October 21, 2019

Mr. Andrew R. Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via regulations.gov

Re: Submission of Comments to EPA regarding the proposed Rule "Updating Regulations on Water Quality Certification" (84 FR 44080; Docket Number EPA-HQ-OW-2019-0405-0025); submitted online to Regulations.Gov EPA-HQ-OW-2019-0405-0025

Dear Administrator Wheeler:

On behalf of the Society of Wetland Scientists (SWS), we respectfully submit the following comments in response to the proposed Rule "Updating Regulations on Water Quality Certification" (proposed Rule) (84 FR 44080; Docket Number EPA-HQ-OW-2019-0405-0025), published in the Federal Register on August 22, 2019. We appreciate this opportunity to provide comments to the Environmental Protection Agency (EPA; the Agency) in response to this proposed Rule.

SWS is an international scientific organization whose 3,000+ members study, manage, and restore wetlands. We are a science-based and non-profit organization with a deep commitment to independent objectivity and peer-review of ecological science, policy and management practices. Our members have numerous areas of expertise in the ecological, hydrological, biogeochemical, ecological restoration and biological sciences. They work in the private sector, academia, and tribal, state and federal agencies and support wetland, aquatic, and ecological resource research, education, restoration and sustainable management, as well as the development and use of the best available science to sustainably manage and restore our freshwater, estuarine, coastal, and ocean resources for the benefit of the U.S. economy, environment, and public health and safety. SWS holds multiple scientific meetings each year focused on wetlands throughout the world and publishes the most important peer-reviewed journal dealing with wetlands (*Wetlands*) in the world.

Cooperative federalism is at the core of the Clean Water Act (CWA). The Water Quality Certification (WQC) process serves as a successful model of cooperative federalism under the act. The CWA requires that federal agencies and actions respect state authority and control over water quality within their respective state boundaries. New rulemaking to modify Section 401 of the CWA is of immense importance to the states and tribes that rely on Section 401 as a means of protecting the quality of surface waters within their boundaries and to all of the citizens of the states and tribes.

The proposed Rule threatens the partnership between the states and the federal government in administering the law and undermines the ability of both to uphold the mandate of the CWA, which is to restore and maintain the chemical,

physical, and biological integrity of the Nation's waters. We respectfully request that any changes made to Section 401 maintain existing state and tribal authority, as established by Congress and the United States Constitution, to review and approve permits through the Section 401 WQC process.

In the absence of any rigorous analysis, restriction of a state's or tribe's ability to administer a Section 401 WQC program in a manner that the states/tribes deem appropriate can be viewed as an arbitrary and capricious limitation of the cooperative federalism goals of the CWA. Indeed, Justice Stevens, concurring with the 7 - 2 U.S. Supreme Court majority opinion in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994), stated, "Not a single sentence, phrase, or word in the CWA purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes the States' ability to impose stricter standards."

As justification for the proposed Rule, EPA claims that state regulations and/or processes for water quality certifications are hindering infrastructure development and asserts that there is confusion and uncertainty around the Section 401 certification process. Yet, no national level published data exists regarding the annual number of Section 401 WQC denials or delays. In the absence of relevant data, any attempt to develop a new rule is unwarranted. A revision based on a faulty premise would lead to unintended consequences and would undermine the successful model that protects the chemical, physical, and biological integrity of our nation's waters.

While there are complex elements of the WQC process that could be improved or streamlined, none of those improvements require rulemaking that entails a reduction in the states' authority to review permits, develop conditions suitable to their respective standards, and issue certifications. To this end, we recommend that no changes be made to the scope of WQC review and that no restrictions be placed on the conditions or requests for information that states or tribes may judge to be reasonably appropriate to include in a certification.

We oppose any revision of guidance or rulemaking that would reduce the states' role and their authority to complete adequate review of federal permits, and we oppose the proposed Rule's provisions that would allow federal agencies to limit the states' and tribes' decision-making timeframes, limit their scope of review, and overrule state WQC decisions at federal discretion.

In addition, we submit to the record the following specific comments for consideration:

Section II.D. Guidance Document

The June 7, 2019 Guidance Document[1] cannot provide guidance for a rule that has not yet been promulgated.

[1] Available at https://www.epa.gov/cwa-401/clean-water-act-section-401-guidance-federal-agencies-states-and-authorized-tribes

To contemplate that the guidance document in question be retained after promulgation of the final rule implies that it has been pre-determined as to what the final rule will entail, despite an active and ongoing public comment period. In addition to being akin to manipulating the data to fit the preferred conclusion, the proposed process is clearly contrary to the intent of the Administrative Procedure Act[2] which requires the Agency to consider public comment in the rulemaking process. We recommend that the June 7, 2019 Guidance Document be immediately rescinded or superseded by new guidance that reflects the contents of the new Rule upon its promulgation. Furthermore, we suggest that EPA work with state regulators and professional organizations to update *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (2010), as this document has served as an excellent resource (albeit not formal guidance) for state regulators working in Section 401 WQC.

Section III.A. When Section 401 Certification is Required

We recommend that the words "may result" be retained in the sentence "Any applicant for a license or permit to conduct any activity which may result in a discharge shall provide the Federal agency a certification from the certifying authority in accordance with this part."

The EPA should place emphasis on the words "may result" to avoid situations where project proponents or private consultants avoid or delay seeking Section 401 WQC based upon claims that they interpret the phrase to mean "shall result".

Consistent with *S.D. Warren*[3], Section 401 should be triggered by any unqualified discharge, rather than only by a discharge of pollutants.

Considering that state water quality standards may not define many common fill materials (e.g., rip rap) or the products of inadvertent returns during Horizontal Directional Drilling (HDD) (e.g. bentonite clay[4]) as pollutants, the new Rule should define *discharge* by its common meaning "issuing or flowing out".

Section III.B. Certification Request/Receipt

The onus for the request for Section 401 WQC should remain squarely on the project proponent and, to remove undue burden on the certifying authority, should be made no later than 14 days after submission of the application for the federal permit or authorization.

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[2] 5 USC §551 et seq. (1946).

[3] *S.D. Warren Co. v. Maine Bd. of Envtl. Prot. et al.,* 547 U.S. 370, 376 (2006).

[4] Bentonite is nontoxic; however, if released into waterbodies, bentonite has the potential to adversely impact fish, fish eggs, aquatic plants, and benthic invertebrates

It is not an efficient use of a state's limited resources to expect state regulators to seek out project proponents that require Section 401 WQC; however, this is frequently the case as many project proponents and private consultants delay contacting the certifying authority to avoid scrutiny by state regulators. Requiring a time limit for project proponents to submit WQC requests or applications would remove undue burden on the certifying authority.

A certification request that contains the components as listed in the proposed Rule would <u>not</u> 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.

To provide the certifying authority with sufficient notice and information to begin evaluation of the proposed project, a certification request, or preferably a complete application, should (at a minimum) include the following:

1. Identity of the project proponent(s) and contact information (phone, email, physical address) for the proponent's authorized representative;
2. Identification of the applicable federal license or permit;
3. A full description of the proposed project: geographic location, boundaries, purpose of the permitted activity, description of the permitted activity, proposed impacts to wetlands and waters (both temporary and permanent), and affected waterbodies;
4. Description of the location, type of material, and extent (acres, square feet, linear feet, volume, as applicable) of any discharge that may result from the proposed project, and the location of receiving waters;
5. A description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat or control the discharge, including an Inadvertent Return Plan for HDD when it will be used;
6. A description of any methods and means proposed to mitigate temporary impacts to wetlands and waters;
7. A delineation of wetlands and waters prepared by a qualified professional;
8. A list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received;
9. Maps, engineering diagrams, and drawings to support the application;
10. A conceptual Compensatory Mitigation Plan, when one is required by the federal permitting authority;
11. A copy of the Pre-construction Notification (PCN) when one is required by the federal permitting authority (a properly prepared PCN would include items 1 through 10); and
12. Any additional information deemed necessary by the state certifying authority on a case by case basis.

In short, we recommend that the project proponent be required to submit to the state certifying authority, at a minimum, a copy of all documents and materials that were submitted to the federal permitting authority. This guideline would provide for an efficient and easily understandable process.

The proposed Rule does not acknowledge states that use existing Joint Permit Application processes in cooperation with the U.S. Army Corps of Engineers (Corps); if promulgated, the proposed Rule will unnecessarily harm a model process that reduces regulatory burden and increases "regulatory certainty" for project proponents.

The proposed Rule does not mention the Joint Permit Application (JPA) process even once. Many states use a JPA process that allows a project proponent to apply concurrently for a Section 404 Individual Permit or Nationwide Permit (NWP), Section 401 certification, and applicable local permits (e.g., Coastal Zone Management Act permits, Local Wetlands Board authorizations)[5]. The JPA system represents a long-standing agreement between state governments and the Corps that acknowledges a state's and locality's rights to determine the appropriate scope of review, even if that review is more stringent than what the Corps requires under Section 404. Many states use the JPA process as the permit application for their respective wetland and water protection programs, and to create more efficiency in the agency coordination process with local, state, and federal agencies. JPA's reduce regulatory burden on project proponents by offering a single point of contact for permit application submission, a single application form, well-articulated document checklists and timelines, and clear and concise instructions.

JPAs should serve as a model for the type of coordination and collaboration sought out by Executive Order 13807[6]. It is wholly inappropriate and unnecessary to break the longstanding agreements between localities, states, and federal agencies represented by the JPA process, or to attempt to improve the process through the proposed Rule, which for some unknown reason has overlooked the utility of JPAs, if not their very existence. If promulgated, the proposed Rule will unnecessarily harm a process that reduces regulatory burden and increases "regulatory certainty" for project proponents.

Section III.D. Appropriate Scope for Section 401 Certification Review

The scope of review and conditions should not be restricted to solely addressing an activity's effects on quantitative effluent limitations. The scope must acknowledge qualitative and narrative water quality standards, and variations from state to state. Additionally, consideration of effects or impacts, and the imposition of conditions not directly related to water quality, should not constitute an expansion of scope when required by state law. Extensive formal consultation with the states and tribes on means to best address these issues will be necessary before any final guidance or Rule is promulgated. Therefore, we recommend that no restrictions be placed on the appropriate scope for 401 Certification at this time.

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[5] For an example, see the U.S. Army Corps of Engineers, Norfolk District JPA web page at: https://www.nao.usace.army.mil/Missions/Regulatory/JPA.aspx

[6] "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" (E.O. 13807 of Aug 15, 2017).

It is critical to create federal guidance and rules that are reconcilable with current state and tribal regulations. State water quality standards include designated uses of the waterbody (e.g., recreation, water supply, aquatic life, agriculture), water quality criteria to protect those designated uses, qualitative anti-degradation policies to maintain and protect existing uses and high-quality waters such as wetlands, and/or general policies addressing implementation issues. It is important to note that water quality standards vary considerably from state to state. Across the country, these standards include a range of metrics that affect water body quality, such as activities that may alter streamflow. In most states, the standards developed are reflective of specific regional or contextual considerations, including specific uses important to that state or the types of waters that exist in that state.

Water quality standards may be numeric or narrative. Whereas many water quality standards reflect more commonly understood quantitative relationships between pollutant discharge and water quality, there are some standards that address impacts to water quality through the lens of wildlife, habitat, or other considerations. For example, a designated use in a water quality standard may be focused on the protection of wildlife (e.g., populations of recreationally valuable fish or waterfowl species). Anti-degradation clauses contained in water quality standards frequently address protection of surface waters such as streams and wetlands from impacts or permanent loss that are not necessarily the result of a discharge (e.g., draining, diversion, conversion of habitat) but are still covered under Section 404. State threatened and endangered species laws that prohibit a state agency from approving any activity that could result in harm toward a state-listed species are of substantial relevance in this consideration[7]. Under such laws, state agencies are mandated to review the effects of any activity they permit or certify on state-listed species, regardless as to whether said species are terrestrial or aquatic, and to take appropriate action to protect those species from harm.

We recommend a careful review of existing state and tribal regulations to identify where these or other factors could be problematic. Formal consultation with the states and tribes on means to best address these issues is necessary before any final guidance or Rule is promulgated. Any new rulemaking must be enacted with the understanding that states and tribes may require additional time to reconcile their regulatory requirements with new federal requirements, and that the process of reconciliation may be subject to action by state legislatures.

Consistent with *S.D. Warren*[8], *discharge* should be defined as any unqualified discharge, rather than only by a discharge of pollutants.

Considering that state water quality standards may not define many common fill materials (e.g., rip rap) or the products of inadvertent returns (e.g. bentonite clay) as pollutants, the new Rule should define *discharge* by its common meaning "issuing or flowing out".

[7] See the Nebraska Nongame and Endangered Species Act (NRS 37-807).
[8] *S.D. Warren Co. v. Maine Bd. of Envtl. Prot. et al.,* 547 U.S. 370, 376 (2006).

Section III.E. Timeframe for Certification Analysis and Decision

The proposed Rule is deficient as it does not provide any requirement or timeline for submission of additional documents and materials necessary for the certifying authority to sufficiently evaluate and act on the request in a timely manner, beyond the proposed contents of the Certification Request.

The documents, materials, and information listed previously as 1-12 in the above comments on Section III.B. are commonly accepted as the minimum standard of a complete application in state Section 401 and federal Section 404 programs. However, the proposed Rule has neglected to provide requirements and submission timelines for those documents or other information (beyond the proposed contents of the Certification Request) that may be determined as necessary to complete a certification evaluation. Starting the clock upon receipt solely of the documents and materials listed in Section III.B. of the proposed Rule (the Certification Request), while not addressing requirements for additional information that is considered necessary in any credible Section 401 WQC program, only serves to award project proponents with a loophole to avoid providing such information. To wit, a project proponent need only submit the minimal Certification Request, then wait one year for the state certifying authority, unable to complete a sufficient evaluation, to waive certification by default. We strongly recommend that the clock for state or tribal review of an application not commence until the minimum standard for a complete application listed as 1-12 in Section III.B in this comment letter has been met.

Merely encouraging federal agencies 1) to notify certifying authorities as early as possible about potential projects that may require a section 401 certification, 2) to respond in a timely way to requests from certifying authorities for information concerning the proposed federal license or permit, and 3) to provide technical and procedural assistance to certifying authorities and project proponents upon request and to the extent consistent with agency regulations and procedures is inadequate to ensure that these steps are actually taken.

In many districts, representatives of the certifying authority are frequently excluded from attending pre-application meetings between project proponents and the Corps, despite evidence that shows that early participation by state regulators is a critical factor in ensuring an efficient and timely permitting process[9]. Requests made by project proponents who wish to avoid scrutiny by state regulators to exclude the certifying authority are commonly granted by the Corps. Exclusion can also occur as a result of federal regulators who are simply "too busy" to extend the invitation. Federal agencies (e.g., the Corps) should be mandated to carry out the aforementioned responsibilities through internal guidance letters, memoranda, and standard operating procedures.

Review times should account for the realities of state funding and staffing for Section 401 WQC programs and should not impose undue fiscal hardship on the states.

[9] Section 401 Certification Best Practices in Dredge and Fill Permit Programs. Association of State Wetland Managers, Inc. (2012).

Most state Section 401 programs remain consistently underfunded and understaffed, especially in those states that promote voluntary compliance by not charging a high fee, or no fee at all, for Section 401 WQC[10] . In considering this fiscal reality, most states are ill prepared to take on the substantial burden that fast-track review timelines would demand.

Any definition of *reasonable period of time* that is less than one year will conflict with the existing statute in several states. Extensive formal consultation with the states and tribes on means to best address these issues will be necessary before any final guidance or Rule is promulgated. Therefore, we recommend that no restrictions be placed on timelines for 401 WQC at this time.

Many states (e.g., Nebraska) have processes for Section 401 WQC, such as a 365-day period for WQC review, codified into statute[11]. These laws cannot be changed or modified without legislative action by individual state legislatures. There is no indication that the states desire, or could achieve, changes to the statutes within a reasonable timeline. According to the Tenth Amendment of the U.S. Constitution, a federal Agency may not have the authority to mandate such changes. Therefore, the EPA should retain the language contained in its existing Rule.

Moreover, the proposed rule violates Executive Order 13132 on Federalism. The Executive Order requires more than mere consultation. It expressly states that "[w]hen undertaking to formulate and implement policies that have federalism implications, agencies shall … where possible, defer to the States to establish standards." Contrary to the EPA's conclusory assertion that its proposed rule may not have federalism implications, this letter illustrates how disruptive the proposed approach would be to cooperative federalism.

Conclusion

Section 401 water quality certification is critical for states' and tribes' efforts to conserve and restore water quality in our rivers, lakes, streams, and wetlands which provide critical fish and wildlife habitat and drinking water to millions of Americans. Section 401 is a foundational part of the CWA and provides a way for states and tribes to collaborate with the federal government and ensures that valuable water and related resources are protected, thereby protecting public health and the environment. The proposed changes to Section 401 of the CWA would have significant adverse effects on our Nation's waters and would challenge the effective and efficient administration of the CWA.

The EPA has failed to provide adequate justification or explanation as to how the proposed Rule complies with the stated objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's

[10] Status and Trends Report of State Wetland Programs in the United States. Prepared by Brenda Zollitsch, PhD and Jeanne Christie, Association of State Wetland Managers, Inc. (2015).
[11] Neb. Rev. Stat. §81-1505(2)(e).

waters, and in fact, the proposed Rule undermines the ability of both the federal and state governments to achieve this objective[12] .

We oppose any revision of the Rule or guidance that would reduce the states' role and their authority to complete adequate review of federal permits, and we oppose the proposed Rule's provisions that would allow federal agencies to limit the states' and tribes' decision-making timeframes, limit their scope of review, and overrule state WQC decisions at federal discretion.

The EPA has not demonstrated, with empirical data, the justification for the proposed Rule; nor has the EPA reconciled why it must limit the authority of the states when it seeks to hand off regulatory authority over intrastate natural resources to the states under the premise of cooperative federalism.

Section 401 of the CWA does not require new rulemaking that reduces the authority of the states. There are several initiatives that could be taken short of a new rulemaking, all of which would provide for a "modernized" implementation of Section 401. In that light, we conclude our comments by offering the following recommendations:

1. Collaborate with state regulators and professional organizations to update the *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (2010), and ultimately use the revised document to form the basis for modernized guidance to the states and federal agencies for Section 401 WQC procedures;
2. Instead of working to restrict the rights of states and tribes the EPA should focus on empowering them through providing adequate funding, technical assistance, and support for capacity building so that certifying authorities can work toward developing functional, efficient, and consistent Section 401 WQC policy, regulations, and procedures, such as the use of JPAs;
3. Continue to emphasize the importance of federal agencies and project proponents bringing states and tribes into the application process, focusing on formal engagement, as early as possible in the Pre-Application phase of a project. Doing so has helped to minimize duplication of effort, ensure the completeness of application materials, and increase compliance;
4. When a Section 404 permit is required, hold project proponents to a high standard of compliance with CWA 404(b)(1) Section 230.10[13] avoidance and minimization guidelines, which will substantially contribute to a given project's adherence to state water quality standards;
5. Emphasize to the regulated community that most NWPs are pre-certified by the states and tribes, and that remaining within impact thresholds for NWP eligibility is the best strategy for expediting a Section 404 permit. Adherence to limiting the complexity and footprint of projects to avoid impacts and careful selection of project

[12] 33 U.S.C. §1251 et seq. (1972).
[13] 40 CFR 230.

sites should be embraced as a viable path toward achieving a regulatory certainty while meeting the legal obligation to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

Before any regulatory changes are made, we urge the EPA to: 1) provide evidence-based responses to the comments outlined in this letter, and 2) provide science-based documentation that the proposed Rule will meet the mandated obligation to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. To do anything less will lead the EPA to promulgate a Rule that will compromise the quality and quantity of the Nation's waters; will fail to meet Congress's mandate as articulated in the CWA; will abandon the existing cooperative federalism; will significantly undermine rights of states and tribes in implementing Section 401; and will invite lengthy court cases, thereby adding to regulatory uncertainty and inconsistency; and burden taxpayers who bear the costs.

Thank you for considering these comments. If you have further questions, please do not hesitate to contact John Lowenthal by email at John.Lowenthal@cardno-gs.com or telephone at (757) 594-1465.

Sincerely,

C. Max Finlayson
President, Society of Wetland Scientists