October 21, 2019

The Honorable Andrew Wheeler
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Ms. Lauren Kasparek
Oceans, Wetlands, and Watersheds Division (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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Submitted via www.regulations.gov

RE: **"Updating Regulations on Water Quality Certification"**
Docket No. EPA-HQ-OW-2019-0405

Dear Administrator Wheeler:

On behalf of the 275,000 members and supporters of American Rivers, I write to urge you to withdraw the proposed rule "Updating Regulations on Water Quality Certification," Docket No. EPA-HQ-OW-2019-0405. If enacted, the rule would severely undermine states' and tribes' delegated authority under the Clean Water Act to enforce their own water quality standards. It would place unnecessary and potentially crippling restrictions on state and tribal agencies' ability to respond efficiently and effectively to requests for water quality certifications and take significant decision-making authority out of their hands. In doing so, the proposed rule would unlawfully abandon the carefully crafted, collaborative approach to protecting and restoring water quality created by section 401 of the Act and weaken protection for rivers, streams and wetlands nationwide.

The Clean Water Act establishes broad authority for government action to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] Recognizing the critical role that states and Native American tribes could play in any scheme to restore and maintain the nation's water, Congress wrote the Clean Water Act (CWA) with clear roles for them, including delegated authority to administer principal CWA regulatory programs. Nowhere is this collaborative, federalist approach to administering the CWA more apparent than in section 401 of the Clean Water Act.[2]

[1] Federal Water Pollution Control, Act of 1972 (Clean Water Act) 33 U.S.C. § 1251.
[2] 33 U.S.C. § 1341.

Section 401 requires that an applicant for a federal license or permit provide a certification that any discharges from the proposed project or facility will comply with the Act, including state (and by extension tribal) water quality standards created under their delegated authority.3 This allows state and tribal authorities to assess hydropower, river canalization, wetlands alteration, and oil and gas infrastructure projects that impact their own waters, and based on their own standards where local expertise, familiarity with the resource, and input from the most directly affected members of the public can inform the decision. Congress recognized the importance of local input into these decisions when it delegated certification authority to the states and tribes, when it mandated procedures of local notice, comment, and public hearings, and when it prohibited the granting of a license or permit "if certification has been denied by the State [or authorized tribe]…."4 Federal courts have consistently held that a denial of certification leaves the licensing or permitting agency "lack[ing]…the authority to issue a license."5

States and tribes utilize section 401 authority to review a variety of projects that may result in water quality impacts on state and tribal waters, including hydropower dam construction and operations (including FERC licensings and relicensings), construction of oil and natural gas pipelines, dredging and filling of wetlands, applications for National Pollutant Discharge Elimination System permits under section 402 of the CWA, and other river and wetlands-related construction projects such as bridges and harbor infrastructure. These processes have allowed states and tribes to block potentially harmful projects, but more often to propose conditions – changes to the project or additional actions by the applicant – that reduce or mitigate the impacts of projects and allow them to go forward.6 This "conditioning authority" is a vital part of the collaborative, federalist approach to implementation of the CWA, providing an opportunity for state and tribal authorities and the public to work constructively with federal agencies and project proponents to develop workable solutions. Federal courts have repeatedly ruled that such conditions are mandatory and cannot be rejected or altered by federal licensing and permitting agencies.7

The EPA's proposal to "update" the water quality certification process seeks to dramatically and unlawfully diminish this well-defined role of states and tribes in the 401 process in the following ways:

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[3] 33 U.S.C § 1341 (a). A 1987 amendment to the Act extended section 401 authority to tribes deemed eligible and authorized after a successful application process (33 U.S.C. § 1377).

[4] Ibid.

[5] *City of Tacoma v. FERC*, 460 F.3d 53,68 (DC Cir. 2006). See also *PUD No.1 of Jefferson County v. Wash. Dep't. of Ecology*, 511 U.S. 700 (1994) and *United States v. Home Concrete and Supply*, 566 U.S. 478 (2012).

[6] Examples of such actions might include changes in flow regime at a dam site to improve water quality, fish passage, investments in river and wetlands restoration to mitigate the project's impact, improved water quality monitoring, requirements for inspection and maintenance of completed projects, etc.

[7] See *Sierra Club v. United States Army Corps of Eng'rs*, 909 F. 3d 635 (4th Cir. 2018); *Am. Rivers Inc. v. FERC*, 129 F. 3d 99 (2d. Cir. 1997); *U.S. Dep't of Interior v. FERC*, 952 F. 2d 538, 548 (D.C. Cir. 1992).

First, the proposed rule would limit the scope of state or tribal review of section 401 certification requests strictly to discharge of pollutants from a point source.[8] This excludes common project impacts such erosion, sedimentation, and low stream flow that can have dramatic impacts on water quality. In addition, this limitation abandons the CWA's commitment to robust state water quality standards that take into account the "designated uses" of state and tribal waters, including the "propagation of fish and wildlife, recreational purposes, and…use and value for navigation."[9] It is common practice for states and tribes – authorized by the Act, Supreme Court precedent and, until recently, by EPA's own guidance - to include such concerns in water quality standards and deny certifications if the proposed project would undermine those designated uses.[10] By limiting review strictly to point source pollution, the EPA would forestall action by state and tribal authorities to protect important designated uses by requiring conditions such as maintenance of stream flow, fish passage, etc.

Second, the proposed rule would severely restrict the time allowed state and tribal agencies to consider requests for water quality certification. The Act specifies that the state and tribal agencies must act on a request for certification "within a reasonable period of time (which shall not exceed one year) after receipt of such request" or they effectively waive their authority.[11] Prior guidance indicated that clock on the "reasonable period of time" began ticking when the state or tribal agency determined that they had received a "complete application."[12] Now EPA proposes that "the statutory timeline for certification review start[] upon receipt of a certification request…."[13] The EPA proposal provides a very specific list of what must be included in such a request, and observes that "a certification request that contains each of these components will provide the certifying authority with sufficient notice and information to allow it to begin to evaluate and act on the request in a timely manner."[14] This supposition is not borne out by actual experience. Not only does the EPA's "form letter" approach disregard the prerogatives of states and tribes to establish their own requirements regarding certification requests, a further abandonment of the federalist approach intended by Congress, it ignores the real world complexities of completing a request that provides the certifying state or tribal agency with the information it needs to make an informed determination. Often a request is initially incomplete as it does not contain requisite information about the project, its anticipated impacts and measures to control those impacts, or it does not support that information with adequate technical or scientific data. This necessitates an extensive, time-consuming and important back-and-forth between applicant and agency before the request is

[8] 84 Fed. Reg. 44084, 44093 (Aug. 22, 2019) (Proposed Rule).
[9] 33 U.S.C. 1313(c)(2)(A).
[10] *PUD No.1 of Jefferson County v. Wash. Dep't. of Ecology*, 511 U.S. 700 (1994); "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes," U.S. EPA Office of Wetlands, Oceans, and Watershed 10 (2010)
[11] 33 U.S.C. § 1341(a)(1)
[12] "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes," U.S. EPA Office of Wetlands, Oceans, and Watershed 15 (2010)
[13] 84 Fed. Reg at 44101 (Aug. 22, 2019)
[14] Ibid.

sufficiently supported for the agency to make a determination.15 The EPA's proposed rule would have all this take place as the time the state or tribal agency has to consider the project is ticking away. Adding this to the time necessary for thorough application review, public notice, comment and hearings, and any necessary environmental reviews required by federal and state law is untenable and would hamstring state and tribal agencies' ability to effectively evaluate certification requests and craft practicable conditions that protect state and tribal waters.

Third, the proposed rule establishes EPA as the arbiter of what constitutes a lawful condition on a state water quality certification, in contravention of the intention of Congress and multiple rulings of the federal courts. 16 The legislative history makes clear that Congress intended the states and tribes to exercise their authority under 401 unhindered by the federal permitting agencies.17 Their power to do so has been upheld in the federal courts on numerous occasions.18 EPA's rulemaking attempts to insert federal agencies into the business of deciding which state and tribal water quality certification conditions are permissible and which are not by proposing a definition for "conditions" that requires them to be within the "scope of certification" of section 401.19 When Congress created section 401, it did not define conditions, but the legislative history, the language of the statute and subsequent interpretation by the courts (all cited repeatedly above) leave little doubt that states and tribes have wide latitude regarding conditions on water quality certifications. The phrase "scope of certification", on the other hand, is not found in the Clean Water Act at all. It is a term coined by EPA in order to create a space for ambiguity regarding conditions where none exists, solely for the purpose of supporting a specious argument for restricting state and tribal authority. Section 401 is founded on the principle that the citizens of states and the members of tribes know their own local water resources best and should have a preeminent role in managing and protecting those resources. This proposal abandons that principle and moves to concentrate authority over water resources in federal hands.

For almost 50 years, federal, state, and tribal governments have been working together under the auspices of the Clean Water Act to protect and restore the nation's waters. Section 401 provides the opportunity for not just state and tribal authorities, but for communities and individuals to have their say about proposed hydropower, oil and gas, and other development projects that will impact wetlands, rivers and streams in their communities. The current proposal chips away at this collaborative approach, removing authority from local actors with often better information and always a greater stake in the outcome, and placing it in the hands of far-away federal bureaucrats. The proposed

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[15] EPA also proposes to limit the time by which state and tribal agencies can request additional information of the project proponent to 30 days after receipt of a certification request, a wholly unrealistic timeframe that EPA has no authority to mandate. See 84 Fed. Reg at 44114.

[16] 84 Fed. Reg. at 44106 (August 22, 2019).

[17] S. Rep. 92-414 at 3735 (1971) (Section 401 serves "to assure the Federal licensing or permitting agencies cannot override state water quality requirements.").

[18] *Roosevelt Campobello Intern. Park Comm'n v. Env'tl Protection Agency*, 684 F. 2d 1041, 1056 (1st Cir. 1982) ("[F]ederal…agencies are without authority to review the validity of requirements imposed under state law or a state's certification."). See also *PUD No.1 of Jefferson County v. Wash. Dep't. of Ecology*, 511 U.S. 700 (1994).

[19] 84 Fed. Reg. at 44105.

rule as promulgated is ill-considered and hastily crafted (likely in violation of the Administrative Procedure Act), bad policy and contrary to law, and it should be abandoned. 20

I urge you to withdraw the proposed rule and keep the current policies and procedures regarding section 401 in place. Thank you for your consideration.

Sincerely,

Christopher E. Williams

Senior Vice President, Conservation

[20] 5 U.S.C. § 500.