



October 18, 2019

Electronically submitted via www.regulations.gov

Mr. Andrew Wheeler
Administrator
Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2019-0405
Northwest Hydroelectric Association Comments on EPA's Proposed
Rules for Updating Regulations on Water Quality Certification
84 Fed. Reg. 44,080-44,122 (Aug. 22, 2019)

Dear Administrator Wheeler:

The Northwest Hydroelectric Association (NWAHA) and its members appreciate this opportunity to provide comments on EPA's Notice of Proposed Rulemaking (NOPR) to revise its regulations on water quality certification pursuant to section 401 of the Clean Water Act (CWA) and welcome the efforts of the EPA in developing this NOPR to reform the process for issuing water quality certifications. NWAHA members own and operate hydropower projects licensed by the Federal Energy Regulatory Commission (FERC or the Commission) and therefore understand the importance of protecting the quality of our nation's waters. Section 401 certification is a critical component of the hydropower licensing process, but a number of problems have arisen with its implementation, leading to delays and increased costs. NWAHA members agree that many of the reforms set forth in the NOPR would greatly improve the certification process by providing greater clarity on a number of issues that have been the subject of debate since the rules were originally promulgated as well as greater consistency in the application of the 401 certification process in various states.

Background

NWAHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient source of energy, while protecting the fisheries and environmental quality that characterize our Northwest region. NWAHA's membership represents all segments of the hydropower industry: public and private utilities; independent developers and energy producers; manufacturers and distributors; local, state, and regional governments including water and irrigation districts; consultants; and contractors. Many of NWAHA's members hold licenses issued by FERC, which has exclusive authority to license nonfederal hydropower projects under the Federal Power Act (FPA). NWAHA's membership includes companies in California, Oregon, Washington, Alaska, Idaho, and Montana; therefore, we have seen how the 401 certification process is applied in a number of states, as well as in situations where multiple states may have jurisdiction.

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Because most hydropower projects involve a “discharge into ... navigable waters,”¹ FERC-licensed projects are generally subject to section 401(a)(1) of the CWA, and FERC may not grant a license for a project unless the appropriate state agency has either issued a water quality certification or waived certification.² Prior to this proposed rulemaking, FERC’s policy has been that, once a state has issued a certification, the Commission does not have the authority to determine the validity of certification conditions or to exclude them from a license,³ and the conditions are included in the license as a matter of law.⁴ Since EPA’s regulations implementing section 401 were implemented in 1971, there has grown a demonstrated need for more clarity surrounding their implementation on matters including the scope of a certification review and what parameters a certification may encompass (i.e., minimum in-stream flows), what constitutes a “reasonable” period of time for a state to act on a request for certification, the lack of clear state processes, and when a request for certification is deemed to have been “received.”

EPA’s Proposed Rulemaking

In part to address the types of concerns discussed above, in April 2019, the President issued Executive Order 13868: “Promoting Energy Infrastructure and Economic Growth,” which, as part of its purpose to encourage greater investment in energy infrastructure in the United States, directed EPA to consult with states, tribes, and federal agencies in an effort to review and update its existing guidance and regulations on section 401 of the CWA. As discussed above, EPA’s regulations implementing section 401 (40 C.F.R. part 121) have not been updated since 1971 and, up until the time the Executive Order was issued, EPA’s only guidance on section 401 implementation was a handbook that has not been updated since it was released in 2010. Among other things, the Executive Order directed EPA to review its existing regulations implementing section 401, issue new guidance to state, tribes, and federal agencies within 60 days, and propose new regulations within 120 days. It also directed EPA to take into account federalism considerations underlying section 401 and to focus on the appropriate scope of any water quality certification reviews and conditions.

As discussed more fully below, since these regulations were first implemented nearly 50 years ago, they have been the subject of increasing instances of litigation and uncertainty, including differing interpretations regarding the scope of 401 certification between federal action agencies, state certifying agencies, and applicants for federal licenses or permits requiring a certification and associated delays in states’ issuance of certifications. On the issue of timing, it has become common practice in some states for applicants for FERC licenses to withdraw and re-file their certification applications annually, often at the request of the state agency. This leads to delays in licensing proceedings that can last for several years, resulting in the delayed implementation of license conditions concerning, among other things, dam safety, water quality, and endangered species.

NWHA and its members agree that EPA’s regulations implementing section 401 of the CWA are in need of reform, and broadly support the provisions set forth in the NOPR. This is particularly

¹ The CWA defines “navigable waters” as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

² 33 U.S.C. § 401(a)(1).

³ See *Am. Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1996).

⁴ See, e.g., *Carex Hydro*, 52 FERC ¶ 61,216 (1990).

true with respect to the NOPR's effort to more clearly define both the timeframe for and scope of state water quality certifications.

Timeframe for certification

Section 401(a)(1) of the CWA provides that a water quality certification is deemed waived if the state certifying agency fails to act on a certification request "within a reasonable period of time (which shall not exceed one year)."⁵ To ensure that the one-year deadline is met, EPA's proposed rule would define a "certification request" as a "written, signed, and dated communication from a project proponent," and require that it include specific, defined information, as well as a statement specifically requesting certification and would require certifying authorities to act on such a request within one year of submittal.

NWHA fully supports EPA's proposal to require that certifying authorities act on a request for certification within an "absolute outer bound" of one year.⁶ As of March 2019, seventeen FERC hydropower proceedings were delayed by the lack of a timely certification request, several for over 10 years. These delays prevent FERC from updating licenses that were issued, in some cases, more than 50 years ago and leave project owners uncertain about when they will be issued a new license and the conditions under which their projects will be operated in the future. EPA's proposed clarification would avoid the use of tactics to toll the one-year time period, including by denying a request for certification "without prejudice" or by directing certification applicants to withdraw and re-file their requests annually. These tactics have the effect of "indefinitely delay[ing] federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters."⁷

EPA also proposes to more clearly define a state's "failure or refusal to act" on a section 401 application as when it "actually or constructively fails or refuses to grant or deny certification..."⁸ NWHA supports this proposed definition, which would maintain that a certifying agency waives its review when it "states its intention unambiguously in writing or takes no action within the reasonable period of time."⁹ This provision would add certainty to the FERC licensing process and eliminate costly delays resulting from ambiguity about when a state has failed or refused to act."

While EPA's proposal includes one year as the *maximum* amount of time within which a state must issue certification, it directs federal action agencies to establish "the reasonable period of time" within which a state must act and solicits comments on whether it should retain existing language in its regulations specifying that a reasonable period of time "shall generally be considered to be 6 months, but in any event shall not exceed 1 year."¹⁰ When determining this time period, either for a category of projects or on a case-by-case basis, EPA's proposal directs federal agencies to consider the complexity of the proposed project, the potential for any discharge, and the potential need for additional studies or evaluation of the water quality effects

⁵ *Id.*

⁶ 84 Fed. Reg. at 44,107

⁷ See, e.g., *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1103-05 (D.C. Cir. 2019) (holding that withdrawing and resubmitting the same certification request did not extend the time for acting on a certification request but expressly not deciding whether resubmitting a different request would start a new certification period).

⁸ 84 Fed. Reg. at 44,110.

⁹ *Id.*

¹⁰ 84 Fed. Reg. at 44,120.

of the discharge. NWA supports these proposed factors and agrees that, while there are significant benefits to supporting an “absolute outer bound” of one year, EPA’s final rule should recognize the need for federal action agencies to work with applicants for federally-permitted or licensed projects on how to properly define the actions that would trigger the *starting point* of that one-year period. This approach would give federal action agencies sufficient discretion to allow for flexibility in certain situations. In the case of a state’s denial of certification, an applicant should be able to use the state’s rationale for its denial—which the proposed rule would require—to form the basis for a new application.¹¹

Scope of certification

Section 401(a)(1) of the CWA authorizes states and tribes to certify that a potential discharge to waters of the United States will comply with the applicable provisions of the CWA, including effluent limitations and performance standards for new and existing sources (sections 301, 302, and 306), water quality standards and implementation plans (section 303) and toxic pretreatment effluent standards (section 307).¹² Section 401(d) of the CWA provides that, in issuing a water quality certification, states and tribes may include conditions, including “effluent limitations and other limitations, and monitoring requirements necessary to assure” that an applicant for a federal license or permit will comply with the applicable provisions of sections 301, 302, 306, and 307 of the CWA, as well as with “any other appropriate requirement of State law set forth in such certification.”¹³ However, due to the lack of clearly-defined terms in section 401(a)(1), states have interpreted section 401 broadly to impose conditions on federal licensees or permittees that extend far beyond effluent limitations, water quality standards, and toxic pretreatment standards. Examples of these types of conditions are discussed below.

Fish and Wildlife

NWA’s members have received certifications including conditions pertaining to fish and wildlife that are well beyond the scope of section 401 of the CWA and that would be more appropriately addressed through other aspects of the FERC licensing process, including through Sections 10(a) and (j) of the FPA. For example, in its 401 certification for Pacific Gas and Electric’s Poe Project, the California State Water Resources Control Board’s (California Water Board) included a condition requiring the licensee to submit a biological monitoring plan to include monitoring of fish, benthic macroinvertebrates, and amphibians.¹⁴ Another certification required the licensee to allow access to the project area for agencies to trap and kill feral hogs and provide support to the state’s Feral Hog Task Force to control and eradicate feral hogs in the area.¹⁵

In another example, Oregon DEQ’s 401 certification for PacifiCorp’s Prospect No. 3 Project, located on the South Fork Rogue River in Jackson County, Oregon includes a condition requiring PacifiCorp to develop “a plan to modify the [existing] fish ladder to provide consistent flow throughout the fish ladder with jump heights not to exceed 9 inches.” Another condition requires those modifications to be completed within one year of Oregon DEQ’s approval of the plan, and a third condition requires the modifications to be operated and maintained in

¹¹ *Id.*

¹² 33 U.S.C. 1341(a)(1).

¹³ 33 U.S.C. § 1341(d).

¹⁴ See California Water Board’s Water Quality Certification for the Poe Project, *available at* https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/poe_ferc2107/poe_final_wqc_signed.pdf.

¹⁵ See *Ameren MO*, 148 FERC ¶ 62,059, at P 40 (2012).

accordance with the Oregon DEQ-approved Fish Passage Facilities Operations and Maintenance Plan. PacifiCorp objected to these conditions because they will provide no substantial benefits to fish beyond those provided by the existing fish ladder and, moreover, are unrelated to water quality. Oregon DEQ also included conditions at the request of Oregon DFW. Oregon DFW had included fish passage improvements in its recommendations filed with FERC pursuant to section 10(j) of the FPA.¹⁶ However, FERC concluded in its Environmental Assessment for the project that “there would be little to no benefit to fry and juvenile trout from modifying the fish ladder,” and declined to include these recommendations in the license. As a result, Oregon DFW instead pursued inclusion of those conditions through the 401 certification process.

And, Oregon DEQ’s certification for PacifiCorp’s Willowa Falls Project states that the licensee shall conduct periodic monitoring to assess the rate of brook trout introgression in the bull trout population residing in the East Fork and West Fork and requires that, within six (6) months of issuance of a new license, the licensee shall consult with Oregon DFW, the U.S. Fish and Wildlife Service (USFWS), and the U.S. Forest Service (USFS) to specify the goals, objectives, protocols and schedule for the monitoring program. The certification provides that the monitoring program shall include electrofishing and requires PacifiCorp to measure and record the length, weight and capture location of each bull trout and provide a written report on the results. In its certification, Oregon DEQ did not demonstrate how the results of bull trout population and genetic monitoring are applicable to proposed Project compliance with the statewide narrative criteria for water quality and failed to identify qualitative or quantitative metrics for evaluation of the monitoring results. Given the generally excellent water quality in the project’s bypassed reach and the absence of any identified mechanism by which the project might be assessed to adversely affect the bull trout genetic community in the bypassed reach, the bull trout genetics monitoring conditions were beyond the scope of section 401 and should not have been included in the Certification.

While these are some of the more egregious examples that NWA’s members have had to address, there are many other examples that also demonstrate the broad scope of conditions that states have sought to impose through the 401 certification process that go far beyond the language of 401(a) and 401(d), including:

- Installation of upstream and downstream fish passage facilities;
- Development of an Invasive Species Management and Monitoring Plan, subject to approval by state water quality agency;
- Development of a fish population monitoring plan, amphibian and reptile habitat evaluation and species presence monitoring plan, and riparian vegetation monitoring plan (to be conducted by aerial photo flights);
- Performance of a survey of pools and ponds at project lake to determine if trout are present, and if so, submit a plan to remove the trout; and
- Installation of fish screens for all life stages of trout.

Recreation

Water quality certifications frequently contain conditions pertaining to recreation that NWA considers far beyond the scope of section 401. For example, state agencies have incorporated conditions requiring licensees to:

¹⁶ 16 U.S.C. § 803(j)(1).

- Submit a recreation improvement and monitoring plan with improvements to recreation facilities;
- Open an existing trail to biking and hiking traffic and provide an accommodation for carryable boat portage using the newly opened trail;
- Design, construct, and maintain improvements at a recreation site, including recreation amenities and parking and signage improvements;
- Make recreation streamflow and lake level information available to the public via toll-free phone and website;
- Re-surface a gravel parking lot and install and maintain portable toilets, trash receptacles, and picnic tables;
- Construct a car-top boat access area, canoe/kayak portage routes, and new parking areas; and
- Operate reservoirs such that the channel between them is navigable by motorized watercraft between July 1 and Labor Day each year.

These types of recreational considerations would be more appropriately addressed through other aspects of the federal agency's permitting process—in FERC's case, through conditions imposed via sections 10(a) and (j) of the FPA.¹⁷

Flow and Operational Requirements

NWHA members also have concerns with certification conditions requiring hydropower licensees to alter their project operations and maintain certain downstream flows and/or reservoir levels to provide habitat for fish. For example, state agencies have included conditions requiring licensees to:

- Develop and maintain a public website with flow information in the bypassed reach, including links to available gages and applicable conversions or calculations to derive real-time flow information;
- Develop a plan to provide the public real-time information on streamflow and reservoir levels via toll-free telephone number and website;
- Implement and maintain minimum streamflows;
- Implement interim and long-term ramping rates and recreational flows;
- Impose limitations on impoundment fluctuations and reservoir levels; and
- Run project in "run-of-river" mode.

Again, these types of considerations would be more appropriately addressed through other aspects of the federal agency's permitting process—in FERC's case, through conditions imposed via sections 10(a) and (j) of the FPA.¹⁸

Monetary Payments

Certifications also frequently include conditions requiring the licensee to make monetary payments. For example, conditions requiring the licensee to:

- Pay project-specific fees to state agency for costs of overseeing implementation of the 401

¹⁷ 16 U.S.C. § 803(a), (j).

¹⁸ 16 U.S.C. § 803(a), (j).

- conditions. Fee is \$5,000 for each of the first five years of license term;
- Provide a one-time payment of \$50,000 to West Virginia DNR for improvements or enhancements to a recreation site, including accommodations for improved boating access;
- Provide \$25,000 annually to West Virginia DNR to maintain and enhance recreation facilities located on lands deeded to West Virginia DNR;
- Provide monetary compensation for entrainment losses of fish due to project operation;
- Provide up to \$20,000 annually to the California Department of Fish and Wildlife for fish stocking; and
- Provide a one-time contribution to Trout Unlimited for the support of habitat improvements and/or the stocking of fish in the watershed.

Such payments do not appear to be tied to water quality considerations that were intended to be covered by the 401 certification process.

Programmatic and Administrative Conditions

Finally, many licensees, including NWAHA members, have expressed frustration with water quality certifications that automatically include “programmatic” conditions that are not specifically tied to the project being certified. For example, the California Water Board has over 20 of these conditions that cover a variety of topics, including reservation of state authority to enforce or add to certification conditions, climate change, compliance with basin-wide plans. Often, these types of certifications include conditions that clearly do not apply to the project being licensed. For example, a state certification that was issued for a period of 15 years would have required the licensee to renew its certification in the middle of its FERC-issued license.¹⁹ The same certification included a condition requiring the licensee to allow state water quality staff entry to the project at any reasonable time to inspect property, facilities, operations, practices, and records.²⁰ Another certification required the licensee to maintain electronic records of project operation and provide an annual report to the state demonstrating compliance with project operation requirements.²¹

To address concerns of the types described above, EPA proposes to more narrowly define the scope of states’ certification authority by defining several terms included in—but up until now not defined by—section 401(a)(1). EPA’s proposed rule would define these terms in subsection 121 of the proposed rule as follows:

Subsection 121.1(f) would define a “condition” as “a specific requirement included in a certification that is within the scope of certification.”

Section 121.3 would limit the scope of certification “to assuring that a *discharge* from a Federally licensed or permitted activity will comply with *water quality requirements*” (emphasis added).

Subsection 121.1(g) would define “discharge” as “a discharge from a point source^[22] into navigable waters.”

¹⁹ Fries Project, P-2883 (VA).

²⁰ *Id.*

²¹ Eastman Falls Project, P-2457 (NH).

²² The proposed rules do not define “point source,” but the CWA defines it as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, . . .

Subsection 121.1(p) would define “water quality requirements” as the “applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.”

Subsection 121.5(d) would require any grant of certification with conditions to include statements “explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements” and “whether and to what extent a less stringent condition could satisfy applicable water quality requirements.”

Subsection 121.8(a) would incorporate into federal licenses and permits only those “conditions that satisfy the definition of § 121.1(f) [the definition of “condition”] and meet the requirements of § 121.5(d) [the requirement for a statement explaining why the condition is necessary to comply with “water quality requirements”].

These definitions would limit water quality certification conditions to only those necessary to ensure that discharges from point sources comply with the specified provisions of the CWA. EPA’s proposed revisions would focus a state’s review on the water quality impacts of the actual discharge, rather than the overall activity that is the subject of the federal permitting effort. NWAHA supports these proposed reforms to the water quality certification process, which would more clearly define states’ authority to impose water quality conditions and focus that authority on implementing water quality standards, rather than non-water quality impacts including the issues identified above. For many of these considerations—such as those related to fish and wildlife—the water quality certification process is not an appropriate vehicle for their review. Rather, NWAHA supports the review of these broader considerations through other aspects of the federal hydropower licensing process, including through conditions imposed via sections 10(a) and (j) of the FPA, through the National Environmental Policy Act review, the Endangered Species Act, and other applicable regulatory frameworks that are a better fit to address these broader considerations.

Moreover, NWAHA would encourage EPA to prohibit states from including these broad conditions in certifications without an explanation of why the conditions are necessary to comply with “water quality requirements,” as proposed in subsection 121.8(a). In addition, EPA’s proposed subsection 121.5 would require state certifying agencies to make specific statements in support of certification conditions and denials, including an identification of the specific water quality requirement on which the denial or condition is based. In the case of denials, the statement would be required to explain why the “proposed project will not comply” with water quality requirements and include the “specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project complies with water quality

. container . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (emphasis added). The section 401 certification requirement is limited to discharges from point sources. See *Oregon Natural Desert Ass’n v. Dombeck*, 172 F.3d 1092, 1095-99 (9th Cir. 1998). In *S.D. Warren Co. v. Maine Bd. of Env’tl. Protection*, 547 U.S. 370 (2006), the U.S. Supreme Court held that the certification requirement was not limited to discharges of pollutants, see 547 U.S. at 377, but the discharge must nonetheless be a *point source* discharge, whether or not that point source discharge also includes the addition of pollutants, see *Oregon Natural Desert Ass’n v. U.S. Forest Service*, 550 F.3d 778, 782-85 (9th Cir. 2008) (rejecting arguments that *S.D. Warren* expanded the certification requirement to nonpoint source discharges and adhering to its decision in *Dombeck*).

requirements.”²³ NWA supports these revisions, which would create additional certainty for licensees that state certification conditions do not extend beyond the scope of section 401, as discussed above.

“Reasonable Assurance” of Compliance

While NWA generally supports EPA’s proposed reforms to the 401 certification regulations, NWA requests that EPA maintain the language of its current regulations implementing section 401 that provide that a certification must include a statement that there is “reasonable assurance” of compliance.²⁴ The proposed rule would require certification that the discharge “will comply.”²⁵ The purpose of the omission of this language from section 401(a)(1), however, is unclear, as section 401(a)(3) of the CWA continues to provide that a certification fulfills the federal licenses and permits unless the certifying agency notifies the federal agency “that there is no longer reasonable assurance” of compliance with sections 1311, 1312, 1313, 1316, and 1317...” In its proposal, EPA notes that section 401(a)(1) of the CWA has been amended to remove a prior reference to “reasonable assurance,” in favor of language requiring that the discharge “will comply” with water quality requirements.²⁶ However, the fact that this language remains in section 401(a)(3) indicates that the omission may have been inadvertent. As a result, NWA would support retaining the “reasonable assurance” language in the existing regulations to allow for adaptive management and other solutions to water quality issues and allow states to retain some flexibility in their implementation of water quality standards.

Post-certification

Nothing in the CWA—including sections 309 (state and EPA enforcement), 401, and 505 (citizen suits)—provide authority to states to enforce or implement conditions of a water quality certification. However, some state certifying authorities believe that they have authority under the CWA to enforce certification conditions.²⁷ EPA’s proposed subsection 121.9(c) provides that the “Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit.”²⁸ NWA supports this proposed revision, which would clarify that with respect to hydropower licenses, only FERC has the authority to enforce certification conditions.

Finally, EPA has solicited comments on whether its revised rules should prohibit water quality certifications from including “reopener” clauses that would permit certifying agencies to revise conditions after a certification is final. NWA would support the preclusion of such reopener clauses, which would permit a certifying agency to impose conditions on an applicant far beyond the one-year period set forth in section 401. Moreover, such clauses would permit a certifying agency to unilaterally amend a FERC-issued license, in contravention of section 6 of the FPA, which provides that “licenses may be altered or surrendered only upon mutual agreement between the licensee and the Commission...”²⁹

²³ 84 Fed. Reg. at 44,120.

²⁴ 40 C.F.R. § 121.2(a)(3).

²⁵ 84 Fed. Reg. at 44,122.

²⁶ 33 U.S.C. § 1341(a)(1).

²⁷ See, e.g., Earthjustice’s administrative appeal to Maryland Dep’t of Environment, urging MDE to reconsider and revise its water quality certification for Exelon’s Conowingo Project, *available at* <https://earthjustice.org/documents/legal-document/conowingo-dam-administrative-appeal>.

²⁸ *Id.* at 44,121.

²⁹ 16 U.S.C. § 799.

Again, we appreciate the opportunity to comment on this proposed rule. Please feel free to contact me should you have any questions about these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Brenna Vaughn". The signature is fluid and cursive, with the first name "Brenna" written in a larger, more prominent script than the last name "Vaughn".

Brenna Vaughn, Executive Director