EPA Answers Trump's Call for Less State Authority Under the Clean Water Act

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EPA recently published a proposed federal rule ("Proposed Rule") aimed at limiting the authority of states to deny certifications of compliance with state water quality requirements under Section 401 of the Clean Water Act (CWA). The move is no surprise to those watching the battle over permitting of large energy and export terminal projects. A concern of many, however, is that the rule will have a much broader impact.

CWA Section 401

The CWA was enacted to protect and restore the quality of our Nation's surface waters. To this end, the CWA requires persons desiring to engage in activities that result in direct or indirect discharges into navigable waters to apply for a permit or license. Permits and licenses include CWA Sections 402 and 404 permits, Federal Energy Regulatory Commission (FERC) hydropower licenses, and United States Army Corps of Engineers (USACE) permits for construction of bridges, dams, or dikes under the federal Rivers and Harbors Act.

Section 401 of the Clean Water Act prohibits the issuance of these federal permits or licenses without prior state certification that the project will not impair applicable state water quality standards. States are required under Section 401 to make a certification decision within "any reasonable time not to exceed one year." A state may waive the certification either by written waiver or inaction.

For the last twenty-five years, the scope of the states' authority under Section 401 has been broadly interpreted due to the 1994 United States Supreme Court decision in *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology* ("PUD"). In PUD, the Supreme Court ruled a state has broad authority under Section 401 to require a hydroelectric project to meet minimum stream flow limits in order to protect the river's salmon population. Also, more recently, FERC has issued conflicting decisions on whether New York waived the right to deny certification requests where it failed to act within one year, despite the applicant's withdrawal and reapplication prior to the one year deadline. The influx of new hydroelectric and gas pipeline projects has brought political attention to the timing and scope of the 401 permitting process and what Congress intended with the 401 certification process.

Background

In April of this year, President Trump signed an Executive Order directing EPA to update existing guidance and regulations dealing with states' authority under Section 401 of the CWA. The Executive Order is presumably a reaction to concerns expressed by FERC and applicants complaining states aren't acting fast enough and are illegally expanding the scope of the CWA authority to kill, impose burdensome restrictions on, or delay projects.

In June 2019, EPA issued updated CWA Section 401 guidance and recommendations as required by Trump's Executive Order (the "Guidance"). The Guidance provided insight on the statutory and regulatory timelines and the appropriate limited scope of Section 401 certification review and conditions. EPA cautioned that states have no authority under the CWA to wait to start the one year or less clock until they determine the request to be "complete." In addition, EPA said that, where a state does not make a decision within a reasonable time not to exceed one year of receiving a request (whether complete or incomplete when first made), the right to make a certification decision is waived and federal agencies may issue the permit. Regarding scope, the Guidance stated that the certification review should be limited to an evaluation of water quality impacts and nothing else. Allowable reasons for denial or for conditions in a certification were said to include effluent limitations and monitoring requirements necessary to comply with the water quality standards. If a state denied a certification or conditioned it on issues outside of water quality protection, the Guidance directed federal permitting agencies to seek legal and EPA advice on whether to issue the permit or license without the conditions or despite the denial. Finally, the Guidance stated that a 401 certification need not wait on a completed environmental assessment or impact statement where NEPA is involved. In fact, the Guidance went so far as to say that a state waiting for completion of the NEPA process before taking action may result in waiver of the certification.

The Proposed Rule

The Proposed Rule proposes to make the June 2019 EPA Guidance a regulatory requirement, and it builds on the Guidance to create a clearer path for regulators. The preamble to the Proposed Rule explains that the existing regulations do not reflect the language of Section 401 and do not address important procedural and substantive components of a 401 certification.

The Proposed Rule contains the following specific procedural and substantive requirements for 401 certifications.

1. 401 Certifications are required only if the proposed activity has the potential to result in (1) a discharge; (2) from a point source; (3) into waters of the United States.

This language clarifies three issues that have arisen over the years that potentially enlarged the scope of authority given to the states under the CWA. First, the Proposed Rule clarifies that the need for a 401 certification is not triggered by whether a proposed "activity" could impact water quality standards, but whether a "discharge" could impact water quality standards. Second, as EPA has consistently held, the process is not triggered unless the discharge is from a "point source," not an indirect discharge. Finally, the discharge must be into waters of the United States – not non-navigable waters such as isolated wetlands.

2. The reasonable timeframe for certifying authorities to act on a 401 certification request is within one year of receipt of a "certification request." A "certification request" triggering the one year clock is no longer interpreted by EPA as a "complete application"; instead, it now includes receipt of a request with the following components:

- The name of the project proponent(s) and a point of contact;
- A description of the proposed project;
- The applicable federal license or permit sought;
- The location and type of any discharge that may result from the project and the location of receiving waters;
- The methods and means proposed to monitor and to treat or control the discharge;
- All other federal, tribal, state, or local agency authorizations required for the proposed project (including all approvals and/or denials already received); and
- The following statement: "*The project proponent hereby request [sic] that the certifying authority review and take action on this CWA section 401 certification within the applicable reasonable time frame*."

3. The term "receipt" for purposes of triggering the one year or less timeframe is defined as "the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures."

4. The one year or less time frame to act upon a certification request may not be tolled or extended for any reason. Withdrawing and resubmitting the same 401 request does not restart the clock. To avoid delays, the Proposed Rule requires a proponent to request a pre-filing meeting with the certifying authority at least 30 days prior to submission of the 401 certification request. The agency has only 30 days after a 401 certification request is received to seek additional information that (a) is within the scope of the law; and (b) can be provided within the reasonable time (not to exceed one year of the

receipt of the request).

5. The certifying authority may take only one of four potential actions on a request: (1) grant certification; (2) grant with conditions; (3) deny; or (4) waive its right to provide a certification by express waiver or failure/refusal to act. In taking any of the above-listed actions, EPA explains in the preamble that the certifying authority may consider only whether the discharge to waters of the United States will meet appropriate state or tribal "water quality requirements" as defined by the Proposed Rule. Any conditions placed under a grant "must be necessary to assure compliance with water quality requirements." "Water quality requirements" are limited to "applicable provisions of §§ 301, 302, 303, 306 and 307 of the CWA and EPA-approved state or tribal CWA regulatory program provisions." "State or tribal CWA regulatory program provisions" are defined to include only those water quality requirements established under State or tribal law that are more stringent than those under the CWA, but only if they are EPA-approved. Any conditions imposed by a certifying authority must have a nexus to protection of water quality, refer to the law requiring the condition, and analyze whether a less stringent condition could also satisfy the standards.

6. The rule allows states only to add conditions that are "within the scope of certification," which is limited to "assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." If a specific condition added by a state is deemed by the federal agency issuing the permit not to satisfy the proposed water quality requirements, the federal agency may give the state an opportunity to remedy the condition only if the one year time period has not expired. If it has expired or the state does not modify the condition within one year of receipt of the request for certification, the condition is not required to be included in the federal permit or license.

Conclusion

The Proposed Rule seeks to prevent unnecessary delays and illegal conditions imposed on 401 certifications. Delays and unwarranted conditions cost money and often kill projects. EPA touts the rule as needed to ensure the scope of the 401 certification process is not expanded to exceed the intent of Section 401 of the CWA, being to protect water quality from impairments caused by direct discharges to navigable waters. However, it is a certainty that some states will see this as a dilution of the authority granted to them by Congress under the CWA. That means this issue will surely be litigated. The comment period on the Proposed Rule closed on October 21, 2019.

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