

EPN Oral Testimony on Updating the Water Quality Certification Regulations

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My name is Philip Mancusi-Ungaro. I retired from the Environmental Protection Agency in 2018 after 29 years as an attorney focusing on issues related to the Clean Water Act and related statutes. Currently, I volunteer for the Environmental Protection Network focusing on non-legal regulatory matters. The Environmental Protection Network harnesses the expertise of more than 700 former EPA career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

Let me begin by thanking the EPA staff for providing this opportunity to provide these comments.

The comments I am presenting today highlight some of the primary issues we identified in reviewing the proposed Section 401 rulemaking. The EPA has provided for an unusually short 30 day comment period. The EPN and others had requested additional time to more fully comment on this rule but the EPA chose not to extend the public comment period.

As an initial note, it is interesting that the WOTUS rulemaking talks about restoring state control of waters whereas this proposed rules takes the opposite approach, restricting and preempting state and tribal authority.

The proposed rule would establish requirements and standards for state and tribal water quality certification under Section 401 of the Clean Water Act that inappropriately restricts the scope and timing of this important avenue for states and tribes to protect their waters. We believe the proposed limitations are inappropriate and are inconsistent with the statute.

Under the statute, Section 510, the states have the right to establish requirements which include procedural and substantive standards controlling water pollution. Section 313(a), waives sovereign immunity, making federal agencies subject to state authorities and permit requirements. Taken together, under the CWA federal agencies are subject to state water pollution and water quality requirements whether “substantive or procedural.”

Section 401 is written broadly for authorizing states and tribes, among other things, to include conditions in the certification related to “any requirement of state law” and should be construed and applied in a manner that enables states to apply their standards as fully as the statute allows.

EPN recommends continuing to use the existing Section 401 regulations.