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Lauren Kasparek, Oceans, Wetlands, and Communities Division, Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2022-0128

Dear Ms. Kasparek:

On June 9, 2022, the Environmental Protection Agency (hereafter, the “EPA”) published a proposed rule to revise and replace its 2020 regulatory requirements for Water Quality Certification under Clean Water Act (CWA) § 401.¹ CWA § 401 requires federal agencies and project proponents to seek authorization from a state or Tribe (“certifying authority”) before issuing a license or permit to conduct an activity that may result in a discharge into a Water of the United States.² Included in such activities are those activities authorized by general permits such as the U.S. Army Corps of Engineers (“the Corps”) CWA § 404 Nationwide Wetland Permits and the U.S. Environmental Protection Agency (“EPA”) CWA § 402 NPDES stormwater Construction General Permits.

NAHB opposes the proposed rule’s requirement that federal agencies obtain a final draft permit before requesting required § 401 Water Quality Certification because of the potential delays that could result. NAHB also opposes the proposed rule’s failure to address certifying authorities’ ability to delay the certification process with strategic tactics. Finally, NAHB opposes the proposed rule’s expansion of scope for certifying authorities to review certification requests. NAHB believes that the 2020 version of the 401 certification rule, that EPA is now proposing to rescind, better addresses these concerns than the proposed rule for the reasons outlined in this comment letter.

The National Association of Home Builders (NAHB) is a Washington D.C. based trade association representing over 140,000 residential land developers, builders, and associate member firms organized in approximately 700 affiliated state and local associations located in all fifty states, the District of Columbia, and Puerto Rico. NAHB’s members include those who design, construct, and supply single-family homes; build and manage multifamily, light commercial, and industrial structures; develop land; and remodel existing homes. NAHB is also a member of the industry coalition Federal Water Quality Coalition (FWQC). NAHB supports the comments submitted by FWQC and incorporates those comments by reference as part of NAHB’s comments and recommendations on EPA’s proposed rule.

Creating residential subdivisions, building lots, and constructing new homes all involves a substantial amount of earth-moving activities. As a result, NAHB members regularly seek coverage under both the CWA § 404 Nationwide Wetland Permits and CWA § 402 NPDES stormwater Construction General Permits, issued by the Corps and EPA. When the Corps and EPA propose or reauthorize general permits like these, a rulemaking process is required. Under the proposed rule, the Corps and EPA would have to complete this rulemaking process to obtain a final draft permit before they could request the required § 401 Water Quality Certifications from each state’s certifying authority, whereas previously these actions were accomplished simultaneously. Considering the length of the rulemaking process and the CWA’s statutory obligation upon the Corps and EPA to

¹ 87 Fed. Reg. 35318 (Thursday, June 9, 2022).

² 33 U.S.C. 1341(a)(1).

reauthorize these general permits every five years,³ NAHB is concerned the proposed rule will cause significant delay for NAHB members seeking coverage under these permits.

I. EPA's failure to establish clear deadlines for certifying authorities under "reasonable period of time" means continued permitting delays and even potential abuses.

In the proposed rule, EPA recognizes various delay tactics certifying authorities have at their disposal to extend the "reasonable period of time" they have been granted to make certification decisions. Yet, EPA has chosen to take no stance to regulate the authority of certifying authorities, encouraging these tactics' further use. NAHB encourages EPA to explicitly designate these tactics as unreasonable and therefore unlawful. A "reasonable period of time" begins for a project proponent once a certifying authority is in receipt of a request for certification⁴ and is not to exceed one year⁵. However, EPA's 2020 version of the 401 certification rule provided greater clarity by stating the one-year statutory deadline cannot be extended, and furthermore the one-year deadline for providing a requested certification begins when the initial application is submitted, and any subsequent submittals of additional information by the federal agency or project proponent does not restart or modify the statutory one-year deadline.⁶ By comparison the proposed rule provides federal agencies and certifying authorities 30 days to jointly set the "reasonable period of time" provided the period does not exceed one year. If the federal agency and certifying authority do not set a period within 30 days, a 60-day default period applies.

Lack of clarity regarding how "reasonable" a "reasonable period of time" creates a loophole for certifying authorities to exploit. As the proposed rule acknowledges, certifying authorities have historically engaged in various tactics to delay the set or default "reasonable period of time". For example, certifying authorities have asked project proponents to withdraw and resubmit their certification requests or denied certification "without prejudice to refile" in order to "restart the clock" extending their time to make a certification decision.

There can never be an appropriate scenario for certifying authorities to use tactics to purposefully slow down the project approval process. Yet, their authority to engage in these tactics remains completely unregulated. NAHB previously supported the 2020 version of the 401 certification rule that established clearer one-year deadlines for certifying authorities to make certification decisions. NAHB once again reminds EPA of its duty to ensure that the period of time certifying authorities have to make certification decisions remains "reasonable".

Finally, in the proposed rule, EPA acknowledges that the aforementioned tactics might cause unreasonably delay and frustrate the federal permitting process. Accordingly, EPA should then recognize that leaving certifying authorities to justify using these tactics on a case-by-case basis instead of creating a bright line rule will only continue to delay and frustrate the process on behalf of project proponents. NAHB urges EPA to adopt a bright line rule designating delay tactics like withdraw and resubmit or denial without prejudice to refile as unreasonable extensions of time and therefore unlawful.

II. Requiring federal agencies/project proponents to obtain final draft permits before requesting § 401 Water Quality Certification will cause unnecessary delays.

Formerly, federal agencies or a project proponent could request required § 401 Water Quality Certification from the relevant certifying state authority on a draft permit or license, provided the draft permit or license provided

³ 33 U.S.C. 1344(e)(2).

⁴ 33 U.S.C. 1341(a).

⁵ 33 U.S.C. 1341(a)(1).

⁶ 85 Fed. Reg. 42210 (Friday, September 11, 2020).

sufficient information regarding the discharge from the proposed activity. The proposed rule at issue requires that project proponents now obtain a final draft license or permit from the issuing agency *before* requesting § 401 Water Quality Certification from the relevant certifying authority. Thus, this proposed rule adds an additional step to the project approval process which will result in delays before projects can break ground.

NAHB is concerned that under this proposed rule, the benefits to the certifying authority will be marginal, but the detriment to project proponents will be significant.⁷ The proposed rule's justification for adding an additional step to the project approval process is to "ensure that states and Tribes have the critical information they need"⁸ to make a certification decision. Under the proposed rule, the Corps or EPA would have to complete a federal rulemaking process to propose or reauthorize a general permit before approaching certifying authorities for the required § 401 Water Quality Certification. EPA is suggesting that this extra effort on behalf of a federal agency will make the certifying authority better adept to make certification decisions. While in theory, this should expedite certifying authorities' decision-making, it lengthens the amount of time project proponents will have to wait for the Corps and EPA to propose or reauthorize the general permits that cover their projects. Importantly, the likely impact of delays caused by the proposed rule's requirement that entities (federal agencies or private landowners) seeking required § 401 Water Quality Certification must submit draft permits, must consider the CWA statute that requires federal general permit programs such as the Corps' CWA 404 NWP to be reauthorized within five years.⁹

Realizing the potential detriments the proposed rule offers project proponents, it is unclear how the proposed rule actually benefits the efficiency of certifying authorities' decision-making. Notably, it is unclear what new information a certifying authority would receive if the Corps and EPA had to complete a federal rulemaking on proposed general permits before requesting the required CWA § 401 Water Quality Certification. The permit requirements and types of discharges authorized under CWA § 404 Nationwide Wetland Permits and CWA § 402 NPDES stormwater Construction General Permits rarely if ever change.¹⁰ Given that changes to these permits are minimal if existent, certifying authorities should already have sufficient information about the types of projects that they cover. Yet, the Corps and EPA would still have to complete a federal rulemaking process to obtain a final draft permit necessary under the proposed rule for certifying authorities to have sufficient information when these CWA general permits are proposed to be reauthorized. For the sake of efficiency, it seems unlikely that the benefits this added step provides certifying authorities could possibly outweigh the burden it places on project proponents.

Accordingly, NAHB encourages EPA to revise the proposed rule to eliminate the requirement that a final draft license or permit be issued before the project proponent can request § 401 Water Quality Certification from certifying authorities.

III. Broadening the scope of review to "activity as a whole" is vague, confusing, and could open the certification process to potential abuses by certifying authorities.

NAHB is concerned about the proposed rule's expansion of certifying authorities' scope of review for § 401 Water Quality Certifications. NAHB recognizes certifying authorities' authority to review a § 401 Water Quality

⁷ 87 Fed. Reg. 35318 (Thursday, June 9, 2022).

⁸ *Id.*

⁹ 33 U.S.C. 1344(e)(2)

¹⁰ For example, the CWA § 404 Nationwide Wetland Permit has maintained a ½ acre or less maximum allowable impact to non-tidal water of the United States for more than 20 years. 86 Fed. Reg. 2861 (Wednesday, January 13, 2021). Additionally, 33 U.S.C. 1344(e) mandates that nationwide permits be "similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal cumulative adverse effect on the environment."

Certification request as an “activity as a whole”.¹¹ However, NAHB supports a return to the “discharge-only” approach it previously adopted in the 2020 version of the 401 certification rule.¹² This would limit the scope of § 401 Water Quality Certifications to only include review of effects resulting from the discharge of proposed activities and the effects of those discharges on water quality within the certifying authority’s jurisdiction or to neighboring states or Tribes. The “activity as a whole” approach is too broad and could welcome potential abuses from certifying authorities requiring modifications to proposed permits for non-discharge impacts that span beyond the scope of the CWA. The “activity as a whole” approach additionally eliminates predictability and certainty for project proponents to understand why their certification would be granted or denied. Therefore, NAHB urges EPA to return to the 2020 “discharge-only” approach from its 2020 version of the 401 certification rule.

IV. Conclusion:

NAHB appreciates the opportunity to comment on EPA’s proposed rule to improve the § 401 Water Quality Certification process. NAHB encourages EPA to eliminate the proposed rule’s requirement that project proponents first obtain a final draft license or permit from the issuing federal agency before requesting § 401 Water Quality Certification from the relevant certifying authority. NAHB also encourages EPA to address certifying authorities’ unregulated abilities to use tactics to frustrate the certification process. Finally, NAHB urges EPA to return to its 2020 “discharge-only” approach for certification review. These suggested changes will eliminate delays for the project proponent and add efficiency and clarity to the certification process. NAHB looks forward to continuing to participate in discussions regarding the § 401 Water Quality Certification process as a regulated interest. If you have any questions or would like to discuss the issues raised, please contact Sara Fox, Program Manager, at smfox@nahb.org or (202) 266-8662.

Sincerely,



Michael Mittelholzer, AVP, Environmental Policy
National Association of Home Builders

¹¹ *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 US 700 (1994) (granting certifying authorities the power to place conditions on the “project in general” or the “activity as a whole” to assure compliance with state laws).

¹² 85 Fed. Reg. 42210 (Friday, September 11, 2020).