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EPN Comments on EPA's Proposal to Update Water Quality Certification Under the Clean Water Act Section 401

October 21, 2019

Re: Docket ID No. EPA–HQ– OW–2019–0405, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44089-44123 (August 22, 2019)

Dear Administrator Wheeler,

The Environmental Protection Network (EPN) is an organization comprised of over 450 EPA alumni volunteering their time to protect the integrity of the U.S. Environmental Protection Agency (EPA), human health and the environment. We harness the expertise of former EPA career staff and confirmation-level appointees to provide an informed and rigorous defense against current Administration efforts to undermine public health and environmental protections.

EPN submits these comments on the August 22, 2019 proposal "Updating Regulations on Water Quality Certification" due to concerns that the proposal:

- Urges a reduction in what would constitute a "reasonable time" for a state to act on a certification request from six months to a year in the existing regulation to a period perhaps as short as 60 days.
- Changes and limits the scope of various considerations for 401 certifications, including what triggers an obligation to request certification, what the certifying agency can look at in determining compliance, and what conditions can be included with the certification. The proposed regulation would limit consideration to point sources, such as factories, and exclude discharges from non-point sources such as industrial runoff.
- Should specify that having inadequate or insufficient information to certify compliance with water quality requirements is an acceptable basis for denial.
- Should allow the certifying authority to deny certification in circumstances in which the state disagrees with a federal agency over the requirements of state law.
- Should require pre-request consultations with the states to apply for all certifications, or at least for major projects, rather than only when the Administrator of EPA is the certifying authority.
- Should clarify that if information necessary to determine compliance with water quality protection isn't available during the "reasonable period of time," certification may be denied.

EPA's proposed regulation would establish requirements and standards for state water quality certification under Section 401 of the Clean Water Act (CWA) that inappropriately restrict the scope and timing of this important avenue for states to protect their waters. The proposed limitations are inappropriate and inconsistent with the statute.

We start with two fundamental provisions of the CWA. Section 510, 33 U.S.C. § 1370, provides that nothing in the statute shall "preclude or deny the right of any State…to adopt or enforce…any requirement respecting control or abatement of pollution…" as long as the requirements are not less stringent than federally established requirements. It also provides that nothing in the CWA shall "be construed as

impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters…of such states."[1] Thus states have the right to establish requirements, which include procedural and substantive standards, controlling water pollution. The second principle is found in Section 313(a), 33 U.S.C. § 1323(a), which waives sovereign immunity, making federal agencies subject to state authorities and permit requirements.[2] Taken together, under the CWA federal agencies are subject to state water pollution and water quality requirements, whether "substantive or procedural." Section 401 itself is written broadly authorizing states, among other things, to include conditions in the certification related to "any requirement of state law."[3] Section 401 should be construed and applied in a manner that enables states to apply their standards as fully as the statute allows.

In some states, the water quality certification procedures are linked to the state's own permitting requirements. This is efficient for the state and for project applicants who must comply with federal and state requirements. It makes no sense to have new, narrowing limitations on the Section 401 certification when states already have substantive and administrative requirements for pollution control with which the federal agencies must comply.

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[1] Section 510 provides: "Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." (33 U.S.C. 1370)

[2] Section 1323(a) reads, in part: "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government .•• and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural ..•, (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." 33 U.S.C. § 1323(a)

[3]Section 401(d) provides in part: "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit *will comply* with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and *with any other appropriate requirement of State law set forth in such certification*, and shall become a condition on any Federal license or permit subject to the provisions of this section. (33 U.S.C. 1341) (emphasis provided).

In the real world, applicants understand that they must meet state and federal pollution control requirements. As such, it seems more than odd that the proposed regulation would establish limitations on state exercise of water quality certification under Section 401, restricting what states can consider in making that particular decision and deciding what conditions they can include with their certifications. Section 401 should be construed and applied in a manner that is consistent with other provisions of the CWA that expressly subject federal agencies to state pollution control laws and requirements.

EPN has organized its comments topically, addressing provisions of the proposed regulation that are without support, inappropriate or otherwise warrant re-evaluation prior to finalizing any regulation.

I. Time Period

The proposed Section 401 certification regulation is similar to the existing regulation in that it allows the federal agency to determine what constitutes a "reasonable time" for the state to act. However, the existing regulation suggested six months to one year, while in the Preamble to the proposal, EPA urges that a shorter period, perhaps as short as 60 days, would be reasonable. We can only hope that federal agencies will recognize that state workload, state's need for sufficient information and the propriety of integrating the Section 401 certification with other state permitting and regulatory requirements should determine what is a reasonable time. Unfortunately, these are not among the considerations identified in proposed Section 121.4(d) or (e).

Significantly, proposed Section 121.4(f) says that the certifying agency is not authorized to request the project proponent to withdraw a certification request or take any other action for the purpose of modifying or restarting the established reasonable period of time. Withdrawal of a request is a reasonable way for federal agencies to avoid denial of water quality certification. This provision doesn't prevent a federal agency from withdrawing the request, but arguably would strip the certifying authority of even suggesting withdrawal or otherwise working cooperatively with the federal agency and the project applicant. This blanket prohibition seems excessive and inconsistent with fostering cooperative relationships with the states to protect water quality.

II. Limitations on Scope of 401 Certification

The scope of 401 certifications involves separate substantive considerations, each of which are changed and limited by the proposed regulation: 1) What triggers an obligation to request certification? 2) What can the certifying agency look at in determining compliance? 3) What conditions on the federal action are permissible? We address each of these in turn.

A. Triggering the Section 401 Obligation

The statute says that Section 401 applies to "any discharge." The proposed regulation would limit the obligation to discharges from point sources. See Section 121.1 (g): "Discharge for purposes of this part means a discharge from a point source into navigable waters." And Section 121.3: "The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." Limiting Section 401 to point source

discharges omits non-point source discharges, which can have significant impact on water quality. If a state protects its water quality through requirements for both point and non-point source discharges, the state should be able to require Section 401 certifications for Federal licenses that may result in either discharge; furthermore, even if only a point source discharge were to trigger the need for state certification, the state should be able to consider the cumulative water quality impacts from both the point source and non-point sources associated with the facility. "Any discharge" should mean any discharge that the state controls or manages to protect its water quality.

B. Certifying Authority Considerations

The proposed regulation limits certification to water quality requirements that are defined in Section 101.1(p) as: "Water quality requirements means applicable provisions of §§301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions." The use of "and" seems to mean that any state or tribal water protection requirements that are not part of an EPA approved program cannot be included in the water quality certification. Nothing in the statute supports this limitation and it is inconsistent with the state authority provision of Section 510 of the CWA, which preserves the rights of the state to establish substantive and procedural requirements for water quality, specifically those that may be more stringent than the federal requirements.

The explanation of this limitation in the Preamble (84 Fed. Reg. 44104) argues that the regulatory provisions of the CWA are limited to regulations of point source discharges. Without addressing whether this is accurate, it makes little sense to try to limit state responsibilities under Section 401 to the limits applicable to federal regulatory authority. Section 401 certification is a doorway through which the state can certify compliance with <u>its requirements</u>, not EPA's. It is the avenue for the project applicant to notify the federal permitting agency that its project won't violate <u>state</u> standards, not just federally approved state standards. This justification ignores the language of Section 401(d), which allows certifying agencies to include conditions drawn from "any other appropriate requirements of state law" in their certification.

C. Conditions of the Certification

By limiting the trigger and scope of the certifying authority's action, the proposed regulation limits the scope of what conditions can be included with the certification. As noted above, Section 401(d), addressing conditions of certification, does not support such narrow limitations.

Section 121.5(d) imposes specific and exacting requirements on the certifying authority, particularly for denials. While it is fair to demand specificity in a denial, taken together with the limited time periods for state review and the limitations on the ability of the state to obtain additional (and sufficient) information, certifying authorities may find themselves stripped of the ability to comply with the information required under Section 121.5(d). There should be more flexibility for additional time and information to assure that a rational certification decision is possible.

D. Federal Action on a Certification Denial

Section 121.6(c) provides that the federal agency can determine whether the certification satisfies the requirements of Section 401 and Sections 121.3 and 121.5(e), providing written notice to the certifying authority. Under this provision, only if the certifying authority's decision is received prior to the end of the "reasonable period of time" can the certifying agency have the opportunity to remedy "the identified deficiencies in the remaining period of time." If the certifying authority doesn't satisfy the federal agency "by the end of the reasonable period of time," the certification is treated as waived.

The statute is quite clear. Section 401(a) provides: "No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be." The same section allows the state to establish procedures for public notice and public hearings; Section 401 certification is a state action. Clearly, as has been in effect since enactment of the statute, if an agency or applicant is unhappy with a state certification decision, that must be addressed under state law.

Moreover, use of the word "may" in 121.6(c)(1) means that the federal agency has discretion not to allow a state to correct deficiencies that the federal agency concludes invalidate a denial. And the fact that this sham process must be completed prior to the end of the "reasonable time period" puts the federal agency in a position where it can simply sit on a denial, then announce its decision to reject that denial. The regulation thus would allow a federal permitting agency to nullify a state denial of certification or conditions it disagrees with, contrary to the CWA.

Poorly conceived regulations cannot preempt state law, particularly under the anti-preemption provision of Section 510 of the CWA. This section of the proposed regulation should be dropped.

III. Additional Comments on Proposed Regulation

The following additional comments on the proposed regulation relate to clarity and propriety of the requirements.

A. Section 121.5, Action on the Certification Request

This Section has inconsistent language about what happens if the certifying agency doesn't have enough information by the deadline to certify that the proposed project will comply with the water quality requirements. Section 121.5(b) suggests that in that circumstance, the certifying agency can deny (or waive). But Section 121.5(e) says that any denial "shall" identify the specific water quality requirements with which the proposed project will not comply. This seems to foreclose a denial based on insufficient information. There is no provision for basing a denial on uncertainty or insufficient information.

Insufficient or inadequate information is a critical and real-world problem for Section 401 certification. State resources are limited, and both state and federal agencies rely on applicant-submitted information to process permits and certifications. There must be time and adequate information for the certifying authority to

evaluate and perform its duties under Section 401. This provision should be clarified to specify that insufficient information is an acceptable basis for denial.

B. Section 121.8, Authority of Federal Permitting Agency

The proposed regulations allow the federal permitting agency to decide if the certification meets regulatory requirements. Under Section 121.8, if the permitting agency determines a condition is outside the scope of "water quality requirements," as defined in Section 121.1, or the written certification doesn't meet all requirements of Section 121.5(d), "such condition shall not be incorporated into the license or permit." Federal permitting agencies have no special expertise in state law (or federal CWA requirements).

The problem is magnified by Section 121.8(a)(2), which makes it discretionary on the part of permitting agency whether to allow certifying agency an opportunity to remedy a "defective" condition in the remaining portion of the "reasonable period of time." There should be a clear, mandatory right of the certifying authority to challenge a federal permitting agency determination and to remedy any defects that agency has identified. The remedy should include the ability of the certifying authority to deny certification in the circumstances where it disagrees with the federal agency over the requirements of state law.

C. Section 121.12, Pre-Request Procedures

Sections 121.12 and 121.13 fall within Subpart D, addressing situations when EPA acts as certifying agency. There seems to be little reason for not extending these provisions, in a modified form perhaps, to all certifying authorities.

The pre-request procedures seem to apply only when the Administrator of EPA is the certifying agency, which is a small subset of all certifications. It would seem to make sense to provide this for all certifications (or at least for major projects), as the preamble acknowledges that many states like the idea. Pre-request consultation would facilitate state decision-making and provide useful information to the federal permitting agency about state law and procedures. Rather than imposing a set procedure such as Section 121.12 on states, the regulation could encourage the federal agency to conduct pre-request consultation with the state and provide that if the state has a pre-filing procedure, the federal applicant should follow it.

D. Section 121.13, Additional Information

Similar to Section 121.12, there seems no reason why the authority to request additional information in Section 121.13 should apply only when EPA is the certifying agency. Why not extend to states?

Even if applicable only to the Administrator, the time periods for requesting additional information seem unreasonable. Section 121.13(a) limits the certifying authority to 30 days after receipt of the request to ask for additional information; this is a very short time period. Section 121.13(c) limits the scope of the information request to information that can be generated within the "reasonable period of time" for certification decision, so that information requests cannot extend to overall time period for the certification. Information requests should be linked to the sufficiency of the information to the water quality determination. The regulation should be clarified here and in Section 121.5 to provide that if information

necessary to determine compliance with water quality protection isn't available during the "reasonable period of time," certification may be denied.

Summary

EPN appreciates the opportunity to provide comments on this proposed regulation. We have serious concerns that the proposed regulation impermissibly narrows the scope of state water quality requirements that should be considered under Section 401.