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Clean Water Act Section 401: Background and Issues

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Summary

Section 401 of the Clean Water Act requires that an applicant for a federal license or permit provide a certification that any discharges from a facility will comply with the Act, including water quality standard requirements. Disputes have arisen over the states' exercise of authority under Section 401. Until recently, much of the debate over the Section 401 certification issue has been between states and hydropower interests. A 1994 Supreme Court decision which upheld the states' authority in this area dismayed development and hydroelectric power interest groups. The dispute between states and industry groups was a legislative issue in the 104th Congress through a provision of a House-passed Clean Water Act reauthorization bill; the Senate did not act on that bill. There was no similar activity in the 105th or 106th Congress. It could be an issue in the 107th Congress in the context of energy policy debate and reforming hydropower licensing proceedings. In addition, interest could develop in clarifying whether Section 401 certification applies to nonpoint source pollution discharges, as well as point sources. This question was raised in an Oregon lawsuit; the court ruled that Section 401 does not apply to nonpoint source discharges. This report will be updated as warranted.

Background

Under provisions of the Clean Water Act (CWA), an applicant for a federal license or permit to conduct any activity that may result in a discharge to navigable waters must provide the federal agency with a Section 401 certification. The certification, made by the state in which the discharge originates, declares that the discharge will comply with applicable provisions of the Act, including water quality standards requirements.

Section 401 provides states with two distinct powers: one, the power indirectly to deny federal permits or licenses by withholding certification; and two, the power to impose conditions upon federal permits by placing limitations on certification. Generally, Section 401 certification has been applied to hydroelectric projects seeking a license from the

Federal Energy Regulatory Commission (FERC) and for dredge-and-fill activities in wetlands and other waters that require permits from the Army Corps of Engineers under Section 404 of the CWA and Sections 9 and 10 of the Rivers and Harbors Act. It also is applied to permit requirements for industrial and municipal point source dischargers under Section 402 of the CWA. In addition, it has the potential to be applied to a range of other activities that could affect water quality, a point that has increasingly become an issue.

Because participation by states in Section 401 certification is optional (they may waive the authority if they choose to do so), state implementation has varied. In recent years, however, some states have come to view Section 401 as an important tool in their overall programs to protect the physical and biological, in addition to the chemical, integrity of their waters. Some have begun using Section 401 to address a wide range of impacts to the quality of their waters, including impacts to aquatic habitat such as wetlands where issues of non-chemical impacts arise. Through Section 401, some states have addressed such impacts of a project as inadequate river flow, inundation of habitat, dissolved oxygen levels, and impacts on fish and other wildlife.

This expanded use of Section 401 has, in turn, led to tensions between state and federal agencies (especially FERC) over the scope of the states' Section 401 authority, particularly the extent to which states can legally address water flow requirements in water quality standards. Some state courts have placed limitations on the use of Section 401 authority (at least for hydropower projects) to address only chemical impacts of projects (such as dissolved oxygen or numeric chemical criteria) and not physical impacts (filling of aquatic habitat in a streambed as a result of the project) or biological impacts (effects on fish migration, for example). Other courts have adopted a broader view and allowed states to condition certification on compliance with all applicable water quality-related laws. A 1990 Supreme Court case (*California v. FERC*, 495 U.S. 490, known as the Rock Creek Case) addressed the issue of whether hydropower projects must comply with any aspect of state water use law. It held that, with regard to federally licensed hydropower facilities, the Federal Power Act preempts state water use law, including states' comprehensive arrangements for allocating water among competing uses.

Concerns and Legislative Issues

Until recently, much of the debate over the Section 401 certification issue was between states and hydropower interests. States have favored clarifying the CWA to confirm their broad authority to impose conditions on federally permitted activities (some also favor amending the Federal Power Act to clarify that it does not preempt state regulation of water uses). This position was described in testimony at a Senate subcommittee hearing in 1991.[1]

> [A]n overly narrow reading of section 401 would deprive the States of the ability to maintain the very beneficial uses that the Clean Water Act was designed to protect.

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[1] Strong, Clive J. Statement on behalf of the National Association of Attorneys General, in, U.S. Congress. Senate. Committee on Environment and Public Works. Subcommittee on Environmental Protection. Water Pollution Prevention and Control Act of 1991. Hearings on S. 1081. 102d Congress, 1st session. Washington, U.S. Govt. Print. Off., 1991. (S. Hrg. 102-335) p. 805. (Hereinafter, 1991 Senate Hearing)

> Federal agencies could permit activities that would undermine a State's investment in pollution control efforts and impose a double standard for different activities affecting the same in-stream values. It makes no sense to authorize States to implement Clean Water Act programs designed to protect beneficial uses and yet leave them powerless to prevent a federally permitted activity from impairing those values.
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> The comprehensive nature of State management of water quality and water quantity means that the States are best situated to determine whether a federally permitted activity will fully protect beneficial uses. The States have lead responsibility for protecting water quality under the Clean Water Act and for administering laws governing allocation of water quantity. Water quality and quantity are inextricably linked; both are essential to maintaining the integrity of the nation's waters.

Hydropower interests favor allowing federal agencies such as FERC to determine what conditions on a project are necessary for protection of water quality or to satisfy other criteria, in light of the important purposes directed by Congress in other laws, specifically the Federal Power Act.[2]

> The current limitation on the role of the States in the [federal hydropower] licensing process is that ultimately the FERC must make the decision balancing the multitude of resource interests affected by the project. The expansive reading of Section 401 water quality certification being used in some States crosses this barrier, using this mandatory water quality review to effectively take control of all aspects of the project. ....Expansion of 401 certification places authority for an energy resource in the effective control of a State water quality agency, that is not responsible for utility rate stabilization, assuring adequate water supplies, promoting clean air technology, or controlling floods.

In the 103rd Congress, interest in clarifying the scope of Section 401 certification authority led to several legislative proposals. The Senate Environment and Public Works Committee included a provision in S. 2093, a CWA reauthorization bill (S. Rept. 103-257). S. 2093 would have amended Section 401 to clarify that applicants for a federal license or permit, including applicants for a FERC license to operate hydroelectric generating facilities, must obtain state certification that the project will comply with water quality standards and will allow for attainment and maintenance of designated uses included in the state's standards. The Senate did not act on S. 2093.

The Supreme Court again considered the Section 401 issue in a case decided after S. 2093 was reported in 1994. In *Public Utility District (PUD) No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Court held that a state may impose minimum stream flow requirements as a condition in a Section 401 certification issued for a proposed hydroelectric facility because the CWA allows states to condition certification upon any effluent limitation or other appropriate state law requirement, to ensure that the facility will not violate State water quality standards. Imposition of the condition in question as part of the Section 401 certification did not conflict with FERC's authority to issue a license under the Federal Power Act, the Court said. (For additional information, see CRS Report 94-601 A, *PUD No. 1 of Jefferson County v. Washington Department of Ecology: An Expansive Interpretation of State Authority under the Clean Water Act*.)

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[2] Greely, Gail Ann. Statement on behalf of the National Hydropower Association, in, 1991 Senate Hearing. P. 810.

This decision supported the position of states, which had sought confirmation of their power to impose minimum stream flow and other requirements of state water quality standards. Environmentalists, who have supported states' use of Section 401 to address aquatic habitat alteration and biological diversity of the Nation's waters, also were pleased with the ruling. Development and hydropower interests, on the other hand, were said to be dismayed by the *PUD No. 1* decision, saying that it would make licensing of hydroelectric facilities more difficult and costly, at a time when more than 300 hydro projects are seeking FERC relicensing. Utility industry representatives were said to be concerned that water quality agencies reflect a narrow viewpoint under their mandates and could bias licensing policies by not adequately addressing power needs.

Following the Supreme Court's decision, disputes over Section 401 became an issue in the Congress. At the end of the 103rd Congress, legislation was introduced to amend the Clean Water Act and overturn the *PUD No. 1* decision. The sponsor of the bill, Senator Wallop, said that the decision threatened state water law (by limiting the amount of water that could be used for the project in question and, thus, interfering with state water rights systems) and the integrity of the FERC hydroelectric licensing process (Cong. Rec., daily ed., Nov. 30, 1994, S15237).

The 104th Congress addressed the issue in H.R. 961, a bill to reauthorize the Clean Water Act passed by the House in 1995. Section 507, adopted during House debate, would make Section 401 inapplicable to hydropower projects if FERC determines that the state's certification is inconsistent with the Federal Power Act. The bill also set up a mechanism, to be administered by FERC, to resolve differences that might arise between the state and FERC on questions relating to the consistency of the 401 certification to a hydropower project. That is, in the event of a dispute between FERC and a state over 401 certification of a hydropower project, the federal agency with licensing authority under the Federal Power Act also would oversee resolving the dispute between itself and an individual state.

This amendment to H.R. 961 was one of several proposed to address the issue. Some Members favored simply exempting hydropower projects from Clean Water Act regulation, since FERC project review is intended to consider inputs of state and federal agencies, Indian tribes, and the public in connection with licensing and relicensing decisions. Others argued that states should continue to have authority to regulate matters related to water quality concerns, and the amendment attempted to balance those concerns. No further action occurred on H.R. 961 during the 104th Congress, leaving the issue unresolved. There was no comprehensive legislative action to amend the Clean Water Act during the 105th or 106th Congress.

Section 401 and Land Runoff

In September 1996, a federal district court in Oregon ruled that Section 401 "applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources." (*Oregon Natural Desert Association v. Thomas*, 940 F.Supp. 1534, D.Or. 1996) The case, brought by environmental groups in Oregon, sought to have the U.S. Forest Service obtain Section 401 certification from the state that cattle grazing would not violate state water quality standards before issuing a grazing permit. The Forest Service argued in response that, under the CWA, only discharges from a point source or nonpoint source with a conveyance (i.e., a pipe or channel outlet) are regulated by the Act

and, while cattle grazing may cause water pollution, it is not a regulated discharge under the Act. However, in its ruling, the court distinguished the definition of "discharge" from "discharge of a pollutant" from a point source and said that "pollution caused by cattle grazing constitutes a discharge into navigable waters within the meaning of section 401 of the Clean Water Act. Therefore, state certification under section 401 was required before the U.S. Forest Service issued a cattle grazing permit."

The ruling was seen by supporters as giving states new regulatory power over federal licenses or permits that affect water quality by clarifying that Section 401 applies to nonpoint source discharges of water pollution, in addition to point source discharges. Nonpoint source pollution includes rainfall and snowmelt runoff from farmlands, ranches, city streets, and similar areas. The ruling had the potential to give states a stronger hand in determining how federal lands should be managed. If so, the impact on states could be significant, since cattle grazing is a common activity on millions of acres of western lands managed by the Forest Service and the U.S. Bureau of Land Management, and states could face a substantial workload in processing Section 401 certifications for hundreds of grazing permits annually. Additional impacts could occur if Section 401 were held to apply to other types of federally permitted activities generally categorized as nonpoint sources, such as timber harvesting or logging.

Federal agencies disagreed over how to respond to the Oregon district court's ruling. EPA favored letting the decision stand, on the basis that nonpoint source pollution is the most significant contributor to water pollution in many states, and the decision would give states more power to manage it. The Agriculture Department (parent of the Forest Service), on the other hand, urged the Department of Justice to support an industry group's appeal of the case, and ultimately the government did join in appealing the decision.

In July 1998, a federal court of appeals reversed the district court's ruling, finding that cattle grazing on federal lands does not fall within the type of pollution covered by Section 401 of the Clean Water Act (*Oregon Natural Desert Association v. Dombeck*, 151 F.3d 945 (9th Cir., July 22, 1998)). The court maintained that Congress intended to permit direct federal regulation of effluent flowing from point sources, such as a pipe, ditch, or machine, but to regulate nonpoint source pollution only through federal grants, not through Section 401 water quality certification. In November 1999, the Supreme Court declined to review the case, thus leaving the matter as it was resolved by the court of appeals.

The State of Oregon had responded to the 1996 district court decision by adopting rules establishing a certification process for livestock grazing permits on federal lands in Oregon. However, after the court of appeals reversed that ruling and the Supreme Court declined to review it, the state withdrew the rules. Groups representing ranchers, farmers, and others were pleased that the district court's ruling was overturned, believing that Congress did not intend Section 401 to apply to nonpoint source pollution. Other CWA programs and tools such as financial incentives are better means of addressing nonpoint pollution problems, some say. Environmentalists disagree with the appeals court's conclusion and the legal outcome of the case, believing that Section 401 generally supports a broad reading that includes discharges from nonpoint sources.

In a broader context, some observers had viewed the district court's ruling as giving a boost to the ongoing process in a number of states to develop total maximum daily load (TMDL) allocations on pollution-impaired water bodies. Efforts to carry out this

requirement in the Clean Water Act have been prompted recently by more than 40 lawsuits in 38 states against EPA and states, claiming they have failed to fulfill mandates in the law. (For additional information, see CRS Report 97-831, *Clean Water Act and Total Maximum Daily Loads (TMDLs) of Pollutants*.) In many cases, TMDLs are being developed to include nonpoint sources, as well as point sources, resulting in imposition of pollution control requirements and other measures to improve water quality and attain water quality standards. While the 9th Circuit's ruling did not directly affect the TMDL process, some persons believe that one result will be that nonpoint sources will be less involved in TMDL negotiations, leaving it mainly up to point sources to make the necessary water quality improvements.

So far, Congress has not responded to issues raised in the *Oregon Natural Desert* litigation. Nor was legislation introduced in the 105th or 106th Congress concerning licensing of hydroelectric facilities and the 1994 *PUD No. 1* case.

Legislative interest in Section 401 could increase in connection with recommendations on national energy policy by Vice President Cheney's National Energy Policy Development Group (NEPD Group).[3] It recommends that the hydroelectric licensing process administered by FERC undergo administrative and legislative reform so that hydropower can contribute to meeting the nation's energy needs. At the same time, a recent FERC report concludes that the most common cause of delayed hydropower licensing proceedings is untimely receipt of state water quality certification under the Clean Water Act.[4] Several legislative proposals in the 107th Congress (H.R. 1832, S. 71, and S. 388) would restrict the ability of the Departments of Interior and Commerce to impose conditions on hydropower projects concerning fishways at hydropower dams. The bills reflect concerns also discussed in the FERC report about delays caused by these and other federal agencies. Further, the Securing America's Future Energy (SAFE) Act of 2001, passed by the House in July, would allow FERC licensees to propose alternative fishway conditions, in lieu of conditions prescribed by Interior or Commerce (Division A, section 401 of H.R. 4). While these bills only address the roles of federal agencies in hydropower licensing, not state certification under CWA Section 401, these water quality issues could be joined, as well, in the context of energy policy debate.

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[3] *National Energy Policy*, Report of the National Energy Policy Development Group, May 2001.

[4] Report to Congress prepared by the Staff of the Federal Energy Regulatory Commission. *Hydroelectric Licensing Policies, Procedures, and Regulations, Comprehensive Review and Recommendations*. May 2001. 145 p. See [http://www.ferc.gov/hydro/docs/section603.htm]