State of Utah

SPENCER J. COX
Governor

DEIDRE HENDERSON
Lieutenant Governor

Department of
Environmental Quality

Kimberly D. Shelley
Executive Director

DIVISION OF WATER QUALITY
Erica Brown Gaddis, PhD
Director

July 30, 2021

Michael S. Regan
Administrator
US Environmental Protection Agency
Office of the Administrator 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Subject: Comments on Notice of Intention to reconsider Clean Water Act Section 401 Rule Change (Docket ID No. EPA-HQ-OW-2021-0302)

The State of Utah appreciates the opportunity to submit comments regarding the Environmental Protection Agency's proposed Notice of Intention to Reconsider the Clean Water Act Section 401 Rule Change (EPA-HQ-OW-2021-0302), hereafter referred to as the NOI. The NOI is seeking feedback on how to revise the requirements for water quality certification under the Clean Water Act (CWA). Utah supports a rule review and revision process that is transparent and inclusive of Certifying Authorities concerns while supporting cooperative federalism. Although there are several aspects of the 2020 CWA Section 401 Certification Rule (the "rule") that Utah finds to be reasonable and clarifying, many aspects of the rule are inconsistent with the goal of cooperative federalism. Utah is submitting comments related to the notice of intent including the questions for consideration and the identified key issues. Specifically, Utah has concerns with the rule because it:

1.) Substantially reduces state authority and sovereignty to manage water quality in state waters;
2.) Unreasonably narrows the scope of certification authority, beyond the intent of congress;
3.) Imposes unreasonable and stringent timelines; and
4.) Interferes with public outreach and notice practices and is inconsistent with Utah statutory requirements;

Background

Utah was granted primacy to administer the CWA in 1986, although Utah's first statutory water quality regulations were enacted in 1967. The Utah Water Quality Act, Title 19-5, outlines Utah's water quality programs, grants authority to the Water Quality Board to establish water quality rules, and to the Director of the Division of Water Quality, within the Utah Department of Environmental Quality, to administer both federal and state water quality programs. The Division of Water Quality (DWQ) is the certifying authority for 401 water quality certifications in Utah.

DWQ receives an average of sixteen requests for 401 water quality certification per year. Typically, DWQ issues a final certification within 80 days of receipt of a complete application including a draft review period for the applicant and a 30-day public comment period. Rules governing the issuance of 401 water quality

certifications can be found in Utah Administrative Code R317-15. DWQ has a good working relationship with the US Army Corps of Engineers (USACE) office that issues CWA 404 permits in Utah, the most frequent trigger for a 401 water quality certification. DWQ has also certified several FERC licenses on dams in Utah, none of which have caused delays in project implementation. DWQ has a history of working collaboratively with project applicants and federal agencies to develop conditions that protect waters and allow for timely project implementation.

Questions for Consideration

Cooperative Federalism

Utah echoes the EPA's concerns about whether portions of the rule impinge on cooperative federalism principles central to the CWA Section 401. State authority to certify and condition federal permits for discharges under CWA section 401 is vital to the CWA's system of cooperative federalism as expressed in CWA Section 101. The rule unreasonably curtails and reduces states' authority to manage water quality within their boundaries. The CWA assigns distinct roles for the federal government and the states to accomplish the goals of the CWA. The CWA assigns primary responsibility for regulating water pollution to the states as expressed in this statement in Congress's declaration of the goals and policy of the CWA.

> 33 USC 1251(b) [FWPCA § 101] It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution in the nations waters.

Congress intended that Section 401 is a direct grant of authority to the states to review for compliance any proposed activity that requires a federal license or permit and may result in a discharge to navigable waters. One of the stated goals of the rule was to ensure consistency with the CWA. The following sections clearly demonstrate Congress' intent that administration of the CWA adhere to principles of cooperative federalism. Further, states have been given the primary authority to regulate water quality for a broad range of activities.

> 33 USC 1251(g) [FWPCA § 101] Federal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.
>
> 33 USC 1252(a) IFWPCA § 102] the administrator shall, after careful *investigation*, and in *cooperation* with other federal agencies, *state water pollution control agencies*... prepare programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.

The rule transfers final decision-making authority from the state to the federal agency issuing the license or permit by requiring a review and determination of whether individual certification conditions are within the scope of the proposed rule. This is an inappropriate transfer of authority from the state to federal agencies given Congress' clearly expressed intent in the CWA. Rather, Utah should retain the authority to make 401 decisions subject to administrative review and subsequent appeal under the process outlined in title 19-1-30.1.5.

Key Issues

1.Pre-filing meeting requests. The pre-filing meetings have been a beneficial tool to initiate early engagement between the project proponent, the U.S. Army Corps of Engineers (USACE), and the Utah Division of Water Quality (DWQ). Prior to the rule change, the USACE held pre-application meetings once a month, where other interested agencies including the EPA and the State certifying authority were invited to attend. Typically, these meetings covered projects that were planned USACE Section 404 Letter of Permissions (LOPs), but occasionally a project proposing a USACE Section 404 Standard Permit (SP) would request a meeting. Since these meetings covered primarily LOPs, the DWQ was often unaware of large projects that were in the process of seeking Section 404 coverage. The pre-filing meeting requirement in the new rule has resulted in the DWQ having early engagement with both anticipated LOPs and SPs, allowing the DWQ to provide project proponents details on additional information required to make a certification decision, prior to receiving a certification request. The requirement has also improved communication between the USACE and the DWQ about proposed projects and encouraged an effort to hold joint meetings when possible.

Although the DWQ finds the pre-filing meeting request requirement beneficial, the DWQ would support a rule revision that allows certifying authorities to waive the 30-day wait period if they deem it unnecessary. Projects such as those proposed under a USACE Section 404 LOPs are routinely certified with conditions. Allowing the DWQ to waive the 30-day wait period would allow these types of projects to progress faster, benefiting the project proponent. Additionally, it would be beneficial to be able to waive the 30-day wait period for projects that deal with emergency situations, critical maintenance, or where the project proponent has otherwise demonstrated a need for an expedited process.

2.Certification Request. The contents of a Certification Request as defined in the rule are limited, insufficient, and restrictive. The rule requires a brief list of items that define receipt of a request for certification and preemptively determines such a receipt to be a complete application. It is inappropriate for the rule to define what constitutes a complete application on the states' behalf. The definition of a certification request as defined in the rule is not comprehensive and does not provide enough information for the state to make a certification decision. The rule only requires information for the discharge locations (location, type of discharge, and how it will be monitored), rather than information that specifically addresses state water quality standards, which is fundamental information that is necessary to make a certifying decision. This places burden on the states to acquire all pertinent information from the project proponent within the reasonable period of time. The rule does not provide for pausing the state's reasonable period of time for any reason, including failure of the project proponent to provide necessary information to the state in a reasonable amount of time, putting states in a situation where they do not have sufficient time to review the additional information.

Prior to the rule change, the timelines in Utah were based on a complete application. Everything that was required for an application is listed in the Utah Administrative Code and in the State's 401 application form, which provided a transparent process to project proponents. Materials requested may vary by state, region, and project type. Utah supports a rule revision that requires states to have a clear and transparent process, but also provides the flexibility for each state to determine what is necessary to make a certifying decision, and that does not start the reasonable period of time until a complete application is received, a determination that should be made by the state.

3.Reasonable Period of Time. The rule narrowed the definition of reasonable timeframe for certification to the statutory maximum of one year, without accounting for incomplete applications or any other potential issue that may arise. The rule provides Federal agencies the ability to reduce the timelines further, to a

timeline they deem appropriate. Prior to the rule change, Utah typically issued certifications decisions within 80 days[1] of receiving a complete application. Complex certification decisions may have required more review and/or discussion with the project proponent to reach a set of conditions that protect water quality without interfering with the project purpose. Utah actively works to issue 401 certification decisions in a timely manner. The most common cause of extended timeframes for issuance of a certification was receipt of an application too early in the project's design process resulting in delays associated with significant project changes occurring after the initial submittal.

The rule sets timeframes that unreasonably limit the state's ability to meet its required administrative and public processes for water quality decisions. The CWA clearly grants states the responsibility and authority to develop reasonable public notice procedures. Specifically, 33 USC 1341(a)(l) provides that a state shall establish procedures for public notice in all applications for certification and for public hearings in review connection with specific applications. The rule review and revision should consider that States 'need appropriate time to meet established procedures for public notice. Utah's general requirements for notice and publication are contained in the following codes:

- The Utah Open and Public Meetings Act, Utah Code Title 54 Chapter I
- The Utah Administrative procedures Act, Utah Code Title 63G Chapter 40
- The Utah Administrative Rulemaking Act, Utah Code Title 63G Chapter 3

The rule makes it very difficult for Utah to comply with existing public notice and comment requirements, particularly with respect to complex certification decisions. Consistently meeting time limits imposed by the rule would require noncompliance or amendment of the state statutes noted above containing the general notice requirements. Under the rule, if the state does not act within the prescribed deadline, the federal agency can consider the certification requirement waived and issue the license or permit without a certification. This limited review period interferes with the ability of the state to meet its administrative processes for water quality determinations and may not provide opportunity for meaningful notice and comment.

Utah respectfully requests that EPA consider updating the rule to prevent the interference with the 401 process, including public notice, which was working well for applicants, the federal agencies, and the state.

Tolling the reasonable period of time should be allowed. The rule eliminates the ability to toll application timeframes to the detriment of all parties involved. The use of tolling principles in meeting required timeframes is important, in rare cases, to ensure that the state has the opportunity to review final and complete project plans that may be modified by proponents over the course of the permitting process. Specifically, states should be given the same opportunity to fully consider amended applications as the federal permitting or licensing agency. For example, Utah utilized tolling in the 401 certification for the Union Pacific Railroad Causeway closure in the Great Salt Lake, allowing the state to fully consider amended applications developed during the permit review process. This particular instance allowed for the

[1] The average time to issuance for Utah Water Quality Certifications is currently 80 days. After receipt of a complete application, a certification is drafted within 1-2 weeks including a week-long review period for the applicant to provide any concerns to the draft. The draft certification is public noticed, typically for 30 days, depending on the magnitude of impacts. Following public notice, the certification is finalized and signed within 2-4 weeks including management and response to comment. These timelines are contingent upon no major changes to the project after application is received and review is initiated.

state to obtain enough information to be able to certify the project and provide a new mechanism for adaptive management of salinity in the Great Salt Lake, while reducing costs for the project proponent. The use of tolling in this situation was mutually beneficial.

The Project Proponent should not be allowed to determine the reasonable period of time. The rule creates a conflict of interest by allowing the project proponent to determine the reasonable period of time in certain instances. For example, on October 21, 2020, the USACE Sacramento District issued a letter to the DWQ categorically establishing reasonable periods of time by permit type. The letter determined the following deadlines by type of Department of the Army (DA) permit:

- General Permits - 60 days, including proposed programmatic, regional, and nationwide, general permits, and any requests for coverage under an existing general permit;
- Letters of Permission and Standard Permits that do not require an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) - 90 days; and
- Standard Permits that require an EIS where the Corps is the lead NEPA agency – 180 days.

The letter indicated that requests to extend the reasonable period of time could be made at least 2 weeks before the initially established reasonable period of time ends and when deemed appropriate, an extension would be granted on a limited time basis, generally not more than 30 days.

On October 13, 2020, the DWQ received a Certification Request from the USACE for the Proposal to Reissue and Modify Nationwide Permits 85 FR 57298, in which the USACE set the reasonable period of time as 60 days. On October 15, 2020, the DWQ requested a 19-day extension of the 60-day reasonable period of time due to time constraints associated with the state's required 30-day public notice period and time needed to ensure that the certification decision met the new requirements outlined in 40 CFR Part 121. However, the USACE denied Utah's request for extension on October 23, 2020 and advised DWQ to act on the request within the 60-day reasonable period of time.

The USACE was both the Federal Permitting Agency and the Project Proponent, therefore, it was not appropriate for the USACE to set the reasonable period for time, nor evaluate whether our request for extension was appropriate. The EPA should consider a process that addresses this conflict or allows for the statutory maximum of one year.

The USACE Sacramento District issued reasonable periods of time based on permit type. Standard Permits have a reasonable period of time of 90-days. This requires Utah to review and evaluate proposed projects, request and wait to receive any additional information needed from the project proponent, draft a certification decision, put the draft certification decisions out to public notice for 30-days and review and respond to public comment before finalizing the decision, all within a 90-day period. This is an aggressive timeline, especially for a state that employs a 0.5 FTE in the 401 Certification program. As larger projects are proposed, the strain on the 401 Certification program in Utah will be exacerbated. The reasonable period of time of up to one year should be reinstated to allow for states to have a thorough review of larger projects and allow for enough time for states to receive necessary information to make certifying decisions.

4. Scope of Certification. The rule unreasonably narrows the scope of the certification authority by limiting considerations to point source discharges and diminishing consideration of state laws designed to protect

water resources within a state. The previous authority and practice to evaluate water quality impacts of any discharge to waters of the state associated with a federally permitted activity should be reinstated.

States should be allowed to consider project activities as-a-whole that could impact water quality, not just discharges from a point source. Under the rule, a certification decision is limited to assessing whether any point source discharges from a federally approved project comply with the CWA. Until the rule change, the process included an assessment of the broader water quality impacts that could result from activities associated with the project as-a-whole. The rule focuses on impacts of point source discharges and prevents the state from considering water quality impacts associated with all activities.[2] Section 401 of the CWA states the following (*emphasis added*):

> any applicant for a federal license- or permit to conduct any activity which may result in a discharge into the *navigable waters*.[3]
>
> any certification provided under this section shall set forth any effluent limitations...necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations...and with *any other appropriate requirement of State law*...set forth in such certification, and shall become a condition of any Federal license or permit subject to the provisions of this section.[4]

Activities, both construction and operation, resulting in nonpoint source discharges (runoff) should be considered in certification decisions as well as water quality impacts associated with changes to hydrologic regime. States should be allowed to rely on all aspects of water quality standards and not be limited to point source discharges.

States should be allowed to apply state water quality law, not just CWA provisions listed by the rule. The rule interprets "any other appropriate requirement of State law" to mean applicable provisions of those EPA-approved state and tribal CWA regulatory programs (applicable provisions of 301, 302, 303, 306, and 307 of CWA). Utah finds this to be an unreasonably narrow interpretation of this part of the 401 authority.

The CWA clearly grants states the authority to adopt water quality standards that are appropriate for state waters as long as they are at least as stringent as the CWA, as stated below.

> 33 USC 1370 [FWPCA 510].. . nothing shall preclude the right of any state to adopt any standard or limitation respecting the discharge of pollutants so long as the standard or limitation is not less stringent than the act.

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[2] 33 USC 1341(d) when a state issues a 401 certification, it shall include conditions sufficient to ensure that the applicant will comply not only with state water quality standards, but also with "any other" appropriate requirement of State law. Other conditions may be imposed in a UPDES discharge permit but a project would certification would not be dependent on those conditions.

[3] 33 USC 1341(a)(1)

[4] 33 USC 1341(d)

For example, Utah has adopted water quality standards to protect ground water in Utah. These standards do not require EPA approval because ground water is not a water of the United States. It is important for states to be able to review impacts to state waters that are involved in a project receiving a federal license or permit and utilize all applicable laws to condition those impacts. Utah has used 401 certification authority to condition impacts to aquifer systems that are clearly connected to impaired surface waters. The conditions were designed to protect downstream waters without unnecessarily restricting activities.

Further, the stated goal of the CWA is the restoration and maintenance of the chemical, physical and biological integrity of the Nation 's waters.5 States achieve this goal through state laws that extend beyond EPA-approved water quality standards.

Case law demonstrates that other "appropriate requirements of State law" has been interpreted broadly to include other state laws that protect the biological, chemical, and physical integrity of state waters. Specifically, in Jefferson County v. Washington Department of Ecology6 , the U.S. Supreme Court held that states can condition certification of projects on "any limitations necessary" to ensure compliance with state water quality standards or other "appropriate requirements" of state law. In S.D. Warren v. Maine Board of Environmental Protection[7], the U.S. Supreme Court reviewed the congressional intent behind section 401 and confirmed that the states have power to look beyond a point source discharge and enforce "any other appropriate requirement of state law," in that case minimum stream flows.

The rule therefore limits the state's ability to consider all relevant laws in evaluating water quality impacts from federally permitted activities beyond its legal authority to do so. The rule removes authority that has been clearly granted by Congress, and affirmed by the U.S. Supreme Court, to condition or deny projects that do not meet chemical standards of water quality and the overall physical and biological integrity of the waters.

6. Certification Actions and Federal Agency Review. The rule allows federal agencies to determine whether a condition complies with procedural requirements and allows for the federal agency to throw out or “waive” a state’s certification conditions that it determines are not applicable or otherwise do not comply with the CWA. In doing so, the rule favors how the federal agency interprets state law over how the State interprets its own law. Utah echoes EPA’s concerns that a federal agency’s review could result in state certifications or conditions being permanently and inadvertently waived in error as a result of a non-substantive and easily fixed procedural issue. Utah does not see utility in allowing federal agencies applicability determinations to continue, or the continuation of requiring specific components and information for certifications with conditions or denials. The additional requirements place unnecessary burden on States’ to justify every condition in a manner that the federal agencies deem sufficient, which is subjective. If the EPA continues to require condition/denial applicability reviews and additional procedural requirements, Utah requests consideration of a procedure to allow the states an opportunity to evaluate the

[5] 33 U.S.C. 1251 (a)

[6] PUD No. 1 of *Jefferson County v. Washington Department of Ecology, 114 S. Ct. 1900 (1994).*

[7] *S.D. Warren v. Maine Board of Environmental Protection, 126 S. Ct. 1843 (2006).*

condition putting the certification decision at risk for waiver and address any concerns the federal agency may have.

7. Modifications. The rule's prohibition of modifications unreasonably limits the state and the project proponent's ability to adapt to changing circumstances. Under the rule, if a project proponent requests a modification of their certification request or waiver/replacement of a particular condition, then the 401 certification process and federal permitting process must start over, including: request of pre-filing meeting and 30-day wait period; federal permit public notice period; state review and associated fees; state public notice of draft decision; and neighboring jurisdiction review. This places additional administrative burdens on the state and federal agencies, increases the costs and delays the project, negatively impacting the project proponent. Allowing for re-opener clauses or modification gives the project proponent, federal agency, and the certifying authority opportunity to work cooperatively to address and adapt to changing circumstances without having to complete procedural requirements more than once.

8. Data and Other Information.

Implementation of the rule has caused the state to unnecessarily hold pre-filing meetings and review certification request materials for projects that would be covered under a USACE Nationwide Permit, all of which the DWQ has certified, with conditions. Some project proponents have requested pre-filing meetings prior to submitting an application to the USACE to prevent potential delays caused by the 30-day wait period after a pre-filing meeting request. In some cases, the project proponent has not engaged with the USACE at all. In a number of these cases, the project ended up qualifying for a USACE Nationwide Permit and the pre-filing meeting was unnecessary. This causes a burden on the state to hold pre-filing meetings for projects that are unsure of permit applicability.

Project proponents with large projects are having difficulty in determining the appropriate time to submit a certification request. Prior to the 2020 rule, the reasonable period of time was based on a complete application, not a receipt of a certification request. This allowed the DWQ to start the reasonable period of time once the project proponent submitted all of the necessary information. The constraints of the reasonable period of time puts more burden on the project proponent to determine if they have all the appropriate information needed to make a certifying decision, prior to submitting a request. The inability to pause or reset the reasonable period of time could result in a denial decision due to insufficient information if the project proponent does not provide the DWQ with sufficient information to determine the project meets applicable water quality standards within the reasonable period of time. If the project proponent requests a certification too soon in the process and the project significantly changes, then the project proponent will have to go through the entire procedural process again.

The DWQ is aware of a number of large projects that are planned in the next few years that would be encumbered by the rule's procedural requirements. In the past the DWQ could work cooperatively with the project proponent to ensure that the DWQ had sufficient information to make a certifying decision and the project proponent was content with the certifying decision through a pre-public notice draft certification review and coordination. The timelines and constraints imposed by the rule no longer allow for the DWQ and the project proponent to work through any concerns prior to public notice, diminishing the state's ability to work cooperatively with the project proponent to address water quality concerns.

10. Implementation Coordination. Utah requests that a revised rule gives states appropriate amounts of time and the adequate authority to review and issue certification decisions so that the state can be confident projects meets water quality requirements. Updating the rule to be consistent with cooperative federalism and returning states' authority, limited under the current 401 Certification rule, would benefit Utah greatly. Utah supports concomitant regulatory changes being proposed and finalized simultaneously by relevant federal agencies to prevent inconsistencies in regards to interpretations. EPA's review and revision process should be inclusive of certifying authorities concerns and provide adequate outreach and coordination. EPA should be transparent through the rule review and revision process and provide training and outreach necessary to ensure certifying authorities are equip to meet any new requirements.

Conclusions

Utah is best positioned to protect the unique waters within its boundaries. Utah manages many exceptional waters including those that have unique geochemistry such as the Great Salt Lake and Utah Lake and others with complex desert hydrology with important linkages to ephemeral and aquifer systems. Utah's state water quality laws are specially designed to protect the unique aspects of these waters. The state is therefore best placed to tailor conditions to protect the waters within its boundaries. The CWA recognizes that state management is preferable to a federally mandated one-size-fits-all approach to water management and protection that does not accommodate the practical realities of geographic and hydrologic diversity among states. Utah finds that the rule substantially reduces state authority to manage waters within our boundaries and respectfully ask that EPA reinstate the current policy of cooperative federalism in this important program. Utah welcomes an expeditious review and revision of the rule.

Sincerely,

Kimberly D. Shelley
Executive Director
Department of Environmental Quality