LEAGUE OF WOMEN VOTERS® OF OREGON

*The League of Women Voters of Oregon is a 99-year-old grassroots nonpartisan political organization that encourages informed and active participation in government. We envision informed Oregonians participating in a fully accessible, responsive, and transparent government to achieve the common good. LWVOR Legislative Action is based on advocacy positions formed through studies and member consensus. The League never supports or opposes any candidate or political party.*

October 9, 2019

The Honorable Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Public Comment on Proposed Regulations on Section 401 Clean Water Act, Docket ID: EPA-HQ-OW-2019-0405

Dear Administrator Wheeler:

League of Women Voters of Oregon (LWVOR) is writing to express our grave concerns about proposed regulations for the Clean Water Act (CWA) Section 401 published by the Environmental Protection Agency (EPA) in the Federal Register on August 22, 2019. LWV has a strong position in support of the CWA.[1] The League's citizen activists helped pass the landmark CWA in 1972 and worked to protect, expand, and strengthen it through the 1990s. The League has supported water issues, from groundwater protection to agricultural runoff to the Safe Drinking Water Act, for decades.

***The regulations the EPA is currently proposing must not be implemented because they are clearly and openly designed to further the goal to encourage fossil fuel development and would do so at the expense of the protection of water quality and in violation of Congress's intent in passing the Clean Water Act. This body of proposed regulations is nothing short of breath-taking in its irrelevance to, and contradiction of, Section 401 of the CWA, regulations for which it purports to "update."***

The CWA resulted from 1972 amendments to the Federal Water Pollution Control Act of 1948, both of which Acts reflect the intent of Congress to improve the condition of waters within the country. Congress in the CWA saw fit to amend the earlier law "to address longstanding concerns regarding the quality of the nation's waters and the federal government's ability to address those concerns." In other words, Congress believed the existing law did not contain strong enough measures to ensure its goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] Indeed, in passing the CWA, Congress declared a national goal of *eliminating the discharge of pollutants* by 1985 and declared in the meantime, "that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water," by 1983.[3] Congress understood that states and tribes were the most knowledgeable about the waters under their jurisdiction and would therefore be best able to assess and evaluate potential impacts on those waters, including by activities of projects requiring federal authorization and

[1] *LWV 2018-20 Impact on Issues*, p. 51, https://www.lwv.org/sites/default/files/2019-04/LWV%202018-20%20Impact%20on%20Issues.pdf.
[2] 33 USC 1251(a).
[3] 33 USC 1251(a)(1)-(2).

determine how to protect and prevent their degradation. In Section 401, Congress granted to states and certain tribes the authority and responsibility to do that.

The CWA regulations currently proposed do not even claim to protect and enhance the quality of the nation's waters and facilitate states and tribes in carrying out their roles and responsibilities. Instead, the proposed regulations are "intended to increase the predictability and timeliness of section 401 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures."[4] What predictability and timeliness has to do with protecting the nation's water is revealed by the impetus behind this attempted regulatory upheaval: The President's April 10, 2019 Executive Order 13868 "Promoting Energy Infrastructure and Economic Growth."[5] In plain language, the purpose of that EO is "to encourage greater investment in energy infrastructure in the United States by promoting efficient federal permitting processes and reducing regulatory uncertainty." The seeming intent of the proposal is to blame without evidence "outdated federal guidance and regulations" for hindering fossil fuel development and then go on to require a revamping of CWA regulations, including those pertinent to Section 401. The result of that direction is the August 22, 2019 issuance of the proposed rules we are herein considering. We note that stripping away state and tribal authority to protect their waters is also clearly intended by this proposed rule change. In an opinion piece published five days earlier, EPA Administrator Wheeler so indicated: "The Clean Water Act wasn't designed to allow states to drag out decisions for years or use their Section 401 authority to veto projects of national significance when the projects wouldn't impact water quality."[6] The proposed regulations, then, stem from a plainly and openly stated effort to refocus federal regulations governing portions of the Clean Water Act—including the entire body pertinent to Section 401 outlining the authority and responsibilities of states and tribes—away from the water protective purpose, goals, and locus Congress intended, to serve instead the goal of fossil fuel development. LWVOR believes strongly that the nation should be moving away from fossil fuels due to their clear impact on climate change.

Broadly speaking, **we find the proposed regulations so irrelevant and contrary to Congress' intent that we strongly and urgently recommend that the entire body of regulations be discarded**. While not exhaustive, we resist and object to the following key mechanisms the proposed regulations would utilize to accomplish the goal of EO 13868 to facilitate the fossil fuel industry at the expense of water quality and state and tribal protective authority granted by Congress under the CWA.

- **Inappropriate restriction of consideration of potential discharges of a project to those that would go directly into "navigable waters" from a point source, specifically prohibiting consideration of tributaries and discharges from nonpoint sources.** The CWA also extended protections to other waters of the U.S. and discharges from nonpoint sources.[7] These restrictions are inappropriate.

- **Effective usurpation of the authority of states and tribes to evaluate a project's impacts on water quality, and instead proposing to limit requirements to an inadequate seven-point "certification request."** The CWA specifically granted states and certain tribes "primary responsibilities . . . to

[4] EPA, "Updating Regulations on Water Quality Certification," Federal Register, p. 44080.
[5] EPA, "Updating Regulations on Water Quality Certification," Federal Register, pp. 44081-82.
[6] Andrew Wheeler, "Here's how Team Trump will bust Cuomo's gas blockade," *New York Post*, August 15, 2019, https://nypost.com/2019/08/15/heres-how-team-trump-will-bust-cuomos-gas-blockade/.
[7] 33 USC 1251(a)(1)-(2) and (3)-(7); EPA, "Updating Regulations on Water Quality Certification," Federal Register, p. 44084.

prevent, reduce, and eliminate pollution" of their waters.[8] Congress stated that "[e]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." [9] Congress stressed that states would take meaningful protective action, by prohibiting them from adopting standards less stringent than those required by the CWA. Congress "declared as the national policy that States . . . implement the core permitting programs authorized by the statute, among other responsibilities".[10] However, these proposed regulations go the opposite way, seeking to unlawfully restrict states' and tribes' ability to ensure projects comply with standards from all of this, at least, but not exclusively, by preventing them from obtaining information they need to make good decisions. The proposed seven points fall far short of having the potential to generate anything substantive enough to allow states and tribes to carry out their roles and responsibilities under the law. One telling indication is that only one of the seven points calls for anything beyond simple "identification," a word that means nothing more than naming something. "Description" is only requested for "any methods and means proposed to monitor the discharge and equipment or measures planned to treat or control the discharge."[11] Without context, design, current water quality conditions and uses, and other site-specific information, there is no realistic hope of assessing impacts of project activities on water quality standards. Congress did not intend for the EPA to dictate to states what they need to carry out their Section 401 charge.

- **Failure to adequately consult with and respond to concerns of states and tribal groups in the preparation of these proposed regulations.** For example, contrary to claims by the EPA of a robust effort to engage states and tribes in pre-proposal stakeholder efforts, the Western Governors' Association, National Conference of State Legislatures, Association of Clean Water Administrators, Association of Fish & Wildlife Agencies, Association of State Floodplain Managers, Association of State Wetland Managers, Council of State Governments, Western Interstate Energy Board, Western States Water Council, and Council of State Governments-West sent Administrator Andrew Wheeler a letter protesting inadequate consultation at the end of the period set aside for that purpose.[12]

- **General encouragement of shorter timeframes than one year for states and tribes to render 401 Certification decisions and inappropriate designation to federal entities of the establishment of those timeframes.** While the CWA failed to specify what is meant by a "reasonable period" within the one-year timeframe it established, it seems clear that a shorter period would serve the interests of applicants and simultaneously restrict the state or tribe's ability to ascertain how to best ensure compliance with water quality standards. To contend that a federal bureaucracy is in a position to utilize discretion about such decisions does not bear scrutiny. Moreover, the EPA's claim of statutory federal discretion to determine what shorter periods would be "reasonable" is false. 33 USC 1341(a)(1) they cite as the authority does not, in fact, even mention that concept.[13]

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[8] 33 USC 1251(1); EPA, "Updating Regulations on Water Quality Certification," Federal Register, p. 44084.
[9] 33 USC 1370.
[10] 33 USC 1251(b).
[11] EPA, "Updating Regulations on Water Quality Certification," Federal Register, p. 44101.
[12] 10 entities to Andrew Wheeler, "Consultation and Transparency with Respect to EPA's Announced Actions Affecting Cen Water Act Section 401 Guidance and Regulations (Docket ID: EPA-HW-OW-2018-0855)," May 24, 2019.
[13] See EPA, "Updating Regulations on Water Quality Certification," Federal Register, p. 44081 and compare with 33 USC 1341(a)(1) cited.

- **Development of regulatory mechanisms to shift 401 certification decision-making from states and tribes to the federal entity.** There are a number of these, but we will focus on three. First, the CWA allows a state or tribe to expressly waive its authority on a particular project certification request or alternatively, a waiver may be deemed to have occurred if the certifying authority fails to act within a "reasonable period of time," up to a maximum of one year.[14] The EPA proposes not only to put determination of "reasonable" into federal hands, but to allow the federal entity to review a certification denial as a "failure to act," thereby granting it effective veto power over state and tribal action.[15] Second, the EPA claims the right to determine the degree to which a state or tribal action on a certification request falls within the "scope of the Act" and whether "conditions" a state or tribe may specify within an approved certification are appropriate.[16] If a condition is rejected, the certification stands, despite the fact that the protective condition prescribed by the state is rescinded. Third, federal entities are given outright veto power.[17] We cannot find that any of these actions are supported by the spirit or the letter of Section 401 of the CWA.

- **Denial that the "the environmental health or safety risks addressed by this action [would] present a disproportionate risk to children.[18]** We resist and object to this claim. The Administration in EO 13868 was entirely transparent about its goal in rewriting regulations and guidance for Section 401 of the CWA: to facilitate increased fossil fuel development. There is ample evidence that such development comes with increased air and water pollution, as well as greenhouse gas emissions that are a direct cause of global warming and other harmful and hazardous consequences of climate change. The bulk of these consequences would necessarily fall on children. Also, in EO 13868 the Administration called for revisions to CWA regulations that would hamstring states and tribes in their efforts to protect water quality and maintain water quality standards. Reduced protections promise to turn back the clock to water degradation suffered in the 1960s and early 1970s, which motivated Congress to pass the CWA. The result is a two-pronged effort that most certainly would severely harm children.

These proposed regulations are irreparably flawed. To implement them would be unconscionable. They must be withdrawn.

Regards,

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[14] 33 USC 1341(a).
[15] EPA, "Updating Regulations on Water Quality Certification," Federal Register, p. 41110.
[16] EPA, "Updating Regulations on Water Quality Certification," Federal Register, p. 44107.
[17] EPA, "Updating Regulations on Water Quality Certification," Federal Register, p. 44111.
[18] EPA, "Updating Regulations on Water Quality Certification," Federal Register, p. 44119.