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Spring Cleaning: Trump Administration Announces Further Changes to Clean Water Act Regulation

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On April 10, 2019, President Trump issued a pair of Executive Orders aimed at streamlining Clean Water Act permitting of the nation's energy infrastructure. The Executive Order on Promoting Energy Infrastructure and Economic Growth instructs EPA to review and update rules and guidance on water quality certifications under Section 401 of the Clean Water Act. Section 401 authorizes states and tribes to play a direct role in federal permitting to ensure compliance with state water quality standards, even authorizing states to deny certification for an otherwise duly issued federal permit (for example, a Section 404 dredge and fill permit). The Executive Order notes that outdated Section 401 federal guidance and regulations "are causing confusion and uncertainty and are hindering the development of energy infrastructure." As a result, the Executive Order likely foreshadows a narrowing of the 401 review scope through new guidance and likely a new rulemaking(s). This most recent Executive Order comes amidst other significant changes to Clean Water Act regulation, including a revised definition of "waters of the United States" and ongoing litigation and agency interpretations surrounding federal jurisdiction over groundwater. It will be critical for all industries that rely on federal Clean Water Act permits (especially the energy sector) to participate and to comment on potential changes to the 401 certification program.

Section 401 Certification and Energy Projects

The two most notable Clean Water Act programs affected by Section 401 are the Section 402 National Pollution Discharge Elimination System and the Section 404 dredge and fill program. For instance, applicants for a Section 404 permit from the U.S. Army Corps of Engineers to discharge dredge or fill materials into waters of the United States are required to obtain a Section 401 water quality certification from the state in which the discharge originates. This requirement even applies to projects being permitted under the Section 404 nationwide permitting program (*see* NWP general conditions 25 and 27). This means that states can and often do further condition or even deny certification for federal permits required for pipelines, roads, pads, and other energy-related projects. In recent years, states have used Section 401 to either delay or block interstate energy infrastructure, including a gas pipeline in New York and a coal export terminal in Washington state.

What does the Executive Order do?

The Order requires EPA to begin a comprehensive review of the Section 401 program. First, EPA must review existing interim guidance from 2010 (entitled “Clean Water Action Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes”) and issue new guidance within 60 days. Among other things, the review will focus on federal-state cooperation, types of conditions appropriate to include in a certification, and the scope and timing of certifications. Once guidance is finalized, EPA is required to propose new regulations implementing Section 401 of the Clean Water Act that will be finalized no later than next year. Finally, federal agencies affected by the certification process in Section 401 are required to participate in an interagency review and update their rules and guidance.

The Holland & Hart Water Quality Team is staying up to date on these fast-moving developments and would be happy to assist you or your company with any questions you might have regarding how the changes may affect existing or planned projects.

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