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U. S. EPA Docket Center (EPA/DC)
U.S. Environmental Protection Agency
Mail Code: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attn: DOCKET ID No. EPA-HQ-OW-2019-0405

Re: Updating Regulations on Water Quality Certification; Proposed Rule, 84 Fed. Reg. 163, 44080 (August 22, 2019).

Dear Administrator Wheeler and Staff:

In response to the above-referenced docket, American Municipal Power, Inc. (AMP) and the Ohio Municipal Electric Association (OMEA) hereby provide the following comments for the record. We are supportive of the proposed water quality certification regulation proposed on August 22, 2019.

Background on AMP/OMEA

Ohio-based AMP is the non-profit wholesale power supplier and services provider for 135 locally regulated municipal electric entities located in Delaware, Kentucky, Indiana, Michigan, Maryland, Ohio, Pennsylvania, Virginia, and West Virginia. AMP’s members collectively serve more than 650,000 residential, commercial, and industrial customers and have a system peak of more than 3,400 megawatts (MW). AMP’s core mission is to be public power’s leader in wholesale energy supply and value-added member services. AMP offers its member municipal electric systems the benefits of scale and expertise in providing and managing energy services.

AMP’s diverse energy portfolio makes the organization a progressive leader in the deployment of renewable and advanced power assets that includes a variety of base load, intermediate and distributed peaking generation using hydropower, wind, solar and fossil fuels,

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as well as a robust energy efficiency program. AMP has actively worked over the past decade to diversify our power supply portfolio, to the point that our assets and power purchase agreements provided approximately 25% renewable power in 2018. Our fossil fuel assets currently include a 368 MW ownership share of the 1,600 MW coal-fired Prairie State Generating Company located in Lively Grove, Illinois, as well as the 707 MW (fired) natural gas combined cycle AMP Fremont Energy Center in Fremont, Ohio. Most of AMP's members are in the PJM Interconnection, LLC regional transmission organization footprint, while some members are located within the Midcontinent Independent System Operator, Inc. footprint. The OMEA represents the state and federal legislative interests of AMP and member Ohio municipal electric systems.

Because of AMP's structure, we closely follow regulatory initiatives that have the potential to impact our members. This proposed regulation would provide a streamlined approach to permitting new projects that maintains strong environmental protection while concurrently improving predictability, transparency and oversight.

Comments in Support of the Rule Proposal

AMP/OMEA are supportive of the proposed water quality certification regulation proposed on August 22, 2019. The proposed framework clarifies the scope of the Clean Water Act (CWA) Section 401 certification evaluation and the timeframe for acting on a certification request; increases the transparency of decision making; and, once the certification process is concluded, properly rests enforcement authority with the federal permitting agency.

EPA's proposed regulation makes clear that the scope of a CWA Section 401 water quality certification is to protect the quality of waters of the United States from point source discharges associated with federally licensed or permitted activities. The proposed regulation sets parameters to appropriately focus on state-issued water quality criteria at each stage, while respecting the responsibilities of the states to certify water quality and to impose conditions necessary to protect state water resources.

The proposed regulation balances the allocation of responsibility among state and federal governments consistent with the overall cooperative federalism framework established by Congress in the CWA. While the certifying agency has the authority to determine compliance with water quality standards and to tailor conditions to address the water quality impacts of any discharge of pollutants, the proposed regulation explicitly grants federal agencies the authority to identify CWA deficiencies in a certifying authority's denial;¹ the authority to treat the certification as a waiver where the certifying authority does not provide a decision that satisfies the requirements of the CWA;² and gives federal agencies the discretion not to incorporate deficient or non-conforming conditions in the federal license or permit.³ These provisions promote efficiency by ensuring that the water quality certification process does not veer beyond the scope of Section 401 review and CWA jurisdiction.

¹ Proposed § 121.6(c).

² Proposed § 121.6(c)(2).

³ Proposed § 121.8(a)(1-2).

We urge EPA to further confirm that the scope of any evaluation undertaken, or condition imposed is limited to the effects of the point source discharge on water quality standards. It is not appropriate, for example, to evaluate the effects of a project as a whole or the effects of the applicant itself, nor is it appropriate to evaluate overly broad issues, such as fishery resources or recreation, in a piecemeal assessment outside of a promulgated water quality standard. Likewise, when water is transferred between different portions of a water body and there has been no additional “discharge of a pollutant”, such as with hydropower projects, we urge EPA to recognize that no pollutants have been added by the project for purposes of CWA Section 401 applicability.⁴

Additionally, the proposed regulation clarifies the timeframe for acting on a certification request. While still allowing up to one year from receipt of the certification request for the certifying authority to act,⁵ the proposed regulation provides the federal agency discretion to define a “reasonable period of time” categorically or on a case by case basis.⁶ This maximizes efficiency and ensures that the pace of decision making is commensurate with the project. The proposed regulation wisely prevents the certifying authority from requesting that the project proponent withdraw a certification request, or from taking other action(s) for the purpose of modifying or restarting the review period.⁷

Further, the proposed regulations increase decision-making transparency. A certification with conditions requires a statement explaining why the conditions are necessary to assure that the discharge from the proposed project will comply with water quality standards and must include a citation to the law that authorizes the condition.⁸ A denial must similarly include statements identifying the specific water quality requirements with which the proposed project will not comply, explain the reasons why compliance is foreclosed, and specify what would be needed to comply.⁹ This transparency will lead to more consistent decision making, greater efficiency, and improved environmental protection as project applicants can better prepare for anticipated requirements.

Finally, the proposed regulations properly place enforcement authority for all federal permit conditions with the federal permitting agency.¹⁰ For AMP/OMEA members, the federal agency is the Federal Energy Regulatory Commission. We support meaningful and transparent state agency involvement during the certification process, but once that process is complete it

⁴ See, *Los Angeles Cty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 568 U.S. 78, 82 (2013) (“... the transfer of polluted water between ‘two parts of the same water body’ does not constitute a discharge of pollutants under the CWA ... We derived that determination from the CWA’s text, which defines the term ‘discharge of a pollutant’ to mean ‘any *addition* of any pollutant to navigable waters from any point source.’ 33 U.S.C. § 1362(12) ... Under a common understanding of the meaning of the word ‘add,’ no pollutants are ‘added’ to a water body when water is merely transferred between different portions of that water body.”)

⁵ Proposed § 121.4(a).

⁶ Proposed § 121.4(d).

⁷ Proposed § 121.4(f).

⁸ Proposed § 121.5(d).

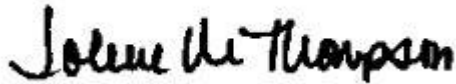
⁹ Proposed § 121.5(e).

¹⁰ Proposed § 121.9(c).

is appropriate that FERC enforce the conditions within its own permit. If additional substantive expertise is needed, nothing precludes FERC from voluntarily consulting with a certifying agency. EPA must make it clear to whom federal permittees are accountable and eliminate any potential for conflicting obligations.

While by no means exhaustive, the comments provided represent issues of most concern to AMP/OMEA relative to the proposed regulation. We thank EPA for this opportunity to provide input to the agency and for its recognition of the need for a practical, workable process for 401 water quality certifications.

Respectfully submitted



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