory Commission (FERC) licenses, industrial and municipal point source discharges requiring National Pollutant Discharge Elimination System (NPDES) permits that would be issued by EPA[15] (CWA Section 402), and certain activities involving the discharge of dredged or fill material into waters of the United States requiring U.S. Army Corps of Engineers (USACE) permits (CWA Section 404 and Rivers and Harbors Act Sections 9 and 10).[16] Examples of activities that may require a CWA Section 404 permit include pipeline projects, infrastructure development, water resource projects, mining projects, or residential or commercial development. Note that such permits are required only for segments or portions of the project that involve a discharge of dredged or fill material into federally regulated waters (i.e., waters of the United States).

Stakeholder Interest in Section 401

Many observe that the certification authority under Section 401—which is a direct grant of authority by Congress—has strong ramifications.[17] First, if a certifying authority denies certification, the federal license or permit is denied, which may prevent the activity, as proposed, from taking place or lead to a modification of the activity. Second, if a certifying authority grants a certification with conditions, those conditions are required to be included in the final federal license or permit. Such conditions imposed by certifying authorities have, for example, limited the time of year in which the proposed activity can occur, or required water quality monitoring or wetland mitigation.

[13] CWA §401(a)(1); 33 U.S.C. §1341(a)(1).

[14] Ibid.

[15] EPA administers NPDES permits in Massachusetts, New Hampshire, New Mexico, the District of Columbia, and certain territories and Indian lands. Because §401 covers only federally issued permits, in the 47 states that are authorized to administer their own NPDES permits, CWA §401 certifications are not required for NPDES permits.

[16] 33 U.S.C. §1344; 33 U.S.C. §§401, 403.

[17] EPA, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes*, April 1989, p. 9, https://www.epa.gov/nscep. Deidre Duncan and Clare Ellis, "Clean Water Act Section 401: Balancing States' Rights and the Nation's Need for Energy Infrastructure," *Hastings Environmental Law Journal*, vol. 25, no. 2 (Summer 2019), p. 237. Jeanne Christie, *The Compleat Wetlander: 401 Certification - Delivering a Big Payload for State Rights, Clean Water, and Flood Protection*, Association of State Wetland Managers, August 26, 2011, https://www.aswm.org/wordpress/the-compleat-wetlander-401-certification-delivering-a-big-payload-for-state-rights-clean-water-and-flood-protection/.

Some license and permit applicants (hereinafter referred to as "project proponents") and other stakeholders have expressed frustration with how some states have implemented this authority.[18] Key concerns include the timeframes for issuing certifications, the scope of review, and the type of conditions that certifying authorities can impose when granting a certification. Some stakeholders have accused states of misusing Section 401 authority to block certain projects and have advocated for changes to the CWA or implementing regulations and guidance to limit states' authority under Section 401.[19] Under the Trump Administration, EPA was also critical of some states' denials of Section 401 certifications.[20] Other stakeholders have asserted that state implementation of Section 401 has been too lenient in some instances and may fail to block or appropriately condition certain projects that may lead to water quality degradation.[21] Many states assert that Section 401 certification allows them to manage and protect the quality of waters within their states.[22] They argue that any efforts to change the CWA or implementing regulations to limit state authority under Section 401 are contrary to the principles of cooperative federalism upon which the CWA is based.[23]

Actions Under the Trump Administration

The Trump Administration characterized some states' uses of Section 401 authority as misusing the CWA and directed EPA to update implementing regulations and guidance.[24] EPA finalized updated regulations in 2020 and issued updated guidance in 2019. Prior to these actions, regulations promulgated in 1971 and interim guidance published in 2010 were in effect.[25] The 1971 regulations implemented the certification provisions included in Section 21(b) of the

[18] See, e.g., Comments of the Association of American Railroads (May 24, 2019); Comments of the Interstate Natural Gas Association of America (May 24, 2019). Both letters are available at EPA Clean Water Act Section 401 Water Quality Certification Pre-Proposal Recommendations, Docket No. EPA-HQ-OW-2018-0855.

[19] See, e.g., American Petroleum Institute, "API-NY Applauds Second Circuit Court Decision, Says It's Good News for Pipelines Across New York," press release, February 5, 2019, https://www.api.org/news-policy-and-issues/news/2019/02/05/apiny-applauds-second-circuit-court-decision-says-its-good-news-for-pipelines-ac. See also American Gas Association, "EPA Proposes Updates to Certification Process for Natural Gas Infrastructure," press release, August 9, 2019, https://www.aga.org/news/news-releases/epa-proposes-updates-to-certification-process-for-natural-gas-infrastructure/.

[20] EPA, "EPA Issues Final Rule that Helps Ensure U.S. Energy Security and Limits Misuse of the Clean Water Act," press release, June 1, 2020, https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0.

[21] Sierra Club, "Environmental Groups Challenge Virginia's Unlawful Approval of Fracked Gas Pipeline," press release, December 8, 2017, https://www.sierraclub.org/press-releases/2017/12/environmental-groups-challenge-virginia-s-unlawful-approval-fracked-gas. Sierra Club, "Dereliction of Duty: WVDEP Abandons Water Quality Review of Fracked Gas Pipeline," press release, November 1, 2017, https://www.sierraclub.org/press-releases/2017/11/dereliction-duty-wvdep-abandons-water-quality-review-fracked-gas-pipeline. Chesapeake Bay Foundation, "CBF Appeals Atlantic Coast Pipeline Certification," press release, January 22, 2018, https://www.cbf.org/news-media/newsroom/2018/virginia/cbf-appeals-atlantic-coast-pipeline-certification.html.

[22] See, e.g., Letter from Western Governors' Association, National Conference of State Legislatures, and National Association of Counties, et al. to Honorable John Barrasso and Honorable Tom Carper, November 18, 2019, https://www.acwa-us.org/wp-content/uploads/2019/11/Coalition-Letter-Clean-Water-Act-Section-401-Legislation-11-18-19.pdf.

[23] Ibid.

[24] EPA, "EPA Issues Final Rule that Helps Ensure U.S. Energy Security and Limits Misuse of the Clean Water Act," press release, June 1, 2020, https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0.

[25] EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, April 2010. Hereinafter *2010 Guidance*.

Federal Water Pollution Control Act (FWPCA) of 1948.[26] The 1972 amendments to the FWPCA created Section 401 and restructured the statutory framework of the statute.[27] However, EPA had not updated its 1971 implementing regulations for Section 401 to reflect the changes to the relevant statutory text.[28] EPA issued Section 401 guidance in 1989, which it updated in 2010.[29]

On April 10, 2019, President Trump issued Executive Order (E.O.) 13868, "Promoting Energy Infrastructure and Economic Growth."[30] The E.O. stated that "outdated federal guidance and regulations regarding Section 401" were "causing confusion and uncertainty and are hindering the development of energy infrastructure." Among other things, the E.O. directed EPA to review and issue new guidance to supersede the existing Section 401 guidance and to revise the agency's existing Section 401 implementing regulations. The E.O. instructed EPA to focus on the need to promote timely federal-state cooperation, the appropriate scope of water quality reviews, the types of conditions that may be appropriate to include in a certification, expectations for review times for different types of certification requests, and the nature and scope of information states may need to act on a certification request.

2019 Guidance

EPA has issued guidance to states to provide information on the applicability and scope of Section 401 and how states may use Section 401 to protect water quality. In accordance with E.O. 13868, EPA released updated Section 401 guidance on June 7, 2019, and rescinded the previous 2010 Guidance.[31] EPA's stated intent in updating the guidance was to provide clarifications and recommendations on Section 401 water quality certifications. In particular, the guidance addressed statutory and regulatory timelines for review and action on a 401 certification, the appropriate scope of 401 certification conditions, and information that the certifying authority may consider in its 401 certification review. EPA changes to the 2010 Guidance reflected different interpretations of key aspects of Section 401 implementation, including certification review timeframes and the scope of certifications. (See discussion under "Start of the Certification "Clock"" and "Scope of 401 Certifications.")

In the preamble to the rule EPA published in 2020 updating regulations on water quality certification (see "Updated Regulations/2020 Final Rule"), EPA announced its decision to rescind the 2019 Guidance coincident with issuing the rule.[32] The agency concluded that retaining the 2019 Guidance after issuing the rule could cause confusion.[33] EPA further stated that "the final rule provides sufficient additional specificity and clarity on the issues discussed in the 2019

[26] 2020 Final Rule, p. 42211.

[27] Since the 1977 amendments to the FWPCA—the Clean Water Act of 1977—the statute has commonly been referred to as the CWA.

[28] 2020 Final Rule, p. 42211.

[29] EPA, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes*, A-104F, April 1989. See also *2010 Guidance*. According to EPA's 2010 Guidance, the agency "substantially updated its handbook on CWA §401 water quality certification" reflecting "two decades of case law and state and tribal program experience."

[30] 84 *Federal Register* 15495, April 15, 2019.

[31] EPA, *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes*, June 7, 2019, https://www.epa.gov/sites/default/files/2019-06/documents/cwa_section_401_guidance.pdf. Hereinafter *2019 Guidance*.

[32] 2020 Final Rule, p. 42214.

[33] Ibid.

Guidance to both meet the expectations of the Executive Order and render the 2019 Guidance unnecessary."[34]

Updated Regulations/2020 Final Rule

EPA also responded to E.O. 13868 by proposing a rule updating regulations on water quality certification in August 2019.[35] In July 2020, EPA issued a final water quality certification rule (the 2020 Final Rule) that went into effect on September 11, 2020, and replaced the prior implementing regulations from 1971.[36]

EPA stated in the preamble to the 2020 Final Rule that the rule was intended to "modernize" the Section 401 implementing regulations and "align them with the current text and structure of the CWA."[37] EPA also stated that the 2020 Final Rule provided additional regulatory procedures that "will help promote consistent implementation of CWA section 401 and streamline federal licensing and permitting processes, consistent with the objectives of the Executive Order."[38]

The 2020 Final Rule included numerous changes to existing regulation and practice that narrowed the authority of states when acting on Section 401 certification requests. Several changes addressed two broad policy issues relevant to the implementation of Section 401—certification timeframes and the scope of certification (including both the scope of review and the scope of conditions). In addition, the 2020 Final Rule included a new process for federal review of certifications and newly authorized the federal licensing and permitting agencies as the enforcement authorities. The following sections discuss these policy issues, how they were addressed in the 2020 Final Rule, and stakeholder responses and legal challenges to the 2020 Final Rule.

Policy Issues and the 2020 Final Rule

Certification Timeframes

Section 401 requires that certifying authorities act on a certification request "within a reasonable period of time (which shall not exceed one year) after receipt of such request."[39] If a certifying authority does not act on a certification request within that timeframe, the statute provides that the certification requirements are waived, and the certification is not required for the federal licensing or permitting agency to issue the license or permit.[40] The 2020 Final Rule addressed several policy issues related to certification timeframes that have prompted interest among stakeholders in recent years. These include what constitutes a "reasonable period of time," when the reasonable period of time begins (i.e., when the certification "clock" starts), and under what circumstances, if any, the certification clock may restart.

[34] Ibid.

[35] EPA, "Updating Regulations on Water Quality Certification," 84 *Federal Register* 44080, August 22, 2019. (Hereinafter 2019 Proposed Rule.)

[36] 2020 Final Rule.

[37] 2020 Final Rule, p. 42220.

[38] Ibid.

[39] CWA §401(a)(1); 33 U.S.C. §1341(a)(1).

[40] Ibid.

"Reasonable Period of Time"

While a full year is the "absolute maximum" amount of time in which certifying authorities must act on a certification request, Section 401 "does not preclude a finding of waiver prior to the passage of a full year."[41] Federal permitting and licensing agencies retain the authority and discretion to establish certification timeframes (i.e., the "reasonable period of time" certifying authorities have to act on a certification request before it is considered waived) as long as the timeframes do not exceed one year.[42] Some federal agencies have done so. For example, EPA's regulations specific to NPDES permits establish a 60-day period "unless the Regional Administrator finds that unusual circumstances require a longer time."[43] USACE regulations establish a 60-day period "unless the district engineer determines a shorter or longer period is reasonable for the state to act."[44] FERC regulations provide a one-year period.[45]

In December 2018, the Assistant Secretary of the Army for Civil Works issued a regulatory policy memorandum, which included a directive related to Section 401 certification timeframes.[46] In the memorandum, the Assistant Secretary noted that although it has been standard practice in some USACE districts to give states an entire year to act on a Section 401 certification request, "such an approach is inconsistent" with existing USACE regulations. He emphasized that the default time period will be 60 days, unless the district engineer determines a longer time period is required, as provided in USACE regulations. Further, he directed USACE to draft guidance establishing criteria for determining the "reasonable period of time" states would be given to act on a certification request. According to the memorandum, the reasonableness of the timeframe may be based on the type of proposed activity or complexity of the site, but not on state workload, resource issues, or lack of sufficient information. USACE issued the guidance in August 2019.[47]

Many states have expressed opposition to any efforts to restrict certification timeframes beyond what is established in the CWA.[48] Some assert that such restrictions may prevent states from complying with their own administrative requirements, preclude public input through state review, and "intrude on the states' primary authority to protect their water quality."[49]

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[41] Hoopa Valley Tribe v. FERC, 913 F.3d 1099, 1104 (D.C. Cir. 2019), *cert. denied sub nom.* Cal. Trout v. Hoopa Valley Tribe, 140 S. Ct. 650 (2020).

[42] 40 C.F.R. §121.

[43] 40 C.F.R. §124.53(c)(3).

[44] 33 C.F.R. §325.2(b)(1)(ii).

[45] 18 C.F.R. §§4.34(b)(5)(iii) and 5.23(b)(2).

[46] Department of the Army, Office of the Assistant Secretary, Civil Works, Memorandum for the Chief of Engineers, *USACE Regulatory Policy Directives Memorandum on Duration of Permits and Jurisdictional Determinations, Timeframes for Clean Water Act Section 401 Water Quality Certifications, and Application of the 404(b)(1) Guidelines*, December 13, 2018.

[47] USACE, *Regulatory Guidance Letter 19-02: Timeframes for Clean Water Act Section 401 Water Quality Certifications and Clarification of Waiver Responsibility*, August 7, 2019, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1547.

[48] For example, see Letter from Letitia James, New York Attorney General, Xavier Becerra, California Attorney General, and Philip J. Weiser, Colorado Attorney General, et al. to EPA, May 24, 2019, https://oag.ca.gov/system/files/attachments/press-docs/2019-05-24finaljoint-comments-epa-401signed.pdf.

[49] Ibid., p. 9.

Reasonable Period of Time in the 2020 Final Rule

The 2020 Final Rule established that the reasonable period of time for certifying authorities to act on certification requests shall not exceed one year from receipt.[50] Although the CWA and 1971 regulations have the same timeframe, EPA noted in the 2020 Final Rule that some states had acted beyond the one-year limit.[51] While the 1971 regulations provided that federal licensing and permitting agencies were authorized to determine the "reasonable period of time" certifying authorities had to act, neither the CWA nor the 1971 regulations specified how these agencies were to determine the reasonable period of time. The 2020 Final Rule specified criteria that federal licensing and permitting agencies should consider in making this determination.[52] Specifically, the 2020 Final Rule required federal agencies, in determining the reasonable period of time for a certification, to consider three specific criteria: (1) the complexity of the project, (2) the nature of any potential discharge, and (3) the potential need for additional study or evaluation of water quality effects from the discharge.[53]

Start of the Certification "Clock"

One specific aspect regarding certification timeframes that has been debated among stakeholders is when the certification timeframe begins (i.e., when the "clock" starts on the "reasonable period of time" established by federal licensing and permitting agencies). Specifically, some have argued that the clock starts when a certifying authority receives a certification request, while others have argued that the clock should start when it receives a certification request accompanied by a complete application (i.e., when the state decides the application has sufficient information to make a decision).

EPA's 2010 Guidance provided that "generally, the state or tribe's §401 certification review timeframe begins once a request for certification has been made to the certifying agency, accompanied by a complete application."[54] In 2018, the U.S. Court of Appeals for the Second Circuit held that Section 401 creates a "bright-line rule" that the timeline for certification begins after receipt of a certification request, not when the certifying authority determines that a request is complete.[55] EPA's 2019 Guidance stated that the 2010 Guidance inappropriately indicated that the timeline for action begins upon receipt of a "complete application" and asserted that the CWA provides that the timeline for action begins upon receipt of a certification request.[56]

Start of the Certification Clock in the 2020 Final Rule

The 2020 Final Rule clarified that the statutory timeline for certification review starts when the certifying authority receives a *certification request*, which was newly defined in the rule.[57] Per the

[50] 2020 Final Rule, p. 42285.

[51] 2020 Final Rule, p. 42243.

[52] 2020 Final Rule, p. 42286.

[53] Ibid.

[54] *2010 Guidance*, pp. 15-16.

[55] N.Y. State Dep't of Env't Conservation v. FERC, 884 F.3d 450, 455-56 (2d Cir. 2018). EPA discussed this case in the 2020 Final Rule, pp. 42222-42223. The Second Circuit further held in 2021 that a certifying authority may not alter the beginning of the certification timeline by entering into an agreement or otherwise coordinating with a certification applicant to do so. N.Y. State Dep't of Env't Conservation v. FERC, 991 F.3d 439, 450 (2d Cir. 2021).

[56] *2019 Guidance*, p. 3.

[57] 2020 Final Rule, pp. 42285-42286.

rule, a *certification request* is a written, signed, and dated communication that contains nine components specified in the rule for individual licenses or permits (or seven components specified in the rule for general licenses or permits).[58]

Restarting the Certification "Clock"—Withdrawal and Resubmission

In cases where certifying authorities believe that more information or time is needed to review a license or permit application before making a certification decision, they have generally taken two approaches, as described by EPA.[59] Some states have denied Section 401 certifications "without prejudice" when they decided that they did not have enough data or information for their analysis. In such cases, they encouraged applicants to resubmit the application. In other cases, states have suggested that applicants withdraw and resubmit applications with the intention of restarting the certification clock. This approach aims to provide the applicant more time to submit additional information and the state more time to review the information and make a certification decision. Some observers assert that restarting the clock in this manner is preferable to denying certification based on data and information gaps.[60] Others assert that restarting the clock, particularly when it is done multiple times, results in delays that are not consistent with congressional intent to limit the length of the certification process.[61]

Parties have disputed which actions constitute acting on a certification request for purposes of avoiding waiver. At least one court has also been critical of the withdrawal and resubmission approach. In January 2019, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held in *Hoopa Valley Tribe v. FERC* that withdrawing and resubmitting the same Section 401 request for the purpose of circumventing the one-year statutory deadline does not restart the timeframe for the state's review.[62] In that case, the Hoopa Valley Tribe sought review of a FERC order regarding PacifiCorp's proposal to relicense some of the dams comprising the Klamath Hydroelectric Project in California and Oregon, and to decommission others.[63] Under the terms of a 2010 settlement agreement, PacifiCorp, California, and Oregon agreed to defer Section 401's one-year statutory limit by withdrawing and resubmitting PacifiCorp's water quality certification application each year.[64] The Tribe argued that California and Oregon had waived their Section 401 certification authority, and that PacifiCorp had therefore failed to diligently prosecute its licensing application.[65] The D.C. Circuit held that Section 401 imposed a clear maximum of one year to act on a request for certification, and that the text "cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request."[66] Otherwise, the court cautioned, "the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine" federal agencies' regulatory jurisdiction.[67] Some

[58] These components include, for example, information on the project proponent and point of contact, the applicable federal license or permit, and the location and nature of any discharge that may result from the proposed project and the location of receiving waters. See 2020 Final Rule, p. 42285.

[59] *2010 Guidance*, p. 13.

[60] 2020 Final Rule, pp. 42261-42262.

[61] 2020 Final Rule, p. 42261.

[62] Hoopa Valley Tribe v. FERC, 913 F.3d 1099 (D.C. Cir. 2019), *cert. denied sub nom.* Cal. Trout v. Hoopa Valley Tribe, 140 S. Ct. 650 (2019). EPA discussed the *Hoopa Valley Tribe* case in the 2020 Final Rule, pp. 42210-42223.

[63] *Hoopa Valley Tribe*, 913 F.3d at 1100.

[64] Id. at 1101.

[65] Id. at 1103.

[66] Id. at 1104.

[67] Id.

observers asserted that the ruling could lead to an increase in certification denials in instances in which states may consider the information insufficient for making a decision.[68]

By contrast, the U.S. Court of Appeals for the Fourth Circuit, in *North Carolina Department of Environmental Quality v. FERC*, distinguished *Hoopa Valley* as "a very narrow decision flowing from a fairly egregious set of facts," and has expressed skepticism regarding FERC's argument that a certifying authority must either grant or deny certification within one year of the certification request in order to avoid waiver.[69] The Fourth Circuit explained that Section 401 specifically provides that certification is waived if a certifying authority fails or refuses to *act* on a request within a year, not if the certifying authority fails or refuses to *grant or deny* certification.[70] The court thus suggested, but did not hold, that a certifying authority that "takes significant and meaningful action on a certification request within a year of its filing," but does not grant or deny the request, would not waive certification.[71]

The D.C. Circuit later endorsed the Fourth Circuit's interpretation of *Hoopa Valley*.[72] In *Turlock Irrigation District v. FERC*, the D.C. Circuit considered whether the California State Water Resources Control Board waived its certification authority in a combined licensing and relicensing proceeding for two hydroelectric facilities in California. The board denied without prejudice the certification requests several times because it could not conclusively determine that certification was warranted in light of ongoing environmental reviews.[73] Ultimately, the board granted certification, but with 45 conditions.[74] The license applicants argued that the state board waived its certification authority, making the conditions "recommendations" for FERC to consider rather than mandatory terms that must be included in their federal licenses.[75] The D.C. Circuit held that the board did not waive its certification authority because it "acted" within the meaning of Section 401(a)(1) when it denied certification and later granted certification with conditions.[76] The court distinguished *Hoopa Valley* as a case where the certifying authority and license applicant entered into an agreement whereby the state agencies repeatedly would take *no* action on the certification request.[77]

The U.S. Court of Appeals for the Ninth Circuit has also opined on withdrawal and resubmission following *Hoopa Valley*. In *California State Water Resources Control Board v. FERC*, the court held that a certifying authority's observation that an applicant would likely withdraw and resubmit its certification requests did not constitute coordination in a withdrawal-and-resubmission scheme so as to constitute waiver.[78] The court did not rule on the validity of FERC's position—adopted after *Hoopa Valley*—that an applicant's "unilateral" withdrawal and resubmission was distinct from "coordinated" withdrawal-and-resubmission schemes in which a certifying authority sought to avoid the one-year deadline.[79] Instead, the court ruled based on its

[68] 2020 Final Rule, p. 42261.

[69] 3 F.4th 655, 669 (4th Cir. 2021).

[70] Id. at 669-70.

[71] Ibid.

[72] Turlock Irrigation Dist. v. FERC, 36 F. 4th 1179, 1183 (D.C. Cir. 2022).

[73] Id. at 1181.

[74] Id. at 1182.

[75] Id.

[76] Id. at 1183.

[77] Id.

[78] __ F. 4th __, 2022 WL 3094576 (9th Cir. 2022).

[79] Id. at *9.

review of emails in the record that the state water resources board simply acquiesced in the applicant's own decision to withdraw and resubmit its applications, and that the board thus did not waive its certification authority.[80]

Courts may continue to clarify when a certifying authority has *acted* on a request for certification and when it has waived its authority. Based on *Hoopa Valley* and subsequent rulings by the D.C. Circuit and other courts, it appears that withdrawal and resubmission could constitute waiver when it results from an agreement between the certifying authority and the applicant to avoid the one-year deadline. An applicant's unilateral withdrawal and resubmission may not form the basis of a waiver finding if the certifying authority has taken some kind of action, such as denying an application without prejudice, but courts have not yet defined what would count as action in that scenario.

Restarting the Certification Clock in the 2020 Final Rule

The 2020 Final Rule clarified that once a certifying authority receives a certification request, the period of time to act on a certification request would not pause or stop for any reason.[81] Specifically, the certifying authority could not request that license or permit applicants withdraw and resubmit their certification requests as a means to restart the certification clock.[82]

The 2020 Final Rule also established a pre-filing meeting process, which was intended to ensure that the certifying authority received early notification of projects and could discuss informational needs with the project proponent before the statutory timeframe for review began.[83] Specifically, project proponents were required to submit a request to the certifying authority for a pre-filing meeting at least 30 days prior to submitting a certification request.[84] Per the rule, the certifying authority had discretion as to whether to grant or respond to the meeting request.[85] In the preamble to the 2020 Final Rule, EPA noted that early engagement, including through a pre-filing meeting, could help improve the quality of information provided to the certifying authority and could reduce the need to make additional information requests of the project proponent during the certification timeframe.[86]

The preamble to the 2020 Final Rule also stated that "if a project proponent withdraws a certification request because the project is no longer being planned or if certain elements of the proposed project materially change from what was originally proposed or from what is described or analyzed in additional information submitted by the project proponent, it is EPA's interpretation that the certifying authority no longer has an obligation to act on that request."[87] However, the preamble also clarified that the agency "expects that voluntary withdrawal by the project proponent will be done sparingly and only in response to material modifications to the project or if the project is no longer planned."[88] In such circumstances, if the project proponent wanted a certification in the future, they would have to submit a new certification request and

[80] Id. at *10.

[81] 2020 Final Rule, p. 42261.

[82] 2020 Final Rule, p. 42286.

[83] 2020 Final Rule, p. 42241.

[84] 2020 Final Rule, p. 42285.

[85] Ibid.

[86] 2020 Final Rule, p. 42242.

[87] 2020 Final Rule, pp. 42246-42247.

[88] Ibid.

would, at a minimum, have to wait 30 days before resubmitting a certification request due to the pre-filing meeting request requirement in the rule.[89]

Scope of 401 Certifications

Congress has provided direction regarding the scope of what certifying authorities are to consider in making a Section 401 certification decision. Specifically, Section 401(a)(1) authorizes certifying authorities to certify that a discharge to navigable waters that may result from a proposed activity will comply with specific enumerated sections of the CWA, including Sections 301, 302, 303, 306, and 307.[90] Section 401(d) provides direction regarding the scope of what conditions certifying authorities may impose in granting certifications, and directs that such certifications

> shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit.[91]

Scope of Section 401 Review

Stakeholders have debated the scope of what certifying authorities should consider when reviewing a request for certification. The Senate Committee on Environment and Public Works held hearings in the 115th and 116th sessions of Congress that included debate over the scope of considerations during certification.[92] Some groups have argued that Congress intended for the review to focus on water quality impacts and assert that, in recent years, some states have overstepped their authority by also considering non-water-quality environmental impacts, such as greenhouse gas emissions.[93] Other groups argue that Congress intended for certifying authorities to have a significant role in ensuring that the water quality in their states is protected, and assert that the denials that states have issued have been well-supported and necessary to protect state water quality.[94]

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[89] Ibid.

[90] 33 U.S.C. §1341(a)(1). CWA §§301, 302, and 306 pertain to effluent limitations and standards of performance for new and existing discharge sources, §303 pertains to water quality standards and implementation plans, and §307 pertains to toxic pretreatment effluent standards.

[91] 33 U.S.C. §1341(d).

[92] U.S. Congress, Senate Committee on Environment and Public Works, *Hearing to Examine Implementation of Clean Water Act Section 401 and S.3303, the Water Quality Certification Improvement Act of 2018*, 115th Cong., 2nd sess., August 16, 2018, S.Hrg. 115-344. U.S. Congress, Senate Committee on Environment and Public Works, *Hearing on S. 1087, the Water Quality Certification Improvement Act of 2019, and Other Potential Reforms to Improve Implementation of Section 401 of the Clean Water Act: State Perspectives*, 116th Cong., 2nd sess., November 19, 2019, S.Hrg. 116-145.

[93] See, for example, Letter from Interstate Natural Gas Association of America to Andrew Wheeler, Administrator, EPA, May 24, 2019. See also Letter from Natural Gas Supply Association and Center for Liquefied Natural Gas to Andrew Wheeler, Administrator, EPA, May 24, 2019. See also Letter from Cross-Cutting Issues Group to Andrew Wheeler, Administrator, EPA, May 24, 2019. All three letters are available in EPA Docket ID: EPA-HQ-OW-2018-0855.

[94] For example, see Letter from Association of State Wetland Managers to Anna Wildeman, Deputy Assistant Administrator, EPA Office of Water, May 20, 2019. See also Letter from Western States Water Council to Andrew

Some states have cited projected environmental impacts other than water quality impacts in denying certain Section 401 certification requests. In 2017, the Washington Department of Ecology denied a permit application for a planned coal export terminal along the Columbia River.[95] In addition to finding that the applicant did not provide "reasonable assurance" that the project would meet applicable water quality standards, the state concluded that the construction and operation of the terminal would result in significant and unavoidable adverse impacts to social and community resources, cultural resources, tribal resources, rail transportation, rail safety, vehicle transportation, vessel transportation, noise and vibration, and air quality.[96] Unrelated to the Section 401 certification application, a separate state agency also denied the applicant's request for approval of a sublease of state-owned aquatic lands on which the applicant proposed to construct a portion of the project.[97] The permit applicant challenged the denials in both federal and state court, alleging that Washington improperly denied the permit because of an anti-coal bias and concerns about greenhouse gas emissions, in violation of the Dormant Commerce Clause and the foreign affairs doctrine.[98] Additionally, Montana and Wyoming sought review of Washington's denial of the water quality certification directly in the U.S. Supreme Court.[99] The parties agreed to move for dismissal of the federal and state lawsuits after the permit applicant filed for bankruptcy and represented that it no longer had funds to continue operation of the terminal site.[100] The Supreme Court also declined to hear Montana and Wyoming's complaint.[101]

The New York State Department of Environmental Conservation (NYSDEC) also denied a series of Section 401 water quality certification applications for the construction of a natural gas pipeline in Raritan Bay.[102] Most recently, the Department denied an application based on the

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Wheeler, Administrator, EPA, May 21, 2019. See also Letter from State of Washington Department of Ecology to Andrew Wheeler, Administrator, EPA, May 24, 2019. All three letters are available in EPA Docket ID: EPA-HQ-OW-2018-0855.

[95] Letter from Maia D. Bellon, Director, Washington Department of Ecology, to Kristin Gaines, Millennium Bulk Terminals-Longview, LLC, September 26, 2017, https://ecology.wa.gov/DOE/files/83/8349469b-a94f-492b-acca-d8277e1ad237.pdf.

[96] Ibid. See also *Millennium Bulk Terminals – Longview Final SEPA Environmental Impact Statement* S.6 (April 2017), https://www.millenniumbulkeiswa.gov/assets/introduction5.17.pdf.

[97] See Nw. Alloys, Inc. v. Wash. Dep't of Nat. Res., 447 P.3d 620, 626-27 (Wash. Ct. App. 2019); Millennium Bulk Terminals-Longview, LLC v. Washington, No. 52215-2-II, 2020 WL 1651475 (Wash. Ct. App. March 17, 2020). Cowlitz County, Washington State Department of Ecology, *Millennium Bulk Terminals – Longview Final SEPA Environmental Impact Statement* (April 2017), https://www.millenniumbulkeiswa.gov/assets/introduction5.17.pdf.

[98] See Brief for the United States as Amicus Curiae, Montana v. Washington, No. 22O152, at 4-7 (U.S. May 25, 2021).

[99] Montana v. Washington, No. 22O152, Bill of Complaint ¶ 44 (U.S. January 21, 2020). The Supreme Court has original and exclusive jurisdiction to adjudicate disputes between two or more states. U.S. CONST. art. III, §2, cl. 2; 28 U.S.C. §1251(a).

[100] See Order, Lighthouse Res., Inc. v. Inslee, No. 19-35415, Doc. No. 93 (9th Cir. March 23, 2021); Agreed Order of Dismissal, Lighthouse Res. Inc. v. Inslee, No. 3:18-cv-05005-RJB, Doc. No. 352 (W.D. Wash. April 27, 2021); Agreed Order of Dismissal, Millennium Bulk Terminals-Longview, LLC v. Wash. State Dep't of Ecology, No. 18-2-994-08 (Wash. Super. Ct. May 10, 2021).

[101] Montana v. Washington, *motion for leave to file a bill of complaint petition denied*, 141 S. Ct. 2848 (U.S. June 28, 2021) (mem.).

[102] See Letter from Thomas S. Berkman, Deputy Commissioner and General Counsel, New York State Department of Environmental Conservation, to Joseph Dean, Transcontinental Gas Pipe Line Company, LLC, April 20, 2018, https://www.dec.ny.gov/docs/water_pdf/transcodenial42018.pdf. Letter from Daniel Whitehead, Director, Division of Environmental Permits, to Joseph Dean, May 15, 2019, https://www.dec.ny.gov/docs/administration_pdf/nodtgp.pdf; Letter from Daniel Whitehead to Joseph Dean, Transcontinental Gas Pipe Line Company, LLC, May 15, 2020, https://www.dec.ny.gov/docs/permits_ej_operations_pdf/nesewqcdenial05152020.pdf.

project proponent's failure to demonstrate that the project would comply with applicable water quality standards.[103] The denial letter also included a qualitative assessment of the greenhouse gas emissions and climate impacts associated with the project in light of the state's newly enacted Climate Leadership and Community Protection Act (Climate Act), which requires a 40% reduction in statewide greenhouse gas emissions.[104] The Department found that the project would result in greenhouse gas emissions from the full lifecycle of natural gas that would be transported through the pipeline; could delay the state's transition away from natural gas and other fossil fuels; and would be inconsistent with the statewide greenhouse gas emission limits and other requirements established in the Climate Act.[105] While the Department noted that the denial did not rest solely on the determination that the project was "inconsistent with the energy and climate policies, laws, and goals" of the state, it noted that "the State should not sacrifice its water quality, sensitive habitats, and important biological resources for a project that would have adverse climate impacts and one that runs counter to the State's policy to significantly reduce GHGs by transitioning away from the use of natural gas to produce electricity."[106] Unlike in Washington, the project proponent has not filed a lawsuit challenging the Raritan Bay certification denials.

Scope of Section 401 Conditions

Stakeholders have also debated the scope of what certifying authorities may impose as conditions when granting a certification. Some observers assert that conditions should be limited to ensuring compliance with the enumerated sections listed in Section 401(d) or state requirements that are water-quality specific. Other observers argue that the phrase "any other appropriate requirement of State law" provides authority to consider conditions that are broader, as long as they relate to water quality.[107]

The Supreme Court weighed in on one aspect of the scope of Section 401 in 1994. In a 7-2 decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the Court upheld a state condition that imposed a minimum stream flow requirement to protect a steelhead and salmon fishery in a Section 401 certification for a hydroelectric project.[108] In rejecting the petitioner's claim that the state's authority to impose conditions under Section 401 should be limited to addressing only "discharges" that may result from the proposed project, the Court held that a "reasonable read" of Section 401 authorizes the state to place certification conditions on the "activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[109] The Court arrived at this conclusion by analyzing the different terms used in Section 401(a) and 401(d), noting that while Section 401(a) requires certifying authorities to certify that a *discharge* will comply with relevant provisions of the CWA, Section 401(d) provides that a certification may include conditions or limitations "to assure that *any applicant*" will comply with the CWA

[103] Letter from Daniel Whitehead to Joseph Dean, May 15, 2020, pp. 3-13, https://www.dec.ny.gov/docs/permits_ej_operations_pdf/nesewqcdenial05152020.pdf#page=3.

[104] Ibid., p. 14.

[105] Ibid.

[106] Ibid., p. 16.

[107] 2020 Final Rule, pp. 42254-42256.

[108] PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700 (1994). The parties in that case did not dispute that state certification was required under Section 401. In a later case, the Supreme Court unanimously held that the flow of water through a dam constitutes a "discharge" for purposes of triggering Section 401. S.D. Warren Co. v. Me. Bd. of Env'tl Prot., 547 U.S. 370 (2006).

[109] *PUD No. 1 of Jefferson County*, 511 U.S. at 711-12.

and appropriate state law requirements.[110] Additionally, the Court noted that this was consistent with EPA's implementing regulations in effect at the time, which interpreted Section 401 as requiring the certifying authority to find that "there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards."[111]

The Court further cautioned, however, that certifying authorities do not have unlimited authority to place restrictions on an activity as a whole, but instead may ensure only that a project complies with the enumerated provisions of the CWA and any other appropriate state law requirement.[112] The Court did not reach the issue of "what additional state laws, if any, might be incorporated" by the reference to "any other appropriate requirement of State law," but held that, "at a minimum, limitations pursuant to state water quality standards adopted pursuant to [CWA] § 303 are 'appropriate' requirements of state law."[113] The Court ultimately concluded that a certifying authority may place minimum stream flow requirements in its certification to enforce a designated use contained in a state water quality standard, reasoning that "[i]n many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery."[114]

2010 EPA Guidance on the Scope of Review and Conditions

EPA's rescinded 2010 Guidance provided that "an applicant must demonstrate that the proposed activity and discharge will not violate or interfere with the attainment of any limitations or standards identified in §401(a) and (d)."[115] Further, it specified that these CWA subsections include the enumerated sections of the act and "any other appropriate requirement of State law set forth in such certification."[116] EPA's 2010 Guidance also supported interpreting the scope of what states may impose as conditions in a manner that allowed consideration of concerns relating to water quality. Specifically, the 2010 Guidance provided that "[u]nder CWA §401(d) the water quality concerns to consider, and the range of potential conditions available to address those concerns, extend to any provision of state or tribal law relating to the aquatic resource."[117] It further provided that "considerations can be quite broad so long as they relate to water quality."[118] Relevant considerations identified in the 2010 Guidance included state and tribal laws protecting threatened and endangered species, "particularly where the species plays a role in maintaining water quality or if their presence is an aspect of a designated use"; state and tribal wildlife laws "addressing habitat characteristics necessary for species identified in a waterbody's designated use"; and state and tribal laws protecting the cultural or religious value of waters.[119]

When EPA updated its guidance in 2019 to respond to E.O. 13868, the agency recommended that the scope of a certification review and related decision "be limited to an evaluation of potential

[110] Id. at 711.

[111] Id. at 712 (quoting 40 C.F.R. §121.2(a)(3) (1993)).

[112] Id. at 712.

[113] Id. at 713.

[114] Id. at 719.

[115] *2010 Guidance*, p. 18.

[116] Ibid.

[117] *2010 Guidance*, p. 23.

[118] Ibid.

[119] *2010 Guidance*, p. 21.

water quality impacts."[120] Also, EPA more narrowly recommended that conditions "be limited to ensuring compliance with the enumerated provisions of the CWA and other appropriate state or tribal water quality requirements."[121]

Scope of Certifications in the 2020 Final Rule

CWA Section 401 requires that the certifying authority certify that "any such discharge will comply with the applicable provisions of [CWA] sections 301, 302, 303, 306, and 307."[122] The 2020 Final Rule limited the scope of a Section 401 certification to assuring that a discharge from a federally licensed or permitted activity would comply with "water quality requirements."[123] The rule also newly defined the term *water quality requirements* in a manner that limited the scope of water quality impacts that states may consider in their certification review, as well as the scope of conditions the state may impose. Specifically, the rule defined "water quality requirements" as "applicable provisions of §§301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for *point source discharges* into *waters of the United States*" (emphasis added).[124]

Under 1971 regulations and practice, the scope of certification included assuring that the activity—which encompasses the project as a whole as well as the discharge—would comply with water quality requirements, which was neither defined explicitly in Section 401 nor the regulations.[125] In addition, as EPA acknowledged in the 2020 Final Rule's preamble, the agency "previously suggested that the scope of section 401 may extend to nonpoint source discharges to non-federal waters" (i.e., waters that are not waters of the United States) "once the requirement for the section 401 certification is triggered."[126]

The Supreme Court addressed one aspect of what activities trigger Section 401 in 2006. In *S.D. Warren Co. v. Maine Board of Environmental Protection*, the Court considered the meaning of the term "discharge" as used in Section 401(a)(1), which establishes the scope of the certification requirement as applying to any application for a federal license or permit to conduct "any activity ... which may result in any discharge into the navigable waters."[127] Ruling that the flow of water through a dam constitutes a "discharge" sufficient to trigger Section 401, the Court unanimously held that the term means a "flowing or issuing out," and is broader than "discharge of a pollutant" or "discharge of pollutants."[128] The Court did not discuss, however, whether a discharge must be from a point source to trigger Section 401, or whether a discharge from a dam is a point source discharge more specifically.

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[120] *2019 Guidance*, p. 4.

[121] Ibid.

[122] 33 U.S.C. §1341.

[123] 2020 Final Rule, p. 42285.

[124] 2020 Final Rule, p. 42285. EPA recently narrowed the definition of "waters of the United States" in a separate rulemaking. See USACE and EPA, "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 *Federal Register* 22250, April 21, 2020.

[125] EPA Office of Water, *Clean Water Act Section 401 Certification Rule Public Webinar*, June 17, 2020, https://www.epa.gov/cwa-401/public-webinar-slides-clean-water-act-section-401-certification-rule.

[126] 2020 Final Rule, pp. 42234-42235.

[127] 547 U.S. 370 (2006).

[128] Id. at 375-76.

The 2020 Final Rule limited the application of Section 401 to point source discharges into waters of the United States.[129] This change meant that any consideration of water quality impacts from the project as a whole (other than the point source discharge itself) was excluded from the scope of the certifying authority's review and consideration of conditions. For example, the certifying authority was no longer able to address water quality-related impacts from the project that were tangential to the discharge. Stakeholders asserted that such water quality impacts could include increased water withdrawals, groundwater pollution, increased erosion and sedimentation, increases in impervious surfaces (resulting in reduced stormwater infiltration), disconnected ecosystems, and harm to endangered species.[130]

In addition, the changes in the 2020 Final Rule meant that the scope of the certifying authority's review and consideration of conditions could not include impacts to nonfederal waters. Some stakeholders expressed particular concern about this change in light of the final rule EPA and USACE published on April 21, 2020, which narrowed the scope of waters that are defined as "waters of the United States" (WOTUS) under the CWA.[131] However, in June 2021, EPA issued a notice of its intention to revise the 2020 Final Rule.[132] Additionally, on October 21, 2021, a federal district court vacated the 2020 Final Rule.[133]

The changes in the 2020 Final Rule also narrowed the scope of review and conditions to focus on water quality requirements, specifically excluding consideration of other non-water-quality impacts. In the preamble to the 2020 Final Rule, EPA stated that the agency was "aware of circumstances in which some States have denied certifications on grounds that are unrelated to water quality requirements and that are beyond the scope of CWA section 401."[134] EPA then referenced, as an example, the certification denial letter from the state of New York to the Millennium Pipeline Company, which considered among other things FERC's failure to consider or quantify the effects of downstream greenhouse gas emissions in its environmental review of the project.[135] The preamble also stated that the agency is aware that some certifications have included conditions that may be unrelated to water quality, including requirements for recreational trails, public access for recreation, or one-time and recurring payments to state agencies for improvements unrelated to the proposed project.[136] EPA emphasized that the 2020 Final Rule clarified that the scope of the certification review and the scope of conditions that were appropriate for inclusion in a certification were limited to ensuring that the discharge from a

[129] 2020 Final Rule, p. 42234.

[130] 2020 Final Rule, p. 42252.

[131] USACE and EPA, "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 *Federal Register* 22250, April 21, 2020. For example, the Navigable Waters Protection Rule narrowed the definitions of certain categories of WOTUS, including the definition of tributaries and adjacent wetlands. Ephemeral tributaries (i.e., flow in response to precipitation events) were sometimes considered WOTUS under prior regulations, but were excluded from the Navigable Waters Protection Rule's definition of tributaries. Similarly, although adjacent wetlands were considered WOTUS under prior regulations, the Navigable Waters Protection Rule limited the definition to include only those wetlands that abut or otherwise have a direct surface connection to other jurisdictional waters.

[132] EPA, "Notice of Intention To Reconsider and Revise the Clean Water Act Section 401 Certification Rule," 86 *Federal Register* 29541, June 2, 2021. See also EPA, "EPA Takes Action to Bolster State and Tribal Authority to Protect Water Resources," press release, May 27, 2021, at https://www.epa.gov/newsreleases/epa-takes-action-bolster-state-and-tribal-authority-protect-water-resources-0.

[133] Order, *In re* Clean Water Act Rulemaking, No. 3:20-cv-04636, Doc. No. 173 (N.D. Cal. October 21, 2021).

[134] 2020 Final Rule, p. 42256.

[135] Ibid.

[136] 2020 Final Rule, p. 42257.

federally licensed or permitted activity would comply with water quality requirements, as newly defined in the rule.

Other Selected Changes in the 2020 Final Rule

The 2020 Final Rule included a number of changes from the 1971 regulations in addition to those addressing certification timeframes and the scope of certification. Some of these changes formalized current practice or clarified timelines around specific requirements and practice. Others represented more substantive changes from the 1971 regulations and practice, including a new federal review process for denials and conditions and a new interpretation of enforcement roles.

Federal Review Process for Denials and Conditions

The 2020 Final Rule addressed the role of federal licensing and permitting agencies in the certification process, including those agencies' authority to review certification decisions. Courts have held that federal licensing and permitting agencies may not change or reject conditions imposed by certifying authorities, including by imposing more stringent alternative conditions.[137] Courts have held, however, that the licensing or permitting agency must determine whether the certifying authority has met the facial requirements of Section 401 before issuing a license or permit.[138]

The 2020 Final Rule required a certifying authority to provide written reasons for the denial or conditions, along with specified supporting information to the federal licensing or permitting agency.[139] The 2020 Final Rule also newly required the federal permitting or licensing agency to determine whether the state denial or certification conditions complied with the procedural requirements of Section 401 and the 2020 Final Rule. If the federal permitting or licensing agency determined that a certification denial did not include three elements as required in the rule, the federal agency was required to determine that the certifying authority "fail[ed] or refuse[d] to act" and therefore waived certification.[140] Similarly, federal licensing and permitting agencies were required to determine whether certification conditions included the two minimum elements required by the 2020 Final Rule.[141] If the federal agency determined that certification conditions did not include the two elements, they similarly were required to determine that the certifying authority "fail[ed] or refuse[d] to act" and the deficient certification condition would be waived.

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[137] Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635, 648 (4th Cir. 2018); City of Tacoma v. FERC, 460 F.3d 53, 67 (D.C. Cir. 2006); Am. Rivers, Inc. v. FERC, 129 F.3d 99, 107 (2d Cir. 1997); U.S. Dep't of Interior v. FERC, 952 F.2d 538, 548 (D.C. Cir. 1992); Roosevelt Campobello Inter. Park v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982).

[138] *City of Tacoma*, 460 F.3d at 67-68; *Am. Rivers, Inc.*, 129 F.3d at 110-11; Keating v. FERC, 927 F.2d 616, 622-23, 625 (D.C. Cir. 1997).

[139] 2020 Final Rule, p. 42286.

[140] 2020 Final Rule, p. 42286. These three elements for denial of an individual license or permit are "(i) the specific water quality requirements with which the discharge will not comply; (ii) a statement explaining why the discharge will not comply with the identified water quality requirements; and (iii) if the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements." The rule lists similar elements for denial of a general license or permit.

[141] 2020 Final Rule, p. 42286. These two elements for conditions on an individual license or permit are "(i) a statement explaining why the condition is necessary to assure that the discharge from the proposed project with comply with water quality requirements; and (ii) a citation to federal, state, or tribal law that authorizes the condition." The rule lists similar elements for conditions on a general license or permit.

The preamble to the 2020 Final Rule clarified that the federal agency review "is procedural in nature and does not extend to substantive evaluations" of certifications, conditions, and denials.[142]

Enforcement

The 2020 Final Rule also newly provided that the federal licensing or permitting agency (rather than the certifying authority) would be responsible for enforcing certification conditions incorporated into a federal license or permit.[143] The preamble to the 2020 Final Rule stated that "the CWA does not provide independent authority for certifying authorities to enforce the conditions that are included in a certification under federal law."[144] Accordingly, it stated that EPA "is interpreting the CWA to clarify that this enforcement role is reserved to the federal agency issuing the federal license or permit."[145] This differs from 1971 regulations and practice, which did not expressly clarify enforcement roles. According to an EPA webinar and the 2010 Guidance, depending on the state, both the certifying authorities and the federal agencies played a role in enforcement under the 1971 regulations and in practice.[146] EPA expressly declined to opine in the 2020 Final Rule on whether the CWA authorizes citizen suits to enforce certification conditions pursuant to Section 505 of the statute.[147]

In commenting on the proposed rule, some commenters agreed with this enforcement approach.[148] Others asserted that states and tribes should be allowed to independently enforce their certification conditions.[149] Some argued that the restriction on enforcement authority would run afoul of Section 510 of the CWA, which reserves state and local governments' authority to enforce "any standard or limitation respecting discharges of pollutants" and "any requirement respecting control or abatement of pollution" that is equally or more stringent than required under the CWA, unless expressly provided for in the statute.[150] EPA explained in the 2020 Final Rule preamble that states may enforce certification conditions under state law (where state authority is not preempted by federal law), and asserted that the rule therefore did not implicate Section 510.[151] Some also argued that states and tribes, rather than the federal agency, have the technical knowledge and capacity to conduct inspections and enforce certification conditions; and some federal agencies noted that it could be challenging to enforce certain certification conditions.[152] EPA responded that federal agencies remained free to consult with certifying authorities, and that the rule's limitations on the scope of certification and the new requirements for certifications with

[142] 2020 Final Rule, p. 42267. Note that this aspect of the 2020 Final Rule differs from the 2019 Proposed Rule, which would have required federal licensing and permitting agencies to review and determine whether certifications, conditions, and denials were within the scope of certification. The final rule does not include the additional substantive federal review requirement.

[143] 2020 Final Rule, p. 42275.

[144] Ibid.

[145] Ibid.

[146] EPA Office of Water, *Clean Water Act Section 401 Certification Rule Public Webinar*, June 17, 2020, https://www.epa.gov/cwa-401/public-webinar-slides-clean-water-act-section-401-certification-rule. See also 2010 Guidance at 32-33.

[147] 2020 Final Rule, p. 42277.

[148] 2020 Final Rule, p. 42275.

[149] Ibid.

[150] 2020 Final Rule, pp. 42275-42276. See also 33 U.S.C. §1370.

[151] 2020 Final Rule, p. 42276.

[152] Ibid.

conditions would provide sufficient clarity to enable federal agencies to effectively enforce conditions.[153]

Stakeholder Views and Legal Challenges

Both the 2019 Proposed Rule and the 2020 Final Rule garnered interest from stakeholder groups. EPA received more than 125,000 comments on the proposed rule "from a broad spectrum of interested parties."[154] Various groups, including those representing energy interests, generally supported the 2019 Proposed Rule. Some argued, for example, that states have misused their Section 401 authorities, and that the proposed changes would improve predictability and clarity, thereby improving applicants' ability to obtain permits for energy infrastructure projects.[155] Many groups emphasized the importance of ensuring that Section 401 certification is focused on water quality impacts, rather than non-water-quality impacts such as climate change or air emissions.[156]

Other groups, including many states and state associations, opposed the proposed changes. They argued that the proposed changes raised federalism concerns, would narrow the scope of state authority, and would substantially affect the ability of states to manage and protect their water resources.[157] Central to their concerns was the implication of the rule for the CWA's cooperative federalism framework.[158] Specifically, they argued that CWA Section 101(b) establishes Congress's clear intent in establishing a system of cooperative federalism that protects "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and to plan the development and use of land and water resources."[159] Many states view Section 401 authority as a critical tool that has helped ensure that activities associated with federally licensed and permitted discharges will not impair water quality in their respective state. They viewed the proposed changes as an infringement upon the authority designated to them by Congress under the CWA.[160]

Various states, tribes, and environmental groups filed five lawsuits challenging the 2020 Final Rule. Three suits—filed by a coalition of environmental groups, a group of 20 states and the

[153] Ibid.

[154] 2020 Final Rule, p. 42213.

[155] See, for example, Letter from Center for Liquefied Natural Gas to Andrew Wheeler, Administrator, EPA, October 21, 2019. See also Letter from Natural Gas Council to Andrew Wheeler, Administrator, EPA, October 21, 2019. See also Letter from National Mining Association to Andrew Wheeler, Administrator, EPA, October 21, 2019. All three letters are available in EPA Docket ID: EPA-HQ-OW-2019-040.

[156] 2020 Final Rule, p. 42255.

[157] See, for example, Letter from Western Governors' Association, National Conference of State Legislatures, and National Association of Counties, et al. to Andrew Wheeler, Administrator, EPA, October 16, 2019. See also Letter from Maryland Department of the Environment to Andrew Wheeler, Administrator, EPA, October 21, 2019. See also Letter from Louisiana Department of Environmental Quality to Andrew Wheeler, Administrator, EPA, October 19, 2019. All three letters are available in EPA Docket ID: EPA-HQ-OW-2019-040.

[158] Under the CWA's cooperative federalism framework, the federal government and the states jointly administer and enforce the statute. For example, CWA §303(c) requires states, territories, and authorized tribes to adopt water quality standards for waters of the United States, subject to EPA approval (33 U.S.C. §1313(c)). CWA §304(a) requires EPA to develop and publish criteria that serve as recommendations to states for use in developing their water quality standards. States are authorized to establish water quality standards that are more stringent than EPA criteria. Additionally, states may adopt standards for additional surface waters if their own state laws allow them to do so. EPA and states use these water quality standards, as well as technology based standards, when establishing permit limits for point source dischargers under §402.

[159] 33 U.S.C. §1251(b).

[160] 2020 Final Rule, p. 42226.

District of Columbia, and a group of Indian tribes and environmental organizations—were all consolidated in the U.S. District Court for the Northern District of California.[161] Other environmental groups also filed suits in the U.S. District Courts for the Eastern District of Pennsylvania and the District of South Carolina.[162] A group of eight states and several energy industry associations intervened in the lawsuits in support of EPA.[163]

In general, the plaintiffs alleged that the 2020 Final Rule violated the Administrative Procedure Act (APA), the CWA, and the Tenth Amendment. Among other things, they argued that the rule unlawfully restricted powers preserved for certifying authorities under the CWA, including by restricting the scope and process for their review of certification applications, and by excluding certifying authorities from the enforcement of certification conditions.[164] The plaintiffs also argued that the rule impermissibly expanded federal authority, including by authorizing federal permitting and licensing agencies to review and overrule certification decisions.[165] With respect to the 2020 Final Rule's limitations on the scope of certification review, some plaintiffs alleged that the rule deprived certifying authorities of the opportunity to consider the effects of a project as a whole on state water quality, and that the narrowed scope of certification review contradicted both the text of the CWA and Supreme Court precedent.[166] Finally, the Suquamish Tribe argued that EPA failed to satisfy its tribal consultation obligations during the development of the 2020 Final Rule as required by an executive order and EPA policy document governing consultation and coordination with tribal governments.[167]

None of the three courts issued opinions on the merits of the plaintiffs' claims. As discussed in further detail below, all three courts remanded the 2020 Final Rule to EPA.[168] One court vacated

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[161] Complaint, Am. Rivers v. Wheeler, No. 3:20-cv-04636, Doc. No. 1 (N.D. Cal. July 13, 2020); Complaint, California v. Wheeler, No. 4:20-cv-04869, Doc. No. 1 (N.D. Cal. July 21, 2020); Complaint, Suquamish Tribe v. Wheeler, No. 3:20-cv-06137, Doc. No. 1 (N.D. Cal. August 31, 2020); Case Management Scheduling Order, *In re* Clean Water Act Rulemaking, No. 3:20-cv-04636, Doc. No. 36 (N.D. Cal. October 23, 2020).

[162] Complaint, Del. Riverkeeper Network v. EPA, No. 2:20-cv-03412, Doc. No. 1 (E.D. Pa. July 13, 2020); Complaint, S.C. Coastal Conservation League v. Wheeler, No. 2:20-cv-03062, Doc. No. 1 (D.S.C. August 26, 2020).

[163] Order Granting Unopposed Intervention, *In re* Clean Water Act Rulemaking, 3:20-cv-04636, Doc. No. 39 (N.D. Cal. November 23, 2020); Orders Granting Motions to Intervene, Am. Rivers v. Wheeler, No. 3:20-cv-04636, Doc. Nos. 62, 78 (N.D. Cal. September 17 2020, October 9, 2020); Orders Granting Motions to Intervene, California v. Wheeler, No. 3:20-cv-04869, Doc. Nos. 101, 113 (N.D. Cal. September 17, 2020, October 9, 2020); Order re Motion to Dismiss and Motions to Intervene, Del. Riverkeeper Network v. EPA, No. 2:20-cv-03412, Doc. No. 47 (E.D. Pa. December 18, 2020); Orders on Motions to Intervene, S.C. Coastal Conservation League v. Wheeler, No. 2:20-cv-03062, Doc. Nos. 24, 34, 49 (D.S.C. October 7, 2020, October 30, 2020, January 13, 2021).

[164] E.g., First Amended Complaint, Am. Rivers v. Wheeler, No. 3:20-cv-04636, Doc. No. 75, ¶¶ 90-95 (N.D. Cal. September 29, 2020); Complaint, California v. Wheeler, No. 4:20-cv-04869, Doc. No. 1, ¶¶ 1.1, 1.8-1.11 (N.D. Cal. July 21, 2020); Complaint, Del. Riverkeeper Network v. EPA, No. 2:20-cv-03412, Doc. No. 1, ¶¶ 10, 182-242, 260-63 (E.D. Pa. July 13, 2020); Complaint, S.C. Coastal Conservation League v. Wheeler, No. 2:20-cv-03062, Doc. No. 1, ¶¶ 10, 14 (D.S.C. August 26, 2020).

[165] E.g., First Amended Complaint, Am. Rivers v. Wheeler, ¶¶ 126-32; Complaint, Suquamish Tribe v. Wheeler, No. 3:20-cv-06137, Doc. No. 1, ¶ 4 (N.D. Cal. August 31, 2020); Complaint, Del. Riverkeeper Network v. EPA, ¶¶ 243-59; Complaint, S.C. Coastal Conservation League v. Wheeler, ¶¶ 197-200.

[166] E.g., Complaint, California v. Wheeler, ¶¶ 1.10-11; Complaint, S.C. Coastal Conservation League v. Wheeler, ¶¶ 1, 165.

[167] Complaint, Suquamish Tribe v. Wheeler, ¶ 9. See also Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," 65 *Federal Register* 67249, November 9, 2000; EPA, *EPA Policy on Consultation and Coordination with Indian Tribes*, May 4, 2011.

[168] Order, S.C. Coastal Conservation League v. Wheeler, No. 2:20-cv-03062, Doc. No. 69 (D.S.C. August 2, 2021); Order, Del. Riverkeeper Network v. EPA, No. 2:20-cv-03412, Doc. No. 75 (August 6, 2021); Order re Motion for Remand Without Vacatur, *In re* Clean Water Act Rulemaking, No. 3:20-cv-04636, Doc. No. 173 (N.D. Cal. October

the rule, which brought the 1971 implementing regulations into effect until the Supreme Court stayed the vacatur order pending appeal in April 2022, thereby bringing the 2020 Final Rule back into effect.[169]

Actions Under the Biden Administration

President Biden's actions immediately upon taking office affected the reconsideration of the 2020 Final Rule. On January 20, 2021, President Biden issued an executive order (E.O. 13990) which directed the heads of all agencies to "immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted" during the Trump Administration "that are or may be inconsistent with, or present obstacles to, the policy set forth" in the order.[170] The executive order further stated "for any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions."[171] In conjunction with the executive order, the Biden Administration included the 2020 Final Rule in a fact sheet listing more than 100 agency actions that heads of agencies were to review in accordance with the executive order. [172]

In June 2021, EPA issued a notice of intention to revise the 2020 Final Rule.[173] The agency stated in a related press release that, after determining that the rule "erodes state and Tribal authority," it "intends to reconsider and revise the 2020 CWA Section 401 Certification Rule to restore the balance of state, Tribal, and federal authorities while retaining elements that support efficient and effective implementation of Section 401."[174] EPA hosted virtual listening sessions with stakeholders in June 2021 to gain input on potential approaches for revisions and also solicited written pre-proposal input.[175]

In light of its decision to revise the rule, EPA asked courts to remand the 2020 Final Rule to the agency while it developed a new regulation.[176] EPA sought remand without vacatur, which would have left the 2020 Final Rule in effect pending the development of a new rule. EPA argued that

21, 2021).

[169] Order re Motion for Remand Without Vacatur, *In re* Clean Water Act Rulemaking, No. 3:20-cv-04636, Doc. No. 173 (N.D. Cal. October 21, 2021); Order on Application for Stay, Louisiana v. Am. Rivers, No. 21A539 (U.S. April 6, 2022).

[170] Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," 86 *Federal Register* 7037-7043, January 20, 2021.

[171] Ibid.

[172] The White House, "Fact Sheet: List of Agency Actions for Review," press release, January 20, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

[173] EPA, "Notice of Intention To Reconsider and Revise the Clean Water Act Section 401 Certification Rule," 86 *Federal Register* 29541, June 2, 2021.

[174] EPA, "EPA Takes Action to Bolster State and Tribal Authority to Protect Water Resources," press release, May 27, 2021, https://www.epa.gov/newsreleases/epa-takes-action-bolster-state-and-tribal-authority-protect-water-resources-0.

[175] EPA, "Upcoming Outreach and Engagement on CWA Section 401 Certification," https://www.epa.gov/cwa-401/upcoming-outreach-and-engagement-cwa-section-401-certification. The administrative docket for pre-proposal input closed on August 2, 2021.

[176] Motion for Remand Without Vacatur, *In re* Clean Water Act Rulemaking, No. 3:20-cv-04636, Doc. No. 143 (N.D. Cal. July 1, 2021); Motion for Remand Without Vacatur, Del. Riverkeeper Network v. EPA, No. 2:20-cv-03412, Doc. No. 67 (E.D. Pa. July 1, 2021); Motion for Remand Without Vacatur, S.C. Coastal Conservation League v. EPA, No. 2:20-cv-03062, Doc. No. 67 (D.S.C. July 1, 2021).

remand was appropriate in light of the concerns identified with the 2020 Final Rule, and would allow the agency to carry out its stated intent of reconsidering and revising the rule without expending resources on potentially unnecessary litigation.[177] Two courts granted EPA's motion and remanded the rule without vacatur.[178]

On October 21, 2021, the U.S. District Court for the Northern District of California granted EPA's motion for remand in the three consolidated cases in that court, but also vacated the rule.[179] While the court did not issue a ruling on the merits of the 2020 Final Rule, it identified problematic aspects of the rule, including "substantial concerns" that EPA itself had raised in its request for remand.[180] In particular, the court noted that the rule's revised scope of certification was "antithetical" to the Supreme Court's decision in *PUD No. 1*, and found that EPA had not "adequately explain[ed] in the preamble how it could so radically depart from what the Supreme Court dubbed the most reasonable interpretation of the statute."[181] According to the court, these and other factors created "significant doubt ... that EPA correctly promulgated the rule."[182] Additionally, the court found that vacatur would not be unduly disruptive because the rule had not yet engendered institutional reliance, and that remand without vacatur would likely result in "significant environmental harms."[183]

After the California district court remanded and vacated the 2020 Final Rule, EPA updated its website to indicate that the vacatur applied nationwide and required a temporary return to EPA's 1971 regulations until EPA finalized a new certification rule.[184] EPA also published a "questions and answers" document in December 2021 to clarify the applicable requirements and procedures following the vacatur.[185] Among other clarifications, EPA indicated that the agency generally did not expect to revisit certifications issued while the 2020 Final Rule was effective, and that pending certification requests would be processed in accordance with the 1971 regulations.[186]

States and industry groups that intervened in the litigation in support of the 2020 Final Rule appealed the remand and vacatur order, and those appeals are now pending in the U.S. Court of Appeals for the Ninth Circuit.[187] The district court denied a request to stay the remand and vacatur order pending appeal, finding that a stay "would substantially injure plaintiffs and does

[177] E.g., Motion for Remand Without Vacatur Memorandum of Points and Authorities, *In re* Clean Water Act Rulemaking, at 7-9.

[178] Order, S.C. Coastal Conservation League v. Wheeler, No. 2:20-cv-03062, Doc. No. 69 (D.S.C. August 2, 2021); Order, Del. Riverkeeper Network v. EPA, No. 2:20-cv-03412, Doc. No. 75 (August 6, 2021).

[179] Order re Motion for Remand Without Vacatur, *In re* Clean Water Act Rulemaking, No. 3:20-cv-04636, Doc. No. 173 (N.D. Cal. October 21, 2021).

[180] Id. at 12-14.

[181] Id. at 12-13.

[182] Id. at 14-15.

[183] Id. at 16.

[184] EPA, "2020 Clean Water Act Section 401 Certification Rule," https://www.epa.gov/cwa-401/2020-clean-water-act-section-401-certification-rule-0.

[185] EPA, *Clean Water Act Section 401 Water Quality Certification Questions and Answers on the 2020 Rule Vacatur*, December 17, 2021, https://www.epa.gov/system/files/documents/2021-12/questions-and-answers-document-on-the-2020-cwa-section-401-certification-rule-vacatur-12-17-21-508.pdf.

[186] Ibid.

[187] Am. Rivers v. Am. Petroleum Inst., No. 21-16958 (9th Cir. appeal filed November 22, 2021); Am. Rivers v. Nat'l Hydropower Ass'n, No. 21-16960 (9th Cir. appeal filed November 22, 2021); Am. Rivers v. Arkansas, No. 21-16961 (9th Cir. appeal filed November 22, 2021).

not align with the public interest."[188] The Ninth Circuit also denied a stay request, ruling that the appellants had not demonstrated a likelihood of irreparable harm absent a stay.[189]

On April 6, 2022, the Supreme Court issued an unsigned order granting an application for a stay pending appeal.[190] The effect of the Court's order is to reinstate the 2020 Final Rule until the appeal is resolved and the Supreme Court either denies certiorari (if one or more parties seeks Supreme Court review) or issues a judgment.[191] If EPA issues a new final rule before that time, the new rule would supersede the 2020 Final Rule.

In June 2022, EPA proposed a new rule to update the regulatory requirements for Section 401 certification.[192] The proposed 2022 rule retains some aspects of the 2020 Final Rule; proposes to return to certain elements from the 1971 regulations and practice (informed by relevant court decisions); and proposes to include new changes to the rule to reflect stakeholder (e.g., state and tribal) feedback on certain aspects of the 2020 Final Rule. The comment period for the proposed rule closed on August 8, 2022. EPA estimates that it will issue a final rule by March 2023, according to its Spring 2022 Regulatory Agenda.[193]

Congressional Interest

Many Members have shown interest in Section 401 implementation in recent sessions of Congress. On November 19, 2019, the Senate Committee on Environment and Public Works held a legislative hearing on potential reforms to Section 401, including legislation introduced by the committee chairman (S. 1087).[194] In the 116th Congress, S. 1087 and H.R. 2205, identical bills titled the Water Quality Certification Improvement Act of 2019, would have amended Section 401. These bills were reintroduced in the 117th Congress (S. 1761, H.R. 3422) as the Water Quality Certification Improvement Act of 2021. The proposed changes would narrow the scope of water quality impacts that certifying authorities may consider in their certification review, narrow the scope of conditions certifying authorities may impose, establish a time limit for certifying authorities to request additional information, and require certifying authorities to provide a written explanation of their certification decision. The committee also held a hearing on the same issue and introduced similar legislation (identical bills—S. 3303 and H.R. 6889) in the 115th Congress.[195] Also in the 117th Congress, S. 3277, introduced after the California district court's remand and vacatur order, would codify the 2020 Final Rule.

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[188] Order Denying Motion for Stay Pending Appeal, *In re* Clean Water Act Rulemaking, No. 3:20-cv-04636, Doc. No. 191, at 1 (N.D. Cal. December 7, 2021).

[189] Order, *In re* Clean Water Act Rulemaking, No. 21-16958 (9th Cir. February 24, 2022).

[190] Order on Application for Stay, Louisiana v. Am. Rivers, No. 21A539 (U.S. April 6, 2022). Justice Kagan, joined by Chief Justice Roberts and Justices Breyer and Sotomayor, dissented from the order granting a stay. She argued that the appellants had not showed that they would suffer irreparable harm absent a stay, in part because they had not identified any projects that had been or would likely be threatened by the district court's ruling. Id., slip op. at 2.

[191] Id., slip op. at 1.

[192] Environmental Protection Agency, "Clean Water Act Section 401 Water Quality Certification Improvement Rule," 87 *Federal Register* 35318, June 9, 2022.

[193] Office of Information and Regulatory Affairs, *Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions, EPA/Office of Water, Clean Water Act Section 401: Water Quality Certification*, RIN No. 2040-AG12.

[194] U.S. Congress, Senate Committee on Environment and Public Works, *Hearing on S. 1087, the Water Quality Certification Improvement Act of 2019, and Other Potential Reforms to Improve Implementation of Section 401 of the Clean Water Act: State Perspectives*, 116th Cong., 2nd sess., November 19, 2019, S.Hrg. 116-145.

[195] U.S. Congress, Senate Committee on Environment and Public Works, *Hearing to Examine Implementation of Clean Water Act Section 401 and S.3303, the Water Quality Certification Improvement Act of 2018*, 115th Cong., 2nd sess.,

Water Quality Certification Improvement Act of 2021

In the 117th Congress, some Members introduced legislation previously introduced in both the 115th and 116th sessions of Congress, titled the Water Quality Certification Improvement Act.[196] S. 1761 and H.R. 3422, if enacted, would limit what certifying authorities may consider in their certification review to whether the discharge into navigable waters by the applicant as a result of the federally licensed or permitted activity would comply with the applicable provisions of CWA Sections 301, 302, 303, 306, and 307. S. 1761 and H.R. 3422 would also limit the scope of conditions certifying authorities may impose to limitations and monitoring requirements necessary to ensure that a discharge into navigable waters complies with the applicable provisions of CWA Sections 301, 302, 303, 306, and 307.

In addition, S. 1761 and H.R. 3422 would establish a 90-day limit, after receipt of a request for certification, during which the certifying authority may identify in writing any additional information necessary to make a certification decision. S. 1761 and H.R. 3422 would also require the certifying authority to provide a written explanation of the certification decision.

Senate Hearing on Section 401 Reforms

During the November 19, 2019, hearing on Section 401 reform, Members in the 116th Congress debated whether proposed Section 401 reforms—whether through legislation such as the Water Quality Certification Improvement Act of 2019 (S. 1087) or the 2019 Proposed Rule—were necessary. Some Members argued that while the majority of states carry out their Section 401 certifications in a responsible way, some are abusing their authority under the provision to block critical energy infrastructure projects.[197] Two state witnesses (the governors of Wyoming and Oklahoma) pointed to examples, such as the state of Washington's certification denial for the Millennium coal export terminal, of states considering impacts beyond the scope of water quality in their certification review.[198] They indicated support for the proposed Section 401 reforms—in particular, the reforms that would clarify the scope of reviews, clarify timelines, and require that certifying authorities provide a clear basis for any certification denials.[199]

In contrast, some Members argued that states are appropriately using Section 401 authority to protect the waters in their states. They criticized the proposed Section 401 reforms as unnecessary, inappropriately restrictive regarding what activities and impacts a state can review and the timeframes in which they can review them, and counter to the principle of cooperative federalism.[200] A state witness—a Senior Assistant Attorney General from Washington—similarly criticized the proposed Section 401 reforms.[201] She further argued that states have largely demonstrated a fair and successful implementation of Section 401, and that efforts to reform Section 401 appear to be based on disagreement with a few state decisions.[202]

August 16, 2018, S.Hrg. 115-344.

[196] The Water Quality Certification Improvement Act of 2021 (S. 1761 and H.R. 3422), the Water Quality Certification Improvement Act of 2019 (S. 1087 and H.R. 2205), and the Water Quality Certification Improvement Act of 2018 (S. 3303 and H.R. 6889) are all identical bills.

[197] S.Hrg. 116-145, pp. 1, 111-112, 114-115.

[198] S.Hrg. 116-145, pp. 6 and 20.

[199] S.Hrg. 116-145, pp. 7 and 20.

[200] S.Hrg. 116-145, pp. 3, 80, 109-110, 112-113, 200.

[201] S.Hrg. 116-145, p. 28.

[202] S.Hrg. 116-145, pp. 28-29.

Conclusion

With the reinstatement of the 2020 Final Rule following its vacatur, and the Biden Administration's new proposed CWA Section 401 rule, stakeholders continue to debate how CWA Section 401 should be implemented. Much of the debate about Section 401 implementation centers on the appropriate balance of "cooperative federalism" between federal agencies' and states' authorities. CWA Section 101(b) provides that "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act." States and others who opposed the changes to the Section 401 implementing regulations included in the 2020 Final Rule argued that the changes undermined the CWA's structure of cooperative federalism. Some asserted that the rule inappropriately limited certifying authorities' ability to protect their own water resources. During the Trump Administration, EPA argued that the 2020 Final Rule was consistent with its role, established by Congress, to administer the CWA, which includes ensuring "that there are sufficient authorities and limitations in place for States and Tribes to effectively implement CWA programs within the scope that Congress established."[203]

On its own, as discussed, the 2020 Final Rule included numerous changes to regulation and practice that narrowed the authority of states when acting on Section 401 certification requests. Other EPA regulatory actions during the Trump Administration might have amplified the impact of some of those changes. Notably, the Navigable Waters Protection Rule, which EPA and the Army Corps of Engineers (Corps) promulgated in April 2020, narrowed the definition of "waters of the United States," thereby reducing the number of waters and wetlands that fall under the jurisdiction of the CWA. Under the 2020 Final Rule, EPA limited the application of Section 401 to point source discharges into waters of the United States. Therefore, taken together, these two regulatory actions could have had a more significant impact, some argue, than they might have when considered in isolation. Some have been concerned that these actions could leave a regulatory gap and prevent states from weighing in on activities that may affect waters within their states. For example, activities that result in a discharge to headwaters and other water resources that are no longer considered waters of the United States under the Navigable Waters Protection Rule would no longer require a CWA permit, nor would they require a Section 401 certification. In responding to such concerns in the 2020 Final Rule, EPA argued that the rule promoted the overarching goals of the CWA to protect water quality while preserving states' major role in implementing the CWA. EPA (and the Corps) also argued, in promulgating the Navigable Waters Protection Rule, that narrowing the scope of the CWA's jurisdiction would not reduce protection of the nation's waters because state, local, and tribal regulations and programs also provide protective coverage for water resources. EPA and the Corps asserted that the Navigable Waters Protection Rule would give state, tribal, and local authorities more flexibility to determine how best to manage waters within their borders.

Like the 2020 Final Rule, the Navigable Waters Protection Rule was also vacated by federal district courts, and EPA and the Corps have similarly announced their intentions to rescind and revise the rule.[204] Unlike with the 2020 Final Rule, however, there is no pending appeal of the

[203] 2020 Final Rule, p. 42226.

[204] The Corps and EPA plan to revise the definition of "waters of the United States" (WOTUS) through a two-step process—a foundational rule to restore prior protections and an anticipated second rule to establish a durable definition. See EPA, "EPA, Army Announce Intent to Revise Definition of WOTUS," press release, June 9, 2021, at

vacatur of the Navigable Waters Protection Rule.[205] Separately, a pending Supreme Court case could affect the regulatory effort currently under way to revise the definition of "waters of the United States."[206]

Congress has shown interest in the role of states in implementing the CWA, including recent interest in certifying authorities' implementation of Section 401 and long-standing interest in the scope of the definition of "waters of the United States," which would indirectly affect the scope of any potential future new Section 401 rule. In the future, Congress may be interested in overseeing the Administration's efforts to promulgate new regulations for both Section 401 and for the definition of "waters of the United States," as well as the Administration's implementation of the new rules.

https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus. On December 7, 2021, the agencies published a proposed foundational rule (Corps and EPA, "Revised Definition of 'Waters of the United States,'" 86 *Federal Register* 69372, December 7, 2021).

[205] Several industry groups initially appealed the vacatur of the Navigable Waters Protection Rule but voluntarily dismissed their appeal. See Order, Pasqua Yaqui Tribe v. EPA, No. 21-16791, Doc. No. 23 (9th Cir. February 3, 2022).

[206] For further discussion of the Navigable Waters Protection Rule litigation, see CRS Report R46927, *Redefining Waters of the United States (WOTUS): Recent Developments*, by Laura Gatz and Kate R. Bowers; CRS Legal Sidebar LSB10646, *What's Next for WOTUS: Recent Litigation and Next Steps in Redefining "Waters of the United States"*, by Kate R. Bowers; and CRS Legal Sidebar LSB10707, *Supreme Court Revisits Scope of "Waters of the United States" (WOTUS) Under the Clean Water Act*, by Kate R. Bowers.

Appendix. CWA Section 401 (33 U.S.C. §1341)

Section 401. (a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of this act. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under Sections 301(b) and 302, and there is not an applicable standard under Sections 306 and 307, the State shall so certify, except that any such certification shall not be deemed to satisfy Section 511(c) of this act. Such 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. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, 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 such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of Sections 301, 302, 303, 306, and 307 of this act because of changes since the construction license or permit certification

was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of Section 301, 302, 303, 306, or 307 of this act.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of Section 301, 302, 303, 306, or 307 of this act.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this act that such facility or activity has been operated in violation of the applicable provisions of Section 301, 302, 303, 306, or 307 of this act.

(6) Except with respect to a permit issued under Section 402 of this act, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under Section 301 or 302 of this act, standard of performance under Section 306 of this act, or prohibition, effluent standard, or pretreatment standard under Section 307 of this act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

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