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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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MEMORANDUM

SUBJECT: Section 401 Certification of Marinas

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North Carolina's Department of Natural Resources and Community Development (Department) has asked for EPA's views on certain issues relating to the scope of state authority under section 401 of the Clean Water Act. In particular, the Department has asked whether, in considering a section 401 certification for a section 404 permit for the construction of a marina, it is authorized to take into account the likelihood of releases from boats expected to use the marina. As explained more fully below, section 401 may reasonably be read to allow the state to consider violations of water quality standards resulting from the operation of the marina, including those resulting from sewage from vessels using the marina.

Section 401(a)(1) provides in pertinent part that 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 obtain a certification from the state in which the discharge originates that any such discharge will comply with the applicable provisions of, inter alia, section 303. Section 401 is largely based on section 21(b) of the Water Quality Improvement Act of 1970. As the legislative history of the two Acts makes clear, the intent of the certification mechanism was to assure that federal licensing agencies could not override state water quality requirements. 1972 Sen. Rep., 2 Leg. Hist 1487; statement of Sen. Muskie, 1 Leg. Hist. at 176; 1970 Conf. Rep., reprinted in EPA Legal Compilation-Water (hereinafter cited as Leg. Comp.). Vol. III, at 1536.

Where construction of a marina involves the discharge of dredged or fill material, a section 404 permit and hence a section 401 certification are required. The specific question presented by the Department relates to the extent to which such certification can consider pollution from boats. 1/ This question raises two separate issues: first, whether a state certifying a construction permit must confine its review to the construction phase of the operation, and second, if not, whether a violation of water quality standards from the operating phase must be directly caused by a "discharge" to be cognizable under section 401.

The threshold question is whether a certification for a construction permit may properly consider water quality impacts of the subsequent operation of the facility. Whatever the ambiguity of section 401(a)(1), section 401(a)(3) makes it clear that a certification issued for a construction license may address possible impacts of the subsequent operation of the facility, even when that operation will itself be subject to another federal license. By providing that a construction permit certification shall also serve as an operating permit certification, unless notice is given of changes which call into question whether the operation will in fact assure compliance with, inter alia, water quality standards, section 401(a)(3) necessarily contemplates that the construction certification will have considered whether the subsequent operation will comply with section 303. 2/

1/ A marina applicant has suggested that pollution from boats is irrelevant under section 401, since the latter refers to "discharges." Section 502 excludes "sewage from vessels" within the meaning of section 312, from the definition of "pollutant." Since section 502 defines the term "discharge" as meaning point source discharge of pollutants, a release of sewage from vessels is technically speaking not a discharge, although it may very well cause "pollution" as that is defined in section 502 and may lead to violations of water quality standards.

2/ This reading is also consistent with the purpose of the section, as expressed in the legislative history. Both the Senate and House debate on the 1970 bill noted that the almost verbatim predecessor of section 401(a)(3) was intended to ensure that sufficient planning was done early (e.g., by selecting best site or best facility design) to avoid violations of water quality standards from subsequent operation. Leg. Comp., Vol. IV at 1201, 1765.

FOOTNOTE CONTINUED

Accordingly, the mere fact that [illegible] violation would result from the subsequent operation, rather than construction, of a marina does not appear to limit the state's authority to consider such violation in certifying the construction permit. It is therefore necessary to reach the second question, that is, whether pollution must come from a point source before it may be considered under section 401. (To trigger the certification mechanism there must, of course be a licensed activity whose construction or operation "may result in a discharge". The question is whether the certification must be limited to such discharge.)

On the one hand, the wording of the 1970 Act (certification "that such activity will not violate water quality standards") strongly suggests that at that time Congress did not intend to limit the state's review to violations directly caused by a "discharge". Moreover, such limited review would run counter to the purposes of the section.3/ However, Congress made wording changes in the section in 1972 which raise a question of whether it intended to restrict review to violations caused by dischargers. At least on its face, the new wording (certification "that any such discharge shall comply with the applicable provisions of section [303]") suggests that under the 1972 Act a certification was simply to address those violations caused by "discharges", not all violations resulting from the activity requiring a permit. However, the legislative history, although not very explicit,

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Footnote 2 continued from previous

While section 401(a)(3), of course, deals with the situation where a subsequent federal operating license is also required, there is no clear indication that Congress intended a narrower scope of review by the state where a second federal permit is not required and there is no "second bite at the apple." (There is a statement in the 1972 House report that the right to review subsequent operations under 401(a)(4) (only one federal permit) does not give the right to impose operational requirements. 2 Leg. Hist. 810. However, this subsection, and therefore the report, apparently refer to the legal effect of a post-certification review, not to the scope of the state's actual certification under section 401(a)(1)).

3/ The House Report states "The purpose of [this section] is to provide reasonable assurance ... that no license or permit will be issued by a Federal agency for an activity that through inadequate planning or otherwise could in fact become a source of pollution." (Legal Comp., Vol. III at 1255.)

indicates that such a change in meaning was not in fact intended. For example, the legislative history contains several references to the fact that section 401 was based on section 21(b), with only "minor changes"; there is no reference to one of those changes being a reduction in scope of certification. Moreover, such a change, which goes against the purpose of the provision, would likely not have been considered "minor." The 1972 Senate report states that the section was "amended to assure consistency with with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants," apparently alluding to the addition of references to newly-created effluent limitation requirements. 2 Leg. Hist. 1487.

Minor changes were made to section 401, as part of the 1977 amendments, to refer to section 303 (i.e., water quality standards) explicitly rather than implicitly through reference to section 301. In paraphrasing section 401, the 1977 Conference Report uses the terminology of the 1970 Act, rather than the 1972 Act, suggesting that no significance attached to the differences in wording that occurred in 1972. 4/

Moreover, the overall purpose of section 401 is clearly "to assure that Federal licensing or permitting agencies cannot override State water quality requirements." 1972 Senate Report, 2 Leg. Hist. 1487. Water quality standard violations may, of course, just as easily arise from some other source of pollution associated with a federal activity subject to section 401 as from the discharge itself. Drawing a distinction between the two not only has no support in the legislative history but also would not serve the stated purpose of the section. Accordingly, I conclude that, although the statute is not altogether clear, section 401 may reasonably be read as retaining its original scope, that is, allowing state certifications to address any water quality standard violation resulting from an activity for which a certification is required, whether or not the violation is directly caused by a "discharge" in the narrow sense. 5/

4/ The Conference Report states, "A federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards" (emphasis added). 3 Leg. Hist. 280.

5/ I also note that at least in the case of 404 permits, the federal permitting agency itself is supposed to take into account all such violations in issuing a permit. See 40 CFR §230.10(b), 230.11(h).