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October 21, 2019

Office of Water - Docket
U.S. Environmental Protection Agency
1200 N. Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: WESTCAS Comments on EPA Proposed Rule Updating Regulations on Water Quality Certification – Docket ID No. EPA-HQ-OW-2019-0405

Dear Madam or Sir:

The Western Coalition of Arid States (“WESTCAS”) appreciates the opportunity to submit our comments to the U.S. Environmental Protection Agency (EPA) proposed revisions to 40 CFR 121, State Certification of Activities Requiring a Federal License or Permit, the regulations implementing Clean Water Act Section (CWA) 401.

WESTCAS is a coalition of approximately 75 water and waste wastewater districts, cities, towns, and professional organizations focused on water quality and water quantity issues in the states of Arizona, California, Colorado, Nevada, New Mexico and Texas. Our mission is to work with federal, state and regional water quality and quantity agencies to promote scientifically-sound laws, regulations, appropriations and policies that protect public health and the environment in the arid West.

WESTCAS members own and operate facilities pursuant to permits issued by States or EPA under the National Pollutant Discharge Elimination System (NPDES) program. In many cases, WESTCAS member operations involve discharges into waters of the United States, and those discharges require a license or permit issued by a Federal agency. The State would then be required to either issue Section 401 certification, finding compliance with water quality requirements, or waive the certification requirement. The proposed changes would substantially revise the requirements that apply under EPA’s Section

The Voice of Water Quality in the Arid West

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401 regulations.

WESTCAS members have been required to sample and analyze for pollutants using unapproved test methods at significant cost, as a condition of Section 401 certification. WESTCAS members have a direct interest in the proposed update.

The proposed update addresses both substantive and procedural concerns our members have experienced with Section 401 program. We think that the revisions in the proposed update would address those concerns, resulting in a program that more effectively executes the States responsibility to protect water quality.

The proposed update would make three substantive scope changes in the current regulations. First, it provides that State review under Section 401 must be focused on point source discharges to U.S. waters – not other sources that are not covered by the NPDES program. Second, it states that the review must focus on the discharge itself – not other, non-discharge aspects of the activity (such as a dam or other major project) that is causing the discharge. Finally, the proposed update makes it clear that the only impacts to be assessed under Section 401 are those related to water quality – not air, land, waste or other environmental impacts of the discharge that are not addressed by the CWA.

We agree with these proposed changes because we think that they will improve the functioning of the Section 401 program. That program can then focus its efforts on those activities and impacts that were always intended to be regulated under the CWA – water quality impacts to U.S. waters from point source discharges – and will help ensure that those discharges meet requirements based on water quality standards.

WESTCAS concurs with the procedural changes in the proposed update. Specifically, States need to make certification decisions within the one-year deadline. If they do not do so, then the certification is waived. The proposed update explicitly states that the one-year timeline starts when the initial application is submitted, and that resubmittals do not restart or modify the one-year timeline. Those changes in the regulations would help ensure that the certification process cannot be misused to delay or prevent the issuance of Federal permits and licenses for projects that substantively comply with CWA requirements.

We also support EPA's intention to clarify the following aspects of the certification process:

- EPA has the responsibility to determine if a discharge may have impacts on downstream States, such that those States should be notified and consulted;

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- It is the responsibility of the Federal agency that issues the license or permit to enforce the Section 401 conditions in the Federal license or permit;
- State-issued certifications that go outside the permissible scope of Section 401 certifications will constitute a waiver of the certification opportunity, unless the problem is remedied within the allowable period of time for issuing a valid certification.

Clarifying these elements of the Section 401 procedure will help all stakeholders to understand and comply, so that valid decisions can be reached in a timely manner.

In response to the request for comment on the requirement for issuing certifications in a "reasonable period of time", WESTCAS is in favor of allowing each Federal agency to specify what constitutes a "reasonable period of time" for the types of projects that are subject to licenses or permits issued by that agency. The agencies have the best sense of the appropriate timelines for their specific regulatory processes.

WESTCAS appreciates the opportunity to submit these comments on the proposed update. Please feel free to call or e-mail if you have any questions, or if you would like any additional information concerning the issues raised in these comments.

Sincerely,



Steve Bigley
President

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