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Clean Water Act Section 401:  
Balancing States’ Rights and the Nation’s Need for Energy Infrastructure  

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ABSTRACT  

Over the past several decades, significant tension has developed between the federal role in overseeing and authorizing certain types of energy infrastructure projects and states’ roles in regulating water quality under Section 401 of the Clean Water Act (CWA or the Act). It is increasingly common for states to use their CWA Section 401 water quality certification (WQC) authority to stall or to impede energy infrastructure projects for reasons unrelated to water quality, such as the state’s stance on energy policy, a perceived need to placate local opposition to a project, or other localized political concerns. 

This paper provides background on the CWA Section 401 certification process, discusses specific problems with the process, and explains several ambiguities that have sparked litigation, caused costly delays or altogether obstructed the development of needed infrastructure and energy projects. 

Background  

Under CWA Section 401(a), any applicant for a federal license or permit to conduct activities that may result in discharges to navigable waters must provide the federal authorizing agency a certification from the state in which the discharge originates that the discharge will comply with specified requirements of the Act, including state water quality standards. The state’s certification must set forth any effluent and other limitations, and monitoring requirements necessary to assure compliance with the Act and with any other appropriate requirement of state law set forth in the certification. These requirements specified in the state’s certification become conditions of the federal license or permit. 

3 Id.
The CWA places a one-year limit on the time that a state has to respond to a request for Section 401 certification, providing that if the state “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.” Congress intended this time limitation to prevent projects from being subjected to unreasonable delays because states failed to act in a timely fashion on requests for certification. Representative Edmondson, who sponsored the amendment, made clear that a state must do more than merely make efforts towards certification within the time allotted: “the State must act, either to grant or to deny the certification.”

The federal license or permit may not be granted until WQC has been obtained or certification waived by the state. Likewise, if a state denies certification, the federal license or permit may not be granted. CWA Section 401 thus provides a powerful tool for states to impose conditions upon federal authorizations for a wide range of activities, or to deny certification altogether—allowing “a single state agency [to] effectively veto[] an energy [project] that has secured approval from a host of other federal and state agencies.”

The Problem

States have on several occasions used their Section 401 authority to veto projects sited in their jurisdictions for a variety of reasons, often unrelated to water quality. Even where the state issues certification, WQC issues are commonly the subject of litigation, particularly where opponents of a specific project use water quality-related objections as a proxy for their objections to other aspects of the project. Such litigation significantly impedes the ability of proponents to

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5 See 115 Cong. Rec. 9,264 (Apr. 16, 1969) (statement of Rep. Edmondson explaining that the amendment intended to “do away with dalliance or unreasonable delay and to require a ‘yes’ or ‘no’ by states).
6 115 Cong. Rec. 9,264, supra note 6 (emphasis added).
8 Id.
9 Islander E. Pipeline Co. v. McCarthy, 525 F.3d 141, 164 (2d Cir. 2008); see also H.R. Rep. No. 911 at 122 (1972) (explaining that “[d]enial of certification by a State . . . results in a complete prohibition against the issuance of the Federal license or permit.”).
deliver needed energy projects in a timely manner and on a schedule that is predictable enough to encourage investment.

Judicial oversight of the Section 401 process through litigation also creates a patchwork of precedent on the scope and timing of certifications, making the process even more unpredictable for future projects. In this section, we survey the principal issues that have arisen in recent years in the Section 401 context and the manner in which courts and agencies have attempted to address these issues, including: (1) the limitations on the one-year period for state WQC review; (2) the proper scope of such review and the types of conditions that states may impose upon certification; and (3) finality and reviewability of the certification once issued.

Timely and predictable issuance of certification is crucial for energy and infrastructure construction projects, which are subject to tight and highly prescribed schedules. Delays and uncertainty can be costly and, depending upon the circumstances, can kill a project. Section 401 certification has historically been of the most common cause of delay in project execution and delivery. In the past few decades, the problem has become more pronounced—with state agencies taking a liberal view of when the one-year clock for acting on a certification request begins. Further, state agencies have adopted certain tactics to extend their time for review, such as asking that a project proponent withdraw and re-submit its application so as to re-start the waiver clock, or requesting that project sponsors specify by agreement a particular date that the clock is deemed to have begun (regardless of when the project’s application was actually submitted). Finally, project sponsors have received mixed messages on who ultimately determines whether the one-year waiver period has run. These issues have been the subject of recent agency and judicial pronouncements, as summarized below.

**When does the one-year clock start?** Under the plain language of CWA Section 401, the one-year waiver period begins to run “after receipt of [a] request.” While the CWA is clear on the one-year deadline, several states, such as New York and New Jersey, have historically taken the position that the one-year waiver period does not begin to run until the state deems a project’s application for WQC “complete.” By engaging in a subjective, case-by-case inquiry as to whether a WQC request is “complete,” states have been able to manipulate the timing of the Section 401 certification process, often delaying consideration of a project’s application well beyond the one-year statutory deadline.

This practice was recently rejected, however, by the Second Circuit Court of Appeals, in the context of an application submitted by Millennium Pipeline Company LLC (Millennium Pipeline) to the New York State Department of Environmental Conservation (NYSDEC) for WQC...
for the Valley Lateral natural gas pipeline project. In that case, Millennium Pipeline’s initial application for WQC was deemed received by NYSDEC on November 23, 2015. Nonetheless, over the course of the next several months, NYSDEC notified the project proponents that it considered the application “incomplete,” requesting further information on the project’s potential environmental impacts. After several additional information submittals to NYSDEC, Millennium Pipeline petitioned the D.C. Circuit Court of Appeals in December 2016 for a finding that NYSDEC had waived its Section 401 authority by failing to act on the project’s application within one year. The D.C. Circuit dismissed the company’s petition for lack of standing, holding that Millennium Pipeline could seek a remedy for the delay only from FERC.

The project proponents thus approached FERC, requesting authorization to proceed with construction on the basis that NYSDEC had waived its certification authority. While that request was pending, on August 30, 2017, NYSDEC denied Millennium’s application for certification on the basis that FERC’s environmental analysis of the project was deficient in “fail[ing] to consider or quantify the downstream greenhouse gas emissions from the combustion of the natural gas transported by the Project.” On September 15, 2017, FERC issued an order (the Waiver Order) finding that NYSDEC had waived its certification authority by not acting on Millennium’s application by November 23, 2016, one year from the date that the Department first received Millennium’s formal written application. FERC subsequently issued a notice to proceed with construction, which the project proponent did, and the Valley Lateral Project was placed into service on July 9, 2018.

NYSDEC challenged FERC’s Waiver Order in the Second Circuit, which upheld the Waiver Order and agreed with FERC that NYSDEC had waived certification authority for the project. According to the Second Circuit,

'[t]he plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state’s action regarding a request for certification ‘shall not exceed one year’ after ‘receipt of such request.’ It does not specify that this time limit applies only for ‘complete’ applications. If the statute required ‘complete’ applications, states could blur this bright-line rule into a subjective standard, dictating that applications are ‘complete’ only when state

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15 N.Y. State Dep’t of Envtl. Conservation v. FERC, 884 F.3d 450, 455-56 (2nd Cir. 2018).
16 Id. at 453.
17 Id.
18 Id.
21 Letter from Thomas S. Berkman to Ronald Kraemer, supra note 18, at 2.
23 Letter from George Flugrad, Counsel, Millennium Pipeline Co., Re: Valley Lateral Project In-Service Notification, Millennium Valley Pipeline LLC, Docket No. CP16-17-000 to Kimberly D. Bose, Sec’y, Fed. Energy Regulatory Comm’n (July 16, 2018).
agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.{}

With this ruling, the court affirmed FERC’s long-held position that the one-year waiver period begins upon receipt of a request for certification and is not tied to any subjective determination of the application’s completeness. This interpretation has been enshrined in FERC regulations governing applications for hydropower licenses since 1987, and FERC has long recognized the “substantial benefits” flowing from its interpretation, including that it “provides the maximum allowable time prescribed by the [CWA],” but also that it serves the public interest by “avoiding uncertainty associated with open-ended certification deadlines.” It also prevents states from “delay[ing] indefinitely”—via case-by-case assessments of whether a project request is deemed acceptable for processing—“their acceptance of a certification request, in contravention of the Congress’ intent, through the waiver provision, to prevent unreasonable delays (i.e., of more than one year).”

May a state restart the statutory clock by asking an applicant to withdraw and re-submit its WQC request? State agencies needing more time for their WQC review often request that applicants withdraw and resubmit their applications, taking the position that the waiver clock starts anew with each resubmittal. This tactic was used recently by NYSDEC in the context of an interstate natural gas pipeline project proposed by Constitution Pipeline Company, LLC (Constitution). NYSDEC denied WQC for that project on April 22, 2016, nearly three years after receiving the project’s initial application. The NYSDEC denial came after years of back-and-forth and agency delays, including two requests by NYSDEC that the project proponent withdraw and re-submit its application to re-start the one-year waiver clock.

Constitution appealed the April 2016 WQC denial to the Second Circuit on the grounds that NYSDEC had exceeded the statutory one-year time limit for review and that the denial was arbitrary and capricious. The Second Circuit dismissed the first claim regarding the timeliness of

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24 N.Y. State Dep’t of Envtl. Conservation v. FERC, 884 F.3d 450, 455-56 (2d Cir. 2018).
26 See 18 C.F.R. § 4.34(b)(iii) (2018) (“A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification.”); see also Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, 52 Fed. Reg. 5446 (Feb. 23, 1987). Note that there is no corresponding FERC regulation under the NGA.
29 Letter from John Ferguson to Lynda Schubring, supra note 18, at 1. NYSDEC cited as reasons for its denial that “the Application fails in a meaningful way to address the significant water resource impacts that could occur from this Project and has failed to provide sufficient information to demonstrate compliance with New York State water quality standards.” Id.
30 Petition for Review, Constitution Pipeline Co. v. NYSDEC et al., No. 16-1568 (2d Cir. May 16, 2016).
the NYSDEC decision for lack of jurisdiction under the NGA.31 The court also denied the petition on the merits, deferring to the agency’s expertise in determining that it lacked sufficient information to issue WQC for the project.32 Constitution also petitioned FERC for a declaratory order finding that NYSDEC had waived its WQC authority. FERC denied the petition on January 11, 2018, finding that the one-year waiver period had re-started each time that Constitution, at NYSDEC’s request, withdrew and resubmitted its application.33 According to FERC’s January 2018 order denying Constitution’s petition, “once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under [CWA] section 401(a)(1).”34

Constitution sought review of the FERC decision in the D.C. Circuit in September 2018.35 The case was held in abeyance, however, pending the outcome of Hoopa Valley Tribe v. FERC, which also presented the question of whether a state agency may manipulate the one-year waiver period by requesting that an applicant repeatedly withdraw and resubmit their application.36 The D.C. Circuit issued a decision in Hoopa Valley in January 2019, staking out a contrary position to the one taken by FERC in its January 2018 order.

In Hoopa Valley, the Court considered whether California and Oregon had waived Section 401 certification for the relicensing of the Klamath Hydroelectric Project located on the Klamath River in both states.37 As part of negotiations over the project with several stakeholders, the project proponent and the state agencies had agreed to defer the one-year statutory limitation for Section 401 certification by annual withdrawal and re-submittal of the project request for certification.38 After petitioning FERC unsuccessfully, the Hoopa Valley Tribe sued in the D.C. Circuit, alleging that the states had waived their Section 401 authority and that the project sponsor had correspondingly failed to diligently prosecute its licensing application for the project.39

In resolving the case, the court in Hoopa Valley addressed a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws and resubmits its request for WQC over a period of time greater

31 Constitution Pipeline Co. v. NYSDEC et al., 868 F.3d 87, 100 (2d Cir. 2017).
32 Constitution Pipeline Co. v. NYSDEC et al., 868 F.3d at 103. The United States Supreme Court subsequently denied Constitution’s petition for a writ of certiorari to review the Second Circuit ruling. See Constitution Pipeline Co. v. NYSDEC et al., 868 F.3d 87, 100 (2d Cir. 2017), cert. denied, 584 U.S. (U.S. Apr. 30, 2018) (No. 17-1009).
33 Constitution Pipeline Co., 162 FERC ¶ 61,014 at P 23 (2018) (explaining that “once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under [CWA] section 401(a)(1)”).
34 Id. The Second Circuit took a similar position in the context of the Millennium Pipeline Valley Lateral (albeit in dicta in its 2018 order upholding FERC’s Waiver Order), explaining that where a state deems an application to be incomplete and needs more time for information-gathering, one available option is to “request that the applicant withdraw and resubmit the application,” presumably starting a new period for review. NYSDEC v. FERC, 884 F.3d 450, 456 (2d Cir. 2018).
37 Id. at 1103.
38 Id. at 1101.
39 Id.
than one year. According to the Court, “[d]etermining the effectiveness of such a withdrawal-and-
resubmission scheme is an undemanding inquiry because Section 401’s text is clear,” requiring
action from the state within one year of “a request.”40 The court thus rejected the notion that
applicants and state reviewing agencies may circumvent the congressionally prescribed one year
period for review by repeatedly withdrawing and resubmitting the same WQC application in a way
that could indefinitely delay federal licensing proceedings and undermine FERC’s jurisdiction to
regulate such matters.41 The court emphasized that, while a year was the “absolute maximum”
amount of time for the state’s certification, this “does not preclude a finding of waiver prior to the
passage of a full year.”42 The D.C. Circuit’s decision would thus appear to prohibit the withdrawal-
and-resubmission practice commonly requested by states (and used by NYSDEC in the
Constitution pipeline project) to prolong the statutory review period, at least in instances where the
applicant repeatedly withdraws and resubmits the same application, with no “new” request
justifying additional time for review.43 In light of this decision, FERC filed a motion requesting
that the D.C. Circuit remand its January 2018 decision denying Constitution’s request for a
declaratory order that NYSDEC had waived its WQC authority, in light of Hoopa Valley.44 The
court granted FERC’s request on February 28, 2019.45 FERC gave the parties to the proceeding
until May 1, 2019 to file supplemental pleadings and record materials addressing the significance
of the Hoopa Valley decision, and these submittals are under consideration by the Commission.46

May a state extend the one-year review period by agreement with the applicant? Hoopa
Valley also casts doubt on a state agency’s ability to extend its review time by agreement with the
applicant, as was done for the Northern Access natural gas pipeline project proposed by National
Fuel Supply Corporation and Empire Pipeline, Inc. (together, “National Fuel”). National Fuel
originally submitted a request for WQC to NYSDEC for that project on March 2, 2016. However,
it signed a letter on January 20, 2017, at the request of NYSDEC, agreeing that, for the purposes
of CWA Section 401, the project’s application would be deemed received on April 6, 2016, thereby
extending the date for NYSDEC to make a final determination to April 7, 2017.47

Nonetheless, when FERC approved the project on February 3, 2017, conditioned on receipt
of authorizations required under federal law (including the WQC), National Fuel sought rehearing
of the FERC order—claiming that it was not required to obtain a WQC from NYSDEC because the
agency had waived certification. This request was still pending when NYSDEC denied the project’s
request for certification on April 7, 2017, on the basis that the project’s application “fail[ed] to
demonstrate compliance with New York State water quality standards.”48 On August 6, 2018,

40 Id.
41 Hoopa Valley Tribe, 913 F.3d at 1104.
42 Id.
43 Id.
44 FERC Unopposed Motion for Voluntary Remand, Constitution Pipeline Co. v. FERC, No. 18-
45 Order, Constitution Pipeline Co. v. FERC, No. 18-1251 (D.C. Cir. Feb. 28, 2019).
46 FERC, Notice Affording the Parties an Opportunity to File Pleadings, Docket Nos. CP18-5-000;
CP18-5-001 (March 11, 2019).
47 Letter from John Ferguson, Chief Permit Administrator, NYSDEC, to Ronald Kramer, Nat’l Fuel
(quoting the relevant portion of the agreement).
48 Id. at 1.
FERC issued an order on National Fuel’s request for rehearing, determining that NYSDEC had waived certification by failing to act within one year, and that the agreement between NYSDEC and the project sponsors was an invalid attempt to override the one-year statutory deadline in the CWA. 49 NYSDEC and others requested rehearing of FERC’s August 8, 2018 order. On rehearing, FERC stood by its original ruling on waiver, denying NYSDEC’s request based upon a finding that the CWA “prohibits state agencies and applicants from entering into written agreements to delay [WQCs], an interpretation consistent with [Hoopa Valley].”50

Meanwhile, National Fuel challenged the NYSDEC April 2017 denial in the Second Circuit, alleging that NYSDEC relied on improper considerations and applied a heightened standard of proof in its WQC decision, and that the decision was arbitrary and capricious.51 On February 5, 2019, the court vacated the denial, remanding it to NYSDEC “for the limited purpose of giving the Department an opportunity to explain more clearly—should it choose to do so—the basis for its decision.”52 With respect to whether NYSDEC had waived certification by exceeding the one-year statutory timeframe, the Court explained that such a “failure-to-act claim is one over which the District of Columbia Circuit would have ‘exclusive’ jurisdiction.”53 It also explained that “Petitioners are free to present any evidence of waiver to FERC in the first instance.”54 The Court failed to acknowledge that FERC had in fact already deemed the certification waived in its August 2018 order and that, because rehearing on FERC’s order was still pending, it was not ripe for review. The ruling thus creates a situation where NYSDEC, at the direction of the Second Circuit, will be undertaking review and reissuance of its WQC decision, despite a determination from FERC that it waived its Section 401 authority.

Who determines if time is up, and a state has waived certification? There has also been ambiguity in the Section 401 process as to who a project proponent may turn to for a definitive determination that a state has waived its certification authority. In its 2017 decision regarding the Millennium Pipeline Valley Lateral project, the D.C. Circuit ruled that—in the context of projects requiring FERC authorization under the NGA—if a project proponent thinks the state has delayed beyond one year (i.e., waived certification), the project must make its case for waiver to FERC and request a Notice to Proceed rather than petitioning a court for a waiver determination.55

According to the court, “[e]ven if [NYSDEC] ha[d] unlawfully delayed acting on Millennium’s application, its inaction would operate as a waiver, enabling Millennium to bypass the Department and proceed to obtain approval from FERC,” thus NYSDEC’s delay “cause[d] Millennium no cognizable injury,” and the company “lack[ed] standing to proceed with its petition” in court.56 The court reasoned that, even if NYSDEC had delayed for more than a year, the delay

49 FERC, Order on Rehearing and Motion for Waiver Determination under Section 401 of the Clean Water Act, 164 FERC ¶ 61,084 (Aug. 6, 2018) at P 42.


53 Nat’l Fuel Gas Supply Corp., No. 17-1164 at 7 (citing Constitution Pipeline Co. LLC v. NYSDEC et al., 868 F.3d 87, 100 (2d Cir. 2017)), supra note 45.


56 Id.
could not injure Millennium; rather, the delay would trigger the Act’s waiver provision, and Millennium could then present evidence of waiver directly to FERC to obtain the agency’s go-ahead to begin construction. In accordance with the court’s instruction, the project proponent thus went directly to FERC and presented evidence of NYSDEC’s waiver. FERC issued its Waiver Order in September 2017 and subsequently a notice to proceed, allowing construction to commence.

The D.C. Circuit’s decision on the Valley Lateral project is in tension with previous authority on this issue, apparently reflecting a circuit split as to who has the final say on waiver. In AES Sparrows Point v. Wilson, for example, the Fourth Circuit deferred to the waiver period as it was interpreted by the U.S. Army Corps of Engineers (USACE or the Corps). Rather than directing the project proponent to present evidence of waiver to FERC (the lead agency for the project at issue in that case) for a waiver determination, the court held that the state agency had not, in fact, waived certification. Given the existence of contrary authority from different circuits, there is thus some ambiguity with respect to a project proponent’s remedies for delayed certification decisions and the proper procedures for seeking a definitive determination of waiver at the conclusion of the one-year period.

Recent Steps Towards a Solution

The current administration has recently taken steps to address some of the concerns with the WQC process identified above, starting with the April 2019 issuance of Executive Order (EO) 13868, Promoting Energy Infrastructure and Economic Growth. The EO acknowledges that “[o]utdated Federal guidance and regulations regarding section 401 of the Clean Water Act . . . are causing confusion and uncertainty and are hindering the development of energy infrastructure” and directs EPA to, among other things, consult with states, tribes, and relevant agencies to revise its outdated Section 401 Handbook and modernize its Section 401 regulations.

EPA opened a docket for “pre-proposal” public comments on the Section 401 rulemaking and guidance efforts directed by the EO. Not surprisingly, based upon the comments submitted, industry was generally supportive of WQC reform, whereas some states opposed. The Agency

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57 Id. at 700.
58 Id. at 701.
59 Millennium Pipeline Co., L.L.C., 860 F.3d at 701. As explained above, NYSDEC subsequently challenged the Waiver Order in the Second Circuit, but that Court upheld FERC’s determination that NYSDEC waived its Section 401 authority by failing to act on the request within one year. NYSDEC v. FERC, 884 F.3d 450, 452 (2d Cir. 2018).
60 AES Sparrows Point v. Wilson, 589 F.3d 721, 729–30 (4th Cir. 2009).
61 Id. (deferring to Corps regulations on waiver at 33 C.F.R. § 325.2(b)(1)(ii) and applying Chevron deference to the Corps’ interpretation of when the one-year waiver period had run).
62 Executive Order 13868, “Promoting Energy Infrastructure and Economic Growth” 84 Fed. Reg. 15495 (Apr. 15, 2019), available at https://www.federalregister.gov/documents/2019/04/15/2019-07656/promoting-energy-infrastructure-and-economic-growth. This statement reflects the fact that EPA regulations implementing CWA Section 401 were promulgated in 1971 and have not been updated since 1979. Further, EPA’s most authoritative guidance on the WQC process—entitled “Clean Water Act 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes” (Section 401 Handbook)—was issued as “interim” guidance in 2010 without public comment and has never been updated or revised to reflect recent developments in Section 401 case law.
subsequently issued revised Section 401 Guidance on June 7, 2019, which clarifies, among other things, that the one-year timeline for review begins “upon receipt of a written request” and recommends that states and tribes promptly begin evaluating the request to ensure timely action.63 The guidance also clarifies the proper scope of Section 401 review and makes recommendations on how federal permitting agencies, states, and tribes can better coordinate to improve the certification process.64 EPA is expected to propose revised regulations later this year.

**Conclusion**

Since its original enactment, the implementation of CWA Section 401 has created tensions between state and federal oversight roles for large-scale energy and infrastructure projects. In recent years, this tension has reached a high watermark, with states using their WQC authority to impede projects that have received federal authorization to proceed or, where the state issues certification, with advocacy groups targeting the certification to de-rail projects already determined to be in the public interest.

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64 Id. at 5-8.