

Clean Water Act rulemaking review bears watching

2020 rules under Trump remain in effect as the EPA works to overhaul discharge permitting process



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SECTION 401 of the Clean Water Act provides that a federal agency may not issue a permit or license to conduct any activity that could result in a discharge into waters of the United States unless a Section 401 water quality certification is issued, or unless certification is waived.

In 2020, in response to an executive order issued by then-president Donald Trump, the U.S. Environmental Protection Agency (EPA) developed the Clean Water Act (CWA) 401 Certification Rule (2020 Rule), which established procedures designed to promote consistent implementation of CWA Section 401 and regulatory certainty in the federal licensing and permitting process.

In response to a challenge from states (including Oregon), tribes, and environmentalists, the 2020 rule was vacated and remanded by the U.S. District Court for the Northern District of California. *In re Clean Water Act Rulemaking*, No. C 20-04636 WHA, 2021 WL 4924844 (N.D. Cal. Oct. 21, 2021). Oregon Gov. Kate Brown remarked of the 2020 Rule, “States and Tribes have relied on the Clean Water Act for almost 50 years to protect our waters and people, and EPA’s action is essential to restoring that historic authority. The [2020] rule was not only harmful to the environment, it was corrosive to state, federal, and tribal partnerships.”

As a result of the district court’s action vacating the 2020 Rule, the original 1971 water quality certification rules were to govern the CWA Section 401 water quality certification process until EPA enacted new rules. However, in an emergency order on April 6, 2022 the Supreme Court issued a stay of the district court’s order. As a result, the Clean Water Act 401 Certification process is again governed by the 2020 Rule.

The 1971 rules are both substantively

broader and procedurally simpler than the 2020 Rule. For example, the 2020 Rule:

- limits the definition of “water quality requirements” to only a few sections of the CWA

- requires that an applicant for a CWA permit request a pre-filing meeting with the certifying authority at least 30 days prior to submitting an application (which request the certifying authority was under no obligation to accept, or even respond to)

- states that the “reasonable period of time” for the certifying authority to act on a request for certification could be determined either categorically or on a case-by-case basis, but was not to exceed one year. EPA has clarified in a guidance document that the “reasonable period of time” begins after receipt of a certification request has been documented received by a certifying authority.

In contrast, the 1971 rules:

- contained no limitation on the definition of “water quality requirements”

- contained no requirement for requesting a pre-filing meeting

- stated that the “reasonable period of time” for the certifying authority to act “shall generally be considered to be 6 months, but in any event shall not exceed 1 year”

According to a “Questions and



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Answers” document updated on April 22, 2022 following the U.S. Supreme Court’s reinstatement of the 2020 Rule, the EPA will continue the rulemaking process announced in May 2021 to overhaul the rule. EPA expects to propose a new CWA section 401 rule in the coming months. EPA is following the Administrative Procedure Act to develop the new rule, but no outreach or engagement opportunities or public comment periods have yet been announced. EPA has also stated that certification actions completed between the date that the District Court vacated the 2020 rule (October 21, 2021) and April 6, 2022 when the Supreme Court reinstated the rule will not be revisited.

Given the modern trend towards process being the final product, it is likely that the new rule will require pre-filing meetings, allow determination of “reasonable time” on a case-by-case basis, and include other hoops through which applicants must jump if they hope to have a chance to move their projects forward.

We recommend that parties who anticipate needing a 401 water quality certification keep a close eye on these developments and engage with the appropriate team of professionals to navigate the upcoming rulemaking process and its subsequent implementation. ©