

INSIGHTS

Executive Order Impact on 401 Water Quality Certification Appears Limited

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President Trump recently issued two much anticipated [Executive Orders](#) aimed to streamline the permitting of U.S. energy infrastructure. One Executive Order (EO) focuses primarily on Clean Water Act (CWA) state issued water quality certifications and associated EPA guidance and regulations. In “Executive Order on Promoting Energy Infrastructure and Economic Growth,” the Administration takes aim at “*outdated Federal guidance and regulations*” under Section 401 of the CWA that are “*causing confusion and uncertainty and are hindering the development of energy infrastructure.*” While states and environmental organizations are concerned that the EO will limit a state’s authority under the CWA, the impact of the EO at least initially appears to be limited, as the statute and the case law on point already establish certain limits regardless of the EO. What remains to be seen is the import of any proposed rulemakings issued as a result of this EO, or whether these issues prompt any legislation that proposes to amend Section 401 of the CWA.

Background

While Section 401 authority was not historically been a significant issue for pipeline projects, in recent years opponents of new or expanded energy projects have sought to use Section 401 to stop or delay permitting associated with a project. Section 401 provides states (and authorized tribes) an opportunity to review and certify that federal permits involving water discharges comply with state water quality standards (33 U.S.C. 1341). This may include granting a certification, granting a certification with conditions, denying a certification or waiving the review. The authorization is not unlimited, however, because the statute further provides that if a State “*fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.*”

CWA Section 401 has been the subject of [controversy and litigation](#) in recent years for pipeline and other energy projects. In some prior Section 401 cases, states have intentionally delayed their review of 401 applications or claimed that they needed more information. Industry has argued that the varying ways each State arrives at a final permitting decision leads to confusion, inconsistency, and limitations on the approval of infrastructure to meet U.S. energy demands. Among the specific issues raised is the timeframe for waiver, the meaning of waiver, and when an application for certification is considered complete. With respect to timing of waiver, the D.C. Circuit recently held that the [one year timeframe](#) under the statute is “absolute.”

April 10, 2019 Executive Order

The EO directs EPA to review CWA Section 401 and related EPA regulations and interim guidance and determine whether they should be clarified to better promote efficiency and consistency in federal permitting processes. Specifically, the review should include Obama-era interim guidance “[Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes](#)” and issue new guidance to supersede that guidance “as appropriate” within 60 days. Further, EPA is directed to review its regulations implementing Section 401 for consistency with the EO and, as appropriate, publish and finalize rules revising those regulations within 13 months. EPA must then lead an interagency review in coordination with the head of each agency that issues permits or licenses subject to 401 water quality certification. If necessary, each respective agency’s guidance should be updated and rulemakings should be issued to ensure that the agency regulations are consistent with any new EPA rules. EPA Administrator Andrew Wheeler has indicated that the agency is already underway on implementing this EO.

Impact Appears Limited

As outlined above, the language in Section 401 of the CWA is straightforward in its requirement that states review and certify federal permits involving water discharges within one year or waive their right to review the permit. An EO cannot by itself revise a statutory requirement or limit the authority states have within the relevant statutory constraints. Further, the courts have recently clarified this obligation, thus already achieving some of the effect intended by this EO. For these reasons, the impact of this EO is not likely to affect current project applications for state water quality certifications or pending litigation under CWA Section 401.

It is not yet clear, however, whether the EO will in implementation, narrow or limit existing state or tribal water quality certification authority, through possible revision of EPA or other agency regulations. All rulemakings must go through notice and comment under the Administrative Procedure Act. Further, states and environmental groups are expected to challenge any such rulemakings in court, and they have already cited the Congressional Review Act as a vehicle to target problematic regulations. Meanwhile, states have pressed for alternative methods to address concerns about consistency, such as “process improvements” that would speed the reviews without limiting a State’s authority, as discussed in an April meeting with the Army Corps of Engineers. Senator Barrasso (R-WY) also introduced a bill earlier this week to amend the CWA with respect to water quality certification. Senator Barasso has stated that his bill tracks the intent of the new EO. The text of the [Barasso bill](#) is not yet publicly available.

The EO regarding CWA Section 401 water quality certification also addresses other energy related topics, including LNG export, right of way renewals on federal lands, and reports on impediments to energy supply in certain regions of the country, all of which are discussed [here](#). In addition, a second EO was issued by the White House on April 10, 2019, to address the review process for Presidential Permits issued for certain cross border energy infrastructure, including oil pipelines, and is discussed [here](#).