WUWC
WESTERN URBAN WATER COALITION

August 5, 2022

Submitted via //www.regulations.gov/
(Docket No. EPA-HQ-OW-2022-0128)

Environmental Protection Agency
1301 Constitution Avenue NW
Washington, D.C. 20004

RE: Comments on "Clean Water Act Section 401 Water Quality Certification Improvement Rule," 87 Fed. Reg. 35318 (June 9, 2022), Docket No. EPA-HQ-OW-2022-0128

The Western Urban Water Coalition (WUWC) [1] appreciates this opportunity to comment on the Environmental Protection Agency's (EPA) proposed rule regarding the manner in which states and tribes process section 401 water quality certification requests under the Clean Water Act (CWA). 87 Fed. Reg. 35318 (June 9, 2022). The proposed rule suggests reversing provisions from the 2020 rule[2] in order to be more consistent with the text of the 1972 CWA and support a more "efficient and predictable" certification process, consistent with the CWA's goal of water quality protection and cooperative federalism. As discussed in these comments, WUWC supports EPA's efforts to clarify certain 401-related processes, including to improve timeliness of certification decisions. WUWC supports the elements of the proposed rule that would provide clear processes and regulatory certainty to reduce future conflicts. WUWC is concerned, however, about some elements of this proposed rule that broaden the scope of what may be considered in the context of a certification decision, because such changes reverse efficiencies achieved in the 2020 rule in a way that could substantially increase costs to WUWC members and potentially result in significant job losses in the communities they serve. As the EPA reviews and reforms section 401 of the CWA, WUWC provides the following comments and recommendations to help improve CWA procedures and EPA's goal of reaffirming principles of the 1972 CWA and supporting a more "efficient and predictable" certification process.

[1] WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (Eastern Municipal Water District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); **Colorado** (Aurora Water, Colorado Springs Utilities, and Denver Water); **Nevada** (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); **New Mexico** (Albuquerque Bernalillo County Water Utility Authority); **Utah** (Salt Lake City Public Utilities); and **Washington** (Seattle Public Utilities). Seattle Public Utilities is not participating in the submission of these comments on behalf of WUWC.

[2] *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42210 (July 13, 2020) (referred to as the "2020 rule").

Introduction

WUWC was established in 1992 to address the West's unique water supply and water quality challenges that threaten the economic sustainability and growth of the western population centers. WUWC consists of the largest urban water utilities in the West, which together serve more than 40 million urban water consumers in 18 major metropolitan areas across seven states. Some of these utilities also operate wastewater, stormwater, natural gas, and electric, including hydroelectric, facilities for their customers.

WUWC members are public utilities dedicated to providing a reliable, high-quality urban water supply for present and future generations. As operators of urban water supply systems, WUWC members serve the health and safety, environmental, and economic needs of their communities around the clock, every day of the year. WUWC advocates for effective and practicable approaches to the implementation of environmental protection programs in a time when water sources are being diminished by climate change and other factors and the development of sustainable supplies is vital. The replacement of aging water systems and the development of new water infrastructure is critical to complement the significant water conservation steps already being taken by western municipal water users to meet the challenges of climate-related events like droughts, wildfires, and floods, as well as the public safety threats of seismic events and facility failures. Regulatory reform, particularly pertaining to the CWA, is needed to promote the sustainability and resiliency of water supply infrastructure and improve and protect the West's critical urban water supplies.

WUWC has historically been, and continues to be, in full support of the goals of the CWA. WUWC members have a strong interest in clean water for municipal water supplies and in the regulatory processes protecting water quality. Section 401 of the CWA is of great significance to WUWC members because, as municipal water providers, members devote considerable resources to meet growing water demands in the western United States, including building the most cost-effective and efficient systems for water supply and related infrastructure. In addition, many of our members are multi-service utilities who also provide stormwater and wastewater services to our customers that trigger regulatory oversight. WUWC members are advocates for predictability and certainty in the section 401 certification process.

Throughout its 29-year history, WUWC has extensive experience working with EPA and various federal agencies on initiatives related to the CWA. With regard to the CWA, we have appeared before congressional committees, met with federal agencies, participated in workshops and roundtable discussions, commented on proposed EPA-specific guidance and rulemaking, and been a party to litigation. And, of course, WUWC members engage regularly with the federal agencies in obtaining authorizations for facilities and operations requiring federal approval on or adjacent to federal lands and waters. As a result, WUWC members are active collaborating partners with the federal agencies and a variety of stakeholders. WUWC is prepared to assist EPA in this regulatory process, most specifically on how an improved section 401 rule can support water providers in the West while protecting water quality. The comments set forth in this letter are offered in furtherance of these general goals.

Specific Comments

WUWC understands EPA's concerns that some provisions in the 2020 rule may be inconsistent with the 1972 CWA, and we support EPA's efforts to create a more "efficient and predictable" certification process. WUWC supports EPA maintaining procedural clarity on the one-year timeframe to act on certification requests as described in the 2020 rule. However, some of the proposed changes unduly broaden the scope of permissible 401 certification conditions in a manner that stands to substantially increase utility costs and increase water supply uncertainty. These risks could be reduced by stating clear limitations on the scope of States' certification authority, which the proposed rule currently lacks.

Specifically, WUWC opposes broadening the scope of section 401 in a manner that creates opportunities for inconsistencies between states or applications by (1) not specifying the scope of activities subject to 401 certification; (2) increasing uncertainty as to what discharges are considered; and (3) permitting States to condition the "activity as a whole," including generically, based on wholly undefined "other requirements" of state law. Overall, WUWC discourages EPA from granting states unfettered authority to add conditions spuriously related to water quality and in potential conflict with areas of exclusive Federal jurisdiction to section 401 certifications and encourages EPA to outline statutory limits on states' certification authority.

A. Scope of Section 401 Certification

WUWC opposes the proposed rule's broadening of what States may consider during the certification process. Ultimately, the proposed rule's scope, which would condone certifying State agencies conditioning the "activity as a whole" with undefined "other requirements" of state law, inserts additional opportunities for expansive and inconsistent interpretations of the scope of a project's impacts and consequent certification conditions. Providing such an open-ended and undefined scope will predictably lead to inconsistencies in the implementation of the proposed rule from state to state, and potentially from application to application within each state that holds primacy for section 401 certifications. These implementation inconsistencies pose an economic uncertainty to project proponents that ultimately increase costs for the communities that WUWC members serve. Critically, a more expansive interpretation of section 401, one untethered from any nexus or proportionality to the water quality impacts of the regulated discharge, may cause significant and unmitigable water supply losses in large urban centers. Failure to provide a clearly limited certification scope also invites litigation, either from regulated entities that believe a state has exceeded its authority, or from project opponents seeking to require the state to impose additional conditions in their certifications. Because of the significantly increased socioeconomic impacts such an open-ended and ill-defined scope may harbor, WUWC encourages EPA to develop specific procedures for certifying authorities to follow in determining if there is a potential for discharge and opposes EPA broadening the scope of section 401 to apply to any potential discharge, as well as to allow state certifying agencies to condition the project as a whole or in reliance on ill-defined "other requirements" of state law.

1. Potential for a Discharge

In the proposed rule, EPA is not proposing a "specific process or procedure for project proponents, certifying authorities, and/or Federal agencies to follow in order to determine whether or not a federally licensed or permitted activity may result in a discharge and therefore

require section 401 certification." 87 FR 35318, 35328. Instead, EPA states that certifying authorities are well-versed in the practice of determining which activities may result in a discharge and encourages project proponents to engage in early discussions with certifying authorities and Federal agencies to determine whether the federally licensed or permitted activity will require section 401 certification.

WUWC encourages EPA to establish a specific process to follow to determine if a federally licensed or permitted activity may result in a discharge and require section 401 certification. A process would provide for increased consistency in the implementation of the 401 program across the country, and WUWC supports EPA providing clarity on that process.

2. Discharges that Trigger Section 401 Certification

EPA proposes eliminating the requirement from the 2020 rule that restricted the scope of what states and tribes could consider in section 401 certification reviews to discharges from point sources. The proposed rule eases that restriction and states that a point source discharge triggering section 401 does not require the addition of pollutants, and that either a point source discharge, or the *potential* for one, triggers section 401. EPA asserts that the scope of certification under the 2020 rule restricted the ability of states and tribes to protect against most water quality-related impacts and impaired their ability to protect valuable water resources.

We disagree with this proposed change because it goes beyond the plain language and intent of section 401 in relation to point source discharges and their impact on the environment. As an example, under the proposed rule, a state may consider cumulative addition of pollutants from reasonably foreseeable future actions as well as hydrologic changes from a proposed project that could create the potential for a point source discharge to trigger section 401. That is too uncertain and broad. The 2020 rule had narrowed the scope of section 401 certification to direct impacts of a project's point source discharge, leading to increased certainty and predictability of the certification process, streamlining the certification process and focusing on the greatest potential discharge sources while also affording reasonable water quality protections.

3. Considering the "Activity as a Whole"

EPA proposes adopting a scope of certification first suggested by the majority opinion in *PUD No. 1 of Jefferson City v. Washington Dept. of Ecology*, 511 U.S. 700 (1994), which opined that certifying authorities may be allowed evaluate and place conditions on the "project in general" or the "activity as a whole." The 2020 rule restricted certifying authorities to considering potential water quality impacts from a project's point source discharges and not the much broader "activity as a whole" scope of review.

WUWC cautions against adopting a broad scope of certification based on whether the activity as a whole will comply with all applicable water quality requirements. Without further guidance, this could add considerable uncertainty, unpredictability, and delay into the certification process, potentially create inconsistencies in application, and result in onerous conditions on 401 certification that exceed a state's or tribe's water quality jurisdiction, and would therefore be unlawful. To prevent these future uncertainties and inconsistencies, we recommend that the proposed rule adopt a clear and reasonably limited scope for certification conditions.

B. Definition of "Reasonable Period of Time"

Section 401 requires states and tribes to decide on certification within a "reasonable period of time," not to exceed one year. The proposed rule allows states to negotiate what a reasonable period of time is after an application is received and use either the EPA's definition or what the certifying authority has defined in accordance with its applicable submission procedures. EPA proposes retaining the requirement from the 2020 rule for a project proponent to request a pre-filing meeting with the certifying authority at least 30 days before a water quality certification request, but grants certifying authorities the flexibility to waive or shorten the time requirement. EPA suggests that this will support early engagement and coordination between certifying authorities and project proponents.

WUWC supports elements of the rule that provide a clear process and allow the federal permitting agency to provide timely permit decisions to the public. WUWC members have projects that could benefit from the ability to accurately plan around the permitting timeframe, so WUWC is in favor of retaining the one-year deadline to act on certification requests included in the 2020 rule. WUWC members are concerned that the proposed rule would grant too much leeway in deciding when the one-year clock starts. Lack of clarity on when the formal review process starts may vary by certifying authorities where decisions on timing could be made on a lack of resources to process 401 certification applications. This could, in turn, conflict with or significantly delay competing Federal approval timelines. Lack of clarity may result in uncertainty in the schedule, delay in processing 401 certifications, and could be more costly to project proponents. If states can delay 401 certifications indefinitely, they could use that authority as leverage to try to exact commitments from permittees they could not otherwise lawfully impose. WUWC encourages EPA to keep the one-year timeline to act on certification requests from the 2020 rule and maintaining a clear start date so applicants know when the one-year clock begins to run.

C. State Authority to Impose Conditions and Scope of Federal Agency Review

The proposed rule narrows the scope of Federal authority over state and tribal certifications and enhances state and tribal authority to impose conditions on section 401 certificates. The proposed rule defines water quality requirements as "any limitation, standard, or other requirements under 301, 302, 303, 306, and 307, any federal and state or tribal laws or regulations implementing those sections, and **any other water quality-related requirement of state or tribal law**." This additional language (bolded) added to the rule is exceptionally ill-defined and, therefore, broad in scope and could add considerable expense to urban water providers and result in significant water supply losses. WUWC asks that EPA clarify and revise this language to list all permissible categories of requirements that states may rely upon to issue certifications, as well as to revise the language in the proposed rule to specify that these requirements only apply to "any other **surface** water quality-related requirements of state or tribal law."

D. Inclusion of Continuing Enforcement Authority

In light of FERC's exclusive jurisdiction over hydropower projects, WUWC would also caution EPA against suggesting certifying states retain enforcement authority over certification

conditions they issue on these projects, as doing so would only lead to further confusion and potential conflicts between states, EPA, and FERC.

The California State Water Resources Control Board ("State Water Board") recently asserted in litigation that "Section 401 does not limit the scope or content of what conditions a State may deem necessary to comply with water quality standards or other appropriate requirements of state law." Opposition to Petitioners' Motions, *Turlock Irrigation Dist. v. State Water Res. Control Bd.*, No. CV63819, at 28 (Super. Ct. Cal. Apr. 29, 2022). True to that assertion, in the past few years, the State Water Board has issued multiple onerous certifications in connection with hydropower license applications, each certification containing dozens of conditions that are arguably untethered from, and out of proportion to, the water quality impacts of the discharge or activity the State Water Board is supposed to be conditioning. The potential socioeconomic and environmental impacts from this string of recent certifications are calculated in the tens of billions of dollars and could potentially lead to significant water supply losses in large urban centers during times of drought—which are unfortunately becoming more common and severe in the arid West.

Conclusion

WUWC supports EPA and states continuing to find means to improve water quality while also providing adequate protections for urban water uses. However, WUWC suspects courts would disagree that Congress intended for section 401 to provide states the open-ended and expansive certification authority that some states assert they have and that EPA proposes to "restore" to states in the proposed rule. The proposed rule would provide more regulatory certainty, reduce future conflicts, and may be more likely to survive judicial scrutiny were EPA to outline the statutory limitations to states' certification authority. Leaving this authority open-ended could (1) lead to the sorts of unintended social and environmental consequences described above, (2) threaten to swallow federal agencies' jurisdiction over federally permitted and licensed projects, and (3) more frequently lead to the decommissioning or abandonment projects where licensees or permittees determine the impacts and costs of certification conditions exceed the benefits of such projects.

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact me at (303) 739-7378 or mbrown@auroragov.org, or the WUWC national counsel, Don Baur at 202-654-6234 or dbaur@perkinscoie.com and Meredith Weinberg at 206-359-3229 or mweinberg@perkinscoie.com.

Very truly yours,

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Chairman

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