



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
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JAN 08 2010

Coleen Sullins, Chief
Division of Water Quality
North Carolina Department of Environment
and Natural Resources
1617 Mail Service Center
Raleigh, North Carolina 27699-1617

Dear Ms. Sullins:

The Environmental Protection Agency (EPA) was provided a copy of the document, "Stream Mitigation for FERC-Related 401 Certifications," in a letter dated July 2, 2009, from American Rivers to EPA, which is enclosed. Based on discussions with your staff, we understand that this document is a draft, internal guidance used by the North Carolina Division of Water Quality (DWQ) in relation to Section 401 Certifications under the Clean Water Act (CWA) for projects licensed under the Federal Energy Regulatory Commission (FERC). This document has neither been submitted by the State for EPA's review or consideration as a Water Quality Standard (WQS) provision, nor as a policy that applies or implements WQS provisions. Based on the recent discussions, I understand that DWQ does not intend to take either of those actions in the future.

In the context of our response to American Rivers, EPA, in its discretion, conducted a preliminary review of this policy and its potential application to Section 401 Certifications for FERC licenses. Our initial review of this document has raised several questions regarding this state policy and its application in particular WQS certifications. EPA has concerns as to whether the policies in this document are consistent with the underlying EPA-approved State WQSs.

The document indicates that land preservation can be considered as compensatory mitigation in return for adverse impacts of a FERC project's flow regulation on aquatic uses. With respect to FERC projects, the use of land purchase or preservation cannot be used as a substitute for meeting provisions of the EPA-approved WQSs under the CWA, including the protection of designated uses and the water quality needed to protect such uses.

Also, based on EPA's initial review, application of policies in this draft mitigation document may be specifically inconsistent with several provisions of State WQSs that have been approved by EPA for CWA purposes. These include, but are not limited to, the following:

15A NCAC .0211

The policy may modify provisions within the State's Class C water quality standards applicable to all waters in the State. Specifically, these standards state: "Conditions Related to Best Usage: the waters shall be suitable for aquatic life propagation and maintenance of biological integrity, wildlife, secondary recreation, and agriculture."

15A NCAC 02B .0226

The policy may create an exemption to water quality standards that has not been properly adopted as a variance to standards that apply to a specific waterbody.

15A NCAC 02B .0101

The policy may replace authorities assigned to certain State entities in the adoption or removal of designated uses of State waters (and the water quality criteria necessary for protection of State waters).

15A NCAC 02B .0201

The policy may modify the State's current antidegradation policy in that application of the policy may result in the elimination of existing uses in certain State waters. It may also result in the lowering of water quality in certain waters without full consideration of antidegradation requirements that would otherwise apply to those waters.

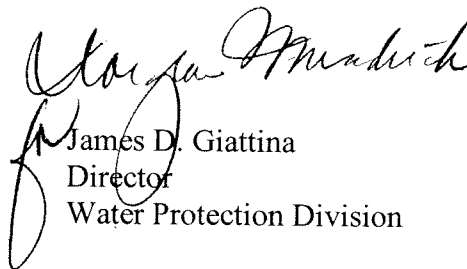
EPA believes that these potential concerns are substantial and asks that the State discontinue use of the policies in this draft document until we can discuss these issues further and reach a conclusion on their use in the future. Such policies should only be used when they result in a reasonable application of existing, EPA-approved WQSSs, including all provisions relating to designated uses, numeric criteria, narrative criteria, and antidegradation provisions. To ensure that EPA fully understands the breadth and implications of the draft policy, we also ask that DWQ provide EPA with information on all past applications of the policy in the development of requirements for CWA Section 401 Certifications.

EPA understands that DWQ has concerns as to the impacts of this position with respect to DWQ's Section 401 Certification of permits issued by the Corps of Engineers and EPA pursuant to Section 404 of the CWA. As you know, there are extensive federal regulations and guidance relating to Section 404 permits, and these materials outline the specific conditions under which compensatory mitigation can be used for certain types of impacts to wetlands and other aquatic resources. Section 404 Compensatory Mitigation and the extensive process and requirements associated with making such mitigation determinations, as well as Section 401 Certification of Section 404 permits, are beyond the scope of this letter and NC's draft mitigation guidance.

In further discussions between EPA and DWQ regarding this policy, DWQ has noted that the State's existing Section 401 Certification rules (15A NCAC 2H .0500) appear to focus heavily on policies relating to Section 404 permitting. It is our understanding that DWQ will begin reviewing these rules during this calendar year to make certain that these rules outline a certification process that ensures that all projects being certified meet applicable WQSs and revise such rules as necessary.

I look forward to your prompt response regarding the use of this policy for CWA Section 401 Certifications of FERC-related projects. Please feel free to contact me if you would like to further discuss the issues outlined in this letter.

Sincerely,



James D. Giattina
Director
Water Protection Division

Enclosure

cc: Tom Welborn, Chief
Wetlands, Coastal and Oceans Branch
EPA Region 4