Updates
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EPA Proposes to Narrow Water Quality Certification Authority Under the Clean Water Act

The Environmental Protection Agency issued a lengthy proposed rule on August 9, 2019 to clarify the substantive and procedural requirements for water quality certifications under Section 401 of the Clean Water Act. According to EPA Administrator Andrew Wheeler, the changes are "intended to increase the predictability and timeliness of Section 401 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures."

The proposed rule would re-write EPA's existing Section 401 implementing regulations and significantly narrow the authority of states and Indian tribes when acting on Section 401 certification requests. Specifically, the rule would restrict the scope of the review under Section 401 to whether the point source discharges from a federally approved project comply with applicable Clean Water Act standards, thereby excluding from this review any broader consideration of the water quality or other impacts from the project as a whole.

The proposed rule would also establish strict timelines for the certifying state or tribe to act on a certification request, without any mechanism to toll or extend the deadline. Lastly, the rule would establish specific procedures to govern the certification process.

EPA developed the proposed rule in response to the Trump administration's April 2019 Executive Order 13868, which directed several administrative agencies to pursue regulatory changes to promote energy infrastructure development. It also follows EPA guidance on the Section 401 certification process issued June 7, 2019. EPA published the proposed rule in the Federal Register on August 22, 2019, kicking off a 60-day comment period which will be open until October 21. EPA estimates it will finalize the rule by May 2020.

Legal Background

There are two key provisions of Section 401 of the Clean Water Act.

- First, under Section 401(a), whenever a federal permit or license is needed for an "activity" that may result in a "discharge" to waters of the United States, the applicant must seek a certification from the appropriate state or Indian tribe that "any such discharge" will comply with applicable water quality standards and other requirements under the CWA. Common examples of federal approvals triggering the requirement for such "water quality certification" are Section 404 permits issued by the U.S. Army Corps of Engineers for the discharge of dredged or fill material, Army Corps permits for projects affecting navigable waters under Sections 9 and 10 of the Rivers and Harbor Act of 1899, hydropower licenses and pipeline certificates issued by the Federal Energy Regulatory Commission, and National Pollutant Discharge Elimination System permits for wastewater discharges where EPA administers the permitting program.
- Second, under Section 401(d), a certification must specify any effluent limits, other limitations and monitoring requirements that are necessary to assure that the "applicant for a Federal license or permit" will comply with the applicable CWA requirements and "with any other appropriate requirement of State law." Section 401(d) further requires that these limitations and requirements as set forth in the certification are incorporated as conditions in the federal license or permit.

Once the applicant requests certification, Section 401 states that the appropriate state or tribal authority must act "within a reasonable time (which shall not exceed one year) after receipt of such request"—if the certifying state or tribe fails or refuses to act within the requisite timeframe, the requirement for a certification is waived. No federal license or permit may be granted until the certification has been granted or waived.

EPA's current Section 401 implementing regulations were adopted in 1971, prior to the enactment of the CWA in 1972. The regulations, which were based on the provisions of the 1948 Federal Water Pollution Control Act, have never been updated. One stated goal of the proposed rule is to update the regulations to ensure consistency with the CWA.

But the EPA's primary objective is to codify a new interpretation of Section 401. Under this interpretation, which would significantly narrow the authority of certifying states and tribes, a certification decision would be limited to assessing whether any "discharges" from a federally approved project comply with the CWA, rather than the prior longstanding practice of assessing the broader water quality impacts that could result from the project as a whole.

Scope of 401 Certification

Consider as an example a large development project that requires a Section 404 permit from the Army Corps for a small area of the project site where wetlands would be filled. Under Section 401, does the certifying state or tribe look only to the "discharge" associated with the fill of wetlands, or may it look more broadly to impose conditions to address the water quality effects of the entire "activity" consisting of the development project as a whole?

In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the U.S. Supreme Court ratified the broader interpretation in upholding a water quality certification issued by the State of Washington that imposed minimum stream flow requirements on a hydroelectric power plant project. The project proponent claimed that such requirements exceeded the state's authority under Section 401, which should be limited to addressing only "discharges" from the federally permitted project. In rejecting this claim, the Court looked to EPA's 1971 pre-CWA regulations, which applied the certification requirement to the broader "activity" (here, the power plant project as a whole) and not merely any "discharges" from that activity. The Court found that the broader interpretation of the scope of Section 401 as reflected in the 1971 regulations was a reasonable reading of the statute and was therefore entitled to judicial deference.

Based on the *PUD No. 1* decision, it has been common practice under Section 401 in a number of states to review the impacts from the entire "activity" that is associated with the discharge. Under this approach, a Section 401 certification can serve as a kind of comprehensive water quality permit for a federally approved project that has a discharge as one of its components.

The proposed rule now seeks to codify the narrower interpretation as reflected in Justice Clarence Thomas' dissent in *PUD No. 1*. The rule would specify that "[t]he 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***." EPA proposes to define the term "discharge" as "a discharge from a point source into navigable waters," and the term "water quality requirements" as the "applicable provisions of … the CWA and EPA-approved state or tribal CWA regulatory program provisions."

In the preamble to the proposed rule, EPA presents an extensive legal argument as to why a narrow interpretation is an appropriate and permissible reading of Section 401 that does not conflict with the *PUD No. 1*

decision. EPA specifically has asked for comments on whether its approach properly captures the scope of authority for granting, conditioning, denying and waiving a Section 401 certification. This issue is likely to be a key focus of the comments on the proposed rule and any subsequent court challenge if the rule is adopted.

Under the proposed rule, any conditions imposed on a certification would need to be limited to only the "discharges" from the federally licensed or permitted activity. To ensure compliance with this limitation, the regulations would require that, for each condition, the certifying state or tribe provide the following information:

1. A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements;
2. A citation to federal, state or tribal law that authorizes the condition; and
3. A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.

If the federal licensing or permitting agency determines that the certifying state or tribe either has imposed a condition that exceeds the defined scope of the certification or has failed to provide the requisite information for the condition, then the federal agency essentially would have the authority to reject the condition and decide not to include it as part of the federal license or permit. The proposed rule would allow, but not require, the federal licensing or permitting agency to provide the certifying state or tribe an opportunity to remedy a defective condition.

Similarly, any denial of certification must include the following:

1. The specific water quality requirements with which the proposed project will not comply;
2. A statement explaining why the proposed project will not comply with the identified water quality requirements; and
3. The specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project complies with water quality requirements.

As with defective conditions, the federal licensing or permitting agency has the power to reject a denial where the certifying state or tribe either has exceeded the defined scope of the certification review or has failed to provide the requisite information for the denial.

Timing of 401 Certifications

The proposed rule would clarify that the one-year timeframe in the statute for acting on a certification request is the "absolute outer bound" for making a certification decision. Further, the clock would start to run when the ***certification request*** is received by the certifying state or tribe, and not when the request is deemed to constitute a complete application. Thus, if a certifying state or tribe needs additional information beyond the initial request to make a certification decision, it may request that information, but that would not restart the clock or otherwise extend the deadline for a final decision.

In addition, the proposed rule would give the federal licensing or permitting agency substantial discretion in deciding whether to impose a shorter period of time (i.e., shorter than one year) as the deadline for individual certification decisions on a case-by-case basis. In establishing the reasonable period of time, the proposal directs a federal agency to consider the complexity of the proposed project; the potential for any discharge; and the potential need for additional study or evaluation of water quality effects from the discharge.

The certifying state or tribe may request an extension of time, but the timeline must still be reasonable and cannot exceed the statutory one-year deadline. If the certifying state or tribe does not act within the deadline

established by the federal licensing or permitting agency (along with any extension up to the one-year maximum), then the federal agency can find a waiver and issue the license or permit without a certification.

The rule would also eliminate opportunities for the certifying state or tribe to toll the deadline to act. This appears to extend the U.S. Court of Appeals for the D.C. Circuit's recent decision in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), which held that the one-year statutory timeline for state certification does not reset if a project proponent withdraws and resubmits its certification pursuant to an agreement with the state. In practice, some states have also paused or tolled the timeline for action to address an outstanding or unfulfilled request for information or documents.

The new timing rules likely will have the greatest practical effect in states with "mini-NEPA" laws—such as California (CEQA) and Washington (SEPA) —where a state's grant of a certification requires an environmental review that may not be completed within a year from the certification request. In this type of situation, a strict one-year rule could result in more certification denials and ensuing litigation, rather than providing for a streamlined certification process.

Lastly, the proposed rule would specify the information and documentation that must accompany a request for certification, as well as the requisite certification procedures.

Impacts of the Proposed Rule

The proposed rule reflects a significant shift in the implementation of Section 401 and the authority of certifying states and tribes. The rule would grant substantial discretion to the federal government, in terms of both establishing the required timeframe for state or tribal action on a certification and making substantive determinations about whether a state or tribal certification decision meets the rule's requirements and restrictions.

Not surprisingly, the proposed rule is anticipated to result in extensive comments, and it is likely that any final rule that is ultimately adopted will be challenged in court. At this juncture, it is too early to predict the fate of the proposed Section 401 rule. As with the uncertainty over the recent final rule redefining the key phrase "waters of the United States," the boundaries, requirements and meaning of Section 401 of the Clean Water Act will likely be resolved in the courts.

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