EPA Limits State and Tribal Authority Under Section 401 of the Clean Water Act

June 2, 2020

On June 1, 2020, the US Environmental Protection Agency ("EPA") announced a final rule narrowing the ability of states and Indian tribes to formally object to federally permitted projects based on state water quality standards. Under Section 401 of the Clean Water Act ("CWA"),[1] states—and authorized tribes[2]—are given the opportunity to review certain proposed projects requiring federal permits to determine whether those projects will comply with applicable water quality standards. States had been increasingly using the so-called Section 401 certification process to block or significantly delay certain development projects. EPA's new rule will make it more difficult for states and authorized tribes to deny or condition Section 401 certifications.

Background

Section 401 requires states and authorized tribes to act on a request for certification within a "reasonable period of time (which shall not exceed one year)."[3] If a state or authorized tribe determines that a project will comply with its standards, it typically grants certification. States and tribes may also grant certification by adding certain conditions, they may deny certification, or waive the review altogether. A federal agency may not issue a license or permit for a project that may result in any discharge into waters of the United States without receiving either a Section 401 certification or a waiver from the applicable state or authorized tribe.

[1] 33 U.S.C. § 1341.

[2] Under Section 518(e) of the CWA, an Indian tribe may apply to EPA for authorization to be treated as a state for purposes of implementing and managing Section 401 for waters within the borders of the tribe's reservation. Like states, authorized tribes have the ability to grant, deny or waive certification of proposed federal permits that may result in any discharge into waters of the United States.

[3] 33 U.S.C. § 1341.

Recent State Implementation of Section 401

In recent years, some states have used their certification authority under Section 401 to delay or functionally veto certain projects requiring federal permits. For example, the New York State Department of Environmental Conservation ("New York") denied Section 401 certifications for two major natural gas distribution pipeline projects: the Constitution Pipeline in 2016 and the Northeast Supply Enhancement project in 2019. Both projects had been approved by the Federal Energy Regulatory Commission ("FERC") before state certification was sought. With respect to the Constitution Pipeline, after repeated withdrawals and re-filings of applications for a Section 401 certification, FERC finally issued an order in August 2019[4] concluding that New York effectively waived its Section 401 authority, because the repeated withdrawals and resubmissions occurred over a period of time greater than the statutory one-year period. Nevertheless, after years of legal challenges, and even after FERC determined that New York had waived its authority, the project proponents ultimately decided to cancel the project. Meanwhile, New York's denial of the Northeast Supply Enhancement project application was without prejudice, based on the developer's "inability to demonstrate the Project's compliance with all applicable water quality standards."[5] The project developer then submitted a new application for Section 401 certification, which New York denied in May 2020, finding that construction of the project would result in "significant water quality impacts resulting from the resuspension of sediments and other contaminants."[6]

Washington State is the venue of another prominent Section 401 certification dispute. In 2017, the Washington State Department of Ecology ("Washington") denied Section 401 certification for the Millennium Bulk Terminal, a planned coal export terminal. The project is supported by neighboring land-locked states Wyoming and Montana, which are looking to use the terminal to ship their coal to foreign markets. Washington reasoned that the terminal would cause irreparable and unavoidable environmental harm to the Columbia River and surrounding area.[7] Because Washington concluded the harm could not be mitigated, the certification denial was made with prejudice. In January 2020, Wyoming and Montana asked the US Supreme Court to exercise its original jurisdiction authority (bypassing the lower courts) to hear their dispute with Washington, arguing that Washington's denial of Section 401 certification for the export terminal violates the Constitution's "Dormant Commerce Clause" (which prohibits states from placing excessive burdens

[4] 168 FERC ¶ 61,129.

[5] NYSDEC, Notice of Denial of Water Quality Certification, Transcontinental Gas Pipe Line Company, LLC, Northeast Supply Enhancement Project (May 15, 2019).

[6] NYSDEC, Notice of Denial of Water Quality Certification, Transcontinental Gas Pipe Line Company, LLC, Northeast Supply Enhancement Project (May 15, 2020).

[7] Washington Dept. of Ecology, Millennium Bulk Terminals Longview.

on interstate commerce) and the Foreign Commerce Clause (which gives Congress the power to regulate commerce "with foreign Nations").[8]

As illustrated by the New York and Washington denials, and others like them, industry groups and several state attorneys general have pushed for changes to the Section 401 certification process to avoid similar outcomes.

Executive Order and EPA Response

On April 10, 2019, President Trump issued an executive order directing EPA to review existing Section 401 guidance to determine whether it aligned with United States policy "to promote private investment in the Nation's energy infrastructure."[9] The order called on EPA to consider the appropriate scope of water quality reviews, the types of conditions that may be appropriate to include in a certification, and the nature and scope of information needed by states and tribes to timely act on a certification request.

In response, EPA released guidance in June 2019, highlighting the one-year statutory limit for Section 401 certification decisions, stating that conditions in a Section 401 certification should be limited to potential water quality impacts, and recommending steps to prevent Section 401 certification decisions from being delayed.[10] Then in August 2019, in order to codify its June guidance document, the agency proposed a new rule, which curbed state and tribal Section 401 authority.[11] EPA announced the final rule on June 1, 2020.[12]

Limits Under the New Rule

EPA's new rule tamps down on state and tribal authority under Section 401 in four major ways.

First, the new rule narrows the scope of activities subject to Section 401 review to only activities resulting in discharge from what would be considered a "point source" under the CWA.[13] In the past, once Section 401 certification was triggered, states considered and imposed conditions on the entire project, even beyond discharges from a point source, in order to ensure compliance with

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[8] *Montana and Wyoming v. Washington*, Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support.

[9] Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth* (Apr. 10, 2019).

[10] EPA, *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes* (Jun. 7, 2019).

[11] EPA, Proposed Rule Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket ID No. EPA-HQ-OW-2019-0405.

[12] EPA, Clean Water Act Section 401 Certification Rule (Jun. 1, 2020).

[13] Examples given in the final rule are bulldozers, mechanized land clearing equipment and dredging equipment.

water quality requirements.[14] For example, in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the United States Supreme Court upheld Washington State's imposition of a minimum stream flow requirement as part of the Section 401 certification process for a proposed hydroelectric project. The requirement Washington added was designed to protect nearby fisheries, a purpose the Court declared lawful despite the project proponent's argument that the condition was unrelated to the two potential discharges associated with the project.[15]

Under the new rule, Section 401 certification conditions may be imposed only on the potential point source discharge, and not on the overall activity subject to federal permitting. This change significantly narrows the activities subject to state and tribal review under the Section 401 certification process. In its final rule, EPA states it has discretion to narrow the scope of Section 401 in this way, because the Supreme Court's decision in *PUD No. 1* relied on EPA's 1971 pre-CWA regulations, which created a framework for implementing the certification provisions under the Federal Water Pollution Control Act of 1948, the predecessor to the CWA. In addition, EPA states that the *PUD No. 1* Court lacked the benefit of EPA's interpretation of Section 401. According to the agency, its new rule marks "the first time that the EPA has undertaken a holistic review of the text of section 401 in the larger context of the structure and legislative history of the [CWA]" and "presents a framework that the EPA considers to be most consistent with the text of the [CWA] and congressional intent."

Second, the new rule narrows the scope of conditions a state or authorized tribe may impose through Section 401 certification. Under the new rule, imposed conditions must be "limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." This eliminates non-water-quality-related considerations from the review process. EPA explained its reasoning in the final rule, noting that certifying states had been including mitigation conditions in their Section 401 certifications that were not directly related to water quality, such as requiring construction of biking and hiking trails, requiring one-time and recurring payments to state agencies for improvements unrelated to the proposed federally licensed or permitted project, and creating public fishing access. Some certifying authorities had also attempted to use Section 401 certifications to address potential impacts unrelated to water quality, such as air emissions impacts and transportation effects. Such considerations are no longer permitted under the new rule.

Third, the rule adds a new role for the federal permitting agency by creating an affirmative obligation for federal agencies to review certifications to ensure that certifying authorities have complied with procedural requirements and have included the required information for certifications,

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[14] This was EPA's position in its now-withdrawn 2010 Interim Handbook. EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, 5, 26 (2010) (citations omitted).

[15] *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994) (stating Section 401(d) "is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied").

conditions, and denials. To aid the federal agency in making this determination, certifying authorities must now include written supporting information for any conditions imposed on a grant of certification, including a citation to the federal, state or tribal law that authorizes the condition. Similarly, if a certification request is denied, the certifying authority must provide a written explanation for the denial, including the specific water quality requirements with which the proposed project will not comply. EPA indicates this change is designed to ensure that state Section 401 certification conditions and denials are clear, specific and consistent with the requirements of Section 401. If a federal agency determines that a certifying authority failed or refused to comply with procedural requirements, the certification will be waived. However, the final rule does not authorize federal agencies to substantively review certifications or conditions to determine whether they are within the scope of certification.[16]

Fourth, the new rule tightens the timeframe to act on a certification request. One particularly contentious issue regarding Section 401 certification has been the length of time it can take for a state to either grant, deny or waive certification, notwithstanding the one-year statutory limit. As was the case with the Constitution Pipeline project, states and permit applicants had found ways to extend the Section 401 one-year statutory limit by having the party requesting the certification withdraw its request right before the one-year deadline and then resubmit it, resetting the one-year clock.

In January 2019, this practice was rejected by the D.C. Circuit in *Hoopa Valley Tribe v. FERC*, in which the court held the withdrawal-and-resubmission of water quality certification requests did not trigger new statutory periods of review.[17] Relying on *Hoopa Valley*, FERC's August 2019 order for the Constitution Pipeline held that by allowing the project proponent to restart the clock by withdrawing and resubmitting its application for a Section 401 certification, New York had waived its Section 401 authority over the Constitution Pipeline.[18] EPA's new rule also relies on *Hoopa Valley* to make clear "the period of time to act on a certification request does not pause or stop for any reason once the certification request has been received." The rule also allows licensing and permitting agencies, such as FERC, to establish what constitutes a "reasonable time" under Section 401, which may be a period shorter than one year.[19]

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[16] The proposed rule would have created a federal agency "veto," which would have allowed the licensing or permitting agency to determine that a state certification decision does not comply with Section 401 requirements. This draft provision was scaled back in the final rule.

[17] *Hoopa Valley Tribe v. FERC*, No. 14-1271 (D.C. Cir. 2019).

[18] The Second Circuit is currently considering another Section 401 case, *NYSDEC and Sierra Club v. FERC*, in which plaintiffs argue FERC incorrectly determined that New York waived its authority to deny Section 401 certification for the Empire Pipeline by failing to act within one year.

[19] Sen. John Barrasso (R-WY) has introduced legislation to address the timing concerns under Section 401. If passed, the bill would require agencies with Section 401 certification authority to identify in writing within 90 days of receipt of a request for certification any additional information needed to make a decision. Water Quality Certification Improvement Act of 2019, S. 1087.

Implications

By limiting the scope and timing of the Section 401 certification process, EPA's new rule will reduce the ability of states and authorized tribes to control projects proposed for development in their jurisdictions. States and tribes with Section 401 certification authority will need to act more promptly and focus more directly on water quality issues in their certification decisions.

Of course, given the controversial nature of these issues,[20] EPA's new rule will surely spark litigation that could continue for several years. Also, federal permitting agencies such as FERC and the Army Corps of Engineers must update their Section 401 regulations or guidance documents to ensure consistency with the new rule. In the meantime, as project applicants, states and tribes undergo the Section 401 process, they will need to carefully consider how to proceed in light of the new rule, related rulemaking activity at other federal agencies, and applicable court orders associated with challenges to the new rule.

[20] On October 21, 2019, 23 state attorneys general filed comments expressing "grave concerns" about EPA's proposed rule, arguing the rule unlawfully restricts states' authority under Section 401. Comments of Attorneys General from the States of Washington, et al. to EPA, re: Proposed Rule Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket ID No. EPA-HQ-OW-2019-0405 (Oct. 21, 2019).

Contributors

Michael Connor
PARTNER

michael.connor@wilmerhale.com
+ 1 202 663 6063

Rachel Jacobson
SPECIAL COUNSEL

rachel.jacobson@wilmerhale.com
+ 1 202 663 6385

H. David Gold
SPECIAL COUNSEL

david.gold@wilmerhale.com
+ 1 617 526 6425

Samantha N. Becker
ASSOCIATE

samantha.becker@wilmerhale.com
+ 1 202 663 6848