#### WSSI 2021 Regulatory Updates April 14, 2021

### Clean Water Act § 401 Water Quality Certification

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# 1. What Is 401 Water Quality Certification?

#### State Water Quality Standards

- Water Quality Standards
  - ~ Designate uses for all state waterbodies (e.g., swimming, drinking, fishing)
  - ~ Criteria to attain the uses (e.g., max pollutant concentrations)
  - ~ Antidegradation
- CWA 401: Federal Permitting Actions Should Not Allow Violations of State Water Quality Standards\*

#### CWA 401: The Law

"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 [the Clean Water Act].... 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."

#### **Key Concepts**

#### ♦ When is 401 certification needed?

- ~ Application for a federal license or permit...
- ~ For an activity that "may result in a discharge" to waters

#### ♦ What is it?

~ Determination by state that proposed activity will comply with state water quality standards

#### How long does it take?

- ~ State has "reasonable period of time" to act
- ~ Not to exceed one year

#### **Key Concepts**

#### What are the State's options?

- ~ Grant certification (with or without conditions)
- ~ Deny certification
- ~ Waive certification (expressly or by default)

#### What does certification do?

- ~ No federal permit without a certification or waiver
- ~ State 401 conditions become conditions of federal permit
- ~ Federal agency entitled to rely on state determination

#### Different types of certifications?

- ~ "Blanket" certifications for general permits (e.g., NWPs)
- ~ Individual certifications for individual permits (e.g., 404 IPs)

## 2. Why did EPA need to update its 401 Rule?



#### **◆ CWA 401**

- ~ Enacted 1970 (pre-CWA!)
- ~ Incorporated into 1972 CWA
- ◆ EPA's Original 401 Rule
  - ~ Published Thanksgiving Day 1971

#### **▶** EPA in 1979:

"The existing State certification regulations predate the Federal Water Pollution Control Act Amendments of 1972 and have never been updated. However, because of the impact of State certification of non-NPDES permits on a myriad of Federal programs, it will be necessary to consult with the affected agencies in some detail before changes are made."

44 Fed. Reg. 32856 (June 7, 1979)

#### Many Unanswered Questions...

#### Application?

- ~ How does applicant request 401 certification?
- ~ What information must be submitted by applicant?

#### **♦** Timeline?

- ~ Who determines the "reasonable period of time"? Fed agency or State?
- ~ When does clock start? On request? Complete application?
- ~ Can applicant reset the clock? Can State deny to reset?



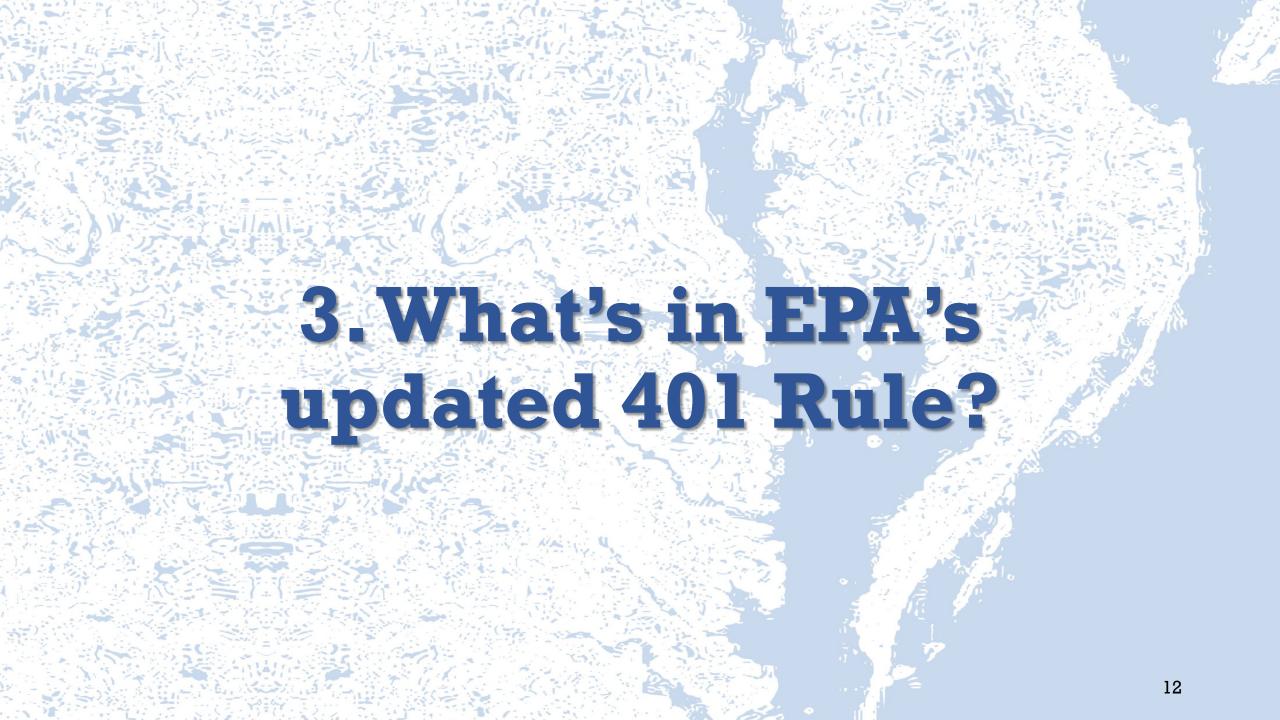
#### And the Tougher Issues...

- Scope of Certification?
  - ~ Can State base decision on impacts other than water quality?
  - ~ Any limit on information State can request?
  - ~ Can State deny if it doesn't receive information requested?
  - ~ Can federal agency reject certification or conditions?
- Does 401 give State ongoing role in federal permit?
  - ~ Can State revoke or amend certification after federal permit issued?
  - ~ Can State enforce 401 certification conditions?
- ◆ Existential Question: Does CWA 401 gives States a veto over federal permits?

#### Hodgepodge of Rules

- ◆ 50 States = 50+ Processes for 401
  - ~ E.g., Virginia
    - Virginia Water Protection Permit (most individual 404 permits)
    - ~ "Blanket" 401 letter (NWPs)
    - ~ Upland 401s (Pipelines)
  - ~ E.g., North Carolina
    - ~ Individual 401 (most individual permits)
    - ~ General 401s (NWPs & other specified activities)
- Various Federal Agency Rules
  - ~ E.g., USACE 401 Rules
    - ~ Individual 404 permits 33 CFR 325.2
    - ~ NWPs 33 CFR 330.4
    - ~ USACE dredging operations 33 CFR 336.1
  - ~ E.g., FERC 401 Rules
    - ~ Hydropower licenses 18 CFR 4.34(b)(5)(iii)
    - ~ Natural gas pipelines None! First rule takes effect June 28, 2021





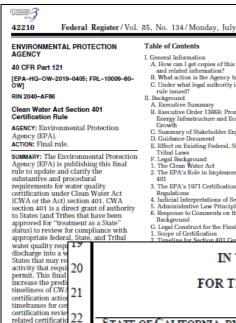
#### Status of Revised 401 Rule

#### Rulemaking

- ~ Proposed by EPA August 29, 2019
- ~ Finalized July 13, 2020
- ~ Effective September 11, 2020
- ~ Codified at 40 CFR Part 121

#### Litigation (of course)

- ~ Appeal filed by 21 States, 3 Tribes, & environmental groups
- ~ 8 states and industry groups defending
- ~ Case presently on hold while EPA considers the rule



Federal Register / Vol. 85, No. 134 / Monday, July 13, 2020 / Rules and Regulations Populations L. Congressional Review Act A. How can I get copies of this document I. General Information B. What action is the Agency taking? A. How can I get copies of this C. Under what legal authority is this final document and related information? 1. Docket. An official public docket for this action has been established B. Executive Order 13868: Promoting under Docket ID No. EPA-HO-OW-Energy Infrastructure and Economic 2019-0405. The official public docket consists of the documents specifically C. Summary of Stakeholder Engagemen referenced in this action, and other information related to this action. The E. Effect on Existing Federal, State, and official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West 2. The EPA's Role in Implementing Section Room 3334, 1301 Constitution Ave. NW Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding egal holidays. The OW Docket 5. Administrative Law Principles telephone number is 202-566-2426. A Response to Comments on the Legal reasonable fee will be charged for G. Legal Construct for the Final Rule 2. Electronic Access. You may access

#### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA AND THE STATE WATER RESOURCES CONTROL BOARD, STATE OF WASHINGTON, STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF RHODE ISLAND,

Case No.: 3:20-cv-4869

#### COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Administrative Procedure Act, 5 U.S.C. § 551 et seq.)

#### **Application Process**

#### Pre-Filing Meeting Request

- ~ Applicant must submit notice to State certifying agency
- ~ Must request a pre-filing meeting
- ~ State has no obligation to hold meeting

#### Certification Request

- ~ Submitted at least 30 days after pre-filing meeting request
- ~ Specific list of information that must be included
- ~ Request submitted concurrently to State and federal agency

#### "Reasonable Period of Time"

#### Deadline for State to Act on Request

- ~ Set by federal agency
  - ~ By regulation (e.g., FERC fixed at one year)
  - ~ Or case-by-case basis (e.g., USACE 60-day guideline)
- ~ Federal agency notifies State of deadline within 15 days of request
- ~ Federal agency must consider:
  - ~ Complexity of project
  - ~ Nature of potential discharge
  - ~ Potential need for additional study or evaluation
- ~ State or applicant may request extension
- ~ Deadline cannot exceed one year (statutory maximum)

#### State Action on Request

#### 

- ~ If State determines discharge will comply with WQS
- ~ Must be in writing and may include conditions
- ~ Must provide water quality-based explanation for each condition

#### Waive 401 Certification

- ~ Expressed in writing
- ~ By default if State fails to act by deadline or comply with 401 Rule

#### Deny 401 Certification

- ~ Must provide written explanation for denial
- ~ May be based on insufficient information (but must specify what information is needed)

#### Federal Agency Response

#### If State Denies Certification

- ~ Federal Agency cannot issue permit unless . . .
- ~ It determines State did not comply with 401 Rule WAIVER

#### ♦ If State Waives Certification

~ Federal Agency can issue permit

#### **♦ If State Grants Certification**

- ~ Unconditionally Federal agency can issue permit
- ~ Conditionally Will review each condition
  - ~ Conditions that comply with 401 Rule will be incorporated into federal permit
  - ~ Conditions that do not comply will be deemed waived

#### **Takeaways**

#### More Predictable Permitting Timelines for Applicants

- ~ Fixed/written start and end to timeline
- ~ No more summary denials to reset clock

#### ▲ Limited Ongoing State Role After Certification Decision

- ~ Right to inspect facility after construction; one shot to modify 401
- ~ Federal agency solely responsible for enforcing 401 conditions (but State may have authority under State law)
- ~ State may not revoke or amend 401 certification

#### Cabins States' Influence on Federal Permits

- ~ No State "Veto" over federal permits for public policy reasons
- ~ Focuses certification decision on water quality impacts

