CLIENT ALERTS & INSIGHTS

U.S. EPA Rule Seeks to Curtail State Discretion Under the Clean Water Act to Block Pipelines and Other Infrastructure Projects

JUNE 10, 2020

Authors: Kevin D. Margolis, Reed W. Sirak

On June 1, 2020, the U.S. Environmental Protection Agency finalized a regulation intended to reduce the ability of individual states, Native American tribes or interstate regulatory agencies to veto federal permits for certain projects that could result in the discharge of pollutants to the navigable waters of the United States. The new "Clean Water Act Section 401 Certification Rule" imposes both procedural limits on the time states may take to evaluate proposed federal projects and a substantive limit on the permissible factors they may consider in that evaluation.

The rule is a response to a series of recent state efforts to scuttle large energy-related projects, including fossil fuel pipelines in New York, New Jersey and Oregon, a coal export terminal in Washington state, and hydroelectric dams in California and Oregon. Opponents decry the rule as a rollback of states' right to ensure safe, clean water for their citizens, while proponents applaud the rule as closing a loophole used by certain states to pursue anti-fossil fuel political objectives unrelated to the protection of water quality.

Context for EPA's Action

The federal Clean Water Act is often described an as exercise in "cooperative federalism," in which Congress sought to achieve broad nationwide goals while allocating significant authority to states to achieve those goals in the context of localized considerations. For example, while U.S. EPA establishes the criteria used to set the wastewater discharge limits set out in permits, states determine the appropriate uses for the water bodies that receive such discharges (such as fishable or swimmable) and then set water quality criteria that must be met in those water bodies to support their designated uses.

Section 401 is an example of the Act's cooperative federalism in action. Section 401(a)(1) requires that applicants for certain federally issued permits also present their plans to regulators in affected states and obtain a state certification that the project will comply with water quality requirements established under Sections 301-03 and 306-07 of the Act, unless the state waives the certification requirement, either expressly or by failing to act on the request "within a reasonable time (which shall not exceed one year)…."

Federally-permitted projects requiring Section 401 certifications include hydroelectric power plants, fossil fuel pipelines, bridges, causeways, dams, dikes, wharfs, piers and jetties. Certifications are also required for projects involving the discharge of "dredged or fill" material into regulated waters or wetlands, which require permits issued by the U.S. Army Corps of Engineers.

States may either approve or deny a request for Section 401 certification. If a state approves a request, the certification may include effluent limitations and monitoring requirements (which become part of the federal permit) to assure that the project complies with the applicable provisions of the Act and any other "appropriate requirement" of state law. If a state denies a request, the relevant federal agency may not issue a permit and the unsuccessful applicant is left to whatever appeal rights are provided under state law.

The New Rule's Primary Requirements

U.S. EPA concluded that rulemaking was necessary because some states had adopted practices that the agency believed were inconsistent the statutory purpose of Section 401. First, some states had figured out that they could often kill disfavored projects by extending the certification review process indefinitely. Second, some states had applied criteria in the review process, or attached conditions to certifications, that arguably exceeded Section 401's "water quality standards" scope.

Despite Section 401's seemingly clear one-year time limit for certification decisions, state reviews have often extended much longer based on the state's determination that only receipt of a "complete" application starts the statutory clock. By issuing periodic requests for supplemental information from the applicant, states could control when the clock started and, thus, when the statutory time limit would be reached. Alternatively, some states would request that an applicant withdraw and resubmit its Section 401 request to restart the clock, with the clear implication that a failure to do so would result in a denial.

To put teeth into the Act's time limit on state review of a Section 401 certification request, the new rule establishes criteria for determining what a "reasonable period of time" shall be for a given type of request and places authority for setting the time limit with the federal agency with jurisdiction over the proposed federal permit, rather than with the state agency. To combat the "perpetually incomplete request" syndrome, the new rule specifies the information that will be deemed to constitute a "complete" request sufficient to start the state's review period. The rule also prohibits state agencies from requesting that an applicant withdraw and resubmit a certification request.

The permissible scope of factors that a state may consider under Section 401 has been a source of friction among applicants, states and federal permitting agencies for some time. Some states have included conditions in their Section 401 approvals that seem far afield from water quality considerations, such as requiring construction of biking and hiking trails, establishing public fishing facilities, and making payments to the state for unrelated infrastructure improvements. The issue has become even more pronounced as climate change concerns have found their way into almost every aspect of environmental and energy policy.

Even though Section 401(a) seems to condition certification approval on specific water quality provisions of the Clean Water Act, Section 401(d) authorizes states to include conditions based on "any other appropriate requirement of State law…." As the Trump administration has taken aggressive steps to both promote fossil fuel production and remove regulatory impediments to related projects, states with conflicting policies have employed their Section 401 certification authority, including the ambiguity in Section 401(d), to delay and defeat such projects.

Though the new rule specifies that any state-based requirements applied in the certification process must regulate discharges of pollutants into waters of the United States, the rule does not require

such requirements to be federally approved. U.S. EPA has also directed that in policing the Section 401 process, the role of the federal permitting agency is to ensure that the state has complied with the procedural requirements of the statute and implementing regulations, and is not to second-guess the substantive decision of the state agency.

Potential Impact of the New Rule

The new rule's most significant impacts are likely to be greater predictability for applicants, both in terms of the documentation they must submit in support of a certification request and in the amount of time that may be required to complete the certification process. These procedural improvements should benefit large, costly infrastructure projects like pipelines.

However, to the extent opponents are correct that state agencies simply lack the resources or state legal authority to process requests as quickly as U.S. EPA envisions, the rule could lead such states to simply deny (or at least threaten to deny) requests as they approach the federally-established date on which failure to act would be deemed a waiver. Although the new rule expressly prohibits state regulators from "requesting" that an applicant withdraw and resubmit its request to restart the review clock, many (possibly most) applicants facing an imminent denial may "unilaterally" elect to do so, rather than incur the time, expense and uncertainty of litigating the validity of that denial before a state tribunal.

It is less clear how effectively U.S. EPA's new rule will be in preventing states with very different policy priorities from using the Section 401 certification process to advance those priorities, except where the basis for a state's denial is blatantly unrelated to potential impacts to the relevant water body or wetland. The courts, including the U.S. Supreme Court, have generally allowed states significant leeway to enforce objectives broadly related to "water quality" concerns As the new rule provides that state-based water quality standards need not be EPA-approved to serve as a valid basis for denial, motivated and creative states may still have sufficient space to codify state standards strict enough to stymie categories of projects that they consider anathema. And since federal permit writers are directed to police only states' procedural compliance, not the substance of their certification decisions, the ultimate impact of U.S. EPA's narrowing of state discretion may again depend upon the willingness of applicants to litigate.

Finally, it has become obligatory to note that the new rule will undoubtedly be challenged in court promptly after it appears in the Federal Register by a variety of states and environmental organizations, and the rule might simply be rescinded if Joe Biden is elected President in November, just as numerous Obama-era regulations have been rescinded by the Trump administration.

For more information, please contact a member of Benesch's Environmental Law & Litigation Group.

Kevin D. Margolis at kmargolis@beneschlaw.com or 216.363.4161.

Reed W. Sirak at rsirak@beneschlaw.com or 216.363.6256.