Maryland
Department of
the Environment

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor

Ben Grumbles, Secretary
Horacio Tablada, Deputy Secretary

October 21, 2019

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

RE: Docket ID EPA-HQ-OW-2019-0405-0025
Updating Regulations on Water Quality Certification

Dear Administrator Wheeler:

As Secretary of the Maryland Department of the Environment (MDE), I have been asked by Governor Larry Hogan to provide comments on the above-referenced proposed rule (Proposed Rule) governing water quality certification under Section 401 of the Clean Water Act (CWA), which was promulgated by the Environmental Protection Agency (EPA) on August 22, 2019.

Maryland has previously expressed, in its April 15, 2019 letter to EPA, the strong recommendation that changes to regulations implementing the CWA not undermine Maryland's progress and substantial investment of state resources in restoring the Chesapeake Bay. This includes concern over changing the definition of "Waters of the United States" in a manner which would threaten downstream state water quality. MDE believes that Maryland's progress could be further hindered by the Proposed Rule.

The Proposed Rule, issued by EPA in response to Executive Order 13868, would, if finalized and upheld, undermine state authority and jeopardize the ability of states to protect their waters from pollution associated with federally permitted activities. There is no question that states have the legal authority regulate the quality of their waters more stringently than federal law might require.[1] Yet, in this proposed rule, EPA puts forth a series of constraints on state implementation of CWA Section 401 that are contrary to law and fundamentally different from the positions EPA has taken over the past 40 plus years in overseeing the implementation of CWA Section 401. The cumulative effect of these constraints is to substantially diminish the authority reserved by Congress to the states to protect their waters from pollution.

In particular, by altering the scope of CWA Section 401 certification review, and granting authority to federal permitting agencies to review and effectively "approve" or "disapprove" state–issued

[1] *See* 33 U.S.C. §1311(b)(1)(C) (permitting states to impose "any more stringent limitation" to achieve water quality) and *PUD No.1 of Jefferson Co. v. Wash. Dept. of Ecology*, 511 U.S. 700, 723 (1994) (stating that the CWA "explicitly recognizes States' ability to impose stricter standards").

certifications, the Proposed Rule has the effect of transferring decision-making authority from the states to the federal permitting agencies. Such a fundamental change could only be made by Congress.

This cover letter summarizes MDE's major concerns, which are described in greater detail in Attachment 1. Some of these comments were previously submitted by MDE and other states in response to Executive Order 13868.

1. **Reduction of State Authority**

MDE strongly objects to the cumulative impact of the proposed changes, as they are an unlawful reduction of state authority reserved to states by Congress. The Proposed Rule weakens state authority and does not comport with Congressional intent in the CWA to "recognize, preserve, and protect the primary responsibilities and rights *of States* to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.[2]

2. **Increase in Federal Oversight**

The Proposed Rule creates a new oversight role for the federal permitting or licensing agency that is not articulated anywhere in CWA Section 401. The legislative history of the CWA reflects that Congress intended *no federal role* in the review and "approval" of state certification decisions under Section 401. The Proposed Rule nonetheless gives the federal permitting or licensing agency the authority to determine whether a denial of a Section 401 certification is based on reasons "within the scope of section 401," and it gives the federal permitting or licensing agency the authority to determine whether a state-imposed condition satisfies EPA's proposed definition of a "water quality requirement." MDE objects to these provisions, as this authority is not articulated in the CWA and the legislative history is clear as to Congressional intent that the appropriate venue for a challenge to a state certification decision is *state* review in *state* court.

Subpart E of the Proposed Rule states that EPA "may, and upon request shall, provide federal agencies, certifying authorities, and project proponents with assistance regarding determinations, definitions and interpretations with respect to the meaning and content of water quality requirements, as well as assistance with respect to the application of water quality requirements in particular cases and in specific circumstances concerning a discharge from a proposed project or a certified project." This language impermissibly expands the role Congress has established for EPA in CWA Section 401(b). The legislative history makes clear that Congress did not intend that EPA have any authority to independently review state certifications, and that Section 401(b) was intended to limit EPA's role to cases where a state has *requested* assistance.

[2] 33 U.S.C. §1251(b) (emphasis added).

3. Reduction in the Scope of State Review & Certification

a. Point Source Issue

CWA Section 401 requires certification for any federally-permitted activity that may result in a "*discharge* to navigable waters."[3] While it is well established that the term "discharge" is broader than the term "point source,"[4] the Proposed Rule limits state certification review to discharges from a point source. MDE objects to this proposal because it is contrary to the plain language of the CWA and related Supreme Court decisions.

b. Definition of Water Quality Requirements

The Proposed Rule limits the scope of state review to assuring that a discharge from a federally licensed or permitted activity will comply with applicable provisions of CWA Sections 301, 302, 303, 306 and 307 and *only* EPA-approved state or tribal CWA regulatory program provisions. This contradicts the language of CWA Section 401(d), which requires that certifications include conditions to assure compliance with "any applicable effluent limitations and other limitations, under 1311 or 1312 of this title, standard of performance under section 1316 of this title or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, *and with any other appropriate requirement of state law*" (emphasis added). MDE strongly disagrees with this proposal because it is contrary to the purpose of CWA Section 401, which is to ensure that *state* requirements for water quality—not solely federally approved state requirements for water quality—are met by federal permittees/licensees.

4. Mandate on States to Develop the Least Stringent Condition

The Proposed Rule requires states to include in any Section 401 certification that contain conditions a "statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements." There is nothing in the statutory language or legislative history that suggests that Congress intended to place this burden on states. Even if such a requirement was legal under the CWA, it introduces a new analytical step in the certification process that will make it more difficult for states to act expeditiously on applications for water quality certifications.

5. Impacts on Other Jurisdictions

The Proposed Rule states that "the Administrator *at his or her discretion* may determine that the discharge from the certified project may affect water quality in a neighboring jurisdiction" (emphasis added). This conflicts with CWA Section 401(a)(2), which requires EPA to notify neighboring states "whenever a discharge may affect, as determined by the Administrator, the quality of the waters of any other State." Nothing in the language of the CWA supports a conclusion that this requirement is discretionary.

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[3] 33 U.S.C. §1341(a)(1) (emphasis added).

[4] *See S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (concluding that the term "discharge" is broader than "point source").

MDE is also concerned about the lack of articulated criteria to ensure that the EPA Administrator accurately determines whether there may be an effect on water quality in another state. Such criteria should be provided in regulation, and they should address how EPA would determine when there *may* be an impact to another state, the information that EPA must provide to states, and a requirement to develop operating procedures with individual states to ensure effective implementation of this important provision of the CWA.

6. <u>Review Process Flaws</u>

The Proposed Rule prescribes a list of what is to be included in a certification request, but based on MDE's experience regulating water quality matters, the list lacks basic information that would likely be necessary for a state to appropriately and efficiently render a decision on the request. Examples of such omitted information include (i) a description and quantification of water quality impacts; (ii) the extent of discharges; (iii) methods of construction; and (iv) potential post-construction discharges. States should be permitted to define what information is needed for a "complete" application, including project-specific information identified in pre-request meetings.

The Proposed Rule defines the start of the "reasonable period of time" for state decisions as the date the certification request is made. As described above, if the narrow requirements of the Proposed Rule are adopted, these requests are likely to include inadequate information. It is unreasonable to start the time period for a state certification decision before a state has been given substantially all of the information needed to make that decision.

The Proposed Rule states that, if the federal permitting agency receives the state certification decision prior to the end of the "reasonable period of time" and finds it deficient, the federal permitting agency may offer the state the opportunity to remedy the deficiency—but if not remedied in time, the federal agency will declare "waiver." The Proposed Rule does not establish any timeframe in which the federal permitting agency must provide a state this opportunity for a remedy. In order for such an opportunity to be meaningful, the federal permitting agency must be required to act promptly, and to give the state as much time as possible to respond.

MDE suggests that EPA focus on revisions that will ensure a more efficient 401 certification review process by states, including: (a) requiring applicants for federal permits or licenses to communicate with state authorities before the submittal of a request for Section 401 certification to obtain a list of necessary project-specific information; (b) requiring applicants for federal permits or licenses to submit all information that a state requires when the request for certification is made; (c) establishing the date that a state acknowledges that all the necessary information has been provided as the date of receipt of the Section 401 request; (d) allowing states up to six months to conduct their review with provisions for extension for up to an additional six months if a state requests the additional time; and (e) allowing states to deny certification in the event that an applicant fails to provide the required information that would allow a state to affirm that water quality-related requirements of state law have been met.

The Proposed Rule also undermines efficient review for federal consistency under the Coastal Zone Management Act (CZMA). Federal consistency review under the CZMA provides states with an

important tool to manage coastal uses and resources, to facilitate cooperation and coordination with federal agencies, to work with nonfederal entities seeking federal approval and authorizations, and to balance competing interests such as energy development, tourism, recreation, and ecological protection. The Proposed Rule does not consider interactions of 401 certification and CZMA. MDE recommends that the timeframe for Section 401 review should never be shorter than the CZMA federal consistency period (6 months)—particularly for activities in the coastal zone.

7. Pre-request Procedures for Administrator Certifications

MDE supports required pre-application meetings/communications and early coordination and identification of potential issues and information needs as EPA has prescribed for certifications performed by the Administrator. MDE supports EPA placing into regulation similar requirements for "applicants" for Section 401 certification.

8. Factual Errors Regarding Maryland Review Process for Conowingo Dam

There is also one matter that MDE respectfully requests that EPA correct for the record. The preamble to the Proposed Rule includes an incorrect description of the factual circumstances surrounding the State of Maryland's review process for the water quality certification for the re-licensing of the Conowingo Dam hydroelectric project. It describes the Conowingo water quality certification process as an example of a situation where: "certifying authorities have requested 'additional information' in the form of multi-year environmental investigations and studies…before the authority would begin review of the certification request." As support for this statement, footnote 44 cites the opinion of the U.S. District Court for the District of Columbia in *Exelon Generation Co. v. Grumbles,*[5] claiming that the "State of Maryland's request for a multi-year sediment study resulted in Exelon withdrawing and resubmitting its certification request multiple times to prevent waiver while the company completed the study."[6]

The court's opinion in *Exelon* did not address the issue of waiver. Rather, the State of Maryland had filed a motion to dismiss based on numerous grounds, including venue. The court's opinion denied the motion to dismiss *as to venue only*;[7] the remainder of the motion remains pending. To the extent court's opinion describes the Conowingo certification application process at all, it relies exclusively on the factual allegations of Exelon's complaint, which the court must accept as true solely for the purposes of ruling on a motion to dismiss. The court did not make any independent determination on the truthfulness of those allegations.

MDE also rejects the assertion that the applicant in the Conowingo matter withdrew its request for a water quality certification "to prevent waiver." At the time the applicant withdrew its request, MDE had unequivocally stated its intent to *deny* the request due to insufficient information provided with respect to the impacts of the activity on water quality.[8] The applicant could have allowed MDE to

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[5] 380 F. Supp. 3d 1; 2019 WL 1429530 (D.D.C. 2019).
[6] 84 Fed Reg. 44114.
[7] The State has filed a motion for reconsideration of the court's ruling as to venue, which is pending.
[8] Public Notice, Department of the Environment solicits comment, schedules public hearing on Water Quality Certification application for proposed Conowingo Dam relicensing, Md. Dep't of the Env't (Nov. 18, 2014).

proceed with the denial, then challenged the denial through appropriate judicial means. Instead, the applicant voluntarily withdrew the request, presumably to avoid that outcome.[9]

MDE remains available to coordinate with EPA on improvements to the CWA Section 401 certification process. Please do not hesitate to contact me or Mr. Lee Currey at lee.currey@maryland.gov for additional information and questions.

Sincerely,

Ben Grumbles
Secretary

cc: Jeannie Haddaway-Riccio, Secretary, Maryland Department of Natural Resources
Tiffany Waddell, Senior Advisor & Director, Federal Relations
Maryland Congressional Delegation

Attachment

[9] The request was resubmitted shortly thereafter, consistent with longstanding policy of the Federal Energy Regulatory Commission allowing license applicants to withdraw requests for water quality certifications, provided that a new request is submitted within 90 days.