# Emerging Developments in Water Quality Certification for Federally Licensed or Permitted Facilities

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For many infrastructure projects requiring a federal permit or license, a major permitting hurdle is water quality certification (WQC) under section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., from the state or Native American tribe authorized to implement the CWA. Section 401(a)(1) requires the federal permitting applicant to request WQC for an activity that "may result in any discharge into the navigable waters" to provide the federal permitting or licensing agency a certification from the state in which the discharge will originate. The WQC is intended to provide reasonable assurance that there will be compliance with enumerated provisions of the CWA. Section 401(d) authorizes the certifying entity to include in any certification conditions "necessary to assure" that the applicant complies with these enumerated provisions, "and with any other appropriate requirement of state law." Any such conditions must be included as conditions of the federal license or permit issued by the federal agency. Obtaining CWA section 401 certification often leads to project delay, particularly where the state has limited resources to implement this program within the maximum one-year timeframe provided by the statute. In some instances, to extend the maximum one-year time frame, project proponents—frequently at the request of states—have withdrawn their WQC request prior to the expiration of the one-year period and resubmitted it to toll the deadline, leading to additional uncertainty and delay.

Since 2019, there have been two legal and regulatory decisions that may fundamentally change this longstanding approach to implementing the WQC program under CWA section 401. First, in January 2019, the U.S. Court of Appeals for the D.C. Circuit issued *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), which held that certifying entities have a maximum period of one year to act under section 401, and therefore invalidated the "withdraw and resubmit" practice. Second, on June 1,2020, the Environmental Protection Agency (EPA) issued a final rule revising its nearly 50-year-old WQC regulations. EPA's new rule not only adopted *Hoopa Valley Tribe*'s statutory interpretation of a one-year maximum time period, but also focused certification and conditioning authority for WQCs.

This article provides an overview of the regulatory landscape concerning WQCs for projects regulated by the Federal Energy Regulatory Commission (FERC), as well as an analysis of how *Hoopa Valley Tribe* and EPA's rulemaking are likely to impose significant changes to the section 401 program nationwide. As the regulated community, states, tribes, and environmental advocates await implementation of EPA's final rule and further implementation of the *Hoopa Valley Tribe* precedent, it remains to be seen the depth to which these developments will result in a more focused approach to WQCs, a larger number of denials of WQCs, increased incidents of section 401 waiver by states and tribes, or other results. While initial activity has sparked administrative litigation, with more likely to come, resolving these important matters in the WQC program may lead to settlement opportunities and refinement of state and federal processes that better facilitate coordination between states and federal permitting agencies and accommodate state and tribal action in a timely manner.

## Overview of the WQC Program

Section 401 of the CWA requires that applicants for federal licenses or permits that may result in a discharge to navigable waters seek a WQC from the state in which the discharge will originate. Although the CWA is a federal statute, section 401 delegates to the states, together with tribes that have attained "Treatment as a State" authority under the CWA, the authority to issue certifications and to condition such certifications to ensure that the federal license or permit satisfies certain

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provisions of the CWA and other appropriate requirements of state law. Some common examples of licenses or permits that may be subject to section 401 certification are actions by FERC, including hydropower licenses issued under the Federal Power Act (FPA) and natural gas pipeline certificates issued under the Natural Gas Act (NGA), CWA section 404 dredge-and-fill permits issued by the Army Corps of Engineers (Corps), and CWA section 402 National Pollutant Discharge Elimination System permits where EPA administers the permitting program.

The CWA provides that states and tribes must exercise this WQC authority within "any reasonable time, not to exceed one year." A state or tribe may waive the certification voluntarily, or by "failing or refusing to act" within the established reasonable time period. 33 U.S.C. § 1341(a)(1). Notably, these terms are not defined by the statute, and both *Hoopa Valley Tribe* and EPA's rulemaking interpret Congress's meaning and are poised to change how section 401 is implemented.

To begin with, the Supreme Court has interpreted section 401 as a broad delegation of conditioning authority to the states. *Pub. Util. Dist. No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994). With respect to hydropower projects, the U.S. Court of Appeals for the Second Circuit has held that FERC is required under section 401 to include all certification conditions as conditions of the FERC license. *See Am. Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997). If FERC objects to certain water quality certificate conditions or finds that they would render the project "not in the public interest," it has the option of not issuing a new license altogether, but FERC may not modify or reject a state certification condition in the event it issues a license. *See, e.g.*, *Idaho Power Co.*, 161 FERC ¶ 61,284, at P 20 (2017); *Duke Energy Progress, Inc.*, 153 FERC ¶ 61,056, at P 36 (2015).

This construct has led to WQCs that include conditions addressing issues that arguably have a tenuous connection to water quality effects of the licensed project. For example, certification conditions have required hydropower licensees to construct public recreational facilities, including biking and hiking trails; release water to enhance recreational boating opportunities; develop invasive species monitoring plans; control livestock or wildlife access to navigable waters; and make financial contributions to a nongovernmental organization for habitat. Natural gas developers also have received WQCs with conditions that require quantifying downstream greenhouse gas emissions that result from pipeline projects.

With respect to the timeframe within which WQCs must be issued, FERC's regulations give the certifying agency the full one-year period under the CWA to decide on a certification request, while EPA's and the Corps' regulations generally provide a 60-day certification deadline. In some states, however, it was common practice prior to *Hoopa Valley Tribe* for WQC applicants, at the request of the certifying agency, to withdraw their request prior to the one-year mark and resubmit the same application (often through the filing of a one-page withdraw-and-resubmit letter) to purportedly restart the one-year time period. For several projects, this approach led to substantial delays and hamstrung FERC's ability to license proposed new projects or modernize environmental requirements at existing projects through relicensing. *See, e.g.*, *Placer Cty. Water Agency*, 167 FERC ¶ 61,056, at P 11 (2019).

## D.C. Circuit's Rejection of the "Withdraw-and-Resubmit" Practice

*Hoopa Valley Tribe* rejects the "withdraw-and-resubmit" practice. There, the court held that the states of California and Oregon waived their WQC authority by failing to rule on the applicant's request within one year from the date the applicant first applied for WQC in 2006. The applicant for many years had, at the request of the states, withdrawn and resubmitted its certification application in an attempt to annually reset the one-year time period. Moreover, the applicant, states, and other parties had reached a settlement in the FERC relicensing process, in which the states had agreed to hold their certification proceedings in abeyance pending the disposition of the settlement terms. In *Hoopa Valley Tribe*, the court determined that such activities constituted a waiver of the states' section 401 authority, holding that the plain text of CWA establishes that "a full year is the absolute maximum" time for a state to decide on a certification application.

While *Hoopa Valley Tribe* did not address the scope of certification conditioning authority under section 401, it interpreted a one-year maximum time period for certifying entities to complete their review and decide whether to issue certifications, and what conditions, if any, should be included in them. Aside from the long-delayed proceedings that *Hoopa Valley Tribe* allowed to move forward, the ruling is expected to place additional pressure on both applicants and certifying entities to ensure that sufficient information is available to support a decision, and for the certifying entity to place sufficient resources into certification requests such that it can meet the one-year maximum time allotted under the CWA.

## FERC Implementation of *Hoopa Valley Tribe*

Since its issuance in January 2019, *Hoopa Valley Tribe* has had far-reaching effects for hydroelectric licensing as well as other federal permitting activities. This is particularly true for federal permitting applications that have long languished before the agency, awaiting decision only because of an outstanding CWA section 401 certification decision. Since *Hoopa Valley Tribe*, for example, FERC has determined that a state has waived section 401 authority in no fewer than 14 pending licensing and permitting proceedings. Several of these orders address timing issues not specifically addressed by the D.C. Circuit in *Hoopa Valley Tribe*.

While *Hoopa Valley Tribe* clarified that a state's authority to issue a certification is limited to one year, for example, it did not address the related issue of when the one-year period begins. Prior to *Hoopa Valley Tribe*, FERC in *Empire Pipeline* found that an agreement between New York Department of Environmental Conservation (New York DEC) and National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively, National Fuel) to alter the receipt date of the application did not extend the statutory one-year deadline for New York DEC to act on the application. *Nat. Fuel Gas Supply Corp. &*

*Empire Pipeline*, 164 FERC ¶ 61,064 (2018). On April 2, 2019, FERC relied on *Hoopa Valley Tribe* to affirm its prior order finding that the New York DEC waived its authority under section 401 by failing to act within one year of its actual receipt of the application. FERC's determination has since been challenged, and as of this publication, the case is pending in the Second Circuit. *Nat. Fuel Gas Supply Corp. & Empire Pipeline*, 167 FERC ¶ 61,007 (2019).

Another question raised by *Hoopa Valley Tribe* is what type of resubmission to the certifying entity is sufficient to re-trigger a new one-year period for WQC decision. *Hoopa Valley Tribe* maintains that the submission of the same application (often through a one-page letter) year after year is insufficient but declined to wade into *how* different a new submission must be to be considered a "new" request.

In 2013, Constitution Pipeline (Constitution) applied for a certificate of public convenience and necessity from FERC pursuant to the NGA. FERC granted the certificate in 2014 but required Constitution to file documentation that it had received all applicable authorizations, including a section 401 WQC or evidence of waiver thereof, before beginning construction. The New York DEC denied Constitution's application for WQC in 2016 after it filed two letters to "simultaneously withdraw and resubmit" its application. In 2017, Constitution petitioned FERC to declare that New York DEC waived its section 401 authority through delay, but FERC issued a declaratory order finding that each submission was an independent request. Constitution sought judicial review of that order before the D.C. Circuit, prior to the D.C. Circuit's decision in *Hoopa Valley Tribe*. After *Hoopa Valley Tribe*, FERC asked the D.C. Circuit for voluntary remand on Constitution's challenge. On remand, FERC reversed its determination in Constitution's declaratory order, consistent with *Hoopa Valley Tribe*. FERC found that, as a general principle, a state waives section 401 authority when an applicant withdraws and resubmits a request for WQC for the purpose of avoiding section 401's one-year time limit and the state does not act within one year. It also found that the state's reason for delay—including an agreement with the applicant to withdraw and resubmit its application—was immaterial when considering the plain language of the statute.

FERC grappled with this same issue in a September 2019 order in which it issued a hydropower license to McMahan Hydroelectric, LLC (McMahan), for a project in North Carolina. *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019). There, FERC held that North Carolina Department of Environmental Quality (DEQ) waived its certification authority by failing to act within one year of receiving McMahan's request for certification. In that case, after McMahan filed its request for certification with the state on March 3, 2017, North Carolina DEQ requested additional information, including a water quality monitoring plan and FERC's environmental assessment (EA), and indicated that McMahan's application would be put on hold until that information was filed. In April 2017, McMahan filed its water quality monitoring plan. Because FERC had yet to issue its EA, North Carolina DEQ instructed McMahan to withdraw and refile its application for WQC, which it did on February 20, 2018, and again on February 11, 2019.

Based on these facts, FERC held that North Carolina DEQ waived its section 401 authority, finding that the additional information requested by the state did not constitute a "new" certification application that would reset the one-year statutory deadline. FERC maintained that responding to a state's request for additional information "generally would not rise to the level of a material change to a project's plan of development" warranting a new section 401 application. In its order, FERC held that only "a material change to a project's plan of development," which "would involve significant changes to the project's physical features" would constitute a "new" application for purposes of restarting the one-year certification period under section 401. *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019), *reh'g denied,* 171 FERC ¶ 61,046 (2020).

In FERC's orders, Commissioner Richard Glick concurred that DEQ had waived its 401 authority but stated that there may be situations where an applicant withdraws its request for certification and resubmits "a wholly new one in its place," or where additional information constitutes "a significant modification" to a pending section 401 application that could justify restarting the one-year clock. Importantly, Commissioner Glick's opinion did not address *how* significant a modification would need to be to restart the one-year clock.

## State Agency and Project Proponent Coordination

Following *Hoopa Valley Tribe*, states argued that the court only rejected the ability of the state and project proponent to enter an explicit agreement to delay issuance of the certification. FERC, however, has disagreed. On April 18, 2019, FERC issued an order finding that the California State Water Resources Control Board (SWRCB) waived its authority to issue a certification in the pending relicensing of the Middle Fork American River Project because, even though SWRCB and the applicant did not have a formal agreement in place regarding the withdrawal and resubmission of its certification application, they engaged in a "coordinated scheme" to delay issuance of the certification. *Placer Cty. Water Agency*, 167 FERC ¶ 61,056 (2019).

FERC also rejected arguments that *Hoopa Valley Tribe* should be applied only prospectively, and that finding a waiver of section 401 authority would be fundamentally unfair and disrupt the policy of "cooperative federalism" embodied in the CWA. FERC found that "[t]he *Hoopa Valley* court did not in any way indicate that its ruling was limited solely to the case before it, and to conclude that the court's decision does not apply to similarly-situated cases would fail to give full effect to that ruling. We are aware of no sound legal or equitable basis for doing so." *Id.* at P 15.

## EPA Rulemaking on Section 401 WQC Regulations

On August 8, 2019, EPA released a Notice of Proposed Rulemaking (NOPR) to clarify its regulations on WQC procedures under section 401. Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019). The NOPR proposed substantive changes to the scope of certification authority under the CWA and the procedures governing these

certifications, focusing on the plain language of the statute and at times offering an interpretation of section 401 that differs from prior judicial opinions. On June 1, 2020, EPA released its final rule updating its regulations implementing section 401. While the final rule promulgates considerable across-the-board changes to the section 401 program nationwide—such as adopting an absolute maximum one-year time period consistent with *Hoopa Valley Tribe*; pre-filing consultation requirements; certification application contents requirements; enforcement of certification conditions; and future modification of conditions—EPA recognized that "the foundation of the final rule" is the "scope of certification," as provided in the new section 121.3 of its regulations.

Prior to this rulemaking, EPA's regulations implementing section 401—which were promulgated *before* section 401 was significantly modified by Congress in the 1970s—were broad, giving states extensive power to impose a wide variety of conditions on proposed projects, which are often costly to implement and maintain, and inject a large degree of uncertainty into the development process.

In its final rule, EPA clarified that "section 401 appropriately focuses on addressing *water quality* impacts from *potential or actual* discharges from federally licensed or permitted projects. Clean Water Act Section 401 Certification Rule, Pre-Publication Version at 149. In other words, EPA's final rule requires states and tribes to focus their review on the water quality of the discharge, and not on the overall activity that is the subject of the federal permitting effort.

This interpretation is considerably narrower than the Supreme Court's landmark ruling in Public Utility District No. 1 of *Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), in which the Court found that the authority of states to include conditions pursuant to section 401 is very broad, though not unbounded. Explaining that the federal regulations that guided the Court's *PUD No. 1* ruling were enacted prior to the 1972 CWA, observing that the Court in *PUD No. 1* lacked the benefit of EPA's statutory interpretation of section 401, and persuaded by Justice Thomas' dissenting opinion in *PUD No. 1*, EPA's final rule formally interprets WQC as pertaining only to point-source discharges associated with a federally licensed or permitted activity—and not the entire federally licensed or permitted activity

In addition to confining state and tribal section 401 authority to point-source discharges of a federally licensed or permitted activity, EPA's final rule requires state and tribal certification authorities to demonstrate that their certifications and any included conditions to meet "water quality requirements"—a newly defined term under the final rule. Under the final rule, "water quality requirements" are defined as effluent limitations and standards of performance for new and existing discharge sources (CWA sections 301, 302, and 306); water quality standards under CWA section 303 (including designated uses, numeric criteria and narrative standards); and toxic pretreatment effluent standards under CWA section 307. The final rule significantly curtailed a broad interpretation of section 401(d)'s passage that conditions can include "any other appropriate requirement of state law," maintaining that the canon of *ejusdem generis* requires any such conditions to be related to water quality. As such, the final rule also includes within the definition of "water quality requirements" conditions related to "state or tribal regulatory requirements for point source discharges into waters of the United States. EPA noted that some such requirements may be preempted by federal law, such as the FPA.

EPA's proposed rule would have required federal agencies to review a certification action to determine whether it was within the "scope of certification," and would have permitted them to reject conditions that, in their view, were beyond the scope of the certification. The final rule, however, clarifies that federal agencies are only to review certification actions for compliance with the *procedural* requirements of section 401. These newly imposed procedural requirements include providing certain information in a grant or waiver of certification, including statements explaining why certification conditions are necessary to ensure that the discharge will comply with water quality requirements, or, alternatively, why the discharge will not comply with water quality requirements, as well as citations to applicable federal, state, or tribal law.

The final rule also clarified the time period for section 401 state review, providing more concrete guidance regarding the outer bounds of state review and defining the meaning of a state's "failure or refusal to act."

Building on the D.C. Circuit's ruling in *Hoopa Valley Tribe*, EPA's final rule clarifies that one year is the "absolute outer bound" for states to act on requests for WQC, and that the one-year period begins at the state's receipt (meaning the date the request was received) of a certification request (meaning a signed and dated written communication requesting certification with a description of the project, its discharges, and receiving waters). The rule would also prohibit a state and applicant from engaging in a coordinated effort of withdrawal and resubmittal requests to toll the one-year period.

Recognizing that the statute expressly requires state action within a "reasonable" time period (up to a maximum of one year), EPA also asserted that not all projects should require a full year for the state to act and provided that a federal licensing or permitting agency may set a reasonable period of time for a certification—either on a project-by-project basis or categorically through a rulemaking—but acknowledged that federal agencies should be able to modify the established reasonable period of time as long as the modification does not exceed one year.

EPA's final rule also clarified that a state will be considered to waive its certification authority when it "fails or refuses to act" on a section 401 certification application within the "reasonable period" designated by the federal permitting agency. In addition, the final rule is explicit that a state "fails or refuses" to act when it fails to issue a WQC or denial in writing or follow the procedural requirements of section 401.

## Looking Forward: Waiver, Water Quality Effects, and Final Regulations

Both *Hoopa Valley Tribe* and EPA's rulemaking process have drawn praise and sharp criticism, with environmental advocates generally arguing that these developments will result in a

project's potential impacts on water quality being ignored and project proponents praising greater certainty regarding the scope and timeliness of certifications. One possibility of the developments discussed above is that federal permitting agencies will increasingly find that states have waived WQC—either by failing to timely issue certifications or by issuing certifications that the federal permitting agencies determine fail to meet the procedural elements of section 401. Under that outcome, project proponents might expect the need to protect their interests from state challenges in state or federal court, which could have the unintended effect of drawing out the certification and permitting process, rather than making it more efficient. On the other hand, EPA's finalization of the major regulatory changes set forth in the final rule could lead to increased collaboration between states and federal permitting agencies as they navigate this new regulatory landscape. Indeed, the final rule requires project proponents to seek a pre-filing meeting request with the certifying entity, in an effort to coordinate the process.

It is also unclear whether EPA's final rule will have the deleterious effects on water quality that some fear. The FPA, for example, gives FERC the ability to impose in hydroelectric licenses water quality conditions that are more stringent than those contained in a state's certification. *See*, *e.g.*, *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008). Other applicable statutory programs—e.g., Rivers and Harbors Act, CWA section 404 permitting, and Endangered Species Act—all require environmental stewardship in agency decision-making.

Both *Hoopa Valley Tribe* and EPA's new regulations are now final. Subsequent judicial review of the new regulations undoubtedly will shed light on the scope of the section 401 certification program. Regardless, EPA's final rule and FERC's orders following *Hoopa Valley Tribe* demonstrate both the need and opportunity for project proponents, federal and state regulators, Native American Tribes, and other stakeholders to work cooperatively to develop procedures for timely decision-making in federal licensing and permitting proposals in a manner that accommodates state WQC through the principles of cooperative federalism envisioned by Congress in the CWA.

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