



Briefing Paper on Proposed CWA § 401 Certification Rule

August 16, 2019

I. Background on CWA § 401 Certification Program

- CWA § 401(a)(1): states and tribes (or EPA for non-TAS tribes) can “veto” (deny certification for) federal permits/licenses issued for discharges originating on their lands if the discharge won’t meet their federally approved WQS or other water quality requirements (see also § 401(d)), or may impose conditions on the permit to ensure compliance
 - NPDES permits (EPA)
 - Dredge and fill permits for construction activity (ACE)
 - Licenses for dams for hydroelectric power and natural gas pipelines (FERC)
- CWA § 401(a)(2): downstream states and tribes may object to issuance of a permit and request a hearing if proposed discharges will affect the quality of their waters
 - EPA must determine whether the discharge may affect water quality of another state or tribe and, if so, must notify the affected tribe or state
 - EPA and the state or tribe make recommendations at the hearing
 - Licensing agency determines whether it must condition the license or permit “to ensure compliance with applicable water quality requirements,” and if compliance can’t be ensured it must deny the license or permit
- Applicable water quality requirements include minimum flows and other requirements to protect designated uses, per case law
 - *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*, 511 U.S. 700 (1994)
 - *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006)
- CWA § 401(a)(4)-(5): operation of federally licensed facility also must not violate water quality requirements
- CWA § 401(d): permit conditions may include effluent limitations, “other limitations,” monitoring requirements, and “any other appropriate requirement of State law”

II. Administration’s Initiatives Addressing the CWA § 401 Certification Program & Timeline

- Executive Order 13868, “Promoting Energy Infrastructure and Economic Growth”

- Goals are to “promote efficient permitting processes and reduce regulatory uncertainties,” specifically for energy infrastructure (§ 1)
- Includes CWA § 401 water quality certifications (§ 3)
- Requires EPA to: (1) review timelines for certifications; (2) address permissible scope of certifications and of information relevant to review, and (3) issue new guidance and rule (§ 3)
- Requires other federal licensing agencies to update their guidance and rules within 90 days of EPA doing so (§ 3)
- EPA held one-month tribal consultation period regarding Executive Order (ended May 24, 2019)
- EPA Guidance issued June 7, 2019, per Executive Order
 - ACE issued its guidance, on August 7, 2019
- Proposed rule signed August 8, 2019
- Final rule due by May 15, 2020

III. Key Elements of Proposed Rule

- Shortens time to issue a certification
 - Timeline begins upon certifying authority’s receipt of an application, rather than when application is complete
 - Proposed rule establishes minimal information requirements for application
 - No extension of time by withdrawing and reapplying, or by taking any other action to modify or restart the applicable time
- Narrows permissible “scope of certification”
 - Limited to assessing the impacts of a “discharge,” defined as a point source discharge into a WOTUS, rather than the impacts of the project as a whole on all waters
 - Limited to protecting “water quality requirements,” which are defined as EPA-approved tribal (or state) CWA regulatory program provisions
- Federal licensing agency determines whether the certification conditions or denial are within the “scope of certification”
 - Licensing agency must remove conditions that it finds are not within the scope
 - If licensing agency finds that a denial of certification is not within the scope, it must treat the denial as a waiver of the certification requirement

IV. Impacts on Tribal Water Resources

- Because proposal applies deadlines from receipt of application rather than from determination of completeness, tribes and states could have insufficient time and information for making their decisions



- Due to narrower scope of certification, there may be degradation of tribal water and related water-dependent natural, cultural and subsistence resources
- Impacts similar to above if certification is triggered prior to completion of NEPA, ESA, and NHPA assessments
- Encroachment on tribal sovereignty because permitting agencies are allowed to reject certification conditions and denials if they are not based on factors within the permissible scope of certification
- Any of the limits on certification authority listed above would narrow both EPA’s and tribes’ ability to bring enforcement actions to protect water quality
 - That in turn could limit exercise of federal trust responsibility and protection of tribal treaty rights
- When combined with WOTUS rule, which currently proposes to narrow the types of waters covered by CWA programs, there will be fewer CWA discharge permits issued which will in turn diminish tribal authority to protect water resources through the certification program
 - Proposed CWA § 401 rule limits scope of certification to considering impacts from discharges into a WOTUS

V. Next Steps

- File written comments on Proposed Rule – deadline is 60 days from publication in the Federal Register
 - NTWC is drafting comments and will prepare a template comment letter for use by tribes
 - Your tribe must comment now if it wants to preserve its right to seek judicial review of the final rule
 - There will be a public hearing on the proposal in Salt Lake City on September 5-6, 2019
 - There also will be two half-day tribal “discussion forums,” one in Salt Lake City on September 4, 2019, and the second in Chicago on September 16, 2019
- Request Government-to-Government consultation
- Make sure your tribe either has detailed certification application and review procedures (if you have a certification program) or at least has laws protecting water quality
- For additional information about the NTWC, please visit <https://nau.edu/ntwc>