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GENERAL MEMORANDUM 23-009

EPA Restores Tribal Certification Power Over Federal Clean Water Act Projects and Schedules Webinars for Tribes

On September 13, 2023, the Environmental Protection Agency (EPA) released its prepublication final rule for Clean Water Act Section 401 Water Quality Certifications, [available here](#). Pursuant to the Act, 33 U.S.C. § 1341, a federal agency may not issue a license or permit for activity that may result in a discharge into waters of the United States¹ unless the authorized Tribe² where the discharge would originate certifies the discharge as complying with all applicable water quality requirements—including tribal requirements—or waives certification.

Since the Act's passage in 1972, certification reviews have typically been conducted pursuant to an analysis that considers the effects of the permitted activity as a whole. In 2020, the previous Administration promulgated a rule to cast off the “activity as a whole” analysis in favor of a “discharge-only” analysis that merely considered the potential sources of discharges into waters of the United States. Thus, the 2020 Rule no longer required consideration of the full scope of the activities subject to the federal license or permit. The 2020 Rule also allowed federal agencies to review and deem waived any noncompliant certification decision—essentially granting federal agencies the power to override the tribal and state objections procedure guaranteed by the Clean Water Act statute.

This year's rule restores the previous “activity as a whole” standard for certification review and reverses the 2020 Rule's process for federal override of tribal and state certification denials. The 2023 Rule is clear on this latter effect: “A denial of certification means that a certifying authority is not able to certify that the activity will comply with water quality requirements. If a certifying authority denies certification, the Federal license or permit *cannot be issued*. 33 U.S.C. § 1341(a)(1).” (emphasis added). As such, the 2023 Rule is a powerful affirmation of tribal authority to block federal projects under the Clean Water Act.

The 2023 Rule will take effect 60 days after the Rule is published in the FEDERAL REGISTER.³ The 2023 Rule is extensive and this memorandum provides only a brief overview.

¹ The Supreme Court radically diminished the scope of protected “waters of the United States” earlier this year in its *Sackett v. EPA* ruling. Then, last month the EPA formally scaled back protection of millions of acres of wetlands, stating that the agency had “no alternative” in light of the Court's holding in *Sackett*.

² An authorized Tribe (also “certifying authority”) is one which has been approved for treatment in a manner similar to a State under the Clean Water Act.

³ As of this writing, the final rule has yet to be published in the FEDERAL REGISTER, but its publication is expected soon.

The EPA's outreach and engagement page for the 2023 Rule is [here](#). The page includes additional materials as well as links to a series of webinars for Tribes Interested in "Treatment in a Similar Manner as a State" for Section 401:

- [October 12, 2023 from 3pm-5pm ET](#)
- [October 17, 2023 from 3:30pm-5:30pm ET](#)
- [October 18, 2023 from 1-3pm ET](#)

Please let us know if we may provide additional information on the 2023 Rule or assistance with the process of becoming a certifying authority under the Clean Water Act.

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