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Mr. Andrew Wheeler
Acting Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

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

Dear Mr. Wheeler:

The San Francisco Bay Conservation and Development Commission (the "Commission") provides the following comments to the Environmental Protection Agency ("EPA") in response to its Proposed Rule "Updating Regulations on Water Quality Certification."[1] The Commission has extensive experience conducting federal consistency reviews over the past 40 years since the National Oceanic and Atmospheric Administration ("NOAA") approved the Commission's California Coastal Management Program, San Francisco Bay Segment, for the effective management, beneficial use, protection, and development of the San Francisco Bay portion of the California coastal zone in accordance with the Coastal Zone Management Act ("CZMA").[2]

These comments pertain to the implications of the proposed rule on the Commission's Coastal Management Programs under the CZMA, and the interplay between the CZMA and the Clean Water Act ("CWA"). Both Acts manifest Congress's recognition that states have a primary role in managing land use and natural resources by establishing a federal-state partnership for critical resource management based on cooperative federalism and coordinated decision-making.[3] The Commission is concerned that the proposed rule undermines this partnership by impairing the ability of state coastal management programs to participate in important management decisions through the CWA § 401 water quality certification process.

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[1] 84 Fed. Reg. 44080 (Aug. 22, 2019).
[2] 16 U.S.C. §§ 1451 *et seq.*
[3] *See* 16 U.S. Code § 1452(2) ("The Congress finds and declares that it is the national policy … to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone."); 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.").

The proposed rule fails to address either the CZMA or any of the implications of the proposed changes on central tenets of the CZMA's system of joint federal-state management of coastal and aquatic resources. Consequently, the proposed rule contemplates changes to the water quality certification process that would have far-reaching, adverse consequences on state coastal management contrary to statutory obligations and Congressional intent under both Acts. By weakening the water quality certification process, the proposed rule would undermine the Commission's ability to comprehensively and efficiently manage the resources within the San Francisco Bay segment of the California coastal zone.

The Commission agrees with the California State Water Resources Control Board and the Coastal States Organization in opposing these proposed changes as unwarranted, unproductive, and contrary to the text and intent of the CWA. Therefore, the Commission calls on EPA to withdraw the proposed rule. If EPA continues to pursue these unwise changes, the Commission calls on EPA to revise the proposed rule to resolve the unaddressed adverse impacts on coastal zone management highlighted below.

I. THE PROPOSED CHANGES WOULD DISRUPT THE COMMISSION'S CZMA CONSISTENCY REVIEW PROCEDURES, CREATING UNCERTAINTY FOR PERMIT APPLICANTS AND IMPAIRING RESPONSIBLE MANAGEMENT OF COASTAL RESOURCES

Under CZMA § 307(c)(3), activities requiring federal licenses or permits that have reasonably foreseeable effects on the coastal uses or resources of a state's coastal zone are reviewed by the state for consistency with enforceable policies of the federally-approved state coastal management program.[4] Before incorporation into state coastal management programs or use in federal consistency review, these enforceable policies are reviewed by all relevant federal agencies, including EPA, and approved by the NOAA. Through the CZMA, Congress recognized that the most effective approach to further the national interest in a thriving coastal zone is to ensure that federal activities and permits address applicable state requirements early in the process of project planning and development. Early coordination and consultation through the federal consistency process heads off conflict, averts litigation, and balances competing uses for limited resources.

[4] 16 U.S.C. § 1456(c)(3); 15 C.F.R. § 930 Subpart D.

Federal consistency procedures under the CZMA and water quality certification procedures under the CWA are closely related.[5] Permit applications for projects within the coastal zone, such as new construction or disposal of dredged materials, often trigger review jurisdiction under both processes. As such, coastal states have developed procedures to integrate the two review processes. This includes developing lists of federal licenses subject to review, coordinating state standards between the two statutory regimes, and instituting "one-stop" federal-state joint review processes. Some states rely on the water quality certification review process to determine compliance for federal consistency purposes. Many of these procedures are instituted in state statutory or regulatory law.

For purposes of the NOAA-approved Coastal Management Program that the Commission developed under the CZMA, relevant enforceable policies of that program illustrate the close interrelationship between the CWA § 401 water quality certification and CZMA § 307(c)(3) consistency review processes. Section 66646.1 of the Commission's Coastal Management Program states that "the State Water Resources Control Board and the California Regional Water Quality Control Board for the San Francisco Bay Region ["Regional Board"] … have the primary responsibility for the coordination, control, and enforcement of water quality in San Francisco Bay[, and that t]he policies, decisions, advice, and authority of these boards should be the *primary basis* for the commission to carry out its water quality responsibilities in San Francisco Bay."[6] Furthermore, the "Water Quality" section of the San Francisco Bay Plan ("Bay Plan") component of the Commission's Coastal Management Program recognizes, in Finding "o," that one of the principal means by which the Regional Board "carries out" its water quality responsibilities is to apply water quality standards as set forth in the Regional Board's "Water Quality Control Plan, San Francisco Bay Basin" through the vehicle of, among other things, "water quality certification of U.S. Army Corps of Engineers' permits." Bay Plan Water Quality Policy 2 reiterates the critical role that the "decisions," including water quality certification decisions, of the Regional play in enabling the Commission to successfully carry out its water quality responsibilities under its Coastal Management Program. Consequently, given the close interrelationship between the respective responsibilities of the Commission and of the Regional Board with respect to water quality, any weakening of the water quality certification authority of the Regional Board, such as that resulting from EPA's proposed rule, will significantly impair the ability of the Commission to fulfill its duties and responsibilities under its Coastal Management Program and the CZMA.

[5] Congress recognized the importance of coordinating the procedures under both Acts by automatically incorporating requirements established by the state pursuant to the CWA, including state water quality standards, into the state's CZMA coastal management program. 16 U.S.C. §1456(f).
[6] Cal. Gov't Code § 66646.1 (emphasis added).

The proposed rule fails to address impacts on the federal consistency procedures of the coastal states, and proposes changes that would undermine established procedures, creating uncertainty for permit applicants and impairing states' responsible management of coastal resources. The Commission recommends that, should EPA proceed with this rule, rather than withdraw it as the Commission urges, EPA make changes to account for potential incompatibilities with provisions of state coastal management programs, like the Commission's, which integrate water quality certification with federal consistency certification.

II ESTABLISHING A REASONABLE PERIOD OF TIME FOR WATER QUALITY CERTIFICAION REVIEW

The proposed rule would allow federal agencies to unilaterally set any "reasonable" time limit less than a year on water quality certification review by the state, regardless of state statutory or regulatory requirements. Many state permit review processes, including the Commission's, contain standards and timeframes, established by statute or regulation. For water quality certification review of projects requiring a federal permit or license which are also subject to federal consistency review, in no case would a period shorter than the six months established under the CZMA for federal consistency review[7] be "reasonable." Both processes are closely coordinated and setting separate review periods would create confusion and impair states' ability to collect and analyze necessary information about impacts. EPA does not have the authority to circumvent the CZMA's statutory time period through regulation, nor can it convey such authority on other federal agencies. EPA should remove this provision, or in the alternative introduce language clearly establishing that the definition of "reasonable period of time" includes at least six months in the case of any water quality certification review conducted in conjunction with federal consistency review for a project requiring a federal license or permit.

III SCOPE OF CERTIFICATION

The proposed rule misconstrues CWA § 401(d) by unduly limiting certification conditions based on "any other appropriate requirements of State law"[8] to EPA-approved CWA regulatory programs that control discharges.[9] Some states include relevant water quality-related enforceable policies of state coastal programs as certification conditions. The proposed rule's overly narrow construction could allow federal agencies to exclude relevant certification conditions, including relevant water quality-related coastal program enforceable policies, as "beyond the scope of certification." Such a change would infringe on states' statutory review

[7] 16 U.S.C. § 1456(c)(3)(a); 15 C.F.R. § 930.62(a).
[8] 33 U.S.C. § 1341(d).
[9] 84 Fed. Reg. 44094-44095.

authority, undermine states' comprehensive implementation of their coastal management programs, require unnecessary changes to state statutes, regulations, or agency procedures, and create unnecessary confusion for permit applicants. EPA should remove this provision, or in the alternative explicitly recognize water quality-related enforceable policies under state coastal programs as "other appropriate requirements of State law."

The proposed rule would inappropriately limit the scope of water quality certification review. In contrast to EPA's existing regulations, which provide that a certification shall state "that there is a reasonable assurance that *the activity* will be conducted in a manner which will not violate not violate applicable water quality standards,"[10] the proposed rule would limit the substantive scope of water quality certification review to impacts *from* the permitted discharge only, on federal jurisdictional waters of the United States.[11] Combined with EPA's and the U.S. Army Corps of Engineer's efforts to limit the scope of the regulatory definition of waters of the United States,[12] the proposed changes would impair the ability of states to review the full impact of proposed activities on state water quality standards. This change would undermine state coastal programs that rely on the water quality certification process to understand and manage impacts on coastal water quality and would have consequent negative effects on other coastal ecosystems and natural resources.

In *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700, 711-12 (1994), the Supreme Court rejected the argument that CWA § 401 allows a state to impose only water quality limitations specifically tied to a "discharge," and held, by a 7:2 majority, that once the threshold condition of a discharge is met, a state may impose additional conditions and limitations on the activity as necessary to assure compliance with state water quality standards. Although the Court noted that its view of CWA § 401 was consistent with EPA's regulations implementing the statute – regulations which the Agency now proposes to arbitrarily change – the Court's ruling was ultimately based on its independent statutory interpretation and analysis. EPA's new interpretation, adopting the rationale of the dissenting opinion in that case, which was joined by only two members of the Court, is not a reasonable and appropriate reading of the statute or controlling and well-established case law. EPA has not provided sufficient justification for changing its longstanding position, and disregarding the holding of the Supreme Court majority, to now agree with the dissent. For these reasons, the Commission urges that EPA not change the existing scope of water quality certification review, which encompasses ensuring that a proposed activity will be conducted in a manner that will not violate applicable water quality standards, and not limit the scope of such review to exclude relevant water quality-related enforceable policies under state coastal programs.

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[10] 40 C.F.R. § 121.2(a)(3) (emphasis added).
[11] 84 Fed. Reg. 44103-44107, 44120 (proposed 40 C.F.R. § 121.3).
[12] *See* Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (Feb. 14, 2019).

IV. FEDERAL AGENCY REVIEW OF STATE CERTIFICATIONS

The proposed rule would allow the federal agency to which an application is made for a federal permit or license to determine: (1) whether a condition of a state certification satisfies the proposed regulatory definition of a "condition" and meets the permissible scope of certification; and (2) whether a state agency's denial of certification satisfies the requirements of CWA section 401 and meets the permissible scope of certification.[13] These proposed provisions will improperly allow federal agencies with little or no knowledge of the Clean Water Act, applicable state water quality requirements, or enforceable policies established by a state's coastal management program to second-guess and reject a state agency's determinations of appropriate and necessary conditions to ensure that a proposed activity, or the discharge from such an activity, will comply with state water quality requirements. Under the federal-state partnership established by both the CWA and the CZMA, these determinations are to be made by the state, pursuant to federally-approved CWA and CZMA programs, not by the federal agency to which an application is made for a federal permit or license.[14]

In any case, in accordance with its federally-approved coastal management program, the Commission provides a CZMA certification for any project within its jurisdiction that requires a federal permit or license by issuing a permit under state law, with appropriate conditions to ensure compliance with enforceable policies of that program. Similarly, the San Francisco Bay Regional Water Quality Control Board issues water quality certifications for such projects by issuing a permit under state law (known as "waste discharge requirements") to ensure that the proposed activity will comply with state water quality requirements. Therefore, in the event of a disagreement between the federal agency and the Commission or the Regional Board regarding the appropriateness of a condition imposed by the state agency, the federal permittee or licensee would nevertheless be required to comply will all conditions imposed by the state agency pursuant to a separate permit (or permits) issued under state law. For these reasons, the Commission urges EPA to eliminate the proposed provisions that would allow a federal agency to reject conditions imposed by a state agency to ensure compliance with state water quality standards and other appropriate requirements of state law, and, instead, to include a requirement that the federal agency reviewing a certification defer to and incorporate into the federal permit or license the conditions set forth in the state agency's certification.

[13] 44 Fed. Reg. 44106, 44121 (proposed 40 C.F.R. §§ 121.6(b), (c), 121.8(a)).
[14] 33 U.S.C. §§ 1251(b), 1341(a)(1).

V. CONCLUSION

The Commission calls on the EPA to withdraw the proposed rule or, in the alternative, to revise it to address the concerns raised above and restore the primary role and responsibility of the states for management of coastal resources, including ensuring that federal permitting activities comply with state water quality requirements, in cooperation with the federal government.

Sincerely,

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