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United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via regulations.gov: EPA-HQ-OW-2019-0405

RE: Proposed Rule – Updating Regulations on Water Quality Certification

The Association of Clean Water Administrators (hereinafter "ACWA" or the "states") is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers, who on a daily basis implement the water quality programs of the Clean Water Act ("CWA"). ACWA provides the following comments on the Environmental Protection Agency's ("EPA" or the "Agency") proposed rule, *Updating Regulations on Water Quality Certification*.

Congress purposefully and clearly designated states as having primary responsibility for controlling water pollution and protecting their resources under the CWA. Section 101 of the CWA (33 U.S.C. 1251(b)) states:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

In accordance with the expressed purposes listed in Section 101, Congress included Section 401 in the CWA codifying state authority to certify and condition federal permits and licenses. In advocating for the inclusion of Section 401 in the Water Quality Improvement Act of 1970, Senator Edmund Muskie stated, "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]." 116 Cong. Rec. 8984 (1970). In 2006, the United States Supreme Court upheld state authority under Section 401 stating, "[s]tate certifications under [CWA Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution." S.D. Warren Co. v. Maine Board of Environmental Protection, 547 U.S. 370 (2006). States have effectively and efficiently utilized this clear statutory authority to protect their water resources for almost 50 years.

EPA began the process of revising its CWA Section 401 regulations in response to Executive Order 13868, *Promoting Energy Infrastructure and*

Economic Growth ("Executive Order"). The Executive Order states that in reviewing Section 401 of the CWA and EPA's related regulations and guidance, the review should "take into account federalism considerations underlying [S]ection 401" and focus on "the need to promote timely Federal-State cooperation and collaboration".[1] ACWA does not believe that EPA's process has provided adequate consultation with states, nor adequately taken into account the federalism considerations underlying Section 401. Further, the proposed rule appears to neglect state interests contrary to the express policy of Congress regarding the role of states in preventing, reducing, and eliminating pollution associated with federally permitted activities.

Consequently, states have concerns with the proposed rule. The rule, while ostensibly an effort to modernize Section 401, instead diminishes state authority, unlawfully reduces the scope of Section 401 reviews, creates a role never intended by Congress for federal agencies in the review and approval of state Section 401 decisions and conditions, and presents implementation challenges for states. States are also disappointed with EPA's insufficient engagement and collaboration during the drafting phase of this effort.

Diminishment of State Authority

As indicated above, the Supreme Court explained in S.D. Warren Co. v. Maine Board of Environmental Protection, "[s]tate certifications under [CWA Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution." Justice Scalia stated in his plurality opinion in Rapanos v. United States, 547 U.S. 715 (2006), "[C]lean water is not the only purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions". EPA's proposed rule would reduce states' ability to make land use decisions under Section 401.

Under the CWA, Congress purposefully articulated the designation of states as co-regulators under a system of cooperative federalism that recognizes the primacy of state authority over the allocation, administration, protection, and development of land and state water resources. As indicated above, Section 101 of the CWA (33 U.S.C. 1251(b)) expresses Congress' intent to:

> …recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

This declaration demonstrates Congress' recognition that states have the technical expertise and particular knowledge of their waters to manage their resources. Section 101 also recognizes that state management is preferable to a federally mandated one-size-fits-all approach to water management and protection that does not accommodate the practical realities of geographic and hydrologic diversity among states. State authority to certify and condition federal permits under Section 401 is vital to the state/federal co-regulator relationship as expressed in CWA Section 101.

[1]Exec. Order No. 13868, Promoting Energy Infrastructure and Economic Growth, 84 Fed. Reg. 72, 15496 (April 15, 2019).

This authority ensures that activities associated with federally permitted projects will not impair state water quality.

The proposed rule appears to substitute federal agency judgment over that of states in contravention of the clear purpose of the Clean Water Act, undermining the Supreme Court-affirmed "state authority" to use Section 401 to "address the broad range of pollution", and weakening environmental protection for state water resources.

First, the proposed rule would require federal agencies to set the "reasonable period of time" within one year for a Section 401 review without requiring federal agencies to consult with the certifying authority. As explained above, states are best situated to manage state lands and water resources. Further, states are more knowledgeable of state laws and regulations and can best ascertain the reasonable time within one year to complete a proper review.

Second, the proposed rule provides federal agencies and permitting authorities veto power over states. This runs counter to the fundamental statutory purpose of Section 401, which is to preserve state authority. Regarding certification denials, the proposed rule states that,

> Where a Federal agency determines that a certifying authority's denial did not satisfy the requirements of Clean Water Act Section 401, and proposed sections 121.3 and 121.5(e), the Federal agency must provide written notice of such determination to the certifying authority and indicate which provision(s) of Clean Water Act section 401 and this part the certifying authority failed to satisfy.

Further, "If the certifying authority does not provide a certification decision that satisfies the requirements of Clean Water Act [S]ection 401 and this part by the end of the reasonable period of time, the Federal agency *shall treat the certification in a similar manner as waiver* (emphasis added)." Because the proposed rule allows federal agencies to veto certification conditions and denials, EPA's proposed rule appears to take the position that states cannot deny certification when they cannot affirm that state water quality requirements will be met. States do not believe that this position comports with the statutory language in Section 401 or the legislative history. It is clear that Congress sought to ensure, through Section 401, that operations of and discharges from federally permitted activities would not harm state waters.

Regarding certifications granted with conditions,

> If the Federal agency determines that a condition does not satisfy the definition of § 121.1(f) of this part and meet the requirements of § 121.5(d) of this part, such condition shall not be incorporated into the license or permit. The Federal agency must provide written notice of such determination to the certifying authority and indicate which conditions are deficient and why they do not satisfy provisions of this part.

For certification denials, "If the certifying authority does not remedy the deficient conditions by the end of the reasonable period of time, the Federal agency *shall not incorporate them in the license or permit* (emphasis added)." This veto power given to federal agencies, along with federal

agencies' ability to unilaterally set the "reasonable period of time", effectively usurps state authority, potentially forcing states into unreasonably quick decisions, possibly based upon incomplete information on the project, with the prospect of veto by federal agencies and/or inadvertent waiver. This is clearly contrary to the fundamental statutory purpose of Section 401, which is to preserve state authority to protect and manage water resources.

Third, the proposed rule gives federal agencies sole enforcement authority. The proposed rule explains, "The Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit". This is a contravention of the co-regulator relationship expressed in the Clean Water Act. While it is important that federal agencies take seriously their responsibility to incorporate and enforce conditions added through the Section 401 process, federal agencies should work with states in enforcing conditions to ensure credibility and consistency. Additionally, it is unclear if federal permitting and licensing agencies have the expertise to enforce Section 401 certification conditions developed by states to ensure compliance with state law.

Lastly, states have little recourse in the proposed rule to appeal or challenge any of the case-specific decisions made by the federal agencies, other than to challenge the final permitting decision. States may be forced to deal with disputes by filing legal challenges to the issued permit/license and seeking an immediate injunction, thus delaying project implementation and creating additional uncertainty.

The cumulative impact of the proposed rule would give states less control over the timing and result of a certification review and less authority over their own resources. The proposed rule contravenes the Clean Water Act requirement to "…recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." Moreover, the provisions of the proposed rule create a new role for the federal government contrary to Congress' intent in the creation of Section 401.

Scope

The proposed rule improperly relies on Justice Thomas' minority dissent in P.U.D. No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700 (1994).[2] A dissenting opinion in a Supreme Court case is not controlling. Since the mid-1990s, Congress has shown interest in Section 401 issues in multiple legislative proposals reflecting varying perspectives, however, legislation that would modify Section 401 has not been enacted.[3] As much as some stakeholders would like for the P.U.D. No. 1 decision to be overturned and replaced with a ruling more akin to Justice Thomas' dissent, EPA simply cannot regulate it into being. The Court's majority ruling remains the law of the land, and as Justice O'Connor stated, Section 401(d) "is *most reasonably*

[2]In P.U.D. No. 1, Justice O'Connor authored the opinion of the Court, joined by Justices Renquist, Blackmun, Stevens, Kennedy, Souter, and Ginsburg. Justice Stevens authored a concurring opinion. Justice Thomas authored the dissent, joined by Justice Scalia.

[3]*See,* Cong. Research Serv., 97-488, Clean Water Act Section 401: Background and Issues, (Updated March 7, 2016) (for a more complete discussion of energy sector stakeholder concerns, pertinent court rulings, and related historical bills, available at: https://crsreports.congress.gov/product/pdf/RS/97-488).

read as authorizing additional conditions and limitations on the *activity as a whole* once the threshold condition, the existence of a discharge, is satisfied (emphasis added)." Any contrary assertion is inconsistent with settled law.

Implementation

States have concerns with implementation of the rule as proposed. The proposed rule does not consider state laws and regulations (including process-related state regulations), state resource concerns, or the potential for federal agency and permitting authority abuse. ACWA fears that EPA has not adequately considered the potential ramifications of the proposed rule on states' ability to protect the water resources in their states nor how the rule would work in practice.

First, no matter the contents of the final rule, states will need a sufficient period of time to evaluate the rule and to plan implementation at the state level. The rule may also require changes in current state laws and regulations. EPA should include a delayed effective date/implementation timeline to allow states to do so.

Second, many state laws and regulations conflict with the proposed rule. Many states have laws and regulations regarding notice and comment, impact/degradation avoidance, mitigation, etc. Many of these laws require significantly more information and time than what EPA has proposed under this rule. Therefore, states may be put in a position of making uninformed certification decisions or violating their own laws and regulations. Therefore, ACWA recommends that EPA require permitting authorities to send all state-required information to state certifying authorities prior to the official "certification request". Further, ACWA recommends EPA amend the definition of "Receipt" in the proposed rule to, "*Receipt* means the date that a certification request and all materials required by state law are documented as received by a certifying authority in accordance with applicable submission procedures (underlined text is ACWA's recommended addition)."

Third, and similar to the above, the seven-part definition for "certification request" in the proposed rule is not adequate for most states to properly review whether a project will affect water quality. Therefore, ACWA recommends that EPA require applicants for Section 401 certifications of projects of a certain level of complexity to communicate with state certification authority officials prior to an official certification request in order to obtain a list of state information and data needs. This is similar to what is proposed for certifications where EPA is the certification authority and there does not appear to be any reasonable justification for requiring such consultations for federal certifying agencies but not state agencies. Further, EPA should require applicants to provide substantially complete applications to the states as a pre-requisite to the official start of the mandatory review period. If pre-request communications/meetings occurred, perhaps EPA can require applicants to confirm their requests are "complete and accurate" and that they "reflect communications/conversations held prior to the official request." However, ACWA is not asking for EPA to mandate pre-request meetings for all actions, as some certifications requests are not complex enough to warrant this type of consultation.

Fourth, as the preamble to the proposed rule explained, many states have "relatively low staffing availability in…401 certification programs."[4] The justifications required by the proposed rule for certification conditions and denials as well as the inability for states to determine "reasonable amount of time" of review will unnecessarily burden state staffs.

Lastly, the requirement that when states certify with conditions they must include a statement explaining "whether and to what extent a less stringent condition could satisfy water quality requirements" is inconsistent with the text of Section 401. The text of Section 401 clearly indicates that the federal permitting agency is to incorporate state conditions into any federal license or permit. The statute does not direct states to undertake an analytical process to identify the most cost-effective conditions, only that states may require conditions to ensure that the federally permitted activity will comply with the law and protect state water quality. Nor does the statute convey to EPA the authority to reject conditions imposed by the state. However, states are always open to hearing from permitting authorities as to their proposals for more cost-effective approaches to achieve desired outcomes.

Effects on Downstream States

ACWA is concerned about the potential impact of the proposed rule relative to upstream waters or wetlands. Constraining state authority in the Section 401 review process threatens to increase the risk that activities in upstream waters and wetlands will threaten water quality in downstream waters.

ACWA recommends that additional guidance be provided for how states determine when there may be an impact to the waters of another state, that EPA articulate the information that permitting authorities must provide to states, and that EPA develop operating procedures with individual states to ensure effective protection of downstream states through Section 401.

Insufficient Engagement with the States

The proposed rule would fundamentally alter the state/federal relationship in managing the nation's water resources and would limit states' ability to regulate and manage the water resources within their borders. Yet, EPA did not provide meaningful consultation with states before moving forward. EPA's lack of meaningful consultation has prevented states from providing input into decision making as intended by 40 C.F.R. Part 25.[5] Moreover, the timeline of sixty (60) days for the development of new guidance and 120 days for the completion of rulemaking further makes it difficult for states to provide meaningful input to EPA. Despite letters sent to EPA in December 2018, February 2019, and May 2019 requesting discussions on this issue, states have not been afforded an opportunity to speak with the Agency on the importance of Section 401 authority to

[4]Updating Regulations on Water Quality Certification, 84 Fed. Reg. 163, 44083, (Sept. 22, 2019) (to be codified at 40 C.F.R. pt. 121).

[5]*See* 40 C.F.R. 25.3(b) ("Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views. Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official.")

the states, outside of the Intergovernmental Consultation, ACWA Annual Meeting, the Chicago and Utah meetings, and brief web-based listening sessions.

States hold a unique and congressionally designated role under the CWA as co-regulators. Therefore, ACWA respectfully requests that EPA provide genuine outreach to states and maintain regular contact and dialogue, through forums, calls, and other communication, throughout the life of this effort. This process should also be iterative, allowing for negotiated rulemaking and joint federal-state process development. When EPA partners directly with states through ACWA, better regulations are drafted, superior policy is created, duplication is reduced, national consistency is improved, flexibility is gained, unintended consequences are avoided, greater certainty is realized, legal challenges are minimized, and the public is better served.

Conclusion

The preamble to the proposed rule explains that "[s]everal themes emerged" throughout EPA's process of seeking recommendations and input on issues and process improvements that the Agency would potentially consider for a future rule, "including support for ongoing state and tribal engagement, support for retention of state and tribal authority, and suggestions for process improvements for CWA [S]ection 401 water quality certifications."[6] Therefore, while EPA recognized the importance of these themes, ACWA believes the Agency inadequately considered them in drafting the proposed rule.

As EPA moves through the process of finalizing this rule, the Agency should take care to be communicative, transparent, and respectful of state interests. Curtailing or reducing state authority under CWA Section 401, or the vital role of states in maintaining water quality and protecting water resources within their boundaries, would inflict serious harm to the division of state and federal authorities established by Congress. Any regulatory change to the Section 401 permitting process should not come at the expense of state authority and should be developed through genuine consultation with states. EPA should also recognize, and defer to, states' sovereign authority over the management and allocation of their water resources. EPA should ensure the CWA continues to effectively protect water quality, while maintaining the partnerships and the essential balance of authority between states and the federal government.

Further, ACWA included multiple documents with this letter, including the *ACWA 401 Cert State Timelines Survey Results – April 2019*. Cited in the *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking*, ACWA included this document to provide clarity in the docket. ACWA surveyed its membership in early 2019 to assist in preparing comments responsive to EPA's *Pre-proposal Recommendations for Clarification of Provisions within Clean Water Act Section 401 and Related Federal Regulations and Guidance*. These data also provided general information on state Section 401 certification processes. However, as stated by EPA, "[T]hese summary survey data do not adhere strictly to the EPA's requirements regarding data and information quality."[7]

[6]Updating Regulations on Water Quality Certification, 84 Fed. Reg. 163, 44083, (Sept. 22, 2019) (to be codified at 40 C.F.R. pt. 121).

[7]U.S. Environmental Protection Agency, Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking 6 (2019).

While ACWA's process to develop comments is comprehensive and intended to capture the diverse perspectives of the states that implement these programs, EPA should also seriously consider the recommendations that come directly from individual states, interstates, and territories. Thank you again for the opportunity to provide comment on this effort. Please contact ACWA's Executive Director Julia Anastasio at janastasio@acwa-us.org or (202) 756-0600 with any questions regarding ACWA's comments.

Sincerely,

Melanie Davenport
ACWA President
Water Permitting Division Director
Virginia Department of Environmental Quality

Enclosures: ACWA Comment Letter – Pre-proposal Recommendations for Clarification of Provisions within Clean Water Act Section 401 and Related Federal Regulations and Guidance

ACWA 401 Cert State Survey Summary – May 2019

ACWA 401 Cert State Survey Results – April 2019

Coalition Letter – Clean Water Act Section 401: Process Improvements and the Preservation of State Authority