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Hydro Newsletter

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EPA Issues Revised CWA Section 401 Guidance to States

On June 7, 2019, the U.S. Environmental Protection Agency (EPA) issued an updated [guidance document](#) (Updated Guidance) that clarifies and provides recommendations to states and tribes concerning their implementation of Section 401 of the Clean Water Act (CWA). The Updated Guidance, issued pursuant to Executive Order [13868](#), includes procedural and substantive reforms to the Section 401 process to reduce delays and uncertainty among applicants, states, tribes, and federal permitting agencies. EPA's Updated Guidance supersedes the interim guidance document entitled "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes," issued in 2010 under the Obama administration.

First, the Updated Guidance clarifies that the one-year timeline for the state agency to act on a Section 401 application begins when the agency receives the application, not when the agency deems the application complete. If a state does not grant, deny, or voluntarily waive its Section 401 authority within one year after receiving a request, the federal permitting agency is authorized to waive the state's Section 401 authority and may issue the federal permit. Second, the Updated Guidance recommends that the scope of Section 401 conditions should be limited to those addressing water quality impacts from the project. While EPA acknowledges court decisions finding that federal agencies are bound by 401 conditions even if they exceed the scope of Section 401, EPA characterized it as a matter of "regulatory uncertainty" that it may clarify during EPA's upcoming rulemaking process to revise its Section 401 regulations. Finally, EPA takes the position that to evaluate a Section 401 application, a state need only the application materials submitted for the federal license, and a state should not wait for the federal agency's National Environmental Policy Act (NEPA) decision, which could result in delay or waiver of the state's 401 authority. EPA also clarified that while a state may request additional information from an applicant, an outstanding or unfulfilled additional information request does not toll the timeline for action on a Section 401 request.

While EPA's Updated Guidance does not impose legally binding requirements, it is intended to assist federal permitting agencies, states, and tribes until the EPA promulgates a final rule revising its Section 401 regulations. The Updated Guidance may have immediate impacts since the Federal Energy Regulatory Commission (FERC) is currently considering whether a number of states have waived their authority to issue Section 401 certifications on gas pipeline and hydropower projects by failing to act within a year. The Updated Guidance also states that EPA may consider adopting some elements of the Updated Guidance during its upcoming rulemaking to revise its Section 401 regulations. A proposed rule is expected to be released by August 8, 2019.

For more information on the Updated Guidance, see our [issue alert](#).

Upcoming Speaking Engagements

- [Sharon White](#), "PURPA and Intermittent Renewables: What recent developments mean for transmission and the power mix in the West as states transition to cleaner power," Law Seminars International: Electric Power in the Southwest conference, Santa Fe, NM, July 16, 2019.

FERC Update

FERC Commissioner Cheryl LaFleur has announced that she will depart FERC at the end of August. LaFleur was nominated by President Obama in 2010 and has served two four-year terms as a Commissioner. LaFleur's second term expired at the end of June 2019. She announced in January that she would not seek a third term as FERC Commissioner. LaFleur served as Acting FERC Chairman from November 2013 to July 2014 and January to August 2017 and as Chairman from July 2014 until April 2015.

LaFleur's departure will leave FERC with three sitting commissioners and is likely to restore a Republican majority among the FERC leadership. FERC is composed of up to five commissioners, and no more than three FERC commissioners may be from the same political party. Currently, there is a 2-2 split, with two Republican and two Democratic commissioners. The 2-2 split has affected the Commission's ability to act on certain policy initiatives and major project proposals. The Trump Administration has not yet announced nominees to replace LaFleur or Commissioner Kevin McIntyre, who passed away in January 2019.

CEQ Issues Draft Guidance on the Effects of Climate Change in NEPA Reviews

On June 21, 2019, the Council on Environmental Quality (CEQ) issued a draft [guidance document](#) to assist federal agencies in their consideration of greenhouse gas emissions (GHG) when evaluating proposed major infrastructure projects under NEPA. The draft guidance document, if finalized, would replace CEQ's final guidance issued in 2016 under the Obama administration, which was withdrawn for further consideration pursuant to President Trump's Executive Order 13783, issued on March 28, 2017.

The draft guidance document eases obligations on federal agencies to consider climate change impacts in NEPA analyses. For example, while the guidance recognizes that agencies may use their expertise to determine how and to what degree to analyze particular effects of a proposed action, the guidance clarifies that agencies "need not give greater consideration to potential effects from GHG emissions than to other potential effects on the human environment." Further, the draft guidance directs agencies to assess indirect effects of an action only when a "sufficiently close causal relationship exists between the proposed action and the effect." CEQ notes that a "but for" causal relationship is not sufficient for NEPA purposes. The draft guidance also indicates that agencies should attempt to quantify a proposed action's projected direct and reasonably foreseeable indirect GHG emissions when the amount of those emissions is substantial enough to warrant quantification and when it is practicable to quantify them using available data and GHG quantification tools. CEQ notes that agencies are not required to quantify effects where information necessary for quantification is unavailable, not of high quality, or the complexity of identifying emissions would make quantification overly speculative. Lastly, the draft guidance directs that an agency need not weigh the effects of the various alternatives under NEPA in a monetary cost-benefit analysis using "social cost of carbon" estimates, as recommended under the Obama guidance.

Although FERC generally follows CEQ rules in implementing NEPA, it has held that as an independent regulatory agency, it is not bound by CEQ regulations or decisions.

Comments on the draft guidance document are due by July 26, 2019.

EPA Repeals Clean Power Plan, Finalizes Affordable Clean Energy Rule

On June 19, 2019, the EPA finalized three separate and distinct rulemakings as part of the Affordable Clean Energy (ACE) rulemaking package. First, EPA finalized the repeal of the Obama administration's Clean Power Plan (CPP) on grounds that the CPP exceeded EPA's statutory authority under the Clean Air Act (CAA). Second, EPA promulgated the final ACE rule, which consists of new emission guidelines to inform states on the development and implementation of state plans that establish standards of performance for covered sources. Under the ACE rule, these standards of performance would only apply to certain existing coal-fired electric utility generating units. The ACE rule does not discuss hydropower or any other renewable energy sources. Third, EPA finalized regulations governing implementation of the ACE rule and any future emission guidelines issued under CAA Section 111(d).

For more information on these rulemakings, see our [issue alert](#).

Forest Service Publishes Proposed Rule Revising NEPA Regulations

On June 13, 2019, the U.S. Forest Service (USFS) published a [proposed rule](#) in the Federal Register to revise its NEPA regulations “with the goal of increasing efficiency of environmental analysis while meeting NEPA’s requirements.” In an effort to reduce redundant analyses of similar actions with similar impacts, the proposed rule outlines a process for determining whether an existing completed USFS NEPA analysis is sufficient to satisfy NEPA compliance for a subsequent proposed action, through issuance of a Determination of NEPA Adequacy. Modeled after a similar process already used by the Bureau of Land Management, the process would require consideration of: (1) the similarity between the proposed action and the previously analyzed proposed action; (2) whether the range of alternatives previously analyzed is adequate; (3) whether there are any significant new circumstances or information since the prior analysis; and (4) whether the effects of the new proposed action are similar to those analyzed in the prior NEPA document.

The proposed rule also contains new regulatory language providing that the proposed action and any alternatives may include “condition-based management,” defined as “a system of management practices based on implementation of specific design elements from a broader proposed action, where the design elements vary according to a range of on-the-ground conditions in order to meet intended outcomes.” Under the proposal, “[a] condition-based management alternative must clearly identify the management actions that will be undertaken, and any design elements that will be implemented, when a certain set or range of conditions are present.” Condition-based management is not a new management approach for the USFS, but the agency is proposing to codify the practice to provide for greater clarity and consistency, and to encourage its use.

Comments on the proposed rule are due by August 12, 2019.

[Sharon White](#) and [Robert Conrad](#) contributed to this issue.

For more information

The professionals at Van Ness Feldman possess decades of experience covering every aspect of hydroelectric development, ranging from licensing, environmental permitting, regulatory compliance, litigation, transmission and rates, public policy, transactions and land use planning. If you would like additional information on the issues touched upon in this newsletter, please contact any member of the firm’s [hydroelectric](#) practice.

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