



Environmental Council of the States

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October 21, 2019

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

Via [regulations.gov](https://www.regulations.gov): [EPA-HQ-OW-2019-0405](https://www.regulations.gov/document/EPA-HQ-OW-2019-0405)

Re: U.S. EPA's Updating Regulations on Water Quality Certification

Dear Administrator Wheeler:

Thank you for the opportunity to comment on the proposed rule, *Updating Regulations on Water Quality Certification*. In addition to the following, we are enclosing the comments ECOS submitted in May 2019 during the pre-proposal federalism and tribal consultation period.

A number of states are concerned that some of the changes made in the proposed rule in pursuit of consistency would create procedural issues in some cases. Specifically, ECOS members have pointed out that EPA's proposed criteria for federal agencies to consider in establishing what constitutes a "reasonable period of time" to complete 401 review does not consider existing state regulations.

In the decades that states have been implementing the program, they have developed diverse processes for Section 401 water quality certification which often contain procedural requirements and timeframes for public notice and engagement in the certification process. Many of these processes require more time than EPA or implementing agencies may propose be allowed. This conflict could put states in the position of having to make an inadequately informed water quality certification decision or of violating their own laws, and could therefore result in an increase in denied certifications to avoid those two outcomes.

States recommend that EPA modify the proposed criteria for federal agencies to consider in establishing what constitutes a "reasonable period of time" to include as a factor existing state law and regulations prescribing timeframes and procedures.

Sincerely,

Donald Welsh
Executive Director
Environmental Council of the States

Jim Macy

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May 24, 2019

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

Via regulations.gov: EPA-HQ-OW-2018-0855

Re: U.S. EPA's Review of Clean Water Act Section 401 Guidance and Regulations

Dear Administrator Wheeler:

Members of the Environmental Council of the States (ECOS) appreciate the opportunity to provide comments to inform the U.S. Environmental Protection Agency (EPA)'s development of guidance and proposed regulations regarding Clean Water Act (CWA) Section 401 certification. Our members urge the EPA to preserve states' ability to protect water resources under Section 401 of the CWA as the agency acts to comply with the timelines and directives set out in Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*.

As stated in our August 2018 letter to Congress regarding potential statutory changes to CWA Section 401, the Clean Water Act was built on the foundation of cooperative federalism—the principle that states are best positioned to implement federal environmental laws because of their expertise on local conditions and concerns. The CWA therefore grants to states the legal authority to protect, restore, develop, and use their water resources.

Section 401 of the CWA provides states with an important tool to review activities associated with a wide range of federal permitting decisions and to protect their waters from the impacts of those decisions. ECOS asks that any updates to Section 401 guidance or regulations be made to expressly preserve existing states' rights to exercise Section 401 authority and with great care to avoid unintended consequences for states.

ECOS encourages EPA to develop guidance and regulations that align with the statutory role for states as described in the CWA. ECOS is supportive of improvements to the Section 401 certification process to the extent that the improvements provide for meaningful pre-permitting and pre-licensing engagement, clarity for both states and regulated entities on review timelines, and more effective coordination among federal and state regulatory agencies. At the same time, ECOS requests that EPA's actions reaffirm states' need for adequate information to make Section 401 certification decisions, and adequate time to complete their work. EPA should undertake with the states a careful, measured assessment

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of how the states' review processes are currently conducted to identify the full potential for process improvements. In this review, EPA should consider the states' need within the required timeframe for action to:

- Receive from applicants a complete "application" for certification;
- Review submitted application materials to determine if any additional information is needed;
- Obtain necessary additional information and review information;
- Publish the complete application for public notice and comment following the timeframes and process laid out in state regulations;
- Review all materials and respond to the public comments received; and
- Issue the 401 water quality certification decision.

Changes to the Section 401 certification process that result in less or incomplete information available to states, or unduly limit states' decision-making timeframes, could add uncertainty to the certification process and limit states' ability to affirmatively certify projects. This outcome — more uncertainty and fewer certifications — would seem inconsistent with the intent of E.O. 13868.

ECOS recognizes that the Executive Order is guiding the pace of EPA efforts to clarify guidance and regulations. Given that this review has important cooperative federalism implications and potentially significant impacts on states' rights, the process would benefit from additional time and opportunities for states to engage in discussion with EPA and other federal agencies on the changes under consideration. As a result, states stand ready to discuss specific issues the agency intends to address in revisions to Section 401 guidance and regulations. Even with tight timelines, ECOS encourages the agency to continue to engage in meaningful consultation with states through the duration of the process outlined in E.O. 13868.

ECOS respectfully requests that proposed updates to guidance or regulations preserve existing state authority under Section 401 of the CWA, reinforce the importance of adequate time and complete information for state reviews, respect the principles of cooperative federalism, and reflect genuine consultation with state and local governments.

If you would like to discuss this further, please feel free to contact me. Thank you for your attention.

Sincerely,



Donald Welsh
Executive Director
Environmental Council of the States

Environmental Council of the States

CC:

The Honorable Mary B. Neumayr
Chairman, Council on Environmental Quality

The Honorable Russell T. Vought
Acting Director, Office of Management and Budget

The Honorable R.D. James
Assistant Secretary of the Army (Civil Works)

The Honorable Neil Chatterjee
Chairman, Federal Energy Regulatory Commission

Mr. David Ross
Assistant Administrator for Water, Environmental Protection Agency