

The Clean Water Act Section 401 Certification: A Review of Millennium Pipeline CO., L.L.C. v. SEGGOS

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ABSTRACT

State participation in the protection of water quality of the waters of the United States plays a key role in curtailing environmental issues. The Congress in Section 401 of the clean water act empowers the states to either approve or deny certification before Federal Energy Regulatory Commission grants a permit for a project that may affect the water quality or if states refuse to act within a period of one year, such authority to certify is waived. However, the section has become controversial because courts, through their decisions, has limited the authority of the states in deciding on a request for certification. Also, political administrations pass executive orders that limits the powers of the states in their decision making relating to section 401 certification. The basic challenge from court decisions and executive orders is the concept of time limit in which a state is required to decide upon a request for certification or it becomes a waiver on the part of the state, which actually runs contrary to the certification section.

Therefore, it falls on the congress to amend the section to resolve the ambiguities in the section for a better articulate participation in the protection of water quality and the environment. In the interim, the courts can, when faced with the issue, adopt an interpretation of what amounts to a waiver to better portray the true meaning of the certification section.

Keywords: Environmental issues; Articulate participation; Protection; Water quality

INTRODUCTION

The complexity of water related issues and regulations in the United States is such that it leaves one in the state of bewilderment. As there are other laws that relate to water in the United States, the Clean Water Act (CWA) is mostly the law that regulates Waters of the United States (WOTUS). Issues relating to water and the CWA raise many concerns such as the inconsistency between the CWA and other regulations like the Endangered Species Act (ESA). An example of this includes the controversy between sections 402(d) of the CWA and section 7 of the ESA on issue of obtaining approval for projects from state agencies (though has been judicial settled by the court). As much concern has been raised by the CWA and other regulations, the CWA itself is problematic including, but not limited to, a clear definition of the Waters of the United States (WOTUS), who regulates between activities of WOTUS between the federal and state government and under what circumstances. An in depth

reading of couple of sections of the CWA, will place one in awe as to the exact intentions of this law. However, the judiciary has played a vital role in interpreting these sections of the CWA and other regulations, not only to create a balance between CWA and other regulations, but also between different sections of the CWA for the effective enforcement and implementation of the CWA [1].

This piece will not be focused on the entirety of the clean water act, but on some parts of section 401 this law. In essence, this discussion aims to analyze the prospect of authority granted to states for certification under section 401 of the CWA. This will be in respect of the one-year mandatory timeline for states to either approve or deny certification or waive the right to do so. This provision will be examined in line with the decision of the court in the case of Millennium Pipeline CO., L.L.C. v. SEGGOS [2].

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Based on the decision of the court, the one-year timeline, as provided in the CWA, is such that it is mandatory that there would be no justification for a state to exceed that time limit when an application is made. Also, when a state fails to either to approve or deny certification within the one-year timeline, they have waived their right to issue such certification. The outcome of the waiver implies that the agency requesting such certification would move on with other processes required for its permit except the certification under section 401 of the CWA. This raises questions to be addressed as to the purpose behind the state certification as provided by the CWA, the aim for the one-year limit in the act and when it can be necessary to deem that the one-year timeline is elapsed or that the state has waived its right under the act [3].

LITERATURE REVIEW

Section 401 clean water act

Section 401 certification section provides: “Any applicant for federal license or permit to conduct any activity including but not limited to the construction or operation of facilities which may result in any discharge into navigable waters, shall provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate. If the State, interstate agency or administrator, as the case may be, fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after the receipt of such request, the certification requirements of this subsection shall be waived with respect to such federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the proceeding section...” (Emphasis added) [4].

As simple as the section appears, different interpretation or meaning can be read into the section. Nevertheless, one of the purpose of the section is to empower the states of the United States to participate in decision making relating to federal permits that affect water quality of the WOTUS within the boundaries of the states. States, in considering a request for certification, may grant, grant with conditions or deny any request. In reaching a decision on the request for certification, a state on whom a request is made has to review the effect of the project and its effect on the water quality standard according to the standard set by the state laws [5].

Despite the clear purpose of 401 certification section to allow state participation, the section has raised many concerns leading to court interpretation and executive orders by political administrations. The trump administration, for instance, issued an Executive Order (EO) following the court decision in the Hoopa Valley case. The goal of the EO was to “promote energy infrastructure and economic growth,” and “to create ‘increased regulatory certainty.”

The impact of the EO on the certification section are:

- On a request for certification, states are to constrain their review and decision on water quality only as it relates to point source discharge.

- Imposes states with a condition not to go beyond the scope of water quality concerns (e.g., not to consider environmental impact) when deciding.
- Requires states to decide within a reasonable period not exceeding upon the receipt of a request for certification.

However, the EO, was not welcomed by environmentalist leading to court challenges. The court in California vacated the EO and stating: “{t}he public interest as to clean water act, at bae, lies in preserving nature and avoiding irreparable harm to the environment.” Though decision of the court serves as a safeguard to the section enabling states to protect water quality and the environment, the decision of the court was put to a halt due to a stay issued by the supreme court. By indication, except the congress acts, this implies that the EO shall be in force until the court gives a final decision or another political administration changes the rules. Certification under Section 401 is a vital section as relates to water quality and environmental protection, however, different rule making and interpretations by political administrations and courts are such that calls for a review of the section to better serve the purpose of its enactment. An in depth review of Section 401 certification will be the focus especially as relates to the reasonable time not exceeding one year for a state to act or it be deemed as a waiver [6].

DISCUSSION

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Section 401 mandates state approval or denial of certification upon request for such or their authority to decide on certification will be waived for failure to act within a reasonable time, not exceeding one year. The court decision following this case interpreted the section to mean that a state before whom a request for certification lies, must decide within a reasonable time not exceeding one year, unless such authority to grant certification is waived. In this case, Millennium pipeline sought to extend an existing pipeline it had in Orange county, New York by applying for approval from the Federal Regulatory Energy Commission (FERC). Before such approval would be made by FERC, Millennium had to comply with environmental regulations such as the clean water act. In compliance, a request for certification was submitted to the New York State department of environmental conservation. The department did not grant or deny certification within a period of one year, but instead requested supplemental information [7].

Millennium pipeline relied on section 19(d)(2) of the natural gas Act in bringing a petition to the court on the ground that the department had waived its authority under the CWA for not being able to decide within one year. The court dismissed the petition to review as in the opinion of the court, there is no action to review. The court analysis for the petition to review “if the clean water act’s requirement is waived, there is nothing left for this court to do. Under the natural gas act, if a reviewing court finds that an agency has unlawfully delayed, the court ‘shall remand the proceeding to the agency to take appropriate action consistent with the order of the court’ and ‘shall set a reasonable schedule and deadline for the agency to act on the

remand.’ If we were to determine the department exceeded the clean water act’s deadline, we necessarily would conclude the clean water act have been waived. At that point, the department’s decision to grant or deny would have no legal significance.”

The court decided that the department has waived the authority certify based on waiver, Millennium pipeline require nothing more than apply to FERC and show evidence of waiver [8].

By this decision, the court made clear that upon the expiration of one year from the time a request for certification is made and no decision is made by the state, the state has automatically waived its authority to approve or deny certification. Also, the company requesting certification need not do anything further than to apply directly to FERC for a permit or license showing evidence that the state has waived its authority. With due respect to the judgment of the court, this decision runs contrary to the provisions of Section 401 CWA. The involvement of states by Section 401 in deciding on projects affecting water quality of WOTUS is to protect for environmental purpose local projects that may unnecessarily gain federal approval. If the strict rule of a one-year time limit for review applies in all circumstances, even in response to an incomplete application and a state requests supplemental information, then the purpose of the section would be defeated. Applying the one-year rule in all circumstances, may lead to absurdity including: States denying request for certification rather than request for supplemental information if an application for request is incomplete or approval of a request for certification without a proper review, especially if it is an incomplete application. On the other hand, the court decision may serve as leeway for companies requesting certification to avoid states’ certification. Submission of an incomplete request for certification may call for a state to either deny or make request for additional information; in the later situation, the company may delay responding to the request so that it may amount to a waiver on the part of the state. Yet, any decision by the state in these circumstances may likely be of adverse consequence to wit: A denial because of an incomplete application may serve to block to a project that may serve as a means of development and sustainability and a waiver may be a pathway for companies to hide under the veil of federal license as a validation for violating water quality standards [9].

A holistic reading of the 401-certification section indicates some ambiguities in the section; however, the court in Millennium v. SEGGOS has not clarified these ambiguities. Nevertheless, as it relates to the one-year period for a state to act before it amounts to waiver, the words of the section are clear and the court should have accorded them their ordinary meaning. It is unfortunate that in the instant case, that the court interpreted the waiver part of the section to be dependent on approval or denial of a request for certification. An excerpt of the section reads “if [a] 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 (Emphasis added). The portion of the section is a complete and independent sentence of itself and

should be accorded its meaning in order to represent the intent of the section. The key word in the sentence is “act.” This, the court omitted to recognize when reaching its decision. The section demands a state to “act” within a reasonable time not exceeding one year upon the receipt of a request for certification. The meaning of the word act is defined as the process off doing or performing something. The section does not compel an outcome or a decision within a year but only requires a state to act within a year. The following sentence in the section went further to explain more – “[n] license or permit shall be granted until the certification is required by this section has been obtained or has been waived as provided in the preceding sentence.” (Emphasis added). Therefore, the section states what it means and means what it states as to what qualifies as a waiver. Also, a good read into the section reveals that the section is silent on whether a decision should be handed down within one year of such request for certification. Consequently, a state before whom a request for certification is made, would be assumed to have reasonably acted or is acting on a request for certification in accordance with the provision of the section if the state reviews a certification request and ask for further information from the requesting company once this is done within a reasonable period not exceeding one year. Nevertheless, this is not the only way in which a state can act upon the receipt of a request. What the section obliges is that a state acts, put in another way, do, or perform something on the receipt of a request for certification. The case of North Carolina department of environmental quality v. Federal energy regulatory commission explains the purport of Section 401 CWA. Though this explanation of the court does not form part of the judgement of the court in that case, it is worth adopting by courts when sought with issues of waiver arising from Section 401 CWA.

“Section 401 requires the state agency to certify or deny compliance with water quality standards. The waiver portion of the statute, however, uses a different verb and provides that a state waives its certification authority if it ‘fails or refuses to act on a request for certification’ within a year. If the congress had intended for states to take final action on Section 401 application within a year of filing, the statute could have made that that clear by providing that waiver occurs if the agency ‘fails to certify or deny compliance with water quality standards within one year.’ Since congress instead hinged the waiver on the agency failure ‘to act’ on a certification request, traditional rules of statutory construction would generally require us to interpret ‘acting on a certification request’ as meaning something other than certifying or denying compliance with water quality standards. If this reading of the statute is correct, a state will not waive its certification authority if it takes significant and meaningful action on a certification request within a year of its filing, even if the state does not finally grant or deny certification within that year. Such a reading of the statute would be consistent with the legislative history of the amendment to 401 that added the waiver provision, which indicates that the review was added to prevent states effectively vetoing federal projects by taking no action on 401 applications.”

CONCLUSION

Section 401 certification is a vital and indispensable section as it tends to secure water quality of WOTUS and reduces environmental hazards. However, the section has been susceptible to political administrations modification through executive orders that limit the applicability of the section than was intended by congress. As well, the court performs its roles in interpreting the section. However, the question of what can amount to a waiver as stipulated by the section has not walked its way through the doors of the court. Therefore, the existing precedence of a state not certifying or denying a request for certification within a period of one year or loses its authority to certify or deny still remains applicable. This defeats the purpose of the certification section. For a way forward, the courts can only stand a chance to revise its decision if a question of what constitutes a waiver arises before it. But, for how long will it take for the question to arise before the court? This may be a drawback on the court. explicitly, it behooves on the congress to amend the section for more clarity and for the section to serve the actual purpose it was enactment was intended. Nevertheless, even if the court encounters the opportunity to interpret what amounts to a waiver in the section, there is still need for the congress to amend the section. This is because, states could take leverage on that to not to decide on a request for certification within a reasonable time thereby having a counterintuitive effect of the section. Precisely what the court aims to prevent by determining waiver occurs at the expiration of one year from the time of request if a state does not grant or deny certification.

Additionally, congress can holistically amend the section to also address other related issues like point source and nonpoint source discharge arising from the section.

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