



EPA's Final Clean Water Act 401 Rule, Reinstating 1971 Approach, Already Under Fire

12.21.2023 | By [Mary Lynn K. Coffee](#), [Rebecca Hays Barho](#)

On September 27, 2023, the U.S. Environmental Protection Agency (EPA) published its final rule to implement Clean Water Act (CWA) section 401 water quality certifications (2023 Rule). The 2023 Rule became effective on November 27, 2023, but was the subject of litigation within a week. This article serves as a primer on the 2023 Rule, and CWA section 401 more broadly, by summarizing:

1. The regulatory background that set the stage for the 2023 Rule;
2. Seven key, arguably controversial aspects of the 2023 Rule;
3. The recent lawsuit, *Louisiana v. EPA*, 2:23-cv-01714, challenging the rule; and
4. Our best attempt to predict upcoming developments that may impact the rule's fate.

Background Leading up to the 2023 Rule

Section 401 of the CWA, which was adopted in 1971 and amended in 1972, requires that applicants for a federal license or permit that “may result in any [point source] discharge” into waters of the United States must “provide the licensing or permitting agency a certification” from the state or authorized Tribe (collectively, Certification Agencies) where the discharge originates. It is then left to the Certifying Agencies to determine whether the discharge will comply with the applicable water quality requirements or to waive certification. The Certification Agencies are authorized to certify whether the federally licensed or permitted activity resulting in a point source discharge will be conducted in a manner that will not violate the state’s applicable water quality standards.

Prior to the 2023 Rule, EPA issued regulations to implement section 401 twice: once in 1971 (the 1971 Regulations) prior to the 1972 amendment of the CWA, and then not again until the Trump Administration adopted new regulations that took effect September 11, 2020 (the 2020 Rule). The 2020 Rule narrowed authority granted to Certification Agencies under the 1971 Regulations to be consistent with the

Administration's policy goals to promote development of infrastructure, including energy infrastructure, by providing more efficient and timely infrastructure permitting processes and procedures. The 2020 Rule was quickly challenged in court: litigants filed federal lawsuits in the states of California, Pennsylvania, and South Carolina. Shortly after these lawsuits were filed, in January 2021, President Biden issued Executive Order 13990, requiring federal agencies to review regulations promulgated during the Trump Administration that conflicted with Biden Administration priorities. Pursuant to the Executive Order, EPA published a notice of intent to reconsider and revise the 2020 Rule on June 2, 2021.

After the notice of intent was issued, the federal district courts considering the challenges to the 2020 Rule remanded (sent back to EPA for reconsideration) the rule in all three states, but only vacated (cancelled) in the state of California. As a result, while awaiting the Biden Administration's new rulemaking, the 2020 Rule continued to apply in all states except for California, which was subject to the 1971 Regulations until the 2023 Rule went into effect. A year later, on June 9, 2022, EPA published a proposed rule to revise the 2020 Rule, and, after considering approximately 27,000 public comments, published the final 2023 Rule on September 27, 2023.

The 2023 Rule returns much broader authority to Certification Agencies to review, condition, and reject water quality certifications for federal licenses and permits than was afforded under the 2020 Rule. This broad certification authority reinstates the authority the Certification Agencies had prior to the 2020 Rule, and, in some cases, actually expands that authority beyond that which was afforded pursuant to the 1971 Regulations.

Key Aspects of the 2023 Rule

Key (and arguably controversial) aspects of the 2023 Rule, particularly when compared to the 2020 Rule that it replaced, include the following:

- **Expanded Scope of Certification Authority** – The most controversial aspect of the 2023 Rule is the scope of the authority given to the Certification Agencies. The 2023 Rule reinstates the approach from the 1971 Regulations by allowing Certification Agencies to consider and condition a certification to address water quality effects of an entire project or activity “as a whole,” rather than limiting the scope of the Certification Agencies’ certification and conditions to the point source discharges that trigger the federal permit or license, and the certification process. The 2020 Rule had narrowed the scope of the certification to examining the water quality impacts of the point source discharge rather than directing the Certification Agencies consider the water quality effects of the “activity as a whole.” In the preamble to the 2023 Rule (Preamble), EPA cites to language from its 1989 guidance (“[a]ll of the potential effects of a proposed activity on water quality – direct and indirect, short and longer term, upstream and downstream, construction and operation – should be part of a state’s certification review”) to support a broad approach to certification actions. The Preamble directs Certification Agencies to employ a broad approach to certification actions, even when the federal lead agency does not have jurisdiction over the project or activity “as a whole,” but instead exercises jurisdiction that is limited, for example, to the scope and effects of the point source discharge, and/or to the construction phase of the project. In addition, while EPA includes language in the 2023 Rule stating that the scope of certification review is limited to impacts to water quality that stem from the activity subject to certification, the Preamble discusses “water quality” impacts more broadly, such that Certification Agencies could be read to have the authority to impose conditions related to projects, in general, where there is an impact to the biological, chemical and/or physical characteristics of a receiving water (including to flows and temperature). The Preamble also encourages Certification Agencies to consider all types of state water quality requirements in conditioning certifications, instead of solely considering designated beneficial uses, promulgated water quality objectives, and existing discharge permit conditions and requirements. As a collective result of all of these changes, the 2023 Rule, particularly when read in conjunction with the Preamble, defines the scope of authority for Certification

Agencies much more expansively than previous regulations. The wording of the CWA is ambiguous with respect to each of these factors, making the recent litigation regarding the appropriate scope of certification authority under the statute (discussed at length below) predictable. The potential outcome of this litigation may further be muddied given SCOTUS previously upheld EPA's broad discretion under section 401 based, in part, on *Chevron* deference (so-named for the case *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984))—a longstanding doctrine of agency interpretation that SCOTUS is currently reexamining and may eliminate as early as next month.

- **Thirty Day Pre-Filing Meeting Requirement** – The 2023 Rule retains a pre-filing meeting requirement introduced by the 2020 Rule. The 2023 Rule provides that project proponents must request a pre-filing meeting with the requisite Certifying Agencies at least 30 days prior to requesting certification of the project. This requirement is somewhat controversial because the CWA does not contemplate this added process. Unlike the 2020 Rule, the 2023 Rule introduces flexibility into this requirement by allowing the Certifying Agencies (instead of the federal lead agency that supposedly controls certification procedures) to waive or shorten the pre-filing time period.
- **New Submittal Requirements** – The 2023 Rule lays out minimum requirements for all requests for certification in connection with individual and general federal licenses and permits. Like the pre-filing meeting requirement, the certification submittal requirements are somewhat controversial because the CWA does not include detailed submission prerequisites. The 2023 Rule's minimum requirements include a complete permit application (for individual permits), a copy of the draft permit (for general permits), and all readily available water quality information that informed the development of the application or draft permit or license. Certifying Agencies are also authorized to specify additional submittal requirements (the additional requirements may be standardized across projects or may be identified on a certification-by-certification basis in the pre-filing meeting). The clock that governs issuance of the section 401 certification is not triggered until the applicant submits a certification request that addresses all submittal requirements established by the 2023 Rule (including any additional requirements prescribed by the Certifying Agencies). Because submittal requirements can be adjusted on a certification-by-certification basis, there is room for the Certification Agencies to delay the start of the certification clock by imposing unique submittal requirements or to otherwise deem an application “incomplete.”
- **The Certification Clock – Six Month Default** – Section 401 specifies that certifications must be issued within a “reasonable period of time (which shall not exceed one year).” The 2023 Rule allows the relevant federal agency and the Certification Agencies to jointly agree on a reasonable period of time to consider the project after the certification request is received, but establishes six months as the default “reasonable period of time” if a joint agreement is not reached. Certifying Agencies have the option under the 2023 Rule to modify the 6-month certification clock, so long as it does not exceed the statutory maximum of one year. Notably, EPA removed a provision from the 2020 Rule that prohibited Certifying Agencies from requesting project proponents to withdraw and resubmit certification requests in order to reset the one-year clock. The 2023 Rule remains silent on this issue, but the preamble indicates that this practice, which was invalidated by the D.C. Circuit Court in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), may in certain circumstances be appropriate, citing a split among federal circuit courts on the appropriateness of the ‘withdraw to reset’ practice. Therefore, under the 2023 Rule, it is possible for Certification Agencies to extend the certification period beyond the one-year limitation required by section 401 itself.
- **Role of Federal Agencies** – The 2023 Rule does not provide a federal lead agency with authority to review the substance of the certification, its conditions, or its rejection. Instead, the federal agency is limited to reviewing the timeliness of action by the Certification Agencies, and whether the correct state or tribal entity issued the certification. This is different from the 2020 Rule, which provided that the federal agency should review the substance of conditions for compliance with federal regulations.
- **Justification for Conditions or Denials** – The 2023 Rule *recommends* the Certifying Agencies explain why conditions are justified and the purpose behind any denial, but does not *require* an explanation or the creation of an administrative record. This is a departure from the 2020 Rule, which required an explanation to justify

conditions and grounds for denial to assure transparency for the federal lead agency and federal permit or license applicant.

- **Retroactivity** – The 2023 Rule does not apply to certifications issued prior to the effective date of the Rule (November 27, 2023), and does not require applicants to re-submit certification requests to the Certification Agencies in order to comply with the requirements of the 2023 Rule. However, the Preamble makes clear that the 2023 Rule *will* apply retroactively to requests for certification that are pending issuance on the effective date.

Recent Litigation

On December 4, 2023, one week after the 2023 Rule went into effect, it was challenged by a coalition of states and regulated entities that prefer the narrower regulatory approach of the 2020 Rule and allege that the 2023 Rule impermissibly expands the Certifying Agencies' authority in a manner the CWA did not anticipate or intend. The case, *Louisiana v. EPA*, was brought pursuant to the Administrative Procedure Act (APA) and filed in the U.S. District Court for the Western District of Louisiana by the following plaintiffs: the states Louisiana, Alaska, Arkansas, Kentucky, Mississippi, Missouri, Montana, Oklahoma, South Carolina, West Virginia, and Wyoming, as well as the non-state entities the American Petroleum Institute, the Interstate Natural Gas Association of America, and the National Hydropower Association. This litigation was widely expected, in part because EPA is already fielding a lawsuit brought by many of the same plaintiffs in response to its recent rule updating the definition of waters of the United States (WOTUS) under the CWA, which we have reported on extensively throughout the year (for a summary of these reports, see our 2023 WOTUS overview).

The thrust of Plaintiffs' argument in *Louisiana v. EPA* is that the 2023 Rule's expanded scope of authority (discussed as the first 'key aspect' of the Rule, above) goes beyond the authority afforded to EPA under the CWA. Plaintiffs argue that EPA uses the 2023 Rule to push cooperative federalism beyond the acceptable limit—imposing mandatory requirements on Certifying Agencies that exceed the authority of the statute. This argument is particularly salient in the wake of SCOTUS' ruling in *Sackett v. EPA*, 598 U.S. 651 (2023), which substantially limited what types of waters are considered WOTUS and are thus subject to federal jurisdiction. Plaintiffs argue that by dramatically expanding the scope of section 401, EPA is attempting to claw back the power that SCOTUS stripped away with the *Sackett* ruling. In other words, Plaintiffs allege that EPA is using section 401 to force states to evaluate the quality of waters beyond the federal government's reach, despite the fact that section 401 does not call for a broad inquiry into water quality.

The State Plaintiffs further argue that they are harmed by the 2023 Rule because the requirements for compliance are cumbersome and expensive. In addition, Plaintiffs point out that aspects of compliance with the 2023 Rule may be all but impossible: for example, the rule requires that all request for certification include a copy of the draft federal permit or license for the project at issue, but some key federal agencies (such as the Federal Energy Regulatory Commission) do not create this type of draft permit.

What's Next?

Plaintiffs in *Louisiana v. EPA* have filed for a preliminary injunction—asking the court to freeze the 2023 Rule while the lawsuit proceeds. If the court grants this injunction, the resulting regulatory patchwork between politically red and blue states will mimic what we saw after the legal challenges to the Biden Administration's recent WOTUS rule. Under that scenario, the 2023 Rule will go into effect in the states where the rule has not been challenged, but pre-existing law (here, the 2020 Rule) would apply in the states bringing the

lawsuit until the litigation concludes.

As the situation currently stands—the future of section 401, and the implementation of the CWA more broadly, lies with a handful of federal courts. How these courts will interpret the 2023 Rule remains to be seen. We will continue to monitor the status of this rule and the related litigation, and will provide updates as necessary.