Comments of the Environmental Law & Policy Center
Docket ID No. EPA-HQ-OW-2025-0272
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The Environmental Law & Policy Center (ELPC) is a nonprofit corporation that works to protect the Great Lakes and other water resources of nine states in the Midwest. While Section 401 of the Clean Water Act (CWA) is a tool used by state and tribal governments, not by nonprofits, ELPC's members and the public more generally benefit from a robust use of Section 401 authorities by states and tribes to protect the waters that support public health, recreation, and a strong economy throughout the Midwest.

CWA Section 101(b) establishes Congress's clear intent in establishing a system of cooperative federalism that protects "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use of land [] and water resources." 33 U.S.C. § 1251(b). Section 401 authority is a critical tool that has enabled states and tribes[1] to ensure that activities associated with federally licensed and permitted discharges will not impair water quality in their respective states and tribal lands.

Congress had extensive debate on the respective roles of the federal and state governments in the protection of waterways in the US when the CWA was passed in 1972. The CWA reflects a careful balance of federal, state, and tribal authorities in protection of water resources in the US. Maintaining that balance between federal and state/tribal authorities in protecting water resources continues to be a source of discussion and debate, but we are not writing on a blank slate. Section 401 itself clearly articulates the preeminent role of states in protecting water quality when threatened by activities that require a federal permit. 33 U.S.C. § 1341(a), (d). Under Section 401, in determining whether to grant certification, states and tribes consider whether the proposed activity satisfies effluent limitations standards, water quality standards, national standards of performance, toxic and pretreatment effluent standards, and "any other appropriate requirement of State [or tribal] law." 33 U.S.C. § 1341(d). Congress' intent to give states broad authority over federal activities involving discharges that may have an impact on state water quality was discussed at length in the legislative history of Section 401 as well, as recognized by the Supreme Court in *S.D. Warren Co. v. Maine Bd. of Env't Protection*, 547 U.S. 370, 386 (1986).

It is that role specifically granted to states (and to tribes) that is threatened by the EPA rulemaking contemplated by this administration, just as it was by a similar attempt to limit state and tribal authorities in a previous rulemaking by the first Trump administration. At that time, a number of state and local governmental associations, including Western Governors Association, National League of Cities, National Association of Counties, the US Conference of Mayors, and

[1] The Clean Water Act authorizes EPA to "treat an Indian tribe as a state" for purposes of Section 401 in certain circumstances. 33 U.S.C. § 1377(e).

the Western States Water Council, raised "numerous concerns about the substantial effects" the previous Trump administration's proposed rule would have on "states' authority and autonomy to manage and protect water resources...."[2] Those entities advised that "[a]dministratively curtailing states' historic and well-established authority under CWA Section 401 would inflict serious harm to the cooperative federalism model established by Congress under the CWA and the fundamental constitutional authority of states over water resources within their boundaries."[3] After it had been finalized without addressing their concerns, nineteen states and the District of Columbia filed suit challenging the 2020 rule, 85 Fed. Reg. 42,210 (July 13, 2020), alleging that it "upends fifty years of cooperative federalism by arbitrarily re-writing EPA existing water quality certification regulations to unlawfully curtail state authority under the Clean Water Act."[4]

As discussed in more detail below, the Supreme Court has twice upheld the broad authority given to states by Congress in making certification determinations under Section 401. *Pub. Util. Dist. No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700 (1994); *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006). In the *S.D. Warren case,* the Supreme Court explained that §401 certifications are "essential in the scheme to preserve state authority to address the broad range of pollution." 547 U.S. at 386.

To the extent that the process for making § 401 water quality certification determinations can be made more efficient or effective, by all means, provide more financial assistance to the state and tribal authorities charged to make these decisions and ensure that the federal agencies involved act expeditiously to provide all the information needed by those authorities. There are lots of ideas about how to smooth and expedite the process in the 2019 Guidance issued by EPA entitled, "Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes" (June 7, 2019). But do not abandon the intent of Section 401 as recognized by the Supreme Court, which is to empower states and tribes to protect their waterways for the benefit of all those who use and enjoy them.

With respect to the specific questions outlined in the federal register notice:

1. **Defining the scope of certification generally and the scope of certification conditions**

EPA seeks input on (1) the scope of certification under Section 401(a) and (2) the scope of certification conditions under Section 401(d). Both of these questions have already been

[2] Letter of October 16, 2019 to Andrew Wheeler, Administrator, US EPA, by Western Governors' Association, National Conference of State Legislators, National Association of Counties, National League of Cities, The United States Conference of Mayors, The Council of State Governments, Western Interstate Region, Association of Clean Water Administrators, Association of State Floodplain Managers, Association of State Wetlands Managers, and Western States Water Council.

[3] *Id.*

[4] Complaint for Declaratory and Injunctive Relief at 2, *California v. Wheeler*, No. 3:20-cv-04869-WHA (N.D. Cal. filed July 21, 2020) (No. 1). The case was subsequently remanded and dismissed as moot following EPA's decision to revise the rule.

answered both by Congress in the text of the statute and by the Supreme Court and therefore do not warrant extensive discussion.

Section 401(a) provides that "**[a]ny applicant** for a Federal license or permit **to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters,** shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...." 33 U.S.C. § 1341(a) (emphasis added).

Section 401(d) provides that "[a]ny certification...shall set forth any effluent limitations and other limitations, conditions, and restrictions which are necessary to assure that **any applicant** for a federal license or permit...will comply with **any applicable water quality requirements of State law**," 33 U.S.C. § 1341(d) (emphasis added).

With respect to the first question, whether the Agency should clarify or revise its interpretation of scope of certification, this issue was already definitively decided by the US Supreme Court in *Public Utilities District No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), which upheld Washington's imposition of minimum in-stream flow requirements on a hydroelectric dam. The Court held that Section 401 applies to federally permitted activities involving discharges, and that it authorizes the certification agency to consider the impact of the activity as a whole, on state water resources, not solely the impacts of the discharge.

As the Court laid out in some detail, "Section 401(a)(1) identifies the category of activities subject to certification¾namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." 511 U.S. at 711-12.

Given the specificity with which the Supreme Court has already addressed this issue, it seems unnecessary if not counterproductive to reopen it.

The Supreme Court's *PUD No. 1* opinion also addressed the scope of certification conditions, holding that 401 water quality certifications could by conditioned not only on numerical aspects of the water quality standards of the receiving water, but also narrative water quality criteria, designated uses, and antidegradation policies. 511 U.S. at 711-12, 714-16. In doing so, the Court decided that certifying authorities may use section 401 to impose conditions "to ensure that each activity even if not foreseen by the [numerical] criteria will be consistent with the specific uses and attributes of a particular body of water." 511 U.S. at 717. The Court also spoke favorably of a wide variety of approaches used by states to protect water resources, including "aesthetics." 511 U.S. at 716.

The Court reaffirmed this reasoning in *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), where it considered at some length whether a Section 401 water quality certification could be triggered by a discharge of water from a hydroelectric dam that did not necessarily involve a "discharge of pollutants," as that term is defined by the Clean Water Act. Considering and rejecting several arguments to the contrary, the Court held that Section 401 was not limited to "discharges of pollutants" under the NPDES permitting framework but rather encompassed a broader definition, including the releases from hydroelectric dams. 547 U.S. at 377-78. In addition to its textual analysis, the Court relied upon the broad purposes of the Clean Water Act, including addressing "pollution" as well as the "addition of pollutants," which Congress defined as "the man-made or man-induced alternation of the chemical, physical, biological, and radiological integrity of water." 547 U.S. at 385 (quoting 33 U.S.C. §§ 1251(a) and 1362(19). The Court also relied upon the Act's purpose to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[5] 547 U.S. at 385.

In the nearly two decades since the *S.D. Warren* case was decided, in reliance on the language of 33 U.S.C. § 1341(a), courts have consistently upheld § 401 certifications that impose conditions not only on the discharges from such projects, but also aspects of their construction and long-term operation that affect water quality. These conditions frequently address a wide array of environmental concerns, including dredging plumes, construction dewatering, bank stabilization, fish passage infrastructure, leak detection systems, and emergency spill response planning. *See, e.g.*, *Sierra Club v. State Water Control Board*, 898 F.3d 383, 403-404 (4th Cir. 2018) (upholding Virginia's imposition of erosion and sediment control conditions for upland activities with downstream water quality implications); *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 151 (2d Cir. 2008) (affirming Connecticut's denial of certification to a proposed pipeline due to its adverse impact on shellfish habitat resulting in the loss of an existing or designated use).

2. Definition of "Water Quality Requirements"

EPA seeks input on whether it should revise or clarify its current regulatory definition of "water quality requirements" and whether it should clarify or revise its interpretation of the statutory phrase "other appropriate requirements of State law" which is found in 33 U.S.C. § 1341(d).

Section 401(d) provides that "[any certification provided under this section shall set forth any effluent limitations or other limitations, and monitoring requirements, necessary to assure that any applicant for a Federal license or permit will comply with **any applicable effluent limitations or other limitations under [specific CWA sections] and with any other**

[5] *Id.* at 372 (quoting 33 U.S.C. § 1251(a)), the Court emphasized that the term "pollution" includes "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water."

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(d) (emphasis added).

In 2023, EPA promulgated regulations interpreting the above language as requiring the certifying authority (i.e., states or tribes) to evaluate "whether the activity will comply with applicable water quality requirements." 40 C.F.R. § 121.3(a). As noted above, EPA seeks input on whether it should clarify or revise its definition of "water quality requirements" or the statutory phrase "other appropriate requirements of State law." The latter phrase is not even included in the current regulations, which limit the evaluation under Section 401 to "water quality requirements," which is defined narrowly as "any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other **water quality-related requirement** of state or Tribal law." 40 C.F.R. § 121.1(j) (emphasis added). The regulations clearly limit certifying conditions to water quality-related requirements, so the complaint that non-water quality related aspects of federal projects are being considered by the certifying authority does not result from a textual issue with the regulation that requires revision or clarification. To the extent that some certification decisions are based on concerns broader than those articulated in the rule, they can already be challenged by the applicant in court.[6] This concern does not provide a basis for reopening the rule.

3. Neighboring Jurisdictions

EPA seeks input on how the Agency should consider whether a neighboring jurisdiction's water quality may be affected by discharge for purposes of CWA § 401(a)(2). Under Section 401(a)(2), whenever EPA determines that a proposed discharge "may affect the waters of any other State," it "shall...notify such other State," which then has 60 days to object in writing and request a public hearing. Based on the recommendations of the neighboring state, the Administrator, and any other evidence presented at the hearing, the licensing or permitting agency must impose conditions to ensure compliance with applicable water quality requirements or withhold a permit altogether.[7] EPA's procedures for consideration of impacts on the water quality of neighboring jurisdictions are found in 40 C.F.R. §§ 121.12-121.15.

The notification process here is essential to ensuring neighboring states and tribes can protect their water resources from federally permitted activities that may impact their water quality. The

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[6] *See Alcoa Power Generating Inc. v. F.E.R.C*, 643 F.3d 963, 971–972 (D.C. Cir. 2011) (citing 33 U.S.C. § 1341(a)(1)) (noting that validity of § **401 certification** is a question of federal law); *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982) (citation omitted) (**stating** that **state** courts have jurisdiction to review § **401 certification** when addressing "validity of requirements imposed under **state** law or in a **state's certification**").

[7] 33 U.S.C. § 1341(a)(2).

importance of the notification process was underscored in *Fond du Lac Band of Lake Superior Chippewa v. Wheeler*, 519 F. Supp. 3d 549 (D. Minn. 2021), where the court held that the EPA has an obligation to determine when a discharge may affect the water quality of a neighboring state, triggering the procedural rights Section 401(a)(2) guarantees. This legal obligation is essential to protecting the rights of neighboring jurisdictions. Without the EPA's active role in making this threshold finding, states and tribes whose water bodies are affected by an activity required to obtain a Section 401 certification may be effectively excluded from decisions that may compromise their waters.

EPA's triggering of the review of a proposed Section 401 water quality certification by a neighboring state is more than a procedural step, but rather the key mechanism by which states and tribes are able to ensure that activities subject to federal permitting in neighboring states do not adversely affect water quality of the water bodies in their own states. As such, it should be interpreted broadly so as to enable states and tribes to define and protect their own water quality standards—and to require certifying authorities to evaluate, and if necessary, condition licenses that threaten those standards. The integrity of Section 401(a)(2) depends on the EPA fulfilling its duty to ensure notice, participation, and enforceable protection for all affected jurisdictions.

4. Categorical Determinations under Section 401(a)(2)

EPA requests data or information from stakeholders on "whether there are specific types of activities, geographic regions, types of waterbodies, or other types of circumstances, etc. which may support the Agency establishing a categorical determination that the quality of no neighboring jurisdiction's waters may be affected by discharge in such circumstances." There is no basis for categorical exclusions under Section 401(a)(2); categorical exclusions inherently risk overlooking critical, site-specific science and impacts. The concept of carving out categorical exclusions from EPA's obligation to inform neighboring jurisdictions of the potential impact of a federally permitted activity on that jurisdiction's waterway is particularly inapposite because that determination by EPA provides the notice to the neighboring jurisdiction of the Section 401 application and the opportunity to participate in it to protect that jurisdiction's waterways. Any categorical exclusion would by definition deny the neighboring jurisdiction of that opportunity.