NEW FEDERAL LIMITS ON STATES' AUTHORITY TO PROTECT THEIR WATERS

EPA'S Proposed Changes to the 401 Regulations

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CWA 401 CONDITIONS

- "Any applicant for a Federal license or permit to conduct any activity…which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State…that any such discharge will comply with the applicable provisions of [CWA sections 301, 302, 303, 316 and 317]. §401(a)

- "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 [various CWA standards and limitations] 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." §401(d)

- The Supreme Court in PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology, 511 U.S. 700 (1994) held that under 401(a), (d), a state could properly impose state minimum instream flow operating conditions on a FERC-licensed hydro-electric generating project, an "activity" with a "discharge," to protect a designated use.
- EPA's August 22, 2019 proposed rule, among other things, includes preamble language and new regulations that would undo PUD No. 1, authorize federal permitting agencies to reject conditions that states include in their water quality certifications, and rule numerous state conditions outside the "scope" of 401.

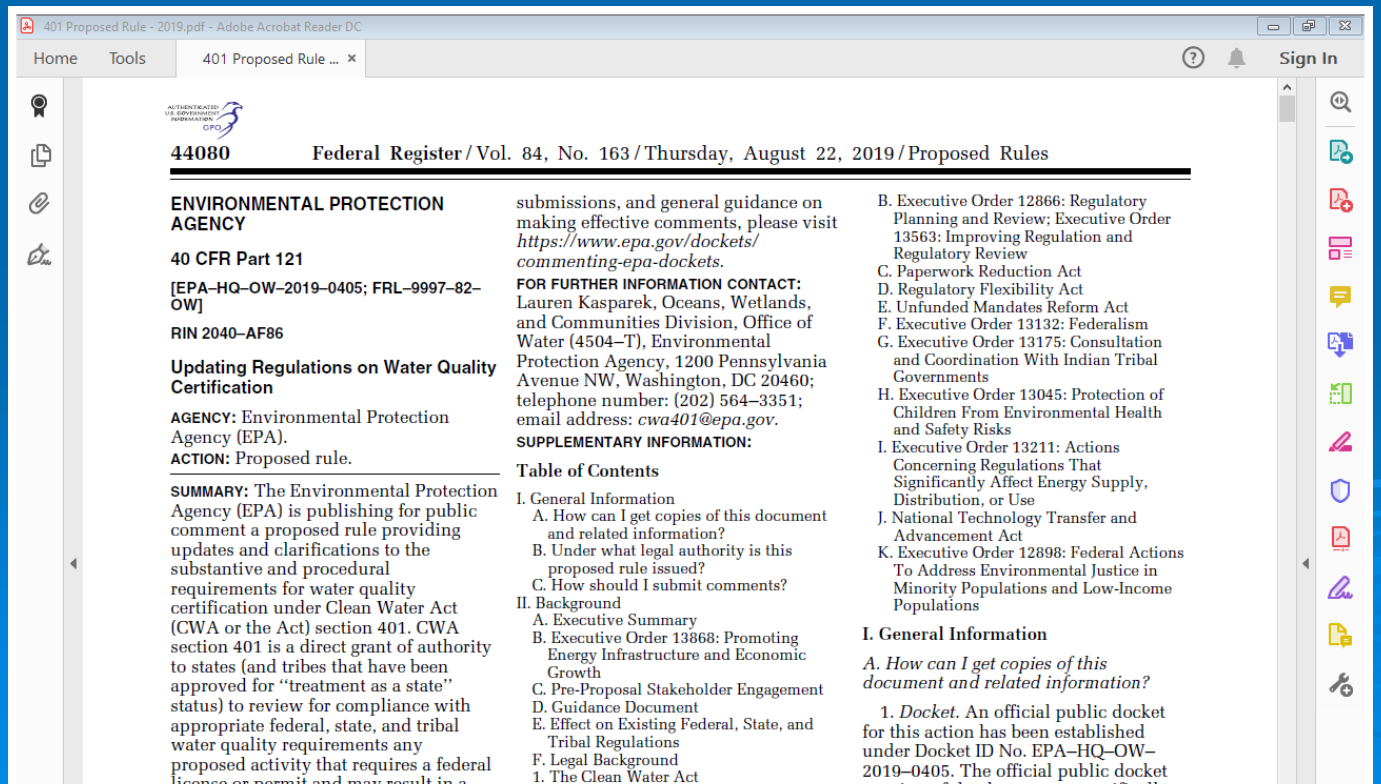
"The EPA is proposing to interpret Section 401 differently than the Supreme Court did in *PUD No. 1.*" 84 Fed Reg. 44099.

How is EPA proposing to do this?

- Chevron plus Brand X (agency asserts power to revise "unwise judicial constructions of ambiguous statutes").
- Recite these words:
  - "This proposal…provides the EPA's first holistic analysis of the statutory text, legislative history, and relevant case law" 84 Fed. Reg. 44084.
  - EPA "addresses comprehensively and for the first time…" 84 Fed. Reg. 44092
  - The EPA has "for the first time conducted a holistic analysis of the text, structure, and history of CWA section 401." 84 Fed. Reg. 44093.
  - "EPA has now performed a holistic analysis of the text and structure of the CWA" and "section 401." 84 Fed. Reg. 44096.
  - "EPA has for the first time, holistically interpreted the text." 84 Fed. Reg. 44097

EPA has concluded that the *PUD No. 1* dissent's "interpretation" of 401 is reasonable, and should be implemented, while the majority's reasoning is based on "what EPA now recognizes was infirm footing" and should be discarded. 84 Fed. Reg. 44097

- Revokes EPA's prior analyses of section 401.
- Repudiates numerous court of appeals decisions cited in the preamble (e.g., *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997)) that follow and extend *PUD No. 1*
- Repudiates nearly 50 years of state and federal practice in favor of what the Agency calls a more "natural" and "reasonable" reading of the law. 84 Fed. Reg. 44097.



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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 121

[EPA–HQ–OW–2019–0405; FRL–9997–82–OW]

RIN 2040–AF86

Updating Regulations on Water Quality Certification

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is publishing for public comment a proposed rule providing updates and clarifications to the substantive and procedural requirements for water quality certification under Clean Water Act (CWA or the Act) section 401. CWA section 401 is a direct grant of authority to states (and tribes that have been approved for "treatment as a state" status) to review for compliance with appropriate federal, state, and tribal water quality requirements any proposed activity that requires a federal

submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Lauren Kasparek, Oceans, Wetlands, and Communities Division, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564–3351; email address: *cwa401@epa.gov.*

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I. General Information

A. How can I get copies of this document and related information?

1. *Docket.* An official public docket for this action has been established under Docket ID No. EPA–HQ–OW–2019–0405. The official public docket

Note importance of 401 to states: states, territories, and tribes integrate it into water quality programs; 20-27 states rely on it for most or all of their freshwater wetlands regulatory programs; many states coordinate 401 certification/state permitting with Corps 404 permitting; state certification of Corps nationwide permits and SPGPs; states use to address dams, hydropower licensing, pipelines, ports, federally licensed nuclear facilities, federal 402 permits, Rivers &Harbors 9 & 10, others.

What would the proposed rule do substantively?

- Redefine “scope” of Section 401 to limit states’ ability to deny or condition water quality certification.
- Require states to justify their denials or conditions and to identify less stringent alternatives.
- Give federal licensing and permitting agencies authority to reject state denials or conditions.

Interlocking provisions of the proposed rule

- 121.1(f) *Condition* means a specific requirement included in a certification that is within the scope of certification.

- 121.3. *Scope of certification.* The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.

- 121.1(p) *Water quality requirements* means applicable provisions of 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.

Related provisions of proposed rule

- 121.6. *Effect of denial of certification.* [Gives Federal agency the authority to determine that a denial is not within the scope of 401, and to treat certification as waived]

- 121.8. *Incorporation of conditions into the license or permit.* [Gives Federal agency the authority to determine that a condition “does not satisfy the definition of 121.1(f)” and other requirements, and requires agency to exclude the condition from the license or permit.]

Is a condition within the new "scope"?

- "...EPA-approved state or tribal Clean Water Act regulatory program provisions"

  Proposed 121.1(p)

- Groundwater protection provisions meant to protect surface waters
- Construction season restrictions meant to prevent landslides, soil erosion, impairment of riparian habitat
- Requirements for karst surveys and dye studies
- Maintenance of buffer, revegetation
- Protection of intermittent streams
- Compensatory mitigation under state law

Proposed requirements for states to justify their 401 certification conditions

- 121.5(d)(3) “A statement of whether and to what extent a less stringent condition could satisfy applicable water quality standards.”

As an alternative, EPA asks if it should reformulate this to require disclosure of a “more or less” stringent condition, or “to remove the third requirement altogether.” 84 Fed. Reg. 44106.

Waiver if state “fails or refuses to act”

- 121.7(a)(2), (b)-(d)

But note definition:

- 121.1(h) *Fail or refuse to act* means the certifying authority actually or constructively fails or refuses to grant or deny certification…within the scope of certification

Implications

- These proposed definitions, provisions on scope, and grant of authority to Federal agencies to determine scope, validity of certificate conditions, and constructive waivers – and EPA's limitation of appropriate state laws to compliance with "EPA-approved" regulatory provisions – will lead to three outcomes:

1. Transfer of decision-making authority from state and tribal 401 agencies to Federal permitting and licensing agencies. (Such agencies may be ill-equipped to address these issues, or may respond to pressure from applicants to exclude state conditions or find constructive waiver.)
2. Possible loss of many ordinary state certification conditions.
3. New grounds for litigation by permit and license applicants arguing that Federal agencies should have disallowed various state conditions as outside the "scope" of EPA's new regulation.

Enforcement

- 121.9 allows enforcement inspection by state "prior to the initial operation."
- State makes recommendation for "remedial measures."
- Federal agency responsible for enforcement.

Preamble emphasizes importance of maintaining federal "enforcement discretion" because only federal agency can make determination of importance, priorities, resources.

- States often assert their ability to enforce their own certification provisions.
- Many states have taken action under both their own authority and 401 where failures have occurred.
- EPA's preamble maintains that this is unlawful and that the enforcement role is reserved to the federal agency, and invites comment on this interpretation as well as whether to include the prohibition in the regulatory text.

Questions

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