



April 23, 2019

Andrew Wheeler
Administrator
United States Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
wheeler.andrew@epa.gov

Re: Public Involvement and Transparency in EPA's Potential Revisions to Clean Water Act
Section 401 Guidance and Regulations

Dear Administrator Wheeler:

On behalf of the undersigned groups, we write to object to the lack of public involvement contemplated in any review of the Environmental Protection Agency's ("EPA") regulations and guidance related to Clean Water Act Section 401, including guidance entitled Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes ("Section 401 Guidance"). We also object to any resulting revisions to or replacement of existing regulations and guidance that undermine the essential role of States and Tribes in protecting water quality under the Clean Water Act.

Section 401 gives States and authorized Tribes the power to review any project applying for a federal license or permit that may result in a discharge into the State or Tribe's navigable waters. 33 U.S.C. § 1341; *see also id.* § 1377(e). By passing Section 401, Congress created a system where the States and authorized Tribes have the authority "to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such [jurisdiction]." *S.D. Warren Co. v. Me. Bd. of Envtl. Protection*, 547 U.S. 370, 380 (2006) (quoting S. Rep. No. 92-414, 69 (1971)). The States and Tribes' power over proposed federal projects' potential impacts to the quality of local waterways and wetlands is "essential in the [Clean Water Act's] scheme to preserve state authority to address a broad range of pollution." *Id.* at 386.

Neither EPA nor the President can limit the extent of the authority Section 401 provides to States and authorized Tribes. But President Trump's April 10, 2019 Executive Order on Promoting Energy Infrastructure and Economic Growth, Section 3, Water Quality Certifications plainly tries to undermine state and local control over fossil fuel projects and shut the public out. The Executive Order directing EPA to reexamine and supersede the Section 401 Guidance focuses on five items that go to the heart of the Section 401 review. The Executive Order directs EPA to revise the Section 401 Guidance to address these five items within 60 days but has no provision for public comment or review of the proposed changes. It is unacceptable to try to

make any changes to such critical components of the Section 401 process behind closed doors with no transparency or opportunity for public input. *See, e.g., Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) (holding that the failure to go through notice and comment rulemaking invalidated a guidance document that effectively sought to enact a rule).

Public review and comment at this stage also is necessary given that the Executive Order attempts to require that EPA and other federal agencies that administer Section 401 “shall” modify regulations implementing Section 401 in a manner that is consistent with the revised EPA guidance on Section 401. The Executive Order creates serious doubt over whether any subsequent public notice and comment period will be meaningful if the changes EPA or other agencies must make to their regulations have been preordained.

The Executive Order appears designed to undercut the role of States and Tribes in protecting their local waterways and wetlands and the public’s ability to participate in reviews of destructive fossil fuel projects. This is unacceptable. Any consideration by EPA of changes to the Section 401 Guidance must be conducted with full transparency and public participation and consistent with the Clean Water Act and Administrative Procedure Act.

Sincerely,

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