

October 20, 2019

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington D.C. 20460

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
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1200 Pennsylvania Ave NW
Washington DC 20460
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Re: Docket ID No. EPA-HQ-OW-2019-0405

To Administrator Wheeler:

On behalf of the Massachusetts Rivers Alliance and the 29 undersigned organizations, we write to express our opposition to the changes in the interpretation and implementation of Section 401 of the Clean Water Act (CWA) as proposed by the U.S. EPA. The proposed rule represents a radical alteration to the federal state and tribal partnership that we have long relied on to protect our nation's waters. This proposal would severely restrict the ability of states and tribes to manage their natural resources, and it curtails the ability of other stakeholders and the general public to review and comment on federally permitted projects.

Impacts of the Proposal Rule

CWA Section 401 provides the basis for the federal/state & tribe partnership designed to protect the health of our rivers, streams, wetlands and other waters. It requires states' and tribes' certification that projects requiring a Federal permit will not have an adverse impact on the quality of state waterways. Such projects include major pipelines, dams, filling of wetlands, and other projects subject to FERC, Army Corps of Engineers and other federal permitting or licensing.

This proposal would have a detrimental impact on states' and tribes' authority and ability to conduct effective reviews. It reduces their authority in the following ways:

- ***Projects and sources of impact subject to certification:*** The proposal would limit state and tribal certification authority to the effects of direct point source discharges to waters of the U.S. This would ignore other ways in which a project might cause environmental harm to affected water resources, including filling wetlands, nonpoint source pollutant discharges, increased water withdrawals, release of pollutants through groundwater, increased erosion and sedimentation, reduced stormwater infiltration, disconnecting ecosystems, blocking or reducing water body flow, harming endangered species, and other adverse impacts.
- ***Criteria for denial or conditioning:*** The proposal limits the criteria on which states or tribes could deny or condition projects, considering only direct impacts on federally approved state water quality criteria. Many "appropriate requirements" of state law would thereby be excluded from Section 401 certifications, such as requirements for buffer maintenance, protection of riparian habitat, compensatory mitigation, and protection of intermittent

streams. The federal agency would be authorized to determine whether the conditions are justified, which in effect gives FERC or another permitting or licensing agency veto authority over certification decisions.

- ***Determination of “reasonable period of time”:*** The time needed to review a given project will depend on the nature of the project and the environmental resources affected, the adequacy of information provided by the applicant on the project characteristics and its potential impacts, and the time needed by stakeholders and the general public to review and comment on projects. This proposal would give the Federal permitting agencies the authority to dictate the maximum time allowed for state & tribal reviews – including defining a “reasonable period” to be as little as six months or even less. For example, EPA suggests that 60 days is an adequate review period for projects subject to Army Corps of Engineers dredge and fill permits. This is a woefully insufficient period of time to fully evaluate the scope of such significant projects. This proposed change would make it nearly impossible for states and tribe to make informed decisions about their natural resources.
- ***When the clock starts:*** Currently the review clock starts after the certifying agency receives a complete application, and the state agency determines when the application is complete. Under this proposal, there is no assurance that a certifying agency would receive complete submissions before the clock started. The agency would have only 30 days from receipt of an application to request additional information and could request only information determined to be within the allowed scope of certification. Moreover, only information that can be provided within the allowed review period can be requested.

Time for review should be determined from the point at which applicants have submitted all the information needed to conduct an adequate review. This includes information on the impact of the project on water quality and on compliance with all relevant state standards. The clock should not start when applicants have merely submitted a request for certification, without regard to the quality or completeness of the application.

In addition, states and tribes should be afforded the opportunity to pause the clock, if they need to request additional information to conduct a defensible review. Otherwise, certifying agencies will have to deny certifications, and require project proponents to re-apply and go through repetitive administrative steps once the required information is available. This is not an effective way to promote timely permitting.

- ***Waiver due to “failure to act”:*** A certifying agency may waive their Section 401 authority for a specific project, or they may be deemed to have waived their authority if they “fail to act” within a “reasonable period of time.” In addition to limits of what “a reasonable time period” is for a particular project and when the review clock starts ticking, the proposed rule would give the Federal agencies the power to designate certification denial as a “failure to act.” This combination of proposed changes invites applicants to game the system by submitting incomplete information initially and later failing to respond to certifying agencies’ requests for required information.

- ***Review and comment by other parties:*** Restrictions on the time, scope and availability of required information available to states and tribes for Section 401 reviews will also have detrimental impacts on review by other parties. States generally provide opportunities for public comment on projects' impacts as part of their certification process. This is a valuable source of information on project impacts and supports defensible certification decisions. Stakeholders need sufficient time to prepare comments and certifying agencies need sufficient time to respond to comments on their proposed certification decisions. Restrictions on the time states and tribes have to act will inevitably restrict the time that other parties have to participate in certification decisions. Accelerated comment periods are severely detrimental to the quality of the rule-making process.

Lack of Policy and Legal Rationale

No reasonable justification for the proposed changes

The proposal does not document any systematic problems with the current implementation of Section 401 that would require these significant changes in long-standing practice. EPA ignores evidence submitted by the Association of Clean Water Administrators (ACWA) that makes evident the explicit and critical authority of states and tribes under Section 401. ACWA's survey of states (submitted with comments in the pre-proposal Docket EPA-HQ-OW-2018-0855) documented that:

- A small percentage of certification requests overall are denied by states;
- Incomplete requests submitted by applicants is the most common reason for certification delays; and
- Significant steps have been taken by states to ensure timely Section 401 certifications, including guidance on what constitutes a "complete" request and encouraging or requiring pre-submittal hearings.

EPA states that the proposal is "intended to increase the predictability and timeliness of Section 401 certification by clarifying timeframes for certification, the scope of certification reviews and conditions, and related certification requirements and procedures." Unfortunately, unlike ACWA, EPA has failed to conduct its own careful analysis of past certification reviews and demonstrate the need for this proposal.

Inconsistency with the intent of the Clean Water Act and judicial precedent

CWA Section 401 clearly provides for broad state and tribal authority to ensure compliance with "applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated" (33 USC §1341(4)). The Supreme Court has affirmed state authority to make a certification decision based on the broader water impacts of activities associated with a project (*PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994)). There has been continuing judicial precedent for this comprehensive interpretation of the Section 401 authority (*S.D. Warren Co. v. Maine Board of Environmental Protection* (2006)). EPA's current proposal is in direct conflict with this well-established interpretation of Section 401's intent and scope. The proposed rule would allow EPA or federal permitting and licensing agencies to make unilateral decisions about states' and tribes' decisions protecting local waterways, well beyond the intent of the CWA.

Poor Rule-Making Process

Inadequate analyses of impacts

EPA's economic analysis and various statutory and Executive Order reviews are remarkably limited considering the significant changes contemplated by this proposed rule. The agency characterizes its economic analysis as "informative" but states that it is not relying on the analysis as a basis for the proposed rule. It acknowledges using a qualitative analysis based on four case studies "to make the best use of limited information to assess the potential impacts of this proposed rule." The analysis addresses impacts on project proponents and on certifying agencies, but does not include any analysis of impacts on the environment.

A proposal of this scope should be supported by a detailed quantitative analysis of impacts. These analyses should include a historical review of 401 certification decisions that would be altered under the proposed rule – or at least a representative sample of such decisions. The analyses should address the potential impacts on all aspects of water resource health. These include impacts from projects going forward that have been denied under existing procedures, and from projects that were certified with conditions instead being subject to fewer conditions.

EPA's analysis falls far short of the kinds of cost, benefit and economic impact analysis performed in the past for significant rulemakings. It does not comply with the requirements of Executive Order 12866 or the agency's own Guidelines for Preparing Economic Analysis. Without conducting these analyses, EPA cannot claim to understand the full impacts of the proposal.

Conclusion

We request that EPA withdraw this proposal. Any continuing review of Section 401 provisions should begin with a detailed analysis of the past implementation of state and tribal Section 401 certifications. In addition, despite its assertions to the contrary, EPA did not adequately consult with states and tribal groups in preparing this proposal. Numerous groups representing states and tribes have objected to the agency's limited consultation and failure to respond to their concerns. EPA needs to collaborate with both states and tribes to adequately review potential changes to the 401 provisions. If any significant problems are identified, proposed changes should be specifically designed to address those problems. EPA should demonstrate that the proposal would not result in increased environmental harm and should conduct a full analysis of costs, benefits and economic impacts. Finally, EPA should allow an adequate comment period, consistent with past rule-making standards.

Thank you for your time and consideration.

Sincerely,

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