



Ohio Environmental Council

Comments of the Ohio Environmental Council Regarding the U.S. EPA's Proposed Updates to Water Quality Certification Regulations

Introduction

The Ohio Environmental Council (the “OEC”) submits these comments on behalf of our thousands of members across Ohio who desire clean water and healthy public lands. The United States Environmental Protection Agency’s (the “U.S. EPA”) decision to amend its Water Quality Certification regulations is not only misguided, it is contrary to the language and purpose of the Clean Water Act. It violates principles of cooperative federalism baked into federal environmental programs.

Through these amended regulations, the current administration at the U.S. EPA shows its hypocrisy—when restricting state authority serves its friends in the fossil fuel industry, it is absolutely willing to shirk all pretext for supporting states’ rights to regulate their own environmental programs. The U.S. EPA must reverse course, keeping the authority of state programs to implement water quality certifications fully intact.

The U.S. EPA improperly restricts the authority of states to place “conditions” within their Water Quality Certifications.

The new rule states: “The scope of the Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.”¹ The agency justified its decision based on a narrow interpretation of Section 401(a)(2) of the Clean Water Act, which states: “Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, *shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.* If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.”

¹ 84 FR 163, 44120 (August 22, 2019). Available at:

https://www.epa.gov/sites/production/files/2019-08/documents/cwa401certification_2060-af86_nprm_20190807_publication_version.pdf

The U.S. EPA has decided to interpret “in such manner as may be necessary to insure compliance with applicable water quality requirements” as creating an upper bound on what conditions a permitting authority may place upon water quality certifications—that the conditions must be narrowly tailored to relate to compliance with water quality requirements.

Such a narrow interpretation of the Clean Water Act defeats the efforts of the Act to achieve water quality improvements across the nation. In defending its decision to narrow the scope of certifications, the agency says:

If Congress intended section 401 of the CWA to authorize consideration or the imposition of certification conditions based on air quality concerns, public access to waters, energy policy, or other multi-media or non-water quality impacts, it would have provided a clear statement to that effect. Neither the CWA nor section 401 contain any such clear statement. In fact, Congress specifically contemplated a broader policy direction in the 1972 amendments that would have authorized the EPA to address impacts to land, air and water through implementation of the CWA, but it was rejected. Agencies must avoid interpretations of the statutes they implement to avoid pressing the envelope of constitutional validity absent a clear statement from Congress to do so.²

The U.S. EPA provides a list of conditions states have used in the past within certifications, including: biking and hiking trails; one time recurring payments to state agencies for other improvements or enhancements; and public fishing access. Arguing these conditions have nothing to do with water quality, the agency is attempting to bar states from implementing these types of conditions in their certifications. Fundamentally, the U.S. EPA’s undue restrictions placed upon states ignore the tailored purposes of those states’ conditions: to achieve and promote the goals of the Clean Water Act.

For example, the Ohio EPA’s Antidegradation Rule (OAC 3745-1-05) is applied to Water Quality Certifications issued by the state agency. In applying the Antidegradation Rule to Water Quality Certifications, Ohio EPA can permit applicants to develop “Credit Projects” in lieu of specific water quality projects. The regulation explicitly states: “the proposal must . . . not necessarily offset the proposed pollutant load being pursued, but address an existing or potential threat to the water body. This may include providing for water body enhancement or restoration activities.”³

These conditions placed upon Water Quality Certifications through Ohio’s Antidegradation Rule do not necessarily directly relate to water quality, especially the water quality directly impacted by the applicant’s project. A project might enhance a water body or restore habitat connected with the water body without addressing the impact to water quality caused by the applicant’s project.

Similarly, a state should be allowed to condition 401 Water Quality Certifications based on other considerations of state law. Consider a state which has a real interest in expanding and improving

² *Id.* at 44094.

³ OAC 3745-1-05(C)(7).

its inventory of wetlands across the state. It passes a statute for wetland restoration, requiring all 401 Water Quality Certifications to contain a condition for applicants to pay into a fund designed to finance wetland restoration. Wetlands play vital roles in hydrological systems, but the wetland restoration fund wouldn't necessarily relate to the water quality at issue for any particular Water Quality Certification.

Under the current 401 Water Quality Certification program, a state has the authority to create this type of program. But the U.S. EPA has proposed eliminating these conditions not only because they must pertain to water quality, but because it argues these additional conditions aren't "any other appropriate requirement of State law." It believes "any other appropriate requirement of state law" is a narrow phrase, meaning a "requirement of state law" pertaining to water quality.

The OEC opposes this statutory interpretation as inconsistent with the purposes of the Clean Water Act and its underlying principles of cooperative federalism. Conversely, the U.S. EPA argues the judicial canon "ejusdem generis"⁴ requires a narrow interpretation of "any other appropriate requirement of State law," limited by the requirements of Section 301, 302, 306, and 307 of the Clean Water Act, but it does not. Section 401(d) says:

Any certification provided under this section shall set forth any effluent limitations and *other limitations*, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and *other limitations*, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, *and with any other appropriate requirement of State law set forth in such certification*, and shall become a condition on any Federal license or permit subject to the provisions of this section. (emphasis added)

The U.S. EPA's reliance on ejusdem generis is unfounded. If the context of a statute dictates an alternative interpretation, ejusdem generis should not apply. *See N. & W. Ry. v. Train Dispatchers*, 499 U.S. 117 (1991). And in the case of Water Quality Certifications, the Clean Water Act was founded on a principle of cooperative federalism. The U.S. EPA should not be dictating to the states what they can and cannot do when conditioning projects within their own territory. The U.S. EPA establishes the baseline—the minimum above which the states are fully allowed to promulgate more stringent rules and regulations.

Therefore, ejusdem generis is inappropriate in this circumstance. "And with any other appropriate requirement of State law" from Section 401(d) should be read as expanding the powers of a state permitting authority to condition Water Quality Certifications using other programs and goals of the respective state. Using the Clean Water Act to restrict the authority of states to go beyond the goals of the Clean Water Act and protect water and ecosystems with more stringent efforts is against the fundamental spirit of the environmental laws of the United

⁴ Ejusdem Generis: Where general words follow an enumeration of two or more things, they apply only to things of the same general kind or class specifically mentioned. *See Washington State Dept. of Social and Health Services v. Keffeler*, 537 U.S. 371, 383-85 (2003).

States. By limiting the authority of states, the U.S. EPA defeats the Clean Water Act's own goal: to eliminate pollution from waters across the country.

The U.S. EPA improperly restricts the authority of states to require “complete” applications for Water Quality Certification prior to the tolling of the one year requirement under the Clean Water Act.

The U.S. EPA's new definition for “certification request,” combined with its prohibition on requiring a “complete application” prior to tolling the one year response timeline, further erodes the cooperative federalism upon which the Clean Water Act was established.

The new rule begins the one year timeline described in Section 401 when a permitting authority receives the following information from an applicant, known as a “certification request:”

1. Identity of project proponents and point of contact;
2. Identity of Proposed Project;
3. Identity of applicable federal license or permit;
4. Locations and types of discharges that may result from the proposed project and the location of receiving waters;
5. Descriptions of methods and means proposed to monitor the discharge and equipment or measures planned to treat or control the discharge;
6. A list of all other agency authorizations required for the proposed project, including all approvals or denials already received; and
7. The following statement: “The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.”

Those seven factors required under the proposed rule do not provide state permitting agencies with enough information to make a proper decision on a Water Quality Certification. Furthermore, if a state has other state considerations in its approach to land and water use, it should have the opportunity to ensure and require an applicant to include relevant information in an application for a 401 Water Quality Certification.

However, the proposed timing requirements in this rule could, conceivably, allow an applicant to submit these minimal requirements then sit on their application until a year lapses, even if state laws require additional application materials. The proposed “Certification Request” definition strips meaningful review powers from any state wishing to go beyond the U.S. EPA's standards.

Instead of establishing a hard definition, the U.S. EPA should promulgate a minimal definition states must meet while allowing states to go beyond it. The Clean Water Act is founded upon cooperative federalist principles, where states are permitted to implement more stringent rules as

needed for their individual interests. The proposed definition does not allow for such additional action by states.

A better rule would provide a clear baseline of what constitutes a “Complete Application” or “Certification Request” required prior to tolling the one year timeline. At the same time, the rule could emphasize how states may provide a more stringent definition to meet their applicable state laws related to 401 Water Quality Certifications.

In the spirit of cooperative federalism, the U.S. EPA must reverse course and propose a different rule more in line with the principles underpinning the Clean Water Act.

Fundamentally, the U.S. EPA’s proposed rule violates the spirit, purpose, and language of the Clean Water Act. As admitted in the agency’s proposed rule, the Clean Water Act, as framed in 1972, was designed to “prevent, reduce, and eliminate pollution in the nation’s waters generally, and to regulate the discharge of pollutants into waters of the United States specifically.”⁵ If the U.S. EPA, in cooperation with the states, is to achieve this goal, it must lean into principles of cooperative federalism.

The currently proposed rule will not further the goal of eliminating pollution in waters across the country because it hamstring the ability of states to use their legislative and regulatory tools to achieve water quality outcomes. The U.S. EPA should establish federally required minimums for water quality programs, not restrict the ability of states to use their own authority to achieve their own water and land use goals.

For the reasons listed above, the OEC opposes the proposed rule and urges the U.S. EPA to reverse course, creating a Water Quality Certification program that cooperates with the states, rather than eliminates their oversight role entirely.

Respectfully Submitted,

Chris Tavenor
Staff Attorney
The Ohio Environmental Council
1145 Cheasapeake Ave, Suite I
Columbus, OH 43212
ctavenor@theoec.org

⁵ Supra FN 1, at 44084.