NEIWPCC
New England Interstate Water Pollution Control Commission

October 21, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Updating Regulations on Water Quality Certification; Docket ID: EPA-HQ-OW- 2019-0405

Dear Administrator Wheeler:

On behalf of the Northeast States, the New England Interstate Water Pollution Control Commission (NEIWPCC) appreciates the opportunity to submit comments regarding the Proposed Rule, "Updating Regulations on Water Quality Certification" (hereinafter the "Proposed Rule"). Established by an Act of Congress in 1947, NEIWPCC is a not-for-profit interstate agency that utilizes a variety of strategies to meet the water-related needs of our seven member states.[1] We represent the primary state agencies in our region responsible for administering programs under the Clean Water Act (CWA). Many of our individual member states will also provide comment letters to the Environmental Protection Agency (hereinafter the "Agency") with additional, noteworthy guidance and advice to consider in final rulemaking.[2]

The Proposed Rule deviates considerably from current CWA §401 certification practice and statutory interpretation and asks for comment on a hundred items, many of which require complex legal analysis. In order for states to comprehensively analyze the Proposed Rule and provide informed input, a 60-day comment period is insufficient, and we therefore request an extension of the comment period to include an additional 60 days.

In support of a cooperative federal-state relationship, we ask that the Agency give suitable weight in its consideration of comments from state and interstate agencies, such as ourselves. We are disappointed to see that our pre-proposal recommendations in a May 24, 2019 letter to the Agency were not heeded in the Proposed Rule, and in fact the principles of state authority and consultation for which we advocated in that letter are considerably rejected in the Proposed Rule.

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[1] Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont

[2] These comments are made by NEIWPCC on behalf of all NEIWPCC member states (the six New England states and New York) as a collective group in response to EPA's Proposed Rule. Individual NEIWPCC member states may also be submitting additional comments regarding EPA's Proposed Rule. Nothing in these NEIWPCC comments is intended to limit any individual state comments.

Connecticut
Maine
Massachusetts
New Hampshire
New York
Rhode Island
Vermont

Wannalancit Mills
650 Suffolk Street, Suite 410
Lowell, Massachusetts
01854

mail@neiwpcc.org
www.neiwpcc.org

p: 978-323-7929
f: 978-323-7919

Relating to Executive Order 13868

This Proposed Rule is being promulgated per Executive Order (E.O.) 13868 of April 10, 2019, *Promoting Energy Infrastructure and Economic Growth*, which outlines a policy of efficient processes and timely action reflecting best-practices and increased regulatory certainty for our nation's energy infrastructure. Respectfully, we are unaware of any thorough analysis that gives cause to suggest the proposed changes will achieve the E.O.'s objectives, nor are we aware of any analysis performed on how the Proposed Rule will protect our nation's water resources according to the objective of the CWA, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (CWA §101(a)).

The Agency's document, "Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking,"[3] acknowledges that compared to current practice, the Proposed Rule may result in increased litigation ensuing from the narrowed scope and a rise in certification denials due to lack of sufficient information for review within the limited timeframe. The combination of more certification denials (which stops a project from going forward) and long court appeals will result in greater uncertainty and delay, especially for those complex projects which are most likely to require a longer timeframe to appropriately review. Furthermore, the changes in the Proposed Rule will result in differences between state and federal protection programs that are so significant as to essentially require "project proponents" to navigate separate and distinct permitting pathways rather than one cooperative and coordinated permit review, causing increased time, cost and uncertainty for applicants.

E.O. 13868 also required that the Agency issue new guidance in advance of a final rule, which is unconventional and without merit. We strongly recommend that EPA immediately rescind its June 7, 2019 guidance and reinstate the Agency's 2010 guidance[4] until the rule is finalized.

We also recommend that the final rule and any associated guidance maintain language consistent with the current CWA §401 text. In particular, the Agency should continue to use the term "applicant" instead of "project proponent," or provide a rationale for the change beyond the discussion of "applicant" as it relates to §401 interpretation provided in the Proposed Rule preamble.

Overall, this Proposed Rule will result in increased certification denials, delays, and confusion. It violates the CWA by granting an inappropriate level of control to federal licensing agencies and diminishing state authority to protect its water resources.

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[3] U.S. Environmental Protection Agency. August 2019. "Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking."

[4] U.S. Environmental Protection Agency. April 2010 Interim. *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes.*

Expanded Federal authority disregards cooperative federalism

The Proposed Rule disregards cooperative federalism and inappropriately limits states' authority under CWA §401 to protect state water resources and provide critical input on the impacts of federal permits and licenses.

Recognizing the necessary overlap between state and federal government, Congress entrusted states with statutory authority as co-regulators under the cooperative federalism framework as articulated in Section 101 of the CWA:

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, and to consult with the Administrator in the exercise of his authority under this chapter.

States have a unique understanding of waters within their jurisdiction and are best positioned to provide that input via the CWA §401 certification process.

Despite the clear state authority in the CWA, the Agency's deference to states has been inconsistent. The Agency's recent proposed rule, "Revised Definition of 'Waters of the United States,'" placed strong emphasis on states' authority to protect its waters. However, the Agency's interpretation of CWA §401 significantly curtails state authority to protect water resources within its boundaries. This is particularly incongruous given the federal licensing agency's heavy reliance on states to date to handle the bulk of the review of proposed projects and ensure that the water resources of all federal waters is protected—a consequence of federal agencies being insufficiently staffed or equipped to handle these reviews themselves.

Additionally, we find it surprising that the Agency claims this is their first, holistic reading of CWA §401. The Agency's interpretation differs dramatically from that of numerous U.S. Supreme Court rulings (e.g. PUD No. 1[5] and S.D. Warren[6]), as well as a 45-year certification history which reached dissimilar conclusions from EPA's reading. It is of utmost significance that states have developed their programs based in part on this long established, prior interpretation of CWA §401, and this radical shift by the Agency undermines the cooperative federalism model. CWA §401 certification is critically important to our member states, and the final rule will impact their implementation of the CWA for years to come.

We are disappointed to see that the Proposed Rule inhibits states' ability to protect their water resources by: limiting the scope of certification review; providing a reduced timeline for review (in many cases); and allowing the federal licensing agency to override state certification conditions or denials.

[5] *PUD No.1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U.S. 700 (1994)
[6] *S. D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006)

The Proposed Rule diminishes State authority to protect its water resources

Certify the Activity, not Discharge

The Proposed Rule specifies that the "scope for 401 certification is limited to assuring that a *discharge* from a Federally licensed or permitted activity will comply with water quality requirements" (emphasis added). The long-established language in CWA §401 authorizes states to consider limitations and other requirements on the *activity* once it is determined that the activity may result in a discharge to waters within the state. In the case of *PUD No.1 of Jefferson County v. Washington Dept. of Ecology*,[7] the Court's ruling opinion gives deference to EPA's regulations in that "activities—not merely discharges—must comply with state water quality standards" (701) and later reiterates that "§401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied" (711). We find no basis for the Agency to restrict states to certify only on the (point source) discharge and not the activity as a whole. We have additional concerns over limiting the definition of "discharge" to consider only the impact to waters of the U.S., to the exclusion of waters of the state. We question the legality of this limited scope of 401 certification, which prevents states from ensuring that activities of federally-permitted projects will not impair state water resources, especially wetlands and small tributaries. We strongly support a continuation of current practice keeping with the Court's opinion in *PUD No. 1*[8] that states may issue certification on the activity as a whole. It is otherwise impossible for the Proposed Rule to effectively protect water quality, which is of vital importance to natural resources, human health, and economic growth.

"Water Quality Requirements"

The second half of the scope definition specifies that the discharge will comply with "water quality requirements," which are defined as applicable provisions of certain enumerated sections of the CWA and EPA-approved CWA regulatory programs. Any definition of "water quality requirements" should enable states to apply aquatic use criteria and impacts beyond that of the discharge directly, such as streamflow and water quantity. The definition removes reference to "reasonable assurance" (40 CFR 121.2(1)(3)) and in so doing, incentivizes stricter conditions to ensure the discharge complies at a future time. This may in turn bring about more stringent monitoring and treatment requirements, which could make a "project proponent" more likely to become non-compliant, increasing their cost and the regulatory burden of both the state and federal agencies.

"Other appropriate requirements of State law"

CWA §401(d) includes in a list of certification limitations and requirements for federal license, "any other appropriate requirements of State law." The Proposed Rule defines this text as meaning only "EPA-approved regulatory provisions of the CWA regulatory programs," which essentially nullified this clause. EPA-approved CWA regulations, of which state water quality standards and NPDES program provisions are provided examples, are only some of the

[7] *PUD No.1 of Jefferson County v. Washington Dept. of Ecology,* 511 U.S. 700 (1994)
[8] Ibid.

applicable statutes and regulations that protect water quality of navigable waters. While we seek greater clarity from the Agency on what is or is not included as EPA-approved regulatory program provisions of the CWA, we would also remind the Agency that numerous state acts and regulations are considered and coordinated during 401 certification, including: coastal management; freshwater and tidal wetlands; stream protection; fish and wildlife protection; floodplain management; threatened and endangered species; historical preservation; uniform and administrative procedures; and environmental impact statement/environmental assessment.

We strongly urge the Agency to allow the certifying authority to consider *all* state water resources related statutes and regulations as part of §401 certification. The definition for "other appropriate requirements" should include any requirement of state law, regardless of whether it is part of an EPA-approved program. We also seek clarity on how the proposed definition applies to those regulations pending EPA approval.

Certifying authorities are newly required to "cite specific state or tribal law or CWA provision that authorizes the condition," and the Agency further clarifies that "citations to CWA section 401 or other general authorization or policy provisions in federal, state or tribal law would be insufficient." We thus recommend that "other appropriate requirements" also include those state statutes that allow for general provisions not explicitly connected to water quality but that allow for a state's "best professional judgement." A non-delegated state currently uses this provision to condition NPDES permits. This type of measure is typically applied to projects on an individual basis where necessary permit provisions are not general enough to be included in statute. Generally, this same state adopts the EPA-issued NPDES permit as a state permit as well, but if the state is not able to apply the full range of state law and regulations to federal permits, they may choose to issue a separate state permit that differs from its corresponding federal permit. This would easily confuse "project proponents" and unnecessarily complicate and lengthen the permitting process.

Conditions and Denials

The Proposed Rule requires that when a certifying authority grants certification with conditions, each condition must include three pieces of clarifying information, including an explanation, legal citation, and statement if a less stringent condition could be applied. This information will be used by the federal agency to determine if the condition fits within the scope of 401 certification. Likewise, a denial must include a written reason, citation, explanation of the water quality requirements with which the discharge does not comply, and what information or project modifications are needed to determine that a discharge will comply (if any).

This information requirement puts undue burden on the certifying authority, especially within a more limited review timeframe, and will further strain states' already limited time and resources. We object to the resulting shift of the burden of proof from the "project proponent" to demonstrate that the project will not violate water quality standards to the state to provide specific reasons why a discharge associated with an applicant's project will result in a violation of water quality standards.

Further, requiring an explanation of what *less* stringent conditions could be applied incorrectly implies that states require certification conditions that are more stringent than necessary to

comply with state water quality requirements. States condition certifications to ensure water quality standards are not violated, and suggesting that they abuse this important authority is unprofessional. Without question, this requirement should be removed.

We are greatly disappointed to see that the Proposed Rule allows the federal licensing agency to deem a condition or denial reason deficient or outside the scope of 401 and exclude it from a federal license or permit, or treat the certification like a waiver and proceed with issuing the license. This unilateral veto-power given to the federal agency is an infringement on the statutory authority granted to states and is unfitting with cooperative federalism and the co-regulatory design of the CWA. We are strongly opposed to this expansion of federal authority and question its legality. Congress clearly states (emphasis added), "*any certification* provided under this section…*shall become a condition* on any Federal license or permit subject to the provisions of this section" (CWA §401(d)) and, "no license or permit shall be granted *if certification has been denied by the State,* interstate agency, or the Administrator" (CWA §401(a)(1)). We see no statutory basis for the Agency to qualify when a condition or denial will be accepted and do not agree with this enrichment of power by the federal agency.

Lastly, we understand that reasonable certification changes may be necessitated for a multitude of reasons, and thus we also support retaining the current regulation's provision that, "the certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency" (40 CFR §121.2 (5)(b)).

Certification Request

The Proposed Rule itemizes seven components which in total make up a "certification request." However, these do not provide sufficient information to states to properly review impact to water resources for all permits or licenses. Therefore, we recommend adding additional requirements by type or category of permit and including a provision to include "any other application requirements" of the certifying authority to ensure the state receives all required fees and information necessary for certification review. Note that if a certifying authority does not receive the information needed for proper review, they can and will deny certification.

As proposed, it is not clear how states' 401 certification application requirements are treated when they are more stringent than those of federal application requirements. As we understand the Proposed Rule, the statutory timeline would begin once a "certification request"—as defined in the Federal rule— is received by the certifying authority, without any consideration of information or fee requirements in a state application. It is critical for states to begin the review process and timeline with all of the application components they require.

Federal Agency Applicants

When a federal agency is both the "project proponent" and the agency responsible for issuing the permit or license, it is a conflict of interest for this same agency to determine the reasonable period of time *and to decide if conditions apply*. Making these determinations in consultation with the certifying authority may be of some assistance here.

Public Notice

When EPA is acting as the certifying authority, the "public notice" requirement should be expanded to include the general public, in addition to those listed parties known to be interested (as described in Section III.G.1 of the Proposed Rule) in order for this process to remain consistent with other federal public notice practices. We are not aware of any similar procedures that omit notification to the general public.

Additionally, considerations need to be given to state-specific public notice requirements associated with issuing certification.

Neighboring Jurisdictions

In EPA's role to determine the effect of a licensed activity on other states, we urge the Agency to always notify neighboring jurisdictions and allow them the opportunity to analyze any potential impact to their waters. As proposed, the Agency has full discretion on determining the need to notify neighboring jurisdictions.

Enforcement

Enforcement of permit conditions should not be restricted to the federal agency. As co-regulators, states are entitled to enforcement rights in order to protect their land and water resources.

A restricted timeframe will lead to increased denials by States

Reasonable Period of Time

The Proposed Rule requires that the federal licensing agency establish a "reasonable period of time" in which the certifying authority can act on a certification request. This timeline should be established in consultation with the certifying authority. States are the one and only entity who can evaluate their resources and capacity for certification review, and substituting federal judgment over that of states goes against the state authority established in the CWA. An overly restricted timeline will lead states to either request an extension (if such a process is available) or simply deny certification.

In consultation with the certifying authority, we urge the federal agency to consider several additional factors when establishing the reasonable period of time beyond those provided in the Proposed Rule. These include the type of permit, timing of additional studies, the certifying authority's resources and capacity to review, and the statutory public comment, notice, or hearing requirements of the certifying authority.

Current regulations of some federal agencies specify a review period that applies across all permit types, and while we generally agree permit type should be a consideration, the complexities of individual project applications suggest that the timeline should be set on a case by case basis. We also note that some additional, required field studies must occur in a particular season, and that timing must also be considered.

The federal agency should also consider the certifying authority's review capacity and workload, especially any other current, pending certification requests. As an example, for Army Corps floodplain management review under CWA §404, hydraulic/hydrologic analysis is often deferred to the state, and engineering reviews take a good deal of time to perform, especially if more than one is being completed concurrently. Many of our member states have only a few staff who review certification requests as part of their numerous responsibilities. As stated above, review capacity is best determined in consultation with the certifying authority.

States have their own laws that must be met in the CWA §401 certification process, and we object to proposed timeline changes that would require states to alter their legislation in order to comply with this rule. We ask for consideration of a certifying authority's statutory requirements for public notice, comment periods and administrative hearing processes in determining the reasonable period of time. As an example, one member state has an administrative appeal process that takes place before certification is issued that alone can exceed one year. States will be forced to deny certifications to avoid violating their own regulations that require processes which exceed the review time period.

Implementation in consultation with States

State certification processes and best practices

From the perspective of states in the northeast, who have implemented §401 certification programs for decades, applications for certifications are reviewed and issued in a timely manner, usually within one year. As characterized by ACWA's survey,[9] delays are generally due to actions or inactions of "project proponents," such as incomplete or poor quality applications and slow response times to information requests. State certification denials are infrequent, representing those instances where the "project proponent" is unable to demonstrate compliance with water quality standards or when information deficiencies persist up to the conclusion of the allowable time for review.

Our member states currently embrace and utilize best practices for implementation of §401, including early and frequent communication between applicants, state and federal agencies; encouraging pre-application consultations; and clearly defined application requirements, templates, and instructions.

Information most commonly requested from an applicant by northeast states as part of §401 certification review includes:[10]

- Project details, maps, plans, site plan revisions, and alternatives
- Water quality monitoring and modeling data
- Streamflow studies and modeling (often water body-specific) and instream flow requirements
- Sediment sampling plans

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[9] Association of Clean Water Administrators (ACWA). May 2019. 401 Certification Survey.
[10] Ibid.

- Operations history (for hydro and water withdrawals)
- Conformance with stormwater treatment standards
- Engineering studies
- State listed species (Natural Diversity Database) information
- Habitat assessments or information on downstream habitats
- Wetland delineations and assessments and mitigation plans

Note that a "certification request," as defined in the Proposed Rule, will not supply the majority of this information.

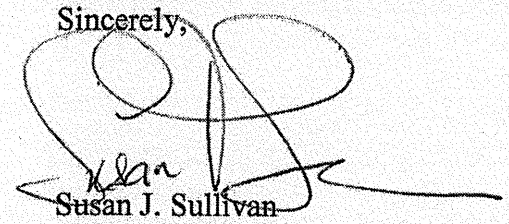
Applicability Date

The applicability date established in the final rule should be determined in close consultation with states and with consideration for state processes. States will need a substantial amount of time to evaluate and properly implement the rule.

Thank you for the opportunity to comment on the Proposed Rule, "Updating Regulations on Water Quality Certification," and for your consideration of these comments. Our member states request greater emphasis on cooperative federalism and the co-regulatory design of the CWA through meaningful engagement with states. NEIWPCC is able and prepared to support such consultation with states in the northeast.

Please do not hesitate to contact me or Richard Friesner, Ph.D., of my staff at 978-349-2523 or rfriesner@neiwpcc.org with questions or to arrange a meeting on this important matter.

Sincerely,



Susan J. Sullivan
Executive Director

cc: NEIWPCC Executive Committee and Commission
NEIWPCC Wetlands/Sec. 401 Working Group
New England and New York Congressional Delegation