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EPA's Clean Water Act Certification Proposal to Significantly Impact Hydropower Licensing

*By Chuck Sensiba, Andrea Wortzel, Anna Wildeman and Morgan Gerard**

The authors discuss the Environmental Protection Agency's proposal to rewrite its Clean Water Act Section 401 Rule.

The Environmental Protection Agency (“EPA”) has released a pre-publication version of its proposal to rewrite the Clean Water Act (“CWA”) Section 401 rule (the “Certification Proposal”), which, if finalized, is expected to have far-reaching impacts on hydroelectric licensing and relicensing. The Certification Proposal is intended by EPA to replace the version of the rule finalized under the Trump administration in 2020 (the “2020 Rule”). While the Certification Proposal maintains some aspects of the 2020 Rule, it differs in some significant areas and in many ways reverts back to the 1971 regulations.

Under CWA Section 401, the Federal Energy Regulatory Commission (“FERC”) cannot issue a hydroelectric license or relicense unless the project applicant has received a water quality certification from the appropriate state or authorized Tribal authority (“Authority”), or the Authority has waived the requirement. The water quality certification will include conditions (which will ultimately be incorporated into the FERC project license) to confirm that the discharge will conform with applicable provisions of CWA Sections 301, 302, 306, and 307 and with “any other appropriate requirement of State law.”

There is a lot to unpack in the proposal. What follows is a high-level overview of the key provisions that will impact the hydropower industry.

PRE-FILING ENGAGEMENT

Consistent with the 2020 Rule, the Certification Proposal encourages early engagement with the Authority to identify issues and promote timely issuance of the water quality certification. Project proponents would be required to request a pre-application meeting with the Authority at least 30-days before

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requesting certification. The proposal includes the opportunity for the Authority to waive or shorten the timeline for this requirement.

CONTENTS OF CERTIFICATION REQUEST

Unlike the 2020 Rule, the Certification Proposal does not provide a definition for the “certification request;” instead, each Authority can determine by regulation the requirements of a water quality certification. Significantly, the Certification Proposal requires that a certification application include a copy of the federal draft license or permit, “any existing and readily available data or information related to potential water quality impacts from the proposed project,” and whatever else the Authority determines it needs in a certification request.

TIMING FOR SEEKING CERTIFICATION

EPA acknowledges that, under the current certification process for hydropower licensing, FERC requires applicants to request water quality certification “no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis.” EPA explains that it “is not aware of any regulatory-based reason why federal licensing or permitting agencies could not manage their internal procedures so that a certifying authority’s ‘reasonable period of time’ did not begin to run until after it had received a copy of the draft license or permit. Moreover . . . it is reasonable to start the certification process only after a draft license or permit for the proposed project is available.”

FERC regulations require the Section 401 water quality certification process to commence immediately after its notice that a licensing or relicensing application is ready for environmental analysis so that it can review all prospective license conditions in its National Environmental Policy Act (“NEPA”) analysis, and often reviews at least draft certification conditions if the final is not yet available.

Moreover, FERC does not issue a draft license. Thus, this requirement, if finalized, is a significant change that could have far-reaching substantive, timing, and procedural impacts for FERC hydropower proceedings. It is currently uncertain how FERC will respond to this proposed change.

REASONABLE PERIOD OF TIME

CWA Section 401 provides Authorities a “reasonable period of time,” not to exceed a one-year period, to issue a water quality certification or waive its authority to do so. The Certification Proposal provides that the “reasonable period of time” starts when the Authority receives the applicant’s request (if submitted in accordance with the applicable procedures).

Under the Certification Proposal, the Authority and FERC would have an opportunity to agree upon a reasonable period of time. If no agreement can be

found, the default reasonable period will be 60 days. In either case, the reasonable period of time is not to exceed one year from receipt of the request. The proposal provides an automatic extension of the review period if the Authority's public notice requirements will take longer than 60 days or if there is a force majeure event. Unlike the 2020 Rule, under the Certification Proposal, the Authority, rather than FERC, will determine whether to extend the reasonable period.

WAIVER

Issues about when certification has been waived by an Authority's failure to approve or deny a request have been the subject of extensive litigation since the U.S. Court of Appeals for the District of Columbia Circuit issued its 2019 opinion in *Hoopa Valley Tribe v. FERC*. The hydropower industry has been pushing for greater clarity about which agency determines whether waiver has occurred and limiting actions that an Authority can take to extend the applicable "reasonable period of time" and avoid waiver. The 2020 Rule prohibited the withdraw and resubmit practice, which has been used by several states to extend the review period.

In the Certification Proposal, EPA expressly provides that it takes no position on whether the withdrawal and resubmissions practice is an acceptable method to reset the one-year period. EPA is also silent on the topic of whether the repeated use of a denial without prejudice by an Authority is an acceptable practice. The Certification Rule does make clear that an Authority must grant, grant with conditions, deny, or expressly waive within the reasonable period of time, otherwise the certification is constructively waived.

SCOPE OF REVIEW

The 2020 Rule provides that the scope of the Authority's review of a request for certification is only the "discharge" and not the activity as a whole. The Certification Proposal reverses this, allowing Authorities to evaluate the "activity as a whole." However, EPA attempts to clarify that the evaluation should be focused on the water quality impacts of the activity by defining "activity as a whole" as "any aspect of the project activity with the potential to affect water quality." The proposal goes on to explain that Authorities would be allowed to "holistically evaluate the water quality impacts of a federally licensed or permitted project."

In practice, though, the scope of the Section 401 certification could be quite broad under the Certification Proposal. For example, the Certification Proposal provides that, in the hydropower context, Authorities may include conditions based on "blocking upstream and downstream passage of nutrients and aquatic

species, altering the timing and volume of flows, transforming a free-flowing riverine reach into a reservoir, and converting the energy that oxygenates water into electricity.”

POTENTIALLY APPROPRIATE CONDITIONS

The proposal specifically identifies the following as potentially appropriate conditions under Section 401, many of which have implications for hydropower projects:

building and maintaining fish passages (related to protecting designated uses); the construction of public access for fishing (related to protecting recreational/fish consumption designated uses); maintaining minimum flow rates for visual, auditory, and religious experiences (related to protecting designated uses); compensatory wetland and riparian mitigation (related to protecting designated uses and criteria); temporal restrictions on activities to protect sensitive aquatic species (related to protecting designated uses); pre-construction monitoring and assessment of resources (related to protecting designated uses and criteria); habitat restoration (related to protecting designated uses and criteria); construction of recreation facilities to support designated uses (e.g., whitewater release for kayakers, canoe portages, parking spaces) (related to protecting designated uses); tree planting along waterways (related to protecting designated uses and criteria); and spill management and stormwater management plans (related to protecting designated uses and criteria).

Thus, this proposal, if adopted, would substantially reduce protections implemented by the 2020 Rule, which ended the longstanding practice of Authorities conditioning any and all aspects of a hydropower project, regardless of whether the condition was related to the discharge or water quality.

FERC REVIEW OF AUTHORITY DECISIONS

The Certification Proposal confirms, consistent with the 2020 Rule, that it is the federal agency's authority to determine that waiver has occurred. This is also consistent with FERC's exercise of that right. However, the Certification Proposal goes on to limit federal agency review of certification decisions to whether:

- The certifying authority has indicated the nature of the certification decision (e.g., grant, grant with conditions, deny, or waiver);
- The proper certifying authority issued the decision;
- The certifying authority provided public notice on the request for certification; and

- The decision was issued within the reasonable period of time.

MODIFICATIONS

The Certification Proposal would allow an issued water quality certification to be modified if the Authority and the federal agency agree to the modification, after consultation with the applicant. More significantly, the preamble discussion clarifies that Authorities may impose “adaptive management” conditions that could require future action under certain circumstances—and that such conditions are permissible and would not constitute a modification. This proposal provides a path for Authorities to include “re-openers” within certifications to include new conditions, many years after the certification is issued. The specific example given in the preamble is a temperature condition in a certification for a hydropower project. The preamble explains:

If a certifying authority is concerned about future downstream, climate change-related impacts on aquatic species due to increased reservoir temperatures during the lifespan of a hydropower dam license, the certifying authority might develop a condition that would allow a project proponent to take subsequent, remedial action in response to reservoir temperature increases (e.g., conditions that might require, as necessary, a change in reservoir withdrawal location in the water column, a change in the timing of releases, etc.). To ensure project proponents and Federal agencies understand and are able to implement any such adaptive management conditions, EPA recommends that certifying authorities clearly define and explain the basis for these conditions and the circumstances in which adaptive management conditions may spring into effect (e.g., expectations for undertaking additional planning and monitoring; thresholds triggering adaptive responses; requirements for ongoing compliance).

Thus, the Certification Rule would open the door to—indeed, it encourages—the inclusion of conditions that will lead to future requirements tied to certain monitoring or modeling actions. This puts applicants in the position of having to appeal such provisions or risk an argument that any future requirements imposed as a result of the condition have been agreed to and cannot be challenged.

EXPANSION OF TRIBAL AUTHORITY

Although Tribes have traditionally received treatment as a state (“TAS”) status for purposes of issuing certification for discharges that impact water within a Tribe’s jurisdiction, the Certification Proposal expands that authority to allow Tribes to act as a neighboring jurisdiction under Section 401(a)(2). Where discharge from an activity subject to certification from another

jurisdiction “may affect” the water quality of any area where a TAS Tribe has treaty rights, the Tribe may now object to the issuance of the license and then participate in the Section 401(a)(2) process. When participating as a neighboring jurisdiction, the TAS Tribe is limited to issues regarding the “discharge” that may affect water quality.

CONCLUSION

The proposed re-write comes after the Northern District of California vacated EPA's 2020 Rule, which the U.S. Supreme Court later reinstated.¹ The 2020 Rule will remain in place unless and until vacated (as litigation continues), or the Certification Proposal is finalized.

¹ <https://www.hydro.org/powerhouse/article/supreme-court-decision-allows-for-water-quality-certification-certaintyfor-now/>.