

**Delaware Riverkeeper Network ~ Berks Gas Truth
New York Progressive Action Network - Enviro Committee ~ N.J. Sierra Club
Blue Ridge Environmental Defense League ~ No Fracked Gas in Mass
New York Water Action ~ Project CoffeeHouse
Bucks Environmental Action ~ Bucks County Audubon Society
Compressor Free Franklin ~ Marshalls Automotive
Seneca Lake Guardian, a Waterkeeper Alliance Affiliate
Concerned Citizens of Allegany County, Inc.
Breathe Easy Susquehanna County
Bucks County Concerned Citizens Against the Pipelines
Lebanon Pipeline Awareness
Concerned Citizens of Lebanon County
Concerned Citizens of Cattaraugus County
Physicians for Social Responsibility Philadelphia
Patriots from The Oil & Gas Shales
Better Path Coalition ~ Berkshire Environmental Action Team (BEAT)
Responsible Drilling Alliance (RDA) ~ Schuylkill Pipeline Awareness
Sullivan Alliance for Sustainable Development ~ Potter's Farm
Mountain Road Jiu-Jitsu ~ Cattaraugus Chatauqua for Clean Water**

October 21, 2019

Lauren Kasparek, Oceans, Wetlands, and Communities Division
Donna Downing
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

Submitted via Regulations.gov

**RE: EPA Proposed Section 401 Water Quality Certification Regulations
Docket ID EPA-HQ-OW-2019-0405**

Dear Ms. Kasparek and Ms. Downing,

The proposed regulations are a clear and obvious power grab designed to take from states' their legal right to deny Section 401 Certification and to empower the EPA and other federal agencies to unilaterally decide whether or not a project should be allowed to advance regardless of the state's determination regarding compliance with water quality standards and applicable state and federal law.

EPA's proposed Section 401 Water Quality Certification regulations would:

- ⇒ illegally re-write Section 401 contrary to the plain language of the Clean Water Act;
- ⇒ severely and improperly constrict state authority, contrary to what Congress intended;
- ⇒ expand EPA's role far beyond the scope of its statutory authority, and do the same for *other* federal agencies;
- ⇒ upset the Clean Water Act's cooperative federalism framework solely for the benefit of the shale gas industry and pipeline companies;
- ⇒ impose more burdens on state agencies that are already understaffed, underfunded, and under attack from the shale gas, pipeline and fossil fuel industries;
- ⇒ result in significant gaps in water quality protection in states like Pennsylvania, New York, New Jersey, West Virginia, Virginia, North Carolina, and Ohio; and
- ⇒ be a clear unconstitutional overreach.

EPA's proposed regulations are a substantive overreach and, if enacted, would be unconstitutional as they seek to usurp congressional law-making authority. Simply because industrial entities, the present Administration, and/or EPA *think* Section 401 should entail different substance and process does not mean that the Clean Water Act is ambiguous or "missing" something that EPA can legally seek to alter through the regulatory process.

Amongst other things, the proposed regulations would re-write statutory definitions (e.g. "discharge"); improperly constrict state authority under Section 401; and limit states to reviewing *only* point source pollution, and *only* for compliance with standards set under the listed statutory sections, or *EPA-approved* Clean Water Act programs and/or provisions. But the Clean Water Act is intentionally broader in terms of state authority. EPA is seeking to re-write the Clean Water Act with its proposed regulations. But legislating is the job of Congress, not EPA. As a result, this regulatory proposal is a clear overreach that seeks to usurp the legislative authority of Congress in violation of, *inter alia*, separation of powers.

The Clean Water Act establishes a system of cooperative federalism, and, to accomplish such a system, carefully set forth the balance of power between states and the federal government. It is only where Congress *expressly* says that states may not act or enact stricter regulations that states are excluded from regulation under their own laws or the Clean Water Act. See 33 U.S.C. §§ 1322(f)(1)(A), 1370. The Clean Water Act also clearly identifies the limited role of both the EPA (i.e. the Administrator) and the federal permitting agencies in the Section 401 process. Through its proposed regulatory re-write, EPA seeks to displace and undermine this carefully crafted balance of power, shifting the power overwhelmingly to the federal government in ways not envisioned nor supported by the Clean Water Act. These regulations are clearly a violation of the plain meaning and the intent of the Clean Water Act.

The proposed regulations also seek to infringe on state sovereignty and the right of states to take action to protect their water resources and environment from harm. The Clean Water Act is written so as to respect states' rights; it is neither appropriate nor legal for EPA, a mere regulatory agency, to seek to use this regulatory process to curtail and/or infringe upon states' rights.

EPA attempts, through this regulatory proposal, to not only limit state certification authority in a

myriad of ways not sanctioned by the Clean Water Act, but EPA also proposes to give itself and other federal agencies the right to determine what, if any, aspects of a state certification should become conditions for a federally-licensed/permitted facility or project. But this is not an authority granted by the Clean Water Act to EPA or any other federal agency. It is a state 401 Certification, in its entirety, that must become a condition of approval for a federally-licensed/permitted facility/project. EPA and other federal agencies have no authority to pick and choose what state identified conditions will be included in the ultimate federal license or permit that is issued.

A plain reading of the Clean Water Act demonstrates that there is, in fact, only a very limited context within which EPA can or should be issuing regulations regarding Section 401. Therefore, the only items regarding which that the Administrator has authority to make regulations “as are necessary to carry out his functions under this chapter” are: EPA’s role under Section 401(a)(2) as to neighboring states, its role in providing guidance and comment (when requested) under Section 401(b), and any certifications EPA issues on behalf of tribes without certification authority, and on lands that are exclusively federally-owned. EPA admits as much in its public notice. Beyond that, EPA has *no* role as to Section 401 and in turn, no functions of the Administrator for which regulations might be needed. This eliminates most of EPA’s proposed regulations, with perhaps the exception of proposed Section 121.10 (pertaining to Section 401(a)(2)) and Subparts D (Certification by Administrator) and E (Consultations). It likewise eliminates the EPA’s attempt to give more power to *other* federal agencies to interfere with state Section 401 certifications, when the Administrator does not even have a role to begin with. In fact, the Clean Water Act expressly quashes EPA’s attempt to enlarge the authority of other federal agencies at 33 U.S.C. 1371(c)(2)(A).

The long and the short of it is, this regulatory proposal is an illegal and unconstitutional power grab designed to undermine states’ rights, state authority, and state sovereignty in order to benefit industry and to illegally grow the power of the federal government in the process.

We, the organizations signed on to this letter, oppose this regulatory proposal and urge EPA to rescind it, in its entirety.

Respectfully,

Maya K. van Rossum, the Delaware Riverkeeper, Delaware Riverkeeper Network
Karen Feridun, Founder, Berks Gas Truth
Cari Gardner, Chair, New York Progressive Action Network - Enviro Committee
Jeff Tittel, Director, N.J. Sierra Club
Louis Zeller, Executive Director, Blue Ridge Environmental Defense League
Rosemary Wessel, Program Director, No Fracked Gas in Mass
Ann Finneran, Member, New York Water Action
Barbara Jarmoska, President, Project CoffeeHouse
Sharon Furlong, Co-Founder, Spokesperson, Bucks Environmental Action
Stacy Carr-Poole, Executive Director, Bucks County Audubon Society
Donald Hebbard, President / Founding Member, Compressor Free Franklin
Barry Marshall, Owner, Marshalls Automotive

Joseph Campbell, President, Seneca Lake Guardian, a Waterkeeper Alliance Affiliate
Karen Ash, Chair, Concerned Citizens of Allegany County, Inc.
Rebecca Roter, Chairperson, Breathe Easy Susquehanna County
Arianne Elinich, Founder, Bucks County Concerned Citizens Against the Pipelines
Ann Pinca, President, Lebanon Pipeline Awareness
Pam Bishop, Principal, Concerned Citizens of Lebanon County
Rob Mrowka, President, Concerned Citizens of Cattaraugus County
Tammy Murphy, Medical Advocacy Director, Physicians for Social Responsibility Philadelphia
Craig Stevens, Founder, Patriots from The Oil & Gas Shales
Karen Feridun, Co-founder, Better Path Coalition
Jane Winn, Executive Director, Berkshire Environmental Action Team (BEAT)
Robert Cross, President, Responsible Drilling Alliance (RDA)
Leah Zerbe, Co-Founder, Schuylkill Pipeline Awareness
Linda Reik, Member, Board of Directors, Sullivan Alliance for Sustainable Development
Leah Zerbe, Potter's Farm
Leah Zerbe, Mountain Road Jiu-Jitsu
Mark Alessi, Organizer, Cattaraugus Chatauqua for Clean Water