



EPA Announces Proposed Rule Regarding Clean Water Act Section 401 Water Quality Certifications

August 16, 2019

On August 8, 2019, the U.S. Environmental Protection Agency (“EPA”) issued a proposed rule (“Proposed Rule”) to amend the regulations governing the issuance of Clean Water Act (“CWA”) Section 401 Water Quality Certifications (“WQC”).^[1] Under Section 401 of the CWA, applicants seeking a federal permit for a project that “may result in any discharge into the navigable waters” must first seek certification from the states in which the project will be located that such discharge will comply with applicable state water quality standards.^[2] During the last few years, states have used the certification process to block a number of proposed interstate natural gas pipeline projects.

The Proposed Rule follows the April 2019 Executive Order “Promoting Energy Infrastructure and Economic Growth,” which was issued by the President with the intent of prompting EPA to streamline the WQC permitting process for energy infrastructure projects.^[3] If adopted, however, the amended regulations would apply to all projects requiring a WQC, not just energy infrastructure proposals.^[4]

The Proposed Rule would, among other things, amend the CWA Section 401 WQC regulations^[5] by: (i) clarifying the timeframe in which certifying authorities must act on certification requests, (ii) clarifying that the scope of WQC review is limited to water quality requirements, and (iii) providing that if a certifying authority fails to comply with the WQC scope restrictions, that the federal licensing agency may overrule a certifying authority’s WQC determination.

The Proposed Rule Establishes Clear Timeframes for Certifying Authorities to Act on WQC Requests

The Proposed Rule clarifies that certifying authorities are required to act on a WQC request within a “reasonable period” and that the maximum time in which to act is one year.^[6] Federal agencies would also be authorized to modify the time period in which a certifying authority must complete its WQC review, provided that such period is reasonable and does not exceed one year.^[7] EPA also clarifies that a certifying authority may not artificially extend or restart the WQC review by requiring a project sponsor to withdraw and resubmit its WQC request.^[8]

The proposal is also intended to clearly define when a WQC request has been received by the certifying authority, thus starting the clock on when the certifying authority must act on the request. ^[9] The amendment would make it clear that a WQC request has been made at the time the certifying authority receives the request, not when the

certifying authority deems the request to be complete.

The Proposed Rule Provides that the Scope of WQC Review is Limited to Water Quality Requirements

The Proposed Rule clarifies that a WQC is only required when a federally licensed or permitted activity would “result in a discharge from a point source into waters of the United States”^[10] and that the “scope of certification” is limited to assuring that such discharge “will comply with water quality requirements.”^[11] The phrase “water quality requirements” is defined as “applicable provisions of 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.”^[12] These proposed provisions are intended to reduce the likelihood that certifying authorities deny WQCs on grounds that are not directly related to water quality, such as greenhouse gas emissions.

EPA clarifies that WQC conditions imposed upon a project sponsor must also be intended to satisfy water quality requirements. For each condition set forth in a WQC, the certifying authority must provide a statement explaining why the condition is required, citing the law that authorizes the condition, and whether a less stringent condition could satisfy applicable water quality requirements.^[13] The federal permitting agency would determine whether a WQC condition satisfies those requirements.^[14] If those requirements are not satisfied, then the condition may not be included in the federal license or permit that is the subject of the WQC request.^[15]

EPA further proposes that a certifying authority “fails or refuses to act,” triggering waiver of its WQC authority, when it “actually or constructively fails or refuses to grant or deny certification, or waive the certification requirement, within the scope of certification....”^[16] In other words, the amended regulation may allow project sponsors to assert that a certifying authority has constructively failed to act on a WQC request in the event that such request is denied on grounds other than water quality requirements.^[17] A WQC denial would be required to (i) reference specific water quality requirements that would be violated, (ii) include a statement explaining why such violation would occur, and (iii) include the specific data, information or project modification needed to determine that the proposed project would comply with water quality requirements.^[18]

These proposed amendments are intended to ensure that certifying state agencies do not exceed the authority delegated to states by the CWA, limiting their WQC review solely to water quality impacts clearly set forth in the CWA or EPA-approved state regulations.

The Proposed Rule Gives Federal Agencies Review Authority Over Water Quality Certifications

Under the Proposed Rule, a federal agency may determine that the certifying authority failed to meet the requirements of CWA Section 401 in issuing a WQC denial.^[19] In such circumstances, if the certifying authority does not remedy the deficiency prior to the expiration of the WQC review period, the federal agency could treat such action as a waiver.^[20] As such, the proposal would give federal agencies veto authority with respect to WQC denials when the certifying authority exceeds the scope of the certification.

Conclusion

EPA's proposal will undoubtedly be viewed favorably by natural gas pipeline developers and other project sponsors whose projects have been delayed or halted as a result of adverse WQC actions by state environmental agencies. However, if adopted, it is anticipated that these regulatory amendments will be subject to legal challenge as states and environmental groups are likely to assert that EPA has exceeded its authority and that the Proposed Rule violates the CWA.

Comments regarding the Proposed Rule will be accepted for sixty days following its publication in the Federal Register. The April 2019 Executive Order requires the EPA to finalize the regulatory amendments by May 2020.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have any questions regarding Section 401 of the Clean Water Act, please feel free to contact Brendan Mooney at (516) 357-3757 or via email at bmooney@cullenanddykman.com.

[1] EPA, Updating Regulations on Water Quality Certification (Aug. 8, 2019), https://www.epa.gov/sites/production/files/2019-08/documents/cwa401certification_2060-af86_nprm_20190807_prepublication_version.pdf.

[2] 33 U.S.C. § 1341(a)(1).

[3] Exec. Order No. 13868, 84 Fed. Reg. 15495 (Apr. 10, 2019).

[4] Updating Regulations on Water Quality Certification, *supra* note 1, at 10.

[5] 40 C.F.R. Part 121.

[6] Updating Regulations on Water Quality Certification, *supra* note 1, at 104

[7] *Id.* at 111.

[8] *Id.* at 105.

[9] *Id.* at 81.

[10] *Id.* at 75.

[11] *Id.* at 89-90.

[12] *Id.* at 91.

[13] *Id.* at 96.

[14] *Id.* at 97-98.

[15] *Id.* at 98.

[16] *Id.* at 112.

[17] *Id.*

[18] *Id.* at 116.

[19] *Id.* at 117.

[20] *Id.*

Practices

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