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October 21, 2019

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

Re: EPA's Proposed Rule, Updating Regulations on Water Quality Certification
(Docket ID No. EPA-HQ-OW-2019-0405)

Dear Administrator Andrew Wheeler:

The state of Washington strongly opposes the U.S. Environmental Protection Agency's (EPA) proposed rule, *Updating Regulations on Water Quality Certification*, that attempts to subordinate states and unlawfully subvert our authority under Section 401 of the federal Clean Water Act. EPA's proposal amounts to no less than a rewrite of this important law that for decades has enabled states to protect and enhance water bodies within our borders. I urge EPA to drop this proposal immediately.

The Washington State Department of Ecology (Ecology) is the designated water quality authority and Section 401 certifying agency in Washington State. Our agency was the first in the nation to receive federal Clean Water Act delegation almost 50 years ago. Since then, we have a long and well-documented record of implementing a successful and fair Section 401 program.

Despite our record, EPA improperly cites in its Economic Analysis (Section 4.1.2 and 6.2), Ecology's denial[1] of the Millennium Bulk Terminals coal export facility that was proposed along the Columbia River, as a reason for EPA to make radical and illegal changes to the Clean Water Act. Contrary to allegations that Ecology "abused its authority" in that decision, Ecology's basis for denial has been upheld by every court that has reviewed the decision.

EPA's rule will not change the facts in the Millennium decision. Even so, EPA is attempting to undo 50 years of successful, non-partisan, Section 401 implementation by state agencies because it disagrees with Washington, and a few other states, on recent decisions.

[1] September 26, 2017 Section 401 Water Quality Certification Denial (Order No. 15417) for the Millennium Bulk Terminal-Longview, LLC Coal Export Terminal. [Attachment A].

By the stroke of a pen, EPA is proposing to:

1. Diminish state authority to review and condition Section 401 certifications;
2. Grant federal agencies absolute veto authority over state conditions and decisions;
3. Impose arbitrary timelines on states, contrary to the Clean Water Act; and
4. Upend the Clean Water Act without a reasoned rationale.

If finalized, the rule would significantly hinder states' ability and authority to manage and protect the water our residents need for drinking, fishing, and recreation. Washington is home to 7.5 million residents and 29 federally recognized Native American tribes. These communities rely on our program to ensure that federally-permitted projects do not undermine federal treaty obligations, violate water quality standards or disrupt our way of life in the Pacific Northwest.

EPA's Rule Diminishes State Authority to Review and Condition Section 401 Certifications

In the amended Clean Water Act of 1972, Congress made clear that the authority for Section 401 certifications belongs with the states — not the federal government. It also made clear that states may regulate beyond federal standards.

Section 401 empowers states to approve, condition, or deny applications to ensure that construction and operation of a project will not degrade our waters. When an applicant seeks an individual Section 401 certification, any actions necessary to protect water quality are included as conditions in the certification, which are then incorporated into the federal permit. As Congress intended, the scope of this review goes beyond just point source impacts. Section 401 certifications address discharges from project operations that are not covered under other federal permits. For example, a pier with a conveyor belt component may have incidental discharges into water from operations such as moving gravel from a stockpile to a vessel. The Clean Water Act gives states the ability to condition Section 401 certifications for all discharges, without restriction from EPA.

Now, EPA proposes to unlawfully narrow the scope of the type of pollution states can review to only point source discharges. This would not only dramatically narrow the scope of what we can review within a specific project, it would exempt some projects from review altogether.

For example, this rule would exclude from federal permitting non-point source discharges, such as Army Corps of Engineers dredge and fill projects and point-source discharges into non-navigable headwater streams and wetlands. These potential sources of pollution are currently covered by Section 401 certifications and allow Washington to maintain the quality of our hundreds of water bodies across the state. By allowing for more degradation of our waters, EPA's proposal could drastically impact Washington's endangered and threatened species, including the southern resident Orca and numerous salmonid species. As EPA's scientists know, activities that reduce stream flow or cause non-point discharges, such as urban run-off, have been shown to directly harm salmon and other aquatic species.

EPA's proposal to limit the scope of Section 401 is not just bad policy, it also directly conflicts with two seminal Section 401 court cases. In 1994, the U.S. Supreme Court

unequivocally held that the scope of 401certification applies to the activity as a whole, not solely point source discharges. *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology,* 511 U.S. 700 (1994) (PUD No. 1). Twelve years later, the Court reiterated this principle in S. *D. Warren* Co. *v. Maine Bd. of Environmental Protection,* 547 U.S. 370 (2006). EPA ignores these binding precedents by narrowly interpreting the scope of Section 401 to apply only to point-source discharges. In doing so, EPA tries to prohibit states from prescribing conditions that address impacts from the project activities as a whole rather than only those impacts that result from a specific point source discharge. EPA's proposal attempts to overrule two Supreme Court cases. The Clean Water Act does not give EPA this authority.

EPA's proposal contravenes the spirit and plain language of the Clean Water Act, ignores Supreme Court precedent, and makes it impossible for states to protect water quality in our own backyard. EPA should cease work on this ill-advised and illegal proposal.

EPA's Rule Grants Federal Agencies Absolute Veto Authority over State Decisions

EPA's rule also gives federal agencies unprecedented veto authority over state Section 401 denials and conditions[2]. This, EPA cannot lawfully do.

EPA's approach treats states like obstacles rather than regulators, requiring states to submit specific supporting information for each condition included in a Section 401 certification. This includes a statement of whether and to what extent a less stringent condition could satisfy water quality requirements. Federal agencies would then determine if the condition meets their criteria and if the state conditions will be included in the project license or permit. This is an insult to states, an affront to cooperative federalism, and is in no way supported by the plain language of Section 401. States are explicitly authorized to impose conditions necessary to meet water quality requirements and other applicable requirements of state law. There is no authority, explicit or otherwise, that allows federal agencies to veto certifying state agencies' conditions.

EPA's proposal also purports to give federal agencies authority to override a state denial of a Section 401 certification. EPA does this by deeming a state's authority waived—even if the state denies within the timeframe—if the federal agency decides the basis for denial is outside of what the federal agency determines to be appropriate. Nothing in the Clean Water Act supports this novel and expanded definition of waiver. Simply put, this is a power grab by EPA to subvert state authority so that projects can be built at lightning speed regardless of their environmental harms or consequences. Neither the language, nor the intent of the Clean Water Act, supports this astonishing overreach by EPA.

EPA also proposes that state certifying agencies would have no continuing jurisdiction to enforce compliance with conditions in the Section 401 certification. The rule language would shift enforcement of the state's conditions to the federal agency. However, history has shown that federal agencies do not enforce conditions in Section 401 certifications. In fact, it has been

[2] This is contrary to a long line of cases recognizing that states, and only states, have authority to impose conditions and that federal agencies may not override them. *See, e.g., PUD No. 1 of Jefferson County*, 511 U.S. 708, 734; *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992)

our experience that the federal agencies rely on Ecology to enforce the Section 401 conditions and provide information to the federal agencies for their own enforcement efforts. It is highly unlikely that federal agencies can now effectively assume an increased burden of monitoring state conditions in future Section 401 certifications. That is why states frequently include a state enforcement provision in certifications. This independent state enforcement provision is based on state law, which EPA has no authority to override.

Under the Clean Water Act, EPA cannot veto the conditions or denials that a state issues under Section 401. EPA must respect the cooperative federalism embodied in the Act and halt its current rulemaking process.

EPA's Rule Imposes Arbitrary Timelines on States

In crafting Section 401 (and its predecessor, Section 21(b) of the Water Quality Improvement Act of 1970), Congress recognized that the robust review, of federally licensed and permitted projects, reserved to states requires a reasonable period of time to accomplish. In balancing reasonable time with preventing permitting delays due to "sheer inactivity" by states, Congress expressly defined the reasonable period of time for Section 401 certifications as up to one year. *Id*.; *see also* 33 U.S.C. § 1341(a)(1). Despite this clear direction from Congress, EPA's proposed rule attempts to authorize federal permitting agencies to set deadlines for states to complete Section 401 reviews far short of this one-year timeline. More troubling still, EPA's proposed rule attempts to authorize federal agencies to find that states failing to meet these unreasonably short timelines to have constructively waived their Section 401 authority.

Decisions as to the appropriate timeline for processing Section 401 certifications must be left to the states. While EPA and federal permitting agencies can suggest guidelines as to what they believe are appropriate timelines for state Section 401 certifications, they lack authority to mandate such timelines or find constructive waiver where those timelines are not met.

Furthermore, EPA's proposal to shorten timeframes is impractical and serves to emphasize that EPA and other federal licensing agencies simply do not have the years of expertise on Section 401 to understand review time needs. In fact, EPA is responsible for only a limited number of Section 401 applications and has little experience in running a robust Section 401 program — let alone a program that can manage the large volume and varied scope of projects processed on a routine basis by states like Washington.

For example, Washington State receives an average of 400 Section 401 water quality certification requests every year. It is important to note that not all certification requests under Section 401 are equal — each is different and each carries unique implications that must be examined based on the specific characteristics of the water bodies and federally-permitted activities in question. Those that do not require an individual Section 401, and are eligible to receive nationwide permits, take an average of 60 days for Ecology to process. For those that require an individual permit, Ecology averages 160 days to reach a decision. However, some Section 401 applications require more time because the proposed project is unusually complicated or the applicants fail to furnish sufficient information. EPA's approach to timing does not consider these individualized circumstances.

EPA's truncated deadlines demonstrate its lack of real-world knowledge over how the Section 401 certification process actually works. Section 401 decisions involve an iterative process of reviewing an application for necessary information and accuracy. Thorough reviews may even be dependent on the time of year and often include verifying an application's accuracy with seasonally-timed field investigations, which can sometimes take a few months to complete. For example, accurate wetlands delineation work typically cannot be accomplished in dry summer months. Thus, if a project that affects a wetland submits the required wetland delineation report in late summer, confirmation of the finding of that delineation report may need to occur months later, in early spring, when wetland hydrologic conditions are likely to be present.

These circumstances are common in Washington. Our state has a large number of wetlands, hundreds of lakes, hundreds of miles of marine shoreline, and thousands of miles of rivers and streams. We are proud to be home to the Columbia River, the fourth largest river in the country, and the Puget Sound, our nation's largest estuary. Washington residents are deeply reliant on clean water for their livelihood. Water quality is, therefore, a paramount concern of Washington State.

Imposing an arbitrary timeline for water quality review in Washington will prevent us from determining whether a project would result in degradation of our waters. Without adequate information to ensure a project will not harm water quality, we will be forced to deny Section 401 certification requests. While it is clear EPA intends for its rule to result in more approvals, placing arbitrary timelines on states will have the opposite effect.

The problem posed by short deadlines is further compounded by EPA's proposal to limit the ability of the states to obtain crucial information before making a decision. In its rule, EPA gives state certifying agencies only 30 days to request additional information from the applicant. EPA then limits the request for additional information to only information that can be collected or generated within the federal agency-established deadline.

The proposed rule goes further by preventing states from getting the information necessary to properly review Section 401 applications by starting the clock on state certifying agencies the moment a request is submitted—regardless of whether the application is complete. In fact, EPA does not require applicants to provide any information about the impact of the project on water quality, or demonstrate compliance with state water quality standards. This approach is fraught with problems. Proponents often intentionally submit applications with minimal or "draft" supporting materials in order to get their projects "in line" with the intent of using the iterative process described above to ensure that our agency has the information it needs to make an informed and defensible decision.

Faced with these information deficiencies and compressed review time, Ecology will be forced to deny Section 401 applications due to inadequate assurance that the project will meet water quality standards. This is an unfortunate but inevitable consequence of EPA's proposed rule, which will undermine our state's long record of success in issuing Section 401 certification decisions under the one year period allotted to states by the Clean Water Act.

Given Washington's proven ability to make certification decisions in a timely and appropriate

manner, we question the administration's motivation for drastically reducing the deadline for Section 401 decisions. This rule seems to be less about streamlining the Section 401 process and more about letting the federal government seize control of these decisions and sideline states in the process. This ignores the intent of the Clean Water Act.

EPA Fails to Provide a Reasoned Rationale for its Rewrite of the Clean Water Act

EPA claims that the proposed rule would provide greater clarity and regulatory certainty for the water quality certification process, consistent with the April 2019 Presidential Executive Order (EO), 13868, *Promoting Energy Infrastructure and Economic Growth*. To the contrary, EPA's rule is a thinly veiled attempt to block states from conditioning or denying certifications, regardless of the water quality that states are seeking to protect. The stated purpose of EO 13868 is to promptly advance the construction of energy infrastructure. The rule, however, would apply to any and all Section 401 certification requests, not just energy projects. EPA's position takes a sledgehammer to the principles of cooperative federalism embodied in the Clean Water Act.

For almost 50 years, Ecology has issued thousands of Section 401 certifications, hundreds of certifications with conditions, and approximately 30 denials. Of these water quality decisions issued in the past half-century, only a small fraction have been appealed. We attribute this low number of legal challenges to our effective, fair, and thorough process.

Yet, in its economic analysis, EPA cites four high-profile Section 401 denials, including Washington's denial of the Millennium coal export terminal, as a basis for rewriting Section 401. What the economic analysis neglects to mention is that the proposed export terminal in Washington failed to demonstrate compliance with water quality standards and further failed to meet our state's environmental standards. The environmental analysis[3] demonstrated that this project would have destroyed 24 acres of wetlands and 26 acres of forested habitat, as well as dredged 41 acres of riverbed. It would have contaminated stormwater from stockpiling 1.5 million tons of material onsite near the Columbia River. Washington's denial of the Section 401 to Millennium has been upheld by every court that has so far reviewed our decision.

It is also worth noting that two other entities have independently denied separate, required approvals for the Millennium project. A Cowlitz County hearings examiner denied[4] a necessary land use permit for the project after concluding that the project would not meet the requirements of the state Shoreline Management Act. The Washington State Public Lands Commissioner denied[5] a necessary aquatic sublease for the project because the company refused to provide information demonstrating that the project was financially viable. That decision was recently upheld by the state Court of Appeals[6].

Thus, even if Ecology had not denied the Section 401 certification for the project, the project

[3] Millennium Bulk Terminals – Longview EIS - Environmental Impact Statement April 28, 2017. http://millenniumbulkeiswa.gov
[4] Cowlitz County Hearing Examiner Shoreline Permit Application No. 17-0992 Findings of Fact, Conclusions of Law and Decision Denying Permits November 14, 2017 (Attachment B).
[5] DNR Denial of consent to Sublease Aquatic Lands Lease No. 20-B0922, January 5, 2017 (Attachment C)
[6] *Northwest Alloys, Inc. v. Washington Department of Natural Resources, __Wash. App. __; 447 P.3d 620, 623 (2019)* (Attachment D)

would not be built due to the denial of other mandatory permits. The company has regretfully failed to point out these facts in its heated rhetoric around the Section 401 denial. As a result, EPA is poised to rewrite Section 401 based on the factually inaccurate complaints of a company that is displeased with the state for refusing to rubber stamp its permit applications.

Finally, EPA's economic analysis, which includes an analysis of the Millennium project, is incomplete because it fails to take into account the significant public health and environmental costs associated with this massive industrial proposal. A report prepared by an expert economist demonstrates that the 50-year costs of the project would range from approximately $4.72 billion to $10.11 billion.[7] The 20-year costs would range from $2.44 billion to $3.34 billion. In other words, the economic costs of this project greatly exceed its economic benefits.

EPA's economic analysis, which is based on false assumptions and contains many deficiencies, utterly fails to provide justification for EPA to gut the Clean Water Act. It does not give EPA authority to overturn landmark U.S. Supreme Court decisions that assure federally licensed and permitted projects comply with state water quality standards and other applicable state laws. EPA's proposal is unlawful and unsupported considering the last 50 years of successful implementation of Section 401.

For the reasons detailed here, EPA should abandon this misguided attempt to diminish state authority and instead allow states to continue their long tradition of stewarding Section 401 responsibly, justly, and consistent with the law. The people of Washington deserve no less.

If you have any questions, please contact Sharlett Mena, my Special Assistant at (360) 688-6229 or by email at Sharlett.Mena@ecy.wa.gov.

Sincerely,

Maia D. Bellon
Director

[7] Expert Report: Economic Costs within Washington State of the Proposed Millennium Bulk Terminal in Longview, Washington – David Batker, November 14, 2018 (Attachment E).