



October 17, 2019

The Honorable David P. Ross
Assistant Administrator
Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Docket ID: EPA-HQ-OW-2019-0405, *Updating Regulations on Water Quality Certification*

Dear Assistant Administrator Ross,

The Association of Metropolitan Water Agencies (AMWA) is an organization representing CEOs and general managers of the largest publicly owned drinking water utilities in the United States and the American Water Works Association (AWWA) is an international, nonprofit, scientific and educational society dedicated to providing total water solutions assuring the effective management of water. AMWA and AWWA appreciate the opportunity to comment on the Environmental Protection Agency's proposed rule, *Updating Regulations on Water Quality Certification* (EPA-HQ-OW-2019-0405).

AMWA and AWWA support any effort to streamline or clarify existing regulatory procedures. Transparency and clarity are crucial for the regulated public. AMWA and AWWA members may often be applicants for these certifications as they build new infrastructure and the associations appreciate efforts to simplify these processes. However, AMWA and AWWA have concerns with certain aspects of the proposed rule, principally in respect to the protection of water quality. AMWA and AWWA would caution EPA against any changes that would weaken the abilities of states to protect the quality of their waters and by proxy, the source waters for drinking water utilities.

Source Water Protection

Protecting the source waters that drinking water utilities rely on is of immense concern to AMWA's and AWWA's members. Drinking water utilities' top priority is protecting public health and the treatment of source waters is key to providing safe and reliable drinking water. Preventing contaminants from entering these source waters is paramount to providing safe drinking water in a cost-effective manner, recognizing that blocking pollutants from entering drinking water supply source water is a complex task involving a myriad of point and nonpoint sources. It is essential that when finalizing this rule, EPA be cognizant of the rule's impact on source waters, particularly those used for drinking water, and finalize language that is protective of these vital resources.

USGS estimates¹ that surface water sources provided 61 percent of the total water withdrawn for public supply use in 2015. These water sources are vulnerable to potential pollution from activities which would require certification under section 401 of the Clean Water Act (CWA). AMWA and AWWA support the protection, preservation and restoration of the nation's surface water resources through comprehensive pollution control measures. It is most effective to control pollutants at the source, where they are highly concentrated, rather than remove them at the consumer's expense after they have entered a water body or supply source. This approach helps ensure that those who pollute our natural resources are not allowed to pass the cost of cleanup onto others.

The current proposal solicits comment on EPA's "interpretation of sections 401(a) and 401(d) as limiting the scope of state and tribal section 401 review and conditions to impacts from potential "discharges," or whether the state or tribe may also consider a different and broader universe of impacts, such as impacts from the licensed project or activity as a whole, or some other universe of potential impacts to water quality." AMWA and AWWA suggest the agency maintain current practices that allow states to include conditions that address water quality issues from nonpoint sources once the overall activity has triggered the need for a water quality certification. Allowing this flexibility is crucial to protecting source waters.

For example, activities that require certification can oftentimes lead to large sediment loads downstream if soil erosion control measures are not properly installed. Implementation of section 401 of the CWA should allow states the ability to include conditions within a certification which would help to protect source waters from these nonpoint source activities for conditions relevant to attaining EPA approved water quality standards of the state, even if those conditions fall outside the scope of a direct discharge as defined within this proposal. The associations understand that this makes it more difficult to determine what would be an acceptable condition under EPA's proposed guidelines, but AMWA and AWWA would note that it is important to not lose vital protections for source water solely for ease and simplicity. If a qualifying project includes certain activities which could impair a state's water quality standards, there should be an avenue for states to address this within their 401 Water Quality Certifications.

State Authority for Protecting their Waters

It is important that EPA generally defer to states on how to best protect their waters. The states' environmental agencies hold extensive knowledge of the characteristics of their local water resources and are oftentimes better equipped than federal agencies to understand how proposed activities might impact the quality of a given water body in the state.

Within the proposal, EPA notes that "there may be multiple reasons why a certifying authority may be unable to certify, including a lack of resources for reviewing the certification request [or] other more pressing priority work that the agency must attend to" and then goes on to suggest that this could be a circumstance where a waiver is appropriate. However, once a state waives its right to

¹ Dieter, C.A., Maupin, M.A., Caldwell, R.R., Harris, M.A., Ivahnenko, T.I., Lovelace, J.K., Barber, N.L., and Linsey, K.S., 2018, Estimated use of water in the United States in 2015: U.S. Geological Survey Circular 1441. Retrieved from <https://pubs.usgs.gov/circ/1441/circ1441.pdf>

certify a project and the federal license or permit is issued, any subsequent actions by the state to condition or deny a section 401 certification has no legal force or effect. This has the potential to put states that are struggling with legitimate workload or staffing issues at a disadvantage by stripping away their authorities under the Clean Water Act. Instead of blanket waivers in cases like these, AMWA and AWWA suggest that EPA consider staffing and workload limitations when determining acceptable timelines for application reviews and when reviewing extension requests from state agencies, so long as these timelines do not exceed the one year allowed within the CWA.

The proposal also includes many new or expanded requirements for states including further justifications for including conditions on a certification or for any certification denials the state may issue. These new requirements could increase the burden on state programs and may inhibit a program's ability to review applications in a timely manner. With this in mind, AMWA and AWWA ask that EPA further investigate and consider how these proposed changes might impact or impede the ongoing activities by the states to protect their own waters. AMWA and AWWA also ask EPA to consider providing delayed implementation for this new rule. A delay will allow states time to determine how these changes impact their programs and to develop plans for how they may want to address any deficiencies within their current protocols.

In conclusion, water suppliers need strong protections against pollution and contamination that can pose health risks to drinking water consumers. Section 401 of the CWA plays a critical role in protecting the nation's surface waters, which serve as the primary drinking water supply for millions of people across the country. While the AMWA and AWWA appreciate EPA's work to provide regulatory certainty, the associations ask the agency to thoroughly consider the points made above in order to ensure that any implemented changes do not inhibit a state's ability to protect its waters.

Sincerely,



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Chief Executive Officer
Association of Metropolitan Water Agencies



G. Tracy Mehan, III
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cc: Lauren Kasparek, OWOW
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