October 19, 2019

Via www.regulations.gov

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Office of the Administrator
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ms. Lauren Kasparek
Oceans, Wetlands, and Communities Division (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

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

Dear Administrator Wheeler and Ms. Kasparek:

American Whitewater submits these comments in strong opposition to the Environmental Protection Agency publication of the proposed rule "Updating Regulations on Water Quality Certification." These proposed rules would fundamentally weaken the ability of states to assure that federally permitted energy projects meet state water quality standards under Section §401 of the Clean Water Act. This action will result in an increase in harm to our rivers and impact water-based outdoor recreation.

American Whitewater is a national 501(c)(3) non-profit organization with a mission to protect and restore America's whitewater rivers and to enhance opportunities to enjoy them safely. Our members are primarily conservation-oriented kayakers, canoeists, and rafters who enjoy exploring whitewater rivers. As outdoor enthusiasts who spend time on and in the water, our members have a direct interest in the health and water quality of our nation's waterways. American Whitewater works throughout the country to protect healthy free-flowing rivers and restore rivers that have been dammed, degraded, and dewatered through hydropower

development. The EPA actions described herein threaten the river conservation and recreation interests of our organization and our membership.

For paddlers, water quality directly influences our health, our enjoyment of public streams, our tourism contributions to rural economies, and in many cases our livelihoods. The Clean Water Act has allowed river-based recreation to flourish along with many businesses that discharge regulated pollution into our Nation's rivers. A 2017 report by the Outdoor Industry Association[1] found that watersports directly generates:

- $139,971,810,172 in retail spending
- 1,234,876 jobs
- $43,893,049,709 in salaries and wages
- $10,618,742,884 in federal taxes
- $9,601,521,150 in state and local taxes

The US Bureau of Economic Analysis confirms that the economic benefits of water-based recreation are significant in the United States.[2] The Bureau calculated that in 2017 boating and fishing were responsible for over $38 Billion of gross economic output. Weakening regulations relating to ensuring that federally permitted projects meet state water quality standards would directly threaten the recreation and tourism economies of countless communities across the United States. American Whitewater partners with many commercial outfitters, equipment manufacturers, and rural municipalities that would be directly financially impacted if federally permitted projects failed to meet state water quality standards. The EPA can best protect rural, recreational, and tourism economies by maintaining or strengthening water quality regulations rather than by weakening them.

Instead, the EPA is proposing rules that would fundamentally undermine a vital section of the Clean Water Act and weaken the role of the states as the primary guardians of water quality in federally permitted energy projects. Ensuring that the construction and operation of these energy projects both balance power generation with protecting environmental quality, and in addition, assuring that these projects meet state water quality standards is based on principles of cooperative federalism, a framework that is threatened by these proposed rules. Section 4(e) of the Federal Power Act states that the Federal Energy Regulatory Commission (FERC) is required "in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning

[1] https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf, pg. 18
[2] https://www.bea.gov/data/special-topics/outdoor-recreation

grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."[3]

This "equal consideration" established under the Electric Consumer Protection Act of 1986[4] does not necessarily result in equal treatment of power and non-power values. Congress noted that FERC must "...give these nondevelopmental values the same level of reflection as it does power...", but this reflection does not "...necessarily result in their equal treatment."[5] Undermining the vital role of the states in protecting water quality under the Clean Water Act will leave FERC with the discretion to prioritize generation over the protection of environmental quality, resulting in a weakening of water quality protections.

Background on Section § 401 of the Clean Water Act

Prior to the Clean Water Act, the Federal Power Commission allowed the complete dewatering of rivers for hydropower dams, and we are still dealing with that legacy today. In enacting the Clean Water Act, Congress established a system of cooperative federalism, whereby states – in partnership with federal agencies – are granted meaningful authority to ensure that federally-licensed activities including hydropower generation balance the desire for power generation with the protection of environmental values.
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The primary mechanism for maintaining and restoring a high level of water quality is section §401 of the Clean Water Act. Under this section an applicant for a federal license to conduct an activity resulting in a discharge into navigable waters is required to first obtain a certification from the state where the project is located. The applicant must ensure that it will comply with state water quality standards. Section §401 certifications contain conditions that must be included as articles in a FERC license lasting 30-50 years and typically include requirements for minimum instream flows along with other measures relating to its water quality standards. States have one year to either grant, grant with conditions, or deny certification. If they fail to do so within that one-year period, they waive their rights and the project can be licensed without certification that the project complies with state water quality standards.

Recent Developments Threatening the Ability of States to Protect Water Quality

Over the past several years, there have been ongoing efforts to undermine the Clean Water Act. In the last Congress, the energy industry and its allies in Congress attempted to pass legislation that would limit the ability of states to determine whether a project complies with

[3] 16 U.S.C. § 797(e)
[4] Public Law 99-495
[5] H.R. Conf. Rep. No. 934, 99th Cong., 2d. Sess. at 22.

water quality standards.[6] Having failed in its effort to persuade Congress to weaken the Clean Water Act, the energy industry and its allies in the executive branch now seek to circumvent Congress through the administrative rulemaking process.

At the same time, a recent court decision interpreting section 401 limits the amount of time that the states have to review projects for compliance with water quality standards.[7] FERC and now the EPA are attempting to extend the holding in that case to a broad range of energy projects, and revise its interpretation of the certification requirement to overturn two Supreme Court decisions, discussed *infra*, that upheld the authority of states to impose conditions and assure compliance with water quality standards for energy projects.[8] The convergence of an industry-friendly administration willing to disregard environmental impacts combined with a misguided interpretation of the certification deadline by the Court of Appeals has created this perfect storm that poses an existential threat to vital Clean Water Act protections.

Last January, the D.C. Circuit ruled in *Hoopa Valley Tribe v. FERC* that the states of California and Oregon waived their §401 authority by failing to either issue or deny certification within one year of application, invalidating a FERC-approved practice where project applicants would withdraw-and-resubmit their applications for water quality certification by the state in order to extend the 1-year deadline.[9] Since the *Hoopa* decision, FERC has found waiver of state section §401 authority in cases where there was no explicit agreement between a state and licensee to withdraw-and-resubmit water quality certification applications.[10]

The threat to state §401 authority from the *Hoopa* decision and subsequent extension by FERC has been compounded by Executive Order 13868 that alleges "[o]utdated Federal guidance and regulations regarding section §401 of the Clean Water Act … are causing confusion and uncertainty and are hindering the development of energy infrastructure." Following the Executive Order, the EPA issued interim guidance and now has proposed new regulations that are basically an industry wish list of ways to eliminate any meaningful role of the states in protecting water quality in federally issued licenses.

The EPA now proposes a complete rewrite of the section 401 certification regulations that would fundamentally weaken the ability of the states to assure that energy projects comply with water quality standards by limiting the ability of the states to obtain necessary information, limiting the time for the states to review an application, and limiting the scope of

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[6] Hydropower Policy Modernization Act of 2017
[7] Hoopa Valley Tribe v. Federal Energy Regulatory Commission, 913 F.3d 1099 (2019)
[8] S. D. Warren Co. v. Maine Board of Environmental Protection, 547 U.S. 370 (2006); PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology , 511 U.S. 700 (1994) (PUD No. 1)
[9] Hoopa Valley Tribe v. Federal Energy Regulatory Commission, 913 F.3d 1099 (2019)
[10] Placer County Water Agency,167 FERC ¶ 61,056 (Apr. 18, 2019)

states' mandatory conditioning authority. At the same time, the rules place the burden on the states to justify any conditions or denial, shifts the appeals process from state to federal court, and prevents the states from enforcing its own water quality standards.

The intent of the proposed rule is to prevent states from imposing conditions on federal licenses and seeks to aid industry in challenging or appealing certification conditions rather than supporting efforts by the state to assure that federally licensed energy projects comply with state water quality standards as Congress intended. The new rules demonstrate an astonishing lack of concern for protecting the health of rivers from adverse impacts from federally licensed energy projects. Instead, these rules are exclusively focused on promoting the use and exploitation of our natural resources for the benefit of the energy industry.

Proposed Rules Prevent States from Ensuring Federally Permitted Projects Meet Water Quality Standards

1. Prevents States from Adequately Reviewing Section §401 Applications

While certification is a precondition to the issuance of a FERC license, the CWA provides that certification is waived if the state fails or refuses to act on the certification request within the specified time that the EPA now proposes to shorten dramatically. The proposed rules give the federal licensing agency the exclusive ability to set the deadline for states to complete their environmental review of project impacts on water quality, but in no circumstance can the deadline extend beyond one year. In the case of FERC licenses for hydropower projects, the EPA suggests that a six-month deadline is sufficient despite the fact that the applicant may not have provided the state with complete information and despite the fact that FERC will not have completed its own environmental review. For Army Corps section § 404 permits, the EPA suggests a 60-day review period is sufficient.

This rule change will prevent the states from having enough time to complete a meaningful review of a project's environmental impacts. The proposed rules start the time clock for state certification when an applicant submits a bare bones request to the state certification agency, rather than when the applicant provides the state with complete information to allow it to begin its environmental review. There is no requirement that the applicant provide any information about the impact of the project on water quality or demonstrate compliance with state water quality standards.

The proposed rule gives state certifying agencies only 30 days to request additional information from the applicant, and in addition, limits the ability of certification agencies to request additional information to only that information that can be collected or generated by the FERC deadline; it also limits the type of information that can be requested. This would only allow states to rely on FERC-approved studies as a basis for making a certification determination. This is of particular concern given FERC's unwillingness to require studies

requested by state certification agencies. Because the needs of certifying agencies are distinct from those of FERC, sole reliance on studies required by FERC will not provide sufficient information for those agencies to determine whether the project will comply with water quality standards. Currently there is no such limitation on information requests.

2. Limits Scope of Section §401 Conditions Allowed

The scope of the certifying agency's section §401 authority is limited under these rules to assuring that a discharge from a permitted activity will comply with water quality requirements. Impacts from activities not related to the discharge are beyond the scope of section §401 according to the proposed rules. This limitation is in direct conflict with two of the Supreme Court's seminal Clean Water Act cases.

The proposed rules make clear that the EPA seeks to overturn *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology* , 511 U.S. 700 (1994) (PUD No. 1) where the Court held that section §401 empowers states to prescribe conditions addressing impacts from the project activities as a whole rather than only those impacts that result from the discharge itself, relying on the dissent by Justice Thomas despite it having no force of law. In addition, the proposed rules are contrary to the Supreme Court's holding in *S.D. Warren Co. v. Maine Bd. of Environmental Protection* , 547 U.S. 370 (2006), in that the proposed rules narrowly interpret the word "discharges" to apply only to point-source discharges.

Additionally, the proposed rules limit section §401 authority to assuring compliance with water quality requirements rather than water quality standards, further narrowing the scope of review to only those aspects of WQS pertaining to water quality. The rules would limit the ability of states to prescribe conditions relating to anything other than direct impacts to water quality from the discharge, excluding impacts from any other requirements in state laws or regulations, impacts to recreation access for fishing and boating and use of project lands, impacts from non-point source pollution, impacts from project operations on reservoirs, impacts on aesthetics, and impacts on fish passage.

3. Undermines State Mandatory Conditioning Authority

Under current requirements, federal permit granting agencies may not issue a license for an activity resulting in a discharge into navigable waters where the certifying agency denies a water quality certificate. In addition, federal agencies must include as license conditions all requirements contained in section §401 water quality certifications. The proposed rules would for all intents and purposes eliminate the requirement that federal agencies include state-mandated conditions in project licenses, and in addition, limit the ability of states to deny certification to projects that fail to comply with state water quality standards. The proposed rules require state certification agencies to justify any conditions and to explain whether a less stringent condition could satisfy water quality requirements. We can expect that FERC will find

some fault and reject state required conditions whenever they are more stringent than its own. This is a change from the current procedures that require FERC acceptance of state conditions in almost all cases.

While a state certification agency may deny certification if it is unable to certify that the project will comply with water quality requirements, the proposed rules do not allow certifying agencies to deny certification for reasons beyond what the EPA considers to be the narrow scope of the state's section 401 authority, excluding any requirement of state and local laws other than EPA-approved aspects of state water quality standards dealing with water quality impacts from discharges from the project. The proposed rules require that the certifying agency justify its certification denial to the federal agency. It is unclear as to whether the failure of an applicant to provide sufficient information upon which to evaluate the certification request is a sufficient basis for denial. These proposed rules define the failure or refusal to act not only in terms of time, but also as the constructive failure to act through denial of certification or the imposition of conditions based on criteria other than EPA-approved water quality impacts from the discharge. This is a major change from current requirements and would in our view require a legislative change.

4. Weakens Enforcement of State Water Quality Standards

The proposed rules shift appeals over state certification conditions from state courts where the project proponent has the burden to show compliance with water quality standards to federal court where the state certifying agency has the burden to show that certification conditions comply with EPA rules. The rules place the burden of proof on the certifying agency to demonstrate that it has acted within the proper scope of authority in imposing the condition or denial rather than placing the burden of showing compliance with the EPA, FERC, or project applicant.

Under the proposed rules, state certification agencies have no continuing jurisdiction over compliance with conditions in the certification as enforcement is left to FERC's discretion. The rules attempt to prevent states or individuals from pursuing a cause of action under the CWA to enforce conditions in the certification or to address violations of state water quality standards. The proposed rules also question the appropriateness of provisions that permit a certifying agency to reopen certification based on changed conditions or other impacts and are unclear whether states have jurisdiction over post-license maintenance and repair projects that have an impact on water quality.

Conclusion

American Whitewater requests that the EPA consider these comments along with those submitted by numerous other resource agencies, organizations, and individuals concerned about the impact of these proposed rules on the ability of states to ensure that federally

licensed energy projects comply with state water quality standards. We further request that the EPA rescind, reconsider and revise these rules consistent with its core mission of protecting human health and the environment.

Submitted by,

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