



LEADERS IN WATER

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August 2, 2021

The Honorable Radhika Fox
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency

Re: Docket ID: [EPA-HQ-OW-2021-0302](#), Notice of Intention To Reconsider and Revise the Clean Water Act Section 401 Certification Rule

Dear Assistant Administrator Fox,

The Association of Metropolitan Water Agencies (AMWA) is an organization representing the largest publicly owned drinking water utilities in the United States. AMWA thanks the Environmental Protection Agency (EPA) for the opportunity to comment on the agency's notice of intent to reconsider and revise the Clean Water Act Section 401 Certification Rule (EPA-HQ-OW-2021-0302).

As AMWA wrote in joint comments with the American Water Works Association responding to EPA's first proposal to update the regulations for water quality certificationsⁱ, the association supports any effort to streamline or clarify existing regulatory procedures. Transparency and clarity in rulemaking are crucial for the regulated public. AMWA members are commonly applicants for water quality certifications as they build and maintain infrastructure. That being the case, AMWA appreciates the agency's efforts to simplify these processes. Nevertheless, AMWA continues to caution EPA against maintaining detrimental provisions or including changes to the regulations that implement Section 401 of the Clean Water Act (CWA) that would undermine the capacity of state, tribal, and territorial drinking water programs (herein states) to protect the quality of their waters and, by proxy, the source waters for drinking water utilities.

Protecting the source waters that drinking water utilities rely on is a foremost concern for AMWA's members. Drinking water utilities' top priority is protecting public health, and a utility's ability to treat source waters is key to providing safe and reliable drinking water. Preventing contaminants from entering these source waters is paramount to cost-effectively providing safe drinking water. Preventing pollutants from entering drinking water sources is a complex task involving the management of many point and nonpoint sources of pollution. Still, it must be addressed to ensure that those who pollute our natural resources are not allowed to pass the cost of correcting the problem onto drinking water utilities and their ratepayers.

USGS estimatesⁱⁱ 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 that would

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require certification under CWA Section 401. AMWA supports the protection, preservation, and restoration of the nation's surface water resources through comprehensive pollution control measures. As EPA looks to revise the regulations which govern Section 401 of the CWA, it is essential that the agency be mindful of the rule's impact on source waters and finalize language that is protective of these vital resources.

EPA has asked for comment on specific aspects of the agency's 2020 Clean Water Act Section 401 Certification Rule. Beyond AMWA's overarching concerns related to source water protection, the association has multiple considerations for EPA concerning state authorities to protect their waters. The states' environmental agencies hold extensive knowledge of the characteristics of their local water resources and should be relied upon to establish reliable restrictions to protect these waters. States are commonly better situated than federal agencies alone to understand how proposed activities might impact the quality of a given water body in the state.

1. *401 WQC Conditions:* AMWA suggests that the agency restore the authority of states to consider nonpoint source impacts once an activity has triggered the need for a Section 401 water quality certification. Allowing for this flexibility when a state is developing the conditions included in a Section 401 water quality certification is crucial to protecting source waters. For example, activities requiring certification can often 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 to include conditions within a certification that would help protect source waters from these nonpoint source activities. The association understands that this can make these certifications more complicated. Still, AMWA would note that it is important not to 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.
2. *Setting Review Timelines for WQC Applications:* AMWA agrees that both federal and state agencies have a responsibility to provide timely reviews of permit and certification applications. Due to the wide variety in the types of projects in need of water quality certifications and the fact that states are working alongside federal agencies to ensure water quality standards are met, states should have a role in setting and extending this timeframe when necessary (provided all reviews fall within the statutory one-year limit).
3. *401 WQC modifications:* AMWA strongly urges EPA to restore states' authority to modify 401 water quality certifications following issuance. This authority allows for quick responses and flexibilities when unforeseen circumstances require changes to a project and therefore require the relevant modification of water quality certifications. Under the current rule, if a project has even minor changes the applicant is forced to go through an entirely new certification process. Under the current rule, there is also no incentive to further minimize the impacts to surface waters from a project if an applicant finds a more effective approach to complete their work since those changes would force them to redo their certification. AMWA implores EPA to restore the states' ability to modify water quality certifications. Restoring the states' authority to

modify water quality certification will help to streamline the overall permitting process and will remove the disincentive to avoid lowering a project's environmental impacts.

4. *Enforcement:* AMWA feels strongly that any proposed rule should restore the states' authority to enforce their water quality certifications and the conditions included therein. Under the 2020 rule, states must rely on their federal counterparts to enforce any conditions that they have placed onto a certification. AMWA believes that this unnecessarily complicates the process as states have established procedures and long-standing relationships in place that better allow them to address compliance issues on the ground. Providing states with the ability to enforce their certification will help ensure that issues are resolved quickly and in a way that best protects source waters.

Finally, AMWA would like to underscore the staffing limitations faced by many state governments. The original 2019 proposal recognized this issue, but the association does not believe EPA took this issue sufficiently into consideration when developing and finalizing the rule. The preamble in the 2019 proposal suggested that states use their ability to waive water quality certifications to address unmanageable workloads. However, in the current rule, once a state waives its right to 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. AMWA suggests that EPA consider approaches to overcome these staffing challenges in a manner that does not mandate a state to waive its rights as a co-regulator with federal agencies.

In conclusion, water suppliers need effective protections against pollution and contamination that may pose treatment challenges and 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 AMWA appreciates EPA's work to provide regulatory certainty, the association asks that the agency thoroughly consider the points made above in order to ensure that any implemented changes do not inhibit a state's ability to effectively protect its waters.

Sincerely,



Diane VanDe Hei
Chief Executive Officer

Cc: Jennifer McLain, Office of Ground Water and Drinking Water
Lauren Kasparek, Office of Wetlands, Oceans and Watersheds

ⁱ AMWA and AWWA. Comments on Updating Regulations on Water Quality Certification. October 17, 2019.
<https://www.regulations.gov/docket/EPA-HQ-OW-2019-0405/document>

ⁱⁱ 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>