Order Code 97-488
Updated March 20, 2008

CRS Report for Congress

Clean Water Act Section 401: Background and Issues

Claudia Copeland
Specialist in Resources and Environmental Policy
Resources, Science, and Industry Division

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 the facility will comply with the act, including water quality standard requirements. Disputes have arisen over the states' exercise of authority under Section 401. For the most part, 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 hydropower interest groups. The Court revisited these issues in a 2006 ruling that unanimously upheld the states' authority to condition hydropower licenses. The dispute between states and industry groups about Section 401 authority has been a legislative issue on several occasions, but Congress has not modified the provision's scope. In addition, there has been interest in clarifying whether Section 401 certification applies to nonpoint source discharges, such as rainfall runoff, as well as point source discharges from pipes or ditches. This question was raised in a lawsuit in Oregon; while a federal court ruled in the case that Section 401 does not apply to nonpoint source discharges, some interests continue to favor a broad reading of 401 that would apply to both nonpoint and point sources of pollutant discharges.

Background

Under the Clean Water Act (CWA), an applicant for a federal license or permit to conduct any activity that may result in a discharge to waters of the United States 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. A state's water quality standards specify the designated use of a stream or lake (e.g., for water supply or recreation) and pollutant limits necessary to protect the designated use.

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 hydropower projects seeking a license from the Federal Energy Regulatory Commission (FERC) and to dredge-and-fill activities in wetlands and other waters that require permits from the U.S. Army Corps of Engineers under CWA Section 404 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 CWA Section 402. 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, many 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 impacts of a project such 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) and regulated entities 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 (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. The Court 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.

Stakeholder Concerns and Other Court Rulings

For the most part, the debate over the Section 401 certification issue has centered on states and hydropower interests. Many states have long 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 1991 Senate subcommittee hearing.[1]

---

[1] Clive J. Strong, 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)

> [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. 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.
>
> 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.

The Supreme Court again considered the Section 401 issue 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 for a proposed hydropower 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 as part of the Section 401 certification does not conflict with FERC's authority to issue a license under the Federal Power Act, the Court said. The ruling said that states may regulate the impacts of a project as a whole, so long as there is a discharge involved. Thus, the conditions a state may require are not confined to the discharge itself but can address a range of conditions as part of their certifications, such as the impacts of a dam's removal of water from a river. Further, federal agencies must include state-imposed conditions in the license or permit.

This decision pleased 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, were similarly pleased.

---

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

Development and hydropower interests, on the other hand, were dismayed by the decision, saying that it would make licensing of hydropower facilities more difficult and costly. Utility industry representatives were concerned that state water quality agencies reflect a narrow viewpoint under their mandates and could bias licensing policies by not adequately addressing power needs.

The Supreme Court revisited these issues in 2006 in a case brought by the owner of several hydropower dams in Maine who had challenged the state's 401 certification for renewal of its FERC licenses for the dams, arguing that the dams did not produce the requisite "discharge" under the CWA. The Court unanimously held that states, through Section 401 certification, can impose conditions on FERC licensing or relicensing of hydropower facilities that states find necessary to prevent adverse alteration of water quality (*S. D. Warren Co. v. Maine Board of Environmental Protection*, 126 S. Ct. 1843 (2006)). States and environmental groups applauded the ruling, as many had feared that an adverse decision would hinder the ability of states to require measures to ameliorate the effects of hydropower dams on water quality and aquatic life. (For additional information, see CRS Report RS22429, *The State Role in the Federal Licensing of Hydropower Dams: S. D. Warren Co. v. Maine Board of Environmental Protection*.)

Section 401 and Land Runoff

In 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 sought to have the U.S. Forest Service obtain state Section 401 certification that cattle grazing under a Forest Service permit would not violate water quality standards. The Forest Service argued 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 and, while cattle grazing may cause water pollution, it is not a regulated discharge under the act. However, in its ruling, the district 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."

Supporters said that the ruling gave 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. Point sources are discrete conveyances, such as pipes or ditches, from which pollutants are discharged. Nonpoint source pollution is 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 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(*Oregon Natural Desert Association v. Dombeck*, 151 F.3d 945 (CA9 1998)). The court found that Congress intended to permit direct federal regulation of effluent flowing from point sources, 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.

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 similar interests 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 source pollution problems, some say. Environmentalists disagreed with the appeals court's conclusion and the legal outcome of the case, and many continue to argue that Section 401 generally supports a reading that includes nonpoint source discharges.

In a broader context, some observers had viewed the district court's ruling as giving a boost to ongoing activities in states to develop total maximum daily load (TMDL) allocations on pollution-impaired water bodies. Efforts to carry out this Clean Water Act requirement have been prompted by lawsuits in more than 35 states, claiming that EPA and states 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 that result in imposition of pollution control requirements and other measures on nonpoint sources, as well as point sources, in order to improve water quality and attain water quality standards. While the 9th Circuit's ruling did not directly affect the TMDL process, some persons saw the reversal of the lower court's ruling as removing one possible argument for involving nonpoint sources in TMDL processes.

Legislative Response

Since the mid-1990s, Congress has shown interest in these issues in several legislative proposals reflecting varying perspectives, but no legislation that would modify Section 401 has been enacted. In the 103rd Congress, interest in clarifying the scope of Section 401 certification authority led to several proposals. The Senate Environment and Public Works Committee included one such provision in S. 2093, a CWA reauthorization bill. It would have strengthened Section 401 by clarifying that applicants for a federal license or permit, including applicants for a FERC license to operate hydropower 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.

Following the Supreme Court's 1994 PUD No. 1 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 decision (S. 2566). The sponsor of the bill, Senator Wallop, said that the Court's 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 hydropower licensing process. The Senate did not act on this bill.

The 104th Congress addressed the issue in H.R. 961, a CWA reauthorization bill passed by the House in 1995. Section 507 would have made Section 401 inapplicable to hydropower projects if FERC were to determine that the state's certification is inconsistent with the Federal Power Act. The bill also would have set up a mechanism, to be administered by FERC, to resolve differences arising 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, FERC would be authorized to resolve the dispute between itself and the state. This provision in H.R. 961 was one of several proposed to address the issue. Some Members favored simply exempting hydropower projects from Clean Water Act regulation, arguing that 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. Section 507 attempted to balance those concerns. However, no further action occurred on H.R. 961 during the 104th Congress, and similar legislation has not been proposed subsequently.

Most recently, legislative interest in Section 401 occurred in connection with recommendations on national energy policy by Vice President Cheney's National Energy Policy Development Group in 2001. It recommended that the hydropower 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 FERC report concluded that the most common cause of delayed hydropower licensing proceedings is untimely receipt of state water quality certification under the Clean Water Act.[3] Responding to these concerns, legislation was proposed that would give applicants for hydropower licenses increased flexibility in complying with conditions imposed by federal agencies such as the Department of the Interior concerning, for example, the need for passageways through which fish can travel around a dam — another issue raised in the FERC report. The 109th Congress enacted the Energy Policy Act of 2005 (P.L. 109-58) with a provision (Section 241) requiring federal agencies to consider alternative license conditions proposed by the license applicant. While this provision only addresses the roles of federal agencies in hydropower licensing, not state certification under CWA Section 401, these water quality issues remain of interest to some stakeholders.

---

[3] Federal Energy Regulatory Commission, Staff Report to Congress, *Hydroelectric Licensing Policies, Procedures, and Regulations, Comprehensive Review and Recommendations,* May 2001, 145 pp.