



August 2, 2021

Honorable Michael S. Regan, Administrator
U.S. Environmental Protection Agency
EPA Docket Center, Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

OW-Docket@epa.gov

Attn: Docket Nos. EPA–HQ–OW–2021–0302; FRL–10023–97–OW

RE: Comments on the Notice of Intention to Reconsider and Revise the Clean Water Act
Section 401 Certification Rule. 86 Fed. Reg. 29,541 (June 2, 2021)

Dear Administrator Regan:

The Pennsylvania Department of Environmental Protection (“PADEP” or “Department”) submits these comments in response to the Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule published by the U.S. Environmental Protection Agency (“EPA”) on June 2, 2021 (86 Fed. Reg. 29,541) (“Section 401 Rule”).

The Section 401 Rule represents a significant departure from the legal precedent and processes established over the past 40 years. The Rule contradicts the plain language and legislative history of Section 401 of the federal Clean Water Act (“CWA” or “Act”), as well as binding judicial interpretations of the Act and Section 401, all of which construe the statutory provision as giving States broad authority to serve as a check on projects approved by the federal government and ensure compliance with State Water Quality (“WQ”) Requirements. EPA should revise the Section 401 Rule to be consistent with that legal precedent and previously established processes.

Introduction

The Section 401 Rule undercuts the CWA’s collaborative and holistic approach to protecting all waters in the United States, which rests in significant part on the preservation and integration of State WQ Requirements, for which the Act sets the floor, in the CWA’s regulatory program. The State WQ Certification process authorized by Section 401 is one of the cornerstones of the cooperative federalism framework of the CWA and ensures that the broad powers to protect water quality which are reserved to the States in Section 510 of the CWA, 33 U.S.C. § 1370 (“Section 510”) are realized. The cooperative federalism model envisioned by Congress is at the heart of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* In its declaration of the goals and policy

Secretary

Rachel Carson State Office Building | P.O. Box 2063 | Harrisburg, PA 17105-2063 | 717.787.2814 | www.dep.pa.gov

of the Act, Congress expressly states that its policy is to “recognize, preserve, and protect the primary responsibility and rights of States to prevent, reduce, and eliminate pollution.”¹

Consistent with this policy, Section 401 of the Clean Water Act (“Section 401”) requires 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... that any such discharge will comply [with applicable water quality requirements].”² A state’s Section 401 certification “shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply” with the Clean Water Act, “and with any other appropriate requirement of State law.”³ Any such limitation or requirement (referred to herein generally as “conditions”) “shall become a condition on any Federal license or permit subject to the provisions of [Section 401].”⁴

The CWA provides *no* authority for EPA to define how States will exercise their Section 401 WQ Certification responsibilities. This absence of federal authority is not surprising given that the role of States under Section 401 and Section 510 of the CWA is to act as a check on the impacts of federal decision-making on the Nation’s waters. The Section 401 Rule ignores the plain language of Sections 401 and 510 by narrowing and diminishing the States’ authority under Section 401. The Rule restricts the scope of allowable conditions a State may impose on the project and imposes new procedural hurdles and time restrictions which hamper a State’s ability to adequately review a certification application, and to include necessary conditions based upon the specific standards established by the state based upon its unique characteristics. EPA, via the Section 401 Rule, has manufactured a new authority for federal agencies which weakens a State’s WQC Conditions by imbuing federal agencies with veto authority over a state’s conditions, turning the CWA’s well-established cooperative federalism model on its head.

Prior to promulgation of the Section 401 Rule, previous EPA Administrators and the federal courts construed Section 401 as giving States broad authority to serve as a check on projects approved by the federal government and to ensure compliance with State WQ Requirements. In *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991) (“*Keating*”), the U.S. Circuit Court for the District of Columbia found that Congress intended for Section 401 to provide States with “the power to block, for environmental reasons, local water projects that might otherwise win federal approval.” 927 F.2d at 622. In *PUD No. 1 of Jefferson County v. Wash. Dep’t. of Ecology*, 511 U.S. 700 (1994) (“*PUD No. 1*”), the U.S. Supreme Court rejected the argument that Section 401 limits States’ authority to simply impose water quality controls for specific discharges from a federal project and ruled that Section 401 authorizes a State to impose ‘other limitations’ to compel compliance with the CWA and appropriate requirements of state law. *PUD No. 1*, 511 U.S. at 711. During the forty-eight years since the enactment of Section 401, EPA has

¹ 33 U.S.C. § 1251(b).

² 33 U.S.C. § 1341(a)(1).

³ 33 U.S.C. § 1341(d).

⁴ *Id.*

recognized and honored the States’ autonomy in the WQ Certification Process consistent with this broad interpretation.

The Section 401 Rule defeats the very purpose of the CWA, i.e., to restore and maintain the integrity of the Nation’s waters. 33 U.S.C. § 1251(a). The Rule reinterprets Section 401 to narrow the States’ authority by limiting the scope of projects that would require a State WQ Certification solely to projects with point source discharges. The ultimate effect of the Rule is to promote pollution of the Nation’s waters by undermining states, such as Pennsylvania, in their review of federal projects or inserting doubt and confusion related to longstanding conditions in State WQ Certifications for many federally permitted or licensed projects that impact state waters in ways other than by direct point source discharge. The attempt to narrow the applicability of the Section 401 Rule threatens Pennsylvania’s abundant water resources. The Section 401 Rule conflicts with the intent of the Clean Water Act, diminishes Pennsylvania’s right to ensure that water quality standards are maintained, and threatens the health of Pennsylvania’s waters by encouraging efforts to circumvent the long-standing protections guaranteed by Pennsylvania law.

Pennsylvania has, with the approval of the state and federal courts, administered the Section 401 WQ Certification Process efficiently and effectively for multiple decades. Pennsylvania relied upon the EPA interpretation of Section 401 reflected in the EPA’s 1989 and 2010 Section 401 Handbooks, as well as the language, purpose, and judicial interpretations of the CWA, to create its robust 401 WQ Certification Program.

In the context of dredge and fill projects, which require permits under Section 404 of the CWA, 33 U.S.C. § 1344, and are reviewed by the U.S. Army Corps of Engineers (“ACOE”), Pennsylvania and the ACOE have developed an integrated approach to processing 401 WQ Certification Requests concurrently with state law permit applications. This integrated approach is memorialized in a long-established 1992 settlement agreement between Pennsylvania and the ACOE, as well as the Pennsylvania State Programmatic General Permit, which is renewed every five years.

In the context of projects requiring federal licenses from the Federal Energy Regulatory Commission (“FERC”) under the Natural Gas Act, 15 U.S.C. §§ 717, et seq. (“NGA”), Pennsylvania DEP has developed an approach that relies on conditions which utilize state law permitting programs for consistent, predictable and efficient mechanisms for assuring compliance with State WQ Standards. The U.S. Court of Appeals for the Third Circuit has reviewed and approved this Pennsylvania water quality certification process in a challenge to PADEP’s granting a conditional State WQ Certification for the construction of an interstate natural gas pipeline. See *Delaware Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl. Prot.*, 903 F.3d 65 (3d Cir. 2018) (“Riverkeeper II”).

For years, Pennsylvania has efficiently administered its State WQ Certification authority through coordination with the regulatory programs DEP administers, which has facilitated predictable processes and reliable water protection. PADEP timely issues between 350 to 500 State WQ

Certifications annually and through those Certifications ensures compliance with its State WQ Requirements. Pennsylvania has well-established State WQ Requirements that protect the broad spectrum of activities that have the potential to impact the quality of Pennsylvania’s waters. The PA WQC Process is founded on the Pennsylvania WQ Requirements, developed under the Pennsylvania Clean Streams Law, 35 Pa. Stat. §§ 691.1 – 691.1001 (“Clean Streams Law”), and related Pennsylvania laws that ensure the protection and maintenance of water quality in Pennsylvania. The codified State WQ Requirements administered by PADEP are applied through regulatory programs such as those associated with management of sewage and wastewater treatment, erosion and sediment control and stormwater management (associated with land development activities), agricultural activities, industrial discharges, water obstructions and encroachments, water withdrawals, mining, oil and gas development, waste management, management of underground storage tanks, and environmental cleanups. The Section 401 Rule diminishes Pennsylvania’s well-established and efficiently administered water protections, particularly in the context of the numerous large-scale energy infrastructure projects created in response to the explosive growth of shale-gas development in the Commonwealth.

Specific Comments on the Section 401 Rule

The Section 401 Rule enacted regulatory amendments that are contrary to law:

1. Subpart A - General:
 - a. New or changed definitions in § 121.1. Without limiting the foregoing, Pennsylvania identifies the following definitions as particularly concerning:
 - The definition of “Certification request” requires certain basic information but, notably, does not require any sort of administrative completeness. This deficient definition triggers the review timeline at § 121.4, ignoring long-established concepts of due process.
 - The definition of “Discharge” impermissibly narrows the activities considered in a state’s Section 401 water quality certification solely to point source discharges. In contrast to point source discharges and discharges of dredge and fill material, nonpoint sources are the responsibility of States who are charged with regulating nonpoint source discharges consistent with WQ Standards pursuant to Section 319 of the CWA. 33 U.S.C. § 1329. “Discharge” which in the context of CWA Section 401 has been recognized by the United States Supreme Court to be broader than the defined term “point source discharge.” *S.D. Warren Co. v. Maine Board of Environmental Protection, et al.*, 126 S.Ct. 1843, 547 U.S. 370, 385 (2006), and *PUD No. 1*, 511 U.S. at 711 (States may impose limitations “on the activity as a whole,” not just on specific discharges.) The Clean Water Act framework is based upon: 1) “water quality standards” (“WQ Standards”) which must be developed by states, and approved by EPA, 2) “effluent limitations” which must be established by EPA, as well as 3) permitting or other approval requirements for specific activities and discharges which have the potential to

cause pollution to the Nation’s waters. 33 U.S.C. §§ 1311, 1312, 1313, 1329, 1341, 1342 and 1344.

- The definition of “Water quality requirements” limits the scope of state review to certain sections of the Clean Water Act and only to EPA-approved state Clean Water Act standards, contrary to the plain language of Section 401 and established caselaw. WQ Standards developed by states, are comprehensive in-stream water quality goals that are implemented by imposing specific regulatory requirements (such as treatment requirements, effluent limitations, and best management practices) on individual sources of pollution that may impact the Commonwealth’s surface waters. Water quality standards include “designated uses,” “numeric” and “narrative criteria” and “antidegradation” requirements for surface waters. 33 U.S.C. § 1313(c); 40 CFR § 131.6.

2. Subpart B - Certification Procedures:

- a. § 121.2 (When certification is required) limits state review of water quality certification requests to when the activity may result from a “discharge” under EPA’s definition at §121.1(g), which, as stated above, is contrary to the plain language of Section 401 and established caselaw.
- b. § 121.3 (Scope of certification) limits the scope of states’ Clean Water Act Section 401 certification to be applicable only to point source discharges under EPA’s definition at § 121.1(g), and assures compliance with only certain sections of the Clean Water Act and EPA-approved water quality standards, contrary to the plain language of Section 401, established caselaw⁵, and EPA’s prior interpretation of Section 401⁶. Limiting the scope of water quality requirements to only point source discharges prevents a certifying authority from evaluating and addressing potential water quality impacts from non-point discharges such as water quality impacts that may occur from a variety of activities associated with water withdrawals, stormwater, or soil and groundwater contamination. For example, the conditions inserted into Pennsylvania WQ0683219-001 included:

Soil Contamination Remediation Work Plan - Applicant shall comply with the PADEP-approved work plan for the remediation of the contamination area identified as a designated Operational Consideration Area (OCA) in the June 29, 1991 Consent Order and Adjudication (CO&A) between DEP and Texas Eastern and the October 11, 1989 Consent Decree between the U.S. Environmental Protection Agency (USEPA) and Texas Eastern. The OCA Remediation Work Plan shall be prepared in accordance with the CO&A and the Federal Consent Decree and all other applicable laws and regulations.

⁵ *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 711-713 (1994).

⁶ See U.S. Environmental Protection Agency, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (2010), at 19 (rescinded June 7, 2019).

Soil & Groundwater Management Plan - Applicant shall comply with the PADEP-approved Soil and Groundwater Management Plan specifying measures the Applicant will develop and implement to prevent the contamination of Waters of the Commonwealth due to the discharge, transport, release, or disposal, whether intentional or non-intentional, of regulated substances, hazardous substances, or contaminated media, including stormwater run-off, groundwater, or soils. The measures to be developed and implemented by the Applicant pursuant to the Plan shall contain, treat, address and/or dispose of contaminated media in a manner that satisfies water quality standards and other applicable laws and regulations, including water quality protection requirements. The Plan shall require the Applicant to conduct sampling and analyses to confirm the agency data and develop and implement actions to prevent the migration of contaminants, hazardous substances, or pollutants due to, but not limited to project activities such as, soil excavation and disposal, hydrovac excavation, decantation operations, trenching, groundwater dewatering, and the creation of preferential contaminant migration paths.

Section 401 of the Clean Water Act recognizes the importance of state water quality laws by prohibiting federal agencies from authorizing an applicant’s activity that will discharge into state waters without the state first certifying that the activity will meet state water quality standards. Pennsylvania water quality standards are encompassed in several Pennsylvania state law programs including those under the Clean Streams Law⁷, Stormwater Management Act⁸, Dam Safety and Encroachments Act⁹, and the implementing regulations and attendant state permitting programs administered thereunder¹⁰.

The United States Supreme Court has recognized that “[s]tate certifications under 401 are essential in the scheme to preserve state authority to address the broad range of pollution... These are the very reasons that Congress provided states with power to enforce ‘any other appropriate requirement of State law.’”¹¹ States have “broad discretion” when developing the criteria for their Section 401 certifications.¹² Section 121.3 impermissibly limits that discretion. It should be revised to ensure that the scope includes potential impacts to water quality from the “discharge” to the “activity as a whole.”

⁷ The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. 691.1-691.1001.

⁸ Storm Water Management Act of October 4, 1978, P.L. 864, as amended, 32 P.S. 680.1-680.17.

⁹ Dam Safety and Encroachments Act, Act of November 26, 1978, as amended, 32 P.S. 693.1-693.27.

¹⁰ *Delaware Riverkeeper Network v. Sec’y Pennsylvania Dep’t of Env’tl. Prot.*, 903 F.3d 65, 69 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1648, 203 L. Ed. 2d 899 (2019) (recognizing conditions placed on Section 401 certification based on state law).

¹¹ *S.D. Warren Co. v. Maine Bd. of Env’tl Prot.*, 547 U.S. 370, 386 (2006).

¹² *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019).

- c. § 121.4 (Pre-filing meeting request.) PADEP has utilized the pre-filing meeting request to provide guidance regarding both the federal 401 certification request requirements and certifying authority requirements. During these meetings, PADEP has also proactively identified state permits, authorizations and/or approvals that may be required for the project. The 30-day period is reasonable. However, it does have the potential to delay projects.

PADEP would recommend that § 121.4 be modified to waive the 30-day timeframe for certification request submittal when the certifying agency declines a pre-filing meeting request and to allow the certifying agency to abbreviate the 30-day timeframe after a pre-filing meeting is held.

- d. § 121.5 (Certification request) purports to set forth the requirements for a certification request. There remains a question as to whether EPA has the authority under the Act to define this process. That issue notwithstanding, the manner in which EPA has done this is too restrictive and contrary to caselaw. As stated previously, the Section 401 Rule is too restrictive in limiting certification requests to only point source discharges. In addition, the items identified at § 121.5 are mostly administrative in nature and alone do not provide enough information for the certifying authority to make an informed action. States should have the ability to request additional information be submitted with a certification request. The courts have previously found that the certification agencies can prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

Section 121.5 should be modified to allow the certifying authority to define the elements required for a *complete* certification request in addition to the items now required under § 121.5. The Rule should also be modified to specify that a certification request will not be considered to have been submitted until the certifying authority determines that the certification request contains all required elements necessary for a complete certification request.

- e. § 121.6 (Establishing the reasonable period of time) appoints Federal agencies as the sole decision maker as to what constitutes a reasonable period of time for states to act on water quality certification requests associated with applicant activities, contrary to the plain language of Section 401 and established caselaw. Allowing individual federal agencies the ability to determine their own reasonable period of time creates inconsistency for both applicants and certifying agencies. In addition, the reasonable period of time does not require federal agencies to consider constraints related to public comment periods, publication of notices, or the time associated with an applicant's response to technical deficiencies. It also fails to account for more complex projects that require coordination between multiple state environmental regulatory programs as well as inter-agency coordination.

Pennsylvania’s Section 401 certification process is effective and efficient. PADEP has a longstanding procedure for Section 401 certifications, designed to meet the Commonwealth’s procedural due process requirements. Those requirements include developing and submitting public notice to the Legislative Reference Bureau, publication in the *Pennsylvania Bulletin* with a 30-day public comment period, and when appropriate, extended public comment and/or public hearing.

PADEP has experienced inconsistent timeframes from various federal agencies. In addition, PADEP has received inconsistent information from the same federal agency regarding the reasonable period of time for projects received prior to the revision of the Clean Water Action Section 401 Certification Rule but under review after the Clean Water Action Section 401 Certification Rule was revised.

EPA’s rule impermissibly grants federal agencies with sole authority to determine a reasonable period of time, which could include timeframes as short as 60 days. Excessively short timeframes inhibit Pennsylvania’s ability to take final action on a Section 401 certification in light of the Commonwealth’s crucial public participation and administrative due process requirements. Requests for WQC for programmatic permits, such as the Army Corps of Engineers’ (“Corps”) State Programmatic General Permit (SPGP) and the Nationwide Permits (NWP) need to provide certifying authorities with adequate timeframes to consider and follow their public participation requirements for granting such certifications.

For example, in 2020, the Corps decreed that the reasonable period of time to consider the Corps’ NWPs was only 30 days. Thirty days was not nearly enough time to review those documents, let alone publish public notice and consider any public comments that might be submitted. The Corps ignored stipulations it had agreed to in a 1992 settlement agreement which specify that Pennsylvania has at least 160 days for review. In addition, the Corps’ request to certify was based on the “proposed” versions of the NWPs and regional conditions, as well as the proposed version of PASPGP-6. No environmental assessment was provided.

Pennsylvania was forced to issue a conditional WQC with a reopener provision that allowed Pennsylvania to withdraw its WQC should any changes from proposed to final be substantive enough to reconsider its decision to certify. Pennsylvania was initially met with substantial resistance from the Corps Districts, although they did eventually relent and accept Pennsylvania’s WQC for the NWPs.

As alluded to above, the ACOE has recognized that Pennsylvania needs additional time under Pennsylvania’s Section 401 certification program to properly administer the program. In 1992, the Corps entered into a settlement agreement with PADEP covering the Baltimore, Buffalo, Philadelphia, and Pittsburgh Districts. Under the terms of that agreement, which remains in force today, the Corps agreed that the Commonwealth shall have at least 160 days to act on WQC requests from the date of receipt of a complete

request with the added concession of providing flexible terms for extension requests beyond the initial 160 days.

EPA’s rule cripples a state’s ability to comply with its due process requirements. As set forth in § 121.6, EPA’s timeframes are triggered upon receipt of a Certification request as defined at § 121.1(c). However, the definition of “certification request” lacks any requirement that a request be administratively complete, although a reasonable interpretation could be advanced that a certification request shall not be considered to have been received until an administratively complete request has been submitted to the certifying authority. In the absence of an administratively complete Certification request, a state will not be able to act upon that request in a manner that conforms with that state’s duties to provide due process and accommodate public participation.

Finally, the rule forbids states from requesting that an applicant “withdraw a certification request and is not authorized to take any action to extend the reasonable period of time other than specified in § 121.6(d).” Such a prohibition on state action is unfounded in the Clean Water Act and contrary to well-established practice utilized by both states and applicants for decades.

Section 121.6 should establish a categorical reasonable period of time for a certifying authority to act on a water quality certification request rather than allowing each federal agency to establish a project specific reasonable period of time. Allowing certifying authorities up to one year after receipt of a complete request for water quality certification is a reasonable period of time (See FERC Action: Docket No. RM20-18-000). A one-year categorical reasonable period of time will simplify the process, provide consistency across federal agencies, and alleviate the need for federal agencies to evaluate and extend a shorter reasonable period of time. This approach would also accommodate varying public participation requirements as well as the need for coordinate between state environmental regulatory programs

The reasonable period of time should only begin when the certification request is determined complete by the certifying authority. A “certification request” should be defined as a request containing all of the required elements under the new rule as well as additional elements required by the certifying authority (complete request). EPA could also create separate procedures for programmatic certifications for federal issuing agencies, such as the Corps’ SPGPs and NWP, while allowing flexibility for local level agreements that take into account states’ procedural due process and need for inter-agency coordination under state law.

- f. § 121.7 (Action on a certification request) narrows the conditions that states can include in their certifications to only those chosen by EPA, and requires states to provide an explanation for each condition included in any granted certification. EPA similarly requires states to justify denial based on limited criteria, all of which are tethered solely to point source discharges. These limitations and requirements contradict the goals and

purpose of the Clean Water Act as declared by Congress and are contrary to the plain language of Section 401. Under Section 401, the authority of States applies to a “project” as a whole and is not limited to point source discharges. 33 U.S.C. § 1341(d); *PUD No. 1*, 511 U.S. at 711. Section 401 of the CWA also requires a federal agency to impose as a condition of its license or permit any condition that a State includes in its water quality certification. 33 U.S.C. § 1341(d). “The state’s ability to deny certification ultimately assures that . . . it has sufficient firepower to insist that its standards are accurately interpreted by federal employees.” *American Paper Inst. v. EPA*, 996 F.2d 346, 352 (D.C. Cir. 1993)

- g. § 121.9 (Waiver) creates authority for federal agencies to unilaterally determine a state’s compliance with Section 401 and EPA’s regulations, and bestows upon those federal agencies the ability to override state denials as certification “waivers.” No authority exists for EPA or any other federal agency to disregard states’ rights under Section 401 in this manner. Caselaw interpreting the roles of federal agencies and states in Section 401 certification reinforces that state certification decisions turn on “questions of substantive *state* environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence.”¹³ As stated previously, Section 401 of the CWA requires a federal agency to impose as a condition of its license or permit any condition that a State includes in its water quality certification. 33 U.S.C. § 1341(d). Section 401 does not permit any federal agency to disregard a condition included in a state’s water quality certification.
- h. § 121.10 (Incorporation of conditions into the license or permit) elevates federal agencies over states in determining what conditions are appropriate, contrary to the plain language and the cooperative federalism model enshrined in the Clean Water Act. The Rule would essentially permit federal agencies to veto state-imposed conditions. This result flies in the face of the cooperative federalism model at the heart of Section 401. As recognized by the federal courts, “[t]hrough [Section 401], Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.”¹⁴ Federal agencies “are without authority to review the validity of requirements imposed under state law or in a state’s certification.”¹⁵ The plain language of Section 401(d) requires that any condition that a state includes in its certification “shall become a condition” of the federal license or permit. EPA cannot, as it impermissibly attempts to do, limit the types of conditions a state can include in its certification to only those that EPA deems satisfies the requirements of Section 121.7(d).

Pennsylvania was met with resistance from the Corps over the issue of multiple 401 WQC’s being applicable in certain situations. For example, Pennsylvania has a longstanding practice of certifying the PASPGP and the NWP’s and to also issue 401

¹³ *Keating v. F.E.R.C.*, 927 F.2d 616, 622 (D.C. Cir. 1991) (emphasis added).

¹⁴ *Id.*

¹⁵ *Roosevelt Campobello Int’l Park Comm’n v. U.S. E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982).

WQC concurrently with any project-specific state permit or authorization. The Corps Districts do not believe that the Rule allows for multiple 401 WQCs. However, a certification issued concurrently with a state permit or authorization is prudent and necessary, since it is based on project-specific information. Although the permittee may be issued a federal general permit that already has been certified programmatically (NWP or PASPGP), the 401 WQC issued concurrently with the individual state permit is necessary to recognize the project-specific circumstances in which the certifying authority has evaluated potential impacts to its water quality standards. This scenario is also true when a certifying authority issues a 401 WQC for a project requiring a FERC license and that certification is based on limited, preliminary information. In contrast, the final state permit issuance is based on project-specific detailed information.

To avoid confusion and add clarity, EPA should add a section to the Rule explaining the nature of a 401 WQC and the ability for certifying authorities, through their condition, to subsequently issue project-specific certifications, such as what Pennsylvania does concurrently with its own permits, authorizations, and approvals.

- i. § 121.11 (Enforcement of and compliance with certification conditions). In Pennsylvania, enforcement of water quality standards is generally done through the respective water quality permits, authorizations, and approvals issued pursuant to state law and not the WQC. When a WQC is issued with conditions, the conditions are typically requirements to obtain and comply with other state water quality permits, although that is not always the case, e.g., hydroelectric dams.

The certifying authority should have the ability to enforce certification conditions when warranted. If the federal issuing agency does not have the authority to enforce a particular condition, it should not be allowed to vacate or decline that condition. Instead, the federal agency should have the flexibility to adopt a certifying authority's condition and state that it is enforceable only by the certifying authority in such cases.

- j. § 121.12 (Determination of effects on neighboring jurisdictions). The neighboring jurisdiction coordination process is cumbersome and lacks specificity. It is essentially a requirement for neighboring jurisdictions to provide WQC for projects not occurring within their jurisdictional authority.

Objecting to another certifying authority's issuance and requesting a public hearing should not be the only option if a neighboring jurisdiction has concerns about a project's potential impact on their own water quality standards. The neighboring jurisdiction may only have a need to request that additional conditions be adopted by the federal issuing agency. For instance, a neighboring jurisdiction located downstream from a project may only wish to receive notification from the permittee/licensee should a spill/release occur during construction. In those cases, EPA or the federal issuing agency, should require the project proponent to request an additional WQC from the neighboring jurisdiction. That issuance should have no bearing on the original certifying authority's WQC.

To the extent these procedures are necessary, they should include more options. Neighboring jurisdictions should be allowed to comment without objection or need for public hearing and be able to provide suggested WQC conditions for consideration by the certifying authority. The new procedure should have no bearing on the timeframe or decision to issue by the certifying authority where the project is taking place. Rather the permittee/licensee should not be allowed to begin construction until securing all necessary WQCs from the affected jurisdictions and subsequently any permits, authorizations, and/or approvals required by those jurisdictions' laws or regulations.

3. General Considerations.

- a. **Modifications.** In Pennsylvania, in cases where the WQC is not integral in a Chapter 105 permit, a conditional WQC is generally issued separately. The WQC conditions require the applicant to obtain all necessary authorizations under the various water quality permitting programs. Most project changes are handled under amendments to the various state authorizations and not the WQC. However, there are times where it would be appropriate to modify a WQC, such as when the scope of the proposed project impacts expands beyond those previously included within the original certification request or where there are subsequent changes to the magnitude and location of the proposed impacts. In those instances, a certifying authority should have the ability to modify or reopen a WQC.
- b. **Data and other information.** In Pennsylvania, the majority of WQCs are issued for projects where the federal 404 permit is the sole federal authorization necessitating the need for WQC. Historically, the WQC review has been integrated with the Chapter 105 permit review. The Chapter 105 permit application was also considered a request for WQC. There was no need for a separate WQC request containing the specific elements defined in the new rule. Procedurally, the new rule conflicts with Pennsylvania's long standing 401 procedures. It also conflicts with the 1992 settlement agreement entered into as a result of federal litigation between DEP and the Corps Districts that operate in Pennsylvania.

The Rule should be written to allow flexibility for procedures previously established by certifying authorities to govern the certification request process. In the alternative, it should be modified to constitute non-binding recommendations. Another alternative would be to rescind the rule and restore the 2010 WQC Guidance for States and Tribes. Certifying authorities which have equal or more protective water quality standards, or legally binding agreements with a federal issuing agency must be able to continue following longstanding local practices. If a certifying authority has a statutory or regulatory requirement, an application for a permit or authorization under that requirement should be allowed to be considered a concurrent request for 401 WQC.

Conclusion

The Section 401 Rule, in its current state, suffers from serious flaws. It conflicts with the intent and plain language of the Clean Water Act as well as existing caselaw. It fundamentally alters Pennsylvania's long-standing and well-administered program. PADEP is committed to fulfilling its duties under the Commonwealth's Constitution and the state environmental laws that form the backbone of Section 401 certification. The Section 401 Rule imperils PADEP's ability to fulfill those duties. PADEP respectfully urges EPA to revise the Section 401 Rule and engage in a rulemaking process that recognizes the cooperative federalism model envisioned by Congress when it enacted the Clean Water Act.

Thank you for your time and consideration of this important matter.

Respectfully,



Ramez Ziadeh, P.E.

Executive Deputy Secretary for Programs