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October 18, 2019

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

Re: Updating Regulations on Water Quality Certification (Docket ID: EPA-HQ-OW-2019-0405)

Dear Administrator Wheeler:

On behalf of the New Mexico Environment Department, enclosed please find our comments on the proposed rulemaking by the U.S. Environmental Protection Agency (EPA) replacing the existing water quality certification regulations at 40 C.F.R. Part 121, Docket ID No. EPA-HQ-OW-2019-0405. See 84 FR 44080 (August 22, 2019).

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "James C. Kenney".

James C. Kenney
Cabinet Secretary

cc: Rebecca Roose, Water Protection Division Director, NMED
Shelly Lemon, Surface Water Quality Bureau Chief, NMED
John Verheul, Assistant General Counsel, NMED

Introduction

The New Mexico Environment Department (NMED) is the state agency charged with certifying federal permits issued pursuant to the Clean Water Act (CWA). NMSA 1978, Section 74-6-5.B, 20.6.2.2001 - 2003 NMAC. NMED's role is to ensure that these federal permits comply with the requirements of state law in order to maintain and protect water quality within our borders. The CWA Section 401 certification is part of a larger water quality protection effort that is an integral part of the CWA. New Mexico has been applying this process successfully for many years.

CWA Section 401 certification authority is crucial for New Mexico to:

- Ensure compliance with state water quality standards;
- Assist regulated entities and EPA with implementation and protection of state standards (e.g., nutrients);
- Identify and correct errors in publicly noticed draft permits;
- Ensure that the state's antidegradation process and final decisions are adequately implemented into permits in a timely manner; and
- Ensure that "any other appropriate requirements of State and Tribal law" are met, such as:
 - water rights considerations under Small Municipal Separate Storm Sewer System (SMS4) permits,
 - cultural or religious value of water,
 - protection of a waterbody's designation under the Wild and Scenic Rivers Act,
 - state regulations dealing with Outstanding National Resource Waters protection,
 - implementation of temporary standards (i.e., variances),
 - required in-stream flows for threatened and endangered species pursuant to the Endangered Species Act, and
 - implementation of state general criteria (i.e., applicable to all waters).

CWA Section 401 certification is a critical tool that allows New Mexico to require federal agencies to add conditions to federal permits for monitoring and/or mitigation in the event of contamination where water quality standards do not yet exist, but the state wants to prevent exceedances of health-related criteria from known sources (e.g., Per- and Polyfluoroalkyl Substances).

The Proposed Rule infringes on states' authority and autonomy to manage and protect water resources within their borders and to implement CWA Section 401. NMED is also concerned about the compressed timeframe for this rulemaking and public comment period, as well as the Agency's inadequate engagement with states during the development of the Proposed Rule. The EPA provided states, tribes and other interested parties merely 60 days to review and comment on a proposed rule with incredibly high stakes and wide scope that deviates from decades of established practice of a more cooperative EPA/state relationship. Due to the inadequate public comment period, NMED was unable to comment fully on all 130 issues in the proposed rule.

NMED's overarching comment is that the Proposed Rule conflicts with the intent of the CWA and has significant legal and policy implications for states' rights to protect water quality within their own borders. While our comments only address state certification, New Mexico has 14 Pueblos and Tribes that have authority similar to a state with respect to CWA Section 401 certifications. Their authority and rights are dramatically altered and diminished under the Proposed Rule provisions, which in turn reduces protections for surface waters shared by Pueblos, Tribes and communities throughout New Mexico.

Comment 1 - The Proposed Rule conflicts with the clear Congressional intent of the CWA.

Under the CWA, Congress recognizes states' primary authority over water resources, purposefully designates states as co-regulators under a system of cooperative federalism, and clearly expresses its intent to:

...recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.

Through this statement, the CWA explicitly recognizes that states have the technical expertise and first-hand knowledge of their waters to manage and protect their resources. The CWA also recognizes that state management is preferable to a federally mandated one-size-fits-all approach to water quality management that does not accommodate the practical realities of climatological, ecological, geological, geographical and hydrological diversity between states. Furthermore, states have been applying this process successfully for many years.

EPA asks if this Proposed Rule appropriately balances the scope of state authority under section 401 – it absolutely does not. In fact, it takes the authority given to the states by Congress to protect their waters and effectively gives it to federal agencies. *See* Comment #4. It is clear in the plain language of the CWA that Congress did not give, or intend to give, federal agencies this authority. Eroding or shrinking state and tribal authority under CWA Section 401 would have deleterious effects on the state and federal partnership and would be inconsistent with statutory intent. *See S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 386 (2006).

A significant part of the opinion in *S.D. Warren* was the recognition of states in the certification process; “[s]tate certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution.” 84 FR 44090 (citing *S.D. Warren* at 386). The Court cited to the legislative history of the CWA, specifically a floor statement from Senator Edmund Muskie of Maine:

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license of permit without providing assurance that the facility will comply with water quality standards. No state water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements. 84 FR 44090 (citing *S.D. Warren* at 386).

While much can be gained from the Court's discussion in this opinion, EPA seems to focus its interpretation to argue that there is no suggestion that, "...an appropriate requirement of State law means anything other than water quality requirements or that a state's or tribe's action on a certification request can be focused on anything other than compliance with appropriate water quality requirements." 84 FR 44091. NMED asserts that this interpretation does not comport with the clear Congressional intent of the CWA, nor with the *S.D. Warren* opinion it purports to cite in support.

Comment 2 – The Proposed Rule would disproportionately impact states and tribes that do not have authority over CWA permitting programs.

New Mexico does not have permitting authority under CWA Section 402 (National Pollutant Discharge Elimination System – NPDES) nor CWA Section 404 (Dredge and Fill) and therefore relies heavily on Section 401 certification to maintain and protect water quality within our borders. The Proposed Rule disproportionately impacts states and tribes that do not have authority over CWA permitting programs where the number of permits issued by the federal government is much higher.

Comment 3 – The Proposed Rule deviates from previous interpretations of CWA Section 401.

The Proposed Rule interprets CWA Section 401 to apply only to discharges; this diverges from past EPA positions and at least one Supreme Court opinion, which found CWA Section 401 certifications apply to *activities*, not merely discharges. For example, if NMED were reviewing a new dam under the Proposed Rule, NMED would only be able to comment on the actual discharge of fill material into a water and not other impacts associated with dam construction, such as to instream flows, channel geomorphology, and adjacent wetlands or habitat. The Supreme Court case *PUD No.1 of Jefferson County and City of Tacoma v Washington Department of Ecology*, 511 U.S. 700 (1994), was a 7-2 decision that confirmed that states may regulate the impacts of a project as whole, so long as there is a discharge involved.

EPA previously read *PUD No. 1* as significantly broadening the scope of CWA Section 401 beyond its plain language meaning. 84 FR 44089. However, it now highlights that states “can only ensure that the project complies with ‘any applicable effluent limitations and other limitations under [33 U.S.C. 1311, 1312]’ or certain provisions of the Act, ‘and with any other appropriate requirement of state law.’ 84 FR 44089 (citing *PUD No. 1* at 712). Thus, while EPA previously saw the holding as broadening the scope, it is now focusing on the limitation that the, “appropriate conditions include those necessary to assure compliance with the state’s water quality standards.” 84 FR 44089.

After explaining the Court’s holding, EPA then changes its previous position and appears to improperly rely upon the dissent’s argument in *PUD No. 1*. Particularly, EPA could not reconcile sections 401(a) and 401(d) in terms of “discharge” versus “applicant”, but EPA now asserts that the dissent correctly reconciled the differences. 84 FR 44090. EPA quotes Justice Thomas’ dissent by saying, “it is reasonable to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve.” Thus, while Section 401(d) permits a State to place conditions on a certification to ensure compliance of ‘the applicant,’ those conditions must still be related to discharges.” 84 FR 44090 (citing *PUD No. 1* at 726-7). Through this reasoning, EPA frames its rulemaking as setting the appropriate bounds, i.e. limited to conditions concerning water quality.

NMED asserts that the majority’s reasoning in *PUD No. 1* be maintained, rather than that of the dissent, and that activities as a whole be considered to determine compliance with state water quality standards (WQS), not just the limited scope of only the discharge. Nearly 50 years of state and federal practice as well as numerous Court of Appeals decisions (e.g., *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997)) support and extend this approach and reasoning.

Comment 4: The Proposed Rule is contrary to stated goals in EPA's FY18 to FY22 Strategic Plan.

The Proposed Rule is inconsistent with the EPA's own Strategic Plan.¹

- (1) Goal 1, "A Cleaner, Healthier Environment: Deliver a cleaner, safer, and healthier environment for all Americans and future generations by carrying out the Agency's core mission." Objective 1.2 under this Goal states:

Provide for clean and safe water. Ensure waters are clean through improved water and infrastructure and, in partnership with states and tribes, sustainably manage programs to support drinking water, aquatic ecosystems, and recreational, economic, and subsistence activities.

The Proposed Rule and EPA's actions are contrary to its own strategic plan. The Proposed Rule does not reflect a partnership with states and tribes, but rather transfers all authority and decision-making to the federal permitting agency. See Comments # 1, 5, and 6. The Proposed Rule does not support drinking water, aquatic ecosystems, and recreational, economic, and subsistence activities because it is not based on science. See also (3) below and Comment #8.

- (2) Goal 2, "More Effective Partnerships: Provide certainty to states, localities, tribal nations, and the regulated community in carrying out shared responsibilities and communicating results to all Americans." Objective 2.2 under this goal states:

Increase Transparency and Public Participation: Listen to and collaborate with impacted stakeholders and provide effective platforms for public participation and meaningful engagement.

The Proposed Rule does not provide for meaningful engagement. EPA requested feedback on 130 issues but only provided 60 days for public comment. EPA rejected multiple requests from stakeholders to extend the comment period. EPA did not provide sufficient time for public review and comment. EPA is disingenuous in asking for public comment while not providing sufficient time for stakeholders to address all the issues.

- (3) Goal 3, "Greater Certainty, Compliance, and Effectiveness: Increase certainty, compliance, and effectiveness by applying the rule of law to achieve more efficient and effective agency operations, service delivery, and regulatory relief." Objective 3.1 states that EPA will comply with the Law and Objective 3.3 states EPA will prioritize robust science.

The Proposed Rule is inconsistent with the Congressional intent of the CWA. See also Comment #1. Objective 3.2 states that EPA will create consistency and clarity. Further, the Proposed Rule creates less certainty for states and tribes. See also Comments #5, 6, 7, 9, and 10. States and tribes have the technical expertise and first-hand knowledge of their waters to effectively manage and protect their resources. The CWA recognizes that state management is preferable to a federally mandated one-size-fits-all approach to water quality management that does not accommodate the practical realities of climatological, ecological, geological, geographical and hydrological diversity between states. Furthermore, the Proposed Rule authorizes unreasonable timeframes above scientific integrity. See Comment #8.

¹ Working Together: FY 2018-2022 U.S. EPA Strategic Plan (September 2019), available at <https://www.epa.gov/sites/production/files/2019-09/documents/fy-2018-2022-epa-strategic-plan.pdf>.

Comment 5: The Proposed Rule would place unreasonable restrictions on the conditions a state or tribe may impose under CWA Section 401.

The Proposed Rule disallows a state's broad review and conditioning of a proposed project. EPA maintains that states' conditions are limited to water quality requirements in EPA-approved plans, and that broader, non-water quality impacts are more appropriately reviewed by the federal licensing or permitting agency under the National Environmental Policy Act and other applicable environmental programs. Again, *PUD No. 1* confirmed that the conditions a state may require are not confined to the discharge itself but can address the activity as a whole as part of their certification.

According to the Proposed Rule, a federal agency can:

- a. Determine if a state's action under CWA Section 401 was limited to "water quality requirements" or if it was beyond the scope of certification. *Water quality requirements* as defined in the Proposed Rule means "applicable provisions of [CWA Sections] 301, 302, 303, 306, and 307... and EPA-approved state or tribal Clean Water Act regulatory program provisions."
- b. Require the state to provide specific information to support a deficient certification or condition, including requiring the state to identify less stringent conditions. However, under the Proposed Rule a federal agency would not be required to provide this opportunity to the certifying authority. If revisions were allowed, the certifying authority would need to provide the corrected condition or required information within the original reasonable period of time.
- c. Reject state certifications or conditions. Under the Proposed Rule, federal agencies can determine if the state's certification or condition(s) are beyond the scope of certification or deficient/unreasonable. The result would be that even if the state acted within the required time period a federal agency could consider the certification or condition(s) constructively waived and issue the permit or license without regard to the certification or condition(s).

These restrictions on state certification effectively transfer all the authority and decision-making power to the federal government and drastically weaken and undermine states' authority to manage and protect water quality within their borders. The restrictions offered by the Proposed Rule allow the federal agency to (1) determine the timing, (2) proclaim deficiencies, and (3) unilaterally reject or veto a state's certification or condition(s) and issue the permit regardless of the state's requirements. If the certification or condition(s) are rejected or considered "waived" and the federal license or permit is issued, any subsequent action by a state or tribe to grant, grant with condition, or deny the permit under Section 401 has no legal force or effect. There is no mechanism for the state to appeal. It is hard to imagine a procedural mechanism that would undermine the intent of state/tribal certification more than this.

As justification for these restrictions, EPA mentions several times that unreasonable conditions have been placed on certifications in the past, such as requiring bike trails or payments to the agency. These are extremely rare circumstances and EPA does not give any further information as to how many states have similar examples or how many unreasonable conditions or certifications are developed every year or even how many have been developed over the past 50 years. NMED agrees some conditions may not be appropriate for a water quality certification, but at the same time, a few bad examples do not justify the Proposed Rule. Narrowing the scope of certification constrains and impedes states from providing proper assurances that water quality will be protected.

Comment 6: The Proposed Rule would significantly diminish states' ability to impose conditions to enforce state WQS.

The EPA solicits response to considering CWA Sections 401(a) and 401(d) as two separate scopes for action on a certification request, whereby Section 401(a) would authorize a review of a certification only on the basis of determining whether the discharge would comply with the enumerated sections of the CWA and Section 401(d) would authorize consideration of "any other appropriate requirement of State Law" only for the purposes of establishing conditions once the certifying authority has determined to issue the certification. Under this approach, a certification request could be denied only if the certifying authority could not certify that the discharge would comply with applicable provisions of the CWA, but could not be denied based on other appropriate requirements of state law. This approach disregards the states' authority to deny certification if state requirements will not be met. Furthermore, a federal agency has no legal authority to determine if a condition is appropriate to meet New Mexico WQS.

The federal regulations must protect state water quality requirements and preserve existing state authority, including the opportunity to insert enforceable conditions into federal permits.

Comment 7: State experts, not federal agencies, should determine how much time is needed to certify a project.

Current practice gives states a reasonable time to certify a project, which has been interpreted as no more than one year. The Proposed Rule provides a federal agency the authority to determine how much time a state needs to certify. The federal agency would ostensibly determine the reasonable time period based on the complexity of the proposed project, the potential for discharge, and the need for additional information. These are responsibilities that the state currently performs to determine how a project will comply with state WQS. A federal agency, especially one that does not have expertise in water quality nor first-hand knowledge of the state's water resources, should not be dictating how long a state needs, how complex a project is, and whether or not the state requires additional information.

Comment 8: The Proposed Rule forces states to deny certifications because it unjustly constrains the timeline necessary for a complete, scientifically-based environmental review.

The Proposed Rule states that there is no tolling provision and that the clock does not stop at any time. This means that the clock does not stop when there are insufficient data and information to make an informed and appropriate decision. The clock does not stop if an applicant is unresponsive – the Proposed Rule states that if an applicant does not provide timely information to the state, the "reasonable time period" does not stop. The clock does not stop if a state is *allowed* to amend a "deficient" certification or condition. According to the Proposed Rule, if the certifying authority does not act on a request for certification (for whatever reason) within the reasonable time period, the certification requirement will be waived by the federal licensing and permitting agencies. This encourages states to certify projects with inadequate or incomplete information to support the decision, or to flatly deny certification of a project. NMED would be forced to deny incomplete and inadequate certification requests because the Department is unwilling to compromise scientifically-based environmental protections, despite federal regulations. What's more, the state only has 30 days from receipt of the request to ask for more information. In fact, a federal agency can decide that a state's request for more information is beyond the scope of certification. *See also* Comment #6.

NMED coordinates closely with the Albuquerque District of the U.S. Army Corps of Engineers (Corps) to determine when an application was submitted and if the Corps considers that application complete. The

Corps does not have a deadline by which to issue a permit. If the Corps requests additional information and the applicant is non-responsive, the Corps does not continue to process that application. If the Proposed Rule were to become final, and the Corps was waiting for additional information, the clock for certification would not stop and the state would be forced to issue the certification or waive its right to certification. Coordination with the Corps and the review of a complete application is the only way a state can determine if the project complies with state WQS.

Issuing a certification that is based on incomplete information makes the state vulnerable to litigation. Indeed, applicants denied state certification would be encouraged to pursue such litigation under the Proposed Rule. As experts in water quality of state waters, it is up to the state to determine what kind of information is required to determine compliance with state water quality standards, when they decide to request more information, and how to use that information, for example, to develop a condition.

Providing an applicant with a deadline to submit complete and adequate data and information to state and federal officials would improve times to certify, ostensibly one of the goals of the Proposed Rule. If the applicant has not or does not provide the necessary and requested information, then the clock should stop until such time that the information is provided. The clock needs to stop if the applicant has not provided adequate information or is unresponsive, otherwise there is less incentive for the applicant to provide adequate information.

Comment 9: The Proposed Rule would increase the burden on states in several areas.

- a. **Programmatic and regulatory changes.** States developed their respective water quality programs to be consistent with and complementary to the federal program. States will need to make programmatic and regulatory changes to meet EPA's additional requirements if the Proposed Rule becomes final and survives litigation.
- b. **Justifying state conditions.** States do not place conditions on their certifications without confirmation that they will help the project comply with state WQS. Many of the conditions have been used for numerous projects for many years and as a result state staff know which conditions work for which projects in a specific part of the state. NMED does not agree that a statement stating why or why not a less stringent condition could apply is appropriate. It is up to the state to determine which conditions are necessary to comply with state WQS. Moreover, nowhere does this requirement appear in the CWA.
- c. **Mandatory pre-filing meetings.** EPA states that pre-filing meetings will streamline the certification process, thereby justifying the reduced time periods for certification. The Proposed Rule also indicates that this meeting should be only between the certifying authority and the applicant, with follow up to the federal agency. This represents a departure from years of accepted practice. In most cases, the state and the Corps meet together with an applicant, if schedules and time permit, usually on-site. This is what streamlines the process, having both regulatory agencies in the room with the applicant at the same time. Making these meetings mandatory is not necessary because not every project requires a meeting. In addition, penalizing the certifying agency for not attending a meeting is unnecessarily punitive and unacceptable. Again, it is up to the state agency to determine what steps are necessary to process a water quality certification that complies with state WQS.

Putting additional limitations and requirements on states, such as mandatory meetings, shortened certification times, and limits on when and what a state can request, places emphasis on the bureaucratic process instead of the water quality certification itself. NMED recommends focusing on the

task at hand – conducting a scientific and water quality-based review that assures state WQS will be met and the environmental impacts resulting from a project will be mitigated.

Supporting states by enhancing EPA financial aid, workshops, and trainings; defining clear guidance and procedures; and establishing a joint application process to promote submission of all necessary information and ensure communication and consultation between the state, federal agencies, and the applicant would certainly improve the CWA Section 401 certification process and unquestionably protect surface water quality at both the state and federal levels.

Comment 10: NMED does not agree with EPA’s stated intention to rescind the 2010 handbook, *Water Quality Certification: A Water Quality Protection Tool for States and Tribes*.

In the Proposed Rule, EPA states several times that the CWA Section 401 regulations have not been updated since the 1970s. While this is true, the 2010 handbook was based on actual state and tribal experience with Section 401 certification. The handbook used state and tribal program experience, in addition to two decades of case law, to develop useful information and guidance to protect water quality and aquatic resources under CWA Section 401. NMED does not agree with EPA’s stated intention to rescind the 2010 handbook and negate decades of cooperative federalism simply because it does not serve EPA’s political agenda.

CONCLUSION

The Proposed Rule has numerous and substantial effects on state and tribal government authority and autonomy to manage and protect water resources within their borders and to implement CWA Section 401. NMED is also concerned about the compressed timeframe for this rulemaking and public comment period, as well as the agency’s inadequate engagement with states during the development of the Proposed Rule. The EPA provided a 60-day public comment period; however, EPA requested feedback on over 130 different items in the Proposed Rule. NMED did not provide comment on every one of these issues given that EPA did not provide sufficient time for public review and comment.

The Proposed Rule conflicts with the intent of the CWA and has significant legal and policy implications for states’ authority to protect water quality within their own borders. In NMED’s pre-proposal comments, we asked that EPA preserve existing state authority and respect the principles of cooperative federalism. Clearly, the EPA did not hear us.

Moving forward, the EPA must promulgate regulations that fully address NMED’s concerns, many of which are shared by states, tribes and government associations. Such a final rule would protect public health and the environment as Congress intended.