NO MORE DELAY?: EPA RULEMAKING CLARIFIES TIMELINES AND SCOPE OF STATE AUTHORITY IN THE CLEAN WATER ACT SECTION 401 CERTIFICATION PROCESS

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On 1 June 2020, the U.S. Environmental Protection Agency (EPA) announced its much anticipated "Clean Water Act Section 401 Certification Rule" the (401 Certification Rule or Final Rule) revising and clarifying the water quality certification process under section 401 of the Clean Water Act (CWA).[1] In its press release announcing the 401 Certification Rule, EPA Administrator Andrew Wheeler stated, "We are following through on President Trump's Executive Order to curb abuses of the Clean Water Act that have held our nation's energy infrastructure projects hostage, and to put in place clear guidelines that finally give these projects a path forward."[2]

The 401 Certification Rule represents a substantial reshaping of EPA's nearly 50-year-old section 401 water quality certification regulations. Notable updates in the Final Rule include:

- Strict timelines for section 401 certifications, requiring certifying agencies to take final action within one year of receiving a certification request.
- Limiting the scope of activity that triggers the requirement to obtain section 401 certification to those projects that have a potential to result in a discharge from a point source into waters of the United States.
- Limiting the scope of state agencies' ability to insert conditions unrelated to water quality in section 401 water quality certifications.

The updated regulations will impact state and tribal certifying agencies and a broad array of project proponents (including the energy sector, businesses developing infrastructure to support the energy sector, and utilities) that require CWA section 401 certification when applying for federal authorizations, including Federal Energy Regulatory Commission (FERC) licensing and CWA section 404 permits issued by the U.S. Army Corps of Engineers (Corps).[3] While the Final Rule will likely streamline projected timelines for infrastructure projects, it could also result in an uptick in 401 certification denials for complex projects with long environmental review cycles. Further, the 401 Certification Rule will almost certainly be challenged in court by states and environmental groups that will view the rule as encroachment on state authority to protect human health and the environment and at odds with existing Supreme Court precedent on the scope of section 401. The Final Rule will go into effect 60 days after the rule is published in the Federal Register.

BACKGROUND

Under section 401 of the CWA, applicants for federal authorizations for activities that "may result in any discharge into the navigable waters" of the United States must first seek water quality certifications from the local certifying authority.[4] A state's water quality review is, in essence, a precondition on such federal authorizations. States can also condition a 401 certification to ensure compliance with enumerated provisions of the CWA, state water quality standards, and "any other appropriate requirement of State law."[5] Defining the scope of this review and when it is triggered was one of the main objectives of the 401 Certification Rule.

In the past, courts have held that the scope of water quality review is broad. The Supreme Court of the United States has interpreted section 401's triggering language in ways that some states and tribes have viewed as expanding their powers to condition or deny federal projects under the "cooperative federalism" model of environmental regulation embedded in the CWA. For example, the principal dispute in *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology* was whether a state or tribe could impose minimum stream flows on a hydroelectric dam as a condition to granting the dam's water quality certification under section 401(d).[6] The Supreme Court in *PUD No. 1* concluded that minimum stream flows were a permissible section 401(d) condition, leading to the prevailing view that states and tribes could impose a wide variety of conditions in section 401 certifications, including conditions that addressed impacts unrelated to water quality.[7]

Further, in *S.D. Warren Co. v. Maine Board of Environmental Protection et al.*,[8] the Supreme Court held that operating a dam, even without adding pollutants to navigable waters, raises the potential for a "discharge" into navigable waters, thus triggering the controlling states' Section 401 authority.[9] The Supreme Court held that reading the term "discharge" broadly would assure no state water pollution control agency would be forced to accept the impermissible discharge by an incumbent industry. But these and other decisions, while viewed by some as supporting the CWA's "cooperative federalism" model, have been viewed by others as enabling state delays of federal projects that are politically unpopular.

Recent lawsuits dealing with energy projects have probed the contours of states' and tribes' power to issue—or deny—section 401 certifications, including the timeframe for taking such action. For example, in *Hoopa Valley Tribe v. FERC*, the D.C. Circuit analyzed the CWA's temporal requirement for states to issue certification decisions within a reasonable time not to exceed one year.[10] The *Hoopa Valley* court held that state certifying agencies waived certification because they failed to act over a 10-year period by allowing the applicant to withdraw and resubmit its section 401 certification request in an attempt to toll the one-year deadline.[11] The court emphasized that section 401's waiver provision "was created to prevent a State from indefinitely delaying a federal licensing proceeding."[12] For more information on the *Hoopa Valley* decision, see our prior alert on this topic.

The controversy over 401 certifications has reached a tipping point in the context of the scope of states' authority to deny certifications in the context of large energy infrastructure permitting, such as natural gas pipelines and energy export terminals. Recent examples include the New York State Department of Environmental Conservation's (NYSDEC) denial of CWA section 401 certifications for two pipeline projects[13] and NYSDEC's delay in acting on another 401 certification request it deemed incomplete.[14] Another prime example is the Washington State Department of Ecology's section 401 certification denial with prejudice for a coal export terminal based on multiple non-water quality impacts, including impacts related to air quality, noise, and other issues

related to rail transportation serving the proposed terminal.[15] Each denial or delayed certification noted here has been appealed and/or is in the process of being litigated.

These issues regarding delay and the scope of state authority spurred President Trump's 10 April 2019 Executive Order "Promoting Energy Infrastructure and Economic Growth" and, in turn, the EPA's efforts to update its regulations implementing section 401, which have not been updated since before the 1972 amendments that enacted the current CWA Section 401.[16] After receiving over 125,000 comments on EPA's notice of proposed rulemaking, the EPA issued its Final Rule clarifying the timeline for Section 401 certification analyses and the scope of state certification authority.[17]

FINAL RULE SUMMARY

The following outlines the key changes in the EPA's 401 Certification Rule.

Timeframe for Certification:

The EPA is reaffirming that CWA section 401 requires certifying authorities to act on a request for certification within a reasonable period of time, which shall not exceed one year.[18] The Final Rule outlines additional clarifications that will eliminate uncertainty regarding the time limits for certification including when the statutory reasonable period of time begins to run. Federal agencies responsible for the licensing or permitting decision determine the reasonable period of time for a certifying authority to act on a certification request, and the Final Rule establishes factors for federal agencies to consider in setting the reasonable period of time for certification, including the complexity of the project, nature of the potential discharge, and the need for additional study or evaluation of water quality effects. The final rule requires that an application submit a defined "certification request" to begin the review process and disavows the receipt of a "complete application" as the triggering action that starts the one-year clock.[19] The EPA also reaffirmed that section 401 does not include tolling provisions.

Scope of Certification Authority:

The Final Rule states "that the scope of a State's or Tribe's section 401 review or action is not unbounded and must be limited to considerations of water quality."[20] Further, EPA concluded that the "certifying authority's review and action under section 401 is limited to water quality impacts to waters of the United States resulting from a potential *point source* discharge from a proposed federally licensed or permitted project."[21]

The Final Rule provides that certifying authorities may take one of four actions on applicants' section 401 certification requests: (a) grant, (b) grant with conditions, (c) deny, or (d) waive the opportunity to decide.[22] Granting a section 401 certification with conditions requires a certifying authority to impose only those conditions necessary to assure compliance with applicable water quality requirements. State or tribal certifying authorities must now provide explanations for any conditions they include in a water quality certification pursuant to section 401(d). These explanatory statements must describe why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements and include a citation to federal, state, or tribal law that authorizes the condition.

Denying a section 401 certification requires a certifying authority to deny only if the proposed activity would be inconsistent with applicable water quality requirements. Certifying authorities who deny water quality certifications must now provide written notifications of denial that include (i) the specific water quality requirements with which discharges that could be authorized by the general license or permit will not comply; (ii) a statement explaining

why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements; and (iii) if the denial is due to insufficient information, the denial must describe the types of water quality data or information, if any, that would be needed to assure that the range of discharges from potential projects will comply with water quality requirements.[23]

Finally, waiver may occur in two ways. First, the certifying authority may waive its certification authority explicitly, and second, the certifying authority may waive its certification authority implicitly by failing or refusing to act in accordance with CWA Section 401. For example, if a certifying agency fails or refuses to act within one year of receipt of a certification request, the certification requirement will be deemed waived by the federal action agency, which may issue the underlying authorization.[24]

The Final Rule also clarified that a federal licensing agency does not have the authority to substantively review section 401 conditions. The proposed rule would have required federal licensing and permitting agencies to review and determine whether certifications, conditions, and denials are within the "scope of certification," as articulated in the Final Rule. The final rule does not include this additional substantive federal agency review requirement.[25] Rather, the Final Rule limits the role of federal permitting agencies to ensuring that certifying agencies have complied with procedural requirements.

Pre-filing Meeting Request:

The EPA finalized a requirement that all project proponents, including federal agencies when they seek certification for general licenses or permits, must submit a request for a meeting with the appropriate certifying authority at least 30 days prior to submitting a certification request.[26]

Enforcement:

The rules clarify that the relevant federal agency is responsible for enforcing conditions included in a water quality certification that is incorporated into a federal license or permit.[27] Additionally, once the certifying authority acts on a certification request, the CWA does not provide independent authority for certifying authorities to enforce the conditions that are included in a certification under federal law.

FINAL RULE'S MAJOR IMPLICATIONS

For project proponents, particularly for energy infrastructure projects and the hydropower sector, EPA's 401 Certification Rule will be a welcome new chapter for the state review process that has been a major source of uncertainty and delay in CWA section 401 permitting and FERC relicensing. The EPA's objective in issuing the final rule is to streamline the permitting process for energy infrastructure, and the Final Rule's strict time limits and recalibration of the section 401 certification process to focus narrowly on water quality impacts from potential point source discharges were designed with that objective in mind.

From here, other federal agencies that issue permits or licenses subject to the section 401 certification requirements, namely FERC and the Corps, will undergo their own guidance and regulatory update for consistency with the Final Rule.[28] These efforts at FERC and the Corps will likely offer more specificity regarding the "reasonable period time" for certification, including categories of projects for which the reasonable period time will be less than the CWA statutory maximum limit of one year.

For many state certifying agencies, the Final Rule's strict interpretation of the time limits for certification and the scope of state authority to review, condition, and/or deny certifications will likely be viewed as a major encroachment into a traditional state responsibility to protect human health and the environment.

For example, in years past, states have successfully, through the certification process, conditioned permits to address non-point source water quality impacts.[29] More recently, states, such as New York and Washington, have pushed the scope of 401 certification beyond water quality and into issues such as greenhouse gas emissions and air quality.[30] For now, the Final Rule appears to have eliminated these prospects. There, no doubt, will be gray areas. Project proponents objecting to 401 certification conditions and denials as beyond the scope contemplated in the Final Rule will have to challenge those in appropriate administrative venues, state courts, or, in the case of interstate natural gas pipelines, federal courts.

Notably, the EPA declined to implement a provision in the proposed rule that would have allowed federal agencies to reject substantive conditions in section 401 certifications as outside the scope of the CWA. By failing to implement this proposal, the EPA has preserved the status quo when it comes to contesting conditions imposed by water quality certifications. However, the preamble to the Final Rule did contain strong language to the effect that conditions must be related to water quality, and the EPA went to great lengths to explain its interpretation of the CWA's statutory text. While the Final Rule might not apply retroactively to already submitted applications, the EPA's statutory interpretation may prove persuasive if and when permit holders challenge existing applications.

Another concern reflected in comments on the proposed rule is the ability of a certifying agency to request and obtain information it deems necessary to complete its section 401 review within the reasonable period of time limitation. The Final Rule notes that requests for additional information may be necessary, but that such request cannot result in extending the period of time for certification. The net result could be an uptick in 401 certification denials for cash-strapped states with limited resources to devote to the certification review process. The Final Rule affirms the ability of states to deny 401 certifications on the basis of insufficient information about the proposed project's impacts on water quality, though it explicitly prohibits the certifying agency from “requesting additional information that cannot be generated within the reasonable period of time,” which could include documents generated during environmental review pursuant to the National Environmental Policy Act.

Finally, given what is at stake for certifying agencies and environmental organizations that are involved in the public component of the certification process, it is likely only a matter of days before we see litigation challenging the Final Rule. In the Final Rule, EPA concedes that it is interpreting the language in CWA section 401(a) and (d) differently than the Supreme Court did in *PUD No. 1*, which held that certification can cover the entire activity and not just impacts from the point source discharge.[31] Like other EPA rulemakings under this administration (e.g., EPA's recent Navigable Waters Protection Rule redefining the scope of waters covered under the CWA),[32] we may have to wait to see how the 401 Certification Rule fares in court before we see how it will operate in practice.

FOOTNOTES

[1] Clean Water Act Section 401 Certification Rule (June 1, 2020) (hereinafter Final Rule), pre-publication draft available here.

[2] Exec. Order No. 13868, Promoting Energy Infrastructure and Economic Growth, 84 Fed. Reg. 15,495, (Apr. 15,

2019); EPA News Release, *EPA Issues Final Rule that Helps Ensure U.S. Energy Security and Limits Misuse of the Clean Water Act*, June 1, 2020, available here.

[3] While EPA issued the pre-publication final rule on 1 June 2020, the new regulations will not go into effect until 60 days after the rule is published in the Federal Register.

[4] 33 U.S.C. § 1341(a)(1).

[5] *Id*. § 1341(d).

[6] 511 U.S. 700, 700, 114 S. Ct. 1900, 1910 (1994).

[7] *Lighthouse Resources, Inc. v. Inslee*, No. 3:18–cv–5005, (W.D. Wash. filed Jan. 8, 2018). In Lighthouse Resources, Washington State officials illegally denied a coal supply chain company's application for a Section 401 certification based on multiple non-water quality impacts, including many rail impacts that are squarely within the Surface Transportation Board's regulatory jurisdiction.

[8] 547 U.S. 370 (2006).

[9] *Id.* at 373.

[10] 913 F.3d 1099, 1104 (D.C. Cir. 2019).

[11] *Id*.at 1105.

[12] *Id*. (internal quotations and citations omitted).

[13] *See Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d Cir. 2017) (finding NYSDEC was not arbitrary and capricious in denying section 401 certification to proposed gas pipeline and finding court lacked jurisdiction to hear argument on whether NYSDEC waived its certification authority); *Nat'l Fuel Gas Supply Corp. v. New York State Dep't of Envtl. Conservation*, 761 F. App'x 68, 69 (2d Cir. 2019) (holding that NYSDEC insufficiently explained the reason for its denial of 401 certification to the Northern Access Pipeline and vacating and remanding NYSDEC decision).

[14] *See Millennium Pipeline Co., L.L.C. v. Seggos,* 860 F.3d 696, 698 (D.C. Cir. 2017) (dismissing appeal by Pipeline to compel NYSDEC to act on request for certification under section 401).

[15] *See Lighthouse Resources, Inc. v. Inslee*, No. 3:18–cv–5005 (W.D. Wash. filed Jan. 8, 2018).

[16] As the Proposed Rule noted, these Federal Water Pollution Control Act regulations that center on water quality certifications from the pre-CWA text are out of sync with the current statutory text, and that has "caused confusion for states, tribes, stakeholders, and courts reviewing section 401 certifications." 84 Fed. Reg. 44,080, 44,088 (Aug. 22, 2019).

[17] *Id*. at 44093-99.

[18] Final Rule at 178.

[19] The regulations state that "Certification request means a written, signed, and dated communication that satisfies the requirements of 121.5(b) or (c)." The regulations further state "Receipt means the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures." Final Rule at 276, 277.

[20] Final Rule at 75.

[21] Final Rule at 90 (emphasis in original).

[22] Final Rule at 145.

[23] Final Rule at 262.

[24] Final Rule at 148–49.

[25] Final Rule at 214.

[26] Final Rule at 114.

[27] Final Rule at 240.

[28] Exec. Order No. 13868, Promoting Energy Infrastructure and Economic Growth, 84 Fed. Reg. 15,495, §3(d) (Apr. 15, 2019).

[29] *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994).

[30] Final Rule at 172.

[31] Final Rule at 94.

[32] *See* K&L Gates U.S. Environment, Land and Natural Resources Alert, Finally Finality? The Trump Administration's Answer to One of Environmental Law's Most Contested Questions: What Are "Waters of the United States"? (Feb. 20, 2020).

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