



WEST



WESTERN STATES
WATER COUNCIL

August 8, 2022

Administrator Michael Regan
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

Sent via email: regan.michael@epa.gov

RE: Comments on Draft Clean Water Act Section 401 Water Quality Certification Improvement Rule

Dear Administrator Regan,

The Council of State Governments – West (CSG-West) and the Western States Water Council (WSWC) are bi-partisan governmental organizations representing multiple western states. Please accept this letter and attachments as our comments regarding EPA’s 401 Water Quality Certification Improvement Rule.

On April 21, 2021, the WSWC submitted the attached letter to your office outlining several concerns raised by western states with respect to implementing the Clean Water Act (CWA) §401 Certification Final Rule. In the letter, WSWC also requested that EPA prioritize review of the 2020 §401 Certification Rule due to the regulatory uncertainty associated with substantial and recurring changes to policies and programs between federal Administrations. We appreciate EPA’s responsive efforts to expedite the §401 rulemaking to bring regulatory certainty to this important water quality program.

Upon review of the Draft Clean Water Act Section §401 Water Quality Certification Improvement Rule (hereafter Draft 2022 §401 Rule), published in the Federal Register on June 9, 2022, we offer the following joint comments. The Draft 2022 §401 Rule proposes some revisions that represent substantial improvements to the 2020 §401 Rule with respect to cooperative federalism including the following:

- allowing states to determine the necessary elements of a “request for certification;”
- requiring that federal permitting agencies collaborate with states to determine a “reasonable period of time” for each certification;
- limiting federal agency review of certification decisions to issues of process; and
- ensuring that the certification review process “clock” does not begin until a complete application, as defined by the state, has been received.

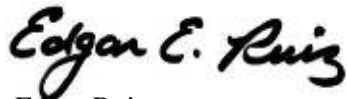
We strongly support early state engagement in federal permitting and licensing actions and the coordination of state and federal environmental requirements and review processes. Unfortunately, the Draft 2022 §401 Rule falls short in this regard by requiring that applicants request a pre-filing meeting 30-days before submitting a request for certification and that the request include a draft of the federal license or permit. Although States appreciate the intent to improve early coordination through a 30-day pre-filing meeting, requiring that such a meeting cannot occur until the federal agency has drafted the federal license or permit has the potential to reduce coordination between state and federal agencies. This

approach puts States at the end of the federal permitting process rather than as a partner at the beginning and throughout the process.

We strongly support meaningful, substantive and early consultation with States as they work in tandem with EPA to achieve national water quality goals.

We thank you for considering these comments and we look forward to working together to protect and restore water quality across our Western States.

Sincerely,



Edgar Ruiz
Executive Director
Council of State Governments – West



Tony Willardson
Executive Director
Western States Water Council

cc: Ms. Radhika Fox
Acting Assistant Administrator, Office of Water
Environmental Protection Agency

Mr. Brian Frazer
Acting Director, Office of Wetlands, Oceans and Watersheds
Environmental Protection Agency

Mr. Roger Gorke
Senior Policy Advisor, Office of Water/WestFAST Liaison
Environmental Protection Agency



WESTERN STATES WATER COUNCIL

682 East Vine Street, Suite 7 / Murray, Utah 84107 / (801) 685-2555 / FAX (801) 685-2559

Web Page: www.westernstateswater.org

April 23, 2021

Mr. Michael Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Regan,

The Western States Water Council (WSWC) is a bi-partisan government entity created by Western Governors in 1965 that represents eighteen states. Our members are appointed by and serve at the pleasure of their respective Governors, advising them on water policy issues. Our mission is to ensure that the West has an adequate, secure, and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

A number of our member states have raised concerns regarding their experiences implementing the Clean Water Act (CWA) 401 Certification Final Rule, finalized June 1, 2020. For example, language in Section 401 certifications vary by state, and the new rule did not take into consideration the impact these changes might have on existing state certifications. Additionally, although the statute provides up to one year for states to complete their certifications, the far stricter deadlines in the rule have been inflexibly applied by federal agencies regardless of the complexity of projects. Further, Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis calls for review of this rule. States are uncertain as to how best to proceed - to implement business processes under the new rule or wait for the results of the review. While, historically, state denial of 401 certifications have been rare, complications and time constraints with the new rule are resulting in an uptick of denials.

Section 401 requires: "Any 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 in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions..." of various CWA sections. This state water quality certification requirement is a vital component of our federalist system for protecting water resources.

The Council has always held that States are responsible for exercising their inherent state water quality protection authority, recognized by CWA Section 101(b), which states: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution."

CWA 401 certification authority is not delegated authority from the Congress with Environmental Protection Agency (EPA) oversight, as are most CWA programs. Rather, Congress required that States certify and federal agencies ensure that any federally-licensed or permitted actions are consistent with applicable state water quality requirements and state-required conditions related to certification. States may review compliance with those conditions and the federal agency may revoke any license or permit for failure to comply.

As EPA determines its priorities over the coming weeks and months, the Council would like to express our strong support for prioritizing and accelerating review of the CWA 401 Certification Final Rule. States are currently reviewing and issuing water quality certification determinations, and will continue to do so under the new rule. However, the outstanding uncertainty of the fate of the rule makes it difficult for state agencies to adjust their programs appropriately. As review of the rule and any subsequent rulemaking will take some time, the Council urges EPA to collaborate with the Army Corps of Engineers and with states to develop, publish for comment, and issue interim guidance that provides States with the time, information and flexibility needed to make informed decisions, within the statutory limitations. If EPA decides to leave the rule as-is, States would request prompt communication of that decision combined with clear guidance on implementation of the rule going forward.

Either way, EPA should involve the States as co-regulators in any review or future rulemaking from the start, long before any action is published for public comment. The Council strongly supports meaningful, substantive and early consultation with States as they work in tandem with EPA to achieve national water quality goals.

We thank you for considering these requests, and we look forward to working together to protect and restore water quality across our Western States.

Sincerely,



Jennifer Verleger, Chair
Western States Water Council



Jon Niermann, Vice-Chair
Western States Water Council

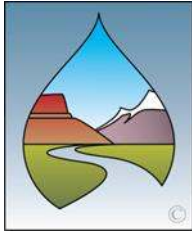


Erica Gaddis, Chair
WSWC Water Quality Committee

cc: Ms. Radhika Fox
Acting Assistant Administrator, Office of Water
Environmental Protection Agency

cc: Mr. John Goodin
Director, Office of Wetlands, Oceans and Watersheds
Environmental Protection Agency

cc: Mr. Roger Gorke
Senior Policy Advisor, Office of Water/WestFAST Liaison
Environmental Protection Agency



**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
STATE CWA SECTION 401 CERTIFICATION AUTHORITY**

**Deadwood, South Dakota
September 16, 2021**

WHEREAS, States have responsibly exercised their delegated authority under the Clean Water Act (CWA) Section 401 and under state water quality statutes to protect water quality, and must consider proposed activities and discharges in light of the states' designated water uses and related water quality standards; and

WHEREAS, the Council supports a balanced and integrated approach to achieve water and energy policy goals that plans for the future in sustainable ways, and recognizes legitimate state water and water quality management, protection and planning authorities to balance competing water uses; and

WHEREAS, the western states strongly support the planning and development of critical infrastructure and streamlined permitting processes, but such efforts should not come at the expense of states' authority to allocate, manage, and protect their water resources; and

WHEREAS, the development of hydropower and other federally permitted and licensed projects involving activities that may impact states' water quality standards should be appropriately undertaken in compliance with substantive and procedural state water law and delegated authority under CWA Section 401; and

WHEREAS, CWA Section 101(b) supports the states' critical role in protecting water quality by stating: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."; and

WHEREAS, CWA Section 101(g) of the CWA further provides that it is the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act"; and

WHEREAS, Section 27 of the Federal Power Act declares: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."; and

WHEREAS, the Supreme Court has narrowly interpreted the Federal Power Act (16 U.S.C. 791a et seq.) reading Section 27 (16 U.S.C. 821) to limit state authority to set streamflow requirements on federally permitted and licensed projects, holding in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946) and in *California v. FERC*, 495 U.S. 490 (1990) that federal requirements preempted any state requirements, including efforts to establish minimum stream flows, noting that "...Congress remains free to alter what we have done"; and

WHEREAS, these rulings eroded state authority over state resources, and the Council has supported federal legislation to restore states' primary authority for regulating streamflows and water use and clarifying Congressional intent under the Federal Power Act; and

WHEREAS, in *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Supreme Court upheld a state's delegated authority to impose minimum stream flow conditions under

the CWA Section 401 certification process where necessary to protect a designated use for fish habitat, expressly rejecting any implied limitations on Section 401 certifications based on the *First Iowa* interpretation of the Federal Power Act; and

WHEREAS, an overly narrow reading of Section 401 would deprive the states of the ability to maintain the very beneficial uses that the Clean Water Act was designed to protect, and threaten the existing partnership between states and federal agencies based on cooperative federalism; and

WHEREAS, the vast majority of Section 401 certification requests are processed within 90 days, well within the one year allowed by current law, with relatively little if any backlog of certification actions; and

WHEREAS, most delays are typically due to submission of an incomplete application, applicants' non-responsiveness to requests for additional information, the completion of necessary study requirements, the size and complexity of some projects (and related impacts), substantive changes to the proposed project requiring further review, or constraints on state resources; and

WHEREAS, CWA Section 401 certification denials by states are rare and carefully considered, and are not examples of the failure of the system, as the process has been historically well-understood, reliable and supported by case law that provides certainty for both the states, federal agencies, and the regulated community; and

WHEREAS, recent actions taken by the federal government under the 2020 CWA Section 401 Certification Rule have caused some western states to issue an increased number of denials, due to inflexible deadlines that do not accommodate state public engagement laws or allow sufficient time to gather adequate information on project impacts; and

WHEREAS, the rule revision has also recently led to federal agencies waiving reopener conditions in nationwide permits imposed on federal projects by states under CWA Section 401, inconsistent with CWA Sections 101(b) and 101(g), Section 27 of the Federal Power Act, and the Supreme Court ruling under *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*; and

WHEREAS, substantial and recurring changes to regulatory definitions, policies, and programs between federal Administrations create uncertainty for co-regulators and the regulated community, often leading to unreliable results, indecision, inconsistency, and lawsuits.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports any changes that strengthen the deference to state water laws and do not diminish the primary state authority and responsibility for the appropriation, allocation, development, conservation, and protection of their water resources, including minimum streamflows, and the protection of water quality and designated uses.

BE IT FURTHER RESOLVED that the Western States Water Council strongly supports early state engagement in federal permitting and licensing actions and the coordination of state and federal environmental requirements and review processes for critical infrastructure without diminishing state authority.

BE IT FURTHER RESOLVED that the Western States Water Council supports a mechanism in any rule development process for a representative number of states, as co-regulators with diverse perspectives and regions, to engage actively with EPA staff to provide direct and effective feedback on the implementability of a proposed rule.