

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE

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Lauren Kasparek,
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Comments Regarding Updating Regulations on Water Quality Certification

Dear Ms. Kasparek:

I am submitting comments on behalf of the Blue Ridge Environmental Defense League (BREDL) based in Glendale Springs, NC. BREDL is a regional, community-based, non-profit environmental organization founded in March 1984. Our founding principles are earth stewardship, environmental democracy, social justice, and community empowerment. BREDL has chapters and members throughout the Southeast.

The proposed changes to the Clean Water Act 401 regulation will lessen water protection by practically eliminating state and tribal input and authority to reduce, control and prevent deterioration of its waterways. EPA is overstepping its authority with this proposal. The proposed rule is a gift to industry and a death knell to waterways across our nation. **This proposal should be withdrawn.**

As pointed out on the U.S. EPA website, Congress passed the Clean Water Act including Section 401 to protect our life-sustaining water resources.

“Growing public awareness and concern for controlling water pollution led to sweeping amendments in 1972. As amended in 1972, the law became commonly known as the Clean Water Act (CWA).”¹

As stated in the August 22, 2019 Federal Register Notice the overall objective of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” while it should

¹ <https://www.epa.gov/laws-regulations/history-clean-water-act>

“recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution”.²

The Clean Water Act states,

“Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements.”³

However, the proposed EPA regulation significantly restricts agency and tribal oversight and implementation. In addition, this further limits citizen input into the process - a process that greatly needs procedures for public participation.

The Proposed Rule illegally limits certifying authorities by reducing them to a determination of whether a point-source discharge will comply with water quality requirements. It further limits certifying authorities by requiring explanations on conditions – conditions that can only look at point-source discharges and not the overall impacts to water quality. Therefore, it would limit the state’s ability to apply conditions that will protect water resources. This will strip the states’ and tribal authority as granted by Congress.

In the August 22, 2019 Federal Register Notice, the proposed rule cites Executive Order 13868 (April 2019) as a reason to update the 401 regulation. The notice quotes the Order as stating that the certification regulation is “hindering the development of energy infrastructure”⁴. Later in the notice, it states, “If Congress intended section 401 of the CWA to authorize consideration or the imposition of certification conditions based on air quality concerns, public access to waters, energy policy, or other multi-media or non-water quality impacts, it would have provided a clear statement to that effect.”⁵

An Executive Order does not have legal priority over Acts of Congress and related court decisions. As mentioned, section 401 has nothing to do with hindering or helping energy infrastructure. It simply is not the purpose of CWA section 401. Using this Executive Order to further erode the CWA not only does not make sense, it arrogates power rightfully delegated to Congress.

Our members in southwest Virginia know all too well what has happened and is happening to our precious life-sustaining water resources because of the section 401 process. The Virginia Attorney General recently announced a \$2.15 million settlement regarding more than 300 water quality violations by Mountain Valley Pipeline. To make this regulation significantly less stringent is not adhering to the purpose and law that is the Clean Water Act. If any changes are done to section 401, they should be to increase public participation and opportunities to deny and revoke ill-advised projects and permits.

In summary, this proposed rule will:

- Greatly lessen water protection undermining the Clean Water Act

² Federal Register, Vol. 84, No. 163, Thur., Aug. 22, 2019, Proposed Rules, p. 44086

³ Clean Water Act, Section 401, (b) Compliance with other provisions of law..

⁴ Federal Register, Vol. 84, No. 163, Thur., Aug. 22, 2019, Proposed Rules, p. 44082

⁵ Ibid., p. 44094

- Re-write the definition of discharge to only include point sources.
- Restrict certifying authorities' congressional granted power to reduce, control and prevent deterioration of its waterways
- Restrict conditions that certifying authorities may place on section 401 permits
- Further reduces public participation
- Redefine and restrict the "reasonable period of time" for certifying authorities to grant or deny a certification
- Restrict certifying authorities' options on certification denial
- Increase EPA's authority over the section 401 permitting process – authority that Congress had granted to the states

We are adamantly opposed to this unconstitutional, industry-written proposal. **We reiterate that this proposal is unconstitutional and should be withdrawn.**

Respectfully submitted,



Mark E. Barker
Executive Assistant, BREDL