

EPA Rules on CWA Section 401 Water Quality Certifications by States

February 20, 2024

In compliance with a 2021 Presidential Executive Order entitled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”^[1] as well as in response to recent case law (including *NYSDEC v. FERC*)^[2], the U.S. Environmental Protection Agency (“EPA”) has finalized new rules^[3] that revise and replace its 2020 regulatory requirements for Water Quality Certifications (“WQC”) pursuant to the Federal Clean Water Act (“CWA”)^[4].

The EPA’s “Clean Water Act Section 401 Water Quality Certification Improvement Rule,” effective November 27, 2023, comprises a voluminous document detailing various changes to or clarifications of rules governing the process for obtaining WQC’s from a State (or certain Tribes). Under the CWA, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge from a point source into “Waters of the United States” unless the State where the discharge would originate either waives certification or issues a WQC. To protect the quality of their waters from adverse impacts resulting from the construction and/or operation activities of Federally licensed or permitted projects, Section 401 of the CWA empowers States to include WQC conditions, including “effluent limitations and other limitations, and monitoring requirements,”^[5] necessary to assure that the applicant for a Federal license or permit will comply with CWA Sections 301, 302, 306, and 307, and with “any other appropriate requirement of State law.”^[6]

In the New York Public Service Law Article VII context^[7], our siting clients or their environmental consultants (each a “project proponent”) frequently request a WQC from the New York State Public Service Commission (the “certifying authority”) because most proposed major utility transmission facility projects trigger the need for a Federal permit from the U.S. Army Corps of Engineers. Our natural gas pipeline project proponent clients require such certifications as well, pursuant to the Natural Gas Act^[8] and Federal Energy Regulatory Commission permitting regulations; in those scenarios, the New York State Department of Environmental Conservation (“NYSDEC”) is the certifying authority. While several questions remain regarding how each of the NYSDEC and the Commission will implement these new EPA rules in issuing a New York State WQC, a few items in such new rules seemed especially noteworthy:

1. A project proponent is now required to request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request a WQC in accordance with the certifying authority’s applicable submission procedures, unless the certifying authority waives or shortens the requirement for the pre-filing meeting request. If a certifying authority fails to communicate whether it wants to waive or shorten the pre-filing meeting request requirement, then the project proponent must wait 30 days from requesting a pre-

filing meeting to submit its request for certification.[9]

2. If the WQC request is for an individual Federal license or permit, the request for certification must include a copy of the Federal license or permit application and any readily available water quality-related materials that informed the development of the application. If the request for certification is for the issuance of a general Federal license or permit, then the request for certification must include a copy of the draft Federal license or permit and any readily available water quality-related materials that informed the development of the draft Federal license or permit.[10]
3. A certifying authority must send written confirmation to the project proponent and Federal agency of the date that a request for certification is received by the certifying authority in accordance with its applicable submission procedures. The reasonable period of time for a certifying authority to act, which shall not to exceed one year, does not start with the written confirmation from the certifying authority; instead, it begins on the date that the project proponent submitted the request for certification in accordance with the certifying authority's applicable submission procedures.[11]
4. The phrase "shall not exceed one year" means that the reasonable period of time need not be one full year and that a certifying authority should not necessarily expect to be able to take a full year to act on a Section 401 WQC request. The certifying authority could be subject to a shorter than one-year reasonable period of time to render its decision, provided that the Federal agency and the certifying authority have agreed to a shorter time, or when the parties do not reach agreement and instead rely on the EPA's default reasonable period of time of six months.[12]
5. If the State certifying authority has identified additional contents for a request for certification, such as those that are relevant to State water quality-related impacts from the activity, then the project proponent must include in its WQC request those additional contents identified by the certifying authority prior to when the request was made.[13] Certifying authorities cannot subsequently modify or add to the required contents of a request for certification after the request was submitted. This does not mean a certifying authority could not ask for additional information after a request for certification is made; rather, it means that a certifying authority cannot alter the required contents of a request for certification after it is received. Any requests for additional information by a certifying authority should be targeted to information relevant to the potential water quality-related impacts from the activity.[14]
6. EPA did not take a position on the legality of withdrawing and resubmitting a WQC request. It is up to the project proponents, certifying authorities, and/or possibly Federal agencies to determine on a case-by-case basis whether and when withdrawal and resubmission of a WQC request is appropriate, and such determinations are ultimately subject to judicial review based on their individual facts.[15]
7. A point source discharge does not require the addition of pollutants; the definition of "discharge" is distinct from the term "discharge of pollutant" and therefore encompasses both the discharge without the addition of pollutants as well as the "discharges of pollutants." A certifying authority's evaluation extends to the activity subject to the Federal license or permit in its entirety, as opposed to only the potential point source discharges associated with the activity. Once there is a prerequisite potential for a point source discharge into Waters of the United States, then the certifying authority may evaluate and place conditions on the "activity," which includes consideration of water quality-related impacts from both point sources and nonpoint sources.[16]
8. While the certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation, a WQC for a Federal license or permit for construction may address potential water quality impacts from the subsequent operation even though the operation may be subject to a different Federal license or permit.[17] By allowing States to protect their water quality from the full activity made possible by a Federal license or permit, the CWA provides an independent grant of authority to States to ensure that federally licensed or permitted activities do not frustrate attainment of their water quality protection goals.[18]
9. Although a certifying authority is limited to considering impacts to "navigable waters" when certifying compliance with the enumerated provisions of the CWA, a certifying authority is not so limited when certifying compliance with requirements of State law that otherwise apply to waters of the State beyond navigable waters.[19] The text of Section 401 states that the need for a certification is triggered by a potential discharge into "the navigable waters," but it does not state that, once the need for certification is triggered, a certifying authority must confine its review to potential water quality impacts to such

“navigable waters” when considering requirements of State law that apply beyond navigable waters.[20]

10. A certifying authority may act on a WQC request in one of four ways: grant certification; grant certification with conditions; deny certification; or expressly waive certification. If a certifying authority grants certification with conditions, those conditions are incorporated into the Federal license or permit, and Federal agencies may not question or reject a State's WQC conditions.[21] When a certifying authority determines that it must add WQC conditions, that is equivalent to deciding that, without those conditions, it must deny certification. Constructive waivers may occur only if a certifying authority fails or refuses to take one of the four actions within the reasonable period of time, in all cases not to exceed one year.[22]

The EPA's new rule recently has been challenged by a group of States and industry groups (Plaintiffs) as an improper broadening of States' (and certain Tribes') power to veto energy projects over water quality concerns. [23] In the complaint filed in December 2023, Plaintiffs argue that statutory limits to states' power are necessary to ensure that the certifying authority does not inappropriately thwart nationally important projects or the development of critical infrastructure that are essential to modernizing the nation's means of generating and supporting energy.

Plaintiffs contend that the CWA 2023 Rule, by now requiring States to review the “entire activity proposed” when processing WQC requests, will complicate and delay the Section 401 review process. [24] Plaintiffs claim that broadening the scope of Section 401 WQC reviews will burden states by increasing their workload, making certification determinations more vulnerable to legal challenge, and causing the certification process to become more unpredictable.

The Cullen and Dykman Energy [Siting and Permitting](#) practice group will continue to monitor developments pertaining to the WQC process and will update clients on significant developments.

If you have any questions, please feel free to contact Angela Cascione at (516) 296-9102 or via email at acascione@cullenllp.com.

This advisory provides a brief overview of the most significant changes in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Footnotes

[1] Exec. Order No. 13990, 88 Fed Reg. 66558 (Jan 20, 2021).

[2] *New York State Department of Environmental Conservation v. FERC* 884 F.3d 450, 455 (2d Cir. 2018) (Second Circuit rejects New York's argument that the Federal Clean Water Act Section 401 process “begins only once [the state agency] deems an application `complete” and instead, agreed with FERC that the Section 401 review process begins when the State receives a request for a Water Quality Certification).

[3] Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66558, (2023)(hereinafter “CWA 2023 Rule”).

[4] Clean Water Act, 33 U.S.C §§ 1251 et seq. (1972)

[5] Clean Water Act, 33 U.S.C §1341(d)

[6] *Id.*

[7] Article VII, Siting of Major Utility Transmission facilities, New York Public Service Law (Sections 120-130)

[8] Natural Gas Act, 15 U.S.C. §§ 717-717z (1940)

[9] CWA 2023 Rule at 66571.

[10] *Id.* at 66575

[11] *Id.*

[12] *Id.* at 66587

[13] *Id.* at 66576

[14] *Id.*

[15] *Id.* at 66590

[16] *Id.* at 66599

[17] *Id.*

[18] *Id.* at 66593

[19] *Id.* at 66604

[20] *Id.*

[21] *Id.* 66607

[22] *Id.* at 66608

[23] *State of Louisiana v. U.S. Environmental Protection Agency*, CA No. 2:2023-cv-01714 (W.D. La. December 4, 2023)

[24] *Id.* at 5

Practices

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