

From the States of New York, California, Colorado, Connecticut, Maine, Maryland, Minnesota, New Jersey, North Carolina, Rhode Island, Vermont, and Washington, and the Commonwealths of Massachusetts, and Virginia

April 25, 2019

Hon. R.D. James
Assistant Secretary of the Army
Civil Works
Department of the Army
108 Army Pentagon
Washington DC 20310-0108

Re: Regulatory Policy Directives Memorandum on Timeframe for Clean Water Act Section 401 Water Quality Certifications

Dear Assistant Secretary James:

We write to express our concerns regarding the “Regulatory Policy Directives Memorandum” (“Directive”), dated December 13, 2018, that you sent to the Chief of Engineers of the United States Army Corps of Engineers (Army Corps) on, among other things, the timeframe for state review of applications for water quality certifications under Clean Water Act section 401.¹ In that Directive, you “emphasize[d]” that Army Corps regulations give a state “sixty (60) days to act on a request for a Section 401 water quality certification upon *receipt* of such request” unless unspecified “special circumstances” warrant more time. Your effort to limit to sixty days the period for a state to review and make a decision on most section 401 applications is impracticable, violates the language and intent of section 401 of the Clean Water Act, and is inconsistent with Army Corps regulations. If implemented, the Directive would infringe on state authority over state water quality and impermissibly undermine the cooperative federalism system established by the Clean Water Act. In addition, the Army Corps’ failure to provide the public with notice and an opportunity to comment on the Directive or its follow-on implementation would violate the public notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*

I. Limiting States to Sixty Days for Review of Most Section 401 Applications Infringes on States’ Rights to Protect the Quality of Their Waters under the Clean Water Act and Upends the Clean Water Act’s System of Cooperative Federalism

Limiting state agency review of most section 401 applications to sixty days undermines an important Congressional policy of the Clean Water Act to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” of

¹ 33 U.S.C. § 1341.

waters within their borders.² “State certifications under § 401 are essential to the scheme to preserve state authority to address the broad range of pollution” under the Clean Water Act.³ Thus, the section 401 certification process is “[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them” under the Clean Water Act.⁴ Congress gave states a reasonable period, of up to one year, to exercise that broad authority.⁵

The default sixty-day limit required by the Directive is *per se* unreasonable. Meaningful review of section 401 applications, including public notice and opportunity to comment, takes time, and limiting a state to sixty days would prevent it from making informed decisions on federal projects that affect state water quality. Moreover, a state’s review time is not entirely within the state’s control. An applicant may submit inadequate information in support of its application and then delay in responding to requests for additional relevant information, causing corresponding delays in the state process.⁶ In some cases, states must await completion of federal and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications.⁷ Accordingly, informed decision-making on section 401 applications for even minor projects can take more than sixty days. By limiting a state agency to a drastically shorter period of time than is permitted in the statute, the Army Corps would exceed its authority under the Clean Water Act.⁸

The unreasonableness of the sixty-day period for state decision-making is not cured by the possibility of obtaining an extension from the relevant Army Corps District Engineer. Section 401 provides for independent state review of a project’s water quality impacts.⁹ It is not up to an Army Corps District Engineer to determine the proper scope of a state agency’s water quality

² *Id.* § 1251(b); *see also id.* § 1370 (preserving states’ right to adopt or enforce water quality protections more stringent than federal standards).

³ *S.D. Warren Co. v. Maine Bd. of Env’tl. Protection*, 547 U.S. 370, 386 (2006).

⁴ *Keating v. Federal Energy Regulatory Comm’n*, 927 F.2d 616, 622 (D.C. Cir. 1991).

⁵ 33 U.S.C. § 1341(a)(1).

⁶ *See, e.g., Constitution Pipeline Co., LLC v. N.Y. State Dep’t of Env’tl Conservation*, 868 F.3d 87, 103 (2d Cir. 2017) (“*Constitution Pipeline*”) (applicant “persistently refused” to provide relevant information that state agency had repeatedly requested).

⁷ *See, e.g.,* 15 U.S.C. § 717n(b) (Natural Gas Act designates FERC as lead agency for environmental review); 23 Cal. Code of Regulations (C.C.R.) §§ 3836(c), 3837(b)(2) (projects subject to section 401 water quality certification must be reviewed under the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., as appropriate, before approval by the State Water Resources Control Board or the Regional Water Quality Control Boards).

⁸ *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear” an administrative agency “must give effect” to that intent).

⁹ *See Constitution Pipeline*, 868 F.3d at 104.

certification review by setting time limits on state action.¹⁰ Only where a state agency has failed to act on a specific application within the one-year limit established by section 401 or, based on the specific circumstances, failed to act in a “reasonable” period of time, may the Army Corps then determine that the state has waived its certification authority.¹¹ The Directive’s default time period for the state action on certification applications is inconsistent with the express language of section 401, and undermines the Clean Water Act’s objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251(a).

II. In Many Cases, States Cannot Comply with Public Notice and Comment Requirements of Section 401 and State Administrative Procedures in Sixty Days

As a practical matter, limiting States to sixty days for review of most section 401 applications would make compliance with section 401’s public notice requirements and state administrative procedures virtually impossible in many cases. Section 401(a)(1) requires that a state “establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.”¹² States have established procedures by way of statute, regulation, policy, or a combination thereof to meet the public notice and hearing requirements of section 401.¹³ A state must not only establish such procedures, it must comply with them.¹⁴ In particular, a state agency must comply with its own procedural rules and substantive standards when determining whether to issue, condition, or deny a section 401 certification.¹⁵

¹⁰ See generally *S.D. Warren Co. v. Maine Bd. of Env’tl. Protection*, 547 U.S. at 380 (impacts to state water quality from federally-regulated projects “fall within a State’s legitimate legislative business, and the Clean Water Act provides for a system that respects the States’ concerns”); *Am. Rivers, Inc. v. Federal Energy Regulatory Comm’n*, 129 F.3d 99, 108-109 (2d Cir. 1997) (holding that FERC does not have authority to second-guess state decision-making under section 401).

¹¹ See *Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017) (holding that once state agency “has delayed for more than year” an applicant’s remedy is to “present evidence of waiver” to relevant federal agency).

¹² 33 U.S.C. § 1341(a)(1).

¹³ *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl Prot. et al*, 903 F.3d 65, 75 (3d Cir. 2018) (Clean Water Act section 401 provides States with discretion as to how they establish public notice and/or hearing procedures).

¹⁴ See *City of Tacoma, Wa. v. Fed. Energy Regulatory Comm’n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006).

¹⁵ *Id.* at 68; see also *Berkshire Env’tl Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 112-13 (1st Cir. 2017) (Clean Water Act section 401 does not affect how agency conducts “internal decision-making before action”); Col. Rev. Statutes (C.R.S.) § 24-4-106(7) (setting forth the standard for judicial review of agency actions).

States have enacted a variety of procedures to implement section 401's public notice and hearing requirements, and their processes share certain features.¹⁶ Before public notice can be given, states must ensure that the section 401 application includes sufficient information for meaningful public review, which may require obtaining more information from the applicant.¹⁷ Public notice often must be accomplished through publication in one or more local newspapers as well as in official agency publications, a process which by itself can take a number of weeks.¹⁸ Public notice is almost always followed by a public comment period, ranging from fifteen to forty-five days.¹⁹ States regularly provide extensions of public comment periods for significant projects.²⁰ The period of public participation may be further extended in situations where states receive requests for a public hearing.²¹ Once the public comment and any public hearing is complete, the state agency must review and, in many cases, respond to the public comments received before making a determination.²² Some states also have procedures

¹⁶ See, e.g., 314 Code of Massachusetts Regulations (C.M.R.) § 9.05(3); 6 New York Code of Rules and Regulations (N.Y.C.R.R.) § 621.7(a)(2), (g); 15A North Carolina Administrative Code (N.C.A.C.) § 02H.0503; 250 Rhode Island Code of Regulations (R.I.C.R.) § 150-05-1.17; Vermont Admin. Code (Vt. A.C.) § 16-3-301:13.11; 23 C.C.R. §§ 3855-3861.

¹⁷ See, e.g., N.Y. Environmental Conservation Law § 70-0109(2)(a); see also 310 C.M.R. § 4.10(8)(g)3.a.-b.; 314 C.M.R. § 9.05(1); 6 N.Y.C.R.R. § 621.7(a), (f); 250 R.I.C.R. § 150-05-1.17(B), (D); Vt. A.C. § 16-3-301:13.3(c)(3).

¹⁸ See, e.g., 6 N.Y.C.R.R. § 621.7(a)(2), (c); 15A N.C.A.C. § 02H.0503(a); 250 R.I.C.R. § 150-05-1.17 (D)(1)(a); 9 Va. Admin. Code (V.A.C.) § 25-210-140(A).

¹⁹ See, e.g., 5 Col. Code of Regulations § 1002-82.5(B)(1) (30 days); Conn. Gen. Statutes Ann. § 22a-6h(a) (30 days); 314 C.M.R. § 9.05(3)(e) (21 days); 6 N.Y.C.R.R. § 621.7(b)(6) (15 to 45 days); 250 R.I.C.R. § 150-05-1.17(D)(2) (30 days); Va. Code § 62.1-33.15:20(C) (45 days for state agencies to provide comment); 9 V.A.C. § 25-210-140(B) (30 days for public comment); Vt. A.C. §§ 16-3-301:13.3(c), 13.11(c) (30 days); 23 C.C.R. § 3858(a) (at least 21 days).

²⁰ See, e.g., Ca. State Water Resources Control Bd., Draft Water Quality Certification Comment Deadline Extended for Application of Southern California Edison Co. (Sept. 27, 2018), *available at*

https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/big_creek/docs/final_bc_ceqa_draft_cert_notice_extended.pdf; N.Y. Dep't of Env't'l Conservation, Notice of Supplemental Public Comment Hearing and Extension of Public Comments on Application of Transcontinental Gas Pipe Line Company, LLC (Feb. 13, 2019), *available at* https://www.dec.ny.gov/enb/20190213_not2.html;

²¹ See, e.g., 250 R.I.C.R. § 150-05-1.17(D)(3) (providing for a mandatory public hearing if enough requests are received, notice of which must be provided fourteen days prior to date of hearing); 15A N.C.A.C. §§ 02H.0503(d), 0504 (notice of public hearing must be given thirty days prior to date of hearing, and record of public hearing must be held open for thirty days after the date of hearing); Vt. A.C. § 16-3-301:13.3(g), (h) (public hearing may be requested during public comment period, and notice of public hearing must be given thirty days before date of hearing).

²² See, e.g., 310 C.M.R. § 4.10(8)(g)3.b.; 205 R.I.C.R. § 150-05-1.17(D)(4).

providing for administrative review of an agency determination on a section 401 certification application, including a hearing, before that determination is deemed final.²³

Limiting a state to sixty days for review of section 401 applications is incompatible with the public notice and hearing requirements of section 401 and corresponding state laws. In many cases, sixty days is simply not enough time for a state to (1) review the application materials to determine their sufficiency, (2) obtain necessary additional information, (3) publish the application for public notice and comment for the required period of time, (4) review and respond to the public comments received, and (5) complete any necessary administrative review process. If limited to sixty days, states would frequently be unable to comply with state law or conduct any meaningful review of section 401 certification applications in many cases, which would result in the unnecessary denial of many section 401 applications, further delays in the administrative process, and related litigation regarding these issues.

III. The Directive Conflicts with Army Corps Regulations Providing that the Waiver Period Does Not Start Until a “Valid Application” Has Been Received by the State Agency

An agency is bound to follow its own rules until they are revoked or amended.²⁴ The Directive ignores the plain language of Army Corps regulations by providing that states must act with sixty days of receipt of *any* request for a water quality certification, even if accompanied by inadequate supporting materials.²⁵ Army Corps regulations provide that “[i]n determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a *valid* request for certification.”²⁶ When promulgating this regulation, the Army Corps noted that “valid requests for certification must be made in accordance with State laws[.]”²⁷ That regulation, the U.S. Court of Appeals for the Fourth Circuit has held, “is permissible in light of the statutory text and is reasonable.”²⁸

Accordingly, under Army Corps’ regulations the length of the waiver period must be measured from the date a state agency receives a request that is considered “valid” under state laws. For many states, such validity requires a complete application that can then be put out for

²³ See, e.g., C.R.S. § 25-8-302(1)(f); 5 Col. Code of Regulations § 1002-21.4(A)(2)(d); 314 C.M.R. § 9.10(1); 23 C.C.R. §§ 3867-3869; see also *Berkshire Env’tl Action Team, Inc.*, 851 F.3d at 111-12 (holding that a certification undergoing administrative appeal under Massachusetts law is not a final agency action).

²⁴ See *National Family Planning and Reproductive Health Ass’n. Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) (“*National Family Planning*”).

²⁵ Directive at 4.

²⁶ 33 C.F.R. § 325.2(b)(1)(ii) (emphasis added).

²⁷ *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986).

²⁸ *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009).

public review and comment.²⁹ Indeed, in order for the public to have a meaningful opportunity to review and provide comment on an application, it must be administratively complete.³⁰ The Directive's assertion that states cannot obtain more time for review even when "they do not have enough information to proceed" directly conflicts with the regulatory requirement that the waiver period does not start until receipt of a valid (*i.e.*, complete) application.³¹

IV. The Directive Has the Effect of a Rule of General Applicability and Must Meet Notice and Comment Requirements under the Administrative Procedure Act

As discussed above, the Directive conflicts with existing Army Corps regulations on section 401 certification waivers³² by requiring states to act within sixty days of a certification application regardless of whether the application is considered "valid" under applicable state laws.³³ Moreover, the Directive unequivocally directs implementation of these substantive modifications, notwithstanding the Army Corps regulations.³⁴ Because the Directive seeks to effectuate changes in administrative rules of general applicability, the Army Corps must comply with the notice and comment requirements of the Administrative Procedure Act.³⁵ Implementation by the Army Corps of these regulatory changes without complying with notice and comment requirements will constitute violation of the Act.³⁶

For all of these reasons, we respectfully ask that you withdraw that aspect of the Directive that limits the review period for section 401 certifications to sixty days and requires the Chief of Engineers to issue guidance implementing the Directive. If the Army Corps proceeds, we will consider taking all appropriate legal action.

²⁹ See, e.g., N.Y. Environmental Conservation Law § 70-0109(2)(a); see also 310 C.M.R. § 4.10(8)g.3.; 314 C.M.R. § 9.05(1); 6 N.Y.C.R.R. § 621.7(a), (f); 250 R.I.C.R. § 150-05-1.17(B), (D).

³⁰ See, e.g., *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D.W.Va. 2010) (noting that "[c]ompletion and public notice are inextricably linked" and rejecting public notice and comment process undertaken on incomplete application).

³¹ Even measured from the receipt of a valid and complete application, the sixty-day waiver period will often be unreasonable given the timeframe required for public review, comment, and administrative appeal, as described in Point II, *supra*.

³² 33 C.F.R. § 325.2(b)(1)(ii).

³³ Directive at 4.

³⁴ 5 U.S.C. § 553 (b).

³⁵ Directive at 3-4.

³⁶ See *National Family Planning*, 979 F.2d at 235-240 (Department of Health and Human Services' directives that ran counter to prior agency regulations were a substantive change to regulations and were therefore subject to the Administrative Procedure Act's notice and comment requirements).

Sincerely,

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