



EPA Issues Revised CWA Section 401 Guidance to States

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On June 7, 2019, the U.S. Environmental Protection Agency (EPA) issued an updated [guidance document](#) (Updated Guidance) that clarifies and provides recommendations to states and tribes concerning their implementation of Section 401 of the Clean Water Act (CWA). The Updated Guidance, issued pursuant to Executive Order [13868](#), includes procedural and substantive reforms to the Section 401 process to reduce delays and uncertainty among applicants, states, tribes, and federal permitting agencies. The Updated Guidance is the latest in a series of recent executive and judicial developments that have significantly changed the Section 401 landscape, particularly for gas pipelines, hydropower projects, and other energy infrastructure projects.

BACKGROUND

Under Section 401 of the CWA, any applicant seeking a federal license for an activity that “may result in any discharge into the navigable waters” must first seek a water quality certification (Section 401 Certification) from the state(s) in which the discharge originates. The federal agency may not authorize the project unless the state water quality certifying agency has either issued a Section 401 Certification or waived its Section 401 authority. The CWA authorizes states to impose conditions in a Section 401 Certification to ensure that the activity complies with applicable effluent limitations and other appropriate requirements of state law. The federal agency must incorporate all Section 401 Certification conditions, without change, into the federal permit authorizing the project.

Over time, Section 401 has become a major source of delay in permitting energy infrastructure projects, including gas pipeline and hydropower projects. A number of states have used procedural mechanisms to extend the time by which they must act under the CWA, in some instances for more than a decade. Moreover, the U.S. Supreme Court has endorsed a broad interpretation of state certification authority under Section 401, which has permitted states to impose conditions and operational constraints on the entire federal project “as a whole,” rather than just the point of discharge. In recent years, some states have begun to aggressively assert their authority under Section 401, imposing conditions and denying Section 401 Certification requests for a variety of reasons unrelated to water quality, and sometimes for reasons not directly tied to the impacts of the project in question. The Federal Energy Regulatory Commission (FERC) has noted its concerns with the delays in the Section 401 process and its disagreement with the scope of conditions imposed by states, but has largely deferred to the courts and Congress to address these problems.

Congressional efforts to address these issues have failed over the years. Recently, however, the courts have begun to address the procedural delays in the Section 401 process. Most significantly, on January 25, 2019, the U.S. Court of Appeals for the D.C. Circuit, in *Hoopa Valley Tribe v. FERC*, held that states must act on a Section 401 request within one year, and cannot enter into an agreement with an applicant to withdraw and resubmit its 401 application to trigger a new one-year period for review. In light of this landmark decision, many energy developers with projects long delayed by the Section 401 process have asked FERC to find that the states have waived their authority, and that the projects may therefore proceed.

On April 10, 2019, President Trump issued Executive Order 13868 to encourage efficient permitting of energy infrastructure projects and reduce regulatory uncertainties that discourage new investment in such projects. Among other directives, the Executive Order requires EPA to review its regulations and guidance on Section 401 to bring them in line with recent judicial developments and the Administration’s objective to promote the development of new energy infrastructure. EPA’s Updated Guidance, issued on June 7, 2019, supersedes the interim guidance document entitled “Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes,” issued in 2010 under the Obama Administration (the Interim Guidance).

GUIDANCE

EPA's Updated Guidance addresses three main topics: (1) timelines for review and action on a Section 401 Certification request; (2) the appropriate scope of state authority to condition or deny a Section 401 request; and (3) the scope of information relevant to a state's or tribe's review under Section 401. Each of these topics is discussed below.

Timelines. The Updated Guidance specifically rejects the approach taken in the Interim Guidance, which stated that the one-year timeline begins when the state deems an application "complete." The Updated Guidance instead states that the one-year timeline begins when the agency receives the certification request. If a state does not grant, deny, or voluntarily waive its Section 401 authority within one year after receiving a request, the federal permitting agency is authorized to determine that Section 401 has been waived and may issue the federal permit. This interpretation is consistent with the plain language of the statute, court precedent, and FERC. Further, the Updated Guidance states that "[o]nce the certification requirement has been waived and the federal permit or license is issued, absent any project modification, a subsequent action by a state or tribe to approve, condition, or deny Section 401 certification has no legal force or effect."

Scope of 401 Conditions. The Updated Guidance recommends that the scope of Section 401 conditions should be limited to those addressing water quality impacts from the project. The Guidance suggests that, if a state issues a Section 401 Certification with conditions that exceed the proper scope of Section 401 authority, or has denied a Section 401 Certification for reasons beyond the scope of Section 401, "federal permitting agencies should work with their Office of General Counsel and the EPA to determine whether a permit or license should be issued with those conditions or if waiver has occurred." The Updated Guidance goes on to acknowledge that "[s]ome courts in limited jurisdictions" have found that federal agencies are bound by conditions even if they arguably exceed the scope of Section 401, but states this is a matter of "regulatory uncertainty" that EPA may clarify during the rulemaking process to revise its Section 401 regulations.

Information Relevant to 401 Review. The Updated Guidance takes the position that "[t]o evaluate a certification request, a state or tribe should only need the application materials submitted for the federal permit or license." It recognizes, however, that a state or tribe "needs adequate information to issue a Section 401 [C]ertification," and the EPA "recommends that project proponents provide appropriate water quality-related information to the state or tribe to ensure timely action on a request." A state may request additional information, including an environmental document prepared by the federal agency under the National Environmental Policy Act (NEPA). However, the Updated Guidance indicates that a state should not wait for the federal agency's NEPA decision, which could result in delay or waiver of the state's 401 authority, and that an outstanding or unfulfilled request by the state for additional information does not toll the timeline for action on a Section 401 Certification request. The Updated Guidance points out that the environmental review required by NEPA has a broader scope than that required by Section 401. EPA states that it may address this issue during the Section 401 rulemaking process.

In addition to the three main topics, the Updated Guidance provides additional guidance both for federal permitting agencies and for states. For example, the Updated Guidance addresses certain concerns that have been raised regarding enforceability of Section 401 conditions. The Updated Guidance recommends that states identify conditions that are clear, specific, and directly related to a state water quality requirement, in order to aid federal permitting agencies in enforcing the conditions. The Interim Guidance had simply noted a disagreement about whether states have independent enforcement authority.

Implications

While EPA's Updated Guidance does not impose legally binding requirements, it is intended to assist federal permitting agencies, states, and tribes until the EPA promulgates a final rule revising its Section

401 regulations. It also provides some indication as to how EPA will revise its Section 401 regulations in the forthcoming rulemaking proceeding.

In addition to adopting the procedural changes to the Section 401 process as a result of the *Hoopa Valley Tribe* case, the Updated Guidance addresses other sources of delay that have arisen in gas pipeline and hydropower cases, such as state requests for additional information and studies. It also reflects an interpretation of the scope of Section 401 conditioning authority that is limited to water quality impacts of energy infrastructure projects, an interpretation that is not consistent with the practice of a number of states, and which is the subject of current litigation. The Updated Guidance may have immediate impacts since FERC is currently considering whether a number of states have waived their authority to issue Section 401 Certifications on gas pipeline and hydropower projects by failing to act within a year. The Updated Guidance also states that EPA may consider adopting some elements of the guidance during its upcoming rulemaking to revise its Section 401 regulations. A proposed rule is expected to be released by August 8, 2019.

For more information

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If you would like additional information about the Section 401 process, please contact any member of our hydroelectric, gas, public lands, natural resources, and land use practices, including the following professionals:

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