October 21, 2019

Mr. Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
EPA Docket Center, Office of Water Docket
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Attn: Docket Nos. EPA-HQ-OW-2019-0405; FRL-9997-82-OW

RE: Comments on the Proposed Rulemaking: Updating Regulations on Water Quality Certification. 84 Fed. Reg. 44,080 (August 22, 2019)

Dear Administrator Wheeler:

The Pennsylvania Department of Environmental Protection ("DEP" or "Department") submits these comments in response to the notice of proposed rulemaking entitled *Updating Regulations on Water Quality Certification* published by the U.S. Environmental Protection Agency ("EPA") on August 22, 2019 (84 Fed. Reg. 44,080) ("Proposed Rule"). As part of its comments on the Proposed Rule, DEP incorporates by reference the contemporaneously filed comment letter submitted by the Attorneys General of California, New York, Pennsylvania, and numerous other states to the EPA on the Proposed Rule for Docket No. EPA-HQ-OW-2019-0405.

For the reasons set forth more specifically below, this Proposed Rule would represent a significant departure from established processes and legal precedent. DEP believes the 60-day comment period provided by EPA is insufficient to respond to such a dramatic shift in interpretation, and respectfully requests that the comment period for this rulemaking be extended by a period of no less than 30 days. DEP also requests that an additional public hearing be held on the east coast to ensure adequate representation of all states.

## Introduction

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 of the Clean Water 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

[1] 33 U.S.C. § 1251(b).
[2] 33 U.S.C. § 1341(a)(1).

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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]

EPA's Proposed 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 circumventing the Commonwealth's longstanding protections under state law. At the same time that EPA seeks to narrow and diminish the states' authority under Section 401, it simultaneously creates new authority for itself and other federal agencies that exceeds the authority granted by Congress under the statute, turning the Clean Water Act's well-established cooperative federalism model on its head.

**Specific Comments on the Proposed Rule**

EPA's Proposed Rule would enact the following regulatory amendments which DEP believes are contrary to law:

1. <u>Subpart A - General</u>:

a. EPA proposes several new or changed definitions in § 121.1. DEP objects to any new or changed definition that is contrary to the plain meaning of the Clean Water Act or established law. Without limiting the foregoing, Pennsylvania identifies the following proposed definitions as particularly concerning:

    - EPA's proposed definition of "Certification request" requires certain basic information but, notably, does not require any sort of administrative completeness. This deficient definition would trigger EPA's proposed review timeline at § 121.4, ignoring long-established concepts of due process.
    - EPA's proposed definition of "Condition" would, in conjuncture with EPA's proposed language at §§ 121.3, 121.5, and 121.8, impermissibly narrow the conditions states may impose under Section 401(d) to a new limited scope of certification.
    - EPA's proposed definition of "Discharge" impermissibly seeks to narrow the activities considered in a state's Section 401 water quality certification.
    - EPA's proposed 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.

2. <u>Subpart B - Certification Procedures:</u>

[3] 33 U.S.C. § 1341(d).
[4] *Id.*

a. § 121.2 (When certification is required) – EPA proposes to limit state review of water quality certification requests to when the activity may result from a "discharge" under EPA's proposed definition at §121.1(g), contrary to the plain language of Section 401 and established caselaw.

b. § 121.3 (Scope of certification) – EPA proposes to limit the scope of states' Clean Water Act Section 401 certification to be applicable only to point source discharges under EPA's proposed definition at § 121.1(g), and assure 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 caselaw[5], and EPA's prior interpretation of Section 401[6]. 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 the Clean Streams Law[7], Stormwater Management Act[8], Dam Safety and Encroachments Act[9], and the implementing regulations and attendant state permitting programs administered thereunder[10]. The 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] EPA's proposed rule impermissibly limits that discretion.

c. § 121.4 (Establishing the reasonable period of time) – EPA proposes to appoint 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.

   Pennsylvania's Section 401 certification process is effective and efficient. DEP has a longstanding procedure for Section 401 certification, 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.

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[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).

[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 Envtl. 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 Envt'l Prot.*, 547 U.S. 370, 386 (2006).

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

EPA's proposed rule not only impermissibly grants federal agencies with sole authority to determine a reasonable period of time, but indicates that such timeframe could be as short as 60 days.[13] It has been DEP's experience that such a short timeframe is insufficient for taking final action on a Section 401 certification in light of the Commonwealth's crucial public participation and administrative due process requirements. Indeed, the ACOE recognized the need for more time under Pennsylvania's Section 401 certification program when it entered into a settlement agreement with DEP in 1992 covering the Baltimore, Buffalo, Philadelphia, and Pittsburgh Districts. Under the terms of that settlement agreement, which remains in force today, the ACOE agreed that the Commonwealth shall have 160 days to act on such requests from the date of receipt of a complete request and provided flexible terms for extension requests.

EPA's proposed rule cripples a state's ability to comply with its due process requirements. As set forth in § 121.4, EPA's proposed 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. In the absence of an administratively complete Certification request, a state will not be able to be act upon that request in a manner that conforms with that state's duties to provide due process.

Finally, the proposed rule forbids states from requesting an that an applicant "withdraw a certification request or take any other action for the purpose of modifying or restarting the established period of time." 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.

d. § 121.5 (Action on a certification request) – EPA proposes to: (1) narrow the conditions states can include in their certifications to those chosen by EPA in the proposed definition at § 121.1(p); (2) limit the timeframe allotted under Section 401(a)(1) to what is determined to be a reasonable period of time by the federal agency; and (3) require states to provide an explanation for each condition included in any granted certification. EPA similarly requires states to justify denial based on limited criteria, which criteria notably do not include any failure of the applicant to supply necessary information or adhere to certification procedures. 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.

e. § 121.6 (Effect of denial of certification) – EPA proposes to create 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." EPA's proposed rule further infringes upon states' rights by providing an opportunity for the state to respond to such a federal determination <u>only if</u> time remains from the federal agency's "reasonable period of time." No authority exists

[13] 84 Fed. Reg. 44,115.

for EPA and other federal agencies 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."[14]

f. § 121.8 (Incorporation of conditions into the license or permit) – EPA proposes to elevate federal agencies over states in determining what conditions are appropriate, contrary to the cooperative federalism model enshrined in the Clean Water Act. The proposed 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."[15] Federal agencies "are without authority to review the validity of requirements imposed under state law or in a state's certification."[16] 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 it its certification to only those chosen by the EPA in its proposed rule at §§ 121.1(f) and 121.3.

3. Subpart D - Certification by the Administrator:

a. § 121.13 (Request for additional information) – EPA proposes to limit the timing and substance of what additional information a state may request of an applicant. Section 401 provides no such limitation. The limits EPA seeks to impose are not only arbitrary and contrary to law but ignore states' duties to review submissions in accordance with their own administrative obligations, as further explained above.

**Conclusion**

DEP again urges EPA to extend the public comment period and hold additional hearings on the Proposed Rule, including at least one public hearing on the east coast. DEP has had insufficient time to fully consider the myriad impacts the Proposed Rule would have.

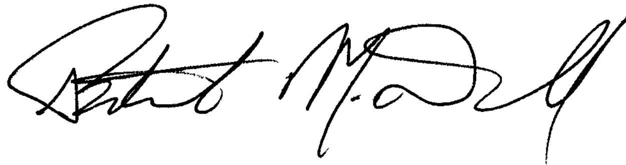
Even with the short time that we have had to review the Proposed Rule, DEP has been able to determine that the Proposed Rule suffers from serious flaws. The Proposed Rule conflicts with the intent and plain language of the Clean Water Act as well as existing caselaw. The Proposed Rule would fundamentally alter Pennsylvania's longstanding and well-administered program.

[14] *Keating v. F.E.R.C.*, 927 F.2d 616, 622 (D.C. Cir. 1991) (emphasis added).
[15] *Id.*
[16] *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982).

DEP is committed to fulfilling its duties under the Commonwealth's Constitution and the state environmental laws that form the backbone of Section 401 certification. EPA's Proposed Rule, if finalized, would imperil DEP's ability to fulfill those duties. DEP respectfully urges EPA to rescind the Proposed 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,



Patrick McDonnell
Secretary