

This post continues my review of the provisions of the Senate Permitting Reform Bill, focusing on the Clean Water Act provisions in Title II. My introduction to the coverage of the bill is [here](#). My discussion of Title I, covering NEPA is [here](#) (for remedies) and [here](#) (everything else).

Water Quality Criteria:

Section 1201 requires notice and comment for water quality criteria issuance. This may make it more time consuming to issue those criteria (which EPA is always behind on in terms of updating), but also will allow the public, including environmental groups, more input into the setting of those criteria, which are important as baselines for the water quality standards issued by states. It also moves judicial review of water quality criteria issued by EPA and definitions of the waters of the United States to the courts of appeal.

Section 401 Certification:

The most important component of the changes to the Clean Water Act is Section 1202, which changes the Section 401 certification process. In essence, the bill seeks to narrow the scope of 401 certification to “water issues.” Denial of a certification by a state, or the imposition of conditions by the state on projects subject to certification, must relate to “water quality requirements.” The state must provide “clear and convincing” evidence to deny a certification or impose conditions. For denial of certifications, the state must show that no conditions would protect water quality requirements. For conditions imposed on projects subject to certification, the state must show that the conditions are “necessary to ensure compliance with water quality requirements”, are the least burdensome to ensure compliance, and are “consistent with the requirements” of the federal license/permit. The last factor could be interpreted to essentially eliminate the nature of certification, if it is broadly interpreted by courts, since any change to a project through conditions might be held to be inconsistent with the requirements of the permit. For instance, if the permit sets a lower emissions standard for a point source (or no standard!), is a stricter standard imposed by the state inconsistent with the permit requirements? Courts might be wary of such a broad interpretation. For one thing, that would amount to an implicit repeal of certification, rendering most of the certification process redundant, something courts avoid doing in statutory interpretation. In addition, the very next provision of the bill has a savings clause that “[n]othing in this paragraph [thus including the prior language] allows a Federal licensing or permitting agency to refuse to include

conditions from a certifying authority in a Federal license or permit if the conditions are necessary to ensure compliance with water quality requirements.” That seems to broadly preserve state authority to impose conditions. So a puzzle that courts will have to sort out....

The bill also requires that states provide public notice for any certification decisions, and offer a prefiling meeting with the project sponsor. States must prespecify in their regulations what additional information they require from applicants seeking certification. States must complete certification decisions within one year. There is a process for project sponsors to seek injunctive relief from federal courts if a state unreasonably delays its certification process or imposes information requirements not in the state’s own regulations.

There is also a special set of rules for electric transmission lines and gas pipelines seeking certification. For those projects, certification only examines the impacts of specific discharges from the project, not the impacts of the project as a whole on water quality (as discussed below, it is the latter standard that usually applies under Section 401). There, special provisions for compliance for these types of projects.

The provision defines water quality requirements defined as “any Federal and State or Tribal laws (including regulations) implementing sections 301, 302, 303, 306, and 307 that are applicable to discharges into waters of the United States,” as well as the provisions of Sections 301, 302, 303, 306 and 307 themselves.

A key question is how these changes to Section 401 certification might affect the leading Supreme Court case on 401 certification conditions, *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*. In that case, the Court held that a state could impose minimum water flow conditions from an outflow of a dam to protect salmon runs. The key for the Court was that Section 401(d), which allows imposition of conditions, applies to compliance of the “applicant” with water quality standards, not the “discharge.” But minimum flow requirements (which in essence prohibit the dam from discharging too little water into the river) are somewhat different from traditional effluent regulation under the Clean Water Act NPDES permitting program, which involves discharges of pollutants into waterways. Would minimum stream flows count as sufficiently related “water quality requirements” under the bill such that they could still be imposed on permits?

I think the key here is that the bill defines water quality requirements as including Section 303, and state law “implementing section . . . 303 . . . that [is] applicable to

discharges into waters of the United States.” The Court was careful to note in PUD No. 1 that the state requirements at issue were part of the states water quality standards pursuant to Section 303. That those requirements related to the uses of waterways (supporting a salmon fishery), to minimum stream flows, and were narrative (rather than quantitative pollutant standards) did not mean they could not be water quality standards pursuant to Section 303. And those standards are applicable to a “discharge” into the water of the United States – that is the requirement for Section 401 to apply, and it does not require the discharge of a pollutant (unlike NPDES permitting). So I think minimum stream flow requirements remain under this bill. I do think broader efforts to address issues such as climate change will likely be excluded – for instance, greenhouse gas emissions that are facilitated by a natural gas pipeline surely will contribute to climate change that will affect water quality (such as water temperature), but they are not “applicable to discharges into waters of the United States.”

Permit Duration:

Section 1203 of the bill extends permit terms to ten year terms for NPDES permits. Currently they are five years. (Generally state agencies and EPA regularly miss the deadlines for renewing permits). Section 1204 of the bill does the same for Section 404 general permits.

Section 404 (dredge and fill permits/wetlands):

Section 1204 of the bill narrows the time in which EPA can prohibit discharge of dredge and fill material in certain areas under a permit to the period when the application is under consideration. (The point seems to be to prohibit changing permit terms after approval.)

Section 1204 also provides greater duration, certainty, and narrower permit discretion for issuing general permits for Section 404 regulated activities. In issuing general permits, the bill limits the Corps of Engineers (which issues Section 404 permits) to consider only the effects of the permit on water quality – the agency may not consider other environmental effects. In addition, in assessing whether to approve general permits, the Corps is required to consider the effects of a discharge of dredge or fill material into areas of less than two acres as producing minimal adverse environmental effects. That in turn means that in issuing general permits for activities that involve less than two acres of discharge of dredged and fill material, the Corps would only consider whether there are cumulative adverse

effects from those discharges (since the individual discharges would have minimal effects.) In general, this would facilitate expansion of general permits issuance to many (maybe all) activities of less than two acres.

The bill also mandates the continuance of certain Nationwide General Permits (12 (oil and gas pipelines), 14 (linear transportation projects), 43 (stormwater systems), 57 (transmission lines), 58 (water pipelines)) where disturbance from a project is in total less than 2 acres. Renewal of those permits is exempt from ESA consultation and National Historic Preservation Act review, and the agency can just do a programmatic environmental assessment for the renewal, so long as the renewal only maintains the basic preexisting terms of the permit.

The bill also creates a judicial review provision specific to Section 404 permits. It imposes a 150 day statute of limitations, requires exhaustion of administrative remedies by plaintiffs, and only allows vacatur of an agency issuance of a Section 404 permit if there is “imminent and substantial danger to human health or the environment” with no other “equitable remedy available.”