



Friends of the Wild Rivers

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Glenn Saums
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New Mexico Environment Dept.
Surface Water Quality Bureau
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RE: 20.6.2.2001 – 401 Regulations

Dear Mr. Saums:

Amigos Bravos is a statewide river conservation organization guided by social justice principles. Our mission is to protect and restore the rivers of New Mexico, and ensure that those rivers provide a reliable source of clean water to the communities and farmers that depend on them, as well as a safe place to swim, fish, and go boating. Amigos Bravos works locally, statewide and nationally to ensure that the waters of New Mexico are protected by the best policy and regulations possible. In this capacity Amigos Bravos works to make sure that New Mexico's water quality standards are protective enough to support the diverse human and non-human uses of our state's water resources and to make sure that these standards are implemented in processes like state 401 certification of federal permits or licenses. We would like to communicate the following comments and concerns regarding the draft 401 regulations being proposed by the New Mexico Environment Department (NMED).

Section 20.6.2.2001.A , Section 20.6.2.2002.A. :

The title and first sentence of these sections should include language that denial of certification is one of the potential outcomes of these regulations. In addition, because the state's antidegradation policy is a component of the state's water quality standards, the second sentence in these paragraphs should read, "comply with applicable water quality standards including the State's antidegradation policy, the statewide water quality management plan, and associated implementation guidance and procedures."

Sections 20.6.2.2001.D(1), 20.6.2.2002.D(1), and 20.5.2.2003.D(1):

Amigos Bravos believes that the same amount of public notice that is given for an individual permit should be given for a general permit. General Permits apply to many sites and thus have a large impact on water quality; therefore the public should be given comprehensive public notice. Amigos Bravos requests that public notice requirements for general permits be as comprehensive as those for individual permits.

Section 20.6.2.2001.G:

Amigos Bravos does not believe that 33 days is an adequate enough time for the department to process a request to grant, deny, or waive certification; issue public notice on this request; grant a 30-day comment period; review public comments; and draft a final certification that takes into account public comment. Amigos Bravos believes that 45 days is a more appropriate time period. Though it is important to note 45 days may not be enough time if the public notice is not issued immediately after the department receives the request to grant, waive or deny certification. To address this concern Amigos Bravos requests that this section include language that states that the final certification will be issued 15 days after the close of the comment period. This amount of time will allow the department to thoroughly review public comment and, if needed, follow up on issues raised in public comment.

Sections 20.6.2.2001.G, 20.6.2.2002. H and 20.6.2.2003.G:

Amigos Bravos is concerned that the requirements listed in subsection 1-8 are more relevant towards issuing a certification or a certification with conditions rather than denying a certification. For example, subsection (3) which states that the certification “*shall* [emphasis added] include a statement that there is a reasonable assurance that the activity will be conducted in a manner that will not violate applicable water quality standards” makes the assumption that in fact the activity can occur or be conducted in a manner that will not violate water quality standards. What if the state denies the certification? If the certification was denied because the activity was going to violate water quality standard then surely the department could not make such a statement. In addition there should be a subsection added that details what must be included in a permit denial.

The Clean Water Act requires that certifications require monitoring to ensure compliance with any provisions listed in 401 certifications (CWA, Section 401(d)). Amigos Bravos suggests adding a subsection number 8 to these sections (20.6.2.2001.G, 20.6.2.2002. H and 20.6.2.2003.G) that requires the certification to include identification of any required monitoring to ensure compliance with 401 certification conditions.

Section 20.6.2.2003:

Amigos Bravos applauds the Department for thinking larger than application of 401 certification to 402 and 404 permits by including this section in the proposed regulations. As the department is aware, the Clean Water Act and associated regulations give broad authority to the state to either certify, deny certification, certify with conditions, or waive certification for any “Federal license or permit to conduct an activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters,” (CWA, Section 401(a)(1)). Amigos Bravos would request that this

section of the proposed regulations be expanded to include procedures for certification for federal permits *and licenses* to mirror the language in the Act itself.

Waivers:

If the state fails to respond to a request for certification within a year the Clean Water Act allows for the requirement for state certification to be waived (CWA, Section 401(a)(1)). Amigos Bravos urges the department to include provisions in the regulations that would prohibit defacto waivers. Specifically, Amigos Bravos requests that the state include language that the state shall respond to all requests to grant deny or waive certification within one year of receiving such requests. In this case, even if the state decides to actively waive its right to certify, the public will receive public notice of this waiver. Amigos Bravos is concerned that if such a provision is not included than some activities may receive a defacto waiver and the public would not have a chance to review or comment on this decision. Alternatively, and preferable in Amigos Bravos' opinion, the department could propose to prohibit all waivers and require the department to either certify, certify with conditions, or deny certification of all requests within one year.

Compliance with the Terms of 401 Certifications:

Amigos Bravos suggests incorporating language into the rule change that will outline how the department will monitor 401 conditions and how the department will assert enforcement authority if a permittee does not comply with 401 certification conditions. For example, Colorado, in their regulations, outlines a 401-enforcement process:

Colorado's 5 CCR 1002-82.7 IMPLEMENTATION AND ENFORCEMENT OF CERTIFICATIONS

The Division is authorized to utilize the following approaches to ensure that the certification is implemented and maintained:

(A) Upon receipt of information that water quality standards are being exceeded as a consequence of the project's construction or operation, the Division, after consultation with the permittee and notification of the appropriate federal permitting agency, may modify the certification and provide a copy of such modification to the federal permitting agency.

(B) Upon receipt of information indicating that one or more certification conditions have not been complied with during the construction or operation of a project, the Division shall notify the appropriate federal permitting agency in writing and request that necessary action be taken to implement such conditions as contemplated in Section 401(D) of the Federal Act. A copy of any such notification and request shall be sent to the permittee. The Division shall remain in communication with the federal permitting agency and the permittee regarding the progress towards implementation of the conditions until satisfactory compliance has been obtained, or until the federal agency has completed enforcement action.

(C) If the procedures in subsection 82.7(A) and (B) above are unsuccessful at implementing the certification, in addition to enforcement authorities provided under the Water Quality Control Act, the Division may initiate procedures pursuant to section 24-4-104, C.R.S., to suspend certification for a defined period of time to enable the applicant to comply with the certification conditions or submit a new certification application, or to revoke the water quality certification.

(D) Temporary exceedances of water quality standards shall be deemed in compliance

with applicable provisions so long as such exceedance will not be of a degree to cause conditions acutely toxic to aquatic life or to exceed standards assigned to protect a domestic drinking water supply where that is a classified use.

Application Requirements:

The department may want to consider including information about what applicants are required to submit in a request for 401 certification. For example Montana has outlined specific 401 certification application requirements in their regulations:

ENVIRONMENTAL QUALITY

CHAPTER 30

WATER QUALITY

Sub-Chapter 1

401 Certification

17.30.103 APPLICATION FOR CERTIFICATION

(1) A person may not conduct or commence construction for any activity requiring state water quality certification under 33 USC section 1341, as amended, unless the department has issued certification, issued with conditions, or waived certification under this subchapter.

(2) The applicant, the licensing or permitting agency, or the regional administrator (under 40 CFR 121.13) shall submit to the department a complete description of the activity for which certification is sought, including:

- (a) the name and address of the applicant;
- (b) a description of the facility or activity and of any discharge which may result from the facility or activity, including but not limited to:
 - (i) the volume of the discharge;
 - (ii) the biological, chemical, physical, and radiological characteristics of the discharge;
 - (iii) a description of the existing environment at the site of the discharge;
 - (iv) the size of the area affected;
 - (v) the location or locations at which the discharge may enter state waters; and
 - (vi) any environmental impact assessment, information, maps, and photographs which have been provided to the licensing or permitting agency;
- (c) a description of the function and operation of equipment, facilities, activities, or practices to minimize or to treat wastes or other effluents which may be discharged, including the degree of treatment expected to be attained;
- (d) the date or dates on which the activity is proposed to begin and end, if known, and the date or dates on which the discharge will take place; and
- (e) a description of the methods being used or proposed to monitor the quality and characteristics of the discharge and the operation of equipment, facilities, or activities employed in the treatment or control of pollutants.

(3) The department may exempt an applicant from the information requirements of (2)(b), (c), and (e) of this rule, if the applicant's federal permit application is to the United States army corps of engineers under section 404 of the federal Clean Water Act, 33 USC 1344, as amended, and the federal permit application provides the information required under these sections.

Thank you for the opportunity to comment on the draft regulations related to 401 certifications. Please do not hesitate to contact me at 575-758-3874 or rconn@amigosbravos.org if further clarification or discussion on the above issues is merited or needed.

Sincerely,

Rachel Conn
Policy Analyst
Amigos Bravos