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Clean Water Act Section 401: Overview and Recent Developments

Updated February 7, 2025

Congressional Research Service
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R46615

CRS REPORT
Prepared for Members and
Committees of Congress

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SUMMARY

R46615

February 7, 2025

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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 first 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 Rule) in July 2020 to update Section 401 regulations. The 2020 Rule went into effect in September 2020, rescinding EPA's 2019 Guidance and replacing its existing implementing regulations for Section 401, which EPA promulgated in 1971. The 2020 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 Rule included changes regarding federal review of certifications and enforcement. The 2020 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 Rule.

In January 2021, President Biden issued an executive order that directed agencies to review certain agency actions from the first Trump Administration, including the 2020 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. In October 2021, a federal district court vacated the 2020 Rule, prompting EPA to announce a temporary return to the 1971 implementing regulations. Various states and stakeholders appealed the district court's decision, and in April 2022, the Supreme Court temporarily reinstated the 2020 Rule. In September 2023, EPA published a new final rule (2023 Rule) to update the regulatory requirements for Section 401 certification. Similar to the 2020 Rule, the 2023 Rule includes changes to address certification timeframes and scope, as well as enforcement and federal review. The 2023 Rule also garnered interest from a variety of stakeholders—some in support of and some opposed to the rule—and prompted litigation.

In the 118th Congress, several legislative proposals were introduced that addressed Section 401. Some proposals in the 118th Congress focused specifically on Section 401, and some incorporated proposed changes into broader permitting reform bills.

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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 in effect were those that the Environmental Protection Agency (EPA) promulgated in 1971.[1] In July 2020, EPA issued a final water quality certification rule that went into effect on September 11, 2020 (hereinafter the 2020 Rule), replacing the 1971 regulations.[2] In January 2021, President Biden issued an executive order that directed agencies to review certain agency actions from the first Trump Administration, including the 2020 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 Rule, resulting in the reinstatement of the 1971 regulations.[3] 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 Rule while the appeal was pending.[4] In June 2022, EPA proposed a new rule to update the regulatory requirements for Section 401 certification, which it finalized on September 27, 2023 (hereinafter the 2023 Rule).[5] The 2023 Rule took effect on November 27, 2023, superseding the 2020 Rule.

This report provides an overview of CWA Section 401, selected policy issues, and how they were addressed in the 2020 Rule and 2023 Rule.

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."[6] 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

[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 Rule), 85 *Federal Register* 42210-42287, July 13, 2020.

[3] In re Clean Water Act Rulemaking, 568 F. Supp. 3d 1013 (N.D. Cal. 2021); EPA, "Clean Water Act Section 401 Water Quality Certification Improvement Rule," 88 *Federal Register* 66558, 66559, September 27, 2023 (hereinafter 2023 Rule).

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

[5] Environmental Protection Agency (EPA), "Clean Water Act Section 401 Water Quality Certification Improvement Rule," 87 *Federal Register* 35318, June 9, 2022 (hereinafter 2022 Proposed Rule); 2023 Rule.

[6] CWA §101(a); 33 U.S.C. §1251(a).

federal licensing or permitting agency with a Section 401 certification.[7] (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.[8] Pretreatment standards apply to indirect dischargers, who discharge to a publicly owned treatment works prior to discharge into a water of the United States.[9]

Section 401 provides states, certain tribes, and in certain circumstances, EPA[10] (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.
- 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."[11]

[7] 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).

[8] 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.

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

[10] 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.

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

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.[12] 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[13] (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).[14] 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.[15] 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.

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.[16] 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.[17] Other stakeholders have asserted that state implementation of

[12] Ibid.

[13] 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.

[14] 33 U.S.C. §1344; 33 U.S.C. §§401, 403.

[15] 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.

[16] 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.

[17] 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.

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.[18] Many states assert that Section 401 certification allows them to manage and protect the quality of waters within their states.[19] 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.[20]

Actions Under the First Trump Administration

The first Trump Administration characterized some states' uses of Section 401 authority as misusing the CWA and directed EPA to update implementing regulations and guidance.[21] 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.[22] The 1971 regulations implemented the certification provisions included in Section 21(b) of the Federal Water Pollution Control Act (FWPCA) of 1948.[23] The 1972 amendments to the FWPCA created Section 401 and restructured the statutory framework of the statute.[24] However, EPA had not updated its 1971 implementing regulations for Section 401 to reflect the changes to the relevant statutory text.[25] EPA issued Section 401 guidance in 1989, which it updated in 2010.[26]

On April 10, 2019, President Trump issued Executive Order (E.O.) 13868, "Promoting Energy Infrastructure and Economic Growth."[27] 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

[18] 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.

[19] See, e.g., Letter from Western Governors' Association 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.

[20] Ibid.

[21] 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.

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

[23] 2020 Rule, p. 42211.

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

[25] 2020 Rule, p. 42211.

[26] 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."

[27] 84 *Federal Register* 15495, April 15, 2019.

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.[28] 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 "2020 Rule"), EPA announced its decision to rescind the 2019 Guidance coincident with issuing the rule.[29] The agency concluded that retaining the 2019 Guidance after issuing the rule could cause confusion.[30] EPA further stated that "the final rule provides sufficient additional specificity and clarity on the issues discussed in the 2019 Guidance to both meet the expectations of the Executive Order and render the 2019 Guidance unnecessary."[31]

2020 Rule

EPA also responded to E.O. 13868 by proposing a rule updating regulations on water quality certification in August 2019.[32] In July 2020, EPA issued a final water quality certification rule (the 2020 Rule) that went into effect on September 11, 2020, and replaced the prior implementing regulations from 1971.[33]

EPA stated in the preamble to the 2020 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."[34] EPA also stated that the 2020 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."[35]

The 2020 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

[28] EPA, *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes*, June 7, 2019, https://19january2021snapshot.epa.gov/sites/static/files/2019-06/documents/cwa_section_401_guidance.pdf (hereinafter 2019 Guidance).

[29] 2020 Rule, p. 42214.

[30] Ibid.

[31] Ibid.

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

[33] 2020 Rule.

[34] 2020 Rule, p. 42220.

[35] Ibid.

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 Rule included a new process for federal review of certifications and newly authorized the federal licensing and permitting agencies as the enforcement authorities.

Stakeholder Views and Legal Challenges

Both the 2019 Proposed Rule and the 2020 Rule garnered interest from stakeholder groups. EPA received more than 125,000 comments on the proposed rule "from a broad spectrum of interested parties."[36] 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.[37] 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.[38]

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.[39] Central to their concerns was the implication of the rule for the CWA's cooperative federalism framework.[40] 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."[41] 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 granted to them by Congress under the CWA.[42]

Various states, tribes, and environmental groups filed five lawsuits challenging the 2020 Rule. Three suits—filed by a coalition of environmental groups, a group of 20 states and the District of Columbia, and a group of Indian tribes and environmental organizations—were all consolidated

[36] 2020 Rule, p. 42213.

[37] 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.

[38] 2020 Rule, p. 42255.

[39] See, for example, Letter from Western Governors' Association 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.

[40] Under the CWA's cooperative federalism framework, the federal government and the states jointly administer and enforce the statute. For example, CWA Section 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 Section 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 Section 402.

[41] 33 U.S.C. §1251(b).

[42] 2020 Rule, p. 42226.

in the U.S. District Court for the Northern District of California.[43] Other environmental groups also filed suits in the U.S. District Courts for the Eastern District of Pennsylvania and the District of South Carolina.[44] A group of eight states and several energy industry associations intervened in the lawsuits in support of EPA.[45]

In general, the plaintiffs alleged that the 2020 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.[46] 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.[47] With respect to the 2020 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.[48] Finally, the Suquamish Tribe argued that EPA failed to satisfy its tribal consultation obligations during the development of the 2020 Rule as required by an executive order and EPA policy document governing consultation and coordination with tribal governments.[49]

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 Rule to EPA.[50] One court vacated the rule, which brought the 1971 implementing regulations back into effect.[51] The Supreme Court

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

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

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

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

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

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

[49] 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.

[50] Order, S.C. Coastal Conservation League v. Wheeler, No. 2:20-cv-03062 (D.S.C. Aug. 2, 2021), ECF No. 69; Order, Del. Riverkeeper Network v. EPA, No. 2:20-cv-03412 (E.D. Pa. Aug. 6, 2021), ECF No. 75; In re Clean Water Act Rulemaking, 568 F. Supp. 3d 1013 (N.D. Cal. 2021).

[51] In re Clean Water Act Rulemaking, 568 F. Supp. 3d 1013.

stayed the vacatur order pending appeal in April 2022, which brought the 2020 Rule back into effect until it was superseded by the 2023 Rule.[52]

Actions Under the Biden Administration

President Biden's actions immediately upon taking office affected the reconsideration of the 2020 Rule. On January 20, 2021, President Biden issued an executive order (E.O. 13990) that 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 first Trump Administration "that are or may be inconsistent with, or present obstacles to, the policy set forth" in the order.[53] 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."[54] In conjunction with the executive order, the Biden Administration included the 2020 Rule in a fact sheet listing more than 100 agency actions that heads of agencies were to review in accordance with the executive order.[55]

In June 2021, EPA issued a notice of intention to revise the 2020 Rule.[56] 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."[57] 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.[58]

In light of its decision to revise the rule, EPA asked courts to remand the 2020 Rule to the agency while it developed a new regulation.[59] EPA sought remand without vacatur, which would have left the 2020 Rule in effect pending the development of a new rule. Two courts granted EPA's motion and remanded the rule without vacatur.[60]

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

[53] 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.

[54] Ibid.

[55] The White House, "Fact Sheet: List of Agency Actions for Review," press release, January 20, 2021, https://www.regulations.gov/document/EPA-HQ-OPPT-2023-0496-0011.

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

[57] 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.

[58] 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.

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

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

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.[61] While the court did not issue a ruling on the merits of the 2020 Rule, it identified problematic aspects of the rule, including "substantial concerns" that EPA itself had raised in its request for remand.[62] 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."[63] According to the court, these and other factors created "significant doubt ... that EPA correctly promulgated the rule."[64] 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."[65]

After the California district court remanded and vacated the 2020 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.[66] EPA also published a "questions and answers" document in December 2021 to clarify the applicable requirements and procedures following the vacatur.[67] Among other clarifications, EPA indicated that the agency generally did not expect to revisit certifications issued while the 2020 Rule was effective, and that pending certification requests would be processed in accordance with the 1971 regulations.[68]

States and industry groups that intervened in the litigation in support of the 2020 Rule appealed the remand and vacatur order.[69] On April 6, 2022, the Supreme Court issued an unsigned order granting an application for a stay pending the appeal in the Ninth Circuit, temporarily reinstating the 2020 Rule. On February 21, 2023, the Ninth Circuit reversed the district court's order.[70] Holding that courts lack authority to vacate an agency's regulation without first holding it unlawful, the Ninth Circuit sent the case back to the district court for reconsideration of EPA's remand motion.[71] On remand, the district court stayed the proceedings in lieu of remanding the 2020 Rule to EPA.[72] On January 24, 2024, the district court dismissed the case as moot, ruling that because the 2020 Rule was no longer in effect and had been superseded by the 2023 Rule, there was no longer a controversy as to which effective relief could be granted.[73]

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[61] In re Clean Water Act Rulemaking, 568 F. Supp. 3d 1013 (N.D. Cal. 2021).

[62] Id. at 1026.

[63] Id. at 1025.

[64] Id. at 1026.

[65] Id. at 1027.

[66] EPA, "2020 Clean Water Act Section 401 Certification Rule."

[67] EPA, *Clean Water Act Section 401 Water Quality Certification Questions and Answers on the 2020 Rule Vacatur*, December 17, 2021.

[68] Ibid.

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

[70] In re Clean Water Act Rulemaking, 60 F.4th 583 (9th Cir. 2023).

[71] Id. at 596.

[72] Order Re Renewed Motion to Remand Without Vacatur, In re Clean Water Act Rulemaking, No. 20-04636 (N.D. Cal. June 29, 2023), ECF No. 226.

[73] Order Dismissing Action as Moot and Without Prejudice, In re Clean Water Act Rulemaking, No. 23-04636 (N.D. Cal. Jan. 24, 2024), ECF No. 237.

2023 Rule

In June 2022, EPA proposed a new rule to update the regulatory requirements for Section 401 certification.[74] In September 2023, EPA promulgated a final water quality certification rule (the 2023 Rule) revising and replacing the 2020 Rule, which went into effect on November 27, 2023.[75]

In announcing the 2023 Rule, EPA stated that the rule was intended to "restore the fundamental authority granted by Congress to states, territories, and Tribes to protect water resources" while "advancing federally permitted projects in a transparent, timely, and predictable way."[76] The 2023 Rule retains some aspects of the 2020 Rule; returns some elements from the 1971 regulations and practice (informed by relevant court decisions); and includes new changes to the rule that reflect stakeholder feedback on certain aspects of the 2020 Rule. Similar to the 2020 Rule, several aspects of the 2023 Rule focus on two broad policy issues relevant to Section 401 implementation—certification timeframes and the scope of certification (including both the scope of review and the scope of conditions). The 2023 Rule also includes provisions regarding federal agency review, neighboring jurisdictions, modifications, tribes applying for treatment in a similar manner as a state, and enforcement and inspection.[77]

Stakeholder Views and Legal Challenges

Both the 2022 Proposed Rule and the 2023 Rule garnered interest from stakeholder groups. EPA reviewed and considered approximately 27,000 comments on the proposed rule "from a broad spectrum of interested parties."[78] Some stakeholders, including many states, state associations, and environmental organizations, generally supported the 2023 Rule.[79] Some emphasized their agreement with the changes in the 2023 Rule that restored some of the state authority that had been narrowed under the 2020 Rule.[80] States further argued that their authority under Section 401, restored by the 2023 Rule, is critical to ensure they can manage and protect their water resources.[81]

Other groups, including those representing energy interests, supported some aspects of the rule while opposing other aspects. Within similar stakeholder groups, views varied on which aspects of the rule they supported or opposed. For example, some stakeholders supported certain requirements, including efforts to define the elements of a complete certification request, the process for determining the "reasonable period of time" (i.e., the timeframe in which a

[74] EPA, "Clean Water Act Section 401 Water Quality Certification Improvement Rule," 87 *Federal Register* 35318, June 9, 2022.

[75] 2023 Rule.

[76] EPA, "EPA Issues Final Rule to Strengthen Water Protections, Support Clear and Timely Reviews of Infrastructure and Development Projects," press release, September 14, 2023, https://www.epa.gov/newsreleases/epa-issues-final-rule-strengthen-water-protections-support-clear-and-timely-reviews (hereinafter EPA 2023 Press Release).

[77] 2023 Rule, pp. 66662-66666.

[78] 2023 Rule, p. 66566.

[79] For example, see EPA 2023 Press Release; Waterkeeper Alliance, "EPA Restores Authority to States, Territories, and Tribes Under CWA 401 Final Rule," press release, September 14, 2023, https://waterkeeper.org/news/epa-restores-authority-to-states-territories-and-tribes-under-cwa-401-final-rule/. See also EPA Docket ID: EPA–HQ–OW–2022–0128.

[80] EPA 2023 Press Release.

[81] For example, see Rob Bonta, California Attorney General, "Attorney General Bonta Co-Leads Coalition to Defend Biden Administration's Final Rule of the Clean Water Act," press release, January 12, 2024, https://oag.ca.gov/news/press-releases/attorney-general-bonta-co-leads-coalition-defend-biden-administration%E2%80%99s-final.

certification decision must be made), and changes regarding pre-filing meetings.[82] Other stakeholders opposed some of those same aspects of the rule, including the approach for defining the elements of a complete certification request and the process for determining the reasonable period of time.[83] Stakeholders that opposed the 2023 Rule, at least in some aspects, often opposed the changes that broadened the scope of review and the scope of conditions (in comparison to the 2020 Rule) and expressed concern that certain aspects of the 2023 Rule could lead to uncertainty or delays.[84]

As with the 2020 Rule, the 2023 Rule has prompted litigation. Eleven states and several industry groups filed a lawsuit in the U.S. District Court for the Western District of Louisiana shortly after the 2023 Rule took effect.[85] Eighteen states, the District of Columbia, and several environmental organizations have intervened in support of EPA.[86]

The plaintiffs allege, among other things, that the 2023 Rule exceeds the scope of EPA's authority under the CWA. Specifically, they argue that the rule improperly broadens the scope of certification review beyond what is permissible under the CWA by requiring the certifying authority to review whether the permitted activity as a whole, as opposed to the discharge from the activity, will comply with water quality requirements.[87] They also argue that the rule improperly imposes an overly expansive definition of "water quality requirements," broadens the scope of effects subject to review in the certification process to include both point and nonpoint sources, and allows for imposition of certification conditions that are unconnected to water quality or the discharge.[88] They also argue that EPA violated the APA by failing to meaningfully respond to comments on the proposed rule or provide a reasoned explanation for changing its position in the 2023 Rule.[89] According to the plaintiffs, the 2023 Rule will cause delay, uncertainty, and unpredictability in the certification process by allowing states and Tribes to require additional materials as part of a certification request.[90]

The court has not issued a final ruling on the merits of the 2023 Rule. On March 7, 2024, the court denied the plaintiffs' motion for preliminary injunction, which sought to bar application of the 2023 Rule to pending certification requests submitted after the effective date of the 2020 Rule but before the effective date of the 2023 Rule.[91]

[82] See comment letters in EPA Docket ID: EPA–HQ–OW–2022–0128. For example, see comments from Duke Energy; the American Municipal Power, Inc. and Ohio Municipal Electric Association. Note these entities do not support all of the examples provided, but support at least one of the examples mentioned.

[83] Ibid.

[84] See comment letters in EPA Docket ID: EPA–HQ–OW–2022–0128. For example, see comments from Duke Energy; the American Municipal Power, Inc. and Ohio Municipal Electric Association; the Interstate Natural Gas Association of America and the American Gas Association; and the National Association of Home Builders.

[85] Louisiana v. EPA, No. 2:23-cv-01714 (W.D. La. filed Dec. 4, 2023).

[86] Order Granting States' Motion to Intervene, Louisiana v. EPA, No. 2:23-cv-01714 (W.D. La. Jan. 23, 2024), ECF No. 51; Memorandum Order, Louisiana v. EPA, No. 2:23-cv-01714 (W.D. La. June 3, 2024), ECF No. 118.

[87] Complaint, Louisiana v. EPA, No. 2:23-cv-01714, ¶¶ 114-118 (W.D. La. Dec. 4, 2023), ECF No. 1.

[88] Id. ¶¶ 119-134, 146.

[89] Id. ¶¶ 172-179.

[90] Id. ¶¶ 105-113.

[91] Memorandum Ruling and Order, Louisiana v. EPA, No. 2:23-cv-01714 (W.D. La. Mar. 7, 2024), ECF No. 91.

Policy Issues and the 2020 and 2023 Rules

The following sections discuss the two broad policy issues relevant to Section 401 implementation—certification timeframes and the scope of certification—as well as other selected changes in the 2020 and 2023 Rules.

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."[92] 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.[93] The 2020 and 2023 Rules 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), what constitutes "acting" on a certification request for the purposes of determining whether the certification requirements have been waived, and under what circumstances, if any, the certification clock may restart.

"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."[94] Under the 1971 regulations, federal permitting and licensing agencies retained 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 did not exceed one year.[95] Some federal agencies have done so.

- For example, EPA's regulations specific to NPDES permits, promulgated in 1983, established a 60-day period "unless the Regional Administrator finds that unusual circumstances require a longer time."[96] EPA amended this regulation as a part of the 2023 Rule to specify that state certification shall be granted or denied "within the reasonable period of time as required under CWA section 401(a)(1)," meaning the agency does not specify a shorter reasonable period of time than the statutory maximum of one year.[97]
- USACE regulations establish a 60-day period "unless the district engineer determines a shorter or longer period is reasonable for the state to act."[98]

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

[93] Ibid.

[94] 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).

[95] 40 C.F.R. §121.

[96] EPA, "Environmental Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA National Pollutant Discharge Elimination System; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration," 48 *Federal Register* 14274-14275, April 1, 1983.

[97] 2023 Rule, p. 66666.

[98] 33 C.F.R. §325.2(b)(1)(ii).

- FERC regulations provide a one-year period.[99]

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.[100] In the memorandum, the Assistant Secretary noted that although it had 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 would 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 could 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.[101]

Many states have expressed opposition to any efforts to restrict certification timeframes beyond what is established in the CWA.[102] Some have asserted 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."[103]

Reasonable Period of Time in the 2020 Rule

The 2020 Rule established that the reasonable period of time for certifying authorities to act on certification requests shall not exceed one year from receipt.[104] Although the CWA and 1971 regulations have the same timeframe, EPA noted in the 2020 Rule that some states had acted beyond the one-year limit.[105] 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 Rule specified three criteria that federal licensing and permitting agencies should consider in making this determination.[106] They were (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.[107]

[99] 18 C.F.R. §§4.34(b)(5)(iii) and 5.23(b)(2).

[100] 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.

[101] 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.

[102] For example, see Letter from Letitia James, New York 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.

[103] Ibid., p. 9.

[104] 2020 Rule, p. 42285.

[105] 2020 Rule, p. 42243.

[106] 2020 Rule, p. 42286.

[107] Ibid.

Reasonable Period of Time in the 2023 Rule

The 2023 Rule, consistent with the CWA, also provides that the reasonable period of time is not to exceed one year.[108] Departing from both the 1971 regulations and the 2020 Rule, the 2023 Rule for the first time provides certifying authorities with a role in determining the length of the reasonable period of time.[109] The federal licensing or permitting agencies may jointly agree in writing to the reasonable period of time under the 2023 Rule, provided that it does not exceed one year from the date that the request for certification was received.[110] If the federal agency and the certifying authority do not agree on the reasonable period of time, the 2023 Rule establishes a six-month default time period.[111] The 2023 Rule also includes provisions for extensions or to accommodate certain public notice procedures or unexpected events, provided the reasonable period of time does not exceed one year.[112]

Start of the Certification "Clock"

One 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). 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."[113] 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.[114] 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.[115]

Start of the Certification Clock in the 2020 Rule

The 2020 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.[116] Per the rule, a *certification request* is a written, signed, and dated communication that contains nine

[108] 2023 Rule, p. 66663.

[109] Ibid.

[110] Ibid.

[111] Ibid.

[112] Ibid.

[113] 2010 Guidance, pp. 15-16.

[114] 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 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).

[115] 2019 Guidance, p. 3.

[116] 2020 Rule, pp. 42285-42286.

components specified in the rule for individual licenses or permits (or seven components specified in the rule for general licenses or permits).[117]

Start of the Certification Clock in the 2023 Rule

The 2023 Rule also clarifies that the statutory timeframe for certification review starts when the certifying authority receives a request for certification, which it also defines in the rule.[118] Per the 2023 Rule, all certification requests must include a copy of the federal license or permit application submitted to the federal agency (for individual licenses or permits) or a copy of a draft license or permit (for general licenses or permits) as well as any readily available water quality-related materials that informed the development of the application. In addition, the 2023 Rule provides that certifying authorities may define other contents required for a certification request if they are water quality-related and identified prior to when the certification request is made. If a certifying authority chooses not to define other required contents, the request must include the seven default elements specified in the rule.[119]

Acting on a Certification Request

Section 401(a)(1) provides that if a certifying authority fails or refuses "to act" within a reasonable period time—not to exceed one year—after receiving a certification request, the certification requirements are waived.[120] The CWA does not identify what responses constitute action on a certification request, however. Several lawsuits involving water quality certifications have raised the question of whether a certifying authority could be considered to have acted on a certifying request such that the certification requirements were not waived. In particular, some court decisions have focused on certification actions where an applicant withdrew and resubmitted its certification request, sometimes in coordination with the certifying authority.[121]

Both the 2020 and 2023 Rules also set parameters around what actions a certifying authority could take pursuant to its Section 401 authority. Additionally, as discussed below, some legislative proposals have sought to add more clarity to the text of Section 401 regarding what constitutes action on a certification request.

Acting on a Certification Request in the 2020 Rule

The 2020 Rule text did not specifically define what it means "to act" on a certification request. The preamble did discuss how EPA viewed what it means to act and what it means to fail or refuse to act.[122] The preamble also stated that "consistent with the text of the CWA, under the final rule a certifying authority may take one of four actions pursuant to its section 401 authority: grant certification, grant certification with conditions, deny certification, or waive its opportunity

[117] 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 Rule, p. 42285.

[118] 2023 Rule, p. 66662.

[119] Ibid. Note that if EPA is the certifying authority, the seven default elements are to be included.

[120] 33 U.S.C. §1341.

[121] 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); N.C. Dep't of Env't Quality v. FERC, 3 F.4th 655, 669 (4th Cir. 2021); Turlock Irrigation Dist. v. FERC, 36 F. 4th 1179, 1183 (D.C. Cir. 2022); Cal. State Water Res. Ctrl. Bd. v. FERC, 43 F. 4th 920 (9th Cir. 2022).

[122] 2020 Rule, pp. 42265-42267.

to provide a certification."[123] However, neither the 2020 Rule nor its preamble were explicit in stating that those are the only means "to act" for the purposes of determining whether or not certification requirements are waived.

Acting on a Certification Request in the 2023 Rule

The 2023 Rule clarifies in the rule text that a certifying authority may act on a certification request in one of four ways: granting certification, granting certification with conditions, denying certification, or expressly waiving certification.[124] In the 2023 Rule preamble, EPA states that "although the Agency has never explicitly defined 'to act on a request for certification,' the interpretation taken in this final rule is consistent with prior Agency guidance and the 2020 Rule preamble."[125] EPA also explains that it is providing clarification regarding what it means to act on a request for certification in light of commenter input and recent case law.[126]

Withdrawal and Resubmission—Waiver or Restarting the Certification "Clock"?

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.[127] 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.[128] 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.[129]

Restarting the Certification Clock in the 2020 Rule

The 2020 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.[130] 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.[131]

The 2020 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

[123] 2020 Rule, p. 42249.

[124] 2023 Rule, p. 66663.

[125] 2023 Rule, p. 66609.

[126] 2023 Rule, p. 66608.

[127] 2010 Guidance, p. 13.

[128] 2020 Rule, pp. 42261-42262.

[129] 2020 Rule, p. 42261.

[130] Ibid.

[131] 2020 Rule, p. 42286.

needs with the project proponent before the statutory timeframe for review began.[132] 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.[133] Per the rule, the certifying authority had discretion as to whether to grant or respond to the meeting request.[134] In the preamble to the 2020 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.[135]

The preamble to the 2020 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."[136] 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."[137] In such circumstances, if the project proponent wanted a certification in the future, they would have to submit a new certification request and 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.[138]

Restarting the Certification Clock in the 2023 Rule

In the preamble to the 2023 Rule, EPA states that the agency is removing the provision from the 2020 Rule that prohibited the certifying authority from asking the project proponent to withdraw the certification request to reset the reasonable period of time.[139] EPA also states that "the agency is finalizing as proposed to take no position on the legality of withdrawing and resubmitting a request for certification."[140]

The 2023 Rule retains the 2020 Rule's requirement for project proponents to request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a certification request.[141] The certifying authority may waive or shorten the requirement under the 2023 Rule.[142]

EPA also notes in the 2023 Rule preamble that it would not take a position on the legality of withdrawal and resubmission in light of the difficulty of drawing a bright line on the issue and the fact that "the law in this area is dynamic."[143] EPA recognized, however, that "there may be situations where withdrawing and resubmitting a request for certification is appropriate."[144] The

[132] 2020 Rule, p. 42241.

[133] 2020 Rule, p. 42285.

[134] Ibid.

[135] 2020 Rule, p. 42242.

[136] 2020 Rule, pp. 42246-42247.

[137] Ibid.

[138] Ibid.

[139] 2023 Rule, p. 66590.

[140] Ibid.

[141] 2023 Rule, p. 66662.

[142] Ibid.

[143] 2023 Rule, p. 66584.

[144] Ibid.

agency states that it intends to allow "certifying authorities, Federal agencies, and/or possibly project proponents to make case-specific decisions addressing the practice."[145]

Implicit and Retroactive Waivers in the Courts

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.[146] 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.[147] 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.[148] 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.[149] 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."[150] Otherwise, the court cautioned, "the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine" federal agencies' regulatory jurisdiction.[151] Some 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.[152]

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.[153] 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.[154] 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.[155]

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[145] Ibid.

[146] 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 Rule, pp. 42210-42223, and the 2023 Rule, p. 66584, 66590.

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

[148] Id. at 1101.

[149] Id. at 1103.

[150] Id. at 1104.

[151] Id.

[152] 2020 Rule, p. 42261.

[153] 3 F.4th 655, 669 (4th Cir. 2021).

[154] Id. at 669-70.

[155] Id.

The D.C. Circuit later endorsed the Fourth Circuit's interpretation of *Hoopa Valley*.[156] 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.[157] Ultimately, the board granted certification, but with 45 conditions.[158] 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.[159] 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.[160] 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.[161]

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.[162] 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.[163] Instead, the court ruled based on its 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.[164]

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.

The D.C. Circuit has also held that a certifying authority may only waive certification by failing or refusing to act, and may not change its position to affirmatively waive certification after granting it. In *Waterkeepers Chesapeake v. FERC*, the court considered the Maryland Department of the Environment's certification of the Conowingo Dam.[165] The state's initial grant of

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

[157] Id. at 1181.

[158] Id. at 1182.

[159] Id.

[160] Id. at 1183.

[161] Id.

[162] 43 F. 4th 920 (9th Cir. 2022).

[163] Id. at 932.

[164] Id. at 932-933.

[165] 56 F.4th 45 (D.C. Cir. 2022).

certification in 2018 with conditions was challenged by the dam operator, resulting in a settlement whereby the operator agreed to submit certain articles to be incorporated into FERC's operating license and the Maryland Department of the Environment agreed to waive certification.[166] FERC then issued a 50-year license adopting the proposed articles.[167] Several environmental groups challenged FERC's license, arguing that Maryland could not retroactively waive its certification authority.[168] The D.C. Circuit agreed, holding that Maryland "acted" on the certification request when it issued the certification with conditions in 2018 and that its subsequent "conditional waiver" was neither a failure nor a refusal to act for purposes of Section 401.[169] Because Maryland's action did not qualify as a waiver under Section 401, the court held, FERC was prohibited from issuing a license for the dam.[170]

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.[171] 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.[172]

Scope of Section 401 Review

Stakeholders have debated the scope of what certifying authorities should consider when reviewing a request for certification. Congress has held hearings during the past few Congresses that included debate over the scope of considerations during certification.[173]

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[166] Id. at 48.

[167] Id.

[168] Id.

[169] Id. at 49 (citing *Turlock*, 36 F.4th at 1183).

[170] Id.

[171] 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.

[172] 33 U.S.C. §1341(d).

[173] For example, see 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; and U.S. Congress, House Transportation and Infrastructure Committee, Water Resources and Environment Subcommittee, *The Next Fifty Years of the Clean Water Act: Examining the Law and Infrastructure Project Completion*, 118th Cong., 1st sess., May 16, 2023, H.Hrg. 118-17.

Water Quality Impacts vs. Other Impacts

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.[174] 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.[175]

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.[176] 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.[177] 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.[178] 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.[179] Additionally, Montana and Wyoming sought review of Washington's denial of the water quality certification directly in the U.S. Supreme Court.[180] 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

[174] 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.

[175] 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 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.

[176] 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.

[177] Ibid. See also *Millennium Bulk Terminals – Longview Final SEPA Environmental Impact Statement* S.6 (April 2017), https://apps.ecology.wa.gov/publications/documents/1706013.pdf.

[178] 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://apps.ecology.wa.gov/publications/documents/1706013.pdf.

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

[180] Montana v. Washington, No. 22O152, Bill of Complaint ¶ 44 (U.S. Jan. 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).

operation of the terminal site.[181] The Supreme Court also declined to hear Montana and Wyoming's complaint.[182]

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.[183] Most recently, the Department denied an application based on the project proponent's failure to demonstrate that the project would comply with applicable water quality standards.[184] 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.[185] 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.[186] 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."[187] Unlike in Washington, the project proponent has not filed a lawsuit challenging the Raritan Bay certification denials.

Impacts from the "Activity" vs. Impacts from the "Discharge"

Stakeholders have also debated whether the scope of a certifying authority's review should consider the impacts of the "activity" (i.e., the impacts from the permitted activity as a whole, including the point source discharge as well as nonpoint source impacts from the activity) or more narrowly consider the impacts from the point source discharge. For example, permitted or licensed activities that involved clearing of trees along the shoreline could result in increased water temperatures or increased sediment runoff. Looking at the impacts of the "activity" would allow a certifying authority to consider those water quality-related impacts, while looking at the impacts of the point source discharge would exclude those impacts from the scope. The debate over whether the activity or the point source discharge is the appropriate scope of review has also come up in the context of the scope of conditions on certification, discussed below.

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[181] See Order, Lighthouse Res., Inc. v. Inslee, No. 19-35415 (9th Cir. Mar. 23, 2021), ECF No. 93; Agreed Order of Dismissal, Lighthouse Res. Inc. v. Inslee, No. 3:18-cv-05005-RJB (W.D. Wash. Apr. 27, 2021), ECF No. 352; 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).

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

[183] See Letter from Daniel Whitehead, Director, Division of Environmental Permits, to Joseph Dean, May 15, 2019, https://extapps.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://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/nesewqcdenial05152020.pdf.

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

[185] Ibid., p. 14.

[186] Ibid.

[187] Ibid., p. 16.

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.[188]

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.[189] 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."[190] 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 and appropriate state law requirements.[191] 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."[192]

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.[193] 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."[194] 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."[195]

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[188] 2020 Rule, pp. 42254-42256.

[189] 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).

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

[191] Id. at 711.

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

[193] Id. at 712.

[194] Id. at 713.

[195] Id. at 719.

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)."[196] 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."[197] 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."[198] It further provided that "considerations can be quite broad so long as they relate to water quality."[199] 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.[200]

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 water quality impacts."[201] 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."[202]

Scope of Certifications in the 2020 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."[203] The 2020 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."[204] 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).[205]

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

[196] 2010 Guidance, p. 18.

[197] Ibid.

[198] 2010 Guidance, p. 23.

[199] Ibid.

[200] 2010 Guidance, p. 21.

[201] 2019 Guidance, p. 4.

[202] Ibid.

[203] 33 U.S.C. §1341.

[204] 2020 Rule, p. 42285.

[205] 2020 Rule, p. 42285.

regulations.[206] In addition, as EPA acknowledged in the 2020 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."[207]

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."[208] 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."[209] 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.

Scope of Certifications in the 2020 Rule

The 2020 Rule limited the application of Section 401 to *point source discharges* into waters of the United States.[210] 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.[211]

In addition, the changes in the 2020 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 under the first Trump Administration on April 21, 2020, which narrowed the scope of waters that were defined as "waters of the United States" (WOTUS) under the CWA.[212]

The changes in the 2020 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 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

[206] EPA Office of Water, *Clean Water Act Section 401 Certification Rule Public Webinar*, June 17, 2020, https://19january2021snapshot.epa.gov/cwa-401/public-webinar-clean-water-act-section-401-certification-rule_.html.

[207] 2020 Rule, pp. 42234-42235.

[208] 547 U.S. 370 (2006).

[209] Id. at 375-76.

[210] 2020 Rule, p. 42234.

[211] 2020 Rule, p. 42252.

[212] USACE and EPA, "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 *Federal Register* 22250, April 21, 2020. The definition of WOTUS has changed following the issuance of the Navigable Waters Protection Rule. The Biden Administration issued a rule redefining WOTUS in January 2023 and a conforming rule amending it in September 2023 to respond to the Supreme Court's decision in *Sackett v. EPA*, 598 U.S. 651 (2023). For more information, see CRS Report R47408, *Waters of the United States (WOTUS): Frequently Asked Questions About the Scope of the Clean Water Act*, by Kate R. Bowers and Laura Gatz.

and that are beyond the scope of CWA section 401."[213] 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.[214] 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.[215] EPA emphasized that the 2020 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 federally licensed or permitted activity would comply with water quality requirements, as newly defined in the rule.

Scope of Certifications in the 2023 Rule

The 2023 Rule clarifies that the scope of Section 401 reviews includes evaluating whether the *activity* will comply with applicable *water quality requirements*.[216] The 2023 Rule also clarifies that the certifying authority's review is limited to the water quality-related impacts from the federally licensed permit or activity, including the activity's construction and operation. The rule also defines *water quality requirements* to mean "any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307" of the CWA and "any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law."[217] Thus, while the 2023 Rule clarifies that the scope of the review may only consider water quality-related impacts, certifying authorities are able to consider a broader range of water quality-related impacts than under the 2020 Rule. These include water quality-related impacts from the activity (e.g., both point source and nonpoint source impacts) as well as impacts to nonfederal waters. In the preamble to the 2023 Rule, EPA states that "the best reading of section 401 is that it authorizes a state or Tribe to apply state law or Tribal law to *all* impacted state or Tribal waters."[218] EPA also reasons that, while the 401 certification requirement is triggered by a potential discharge into navigable waters (i.e. WOTUS),

> water quality impacts from the activity could occur in state or Tribal waters beyond those navigable waters. Allowing states or authorized Tribes to apply state or Tribal law to all potentially affected state or Tribal waters is supported by CWA section 510, which—"[e]xcept as expressly provided" in the CWA—preserves a state's or authorized Tribe's authority and jurisdiction to protect its waters from pollution.[219]

The 2023 Rule also clarifies that the scope of conditions is the same as the scope of review. Certifying authorities are to impose conditions "necessary to assure that the activity will comply with applicable water quality requirements.[220]

[213] 2020 Rule, p. 42256.

[214] Ibid.

[215] 2020 Rule, p. 42257.

[216] 2023 Rule, p. 66662.

[217] Ibid.

[218] 2023 Rule, p. 66605.

[219] Ibid.

[220] 2023 Rule, pp. 66592, 66662.

Other Selected Changes in the 2020 and 2023 Rules

The 2020 and 2023 Rules 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, clarified timelines around specific requirements and practice, or included more detail and explanation of processes. Others represented more substantive changes from the 1971 regulations and practice, including a new federal review process for denials and conditions, a new interpretation of enforcement roles, and a new provision to allow Tribes to obtain treatment as a state for Section 401-related purposes.

Federal Review Process for Denials and Conditions

The 2020 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.[221] 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.[222]

The 2020 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.[223] The 2020 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 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.[224] Similarly, federal licensing and permitting agencies were required to determine whether certification conditions included the two minimum elements required by the 2020 Rule.[225] 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. The preamble to the 2020 Rule clarified that the federal agency review was "procedural in nature and does not extend to substantive evaluations" of certifications, conditions, and denials.[226]

[221] 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).

[222] *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).

[223] 2020 Rule, p. 42286.

[224] Ibid. 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 listed similar elements for denial of a general license or permit.

[225] 2020 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 will comply with water quality requirements; and (ii) a citation to federal, state, or tribal law that authorizes the condition." The rule listed similar elements for conditions on a general license or permit.

[226] 2020 Rule, p. 42267.

The 2023 Rule limits federal agency review to verifying whether (1) the appropriate certifying authority issued the decision; (2) the certifying authority confirmed it complied with its public notice procedures; and (3) the certifying authority acted on the request for the certification within the reasonable period of time.[227] As discussed above, the 2023 Rule also newly clarifies what it means "to act" on a request for certification.[228] It also specifies information that should be included in each written decision.[229]

Enforcement

The 2020 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.[230] The preamble to the 2020 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."[231] 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."[232] 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.[233] EPA expressly declined to opine in the 2020 Rule on whether the CWA authorizes citizen suits to enforce certification conditions pursuant to Section 505 of the statute.[234]

In commenting on the proposed rule, some commenters agreed with this enforcement approach.[235] Others asserted that states and tribes should be allowed to independently enforce their certification conditions.[236] 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.[237] EPA explained in the 2020 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.[238] 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.[239]

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[227] 2023 Rule, p. 66663.

[228] Ibid.

[229] Ibid.

[230] 2020 Rule, p. 42275.

[231] Ibid.

[232] Ibid.

[233] EPA Office of Water, *Clean Water Act Section 401 Certification Rule Public Webinar*, June 17, 2020, https://19january2021snapshot.epa.gov/cwa-401/public-webinar-clean-water-act-section-401-certification-rule_.html. See also 2010 Guidance, pp. 32-33.

[234] 2020 Rule, p. 42277.

[235] 2020 Rule, p. 42275.

[236] Ibid.

[237] 2020 Rule, pp. 42275-42276. See also 33 U.S.C. §1370.

[238] 2020 Rule, p. 42276.

[239] Ibid.

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 conditions would provide sufficient clarity to enable federal agencies to effectively enforce conditions.[240]

The 2023 Rule does not include regulatory text on enforcement. In the preamble, EPA states that it is not finalizing any regulatory text on enforcement and is removing the 2020 Rule's provision because the provision "introduced ambiguity into the Agency's longstanding position that nothing in section 401 precludes states from enforcing certification conditions when authorized under state law."[241] EPA also discusses a number of concerns identified by stakeholders regarding 401 enforcement.[242] EPA notes in that discussion that stakeholders generally agreed that federal agencies could enforce certification conditions but expressed concerns that the 2020 Rule prevented states and Tribes from exercising their independent enforcement authority.[243] Some of these stakeholders raised concerns over federal agencies' willingness or capacity to enforce certifications and their conditions.[244]

Treatment as a State for Tribes Under Section 401

The CWA, like several other federal environmental laws, authorizes federally recognized Tribes to be treated as states under certain circumstances. The 2023 Rule includes provisions for Tribes to obtain treatment as a state (TAS) status for purposes of Section 401 certification or to obtain TAS to act as a neighboring jurisdiction under Section 401(a)(2).[245] Prior to this rule, Tribes did not have this option unless they also applied for TAS for water quality standards under Section 303(c).[246]

Congressional Interest

Many Members have shown interest in Section 401 implementation in the past few Congresses. Congress has held hearings that have included a discussion of Section 401, and some Members have introduced legislation that either focused specifically on Section 401 or would amend Section 401 within broader permitting reform bills.

In the 116th Congress, 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).[247] 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

[240] Ibid.

[241] 2023 Rule, p. 66634.

[242] 2023 Rule, p. 66633.

[243] Ibid.

[244] Ibid.

[245] 2023 Rule, pp. 66651-66654, 66663-66664.

[246] EPA, *Clean Water Section 401 Water Quality Certification Improvement Rule Fact Sheet*, September 2023, p. 4, https://www.epa.gov/system/files/documents/2023-09/Overview%20Fact%20Sheet%20on%20the%20Final%202023%20Rule_508.pdf.

[247] 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. 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.

and in the 118th Congress (S. 3082) as the Water Quality Certification Improvement Act of 2023. The proposed changes would have narrowed the scope of water quality impacts that certifying authorities may consider in their certification review, narrowed the scope of conditions certifying authorities may impose, established a time limit for certifying authorities to request additional information, and required certifying authorities to provide a written explanation of their certification decision.

During the 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.[248] 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.[249] 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.[250]

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.[251] A state witness—a Senior Assistant Attorney General from Washington—similarly criticized the proposed Section 401 reforms.[252] 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.[253]

In the 118th Congress, in addition to the 2023 Water Quality Certification Improvement Act, some Members of Congress introduced other legislation involving Section 401. Several of these bills were broader permitting reform bills that included proposed changes to Section 401.

- Lower Energy Costs Act (H.R. 1 and S. 947, related bills) would have addressed a broad range of changes to permitting and environmental review processes, including to Section 401 certifications. Among other changes, the bills include a provision titled "Water Quality Certification and Energy Project Improvement" that would have narrowed the scope of certification reviews, as discussed below under H.R. 1152. The House passed H.R. 1.
- Promoting Interagency Coordination for Review of Natural Gas Pipelines Act (H.R. 1115) would have provided that a Section 401 certification is not required for applicants for gas pipeline projects. Instead, the bill would have required that FERC incorporate Section 401 certification into its National Environmental Policy Act (NEPA) review.

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

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

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

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

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

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

- The Water Quality Certification and Energy Project Improvement Act of 2023 (H.R. 1152) would have narrowed the scope of certification reviews to focus on the discharge and would have specified that the scope of reviews and conditions should be based only on the enumerated sections of the CWA and requirements of state law implementing water quality criteria under Section 303. It also would have limited "acting on" a request to granting or denying it, required certifying authorities to identify all materials or information necessary to make a certification decision within 90 days of receiving a request for certification, and required that such authorities publish requirements for their certifications.
- The Limit, Save, Grow Act of 2023 (H.R. 2811) would have addressed a broad range of changes to permitting and environmental review processes, including to Section 401 certifications. The bill included a provision titled "Promoting Interagency Coordination for Review of Natural Gas Pipelines" that would have included changes discussed above under H.R. 1115. It also included a provision titled "Water Quality Certification and Energy Project Improvement" that would have narrowed the scope of certification reviews, as discussed above under H.R. 1152.The House passed H.R. 2811.
- H.Amdt. 579 to the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2024, would have prohibited funding for the implementation and enforcement of the 2023 Rule. The amendment was agreed to by voice vote in the House.
- The RESTART Act (S. 1449) would have made a broad range of changes to permitting and environmental review processes, including amendments to several CWA provisions. The bill would have amended Section 401 to narrow state authority with regard to the certification process. For example, it would have narrowed the scope of review to consideration of certain enumerated sections of the CWA as well as any applicable state or tribal regulatory requirements for point source discharges into WOTUS. It would also have provided that licensing and permitting agencies establish the reasonable period of time, either categorically or on a case-by-case basis, and would have authorized such agencies to enforce certification conditions. In addition, the bill would have provided that a certifying authority's decision to waive a certification would not be subject to judicial review and would have set a timeline for further agency action in instances where a federal court remands or vacates a certification. It also would have defined what it means for a certifying authority to act.

Policy Options

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 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 first Trump Administration, EPA argued that the 2020 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."[254] Many states supported the broader authority returned to states under the 2023 Rule, and argued that the 2023 Rule appropriately restored the state role in protecting and managing their own water resources.[255]

On its own, as discussed, the 2020 Rule included numerous changes to regulation and practice that narrowed the authority of states when acting on Section 401 certification requests. The 2023 Rule returned some of that authority to states. However, recent legal and regulatory developments pertaining to the scope of the CWA have also affected and may continue to affect states' use of their Section 401 certification authority. Notably, the Navigable Waters Protection Rule, which EPA and USACE 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. Like the 2020 Rule, the Navigable Waters Protection Rule was superseded by a new rule redefining WOTUS (the 2023 WOTUS Rule).[256]

In June 2023, the Supreme Court decided *Sackett v. EPA*, adopting a narrower approach to CWA jurisdiction and rejecting elements of the jurisdictional test that were present in the 2023 WOTUS Rule.[257] In its ruling, the Court construed the scope of what is considered WOTUS more narrowly than the existing or previous regulatory interpretations. The USACE and EPA then issued a new rule amending the 2023 WOTUS Rule to conform the regulatory definition to the Court's decision in *Sackett*.[258] The 2023 WOTUS Rule, as amended by the conforming rule, remains subject to litigation.[259] Because Section 401 certifications are triggered by a potential discharge to WOTUS (from an activity requiring a federal permit or license), a narrower interpretation of WOTUS implies that Section 401 certifications may be triggered less often. A narrower scope of WOTUS, if combined with a narrower scope for 401 certification reviews (such as any effort to limit the scope of reviews to discharges or to limit reviews only to the effects on WOTUS), could potentially widen the regulatory gap for nonfederal waters in some states and prevent states from weighing in on some federal activities that may affect waters within their states. Some have expressed concerns that this may impair states' ability to protect their water resources.[260] Others assert that while states should have authority to manage and protect their waters, federal agencies should maintain some authority over projects in the national interest.[261]

In the 119th Congress, Members may consider introducing legislation to amend Section 401 to clarify congressional intent regarding some of the policy issues discussed in this report, particularly regarding the certification timeframes, the scope of certification reviews and

[254] 2020 Rule, p. 42226.

[255] EPA 2023 Press Release.

[256] USACE and EPA, "Revised Definition of 'Waters of the United States,'" 88 *Federal Register* 3004, January 18, 2023 (hereinafter 2023 WOTUS Rule).

[257] 598 U.S. 651 (2023).

[258] USACE and EPA, "Revised Definition of 'Waters of the United States'; Conforming," 88 *Federal Register* 61964, September 8, 2023.

[259] Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex. filed Jan. 18, 2023); West Virginia v. EPA, No. 3:23-cv-00032 (D.N.D. filed Feb. 16, 2023); Kentucky v. EPA, No. 3:23-cv-00007 (E.D. Ky. filed Feb. 22, 2023).

[260] For example, see 2023 Rule, p. 66598. See also Movant-Intervenor States' Motion to Intervene, p. 5, Louisiana v. EPA, No. 2:23-cv-01714 (W.D. La. Jan. 12, 2024), ECF No. 40.

[261] For example, see H. Hrg 118-69, pp. 1-2. See also American Gas Association, "AGA Joins Comments Aug. 8, 2022 Urging EPA to Clarify Regulations Governing State Clean Water Act 401 Water Quality Certifications," press release, August 2022, https://www.aga.org/research-policy/resource-library/aga-joins-comments-aug-8-2022-urging-epa-to-clarify-regulations-governing-state-clean-water-act-401-water-quality-certifications/.

conditions, and the roles of certifying authorities and federal licensing or permitting agencies (e.g., enforcement roles and roles in establishing the reasonable period of time). As has been considered in recent sessions of Congress, this legislation could be freestanding or it could be included as part of broader permitting reform legislation. Alternatively, Congress may consider overseeing implementation of the 2023 Rule to distinguish between aspects of the rule that may be working well and any potential areas that might benefit from clarification or other changes. In selecting policy options, Congress may consider the interaction between recent and any future changes to the definition of WOTUS and the indirect impact it may have on Section 401 certifications.

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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