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**MEMORANDUM**

**TO:** Ken Norton, Chairman, National Tribal Water Council
Elaine Wilson, Project Manager, National Tribal Water Council

**FROM:** Jill Grant
Ian Fisher

**DATE:** July 22, 2020

**RE:** Clean Water Act Section 401 Certification Rule

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On June 1, 2020, Andrew Wheeler, Administrator of the Environmental Protection Agency (EPA), signed a prepublication version of the Final Clean Water Act Section 401 Certification Rule, revising EPA's regulations for state, tribal, and EPA Clean Water Act (CWA) § 401 certifications.[1] The Final Rule was published on July 13, 2020 and is set to take effect on September 11, 2020. 85 Fed. Reg. 42,210. The Final Rule rewrites the Section 401 certification procedures as directed by President Trump's Executive Order 13,868, Promoting Energy Infrastructure and Economic Growth, 84 Fed. Reg. 15,495, although pending and expected future litigation may impact the contours and implementation of the Final Rule.

The Final Rule limits state and tribal authority for issuing Section 401 certifications for proposed activities that require a federal license or permit because they may result in a discharge into a water of the United States (WOTUS). States and tribes rely on these certifications to protect their waters, and by-and-large they submitted comments critical of the proposed changes. We reviewed the Final Rule and EPA's response to the tribal comments and found that the agency generally dismissed the arguments made in those comments, with four significant exceptions, described in Part IV below. Otherwise, the Final Rule largely tracks the August 8, 2019 Proposed Rule, 84 Fed. Reg. 44,080.

This memorandum: (1) summarizes the key provisions of CWA § 401; (2) identifies the key provisions of the Final Rule implementing CWA § 401; (3) summarizes the main tribal comments on the Proposed Rule, including those made by the National Tribal Water Council

[1] The prepublication version is available at https://www.epa.gov/sites/production/files/2020-06/documents/pre-publication_version_of_the_clean_water_act_section_401_certification_rule.pdf.

(NTWC), and the agency's responses to them; (4) identifies the key differences between the Proposed Rule and the Final Rule; and (5) summarizes the current status of litigation regarding the Final Rule.

## I. CWA § 401

Section 401 of the Clean Water Act requires that applicants for a federal license or permit to conduct an activity which may result in a discharge into a WOTUS must provide the federal licensing or permitting agency with a certification from the state in which the discharge will originate, providing that such discharge will comply with applicable provisions of the Clean Water Act, including water quality standards. 33 U.S.C. § 1341(a). For discharges into a WOTUS on tribal land, the certification is required from the tribe, if it has been approved for "treatment as a state" (TAS) for the certification program, *see id.* § 1377(e), or from EPA when the tribe has not been approved for TAS, *id.* § 1341(a). The federal licensing or permitting agency cannot grant the license or permit until certification has been obtained or waived; if the state or tribe "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." *Id.* If the certification is denied, the license or permit may not be issued. *Id.* Section 401(a) also requires a state or tribe with TAS to "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." *Id.*

In addition, Section 401(d) states:

> 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 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, *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.

33 U.S.C. § 1341(d) (emphasis added). The Supreme Court has explained that this provision "expands the State's authority to impose conditions on the certification of a project[,]" and "authorizes additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 711-12 (1994). Similarly, EPA's 2010 Handbook explains Section 401(d) means "[o]nce a potential discharge triggers the requirement for §401, the certifying agency may develop 'additional conditions and limitations on the activity as a whole.'"[2]

Relatedly, Section 401(a)(2) states:

[2] EPA 2010 Section 401 Handbook, *supra* note 55, at 10 (quoting *PUD No. 1*, 511 U.S. at 712).

> 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 requirements 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.

33 U.S.C. § 1341(a)(2). This paragraph provides states and tribes an opportunity to object to proposed licenses and permits for discharges from neighboring jurisdictions that may impact their waters. *Id.* It requires the federal agency to condition the license or permit "in such manner as may be necessary to insure compliance with applicable water quality requirements," or, if the imposition of "conditions cannot insure such compliance," to deny issuance of the license or permit. *Id.*

On April 10, 2019, President Trump signed Executive Order 13,868, stating a federal policy "to promote private investment in the Nation's energy infrastructure." 84 Fed. Reg. at 15,495. The Executive Order claimed that "[o]utdated Federal guidance and regulations regarding section 401 of the Clean Water Act, however, are causing confusion and uncertainty and are hindering the development of energy infrastructure." *Id.* at 15,495-96. Among other things, the Executive Order directed EPA to update the agency's CWA § 401 guidance and regulations. *Id.*

On June 7, 2019, in response to the Executive Order, EPA rescinded its 2010 Section 401 Handbook and released a new guidance document that sought to limit the timing for state and tribal review of certification applications, limit the information states and tribes can require in such applications, and impose federal agency oversight of state and tribal certification decisions.[3] Two months later, again in response to the Executive Order, EPA issued the Proposed Rule, claiming to seek increased predictability and timeliness in the certification process by imposing legally binding requirements on tribes and states in line with the new guidance document. 84 Fed. Reg. at 44,081. NTWC and a number of tribes submitted comments, as well as many states, generally opposing the Proposed Rule.

## II. Final CWA § 401 Certification Rule

The Final Rule largely resembles the Proposed Rule. Specifically, the Final Rule requires that:

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[3] *See Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes*, U.S. Envtl. Prot. Agency (June 7, 2019), https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf.

1. At least 30 days prior to submitting a certification request, the project proponent must request a pre-filing meeting with the certifying state or tribe, 85 Fed. Reg. at 42,285 (to be codified at 40 C.F.R. § 121.4(a));

2. Certifying states and tribes must act on a certification request within a reasonable period of time, which shall be established by the permitting federal agency, that shall not exceed one year, or certification is waived, *id.* at 42,285-86 (to be codified at 40 C.F.R. §§ 121.1(l), 121.6(a), 121.9(a)(2)(i));

3. The reasonable period of time begins to run upon receipt of a certification request, rather than on receipt of a complete application. *Id.* at 42,285 (to be codified at 40 C.F.R. §§ 121.1(m), 121.6(a)). The rule defines the term "certification request," which must include the following limited information: the project proponent and a point of contact, the proposed project, the applicable federal license or permit, the location and nature of any potential discharge, a description of any methods proposed to monitor, treat, control, or manage the discharge, other authorizations required for the proposed project, and documentation that a pre-filing meeting request was submitted, *id.* (to be codified at 40 C.F.R. §§ 121.1(c), 121.5(b)). Similar information is required for issuance of a general license or permit, *id.* (to be codified at 40 C.F.R. § 121.5(c));

4. The scope of certification is limited to assuring that the discharge will comply with water quality requirements, defined as applicable Clean Water Act provisions and state or tribal requirements for point source discharges into a WOTUS, *id.* (to be codified at 40 C.F.R. §§ 121.1(n), 121.3);

5. Certifications with conditions must include a statement explaining why the conditions are necessary to assure the discharge will comply with water quality requirements and a citation to the law authorizing the condition, *id.* at 42,286 (to be codified at 40 C.F.R. § 121.7(d));

6. Denials of certification must include the specific water quality requirements with which the discharge will not comply, a statement explaining why the discharge will not comply with those water quality requirements, and, if the denial is due to insufficient information, a description of the specific data or information that would be needed to assure the proposed project would comply with water quality requirements, *id.* (to be codified at 40 C.F.R. § 121.7(e));

7. The federal permitting agency shall review a state's or tribe's certification decision to determine whether it includes the information required by § 121.7(c), (d), or (e). *Id.* at 42,267. The review is "entirely procedural in nature" and "is limited to determining whether the certification action was taken in accordance with procedural requirements and whether the certification, condition, or denial includes all of the required information." *Id.* If certifications do not include this information, the requirement for a certification is waived, *id.*; *see also id.* at 42,286 (to be codified at 40 C.F.R. §§ 121.8(b), 121.9(a)(2)(ii)-(iii), (b), 121.10);

8. The EPA Administrator at his or her discretion may determine that a discharge may affect water quality in a neighboring jurisdiction, in order to begin the process under Section 401(a)(2) that allows neighboring states and tribes to object, *id.* at 42,287 (to be codified at 40 C.F.R. § 121.12); and

9. The Final Rule rescinds the June 7, 2019 Guidance to avoid confusion, *id.* at 42,214.

## III. Tribal Comments on the Proposed Rule and EPA's Response

After EPA proposed the new Section 401 certification rule, NTWC and various individual tribes submitted comments to EPA. Some of the comments explained the importance of water to individual tribes, including its unique spiritual and cultural significance and the federal government's trust and treaty obligations to protect tribal waters and water-dependent resources, and argued that the Proposed Rule would restrict tribes' ability to protect their waters. Other comments argued that consultation had been inadequate and that the Proposed Rule unlawfully infringed on tribal sovereignty and authority.

Tribal comments opposed the proposed limitation on the scope of conditions that could be included in a certification. The Proposed Rule limited those conditions to provisions necessary to meet Clean Water Act or federally approved water quality requirements, contrary to Supreme Court precedent in *PUD No. 1*. This limitation was particularly concerning both because it restricted "water quality requirements" to those applicable to a WOTUS and because many tribes with TAS for CWA § 401 do not have federally approved water quality requirements. Tribal comments also opposed the proposal to allow federal agencies to overturn tribal certification decisions that the agencies decided did not meet the requirements of the rule. Further, tribes commented that a complete application, including coordination with NEPA review, should be required before the timeframe for review begins. Other tribal comments questioned proposed regulatory language that seemingly made it discretionary for EPA to make a determination whether a discharge would impact a neighboring state or tribe (contrary to the statutory language, which requires a determination, the results of which are discretionary).

EPA generally described its tribal consultation efforts and asserted they were adequate. 85 Fed. Reg. at 42,284; Response to Comments, at 190-91.[4] EPA stated that the Final Rule maintains the ability for tribes to provide input and preserves the robust tribal role in the certification process, in a manner consistent with the Clean Water Act. Response to Comments, at 192. Although EPA claimed that it recognized the importance of tribal treaty rights, EPA stated that those rights do not expand Congress's grant of authority in the Clean Water Act. *Id.* at 193. EPA asserted that the Final Rule is a product of its legal interpretation, established within the overall framework of the Clean Water Act. *Id.*

EPA disagreed with comments arguing that the Rule infringes on state and tribal authority and that the Rule dictates to states and tribes how to legislate or regulate, instead asserting that the Final Rule "merely affirms and clarifies the scope of authority that Congress granted to certifying authorities." 85 Fed. Reg. at 42,225-26. EPA acknowledged that some states and tribes will have to enact conforming changes to their laws. *Id.* at 42,214-15. EPA said it is making the Final Rule

[4] Available at https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-1288.

effective 60 days after publication to allow the agency to develop implementation materials for states, tribes, and federal agencies, as necessary or appropriate, and that it stands ready to provide technical assistance. *Id.*

EPA added a reference to CWA § 304(h), 33 U.S.C. § 1314(h), as authority for specifying in the Final Rule the factors which must be provided in any Section 401 certification. 85 Fed. Reg. at 42,210. CWA § 304(h) required EPA to promulgate guidelines establishing test procedures within 180 days of the Act's passage (decades ago). Nevertheless, EPA asserted that it "appropriately interprets that provision as authorizing the Administrator to identify 'factors' that may not be included in a certification." *Id.* at 42,228.

EPA claimed that, for the first time, it had performed a holistic analysis of the text and structure of the Clean Water Act and now concludes that the scope of certification is limited to discharges. *Id.* at 42,233. According to EPA, the Supreme Court in *PUD No. 1* did not rely on the unambiguous terms of the Clean Water Act to support its reading, and therefore limitations in the Final Rule on the scope of certification, which are consistent with that case's dissent, are a permissible agency interpretation of the Act. *Id.* Partially in response to tribal comments, however, EPA removed from the Final Rule the requirement that water quality requirements, which circumscribe the scope of the certification, must be EPA-approved. *Id.* at 42,254. EPA noted that it may take months or years for it to act on TAS applications. *Id.*

In response to concerns about the limited information required before beginning review of a certification request, EPA stated that it is not prescribing a specific point in the federal licensing or permitting process when project proponents are required to submit the request, and that federal agencies may require environmental reviews prior to requesting certification; in the absence of specific guidance, EPA merely recommends coordination between all the parties involved. *Id.* at 42,249. EPA also repeated its statement from the Proposed Rule that the environmental review required by NEPA is broader than that required by Section 401. Response to Comments, at 7. However, EPA clarified that insufficient information can be a basis for denying certification. 85 Fed. Reg. at 42,265.

Finally, EPA seemingly confirmed that, under the Final Rule, the Administrator has discretion whether to make a Section 401(a)(2) determination as to whether a discharge may affect the water quality in a neighboring jurisdiction. *Id.* at 42,273, 42,287.

## IV. Key Differences Between the Final Rule and Proposed Rule

Although the Final Rule largely tracks the Proposed Rule, the Final Rule differs in a few significant respects:

1. The Final Rule retains the proposed requirement that the state's or tribe's time to act on a certification request is a "reasonable period of time," established by the federal agency, not to exceed one year. As proposed, this time period begins when the state or tribe initially receives the certification request rather than when the application is complete. The Final Rule adds two items to the information required in a certification request: documentation that a pre-filing meeting request was submitted, and a certification of accuracy. Neither of those items addresses

concerns about starting the timeline with insufficient information, including without information obtained from the NEPA process. However, the Final Rule clarifies that insufficient information is an appropriate basis for denial of certification. 85 Fed. Reg. at 42,265, 42,286 (to be codified at 40 C.F.R. § 121.7(e)(1)(iii), (2)(iii)). The Final Rule also separates what is required in a certification request for an individual permit or license versus a general permit or license, although the substantive impact of this separation is minimal. *Id.* at 42,285 (to be codified at 40 C.F.R. § 121.5(b), (c));

2. The Final Rule continues to limit the scope of certification, both for considering whether the discharge will comply with applicable laws and for the conditions that may be imposed, to ensuring that the point source discharge into a WOTUS complies with "water quality requirements." Coupled with the recent narrowing of the definition of WOTUS by EPA and the Army Corps, *see* 85 Fed. Reg. 22,250 (April 21, 2020), this aspect of the Final Rule is a significant restriction. However, the Final Rule deletes the additional restriction in the Proposed Rule that would have limited "water quality requirements" to CWA provisions and federally approved state or tribal water quality laws. Under the Final Rule, state and tribal water quality requirements may be considered even if they are not federally approved, although they still must be regulatory requirements. 85 Fed. Reg. at 42,254, 42,285 (to be codified at 40 C.F.R. § 121.1(n));

3. The Final Rule also deletes the requirement that a certification with conditions must include a statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements, which was considered by many commenters to be excessively burdensome. *Id.* at 42,263-64. The Final Rule retains the other proposed requirements for a denial or a certification with conditions, including a statement explaining why the condition is necessary to assure the discharge from the proposed project will comply with water quality requirements, and a citation to the federal, state, or tribal law that authorizes the condition. *Id.* at 42,263, 42,286 (to be codified at 40 C.F.R. § 121.7(d)(1)-(2)); and

4. Although the Final Rule retains the federal agency's role to review a certification or denial for procedural compliance, the Final Rule deletes the proposed federal agency veto of certification decisions that the agency determines would go beyond the scope of the Section 401 regulations. *Id.* at 42,250. This change would presumably leave it up to the project proponent to challenge the substantive scope of certification in litigation.

## IV. Litigation Status

Litigation will likely impact implementation of the Final Rule. Environmental groups have already challenged the Final Rule in two lawsuits. Compl., *Am. Rivers v. Wheeler*, No. 3:20-cv-04636 (N.D. Cal. July 13, 2020); Compl. for Declaratory J., *Del. Riverkeeper Network v. U.S. Envtl. Prot. Agency*, No. 2:20-cv-03412 (E.D. Penn. July 13, 2020). Among other things, the groups argue that the Final Rule violates the Clean Water Act and the Administrative Procedure Act by 1) imposing unauthorized limits on state and tribal authority, 2) failing to analyze the

potential effects of the Final Rule on water quality, 3) ignoring the text of the Clean Water Act and Supreme Court precedent in narrowing the scope of certifications, and 4) turning the statutory mandate of the neighboring jurisdiction provision in Section 401(a)(2) into a discretionary action. Just yesterday, twenty states and the District of Columbia also filed a lawsuit, making similar arguments. Compl. for Declaratory and Injunctive Relief, *California v. Wheeler*, No. 3:20-cv-04869 (N.D. Cal. July 21, 2020).

There may be additional litigation on this Final Rule, and there likely will be intervenors in the existing lawsuits. Tribes with CWA § 401 certification programs may find it advisable to track this litigation to consider whether their involvement in some form would be worthwhile to protect their interests.