

May 24, 2019

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

Via regulations.gov: EPA-HQ-OW-2018-0855

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Executive Director & General Counsel
Julia Anastasio

1634 EYE Street, NW, Ste. # 750,
Washington, DC 20006

TEL: 202-756-0605

WWW.ACWA-US.ORG

RE: Pre-proposal Recommendations for Clarification of Provisions within Clean Water Act Section 401 and Related Federal Regulations and Guidance

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”).

States are disappointed with EPA’s insufficient engagement and outreach regarding this effort, recognizing that the tight timeframe established by Executive Order 13868 *Promoting Energy Infrastructure and Economic Growth* (“Executive Order”) has made outreach more difficult. Because the clarifications to CWA Section 401 and changes to related federal regulations and guidance contemplated by the Executive Order may fundamentally alter the state/federal relationship in managing the nation’s water resources and may severely limit states’ ability to regulate and manage the water resources within their borders, meaningful consultation with states is essential before EPA moves forward. EPA’s lack of consultation prevents states from providing input into decision making as intended by the cooperative federalism goals of the Clean Water Act. Also, the timeline of sixty (60) days for the development of new guidance and 120 days for the completion of rulemaking makes it difficult for states to provide meaningful input to EPA. States hold a unique and congressionally designated role under the CWA as co-regulators. Therefore, ACWA insists 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 negotiation and joint process development.

Also, it is not clear that changes to the CWA Section 401 certification are needed, as states have consistently exercised their authority under Section 401 in an efficient, effective, and equitable manner. Therefore, states insist EPA communicate clearly why this effort is necessary.

Lastly, states are also firmly against any clarifications to CWA Section 401 or changes to related federal regulations and guidance that may curtail or reduce state authority under CWA Section 401 or the vital role of states in maintaining water quality within their boundaries. If clarifications to Section 401 or changes to related federal regulations and guidance are to be made, states insist that EPA provide genuine outreach to states to ensure preservation of states’ congressionally designated role under the CWA to regulate and manage the water resources within their borders.

Cooperative Federalism – State Input

ACWA appreciates 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 vital to the CWA's system of cooperative federalism as expressed in Section 101. This authority helps ensure that activities associated with federally permitted discharges will not impair state water quality.

As stated above, states are disappointed with the lack of consultation and engagement regarding the Agency's intent to clarify CWA Section 401 and make changes to related federal regulations and guidance. Despite letters sent to EPA in December 2018 and February 2019 requesting discussion, states were not afforded an opportunity to speak with the Agency on the importance of Section 401 authority to the states. States sought to provide the EPA with information on how states are currently performing Section 401 reviews, the average length of time for reviews, and suggestions for process improvements as the Agency began contemplating changes to the water quality certification program (Letter from Western Governors Association, National Conference of State Legislatures, Association of Clean Water Administrators, Association of State Wetland Managers, The Council of State Governments – West, and Western States Water Council to The Honorable Andrew Wheeler, Administrator, U.S. Environmental Protection Agency and The Honorable R.D. James, Assistant Secretary for the Army for Civil Works, U.S. Army Corps of Engineers (February 20, 2019) (https://www.acwa-us.org/wp-content/uploads/2019/02/CWA-401-EPA-Process-Improvements-FINAL_.pdf).

Though EPA held two webinars on this effort, on April 17 and May 8, 2019, these webinars provided only limited opportunity for state input and discussion. Each webinar was only an hour in length and had numerous participants, hampering the ability of both participants and the Agency to engage in substantive conversation. As a result, numerous questions posed by states went unanswered. ACWA appreciated EPA providing guidance on what types of comments the Agency seeks, however, the webinars otherwise offered only cursory consultation with states.

Because of states' unique and congressionally designated role under the CWA as co-regulators, ACWA again insists 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.

State Authority

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 Section 101, Congress included Section 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 Section 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 Section 401.

State Processes

EPA has not provided any concrete reasoning as to why this effort is necessary. States have consistently exercised their authority under Section 401 in an efficient, effective, and equitable manner. Therefore, it is not clear to states why changes to the CWA Section 401 process are needed.

To assist in responding to EPA’s pre-proposal recommendation request, ACWA released a survey to states inquiring into state Section 401 certification processes (See attached *401 Certification Survey Summary – May 2019*). ACWA received thirty-one (31) responses to the survey. The results show that the median of the average number of certification requests received per state per year is approximately seventy (70)¹. The average length of time it takes these states to complete a review once a request with all necessary information is received is approximately 132 days (under 4.5 months). Seventeen (17) states average zero (0) denials per year. The rest of the states very rarely issue denials of certification. States most often work diligently with applicants to make certifications in a timely manner.

Though delays occur, for reasons such as incomplete requests, slow responses from applicants, state public comment periods, lengthy negotiations, and staff workload, states have taken significant steps to ensure timely Section 401 certifications. Most states either require or encourage pre-submittal meetings with applicants. States have also adopted electronic submittal and hired additional staff to assist with making certifications. Regulatorily, states have clarified “completeness” of requests and set hard time limits for review in regulations.

Because it is the most common reason for certification delays, states have taken significant steps to inform applicants what constitutes a “complete” request for certification. Twenty-one (21) states either have regulations that explain completeness, accept the federal Army Corps of Engineers application, or clearly list requirements on state applications. Some states work with applicants through early engagement to ensure applicants are aware of request requirements.

States also employ a series of “best practices” to ensure complete requests and timely certifications. Twenty-seven (27) states require or encourage pre-request consultations with applicants or their consultants or have clear request instructions. State websites often have guidance documents and other materials to assist applicants. States also reach out directly to applicants when requests are incomplete.

¹The survey found a large range of average annual number of certification requests. At the high end, Michigan has approximately 5000 requests and New York approximately 4000 annual requests. On the low end, New Hampshire has approximately 10 annual requests and South Dakota approximately 15 requests.

As states have exercised their authority under CWA Section 401 for many years, and have done so in efficient, effective, and equitable manner, states do not think there is a clear justification that changes to the CWA Section 401 certification process are needed. Therefore, states insist EPA communicate clearly why this effort is necessary.

Administrative Procedure Act/Timing

EPA's process to clarify CWA Section 401 and make changes to related federal regulations and guidance as explained in the Executive Order appears to be an attempt to do the bare minimum allowed under the Administrative Procedure Act ("APA") by forcing an overly ambitious timeline: Sixty (60) days for the development of new guidance and 120 days for the completion of rulemaking. 5 U.S.C 553(c) ("the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments..."). As such, EPA is creating serious difficulties for states to provide meaningful input on the proposed changes, thereby undermining the spirit of the APA and cooperative federalism.

Process Improvements and the Preservation of State Authority

Certification Timeliness

As EPA moves forward with this effort, specific care must be taken to preserve the state authority and flexibility granted by Congress under CWA Section 401. Under Section 401 states have up to one year to act on requests for water quality certifications. Section 401 explains further, "[states] shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications". 33 U.S.C. 1341(a)(1). This timeline as well as statutorily required state public notice processes must be respected. However, if EPA seeks to increase certification efficiencies, below are some examples adapted from the previously cited Letter to The Honorable Andrew Wheeler and The Honorable R.D. James (February 20, 2019) of steps the Agency can take that would not curtail state authority:

- Institute an "as-needed" pre-request consultation process involving applicants, states, and federal licensing agencies before the commencement of any prescribed timelines required by a CWA Section 401 review.
- If shorter timelines are needed in specific circumstances, stakeholders could be required to consult and work with state officials as early as reasonably possible. However, in the spirit of cooperative federalism states must be partners in deciding the appropriateness of establishing timelines shorter than one year.
- Work with states to define what constitutes a bona fide "request for certification" to require applicants to have completed all data collection, analyses, and assessments of water quality impacts including baseline data and information before making the request for certification. Requests should include, at a minimum, the same information that is required to be submitted to the federal licensing agency to act on associated applications.
- Adopt policies expressly stating that timelines for state action under CWA Section 401 do not begin until an applicant has submitted a substantially complete request for water quality certification. Encourage states to adopt—by statute, regulation, or guidance—standards for information that must be submitted for a request to be deemed "substantially complete."

- Define 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 Section 401 certification.

Scope of Review

Under CWA Section 401, states have authority to certify that any applicant for a federal license or permit to conduct activity that may result in a discharge to navigable waters within the states' jurisdiction will comply with specific sections of the CWA and other water quality-related requirements of state law. This authority cannot, and must not, be changed by regulation or guidance. However, if EPA seeks to clarify the scope of state review when making such certifications, below are some examples of steps adapted from the previously cited Letter to The Honorable Andrew Wheeler and The Honorable R.D. James (February 20, 2019) the Agency can take that would not curtail state authority:

- Within constraints provided by state law and without limiting the authority of any state department or agency, emphasize the relationships between water quantity, water management, and water quality, and recognize that state water quality certification extends beyond the chemical composition of waters of the United States.
- Recognize the consistent interpretations of state and federal courts, including the U.S. Supreme Court, that state authority to review and act upon requests for water quality certification under CWA Section 401 is to be construed broadly and that the scope of states' certification authority extends to the proposed activity as a whole.

Coordination Efficiencies

If EPA is looking to make CWA Section 401 certification processes more efficient, below are some examples of steps adapted from the previously cited Letter to The Honorable Andrew Wheeler and The Honorable R.D. James (February 20, 2019) the Agency can take that would not curtail state authority:

- To avoid duplicative analysis, ensure certification request information relating to a proposed project's review under other federal statutes (e.g., NEPA, ESA, etc.) is provided to states to use, when appropriate, in their water quality certification review under CWA Section 401.
- Encourage, facilitate and support the development by states of their own best practices for implementation of CWA Section 401 state water quality certification programs, and encourage federal participation in such development.
- Support the adequate funding and staffing of state and federal agencies charged with implementing CWA Section 401.

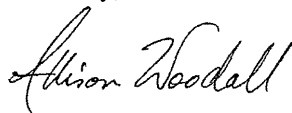
Conclusion

As EPA moves through the process of clarifying Section 401 and making changes to related federal regulations and guidance as explained in the Executive Order, 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 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 must not come at the expense of state authority and should be developed through genuine consultation with states. EPA must 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.

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,



Allison Woodall
ACWA President
Special Assistant
Texas Commission on Environmental Quality

Enclosures: ACWA 401 Certification Survey Summary – May 2019