Uncooperative Federalism: Proposed Changes to CWA 401 WQC Regulations

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Outline

➢ History of state water quality certifications
➢ Key U.S. Supreme Court CWA cases
  ● PUD No.1
  ● S.D. Warren
➢ Casus belli: recent actions by states
➢ Proposed rule’s restrictions on states
  ● Decision-making timeframe
  ● Scope of state review
  ● Federal agency review of state decision
History of state water quality certifications

➢ FWPCA (1948), amended in 1956, 1961, 1965

➢ Water Quality Improvement Act of 1970 introduces WQCs

➢ EPA issues WQC regulations in 1971

➢ Clean Water Act (1972)

- FERC license for hydroelectric facilities
- Washington imposes minimum stream flow requirement in WQC
- Supreme Court rules 7-2 that the minimum stream flow requirement is a WQC permissible condition

https://en.wikipedia.org/wiki/Dosewallips_River
Majority conducted textual analysis: “§ 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole”

Majority then observed that the Court’s “view of the statute is consistent with EPA’s regulations implementing § 401” and cited *Chevron*

- Justice Stevens one-paragraph concurrence:

“For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards.”
Justice Thomas dissenting:

“[T]he text and structure of § 401 indicate that a State may impose under § 401(d) only those conditions that are related to discharges.”
S.D. Warren Co. v. Maine Board of Environmental Protection (2006)

- FERC renewal licenses for hydroelectric dams
- Maine imposed minimum stream flow requirement in 401 WQC
- Supreme Court ruled 9-0 that discharge of water (from a dam) is a discharge triggering the need for a WQC

https://www.mainetrailfinder.com/trails/trail/presumpscot-river-paddling-trail
The Court noted that “Section 401 recast pre-existing law and was meant to ‘continue[e] the authority of the State … to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source with such State.’ S.Rep. No. 92-414, p. 69 (1971).”
Casus belli: recent actions by states

➢ Washington 401 denial related to Millennium Coal Terminal

➢ New York 401 denial related to Constitution Pipeline

➢ Oregon 401 denial related to LNG facilities and pipeline

President Trump: “State level abuse”
The proposed rule ...

- Published in the Federal Register on August 22, 2019
- Comments due by October 21, 2019
- Limits state authority to deny WQCs
  - timing
  - scope
  - veto
Timing

- Clock starts upon receipt of certification request
- Limits on requests for additional information
- Federal agency will establish reasonable time for state to decide, not to exceed one year
Scope of state review

- Water quality
- Activity versus discharge (*Chevron*)
- Discharges from point sources
Federal agency review of state decision

- If the federal agency determines that the state WQC denial satisfies the regulations, the federal license or permit will not be granted.

- If the federal agency determines that the state WQC denial does not satisfy the regulations, the state WQC is treated as a waiver.

- The same approach is applied to conditions in the state WQC: if the condition complies with the regulations, it is incorporated into the federal license or permit; if not, the condition is not incorporated.
Looking forward to your questions ...