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Submitted via Regulations.gov

RE: "Clean Water Act Section 401 Water Quality Certification Improvement Rule," Docket ID No. EPA-HQ-OW-2022-0128

Ms. Kasparek:

I appreciate this opportunity to provide comments[1] to the Environmental Protection Agency (EPA) on the "Clean Water Act Section 401 Water Quality Certification Improvement Rule."[2]

The Clean Water Act makes it clear that states are to play a leading role in protecting water quality, noting at the outset that, "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…" [Emphasis added].[3]

These comments recognize this critical state role, but it does so without ignoring the plain language of the Clean Water Act or the abuses that have taken place through overbroad interpretations of Section 401. In 2020, the EPA finalized a Section 401 certification rule that sought to address the problems caused by misinterpretations of the statute. These problems have turned a cooperative federalism provision into a state veto of federally permitted activities for reasons that have nothing to do with water quality, among other abuses. As the EPA explained in 2020:

> [C]ertifying authorities have on occasion required in a certification condition the construction of biking and hiking trails, requiring one-time and recurring payments to State agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and the creation of public access for fishing along waters of the United States. Certifying authorities have also attempted to address all

[1] The views I have expressed in this comment are my own and should not be construed as representing any official position of The Heritage Foundation.
[2] "Clean Water Act Section 401 Water Quality Certification Improvement Rule," https://www.federalregister.gov/documents/2022/06/09/2022-12209/clean-water-act-section-401-water-quality-certification-improvement-rule (accessed August 8, 2022).
[3] The language does not merely recognize this state role, but goes as far as to say "preserve" and "protect." 33 U.S.C. § 1251 https://www.law.cornell.edu/uscode/text/33/1251 (accessed August 8, 2022).

> potential environmental impacts from the creation, manufacture, or subsequent use of products generated by a proposed federally licensed or permitted activity or project that may be identified in an environmental impact statement or environmental assessment, prepared pursuant to the NEPA or a State law equivalent. This includes, for example, consideration of impacts associated with air emissions and transportation effects.[4]

Unfortunately, the proposed Section 401 rule would lead to the same abuses and take past overbroad interpretations of Section 401 to new levels. The proposed rule would allow Section 401 to be used as an excuse to look beyond the impact of discharges. Also, in what appears to be a first in agency history, it would allow states[5] to grant, condition, or deny Section 401 certification on impacts to non-navigable waters and from nonpoint sources of pollution.

The EPA in the proposed rule appears to be displaying a façade, pretending to give meaning to the language of Section 401. Yet by giving states almost completely unbounded power, "once the certification requirement is triggered by the prerequisite of a point source discharge into a water of the United States," the agency is rendering Section 401 meaningless is many ways. Section 401 is not a gateway that once states pass then gives them the power to deny certification for whatever reason they desire. Instead, the provision is what clarifies the scope of what states can review and use in its certification. The agency's unreasonable interpretation of Section 401 reads out much of the language of Section 401(a).

Section 401 Requires a Discharge-Only Approach

The proposed rule argues that Section 401 certification conditions should apply to the proposed "activity as a whole," instead of the discharges arising from the proposed activity. The following is the start of Section 401(a)(1), which lays out the core requirements under Section 401:

> 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, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.[6]

[4] "Clean Water Act Section 401 Certification Rule," https://www.federalregister.gov/documents/2020/07/13/2020-12081/clean-water-act-section-401-certification-rule (accessed August 8, 2022).
[5] For purposes of this comment, "states" is often used to capture "certifying authorities" in general.
[6] Federal Water Pollution Control Act, https://www.epa.gov/sites/default/files/2017-08/documents/federal-water-pollution-control-act-508full.pdf (accessed August 8, 2022).

The entire Section 401 process exists because of the impact from "any discharge into the navigable waters" of the activity. The focus is on where the "discharge originates." Quite simply, the language throughout Section 401(a) is clearly focused on discharges.

Yet the EPA looks to Section 401(d) to try and claim that this discharge-only approach is incorrect. Section 401(d) provides additional clarification to Section 401(a), the provision that created the framework and foundation for the entire certification process. In the proposed rule, the EPA would use Section 401(d), a limited and narrow provision, as a means to swallow up the very foundation of Section 401 as established in Section 401(a). The agency places great weight on the text of Section 401(d) not including the term "discharge" and apparently believes this gives the EPA the ability to look to the "activity as a whole."

But this fails to acknowledge that Section 401(d) in no way contradicts Section 401(a). Further, Section 401(d) does in fact address discharges. It does so through cross-references to other Clean Water Act sections. The compliance requirements in Section 401(d) only reference sections dealing with discharges.[7]

Section 401 Does Not Apply to Nonpoint Sources or Non-Navigable Waters

In the proposed, rule, the agency explains:

> EPA is now proposing to define "water quality requirements" to include any limitation, standard, or other requirement under the provisions enumerated in section 401(a)(1), any Federal and state laws or regulations implementing the enumerated provisions, and any other water-quality related requirement of state or tribal law *regardless of whether they apply to point or nonpoint source discharges.* [Emphasis added].[8]

Section 401(d) does allow states to require compliance with "any other appropriate requirement of State law." However, this language follows a list dealing with discharges from point sources into navigable waters. The principle of statutory interpretation *ejusdem generis* requires that the requirements of state law be like the preceding requirements in the list. This alone should preclude taking certification into areas that deal with nonpoint sources or non-navigable waters. Further, the language is Section 401(d) does not state "any requirement of State law" but expressly conditions the requirements to those that are "any other *appropriate*" requirements.

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[7] Most, if not all of these points regarding a "discharge-only" approach, were rightfully made by the EPA in 2020 and argued by Justice Clarence Thomas in his dissent in PUD No. 1 of Jefferson County v. Washington Dep't of Ecology. *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*., 511 U.S. 700 (1994). The EPA was correct in 2020 in explaining that it is not bound by the majority opinion in this case (for many reasons). Even the proposed rule appears to recognize that the agency is not bound by the opinion.

[8] "Clean Water Act Section 401 Water Quality Certification Improvement Rule," https://www.federalregister.gov/documents/2022/06/09/2022-12209/clean-water-act-section-401-water-quality-certification-improvement-rule (accessed August 8, 2022).

This is an express signal that the principle of *ejusdem generis* should be respected.

The EPA in the proposed rule also argues:

> EPA does not believe that the scope of a state's or tribe's certification review is limited only to water quality effects in bodies of water meeting the definition of "navigable waters" or "waters of the United States," or to water quality effects caused by point sources.[9]

The agency then argues to support this claim, "there is nothing in the text of section 401 that compels either interpretation." In fact, there is language that compels interpretations limited to point sources and navigable waters. As has been explained, Section 401 is concerned with discharges from point sources into navigable waters. One does not have to look to Section 401(a) to support this contention. Section 401(d) by itself makes it clear that the certification is focused on those referenced sections limited to discharges from point sources and discharges into navigable waters.

The EPA goes on to argue, "unlike section 401(a)(1), which uses the term 'discharge' four times and 'navigable waters' twice, section 401(d) uses neither term." This is an unreasonable interpretation of Section 401 and unreasonable statutory interpretation in general. The agency is effectively saying that cross-referenced sections do not matter. The agency is also failing to analyze Section 401(d) in connection with all of the language in Section 401 or the overall structure and language of the Clean Water Act.

But the agency does not stop there with its flawed analysis. The agency goes on to argue, "had Congress desired to create such a limited scope of review, it could easily have done so. It did not." The agency apparently thinks the default statutory interpretation position is to allow anything unless Congress expressly says otherwise.

It is hard to imagine Congress being clearer regarding the Clean Water Act's regulatory focus being on discharges, navigable waters, and point sources. The EPA's own web page summarizing the Clean Water Act makes these points very clear, stating "the Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States" and "the CWA made it unlawful to discharge any pollutant from a point source into navigable waters."[10]

[9] Ibid.
[10] EPA web page entitled, "Summary of the Clean Water Act," https://www.epa.gov/laws-regulations/summary-clean-water-act (accessed August 8, 2022).

And when Congress did seek to address nonpoint sources (as it did within the statute for non-regulatory matters), it did so in an express manner. But there is no such express language for nonpoint sources in Section 401.[11]

Of course, states can go beyond the requirement established in the Clean Water Act. In fact, ideally, the federal government would play a significantly reduced role when it comes to water regulation, allowing the states to step in and fill any void.[12]

However, when it comes to Section 401, states are bound by the statute itself. The cooperative federalism structure of Section 401 gives states some power they otherwise would not have had absent Section 401, but it also places limits on what states can do within the Section 401 process. In other words, Congress could have easily decided that states would have no way to protect themselves from Clean Water Act federally permitted activities. But Congress, consistent with the principles of cooperative federalism, wisely chose to create the certification process so that states could protect their water quality. This protection though did not mean states could do whatever it wanted. Their Section 401 actions still must be consistent with the Clean Water Act.

Section 401 Certification Should Genuinely be Limited to Water Quality

The proposed rule states that Section 401 certifications are limited to water quality. Yet this appears to be part of the façade discussed earlier. In the rule, the EPA does not stick to "water-quality" but expands the language to concerns about "water quality-related impacts."

The agency points to public access to a river for recreational purposes as being appropriate for states to address in the certification process. The agency highlights imposing conditions like "construction of public access for fishing," and "construction of recreation facilities to support designated uses (e.g., whitewater release for kayakers, canoe portages, parking spaces)." These might be concerns for states, but whether an individual can access a river or park a car is not a water quality concern nor is it appropriate to address through Section 401.

The proposed rule would allow speculative concerns, which would be a way to impose conditions that might have nothing to do with genuine water quality concerns (because they may never occur). The agency is concerned with "the *possibility* that water quality-related changes or impacts *may* occur due to climate change or other factors." The timeline for this speculation can be decades based on the proposed rule. Therefore, the agency is arguing that it is appropriate for states to condition certifications on speculative changes or impacts that may occur decades from now. An example that was used in the proposed rule was a certifying authority placing

[11] The term "nonpoint sources" is expressly listed throughout the statute, see Federal Water Pollution Control Act, https://www.epa.gov/sites/default/files/2017-08/documents/federal-water-pollution-control-act-508full.pdf (accessed August 8, 2022).

[12] Unfortunately, this is something that the EPA has generally not agreed upon, as evidenced by the federal power grabs defining "waters of the United States."

conditions out of concern "about future downstream, climate change-related impacts on aquatic species due to increased reservoir temperatures during the lifespan of a hydropower dam license."

This entire speculative approach is ripe for abuse. A state could claim almost anything without ever showing any concrete threat to water quality or point to something that is not even likely to happen. The EPA should ensure sound science is used and any water quality concern should not be speculative but instead be highly likely to occur.

Past Section 401 abuse is connected to states using water quality as a pretext for seeking to block projects that have nothing to do with water quality. Once a water quality claim is asserted, regardless of whether the state has a genuine concern, it becomes almost impossible to counter.

Language in the proposed rule, which may seem to be helpful on the surface, would exacerbate the problems with states using pretextual reasons to block projects for reasons unrelated to water quality. The agency explains, "EPA continues to maintain that it would be inconsistent with the purpose of CWA section 401 to deny or condition a section 401 certification based *solely* on potential air quality, traffic, noise, or economic impacts that have no connection to water quality." [Emphasis added].

By implication, certification therefore could be denied if 99.9 percent of the reason is based on *potential* non-water quality reasons. This is an absurd result. To address it, the EPA should clarify that non-water quality reasons shall play no role in Section 401 decisions. Further, a state should be required to demonstrate the strong likelihood of significant threats to water quality, and also that a non-water quality reason is not influencing its certification decision.

Conclusion

Section 401 is a great example of cooperative federalism. It gives states a powerful voice, but it also places limits on this voice. The certification process is not a veto process or an excuse to expand the scope of the Clean Water Act beyond its clear regulatory focus on discharges from point sources into navigable waters. I urge the EPA to recognize the significant problems that overbroad and unreasonable interpretations of Section 401 have caused, and to not make matters worse through taking such interpretations even further.

Sincerely,

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