Recent Clean Water Act Issues of Special Interest to Hydropower

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TOPICS

• EPA’s proposed Clean Water Act (CWA) § 401 rules
• National Pollutant Discharge Elimination System (NPDES) (CWA § 402) permits for hydropower projects
• CWA § 316(b) cooling water intake structure requirements
EPA’s Proposed CWA § 401 Rules
CWA § 401

• Prohibits federal permits for activities that may result in a discharge to waters of the U.S. unless the state:
  – Certifies the discharge will comply with specified CWA sections (including water quality standards) or
  – Waives its certification authority
    • Expressly or
    • By not acting on a certification request within a “reasonable” time not exceeding one year

• Certification is commonly required for:
  – FERC licenses
  – CWA § 404 permits issued by the Corps of Engineers
  – NPDES permits issued by EPA (but not by states)
Certification Conditions

- § 401 certifications may include conditions “necessary to assure” that the applicant will comply with the specified CWA sections and “any other appropriate requirement of State law”
- These conditions “shall become” conditions of any federal license or permit subject to § 401
STATE AUTHORITY

• Because a state may waive certification, § 401 is not a regulatory program, but a federal grant of authority to the states to reject or impose more stringent conditions on projects that the federal government is willing to approve.

• The most contentious certification decisions involve projects authorized by federal agencies acting under authority that preempts state law, such as projects licensed by FERC under the Federal Power Act.
**Significant Certification Issues**

- **Delay of federal permits by manipulating the clock**
  - Deeming certification requests to be “incomplete”
  - Withdrawing and then resubmitting requests in order to reset the clock
- **Scope of the state’s certification authority**
  - Does it extend only to the discharge or to the entire activity?
  - What are “other appropriate requirement[s]” of state law?
    - Only state water quality standards?
    - All state requirements in any way related to water?
    - Any requirement that the state deems to be “appropriate”?
- **Federal agency review of state certification decisions**
  - Currently, federal agencies have little or no authority to review state certification decisions or to reject certification conditions
  - Certification decisions generally must be challenged by the applicant through the state appeal system
- **State authority after the federal permit is issued**
  - Does the certifying agency have the authority to enforce, modify, or add certification conditions, or to approve or require project changes after the federal permit is issued?
**Timeline**

- **1970:** Original enactment of § 401
- **1971:** EPA issued its current § 401 rules
- **1972:** CWA enacted with substantially revised § 401
- **1994:** *PUD No. 1 v. Ecology* (conditions may apply to licensed activity, not just the discharge)
- **1997:** *American Rivers v. FERC* (no fed. review of conditions)
- **2006:** *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.* (certification requirement applies to all discharges, not just those that add pollutants)
- **2019:** *Hoopa Valley Tribe v. FERC* (can’t extend 1-year deadline)
- **Apr. 2019:** Executive Order 13868 requires EPA to revise its section 401 guidance and rules
- **June 2019:** EPA issued revised section 401 guidance
- **Aug. 2019:** EPA issued proposed section 401 rules
- **May 2020:** Executive Order’s deadline for final rules


**EPA’s Proposal on Timing**

- Certification period begins when the certifying authority receives the request for certification, not when the request is deemed “complete”
- Federal agency determines “reasonable time” for acting on the request, not to exceed one year
- Certifying authority cannot ask the applicant to withdraw and resubmit the request
- Failure to act within a “reasonable time,” not to exceed one year, constitutes a waiver
- Denial without a valid justification constitutes a waiver
EPA’s Proposal on the Scope of § 401

- EPA’s proposal would limit the scope of a certification decision in two substantial ways:
  - The scope would be limited to the discharge, not the activity as a whole [contra the Supreme Court’s decision in PUD No. 1]
  - The scope would be limited to “water quality requirements,” which EPA would define as the applicable provisions of:
    - CWA §§ 301-03, 306-07 [the sections specified in § 401] and
    - EPA-approved state CWA regulatory program provisions (principally state water quality standards) [thereby limiting “other appropriate requirement of State law” to these provisions]
PROPOSAL TO INCREASE FEDERAL REVIEW OF STATE CERTIFICATION DECISIONS

• The proposal would require certification decisions to include specific information justifying a denial and each certification condition
• The proposal would allow the federal permitting agency
  – To treat a denial as a waiver if it determined that the denial was not accompanied by the required justification or was based on reasons outside the scope of § 401
  – To reject certification conditions that are not accompanied by the required justification or that are outside the scope of § 401 (contra American Rivers)
PROPOSAL FOR ENFORCEMENT

• The proposal provides that the federal agency will be responsible for enforcing certification conditions incorporated into the federal license or permit
  – Although EPA’s discussion of the proposal makes clear that it believes that certifying agencies have no more than an advisory role in enforcement, that is not stated explicitly in the proposed rules themselves

• The proposal invites comments on whether EPA’s rules should address modifications of certification conditions and re-opener conditions, but the proposed rules do not include any provisions related to these issues
NPDES Permits
NPDES Permit Requirement

• An NPDES permit is required for:
  – Any addition
  – Of a “pollutant”
    • Almost any waste substance, including heat
  – To “waters of the United States”
    • Any surface water that has a sufficient connection to navigable waters—currently, most surface waters
  – From any “point source”
    • Any “discernible, confined and discrete conveyance”

• In Washington, EPA has delegated the NPDES program to Ecology, except for federal facilities and on tribal lands
APPLICATION TO HYDROPOWER PROJECTS

• Water flowing through hydropower projects (spillways, turbines, etc.) is not subject to the NPDES permit requirement because there is no addition of pollutants “from the outside world”

• However, discharges of cooling water (heat), oil, and other substances added by the project are subject to the permit requirement

• Ecology in the past issued NPDES permits to hydropower projects but stopped issuing them because it believed that its section 401 authority was sufficient to protect water quality

• Recent litigation and the threat of litigation has forced hydropower projects to apply for NPDES permits
Cooling Water Intake Structures
CWA § 316(b)—Cooling Water Intake Structures

• “Any standard established pursuant to [CWA §§ 301 or 306] and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”

• Key points:
  – § 316(b) applies only to facilities with NPDES permits
  – § 316(b) is a technology standard—best technology available—primarily to prevent impingement and entrainment of organisms
EPA § 316(b) Rules

- EPA has established rules for “new” and “existing” facilities (40 C.F.R. part 125, subparts I, J, and N) that
  - Have a design intake flow of more than 2 million gallons per day from waters of the United States; and
  - Use 25% or more of the actual intake flow exclusively for cooling
- The rules require detailed information on cooling water intake structures in NPDES permit applications
- The rules include relatively elaborate provisions for applying the “best technology available” standard to prevent entrainment and impingement of organisms, including, e.g.,
  - Reusing cooling water
  - Intake velocity limits
  - Alternative compliance options
- For cooling water intake structures that are not subject to the rules, CWA § 316(b) must be applied on a “case-by-case, best professional judgement” basis
CWA § 316(b) AND HYDROPOWER FACILITIES

• In developing its § 316(b) rules, EPA did not consider hydropower facilities and assumed that the rules would not apply to them

• Arguably, because there are no categorical standards for hydropower facilities under CWA §§ 301 and 306, the § 316(b) requirements do not apply

• Determining what constitutes the “cooling water intake structure” at a hydropower facility may be difficult
  – EPA defines a “cooling water intake structure” as “the total physical structure and any associated constructed waterways used to withdraw cooling water . . . from the point at which water is first withdrawn from the waters of the United States up to, and including the intake pumps”
QUESTIONS?

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