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United States Environmental Protection Agency
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Washington, DC 20460
OW-Docket@epa.gov

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RE: Notice of Intention To Reconsider and Revise the Clean Water Act Section 401 Certification Rule

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's members are responsible for implementing section 401 of the CWA and, therefore, have a unique interest in working cooperatively with EPA as the regulations are reconsidered. The states support the agency's efforts to review and revise the sec. 401 water quality certification rule and encourage the agency to engage in robust coordination with the states through organizations like ACWA.

As the agency undertakes its efforts to reconsider and revise the 2020 sec. 401 certification rule (hereinafter "2020 rule"), ACWA offers the following recommendations: any new rule must fully incorporate the principles of cooperative federalism and respect the role of the states in protecting its water resources and enforcing state requirements; any rule should fully incorporate the decision in PUD No. 1 of Jefferson County v. Wash. Dep'.t of Ecology, 511 U.S. 700 (1994)(hereinafter "PUD No. 1"), and respect the role of states in in fully evaluating the impact of potential projects on state resources; and any new rule should maintain those provisions from the 2020 rule that increased transparency, predictability and efficiency.

Cooperative Federalism & Coordination with Co-Regulators

As the agency undertakes an examination of the 2020 rule and considers revising it, the states appreciate EPA seeking pre-proposal comment from stakeholders on this important issue. Under the CWA, Congress clearly and 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 water resources. Section 101 of the CWA 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' explicit 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 of discharges into waters of the United States under Section 401 is authority directly granted to the states by Congress and affirmed by the

U.S. Supreme Court in PUD No. 1. This authority helps ensure that activities associated with federally permitted discharges will not impair state water quality.

States have clear authority to protect their water resources under CWA Section 401. As stated above, Congress purposefully and clearly designated states as co-regulators under the CWA in Section 101. In accordance with the expressed purposes listed in sec. 101, Congress included sec. 401 in the CWA codifying state authority to certify and condition federal permits of discharges into waters of the United States. In advocating for the inclusion of Section 401 in its original location, 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), *See also* Jefferson County PUD v. Washington Dept. of Ecology, 511 U.S. 700, 704 (1994) (explaining the "distinct roles for the Federal and State Governments" under the CWA). Therefore, EPA must not make any clarifications to sec. 401 or changes to related federal regulations and guidance that diminish state authority, as expressed by Congress, and reaffirmed by the U.S. Supreme Court, to protect its water resources utilizing CWA sec. 401.

Scope of Review

As EPA reconsiders and revises the 2020 sec. 401 water quality certification rule, the states encourage EPA to craft a rule that recognizes the scope of state review. For some states this would mean analyzing the activity's impacts on state resources. The 2020 rule restricted states' ability to consider how a federally approved project, as a whole, will impact state water quality. States should be allowed to consider a set of impacts best tailored to local needs and apply conditions that may be relevant to state laws that they deem necessary to best protect their waters. However,

there are other states that are prohibited from considering the activity as a whole and rather focus on the project at hand. Because of the variety of approaches implemented throughout the states, it is essential that the agency craft a rule that respects these differences and provides states with the flexibility they need to implement the CWA in their states.

Any revisions to the 2020 rule, must also restore the authority of states to have broad discretion when developing the conditions included in a sec. 401 water quality certification. The agency should revise its interpretation of scope to include potential impacts to water quality not only from the ''discharge'' but also from the ''activity as a whole'' consistent with Supreme Court case law. This discretion should include the ability to place conditions on impacts from nonpoint sources once the overall activity has triggered the need for a water quality certification. This flexibility is "essential in the scheme to preserve state authority to address a broad range of pollution." S.D. Warren v. Maine Bd. Env'tal Prot., 547 U.S. 370, 386 (2006). However, this direction should not be mandatory but rather flexible so that states can implement the CWA in their states as they see fit.

Process Improvements

ACWA supports efforts to streamline or clarify the sec. 401 water quality certification process to increase transparency and clarity for the regulated public. However, the states stress that it is essential for EPA to avoid maintaining the changes in the 2020 rule or expanding any changes to the sec. 401 regulations that would weaken the abilities of state water programs to protect the quality of their waters.

Many states have found the 2020 rule's pre-filing meeting provisions helpful to both the state and project proponents. However, as EPA is revising the 2020 rule, states caution the agency to refrain from making any pre-filing meeting provisions mandatory for states to follow. Even before the 2020 rule, states already employed a series of "best practices" to ensure complete requests and timely certifications. State websites often have guidance documents and other materials to assist applicants. States also reach out directly to applicants when requests are incomplete. Meaningful early engagement gives states a chance to raise water quality concerns about projects during the planning process and gives project proposers and federal agencies a chance to address those concerns in ways that facilitate the certification process and protect water quality. Early engagement also ensures that states have timely access to the information they need to make informed certification decisions.

Any newly revised sec. 401 rule must also include provisions that empower states to determine when a complete application is received by the state, thereby triggering the "reasonable period of time" clock. The states hope that any new regulation makes it explicitly clear that the "reasonable period of time" does not begin until the states have all of the necessary information to evaluate the proposed project's impacts. Due to the wide variety in the types of projects in need of a water quality certification and the essential role as co-regulators that states play in the certification process, states must have the authority to determine when the reasonable period of time starts, provided, provided all reviews fall within the statutory one-year limit.

The states also suggest that any revised sec. 401 water quality certification rule should require project proponents to provide sufficient information for states to properly evaluate a proposed project's impacts on the state resources. The 2020 rule provisions do not provide sufficient information for states to fully understand the scope of proposed projects to determine all of the necessary information required to make a decision. States often encounter challenges in issuing timely water quality certification responses due to actions or inactions by the project proposers themselves. Examples of these challenges include: 1) incomplete or inconsistent application packages that are missing key information, and/or maps that would enable states to make an informed decision on a project or the project scope, 2) design or construction plans that may have been altered without supplying regulators with updates on the impacts of the changes,3) slow responses (and sometimes refusals) by regulated entities to respond to state requests for information needed to complete an application and allow for effective review of water quality impacts, and 4) certification requests that are filed prior to completion of all federal permitting reviews. In order for states to effectively and efficiently complete the water quality certification process, they must have the appropriate information upon which to base their decision. Any new regulation should also define the processes, timelines and expectations of project applicants for submitting and supplementing information to states (and applicable federal agencies) in relation to any request for CWA sec. 401 certification. At the same time, a new regulation should incorporate flexibility to reflect the variety of state-specific certification request requirements and information needs, which may also differ from project to project.

EPA should restore States' authority to modify or include "reopener" clauses in sec. 401 water quality certifications once they have been issued to cure any deficiencies. The 2020 regulation prohibited modifications and, as such, this change has resulted in an increase in certification denials by state water quality certification programs because they do not have the ability to evaluate new information or data about the proposed project. Authority to modify a request or reopen a certification allows for quick responses and flexibilities when circumstances require changes to a project and therefore require the modification of relevant water quality certifications. Under the 2020 rule, if a project has even minor changes the applicant is forced to go through an entirely new certification process which may result in costly delays.

Role of Federal Agencies

As EPA re-evaluates and revises the 2020 rule, EPA should revise provisions related to the role of federal agencies in reviewing state certifications. A state's sec. 401 water quality certification authority is statutory authority directly granted to the states; not authority that the states need to seek delegation for from EPA. Therefore, the states do not believe that it is appropriate for federal agencies to review certifying authority actions or to reject state conditions. The CWA does not support such authority. Furthermore, it is essential that any new rule reinstate the states' authority to enforce conditions included in a sec. 401 water quality certification. In order to be able to enforce conditions, any new regulations must include provisions authorizing states to inspect projects to ensure compliance with certification conditions. Finally, some states believe EPA should eliminate the following requirement to include in certification conditions "ii) A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements; (in section 121.7)". Other states, however, do not see this requirement as an impediment or a provision that should be removed.

Delayed Effective Date

Once EPA has concluded this effort at reevaluating and revising the 2020 rule, EPA should provide for a delayed effective date so that states have time, if necessary, to revised state statutory or regulatory requirements to ensure clarity and transparency is achieved. The states would also recommend that any concomitant regulatory changes should be proposed and finalized simultaneously by relevant federal agencies (e.g., the Army Corps of Engineers, Federal Energy Regulatory Commission) so that implementation of revised water certification provisions would be more effectively coordinated and would avoid circumstances where regulations could be interpreted as inconsistent with one another.

Conclusion

Because of states' unique and congressionally designated role under the CWA as co-regulators, ACWA recommends that EPA provide a genuine outreach to states and maintain regular contact and dialogue, through forums, calls, and other communication, throughout the life of this effort. When commissioners and elected officials need to discern how to implement this new rule and what effects it will have on state government, local landowners, and other stakeholders, on permitting efficiency, and on water quality our members are the experts they will turn to. ACWA urges EPA to continue to take advantage of this expertise and experience by working directly with ACWA and its members as the proposed rule is drafted.

Specifically, we ask that EPA provide at least an early draft of regulatory text, or options with sufficient detail for our workgroup members to give EPA useful and specific feedback on the new rule. Providing this information to state surface water program directors would be tremendously beneficial for EPA, as our members are uniquely qualified to evaluate the regulatory text in terms of technical details, implementation challenges and barriers, and unintended consequences. Undertaking such a series need not be a drawn-out process, as our workgroup is ready and able to have thorough discussions in a short period of time to meet your schedule.

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 pre-proposal recommendations 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,