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EPA Issues Final Rule Revising CWA Section 401 Regulation

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On June 1, 2020, the U.S. Environmental Protection Agency (EPA) released a Final Rule revising its regulations implementing Section 401 of the Clean Water Act (CWA). Section 401 gives states and tribes the authority to evaluate proposed projects requiring federal licenses or permits to ensure they will meet state water quality standards. States can "certify" a project under Section 401, often with extensive conditions for large projects; waive certification; or deny certification, thereby preventing the permit or license from being issued. According to EPA's press release, the rule "provides a holistic analysis of the statutory text, legislative history, and relevant case law informing implementation of CWA Section 401." The Final Rule would substantially narrow the substantive scope of Section 401 reviews and would require changes to the procedure states follow for certifications.

BACKGROUND

Section 401 authorizes states and tribes to play a direct role in federal permitting to ensure compliance with state water quality standards, even authorizing states to deny certification for an otherwise duly issued federal permit (for example, a Section 404 dredge and fill permit).

A state can deny or condition certification if it determines the project will have a negative impact on water quality within the state's borders. This means that states can, and often do, further condition or even deny certification for federal permits required for pipelines, roads, pads, and other energy-related projects. In recent years, states have used Section 401 to either delay or block interstate energy infrastructure, as has occurred with a gas pipeline in New York and a coal export terminal in Washington state.

Pursuant to President Trump's executive order directing agencies to "promote efficient permitting processes and reduce regulatory uncertainties," EPA released Section 401 certification guidance in June 2019, and a proposed rule revising EPA's Section 401 regulations in August 2019.

FINAL RULE

The Final Rule's most notable changes to Section 401 certification procedures are described below.

Time Limits for State Action: The Final Rule specifies a firm one-year limit on the time a state or tribe can take to make its decision after receiving a certification request. Previously, states began the one-year clock after they

deemed an application complete and would sometimes extend the review timeline by requesting additional information from the project proponent.

Scope of Section 401 Certification and Conditioning Authority: The Final Rule narrows the scope of activities subject to state Section 401 review "to considerations of water quality" from point source discharges. Thus, states can no longer deny or place conditions on projects if the denial or condition relates to water quality impacts from the project as a whole, rather than just from the specific point source discharge. Projects without point source discharges (which are regulated directly under other CWA programs) would presumably not require certification under the Final Rule.

Federal Permitting Agency Oversight of State Certification Procedures: The Final Rule creates an affirmative obligation for federal permitting agencies to review state Section 401 certifications to ensure compliance with procedural requirements. Failure to comply with procedural requirements can lead to Section 401 certification being waived. The Final Rule omits the proposed rule's controversial provision that would have allowed federal permitting agencies to substantively review Section 401 certifications or conditions to determine whether they are within the scope of certification.

WHAT'S NEXT?

The Final Rule becomes effective 60 days after it is published in the Federal Register. However, the Final Rule is likely to be legally challenged by a wide range of interested parties, including many states, which could delay or even prevent its implementation.

Legal challenges are likely to focus on the Supreme Court's 1994 decision in *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology* ("*PUD No. 1*"), 511 U.S. 700 (1994), wherein the Court concluded that Section 401 authorizes a state to impose broad conditions on the activity as a whole, not just the discharge. In reaching its decision, the Court gave deference to EPA's conclusion at the time that "activities—not merely discharges—must comply with state water quality standards." *Id.* at 709. The Final Rule attempts to resolve the apparent conflict between the *PUD No. 1* Court's holding and EPA's decision to narrow the scope of Section 401, often relying on novel legal reasoning and the dissent in that case. While lower courts may feel constrained by the *PUD No. 1* decision, it is far from clear how they will resolve legal challenges to the Rule.

If the Final Rule survives the legal challenges and goes into effect, it could reduce project permitting delays and lead to streamlining in the permitting process. States and tribes with Section 401 certification authority would need to act more promptly and focus more directly on water quality issues in their certification decisions to comply with the Final Rule's scope and timing limitations on Section 401 certification review. However, states that feel overly constrained by this process and are unable to complete sufficient analysis may be inclined to deny more certifications as a result of the Rule.

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