



August 5, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Comments on EPA's proposed Clean Water Act Water Quality Certification Improvement Rule (EPA Docket EPA-HQ-OW-2022-0128-0002).

Dear Administrator Regan:

On June 9, 2022, the Environmental Protection Agency (EPA) published a notice of proposed rulemaking on the Water Quality Certification Improvement Rule under the Clean Water Act.¹ As described below, the Office of Advocacy (Advocacy) believes the proposed rule has been improperly certified under the Regulatory Flexibility Act (RFA). Advocacy further believes that project proponents should not be required to submit draft Federal permits and licenses to the Certifying Authority (as defined below). Requiring project proponents to submit draft Federal permits and licenses that are not readily available or accessible imposes an unnecessary burden on small entities.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA², as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA)³, gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

¹ 87 Fed. Reg. 35318 (June 9, 2022).

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule’s publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”⁶

Proposed Rule

The Clean Water Act (CWA) was enacted in 1972 to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”⁷ The CWA accomplishes this by regulating the “discharge of pollutants into the navigable waters.”⁸ The CWA requires a permit to discharge pollutants, dredged, or fill materials into any body of water deemed to be a “water of the United States.”⁹

In addition to requiring a permit, the CWA through Section 401 authorizes states and certain tribes (Certifying Authorities) to protect the quality of their waters from adverse impacts resulting from discharges from the potentially permitted project.¹⁰ A CWA permit may not be issued unless the Certifying Authority issues a water quality certification “that any such discharge will comply with the applicable provisions” with or without additional conditions.¹¹ The Certifying Authority may also waive certification.¹²

EPA first promulgated implementing regulations for water quality certification in 1971 and revised those regulations in 2020.¹³ EPA is proposing to revise the 2020 regulation by giving Certifying Authorities more deference in the water quality certification process.¹⁴ EPA is also proposing to require project proponents to provide more information to Certifying Authorities than has been previously required under either the 2020 regulation or the 1971 regulation.¹⁵ This new information includes draft Federal permits and licenses.¹⁶

⁴ Small Business Jobs Act of 2010 (Pub. L. No. 111-240) § 1601.

⁵ *Id.*

⁶ 5 U.S.C. § 601 note.

⁷ 33 U.S.C. § 1251(a) (1987).

⁸ 33 U.S.C. § 1251(a)(1) (1987).

⁹ 33 U.S.C. § 1341 et. seq. (2019).

¹⁰ 33 U.S.C. § 1341(a) (1977).

¹¹ 33 U.S.C. § 1341(a) (1977). See also 87 Fed. Reg. 35318 (June 9, 2022).

¹² 33 U.S.C. § 1341(a) (1977).

¹³ See 87 Fed. Reg. 35318 (June 9, 2022).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 87 Fed. Reg. 35318 (June 9, 2022).

I. The Proposed Rule Has Been Improperly Certified

Section 603(a) of the RFA requires any Federal agency to produce an initial regulatory flexibility analysis of the impacts of proposed rules on small entities, unless the agency can certify under section 605(b) that the rule will not have a significant economic impact on a substantial number of small entities.” Any certification under section 605(b) must be accompanied by a statement of the factual basis for the certification.¹⁷ Advocacy believes that EPA has improperly certified the proposed rule. The proposed rule imposes costs directly on small entities, but EPA has not provided a comprehensive factual basis to certify that those impacts will not be significant for a substantial number of small entities. EPA specifically failed to analyze the impact of requiring small entities to obtain and submit draft Federal permits and licenses to Certifying Authorities.

A. The Agency Failed to State a Factual Basis for its Certification

Advocacy believes that EPA failed to state a factual basis in its RFA certification. In certifying the rule, EPA acknowledged that it was “not able to quantify the impacts of the proposed rulemaking on small entities due to several data limitations and uncertainties.”¹⁸ To address the quantitative deficiency, EPA’s Economic Analysis¹⁹ included a “qualitative assessment of the potential impacts of the proposed rulemaking on project proponents that are small entities.”²⁰

The Economic Analysis describes five provisions in the proposed rule that may have an impact on small entities:

- The pre-filing meeting request requirement
- The contents of a request for water quality certification
- The scope of water quality certifications
- Modifications
- The section 401(a)(2) review process²¹

If EPA cannot provide a factual basis for certifying that none of these impacts will be significant for a substantial number of small entities, it cannot certify the rule under section 605(b). EPA has failed to provide a qualitative summary of the impacts on small entities related to the second provision, the contents of a request for water quality certification, undermining the factual basis for EPA to certify the proposed rule under the RFA.

In the Regulatory Flexibility Act section, EPA states that “several project proponents noted that it was important to have clarity and predictability regarding the elements of a request for certification.”²² EPA supplied no facts here to describe the burden placed on small entities by requiring them to obtain draft Federal permits and licenses.

¹⁷ 5 U.S.C. Sec.605(b).

¹⁸ 87 Fed. Reg. 35318 (June 9, 2022).

¹⁹ Id.

²⁰ Id.

²¹ Economic Analysis for the Clean Water Act Section 401 Water Quality Certification Improvement Rule, available at <http://www.regulations.gov/document/EPA-HQ-OW-2022-0128-0016> (last accessed July 29, 2022).

²² Id.

In Section 4 of its Economic Analysis, EPA attempts to conduct a more robust analysis of the impacts of the proposed rule on all parties, including Federal agencies, States, and project proponents. In this section, EPA admits that requiring a copy of a draft Federal permit and/or license “may postpone when the section 401 review process could begin.”²³ EPA also states that requiring a copy of draft Federal permits and licenses “would reduce redundancy in the certification and federal licensing or permitting process”²⁴ and “could benefit both project proponents and federal agencies.”²⁵ However, the only fact provided by EPA confirms this new requirement will delay project approval, which intuitively means costs will increase. Because this requirement will raise costs for regulated small entities, and EPA does not have a factual basis for certifying the rule under section 605(b), the rule remains subject to the requirements of section 603(a).

II. The Proposed Rule Should Not Require Project Proponents to Submit Draft Permits and/or Licenses to the Certifying Authority

As discussed above, the proposed rule requires project proponents to submit draft Federal permits and licenses to the Certifying Authority in its water quality certification request for the first time. The project proponent is specifically prohibited from “submit[ting] a request for certification to a certifying authority until after a Federal agency has developed a draft license or permit.”²⁶

EPA believes this new requirement is reasonable because “it ensures that the certifying authority has arguably the most important pieces of information . . . to evaluate and determine whether it can certify.”²⁷ EPA further argues that “[w]ithout the ability to see and evaluate what conditions and limitations the Federal agency has preliminarily decided to include in its license or permit . . . the certifying authority might be inclined” to either deny the certification request or include unnecessary and duplicative conditions to the certification grant.²⁸ EPA concludes that it “is entitled to deference for its reasonable interpretation of the statute that a draft license or permit must be included” in the certification request.²⁹

This proposed change is largely unfeasible and will lead to unnecessary permitting delays. Excluding general and nationwide permits issued by EPA and the Army Corps of Engineers, Advocacy has learned that many federal agencies do not provide copies of draft permits or licenses to project proponents. Similarly, Advocacy has learned that many federal agencies are not able to prepare draft permits or licenses until after a Certifying Authority communicates its own comments or concerns about a proposed project.

²³ Economic Analysis for the Clean Water Act Section 401 Water Quality Certification Improvement Rule, available at <http://www.regulations.gov/document/EPA-HQ-OW-2022-0128-0016> (last accessed July 29, 2022).

²⁴ Id.

²⁵ Id.

²⁶ 87 Fed. Reg. 35318 (June 9, 2022).

²⁷ Id.

²⁸ Id.

²⁹ Id.

Despite acknowledging the variety and complexity of projects, EPA has failed to understand the importance of multi-tasking. As project proponents plan for the eventual implementation of a project proposal, the project proponent interacts with a variety of stakeholders to ensure the project is implemented in a cost-effective and efficient manner that both achieves organizational goals while complying with all applicable federal, state, and local requirements. These interactions include achieving simultaneous and parallel goals to further propel implementing the final project. Project proponents, like federal agencies, cannot take a linear approach, checking off only one requirement at a time. Instead, to achieve maximum efficiency, project proponents attempt to satisfy financial and legal requirements simultaneously to reduce the expense of a project and bring it online.

EPA agrees that “if a project proponent is legally precluded from obtaining a copy of a draft license or permit, the project proponent would not be required to provide a copy.”³⁰ However, “legally precluded” is an excessively high standard that ignores the infeasibilities and inefficiencies of requiring copies of Federal permits and licenses. It also ignores that under current regulation, project proponents are authorized to request certification before EPA prepares a draft NPDES permit.³¹

Advocacy recommends EPA eliminate the requirement that project proponents submit draft Federal permits and licenses to the Certifying Authority in its water quality certification request.

Conclusion

This rule will have a direct and potentially costly impact on small entities by requiring project proponents to submit draft Federal permits and licenses to Certifying Authorities. To reduce the cost of the rule, Advocacy recommends that EPA modify the proposed rule to eliminate this costly and unnecessary requirement. Otherwise EPA lacks a factual basis for its certification that the rule will not have a significant impact on a substantial number of small entities, and therefore must prepare and publish an initial regulatory flexibility analysis. If we can be of any further assistance, please contact Astrika Adams, Assistant Chief Counsel, at astrika.adams@sba.gov. Thank you for your attention to this matter.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
Small Business Administration

³⁰ Id.

³¹ See 40 CFR 124.53(a)-(c).

/s/

Astrika W. Adams
Assistant Chief Counsel
Office of Advocacy
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Copy to: Dominic J. Mancini, Deputy Administrator
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