August 02, 2016

Water Permits Division
Office of Wastewater Management
Mail Code 4203M
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2016-0145

RE: National Pollutant Discharge Elimination System (NPDES): Applications and Program Updates; Proposed Rule, 81 Fed. Reg. 31,344 (May 18, 2016)

To Whom It May Concern:

The undersigned organizations appreciate the opportunity to offer comments on the U.S. Environmental Protection Agency's (EPA) proposed revisions to the National Pollutant Discharge Elimination System (NPDES) regulations, to be codified at 40 C.F.R. Parts 122, 123, 124, and 125. The proposed revisions were published in the *Federal Register* on May 18, 2016, at 81 Fed. Reg. 31,344. The stated purpose of these revisions is to eliminate regulatory and application form inconsistencies; improve permit documentation, transparency and oversight; clarify existing regulations; and remove outdated provisions. The proposed revisions cover 15 topics altogether.

As agricultural organizations, we regularly represent our members' interests before Congress, federal regulatory agencies and the courts. Our members produce a variety of commodities grown or raised commercially in the United States. Our organizations all have a significant stake in this regulation and many of our members require NPDES permits under Clean Water Act (CWA) Section 402 to conduct their operations, *e.g.*, pesticide general permits and concentrated animal feeding operation (CAFO) permits. Those members will be directly affected by the proposed rule.

The undersigned organizations offer the following comments on specific aspects of EPA's proposal. We recognize that many of the proposed revisions would generally result in only minimal, new or increased obligations or burdens on regulators and the regulated community. There are, however, three areas of concern in the proposed rule that we address below.

1. The Proposal Improperly Expands EPA's Authority to Object to State-Issued NPDES Permits under CWA Section 402(d).

EPA proposes to revise 40 C.F.R. § 123.44(k) to allow EPA to designate administratively continued NPDES permits issued by states as "proposed permits" so that EPA can object to those permits and, if necessary, take over the NPDES permit. *See* 81 Fed. Reg. at 31,356-57. EPA

also proposes to expand the definition of "proposed permit" (in 40 C.F.R. § 122.2) to include administratively-continued state NPDES permits that EPA "designate[s] as a proposed permit" under the revised § 123.44(k). We oppose these changes, as they exceed the scope of EPA's authority under Section 402(d), 33 U.S.C. § 1342(d).

Congress envisioned that after EPA approves a particular state NPDES permitting program, there would be only two specific triggers for EPA to exercise its authority to object to that state's issuance of an NPDES permit:

- After the issuing state notifies EPA (pursuant to § 402(b)(5)) that it will not accept the written recommendations of another state whose waters may be affected by the issuance of a permit; or

- After the issuing state transmits a proposed permit to EPA.

The statute does not give EPA authority to object to an administratively continued permit unless one of the aforementioned conditions is present. EPA cannot circumvent the limits that Congress placed on its objection authority by defining "proposed permit" to suit that purpose. EPA's current regulations appropriately define "proposed permit" to include only those state permits "prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State." 40 C.F.R. § 122.2. Where a state has not yet prepared a revised proposed permit and submitted it to EPA for review, there is no "proposed permit" that triggers EPA's Section 402(d) authority.

Not only do the proposed revisions to 40 C.F.R. § 123.44(k) and 40 C.F.R. § 122.2 exceed EPA's authority; they are unnecessary. As EPA notes in the preamble, it already has the "priority permits" process in place to address the backlog of NPDES permits. *See* 81 Fed. Reg. at 31,357. EPA describes "priority permits" as "those permits that have been expired longer than two years, and which EPA has asked the permitting authority to target for reissuance." *Id.* And the 2004 Hanlon memorandum that outlines that process describes how EPA "worked with States and Regions to identify a variety of criteria for selecting environmentally significant priority permits." *See* Memorandum from J. Hanlon to Water Division Directors, "Permitting for Environmental Results: Permit Issuance and Priority Permits," at 3-4 (March 5, 2004). Given that EPA already has this procedure in place to address states' reissuance of administratively continued permits, it should decline to "add a new mechanism" that expands its Section 402(d) authority. *See* 81 Fed. Reg. at 31,356.

If, however, EPA insists on finalizing one of its proposed revisions to 40 C.F.R. § 122.44(k), we recommend that the agency adopt proposed Option 2 for paragraphs (k)(1) and (k)(2), which would allow EPA to designate an administratively continued permit as a "proposed permit" after a five-year period. That option would give time for the existing "priority permits" process to run its course, and it would better ensure that state permitting authorities retain the lead role over their NPDES permits.

2. EPA Continues to Distort the Provisions of the CWA Dealing with State Antidegradation Policies.

40 C.F.R. § 122.44(d)(1) currently provides that NPDES permits shall include "any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards . . . necessary to achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." EPA proposes to add language to that provision that would require that permits include requirements necessary to "ensure consistency with the State antidegradation policy established under § 131.12." 81 Fed. Reg. at 31,371. The preamble discussion in the proposal shows that EPA continues to misconstrue and overstate the reach of statutory language that purportedly deals with antidegradation, just as it did last year when it revised 40 C.F.R. part 131. *See* 80 Fed. Reg. 51,020 (Aug. 21, 2015).

EPA incorrectly asserts that "[w]ater quality standards consist principally of three elements: Designated uses, water quality criteria, and antidegradation policies." 81 Fed. Reg. at 31,352 (citing 40 C.F.R. § 131.6 & 40 C.F.R. §§ 131.10-12). Tellingly, EPA cites no *statutory* support for that assertion but instead refers only to its own regulations. As explained in comments on the 2015 rulemaking revising those regulations, EPA's position on anti-degradation has no basis in law. *See* AFBF, et al. Comments, Docket ID No. EPA-HQ-OW-2010-0606-0207, at 9-12 (Jan. 2, 2014). We reiterate those concerns and incorporate them by reference here.

CWA Section 303(c)(2)(A) plainly states that a "revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). Nothing in Section 303 says that antidegradation policies are an "element" or a "component" of water quality standards, as EPA suggests. *See* 81 Fed. Reg. at 31,352-53. Because state antidegradation policies are not an element of water quality standards, EPA lacks review and approval authority over them. Similarly, it lacks "backstop" authority to promulgate federal policies or requirements concerning antidegradation. *See* 33 U.S.C. § 1313(c)(3)-(4). Finally, antidegradation policies cannot be the basis for an impaired waters listing or the TMDL process in Section 303(d).

To try to bolster its view that antidegradation policies are elements of water quality standards, EPA refers to Section 303(d)(4)(B) of the Act, as well as a limited passage from the Supreme Court's opinion in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 705 (1994). *See* 81 Fed. Reg. at 31,352. Both of those authorities, however, reflect that Congress held a narrow view of the role that state antidegradation policies would play under the federal Clean Water Act.

- Section 303 mentions consistency with state antidegradation policies only in the context of "anti-backsliding." Specifically, Section 303(d)(4)(B) states that, when water quality equals or exceeds levels necessary to protect designated uses or otherwise required by applicable water quality standards, "any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any permitting standard may be revised only if such revision is subject to and consistent

with the antidegradation policy established under this section." 33 U.S.C. § 1313(d)(4)(B).

- *PUD No. 1* confirms that the only mechanism for implementing the antidegradation policy in Section 303 is the "anti-backsliding" provision in Section 303(d)(4)(B). There, the Court referenced the antidegradation policy and then basically quoted the statutory language in stating that "the Act permits the *revision* of certain effluent limitations or water quality standards only if such revision is subject to and consistent with the antidegradation policy established under this section." 511 U.S. at 705.

Neither the statute nor *PUD No. 1* supports EPA's view that antidegradation policies are "components" of water quality standards in addition to designated uses and water quality criteria. *See* 81 Fed. Reg. at 31,353. And in terms of the NPDES program, nothing in either Section 303(d)(4)(B) or *PUD No. 1* suggests that antidegradation policies must be applied when deriving NPDES permit limits *in the first instance*. Rather, the Act provides only that consistency with antidegradation policies is a requirement when *revising* effluent limits or permitting standards. 33 U.S.C. § 1313(d)(4)(B). Consequently, EPA must revise the reference antidegradation in the text of 40 C.F.R. § 122.44(d)(1), as well as the corresponding preamble discussion, to make it clear that antidegradation is a relevant consideration only when determining compliance with the "anti-backsliding" language in Section 303(d)(4)(B).

3. EPA Should Not Revise Its Existing Regulation on State Certifications (40 C.F.R. § 124.55).

We oppose EPA's proposal to revise 40 C.F.R. § 124.55(b) to broaden the circumstances under which Regional Administrators can modify NPDES permits after states issue them—namely, to allow for modifications to *add* more stringent section 401 certification provisions that result from state administrative or judicial decisions. *See* 81 Fed. Reg. at 31,359-60, 31,372-73. Rather than finalize the proposed revision, EPA should retain the language in the existing regulation, which restricts EPA's ability to modify NPDES permits "on request *of the permittee* only to the extent necessary to *delete* any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency." 40 C.F.R. § 124.55(b) (emphasis added).

When EPA originally promulgated the current regulation in 1979, it recognized that modifications to finalized NPDES permits would be appropriate only to remove provisions resulting from a certification that were invalidated, but not to add any new provisions. EPA emphasized that such "limitations [on the ability to modify issued permits] are necessary to avoid a 'moving target' of State law during the permit's life." 44 Fed. Reg. 32,854, 32,880 (June 7, 1979). The need for regulatory certainty and to avoid subjecting permit holders to moving targets, which EPA highlighted in that 1979 preamble, has been an important check on EPA's ability to reopen and modify permits for several decades. That need remains no less important today. EPA claims that it should have the ability to modify already issued permits to add conditions in order to "ensure that permits are environmentally protective and that they reflect the most up-to-date state administrative and judicial determinations." *See* 81 Fed. Reg. at 31,359-60. Yet EPA does not explain why that claimed interest outweighs the need to avoid

moving targets. Indeed, the current proposal fails to even acknowledge the 1979 preamble, much less explain why EPA has abruptly abandoned its long-held views concerning the need for regulatory certainty. This defect in EPA's proposal violates basic administrative law principles. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009) (agency may not "depart from a prior policy *sub silentio*" and "must show that there are good reasons for the new policy").

EPA seemingly tries to downplay the impact of this proposed change by burying it in a rulemaking that supposedly "would generally not result in a[ny] new or increased impacts or information collection by authorized states or the regulated community." *See* 81 Fed. Reg. at 31,364. EPA also states that this proposal "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." *Id.* at 31,367. Despite these statements, the ability of Regional Administrators to reopen and modify already issued NPDES permits has significant ramifications for state NPDES permitting authorities. There is, however, no indication that EPA sought the states' input on this significant revision to 40 C.F.R. § 124.55.

We urge EPA to maintain and again emphasize its longstanding view that the need for regulatory certainty and finality in decision-making outweighs any claimed interest (*see* 81 Fed. Reg. at 31,360) in ensuring the most environmentally protective and up-to-date state determinations. Any required revisions to permits to reflect changes under state law would appropriately be addressed in the next permitting cycle.

The undersigned organizations appreciate the opportunity to provide these comments on EPA's proposed revisions to its NPDES regulations. Should you have any questions, please do not hesitate to contact David Chung at DChung@crowell.com, 202-624-2587.

Sincerely,

Agricultural Retailers Association
Agri-Mark, Inc.
American Farm Bureau Federation
American Sugarbeet Growers Association
CropLife
Dairy Producers of New Mexico
Dairy Producers of Utah
Exotic Wildlife Association
Idaho Dairymen's Association
Milk Producers Council
Missouri Dairy Association
National All-Jersey Inc.
National Association of State Departments of Agriculture
National Cotton Council

National Council of Farmer Cooperatives
National Milk Producers Federation
National Pork Producers Council
National Turkey Federation
Northeast Dairy Farmers Cooperative
Oregon Dairy Farmers Association
South East Dairy Farmers Association
St. Albans Cooperative Creamery
The Fertilizer Institute
The Ohio AgriBusiness Association
United Egg Producers
Upstate Niagara Cooperative, Inc.
Washington State Dairy Federation
Western United Dairymen

Attachment: AFBF et al Comments on Water Quality Standards Regulatory Clarifications, EPA-HQ-OW-2010-0606, 78 Fed. Reg. 54517.