Via eRulemaking Portal (http://www.regulations.gov)

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

Attn: Docket ID No. EPA-HQ-OW-2022-0128

Re: Comments of American Municipal Power, Inc. ("AMP") on Proposed Rule: Clean Water Act Section 401 Water Quality Certification Improvement Rule – 87 Fed. Reg. 35318 (June 9, 2022)

Dear EPA Administrator Reagan and Agency Staff:

On behalf of American Municipal Power, Inc., and the Ohio Municipal Electric Association, we appreciate this opportunity to provide the following comments in response to the above-referenced notice of proposed rulemaking.

BACKGROUND ON AMP/OMEA

American Municipal Power, Inc. (AMP) is a nonprofit wholesale power supplier and services provider for 133-member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland and the Delaware Municipal Electric Corporation, a joint action agency with nine members headquartered in Smyrna, Delaware. AMP's mission is to serve members through public power joint action, innovative solutions, robust advocacy and cost-effective management of power supply and energy services. AMP offers a wide variety of services to help member communities improve the quality of municipal utility services to their customers. AMP provides these services on a cooperative, nonprofit basis for the mutual benefit of member communities.

AMP members receive their power supply from a diversified resource mix that includes wholesale power purchases and energy produced at AMP and member-owned generating facilities utilizing fossil fuels, hydroelectric, wind, solar and other renewable resources. Assets include the

AMP Fremont Energy Center, a natural gas combined cycle facility in Fremont, Ohio, a majority ownership stake in the coal-fired Prairie State Energy Campus, diesel and natural gas peaking units, and solar and wind projects throughout the region. In addition, AMP has actively worked over the past two decades to diversify our power supply portfolio to include renewable resources and continues to explore additional opportunities for new renewable energy resources. AMP and our members operate and maintain multiple hydroelectric projects situated along the Ohio River at existing Army Corp of Engineers locks and dams. These facilities represent one of the largest deployments of clean, renewable run-of-the-river hydroelectric generation in the country.

The Ohio Municipal Electric Association (OMEA) represents the Ohio and federal legislative interests of AMP and member Ohio municipal electric systems. Although closely aligned with AMP, the OMEA is a separate, nonprofit entity guided by a 16-member Board of Directors. However, subsequent "AMP" references herein also represent the interests and comments of OMEA.

In recognition of our unique position as both a wholesale power supplier and services provider, as well as the owner and operator of electric generating assets in Ohio, AMP offers the following comments for consideration.

BACKGROUND

The U.S. Environmental Protection Agency (EPA) revised the regulations governing the Clean Water Act Section 401 water quality certification (WQC) process only two years ago. 85 Fed. Reg. 42284 (2020) (the "2020 Rule"). AMP submitted comments to EPA in October 2019 supporting those changes. AMP believes those changes were important in clarifying the scope of the Section 401 WQC evaluation and the timeframe for acting on a certification request; increasing the transparency of decision making; and properly resting post-issuance enforcement authority for WQC decisions with the federal permitting agency. The 2020 Rule struck an appropriate balance between protecting states' water quality and ensuring timely, transparent and fair decisions on Section 401 WQC requests.

EPA has now proposed to revisit and substantially revise the 2020 Rule, restoring in large part the 50-year-old certification regime that existed before the 2020 Rule while also imposing new and potentially cumbersome requirements that will place greater uncertainty and inefficiency in the Section 401 WQC process. EPA's current proposal, set forth at 87 Federal Register 35318 (the "Proposed Rule"), addresses multiple components of the certification process, including: the requirement for pre-filing meetings; the content of requests for certification; the determination of the "reasonable period of time" within which state agencies must act on a certification request; the scope of the state's certification review; the nature and content of certification decisions; the role of the federal agency in the certification process; and the ability of certifying authorities and federal agencies to modify a grant of certification after the fact. Each of these changes has the potential to impact AMP and the regulated community. AMP's comments herein focus on several of the most consequential changes proposed by EPA.

AMP COMMENTS

AMP continues to support efforts to provide greater clarity and certainty in the Section 401 WQC process. To that end, AMP supports certain aspects of the Proposed Rule, so long as they do not introduce additional procedural delays. For example, AMP supports EPA's effort to clearly define

the required elements of a request for certification[1] and the requirement that the certifying authority send written confirmation of the date of receipt of the request for certification to the project proponent and federal agency.[2] AMP believes that the elements required for a complete certification request in proposed Section 121.5(c) should be applied to all certification requests, whether submitted to an EPA Regional Administrator or to a state or tribal certifying authority. Such an approach will provide consistency and clarity for applicants and agencies alike.

AMP also supports EPA's proposal to allow the requirement for a 30-day, pre-filing meeting request to be waived or shortened by the certifying authority. AMP further suggests that Proposed Section 121.4 should provide an explicit option for the project proponent or federal agency to request a waiver of the pre-filing meeting requirement, subject to agreement of the certifying authority.

Despite support for limited aspects of the Proposed Rule, as described above, AMP remains concerned that most of the changes in the Proposed Rule will reverse the transparency and efficiency goals of the 2020 Rule, reinstate pre-2020 inefficiencies in the Section 401 WQC process, and insert uncertainty into the process.

Content of Certification Request (Proposed Section 121.5): AMP strongly objects to the proposed requirement to include a copy of the draft federal license or permit with the request for certification. In most cases, the application processes for various federal and state permits and other approvals run concurrently and are in fact often complementary, as the agencies confer and coordinate their various approvals. For example, in many states, the U.S. Army Corps of Engineers (USACE) and state water quality agencies use a combined application form for requests for authorization and certification under Clean Water Act Sections 404 and 401, respectively. Requiring project proponents to wait to make a Section 401 WQC request until the federal agency has issued a draft license or permit will extend the overall approval process by requiring the federal and state approval processes to run in sequence, rather than concurrently.

AMP also has concerns about the open-ended requirement to provide "any existing and readily available data or information related to potential water quality impacts from the proposed project" in the request for certification. According to the Proposed Rule, such information may include, but is not limited to, any documents prepared under the National Environmental Policy Act (NEPA), such as an Environmental Impact Statement (EIS). First, the requirement to supply "any existing and readily available data or information" is ambiguous and could lead to delays if the certifying authority decides that a good faith submittal by a project proponent does not include all information the agency deems to be "related to the potential water quality impacts from the proposed project." Second, as with the requirement to provide a draft permit, requiring a project proponent to wait until a NEPA document is available to provide with its certification request would cause significant delays in the review and approval process. The effect of these additional requirements that prohibit a certification request from even being made until draft permits and NEPA documents are available, will be to further prolong and complicate the certification process, which is inconsistent with EPA's stated intent.

[1] Proposed § 121.5(c).
[2] Proposed § 121.5(d).

Reasonable Period of Time (Proposed Section 121.6): AMP is concerned that the proposed changes in Sections 121.5 and 121.6 together may have the effect of allowing state and tribal certifying authorities to impose "completeness" determination requirements in the certification process, despite previous federal court rulings invalidating such requirements. Proposed Section 121.6(a) specifies that the reasonable period of time for acting upon a certification request "shall begin upon receipt of a request for certification." Proposed Section 121.5(b) in turn provides that a state or tribal certifying authority may, through its own regulations, specify "additional contents of a request for certification," beyond those elements specified in Proposed Section 121.5(c). The result could be to allow certifying authorities to use excessive, ambiguous, or open-ended submission procedures or requirements to effectively allow them to delay or even indefinitely postpone the running of the "reasonable period of time" because the certifying authority determines that its own submission requirements have not been met. The federal regulation should provide a well-defined, unambiguous set of submission requirements so that project proponents, certifying authorities, and federal agencies know what is required for a proper certification request.

Scope of Review (Proposed Section 121.7): AMP disagrees with EPA's proposal to expand the scope of Section 401 WQC review to authorize certifying authorities to base their certification decisions on the potential impact of the "activity as a whole" on waters of the U.S. *and* other state or tribal waters. The plain statutory language of CWA Section 401 makes clear that the certifying authority's review is to be focused on the effects of the proposed "discharge" on waters of the U.S. That does not include other aspects of the "activity as a whole" that are not directly related to the discharge into waters of the United States. EPA's interpretation of federal case law, including the decision of the Supreme Court in *PUD No. 1 v. Washington Dep't of Ecology,* 511 U.S. 700 (1994), does not support the extremely broad approach presented in the Proposed Rule.

Additionally, the proposed inclusion of other state and tribal waters within the scope of EPA's proposal is inappropriate. The Clean Water Act governs discharges to waters of the U.S., and the Section 401 WQC rule cannot be used to extend federal authority over the potential effects of a federally authorized project on non-federal waters. States are fully authorized under their laws to impose additional water quality and other environmental requirements on projects that occur within their borders. But Section 401 was not intended to give certifying authorities broad rights to review and place conditions on aspects of projects that do not involve the effects of proposed discharges on waters of the U.S.

EPA's approach in the Proposed Rule would give certifying authorities under Section 401 the ability to place conditions on all aspects of a proposed project, regardless of whether they are associated with a discharge or whether they affect waters of the United States. EPA attempts to rely on the language of Section 401(d) of the statute to trump the overall goal and purpose of Section 401, which is to ensure that any "discharge" to waters of the U.S. will comply with the water quality provisions of the Clean Water Act. 33 U.S.C. § 1341(a). Indeed, it is significant that the process under Section 401 has been called "water quality" certification for decades. EPA properly emphasizes "cooperative federalism" in the preamble to the Proposed Rule; however, the purpose of Section 401 is to give state or tribal authorities the power to ensure that proposed federal actions will not result in violations of *water quality standards promulgated pursuant to the Clean Water Act*. Implementation of the rule should keep within the focus of the rule.

Finally, EPA's "activity as a whole" approach to the scope of Section 401 WQC review appears to duplicate the stringent and broad environmental review already performed under NEPA. NEPA

already provides a forum and vehicle for a "big picture" review of the full range of potential impacts of a federal action, with numerous opportunities for review and input by state and tribal authorities, as well as citizens, interest groups, and local governments. By proposing such a broad scope for Section 401 WQC review, EPA appears to be unnecessarily duplicating aspects of the NEPA review.

Certification Conditions (Section 121.7): AMP similarly objects to Proposed Rule 121.7(c) to the extent it authorizes a certifying authority to impose conditions in a Section 401 WQC that are associated with elements of a project that are unrelated to a discharge to waters of the U.S. or its effect on compliance with water quality standards adopted under the Clean Water Act. As explained in the foregoing discussion, allowing a state or tribal authority to place wide-ranging conditions on aspects of a federally authorized project that do not implicate the interests sought to be protected by the Clean Water Act – i.e., potential impacts to the quality of waters of the U.S. – is not reasonable and would constitute an unnecessary expansion of authority. Again, state and tribes have independent legal authority to evaluate the potential environmental impacts of projects to be constructed withing their jurisdiction and to place appropriate conditions on those activities. Section 401 should not be used as a back door to create such regulatory authority where neither federal nor state law has granted it. Conditions of 401 certifications must be tied to water quality impacts resulting from a point source discharge to waters of the United States.

Modifications (Section 121.10): The proposal to allow the federal agency and certifying authority to mutually agree to modify a grant of certification, with or without conditions, after the initial certification decision is made is unjust and unreasonable. Although any such modification apparently would need to occur within the "reasonable period of time" for initial issuance (which is statutorily limited to one year), the uncertainty created by this provision would dramatically undermine the reliance interests of applicants. Most applicants for Section 401 WQC certification rely upon a grant of such certification, including any reasonable conditions thereon, to make significant project investment and development decisions. The ability of the federal agency and certifying authority to agree to any modification to an already-granted certification is made particularly concerning by the lack of any specific criteria in Proposed Rule 121.10 for when such a modification can be made and under what circumstances. Without greater clarity and certainty, project proponents will be faced with extremely difficult decisions about how to proceed with proposed projects and make costly investments when the rules could change for undefined reasons.

General: The 2020 Rule was an important step forward in providing greater clarity, transparency, efficiency, and predictability in the Section 401 WQC process. The Proposed Rule would reverse most of that progress and impose additional burdens that exceed the requirements of Section 401. AMP respectfully requests that EPA abandon its current proposed approach and, if necessary, pursue more targeted, reasonable, and statutorily justified changed to the regulations.

AMP and its members appreciate the opportunity to submit comments on this important proposed rulemaking. If the Agencies have any questions, please do not hesitate to contact the undersigned.

Respectfully Submitted,

Adam Ward
AMP Senior Vice President
Member Services and External Affairs
American Municipal Power, Inc.
award@amppartners.org
614.540.1111

Michael Beirne
Executive Director
Ohio Municipal Electric Association
mbeirne@amppartners.org
614.540.0835