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U.S. EPA Proposes Rule Revising Clean Water Act Section 401 Water Quality Certification Process

June 30, 2022

On June 9, 2022, the U.S. Environmental Protection Agency ("EPA") published in the Federal Register a proposed rule ("Proposed Rule") that, if adopted, will revise the Federal Clean Water Act ("CWA") Section 401 Water Quality Certification ("WQC") process.[1] Under Section 401 of the CWA, applicants seeking a federal license or permit to conduct a project that may result in a discharge into waters of the Unites States must first obtain certification from the state in which the discharge would originate that such discharge will comply with the applicable state water quality standards.[2] Section 401 allows state involvement in federal project permitting processes by applying certain state water quality restrictions to those projects.

In 2020, the Trump administration amended the Section 401 WQC rule (the "2020 Rule"), in a manner that limited the role of states in the WQC process.[3] The Proposed Rule would restore and expand states' authority under CWA Section 401. As discussed below, the Proposed Rule would, among other things, (i) establish new requirements for certification requests, (ii) broaden the scope of WQC review, and (iii) limit federal agency review authority over WQCs.

The Proposed Rule Includes Requirements for a Request for Certification

The Proposed Rule establishes that all requests for certification must include (1) a copy of the draft license or permit (unless legally precluded from obtaining a copy), and (2) any existing and readily available data or information related to the project's potential water quality impacts.[4]

The Proposed Rule also allows states to prescribe other necessary elements for a certification request. While the EPA suggests that this approach is intended to promote efficiency and transparency by clearly defining the minimum requirements for a request for certification, it also provides states with additional authority to determine when a WQC request will be deemed complete.[5] This additional authority and the requirement to file a draft permit with the WQC request could cause project permitting delays.

The Proposed Rule Broadens the Scope of WQC Review to the "Activity as a Whole" Standard

Unlike the 2020 Rule, which limited the scope of review to potential water quality impacts from the project's point source discharge, the Proposed Rule allows certifying authorities to broadly review the "activity as a whole" and, thus, holistically consider any aspect of the project activity that may affect water quality.[6] This change may increase the likelihood that states will incorporate into their WQC review environmental impacts that are only

tangentially related to water quality.

The Proposed Rule Limits Federal Agency Review Authority over WQC

The 2020 Rule provided federal agencies with review authority over WQC decisions. Under that rule, federal agencies could effectively "veto" certification denials if they determined that the certifying authority failed to meet Section 401 requirements.[7] In response to states' concern over that veto authority, the Proposed Rule provides that federal agencies may review a certifying authority's certification decision only to determine whether (i) the certifying authority clearly indicated the nature of the decision (i.e., grant, grant with conditions, deny, or waiver); (ii) the proper certifying authority issued the decision; (iii) the certifying authority provided public notice on the certification request; and (iv) the decision was issued within a reasonable period of time.[8]

Conclusion

The Proposed Rule clearly shifts back to the states significant authority to review certain federal projects. If adopted, the Proposed Rule may make it more likely that state agencies will delay or halt the development of certain federally permitted projects by exercising their WQC authority.

The public comment period regarding the Proposed Rule expires August 8, 2022.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding the Clean Water Act, or any other aspect of environmental law, please contact Brendan Mooney (bmooney@cullenllp.com) at (516) 357-3757, Amie Kalac (akalac@cullenllp.com) at (609) 279-0900 or Neil Yoskin (nyoskin@cullenllp.com) at (609) 279-0900. We thank Sharlene Cubelo, a 2022 Summer Fellow with Cullen and Dykman LLP, for her assistance and research in the preparation of this advisory.

Footnotes

[1] Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 Fed. Reg. 35318 (June 9, 2022) (to be codified as 40 C.F.R. pt. 121-22, 124)

[2] 33 U.S.C. § 1341(a)(1)

[3] EPA, 2020 Clean Water Action Section 401 Certification Rule (June 9, 2022), https://www.epa.gov/cwa-401/2020-clean-water-act-section-401-certification-rule-0

[4] 87 Fed. Reg at 35335

[5] Id. at 35335

[6] Id. at 35342

[7] Id. at 35351

[8] Id. at 35354

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