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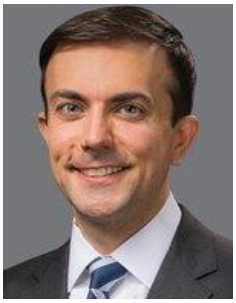
Clean Water Act Ruling Could Obstruct Future Permitting

By **David Fotouhi** (March 1, 2021, 4:31 PM EST)



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On Feb. 16, U.S. District Judge Patrick J. Schiltz of the U.S. District Court for the District of Minnesota held, in Fond du Lac Band of Lake Superior Chippewa v. Thiede, that the U.S. Environmental Protection Agency must review applications for federally licensed or permitted discharges and corresponding certifications issued under Clean Water Act Section 401(a)(2),[1] to determine whether "such a discharge may affect … the quality of the waters of any other state."[2]

The court rejected the EPA's arguments that such findings were wholly discretionary and, even if required, not subject to judicial review.

If this decision is affirmed on appeal, or if the EPA adopts its reasoning, then applicants for federal licenses or permits that may result in a discharge into waters of the U.S. — thus requiring a certification under CWA Section 401 — may see additional delays in the federal permitting process, including additional public hearings, and an uptick in licenses or permits that are denied or issued with conditions designed to ensure compliance with applicable water quality requirements.

Background

Under Section 401, a federal agency may not issue a license or permit for an activity that may result in a discharge into waters of the U.S. unless the appropriate authority — often a state or tribe — provides a Section 401 certification, or waives its ability to do so.[3]

A certifying authority may either grant, grant with conditions, deny or waive certification under Section 401.[4] The certifying authority determines whether the potential discharge from the proposed activity will comply with the applicable provisions of CWA Sections 301, 302, 303, 306 and 307, and any other appropriate requirement of state law.[5]

Certifying authorities shall also add to a certification any effluent limitations and other limitations, and monitoring requirements necessary to assure compliance, and these additional provisions must become conditions of the federal license or permit.[6]

Federal licenses or permits potentially subject to Section 401 certification include certain CWA Section 402 permits, in states in which the EPA administers the program; CWA Section 404 and Rivers and Harbors Act Sections 9 and 10 permits issued by the U.S. Army Corps of Engineers; bridge permits issued

by the U.S. Coast Guard; and hydropower and pipeline licenses issued by the Federal Energy Regulatory Commission.[7]

Subsection 401(a)(2) provides that a federal licensing or permitting agency must notify the EPA of its receipt of an application and certification. "Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State," the EPA must notify the other state, the licensing or permitting agency, and the applicant within 30 days.[8]

If the other state determines that such discharge will violate any water quality requirements, it has 60 days to notify the EPA and the licensing or permitting agency of its objection and request a public hearing, at which the EPA must provide an evaluation of the objection and its recommendations.[9] The licensing or permitting agency must either condition the license or permit to ensure compliance with applicable water quality requirements based on the information presented at the hearing, or deny the license or permit.[10]

The EPA's Interpretation

In the matter before Judge Schiltz, the EPA did not provide notification under Section 401(a)(2) to downstream states or tribes upon receiving an application for a Section 404 permit and Section 401 certification for a copper-nickel-platinum mining project in Minnesota.

The agency's long-standing interpretation of this provision, as articulated in the preamble to its recent update of the implementing regulations for Section 401, is that "[b]ecause the EPA's duty to notify is triggered only when the EPA has made a determination that a discharge 'may affect' a downstream State or Tribe, the section 401(a)(2) notification requirement is contingent."[11]

Thus, "[i]t is not a duty that applies to the EPA with respect to all certifications, rather it applies where — exercising its discretion — the EPA has determined that the certified discharge 'may affect' a neighboring jurisdiction's waters."[12]

In other words, the EPA has taken the view that, although a licensing or permitting agency must provide it with every application and certification submitted, its review of those materials and subsequent "may affect" determinations fall entirely within its discretion. The agency does not make an up-or-down determination in each instance; rather, it makes either a "may affect" finding wholly within its discretion — which triggers downstream notification — or no finding at all.

And the EPA's position is that its decision to make a "may affect" finding or no finding at all is committed to agency discretion by law — and therefore not judicially reviewable. In this case, the Fond du Lac Band viewed the agency's failure to provide it with downstream notification as a failure to make a "may affect" finding, which it argued was subject to judicial review, and erroneous under the CWA and the Administrative Procedure Act.

The District Court's Decision

In its partial denial of the EPA's motion to dismiss, Judge Schiltz held that Section 401(a)(2) imposes a duty on the EPA to make a "may affect" finding, and that its decision whether a discharge may affect a downstream state or tribe is judicially reviewable.

After acknowledging that the legal question presented a "difficult issue" without "any [prior] judicial

decisions addressing it,"[13] the district court distinguished other statutory provisions with broad language similar to "whenever" in Section 401(a)(2) that courts have held grant an agency "discretion to choose whether to make a determination or finding."[14]

Because "whenever" in this context "refers to a specific decision that must be made within a specific timeframe" — i.e., 30 days after receiving notice of the application and certification from the licensing or permitting agency — this language imposes a duty on the EPA to make a finding one way or the other for each application and certification.[15]

The court went on to conclude that the EPA's determination was not committed to agency discretion by law, and thus was subject to judicial review, because Section 401(a)(2) "refers to whether the discharge may violate the water-quality standards of another state" and therefore provided a "meaningful standard against which to judge the agency's exercise of discretion."[16]

Implications

The court's interpretation, if affirmed on appeal by the U.S. Court of Appeals for the Eighth Circuit or adopted by the EPA, could affect many applicants of federal licenses and permits. In the past, the EPA has provided downstream notification for a fraction of the applications and certifications that it receives, and it has generally not provided a record basis or otherwise explained its decisions for not making "may affect" findings.

Requiring such a determination in each instance may increase the number of positive "may affect" findings made by the EPA, thus triggering the additional procedural requirements of Section 401(a)(2), and potentially resulting in an increase in the scope, stringency and number of conditions included in a federal license or permit.

The court's decision that "may affect" findings are judicially reviewable could lead to more litigation by citizens groups when EPA makes no "may affect" findings, potentially slowing the permitting process further.

Alternatively, for certain projects, the court's interpretation may result in more permit or license applications that are denied by the licensing or permitting agency based on an inability to condition the license or permit adequately to address the downstream state's or tribe's objection, the EPA's recommendations, or the other information raised at the public hearing.

As the legal and regulatory landscape related to Section 401 continues to evolve, project proponents should monitor developments in the courts and federal agencies closely.

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Disclosure: The litigation that is the subject of this article was under the author's supervision when he served as the EPA's acting general counsel.

[1] 33 USC 1341(a)(2).

[2] Fond du Lac Band of Lake Superior Chippewa v. Thiede, No. 19-cv-2489 (D. Minn. Feb. 16, 2021).

[3] 33 USC 1341(a)(1).

[4] Id.

[5] Id. at 1341(a)(1); (d).

[6] Id. at 1341(d).

[7] EPA, "Clean Water Act Section 401 Certification Rule," 85 Fed. Reg. 42,210, 42,217 (July 13, 2020).

[8] 33 USC 1341(a)(2).

[9] Id.

[10] Id.

[11] 85 Fed. Reg. at 42,274.

[12] Id.

[13] Fond du Lac Band, slip op. at 19.

[14] Id. at 20.

[15] Id. at 21.

[16] Id. at 27-31.