WATERKEEPERS® CHESAPEAKE

Post Office Box 11075
Takoma Park, MD 20913-1075
(202) 423-0504
info@waterkeeperschesapeake.org

Mrs. Lauren Kasparek,
Oceans, Wetlands, and Communities Division
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
submitted electronically via regulations.gov

Docket ID No. EPA-HQ-OW-2019-0405

Dear Mrs. Kasparek,

The undersigned members of Waterkeepers Chesapeake (WKC) thank you for the opportunity to provide the following comments on the United States Environmental Protection Agency's (EPA) *Proposed Rule* providing updates and clarifications to the substantive and procedural requirements for water quality certification under the Clean Water Act ("CWA") Section 401. Waterkeepers Chesapeake is a coalition of 18 Riverkeepers, Waterkeepers, and Coastkeepers from Pennsylvania to Virginia working to make the waters of the Chesapeake and Coastal Bays swimmable, drinkable and fishable once again. We are committed to maintaining and restoring clean water to the rivers and streams throughout the Chesapeake Bay region and we rely on the Clean Water Act as the foundation of restoration and protection efforts.

1. Background

Any major development project, like a pipeline or a dam, that has the potential to pollute into navigable waters requires a "water quality certification" (WQC) under Section 401 of the Clean Water Act from the state or tribe where the proposed pollution will occur. The WQC is a way for the state or tribe to either (1) review and "certify" that the federally-licensed project will not have a significant impact on the quality of state waterways, (2) place certain pollution prevention conditions on the project to minimize the impacts of a project, or (3) deny certification all together because the impacts of the project on local water quality would be too significant. More often than not, states and tribes will allow federally-licensed projects to move forward under Section 401, but in some egregious instances, a state will deny a project.[1] However, the federal government must first have the approval of the state through the WQC before granting the new

[1] For instance, Washington State was able to prevent a coal export terminal on the Columbia River and New York denied water quality certification for a major, 124-mile long natural gas pipeline carrying fracked gas.

construction of any major project. The CWA also requires states to issue or deny the water quality certification in a reasonable time, not to exceed one year, or it will be considered waived.

Courts have overwhelmingly affirmed the broad authority that the CWA grants to states and tribes to review and determine the fate of certain federal projects that would negatively impact local waterways. The importance of this authority is best explained in the United States Supreme Court case, *S.D. Warren Co. v. Maine Board of Environmental Protection, et. al.* from 2006. The Supreme Court states,

> State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now §401 was first proposed: "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970). These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law," 33 U. S. C. §1341(d). by imposing conditions on federal licenses for activities that may result in a discharge...

States have wielded the authority given to them through the CWA with increasing efficacy in the last few years to prevent projects from being developed within their borders from having lasting impacts on the quality of their local waterways. However, the *Proposed Rule* would limit the steps that states can take to protect their waterways.

The *Proposed Rule* at hand will significantly erode state authority under the CWA by: (1) preventing states from denying projects that will, as a whole, directly and negatively impact the state's water quality; (2) preventing states from placing conditions on projects that relate to the overall water quality impacts of a project, rather than just the specific "discharge" from the project; (3) restricting the time available to states and tribes to review and make decisions about major projects impacting their local waterways; and, (4) providing an outsized role for federal agencies in the WQC process, in the name of economic development. The *Proposed Rule* would grant substantial discretion to the federal government to force multi-state projects through, without state or local buy-in. If finalized as is, the *Proposed Rule* would represent a major shift in how Section 401 under the Clean Water Act is implemented and enforced by states and tribes.

2. Limited Scope of State Review and Decision-Making Authority

a. State or Tribe WQC Denials

By significantly limiting the scope of review, the *Proposed Rule* would actually codify dissenting opinion in a U.S. Supreme Court case and give EPA authority to reject a state or tribe's WQC denial if that denial is not directly tied to a specific discharge from the project or a federally imposed water quality requirement under the CWA.[2] For decades, states have considered the broader water quality impacts of proposed projects as a whole when reviewing applications for WQC under Section 401. However, the specific question of whether a state or tribe's Section 401 review is limited to the specific "discharge" was answered by the Supreme Court in 1994 in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*. In this case, the state of Washington was reviewing a Section 401 application for a hydroelectric dam. The dam owner claimed that state authority under Section 401 was restricted to only assessing whether a project would "discharge" in a way that would violate the CWA. The Supreme Court disagreed and affirmed state authority to make a Section 401 determination based on the broader water impacts of the activities associated with any given project.[3] Justice Clarence Thomas's dissenting opinion in *PUD No. 1* advocated for state review to be limited to the specific discharge from the federally-licensed project.

There's an overwhelming amount of judicial precedent in support of the broad authority Section 401 provides to states and tribes.[4] The longstanding authority for states to make these broad determinations has been backed by the courts time and time again -- who better to make determinations about how a proposed multi-state or federal project will impact *local* water quality than the state charged with enforcing its own water quality standards? EPA's regulations from 1971, prior to the Clean Water Act, support the holding in *PUD No. 1* and the longstanding regulatory practice of granting states and tribes broad leeway to make 401 determinations. And even more importantly, the plain language of the CWA supports this holding and regulatory

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[2] Updating Regulations on Water Quality Certification, Proposed 40 CFR 121.3, 121.1(p) (Aug. 22, 2019) ("The scope of 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… Water quality requirements means 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."); see also Proposed 40 CFR 121.6, 121.7, 121.8.

[3] 511 U.S. 700 (1994).

[4] S.D. Warren Co. v. Maine Board of Environmental Protection (2006).

practice: states or tribes may deny WQC if the state or tribe has reason to believe that a project will violate the state's water quality standards or any other appropriate state law.[5]

The rule would also prevent states and tribes from enforcing any state laws or regulations that deal with water quality in the WQC process, unless that state law or regulation had already been approved by the EPA. This calls into question whether any new state and tribal laws aimed at promoting clean water would ultimately be approved by the EPA, if that approval hinges on whether the law directly relates to federally-licensed "discharges," as narrowly defined by the EPA.

Recommendation: EPA should remove any additional limits on state or tribe WQC denials under the *Proposed Rule* all-together, as current regulations are adequate.

b. State or Tribe WQC Conditions

In a similar vein, the *Proposed Rule* also limits the types of conditions states may impose on projects that fall under Section 401. Under the rule, if a state or tribe decides to impose conditions on a project through a WQC, the appropriate federal licensing agency could reject any or all of the conditions by determining that it exceeds the defined scope.

State and tribe authority to impose conditions under Section 401 has been the bedrock of allowing projects to move forward in a way that least harms the state or tribe's waterways. For decades, states and tribes have utilized their expansive authority to impose conditions on projects that require WQC and this authority -- like the authority to deny WQC -- has been strongly backed by the courts and incorporated into the CWA Section 401 regulatory scheme. There is no administrative record on which EPA can base its reversal of Supreme Court precedent and nearly 50 years of consistent practice. For instance, Virginia's WQC for the Atlantic Coast Pipeline (ACP) imposed conditions that went well beyond addressing just the temporary pipeline construction impacts to wetlands and streams with the intent to protect local water quality across the broad range of pipeline activities actually taking place. Conditions imposed on the developers of the ACP -- which would potentially be thrown out under the *Proposed Rule* had it been finalized at the time Virginia issued the WQC -- addressed sediment, erosion, karst geologic studies, steep slopes, public water supplies, and areas prone to rockslides, to name a few. All of these are aimed at the very real impacts a pipeline project could have on Virginia's water quality,

[5] 33 U. S. C. §1341 (4) ("...the licensee or permittee shall provide an opportunity for such certifying State...to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated.")

which in turn impacts the health of the Chesapeake Bay. Likewise, as explained in more detail below, all of these water quality protections imposed through conditions under the WQC could be interpreted by any federal permitting or licensing agency as outside the new limited scope under the *Proposed Rule* and thrown out altogether.

Under the *Proposed Rule*, any certification decision that would impose conditions on a project would need to be limited to only the "discharges" from the project. More specifically, the *Proposed Rule* would require that, for each condition, the certifying state or tribe provide the following:

1. A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements;
2. A citation to federal, state, or tribal law that authorizes the condition; and
3. A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.[6]

Moreover, conditions would only be considered "within the scope" of Section 401 if they implement specific provisions of the Clean Water Act or "EPA-approved state or tribal … regulatory program provisions."[7] Based on this, under the *Proposed Rule,* a state may not impose conditions that are based on broader water quality goals and other appropriate requirements of state law, such as groundwater protection provisions meant to protect surface waters, construction season restrictions meant to prevent landslides, impacts from soil erosion, impairment of riparian habitat, requirements for karst surveys and dye studies, maintenance of buffer or revegetation, protection of intermittent streams, compensatory mitigation under state law, and the list goes on. While these are very real water quality considerations for states and tribes to consider when reviewing the impacts of a proposed federally-licensed project, under the *Proposed Rule* the permitting and licensing agencies would have the authority to unilaterally remove any state or tribe imposed condition relating to these impacts. The rule does not even require the EPA to work with the state or tribe to remedy the condition.

If the *Proposed Rule* moves forwards as is, this provision would be a reversal of longstanding judicial precedent, including *American Rivers v. FERC*,[8] that have affirmed the broad ability states and tribes have to impose conditions related to the water quality impacts of any given project and the inability of the federal government to reject those conditions. Likewise, the

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[6] Proposed 40 CFR 121.8. Note that there is no basis in federal law for the third statement.

[7] Proposed 121.3, 121.1(p).

[8] 129 F.3d 99 (2nd Cir. 1997)(holding that the federal government cannot reject any certification conditions timely imposed by states or tribes).

limited ability for states to impose conditions under the *Proposed Rule* would go against the plain language of the Clean Water Act, which states "[a]ny certification provided under this section *shall* set forth any… other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit…" (emphasis added).[9] This language makes it pretty clear that the federal permitting authority does not have the authority to reject any state or tribe-imposed conditions.[10]

Recommendation: The *Proposed Rule* must remove any language related to limits on state or tribe-imposed conditions for federally-licensed projects. The invention of a restrictive definition of "water quality requirements" that bears no relationship to existing state and tribal practice nor to the term "any other appropriate requirement of State law" in section 401(d) itself, cannot stand.

We also ask that the EPA allow each state or tribe to come up with its own standard form and process for handling all projects that need water quality certifications under Section 401. EPA's suggestion that it may generate a federal standard form that states or tribes would be required to use just continues the trend of federal encroachment in an area that best belongs to the states and tribes. This would essentially only allow states and tribes to review every project in a vacuum -- and the vacuum would be completely orchestrated and manufactured by the federal government -- turning state authority on its head. Currently, a large majority of states already have standard applications for CWA Section 401 applicants. We agree that having an available state application puts applicants, the public, and state officials on notice for what to expect for under the state's 401 water quality review of any given project. But every state has specific water quality needs that are complex and would not be best captured by a federally mandated form.

3. Restricted Timelines for States and Tribes to Review WQC Applications

EPA's *Proposed Rule* further restricts state and tribe authority by recommending that the one-year clock for states to make a decision on a water quality certification begins when the state or tribe receives the initial request, even if an incomplete request was submitted.[11] Thus, the rule establishes one-year as the "absolute outer bound," regardless of the complexity of the case or

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[9] 33 U. S. C. §1341(d).

[10] *Id.* ("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 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 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.

[11] Proposed 40 CFR 121 III. E.

the lack of needed information provided by applicants. Currently, the one-year clock begins after the appropriate state agency receives a "complete application." State agencies have the authority to determine when the application is deemed complete. The EPA takes the preposterous position that the CWA "makes no mention of a state or tribe's authority to determine that a request is incomplete…" and therefore it would be "inappropriate" for states to require having all of the facts and relevant information before starting the clock. It's unclear how states can do their due diligence in ensuring that a project won't dramatically impact local water quality without having all the relevant information to make that determination. Further, the strict timeline under the *Proposed Rule* for a state or tribe to act on a certification request is not accompanied by any mechanism to extend the deadline.

The *Proposed Rule* grants the federal government substantial discretion (clearly unintended by the legislation's drafters) to impose shorter periods of time for state's to review projects. With this *Proposed Rule*, the EPA is forcing states to run a foot race but refuses to tell them where the finish line is or how long they have to get there until the race has already begun.

State authority to conduct these water quality certifications under the CWA is further usurped by the *Proposed Rule* which suggests that the *Hoopa Valley* decision made clear that states are not allowed to restart the one year clock -- even if an application is submitted to the state, then fully withdrawn due to incompleteness, then re-submitted again at a much later time.[12] This was the case in Maryland when Exelon submitted a severely incomplete WQC application to continue operating Conowingo Dam for another 50 years. The WQC process for Conowingo Dam ended taking many years because Exelon fully withdrew and resubmitted the WQC application multiple times because it could not pull together information that was adequate enough for Maryland's review process, especially given the complexity of the water quality issues arising from Conowingo Dam and the substantial length of the new license. Likewise, some of the conditions Maryland ultimately imposed on the WQC for Conowingo Dam were not directly related to the "discharge" from Conowingo Dam, but the millions of pounds of sediment and pollution backed up behind the Dam, which indirectly causes discharges every time it rains in the area -- which very much affect Maryland's overall water quality, including quantitative impacts to the Susquehanna River and the Chesapeake Bay.

Under the *Proposed Rule,* EPA also suggests that federal permitting agencies are authorized to determine, on behalf of the states or tribes, that the authority to issue a water quality certification

[12]The EPA even notes in the *Proposed Rule* that the D.C. Circuit made clear in its *Hoopa Valley* decision that it did not consider the possible legitimacy of an arrangement whereby an applicant may submit a new request in place of the old one as long as the new application was not substantially similar to the old one.

has been waived if a decision is not made within the deadline set by each federal agency.[13] This could cause a situation where a developer intentionally submits an incomplete application for a proposed project, then simply waits for the clock to toll so that the state's authority is then waived. Additionally, the *Proposed Rule* allows the federal government substantial discretion in imposing shorter periods of time for states to review certain types of projects.[14] It also would forbid states from even "requesting" that an applicant withdraw an incomplete application for the purpose of restarting or modifying a timeline.[15]

The *Proposed Rule* also says that a state denial or condition outside the newly restricted "scope" of 401 certification will be treated as a "constructive" failure or refusal of the state to act, resulting in a complete waiver of 401 as determined by the federal licensing or permitting agency.[16]

Recommendation: The EPA must amend the *Proposed Rule* to allow for the certifying state or tribe to extend the deadline to act under Section 401 if the state or tribe has not received all needed information in a timely manner. In the past, states have only 'paused' the one-year clock to address outstanding and unfulfilled requests for relevant information from project applicants. This is reasonable for states and tribes to request, given the complexity of certain projects and the need to receive all information in a timely manner in order to conduct a thorough review of any given project. In addition, state denials (including denials for incomplete information) or conditions cannot be treated as constructive waivers of review.

4. Conclusion

The *Proposed Rule* would give the EPA the discretion to reject any state-imposed WQC denials or conditions it deems "deficient," or beyond the scope of addressing direct discharges from projects that require a federal license.[17] The rule attempts to give the EPA the authority to deem "constructive waiver" of a WQC, if it deems that the state has acted outside of the new limited scope of certification, as defined under the *Proposed Rule*. Nowhere in the CWA does it grant the EPA such broad authority to make unilateral calls about a state or tribe's WQC. Robust

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[13] Proposed 40 CFR 121 III. E. ("Fail or refuse to act means the certifying authority actually or *constructively fails* or refuses to grant or deny certification, or waive the certification requirement, within the scope of certification and within the reasonable period of time… [a] certifying agency constructively fails or refuses to grant or deny certification when it *acts outside the scope of certification as defined in the proposed rule*.").

[14] Proposed 40 CFR 121 III. E.

[15] Proposed 121.4(f). Forbidding such a request, and apparently allowing a federal agency to determine whether the request had an improper "purpose" completely undermines state regulatory review processes.

[16] Proposed 121.1(h), 121.6, 121.7.

[17] Proposed 121.4(f). Forbidding such a request, and apparently allowing a federal agency to determine whether the request had an improper "purpose" completely undermines state regulatory review processes.

judicial precedent actually supports the opposite as this is the one chance for states and tribes to have a say in a federally licensed project that can and will impact local waterways.
The EPA seems to be paving a path for federal agencies to loom over the shoulders, and perhaps, introduce a not-so invisible hand into states and tribes Section 401 Certification decision-making process. This is unfortunate because the Clean Water Act is very explicit in giving broad authority to states to review and prevent major projects that would have a negative impact on state water quality. States have an explicit interest and knowledge in protecting their own waterways. This authority simply doesn't belong to the federal government.

The *Proposed Rule* puts further pressure on states and tribes to make hasty decisions and open the door to greater federal agency influence. By flooding state agencies and tribes with project proposals all at once, with varying deadline dates, offices with limited resources may feel compelled to lean on the federal agencies to aid in the decision making process, effectively circumventing the broad state authority under the Clean Water Act.

A common sentiment among observers of the *Proposed Rule* is that it rolls back standards to those held in 1986.[18] The standards from over 30 years ago were the best that we could do with the scientific knowledge and experience that we had in that era. Since then our understanding of the ongoing threats to water quality has advanced exponentially. Rather than capitalizing on the decades of gained knowledge and further advancing water quality efforts, the EPA has chosen to exert extraordinary pressure on state and tribal agencies in order to blindly authorize projects that could be detrimental to public health for decades to come. In doing so, the EPA seems to be paving a path for federal agencies to loom over the shoulders of states and tribes Section 401 Certification decision-making process. Any honest and full review of the Clean Water Act would recognize that the plain language of the bill gives broad authority to states and tribes to review and prevent major projects that would have a negative impact on the water that flows within their boundaries.

States and tribes have explicit interest, knowledge, and experience in protecting their own waterways. Rather than trusting the states and tribes in that role, the *Proposed Rule* opaquely forces them to 1) waive their Section 401 certification, or 2) choose between a) granting the

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[18] *See* Juliet Eilperin and Brady Davis, *Administration finalizes repeal of 2015 water rule Trump called 'destructive and horrible'*, Washington Post, Sept. 11, 2019 ("On Thursday, the Trump administration plans to scrap the Obama-era definition of what qualifies as 'waters of the United States'... returning the country to standards put in place in 1986"); Jess Nelson, *Trump Repeals Obama-Era Clean-Water Protections*, Miami New Times, Sept. 13, 2019 ("'This is a step in the wrong direction,' says Brett Hartl, government affairs director at the Center for Biological Diversity. 'It resets us to a set of regulations from 1986.'"); Stephanie Ebbs, *Trump EPA announces repeal of Obama-era rule protecting rivers and wetlands*, ABCNews, Sept. 12, 2019 ("The Environmental Protection Agency on Thursday announced the official repeal of the Obama-era Waters of the United States rule...returning the country to water standards from 1986.").

proposed project without the benefit of a full analysis, or b) deny the proposed project only for the Federal agency to overrule the decision.

We ask that the EPA reconsider its current course of action with the *Proposed Rule*. Rather than looking in the rearview mirror for answers to today's problems, we encourage the EPA to utilize the full breadth of scientific data and experience at their disposal to protect water quality for the next 30 years and beyond.

Sincerely,

Betsy Nicholas
Executive Director
Waterkeepers Chesapeake

Katlyn Schmitt
Staff Attorney
Waterkeepers Chesapeake

Kathy Phillips
Assateague Coastkeeper

Brent Walls
Upper Potomac Riverkeeper

Alice Volpitta
Lead Water Quality Scientist
Blue Water Baltimore

Arundel Rivers Federation
Jesse Illiff, *South Riverkeeper*
Jeff Holland, *West & Rhode Riverkeeper*

ShoreRivers
Elle Bassett, *Miles-Wye Riverkeeper*
Matt Pluta, *Choptank Riverkeeper*
Tim Trumbauer, *Chester Riverkeeper*
Emmett Duke, *Sassafrass Riverkeeper*