October 21, 2019

New Civil Liberties Alliance

Andrew Wheeler
Administrator of the Environmental Protection Agency
Attention: Oceans, Wetlands, and Communities Division, Office of Water
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: *Updating Regulations on Water Quality Certification*
Docket ID No.: EPA-HQ-OW-2019-0405

Dear Administrator Wheeler:

The New Civil Liberties Alliance ("NCLA") submits the following commentary in response to the Environmental Protection Agency's ("EPA" or "Agency") proposed rule related to Section 401 of the Clean Water Act ("CWA" or "Act") entitled "*Updating Regulations on Water Quality Certification*," 84 Fed.Reg. 44080 (August 22, 2019) ("Proposed Rule"). NCLA sincerely appreciates this opportunity to provide comments on the recent Proposed Rule. As an initial matter, however, NCLA would like to commend the Agency on its decision to update and revise the Section 401 regulations, thereby voiding what has become an effort by some states to use the CWA certification process to address policy concerns outside of and tangential to the water quality framework.

I. STATEMENT OF INTEREST

NCLA is a nonprofit civil rights organization founded to defend civil liberties against unlawful administrative power through original litigation, amicus curiae briefs, the filing of regulatory comments, and other means. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the due process of law, the right to trial by jury, the right to live under laws made by the nation's elected lawmakers rather than by prosecutors or bureaucrats, and

the right to be tried in front of an impartial and independent judge whenever the government brings cases against private parties.

NCLA defends civil liberties by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different type of government—a type, in fact, that the Constitution's foundation and design sought to prevent. This unconstitutional and often unconstrained administrative state within the Constitution's United States violates more rights of more Americans than any other aspect of American law, and it is thus the focus of NCLA's efforts.

Even when NCLA has not yet brought a suit to challenge an agency's unconstitutional exercise of administrative power, it encourages agencies themselves to curb the unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to, comply with, and enforce the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act ("APA") and with the Constitution.

II. COMMENTS ON PROPOSED RULE

The Summary published in the Federal Register related to the Proposed Rule lays out the following background and purpose:

> The [EPA] is publishing for public comment a proposed rule providing updates and clarifications to the substantive and procedural requirements for water quality certification under Clean Water Act (CWA or the Act) section 401. CWA section 401 is a direct grant of authority to states (and tribes that have been approved for 'treatment as a state' status) to review for compliance with appropriate federal, state, and tribal water quality requirements any proposed activity that requires a federal license or permit and may result in a discharge to waters of the United States. This proposal is intended to increase the predictability and timeliness of section 401 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures.

84 Fed.Reg. 44080.

"Congress enacted section 401 of the CWA to provide states and authorized tribes with an important tool to help protect water quality of federally regulated waters within their borders in collaboration with federal agencies." *Id.* at 44081. The CWA requires an applicant for a federal license or permit for an activity that may result in a discharge to waters of the United States to provide the federal agency with a Section 401 certification. Such certification is provided by the states in which the discharge originates and, upon issuance, declares that the discharge will comply with the CWA (including water quality standards).

Section 401 purportedly grants to states two distinct powers. The first indirectly allows states to deny federal permits or licenses by withholding the certification as per the purpose of the Act. The second allows states to impose conditions on federal permits by placing limitations on the certifications granted, again, as per the purpose of the Act.

Section 401 applies to a variety of projects, including hydropower projects seeking licensing from the Federal Energy Regulatory Commission ("FERC"), and dredge-and-fill activities in waters of the United States as overseen by the U.S. Army Corps of Engineers (as per Section 404 of the CWA), among others. Such projects, however, often have interstate (as opposed to just intrastate) impacts, thereby implicating interstate commerce and creating other concerns in those circumstances under which a state withholds the certification requested or imposes onerous and burdensome conditions on such projects.

Certain states have been relying on Section 401 as a mechanism to address a wide range of "impacts" including in relation to matters outside of the water quality context. Such states have also sought to indefinitely delay projects by refusing to timely issue Section 401 certifications. These actions have impacted and will continue to impact the rights of other states, which situation has in

some cases become simply untenable. Individual states should not be allowed to use Section 401 in order to impose a certain ideology on their neighbors.

EPA through its proposed rulemaking has acknowledged these dual problems, noting that "the most challenging aspects of section 401 concern the scope of review and action on a certification request, and the amount of time available for a certifying authority to act." 84 Fed.Reg. 44093. EPA, in other words, has now recognized that certain states have been acting in a manner that is clearly contrary to the intent and purpose of Section 401. The Proposed Rule is designed to address those specific concerns.

EPA has emphasized the importance of these state-to-state issues in the preamble to the Proposed Rule identifying cases where a state used Section 401 in a manner that ultimately interfered with interstate commerce (*see* 84 Fed.Reg. 44087), or where a state used the Section 401 certification process to impose non-water-quality conditions on projects being evaluated (*id.* at 44089). EPA has requested commenters to specifically address whether the Proposed Rule "appropriately balance[s] the scope of state authority under section 401 with Congress' goal of facilitating commerce on interstate navigable waters, and whether they define the scope in a manner that would limit the potential for states to withhold or condition certifications such that it would place undue burdens on interstate commerce." NCLA believes that EPA has struck an "appropriate balance" in that regard. NCLA, for example, agrees with the dissenting opinion issued in *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700, 726-727 (1994) ("*PUD No. 1*") (as discussed in the Preamble to the Proposed Rule), that "it is reasonable to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while section 401(d) permits a State to place conditions on a certification to ensure compliance of the 'the applicant,' those conditions must still be related to discharges." (Internal

quotation marks omitted). 84 Fed.Reg. 44089-44090. NCLA supports EPA's efforts to repeal any prior guidance or regulations that are contrary to this common-sense conclusion.

EPA has also rightfully recognized that the Court's reliance on *Chevron* deference in *PUD No. 1* was entirely misplaced in the Section 401 context without first identifying an ambiguity in the statute, and while ignoring the fact that EPA's own regulations at the time only spoke in terms of "discharges." 511 U.S. 728, 84 Fed.Reg. 44090. It is imperative that EPA ensures that there are no ambiguities in its Section 401 regulations in order to avoid this issue entirely.

NCLA appreciates the fact that EPA understands the need to "update its regulations to provide a common framework for consistency with CWA section 401 and to give project proponents, certifying authorities, and federal licensing and permitting agencies additional clarity and regulatory certainty." 84 Fed.Reg. 44081. NCLA also agrees that "[r]egulatory consistency across both federal and state governments with respect to issues like timing, waiver, and scope of section 401 reviews and conditions will substantially contribute towards ensuring that section 401 is implemented in an efficient, effective, transparent, and nationally consistent manner and will reduce the likelihood of protracted litigation over these issues." *Id.* at 44083-44084.

NCLA also believes that it is important for EPA to recognize that the meaning of the words used in the CWA must be interpreted with reference to what they meant when the statute was adopted. As recently stated by the United States Supreme Court in *New Prime Inc., v. Oliveria*, 139 S.Ct. 532, 539 (2019):

> In taking up this question, we bear an important caution in mind. [I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute. *Wisconsin Central Ltd. v. United States,* 585 U.S. ——, ——, 138 S.Ct. 2067, 2074, 201 L.Ed.2d 490 (2018) (quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)).

> See also *Sandifer v. United States Steel Corp.,* 571 U.S. 220, 227, 134 S.Ct. 870, 187 L.Ed.2d 729 (2014). After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands. *INS v. Chadha,* 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). (Internal quotation marks omitted).

No agency has any inherent power to make law. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress, and "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). This is a constitutional barrier to an exercise of legislative power by an agency. Further, "an agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, even if an agency could constitutionally exercise legislative power, it cannot purport to bind anyone without congressional authorization.

In summary, EPA's authority is defined by Congress. A state's certification authority under Section 401 has also been defined by Congress, primarily in relation to the purpose of the CWA when it was passed. States do not have the power to use Section 401 as a mechanism to adopt and impose a certification regime or requirements that are outside of the purview of the Act to address unrelated issues or to hinder other states from moving their goods or developing their projects.

It is for the foregoing reasons that NCLA supports EPA's decision to interpret "the scope of section 401 as protecting the quality of waters of the United States from point source discharges associated with federally licensed or permitted activities by requiring compliance with the CWA and EPA-approved state and tribal CWA regulatory program provisions." 84 Fed.Reg. 44093. NCLA also supports EPA's decision to return to the foundation and purpose of the CWA, and the Section 401 certification process, to "conclude that the scope of section 401 review or action must be limited

to considerations of water quality." *Id.* at 44094. Any other interpretation runs afoul of the CWA and the concept of federalism.

EPA has also correctly confirmed that the timeframe for certification analysis and decision must by necessity be bounded by reasonableness. *Id.* at 44107-44110. It is simply unfair for states to essentially deny a project by refusing to act on the certification requests. It is reasonable for states to respond to such requests within one year of receipt, a conclusion that clearly comports with Congressional intent.

III. CONCLUSION

NCLA commends EPA's efforts to provide more certainty and stability in relation to implementing Section 401 of the CWA. NCLA also appreciates EPA's recognition that neither the Agency—nor the states responsible for issuing Section 401 certifications—are entitled to rewrite the CWA to pursue agendas and issues that are clearly outside of the confines and stated purpose of the Act. It is a hallmark of our form of government that only Congress has the authority to write the law, with agencies such as EPA tasked solely with carrying out those laws as written. While NCLA appreciates the importance of state sovereignty and the purpose underlying Section 401, it is also important to ensure that one state's exercise of sovereign power does not deny the rights and entitlements of other states.

Thank you again for this opportunity to provide NCLA's views on this important issue. Should you have any questions, please contact Harriet M. Hageman, Senior Litigation Counsel, at Harriet.Hageman@ncla.legal.

Sincerely,

Harriet M. Hageman
Harriet M. Hageman
Senior Litigation Counsel
New Civil Liberties Alliance