October 21, 2019

Laura Kasparek
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Response to Proposed “Updating Regulations on Water Quality Certification,” 84 Federal Register at 44,080 (August 22, 2019); Docket ID No. EPA-HQ-OW-2019-0405

Dear Ms. Kasparek:

The Associated General Contractors of America (AGC) appreciates the opportunity to comment on the U.S. Environmental Protection Agency’s (EPA) proposal to update the regulations on water quality certification under the Clean Water Act (CWA) (the “proposal”). The need for, and process for, obtaining water quality certifications affects several permitting programs for activities that AGC members perform in the course of constructing projects of all types.

AGC understands the importance of recognizing the states’ primary responsibilities in water pollution prevention and land use decisions under the CWA; and likewise, the association appreciates the difficulty of achieving balance between federal and state or tribal government roles. In prior communications to the Administration related to regulatory reform, AGC highlighted opportunities to streamline the environmental review and permitting processes without jeopardizing environmental quality or input from stakeholders involved in the process. Reducing uncertainty, duplication and delay are valuable tools to advance critical infrastructure projects that may be bogged down with environmental approvals. AGC has identified CWA section 401 certification as one of the roadblocks to vital infrastructure because – based on industry reports and observations – the current process is ill-defined, confusing in scope, and lacking clear deadlines.

AGC agrees with the preamble to the proposal that the current, out-of-date regulations reflects the language and strategy of prior water policy, which Congress changed in 1972 with a new focus on controlling point source discharges through the CWA. EPA’s inaction on updating its own

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2 84 FR 163 at 44,084.
regulations to reflect the evolution of CWA law has created confusion, forcing project proponents to turn to the courts to reconcile the differences. Certification is as an important check to ensure discharges to federal waters, authorized by federal permits, do not compromise a state’s water quality requirements. However, the 401 process has become an unchecked and at times far-reaching review akin to that under the National Environmental Policy Act—stretching outside the scope of the CWA to incorporate other environmental and cultural concerns.

AGC generally supports EPA’s proposal to update its 401 regulations and provide clear parameters for water quality certifications. EPA’s proposed rule seeks to refine the scope of the certification review to those water quality concerns at the “point source” and to ensure the process adheres to a defined timeline. The current process can be protracted and bogged down by an overly broad scope resulting in unrelated and/or onerous conditions placed on permits. The proposal will add focus and clarity to the process. Providing regulatory clarity is one step in reducing roadblocks in the environmental review and approval process for infrastructure projects.

AGC is the nation’s leading construction trade association. It dates back to 1918, and it today represents more than 27,000 construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, D.C., and Puerto Rico, AGC contractors are engaged in the construction of the nation’s public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

I. BACKGROUND

AGC members perform many construction activities on land and water that may require section 401 water quality certification before proceeding. State water quality certifications are an integral part of the permitting process for work in or near “waters of the United States” (WOTUS). Indeed, project proponents need a certification from the state (or tribal government) before a federal agency can issue a permit or license for an activity that may result in a discharge to WOTUS. “Federal licenses and permits most frequently subject to §401 water quality certification include CWA §402 (stormwater) permits issued by EPA, §404 (dredge and fill) permits issued by the Corps, Federal Energy Regulatory Commission (FERC) hydropower licenses, and Rivers and Harbors Act (RHA) §9 and §10 permits issued by the Corps.”

During a state’s review of a proposed construction activity, the state must either waive, grant (with or without conditions), or deny the 401 water quality certification before the activity can commence. The state can impose conditions on the grant of certification that the federal agency then incorporates into the federal permit. Effluent limitations and other limitations and monitoring requirements are examples of the types of conditions referenced under section 401.

For example, construction work that involves the discharge of dredged material or the placement of fill material in a WOTUS cannot legally commence without authorization from the federal

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3 Clean Water Act Section 401 Water Quality Certification: A Water Quality Projection Tool for States and Tribes (April 2010 interim guidance, withdrawn); also referenced in the proposed rule 84 FR 163 at 44,085.
government, which takes the form of a CWA Section 404 permit (and may require additional permissions and reporting duties under other CWA programs such as a stormwater permit). That federal permit cannot proceed without a 401 certification. Currently, and as further described below, AGC members report that state-imposed conditions can reach beyond the point of discharge to address the activity as a whole; and federal agencies cannot choose which conditions to accept.4

II. PROPOSED CHANGES TO SCOPE AND CONDITIONS

EPA proposes that the scope of certification be “limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.” As discussed above, the certifying authority imposes conditions to ensure the proposed activity would meet water quality requirements. EPA’s proposal outlines requirements that a grant of certification with conditions should include: “(1) a statement explaining why the condition is necessary . . . (2) a citation to federal, state, or tribal law that authorizes the condition; and (3) . . . whether and to what extent a less stringent condition could satisfy applicable water quality requirements.”6 Furthermore, EPA proposes that the federal agency can exclude/reject conditions that are outside the scope of the certification (i.e., address concerns outside of water quality) or that do not meet the requirements above.7

AGC supports the proposed changes to the scope of certification. This action should align the 401 process with the rest of the CWA programs and set manageable parameters for the certification process. For the same reasons, AGC supports the clarification in the proposal that the certification, and any resultant conditions certifying authorities would place on federal permits, should be related to water quality. Furthermore, the requirement to cite each condition back to a legal authorization will help ensure that the conditions are actionable and enforceable as well as clearly demonstrate their relationship with applicable state or tribal government requirements. AGC also supports a means to reject conditions that are outside the scope of the certification. Other statutes and processes currently address non-water quality related concerns.

A review of approximately a dozen state programs, as well as AGC member input, has found that state use of conditions is a frequent occurrence and for some it is a standard practice. Some states have an established set of conditions that apply to all certifications as a threshold and will consider additional conditions on a case-by-case basis. States will also draft a set of general conditions for each of the nationwide permits (the “general” permits under section 404) when the U.S. Army Corps of Engineers issues new versions. The states’ reliance on conditions for certification underscores the importance of establishing clear parameters for their development, as well as the need for conditions to be firmly within the scope of the certification.

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4 The preamble to the proposed rule (84 FR 163 at 44,080) outlines the current 401 process summarized here as does the Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (guidance dated June 7, 2019) and the recently withdrawn Clean Water Act Section 401 Water Quality Certification: A Water Quality Projection Tool for States and Tribes (April 2010 interim guidance, withdrawn).
5 84 FR 163 at 44,120.
6 Ibid.
7 84 FR 163 at 44,121.
The review of state programs has found that, in addition to imposing effluent limits or monitoring, conditions can include a range of operational practices, procedures and protocols, for example:

- Time of year adjustments,
- Dredging windows,
- Mitigation,
- Minimum vegetation requirements,
- Minimal clearing requirements,
- Fuel, oil and spill requirements,
- Pre-construction surveys and follow-up consultations for species,
- Protection of listed species,
- Stabilization, and
- Stormwater demonstrations.

AGC members also indicated that it is not uncommon for states to incorporate other requirements into their conditions that may be unrelated or without a clear connection to water quality concerns. States will incorporate as a condition an unrelated avoidance and minimization practice being considered for the activity, such as the construction of wildlife crossings or rehabilitation of existing barriers (e.g., moving existing fences). States will also incorporate considerations to public trust (natural beauty) or wildlife, such as access restrictions to deer wintering areas. Conditions may also require staffing or hiring of professionals, such as having a qualified biologist onsite during vegetation clearing activities. The preamble to the proposal also noted examples such as the construction of biking or hiking trails or the construction of public access for fishing.\(^8\)

AGC supports the proposal’s approach as it would identify troublesome conditions in advance or modify conditions that may not have been adequately considered. For example, an AGC member highlighted a prohibition that no more than two piers can be worked on at one time in addition to monitoring to ensure the work does not impact fish passage. The AGC member indicated the “two pier” restriction increases the time to complete the job, exposing the habitat to impacts for a longer period of time. The member maintains they could work at more than two piers and still meet the limits. Specifically, the proposal recommends pre-application meetings that would be helpful for identifying areas, such as this example, where the condition may be troublesome to implement. The proposal also provides the option for the state to correct a condition that the Federal agency may otherwise reject, if time remains within the reasonable timeframe.

Without a database of conditions to consult, it is impossible to determine how commonly states incorporate unrelated conditions. However, moving forward, the proposal adds much needed clarity on the appropriate scope of the water quality certification and any associated conditions.

### III. CHANGES TO CERTIFICATION TIMEFRAME

AGC has heard from members that the current process delays projects, in part because of the overly-broad scope of the review and conditions, but also because the current process does not have a standard or clearly defined starting point. “The amount of time allowed for action on a

\(^8\) 84 FR 163 at 44.094.
certification application is determined by the Federal agency issuing the license or permit, while the certifying agency . . . starts the timeframe clock.” The time provided is not to exceed one year, but the Federal agency may identify a shorter response period. However, the current regulations do not provide direction on when the timeframe clock is to start. The certifying authorities have instituted their own processes for what constitutes a complete application and can request additional information from the project proponents, stretching the process out indefinitely and far beyond the one year that is the maximum time limit for a response.

The proposed rule outlines a process, highlighted below, that would appear to move projects along through the certification with more certainty regarding time constraints.

- “Within 15 days of receiving notice of the certification request from the project proponent, the Federal agency shall provide… information to the certifying authority: (1) the applicable reasonable period of time… (2) the date of receipt of the certification request; and (3) the date upon which waiver will occur if the certifying authority fails or refuses to act on the certification request.”
- Requests to extend the reasonable period of time must be in writing.
- “The certifying authority is not authorized to request the project proponent to withdraw a certification request or to take any other action for the purpose of modifying or restarting the established reasonable period of time.”
- “The certifying authority shall have 30 days from receipt to request additional information from the project proponent.” That request requires a deadline with which the project proponent must comply. That deadline should allow for sufficient time to review and act on the additional information within the established reasonable period of time. Additional information requests must be actionable within the established reasonable period of time and related to the scope of certification.
- If the Federal agency determines that the certification decision or the conditions do not satisfy the requirements prior to the end of the reasonable period of time, the Federal agency may offer the certifying agency the opportunity to remedy the identified deficiencies.

AGC generally supports the proposed changes to the timeframe for certification review and response. AGC has been critical of environmental review and permitting processes that create situations where a project is in an approval “treadmill” and it cannot move forward. This has been seen in section 404 permitting and in NEPA reviews—

- Where the data to support a proposed action can grow stale before the action is approved,
- Repeated requests for additional information or simple application mistakes can add substantial time delays, or
- A small change to a project can start the process over.

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10 See 84 FR 163 at 44,120-44,122 for details on the process timeframe.
IV. CONCLUSION

In conclusion, AGC and its members are supportive of the proposed rule. AGC has requested the Administration address environmental permitting and approval delays. The proposal is a long-overdue effort to bring the 401 program into alignment with the CWA. For nearly fifty years, the courts have been trying to fill the gaps where the EPA’s regulations did not provide direction for project proponents and certifying authorities. Fine-tuning the scope of the review and providing a clear start and end to the review timeframe, as EPA has done in this proposal, will help streamline the process and allow for allocation of resources to the most complex of requests.

AGC appreciates this opportunity to provide recommendations on behalf of its construction industry member companies. If you have any questions, please contact Melinda Tomaino directly at melinda.tomaino@agc.org or (703) 837-5415.

Respectfully,

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Leah Pilconis  
Associate General Counsel, Construction and Environmental Risk Management