



Environmental Council of the States

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August 8, 2022

Administrator Michael S. Regan
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via regulations.gov: EPA-HQ-OW-2022-0128

Re: Clean Water Act Section 401 Water Quality Certification Improvement Rule

Dear Administrator Regan:

Members of the Environmental Council of the States (ECOS) appreciate the opportunity to comment on the proposed *Clean Water Act (CWA) Section 401 Water Quality Certification Improvement Rule*. The Section 401 certification process is an important tool states can use to protect their waters for the benefit of their citizens. ECOS appreciates the agency's efforts in this proposed rule to preserve states' rights to exercise Section 401 authority, including clarifications to ensure that nothing precludes states from enforcing certification conditions when so authorized under state law, while also retaining elements of the *2020 Water Quality Certification Rule* that increased clarity and efficiency in the certification process. ECOS provides the following comments for consideration in development of the final rule.

Scope of Certification

Congress built the CWA 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 clearly recognizes that states have primary 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 water quality from the impacts of those decisions. States have effectively used this statutory authority for nearly 50 years.

The *2020 Water Quality Certification Rule* restricted states' ability to consider how a federally approved project, as a whole, will impact state water quality. Many states support the readoption of definition of "activity as a whole," allowing states to evaluate "any aspect of the project activity with the potential to affect water quality," and see this definition as consistent with the intended role of state certifying authorities. This is consistent with long-standing Supreme Court endorsed interpretation.

However, some states are prohibited from considering a proposed project's "activity as a whole" and must rather focus on the impacts to water quality of the project at hand. Still

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others find the definitions of “activity as a whole” and “water quality requirements” to be ambiguous. It is important that 401 regulations respect the variety of approaches and requirements implemented throughout states and provide the clarity and flexibility needed for states to achieve the goals and requirements of the CWA.

Request for Certification

Some states support the requirement in this section that a request for certification must include a draft permit, but other states have raised concerns about this. While inclusion of a draft permit could ensure the certifying agency has adequate information, several federal agencies do not issue draft licenses or permits. This means that project applicants would not be able to submit a request for certification until the final permit or license is issued, which would likely result in unnecessary delay and create inefficiency in the certification process. It could also create an impression that the 401 certification is no more than a “rubber stamp” of the draft federal permit.

As an alternative, an applicant could be required to submit their federal permit application along with their 401 certification application. Most states agree that the submission of a complete application should be the trigger for a state’s reasonable period of time to make a decision. Most states also agree that certifying authorities need flexibility to determine what constitutes a complete application in accordance with state administrative requirements.

Reasonable Period of Time

This section of the proposed rule incorporates some flexibility in allowing for certifying authorities and the permitting federal agency to collaboratively agree to a reasonable period of time for the certifying authority to act on a request, up to one year. States appreciate the accommodations made for certifying authorities’ public notice requirements or force majeure events. However, even with these accommodations, the default reasonable period of 60 days for a certifying authority to act if the agencies cannot come to agreement is problematic and unfeasible for most states to evaluate many certification requests.

Modifications

Some states would like to see additional clarity provided around certification modifications. Since the proposed approach in the event of a certification deficiency requires the federal agency to notify the certifying authority and to provide an opportunity to remedy it within the “reasonable period of time,” the final rule should include a requirement that the federal agency must notify the certifying authority immediately after identifying any deficiencies. Opportunities to modify an existing certification or correct certification deficiencies can help avoid delays in some cases, and can ensure consistency between federal permits or licenses and state water quality goals.

ECOS appreciates the opportunity to provide this feedback, and encourages EPA to review the comments of our member agencies and partner state associations. Please reach out to Ben Grumbles, 202-266-4929, or bgrumbles@ecos.org, with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ben Grumbles". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Ben Grumbles
ECOS Executive Director

Cc:

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