WESTERN STATES WATER COUNCIL

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August 14, 2018

The Honorable Lisa Murkowski, Chairwoman
Energy and Natural Resources Committee
United States Senate
304 Dirksen Senate Building
Washington, DC 20510

The Honorable Maria Cantwell, Ranking Member
Energy and Natural Resources Committee
United States Senate
304 Dirksen Senate Building
Washington, DC 20510

The Honorable John Barrasso, Chairman
Environment and Public Works Committee
United States Senate
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper, Ranking Member
Environment and Public Works Committee
United States Senate
456 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairs and Ranking Members:

The Western States Water Council, a government entity advising western governors on water policy issues, supports collaboration and leadership at all government levels – federal, state, tribal, and local – and the private sector – to address the Nation's infrastructure needs and establish water infrastructure improvements as a public policy priority. The Council has supported federal investments in water-related infrastructure projects and programs, and called on the Congress and the Administration to continue to work together and with States to streamline permitting processes and coordinate environmental and other regulatory reviews to eliminate duplicative procedures, reduce costs of compliance and construction, and ensure timely completion, maintenance, or relicensing of authorized infrastructure projects so vital to the West and the Nation. Clean Water Act Section 401 State Water Quality Certification alone is not usually an obstacle in itself to timely federal licensing and permitting.

It should be noted that the Council has been a continuous advocate for the rights of States to conserve and protect their water resources, a primary responsibility often cited in state constitutions. States and federal agencies strive to work in concert as co-regulators to achieve water quality goals. The Clean Water Act (CWA) clearly recognizes the important role of the States. Section 101(b) declares: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution;" and Section 101(g) adds that the authority of the States to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act…."

Section 401 requires: "Any applicant for a 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 the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate…that any such discharge will comply with the applicable provisions…" of various CWA sections. This state water quality certification authority is a vital component of our federalist system for

protecting water resources, and any conditions deemed necessary by the States to ensure compliance are a mandatory addition to any federal license or permit.

In 2014, in response to criticism of States' actions under Section 401, including claims of unnecessary project delays, primarily as related to development of hydropower, the Council surveyed its membership to get a regional perspective on the certification process. Fifteen of our eighteen-member states responded and a summary is attached. The following are some of the highlights:

- *Provided that applications are complete and ancillary federal activities are complete or nearly complete (e.g. public notice, study requirements, a complete EIS, mitigation requirements, etc.), 401 certification is not usually an obstacle to timely federal licensing and permitting.*
- *401 certifications related to CWA Section 404 permitting dominate the number of requests. Many times certification requests are filed before the Corps has completed their assessment. Also, it is not uncommon for 404 permitting applications to be elevated to Corps/EPA Headquarters for consideration.*
- *States and the U.S. Army Corps of Engineers collaborate to expedite the process, but projects requiring an individual 404 permit can be time consuming.*
- *CWA 401 certifications are also used to inform state 402 NPDES permits issued by states.*
- *Hydropower permitting-related requests vary with hardly any in Plains States, few in the Rocky Mountain States, while West Coast States face more permitting and 401 certification requests.*
- *The complexity and long duration of the FERC licensing and relicensing process is a major contributing factor in those States with related 401 certification requests pending. FERC's Integrated Licensing Process (ILP) takes a minimum of five years to complete.*
- *All States act on 401 certification requests within the one-year period allowed by the CWA. The majority of requests, on average, are processed within 40-90 days, some in a couple of weeks.*
- *States report certification applications filed with missing signatures, illegible maps, and/or lacking required documents such as a CWA Section 404 application.*
- *Certifications may also be held up by the applicant not responding to States' requests for additional information or failing to comment on proposed project conditions. Often substantive details of the proposed action change, requiring further review.*
- *States generally have a process and rules outlining a formal timetable or goal for action, but where there is not, every effort is made to issue the certification or a waiver in a timely manner.*
- *The vast majority of states have no backlog of certification actions, but a few do. Delays are typically due to submission of an incomplete application, completion of study requirements, and constraints on state resources, including staff limitations and turnover.*
- *States have undertaken various process improvements, including coordinating state and federal environmental reviews, some through formal memoranda of understanding.*
- *Many States provide information in advance to assist applicants in navigating the 401 certification process, including online resources.*
- *Most states do not anticipate a significant increase in 401 certification requests. Some do. Some states have actually seen significant declines in requests. Again, most requests appear to be related to 404 permitting, which in turn increases with general economic conditions and related construction starts, oil and gas development, etc.*

The 401 certification process is an important tool for States to fulfill their responsibilities to conserve and protect their water resources, and States are responsibly acting to execute their delegated authority in a timely manner. Ensuring federally permitted projects comply with state water quality standards is a proven process. Resources should be focused on reforming, streamlining, and expediting time consuming and costly federal requirements – such as the 404 permitting process. The Administration's efforts in consultation with the States to refine the definition of and jurisdiction over Waters of the United States holds greater promise of simplifying and expediting infrastructure project approvals.

We look forward to working with the Administration and the Congress to appropriately remove obstacles to timely action on infrastructure projects.

Sincerely,

Tony Willardson, Executive Director
Western States Water Council

Attachment

WESTERN STATES WATER COUNCIL

Summary of State Responses

Clean Water Act Section 401 Water Quality Certification Activities

April 2014

The Council surveyed its 18 member states. Responses have not yet been received from Nebraska, North Dakota and Washington.

Hydropower permitting-related requests vary widely by state as might be expected, with little or no hydropower development and related 401 certification requirements in most Plains States. Even in the Rocky Mountains there appear to be relatively few active requests. West Coast States have more certification and permitting actions.

It appears that 401 certifications related to CWA Section 404 permitting dominate the number of certification requests. Coordination and collaboration between the States and Corps often expedite the process, but projects requiring an individual 404 permit can be time consuming.

CWA 401 certifications are also used to inform state 402 NPDES permits issued by states, and would be required in those states without primacy to issue 401 permits, which would include Idaho and New Mexico.

1. In your opinion is State 401 certification authority a significant obstacle to timely federal licensing and permitting activities? Specifically hydropower licensing? Other permits (such as CWA Section 404 permits)?

States unanimously reported that the CWA 401 State Water Quality Certification is not usually an obstacle in itself to timely federal licensing and permitting, provided that all applications are complete and ancillary federal activities are complete or nearly complete (e.g. public notice, study requirements, a complete EIS, mitigation requirements, etc.).

States report certification applications filed with missing signatures, illegible maps, and/or required documents such as a CWA Section 404 application. Often substantive details of the proposed action requirement certification can also change. Many times certification requests are filed before the Corps has completed their assessment. Certifications may also be held up by the applicant not responding to requests for additional information, or failing to comment on proposed project conditions.

EPA and other federal agency comments, conditions and other actions can delay certification. It is not uncommon for example for 404 permitting applications to be elevated to Corps/EPA Headquarters for consideration.

The complexity and long duration of the FERC licensing and relicensing process is a major contributing factor in those States with related 401 certification requests pending. FERC's Integrated Licensing Process (ILP) takes a minimum of five years to complete.

Some States have separate environmental review requirements, such the California Environmental Quality Act (CEQA) process required for non-governmental entities (which can be time consuming). The federal NEPA process is the starting point for CEQA. Further, the California State Water Resources Control Board, consistent with maintaining a transparent and public process, provides a public comment opportunity on draft certification decision before issuance. As project licenses typically range from 3050 years, this is considered to be important, though this is not a required step.

Oregon has a separate state hydropower licensing process, in parallel to the federal process.

2. How long does it usually take for your State to act on a certification application? It there a specific goal or timeline for action?

This varies by state, but all are within the one year period allowed by law. The majority, on average, fall between 40-90 days, while some may process certification requests within a couple of weeks. Action on a request can depend on a number of factors, such as a 30-day public comment period requirement. Other reasons for delay are listed below under Question #3.

States generally do have a process and specific rules outlining a formal timetable or goal for action, but where there is not, every effort is made to issue the certification or a waiver in a timely manner.

Alaska has a goal of processing 401 certification requests within 10 days after the close of the public notice and comment period.

Similarly, the Texas Commission on Environmental Quality (TCEQ) reviews 401 certification requests in parallel with federal licensing and 404 permitting activities, and based on an memorandum of agreement (MOA) with the Corps Southwestern Division, TCEQ make a decision within 10 days of the Corps having reached a permitting decision (certification is required before a permit is issued).

3. Does the State currently have a backlog of certification applications? If so, what is the size of the backlog? What types of licenses or permits are most likely to be delayed? What are the primary reasons for delays (incomplete applications, study requirements, state staff or other resource limitations, etc.)?

The vast majority of states have no backlog of certification actions, but a few do. Delays are typically due to submission of an incomplete application, completion of study requirements, and constraints on state resources, including staff limitations. Often, 401 certification is a part-time duty for staff, assigned as needed. State turnover is another problem, and often entry level staff is assigned 401 certification responsibilities. Given the length of the FERC permitting process staff may change over time.

California reported the most delayed FERC projects and certification requests (only 2-3 staff are devoted to requests). California is working on certification for sixteen FERC licensed projects where their license has expired. Most should be completed within two years. Post-licensing monitoring of certification and

permitting conditions, which may involve continuing studies given the uncertainty regarding future conditions, also place an increasing burden on staff time.

Oregon does have two large hydropower projects which haven't been certified within one year of the original application, one due to ongoing federal activities, and ongoing mitigation studies have delayed the other.

At least one state will no longer accept 401 certification applications as complete until required federal actions have already been approved or completed.

4. What actions has the state taken to simplify or expedite the certification process (such as interagency MOUs, online applications, etc.)? Please provide references and copies.

States have undertaken various process improvements, including coordinating state and federal environmental reviews, some through formal memoranda of understanding.

The Alaska Department of Environmental Conservation has developed a waiver process applied to individual 404 permits issued by the U.S. Army Corps of Engineers. Criteria are based on the potential risk of a particular activity that may affect water quality, such as the size of the wetlands fill, the type of activity, the proximity to a waterbody and the particular wetlands functions and values.

On November 19, 2013, The California State Water Resources Control Board (SWRCB) executed a memorandum of understanding (MOU) with FERC that covers coordination of pre-application activities that include "consultation, environmental scoping, study planning, and submittal of and commenting on the applicant's preliminary licensing proposal." A copy of the MOU is available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/ferc_mou/index.shtml

Also, with the support of the California Hydropower Reform Coalition and FERC licensees, SWRCB is ramping up staffing resources and increasing fees. Three 401 certification requests were completed within an eight month period. Each project request is also assigned a back-up staff person to assure continuity. There are templates for standard letters and more common certification conditions, and SWRCB is developing a program manual and training staff on up-to-date techniques.

For large, complex projects the Colorado Department of Public Health and Environment works with applicants prior to formal filing of a certification request to streamline the review process and minimize requests for additional information. In 2010, Colorado executed an MOU with FERC, and also hired a contractor to identify a number of small projects that were reviewed and certified, but the contract was not renewed and FERC has not informed the State of new conduit or other small scale hydropower project licensing applications, though some potential projects have come to light through public information and conversations with Corps staff.

Idaho has used settlement agreements to develop FERC 401 certifications.

New Mexico has expedited the certification process through the use of general permits and established procedures. The "New Mexico Implementation Plan" governs the process for issuing NPDES permits.

Oklahoma meets regularly with the Corps to coordinate procedures for public notice and processing of permit and certification applications.

Oregon Department of Environmental Quality staff work with applicants on study design and data review early on to ensure a 401 request is complete. Oregon also has a statute outlining state review of hydropower relicensing in coordination with federal relicensing to avoid duplication through a Hydroelectric Application Review Team (HART) with staff from DEQ, the Department of Water Resources, and the Department of Fish and Wildlife. Other state agencies may participate as well.

HART may provide applicants with an estimate of costs for relicensing work, including certification, and one applicant entered into an agreement to pay the state agencies' costs. HART addresses relicensing, but state agencies coordinate as needed for any new project to reduce inefficiencies. Also, DEQ invoices all 401 certification applicants for costs incurred in processing, providing the revenue necessary for timely action, including reassigning staff work.

A Texas/Corps MOA implements a tiered classification system for projects that require an individual CWA 404 permit, which require certification reviews for proposed projects that directly impact aquatic resources of greater than three acres or 1500 linear feet of stream (Tier II projects). For Tier I projects (below that threshold), TCEQ waives certification if the permit applicant agrees to incorporate specific best management practices.

In Wyoming, electronic delivery of certification requests directly from the USACE (Corps) Wyoming Regulatory Office to the Department of Environmental Quality facilitates timely review and processing. WY DEQ encourages project proponents to contact the agency prior to submitting their 404 application to the Corps. Lastly, Wyoming has categorically certified several nationwide permits, further expediting the process.

5. What public information regarding 401 certification is available from the State (include state websites and addresses)?

Many states provide information in advance to assist applicants in navigating the 401 certification process, including online resources. This may include current program activity, staffing, current projectspecific webpages, 401 certifications issued, etc. FERC also posts 401 certification information on its website. Further, Corps Districts may post information on 404 permit applications.

AK: http://dec.alaska.gov/water/wwdp/wetlands/index.htm

AZ: http://www.azdeq.gov/environ/water/permits/cwa401.html

CA: http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/

CO: http://www.colorado.gov/cs/Satellite/CDPHE-WQ/CBON/1251596872987

ID: http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification.aspx

This is Idaho's 401 certification website. The 401 certification list of projects is on these webpages:

NPDES: http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification/401certifications-npdes-permits.aspx

404 Permits: http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification/401certifications-dredge-fill.aspx

MT: All FERC related 401 water quality certifications are posted on the FERC website. Montana shares the public notice with the Army Corps of Engineers for individual 404 related 401 water quality certifications.

NV: http://ndep.nv.gov/bwqp/401cert.htm

NM: Section 404 program can be found at **http://www.nmenv.state.nm.us/swqb/404/** . The web site for the NPDES program can be found at **http://www.nmenv.state.nm.us/swqb/Permits/**.

OK: http://www.deq.state.ok.us/wqdnew/401_404/index.htm.

Public notices for the Section 404 permits are located on the U.S. Army Corps of Engineers, Tulsa District website: http://www.swt.usace.army.mil/Missions/Regulatory/PublicNotices.aspx

OR: http://www.deq.state.or.us/wq/sec401cert/hydro.htm

SD: http://denr.sd.gov/des/sw/401.aspx

TX: The TCEQ maintains several public web pages containing information about the TCEQ 401 certification program. Each page can be accessed from the following URL:

http://www.tceq.texas.gov/permitting/401certification UT:

http://www.waterquality.utah.gov/permits/index.htm

WA:

WY: The USACE Wyoming Regulatory Office website provides a link to the Wyoming Department of Environmental Quality website that contains information on specific State 401 certification.

6. Do you anticipate an increase in the number of 401 certification requests in the future, and what might be the impact on State administrative resources?

Most states do not anticipate a significant increase in 401 certification requests. Some do. Some states have actually seen significant declines in requests. Again, most requests appear to be related to 404 permitting, which in turn increase with general economic conditions and related construction starts, oil and gas development, etc.

[Expansion of CWA jurisdiction as may be proposed by new rules could have an undetermined impact on the number of requests related to any increase in Section 404 permitting requirements.]

California expects an increase in requests due to FERC relicensing, license amendments, and new projects. Further, as described post-licensing monitoring of conditions, as well as non-hydropower certification requests will significantly impact the State's administrative resources. FERC currently lists 115 non-federal hydropower projects in California, not including transmission line projects, with varying expiration dates. Since 2000, 22 FERC project licenses have expired, and another 26 will expire through 2029, necessitating either relicensing or surrender of the license. Decommissioning can also have water quality impacts. SWRCB is already involved in a number of relicensing pre-application activities. The Division of Water Rights Water Quality Certification Program also certifies non-hydropower projects that involve water rights.

Colorado does not anticipate a significant increase in the number of requests, but does anticipate 4-5 very large and complex project certification requests from water diversion and storage projects over the next 3-4 years.

Idaho does expect an increase in requests, as well as additional review requirements related to antidegradation reviews and analyses associate with federal permits, placing greater demands on static staff.

New Mexico noted drought limits the viability of hydropower projects.

Oregon has certified several projects through the federal relicensing process over the past several years. Currently there are only a few projects under relicensing review. Oregon anticipates ongoing interest in retrofitting both irrigation and drinking water systems with hydro turbines, but many will be exempt from licensing and no 401 certification will be required. Many preliminary permit applications have not proceeded to licensing, making certification requirements difficult to estimate.