

**COMMENTS OF THE ATTORNEYS GENERAL OF CALIFORNIA, COLORADO,
CONNECTICUT, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY,
NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND,
VERMONT, WASHINGTON, THE COMMONWEALTHS OF MASSACHUSETTS,
PENNSYLVANIA, AND VIRGINIA, AND THE DISTRICT OF COLUMBIA**

ON THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S

**"NOTICE OF INTENTION TO RECONSIDER AND REVISE THE CLEAN WATER
ACT SECTION 401 CERTIFICATION RULE," 86 FED. REG. 29,541 (JUNE 2, 2021)**

DOCKET ID NO. EPA-HQ-OW-2021-0302

SUBMITTED: AUGUST 2, 2021

Table of Contents

INTRODUCTION	5
I. THE 2020 RULE IS CAUSING HARM RIGHT NOW AND EPA SHOULD MOVE QUICKLY TO REPEAL THE RULE IN FULL	7
II. EPA SHOULD CLARIFY THAT STATE CERTIFICATION AUTHORITY UNDER SECTION 401 APPLIES TO A PROJECT AS A WHOLE AND THAT “ANY OTHER APPROPRIATE REQUIREMENT OF STATE LAW” MEANS ANY STATE WATER QUALITY REQUIREMENTS	10
A. Section 401 Preserves Broad State Authority Over Water Quality Impacts from Federally Licensed Projects	12
B. In the 2020 Rule, EPA Departed from Its Longstanding Interpretation of Section 401 As Preserving Broad State Authority Pertaining to All Water Quality Impacts from Federally Licensed Projects	15
C. The 2020 Rule’s Narrow Interpretation of the Scope of States’ Section 401 Authority Is Contrary to Supreme Court Precedent	20
D. The 2020 Rule’s Narrow and Unlawful Scope of Section 401 Certification Review Is Harming State Water Quality	22
III. EPA SHOULD ELIMINATE ANY FEDERAL REVIEW OF THE SUBSTANCE OR CONTENTS OF CERTIFICATIONS	26
A. Section 401 Does Not Authorize Federal Agencies to Review and Second-Guess State Denials or Conditions	26
B. The Federal Agency Review Requirement Is Already Harming State Water Quality	30
IV. EPA SHOULD CLARIFY THAT STATES HAVE UP TO ONE YEAR TO ACT ON SECTION 401 REQUESTS THAT ARE COMPLETE PURSUANT TO STATE ADMINISTRATIVE LAWS	32
A. EPA Should Eliminate the 2020 Rule’s Provision Giving Federal Agencies Authority to Dictate the “Reasonable Period of Time”	32
B. EPA Should Clarify That Only an Application That Is “Complete” Pursuant to State Administrative Procedures Can Commence the Section 401 Waiver Period	34
C. EPA Should Eliminate the 2020 Rule’s Limitation on the Use of Withdrawal and Resubmittal to Extend the Reasonable Period of Time	38
V. EPA SHOULD REITERATE THAT STATE ADMINISTRATIVE PROCEDURES GOVERN SECTION 401 REQUESTS	41
A. If Pre-Filing Meeting Requests Are Retained At All, EPA Should Make Them Optional and the 30-Day Waiting Period Should Be Eliminated	41

B. EPA Should Clarify That Review of Certification Requests Must Comply with State Procedural Requirements	43
C. EPA Should Clarify That State Agencies May Modify Section 401 Certifications Pursuant to State Procedures	46
D. EPA Should Clarify That State Agencies Retain Authority to Enforce Section 401 Certification Conditions	51
VI. EPA SHOULD ENCOURAGE OTHER FEDERAL AGENCIES TO CONFORM THEIR SECTION 401 PROCEDURES TO EPA’S FORTHCOMING RULE	52
CONCLUSION	54
ATTACHMENT A: Comment Letter from Attorneys General of the States of Washington, New York, California, Colorado, Connecticut, Delaware, Hawai’i, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the District of Columbia, and the Commonwealths of Massachusetts, Pennsylvania, and Virginia, Docket ID No. EPA-HQ-OW-2019-0405 (Oct. 21, 2019)	
ATTACHMENT B: Letter from Attorneys General of California, Connecticut, Maryland, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Pennsylvania Department of Environmental Protection to EPA Administrator Andrew Wheeler Regarding Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (July 25, 2019)	
ATTACHMENT C: Response by Attorneys General of New York, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Connecticut Department of Energy and Environmental Protection, New York State Department of Environmental Conservation, North Carolina Department of Environmental Quality, and Pennsylvania Department of Environmental Protection to EPA’s Request for Pre-Proposal Recommendations Regarding Clean Water Act Section 401 Water Quality Certifications, Docket ID No. EPA-HQ-OW-2018-0855 (May 24, 2019)	
ATTACHMENT D: Declarations Filed in Opposition to EPA’s Motion for Remand Without Vacatur in <i>In re: Clean Water Act Rulemaking</i> , Case No. 20-cv-04636-WHA (N.D. Ca.)	
1-Declaration of Eileen Sobeck, California State Water Resources Control Board	
2-Declaration of Loree’ Randall, Washington Department of Ecology	
3-Declaration of Aimee M. Konowal, Colorado Department of Public Health and Environment	
4-Declaration of Paul Wokoski, North Carolina Department of Environmental Quality	
5-Declaration of Rebecca Roose, New Mexico Environment Department	
6-Declaration of Paul Comba, Nevada Division of Environmental Protection	
7-Declaration of Corbin J. Gosier, New York Department of Environmental Conservation	

8-Declaration of Scott E. Sheeley, New York Department of Environmental Conservation
9-Declaration of Steve Mrazik, Oregon Department of Environmental Quality

INTRODUCTION

The undersigned Attorneys General submit these comments on the Environmental Protection Agency's (EPA) "Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule," 86 Fed. Reg. 29,541 (June 2, 2021), Docket ID No. EPA-HQ-OW-2021-0302. We applaud EPA's decision to revisit the "Clean Water Act Section 401 Certification Rule," 85 Fed. Reg. 42,210 (July 13, 2020) (the 2020 Rule). As the undersigned states have consistently said since EPA embarked on the prior Administration's politically-driven quest to limit state authority under section 401 in order to bolster the fossil fuel industry,¹ the 2020 Rule infringes upon the fundamental premise that the Clean Water Act allows states to retain broad authority to protect the quality of waters within their borders beyond any federal water quality pollution controls. The 2020 Rule is illegal, detrimental to water quality, and an affront to the cooperative federalism at the heart of the Clean Water Act. As such, EPA should immediately take steps to repeal the 2020 Rule in full to eliminate the legal infirmities and restore all parties to the well-understood legal boundaries that existed for decades prior to the

¹ *See, e.g.*, Comment Letter from Attorneys General of the States of Washington, New York, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the District of Columbia, and the Commonwealths of Massachusetts, Pennsylvania, and Virginia, Docket ID No. EPA-HQ-OW-2019-0405 (Oct. 21, 2019) (2019 Multistate Comment) (Attachment A); Letter from Attorneys General of California, Connecticut, Maryland, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Pennsylvania Department of Environmental Protection to EPA Administrator Andrew Wheeler Regarding Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (July 25, 2019) (Attachment B); Response by Attorneys General of New York, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Connecticut Department of Energy and Environmental Protection, New York State Department of Environmental Conservation, North Carolina Department of Environmental Quality, and Pennsylvania Department of Environmental Protection to EPA's Request for Pre-Proposal Recommendations Regarding Clean Water Act Section 401 Water Quality Certifications, Docket ID No. EPA-HQ-OW-2018-0855 (May 24, 2019) (Attachment C).

promulgation of the 2020 Rule. To the extent that EPA decides to craft a replacement rule, we urge EPA to act as quickly as possible. Leaving the 2020 Rule in place until at least 2023 will result in untold damage to water quality, unnecessary delays for project proponents, and wasted resources for state certifying agencies. Moreover, we recommend EPA adopt the following changes in any replacement rule, summarized here and fully set out below:

- Remove the 2020 Rule’s provisions limiting the scope of state authority under Section 401 to compliance of point-source discharges to waters of the United States with a limited set of state water-quality standards, *see* 40 C.F.R §§ 121.1(f), (n); 121.3, and clarify that states have authority to require that project activities, as a whole, comply with all relevant state water quality laws. Both the text and legislative history support this interpretation, and it has been endorsed by the Supreme Court. *See PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700, 711 (1994) (“*PUD No. 1*”). Indeed, it is the interpretation that EPA adhered to for close to 50 years prior to promulgation of the misguided 2020 Rule. EPA’s suggestion in the 2020 Rule that a “holistic” review of section 401 or a minor amendment to the text of the statute justify limiting the scope of state review to point source discharges into waters of the United States is just wrong.
- Remove the 2020 Rule’s provisions authorizing federal review of States’ section 401 decisions for compliance with federal “procedural” requirements. *See* 40 C.F.R. § 121.9. Nothing in the text or legislative history of section 401 authorizes federal agencies to review and second-guess section 401 decisions, even for allegedly “procedural” reasons. Court precedent is clear that section 401 decisions are binding on federal agencies and are subject to review only in state court. Moreover, the 2020 Rule’s authorization of federal agency review of section 401 certifications for “procedural” compliance has already resulted in substantial harm to state authority and water quality, including unjustified determinations of waiver of state certification authority related to the U.S. Army Corps’ reissuance of numerous nationwide permits.
- Remove the 2020 Rule’s provisions authorizing federal agencies to determine the “reasonable period of time” in which section 401 certification decisions must be made, 40 C.F.R. § 121.6, and clarify that states have up to one year to make section 401 decisions. States are in the best position to determine whether and when section 401 certifications can be reviewed and decisions issued. Moreover, EPA should provide that the “reasonable period of time” commences when the state agency determines that it has received a complete application pursuant to state administrative procedures. Additionally, EPA should eliminate its prohibition on states requesting the withdrawal of section 401 requests by applicants or taking “any action” to extend the reasonable period of time. 40 C.F.R. § 121.6(e). This flat prohibition is not supported by the text, purpose, or legislative history of section

401 and has the effect of forcing state agencies to issue unnecessary section 401 denials, including in some situations on requests that have been withdrawn by an applicant.

- Clarify that section 401 certifications are state permits, subject to processing and enforcement pursuant to state laws. Accordingly, EPA should eliminate the provisions in the 2020 Rule that dictate the contents of section 401 requests. 40 C.F.R. § 121.5. Further, EPA should eliminate the 30-day prefiling request requirement, 40 C.F.R. § 121.4, which has only served to slow state review of section 401 requests. EPA should also remove any restrictions on state authority to modify or enforce section 401 certifications. *See* 40 C.F.R. §§ 121.5, 121.11(c).
- Encourage other federal agencies to conform their section 401 procedures to the provisions of the new rule after it is issued by EPA. One of the frustrations experienced by states exercising their section 401 authority is the inconsistent approach taken by different federal agencies. EPA is in the best position to ensure that all federal agencies respect the primacy of state authority in section 401 reviews.

I. THE 2020 RULE IS CAUSING HARM RIGHT NOW AND EPA SHOULD MOVE QUICKLY TO REPEAL THE RULE IN FULL

EPA projects that it will issue a revised final rule in spring 2023, but the 2020 Rule is causing harm right now. Some of these harms are detailed in the various state declarations included in Attachment D to this comment letter, which were filed in opposition to EPA's motion to remand the rule without vacatur in litigation brought by some of the undersigned states challenging the 2020 Rule in the Northern District of California.² In particular, the 2020 Rule threatens to erode long-standing state water quality protections and undo decades of progress in protecting and preserving state water quality. The 2020 Rule's limitations on the scope of state review under section 401 is limiting states' ability to protect state water quality for a variety of projects, including hydroelectric projects that could have long-term or irreversible water quality

² *See In re: Clean Water Act Rulemaking*, Case No. 20-cv-04636-WHA (N.D. Ca.). The declarations are cited based on the State that prepared them, except for New York which has two declarations and thus the last name of the declarant is referred to in parentheses following the citation.

impacts. *See* Section II.D, *infra*. The limitations on the timing of state review has resulted in inadvertent waivers of section 401 authority for major federal permits. *See* Section III.B, *infra*. And every day the 2020 Rule remains in effect, it creates administrative confusion and unnecessary regulatory burdens for applicants and administrative agencies, including:

- The 2020 Rule mandates that project proponents submit a pre-filing meeting request 30 days before an application can be submitted, regardless of whether such a meeting has any utility. This requirement both upsets existing state procedures and leads to unreasonable delays. For example, under the 2020 Rule even environmentally beneficial projects that need to be performed on an expedited basis—such as wildfire restoration and recovery projects, cleaning up pollution discharges, stream bank repairs, and other in-water remediation work—are subject to the 30-day pre-application clock *without exception*. OR Decl. ¶ 5; NC Decl. ¶ 9; NY Decl. ¶ 25 (Sheeley). Even where states have adopted their own procedures to address emergency situations, the 2020 Rule includes no exception for emergencies. *See* NY Decl. ¶ 25 (Sheeley). Because the 2020 Rule contains no provisions for addressing emergency permitting requests, the 30-day pre-application requirement creates an unnecessary, and potentially dangerous, regulatory hurdle that will continue to exist while EPA reconsiders the Rule. This was recently demonstrated in Oregon where projects focused on recovering from the historic 2020 wildfire season faced confusion and delay. *See* OR Decl. ¶ 6.

- The 2020 Rule’s elimination of any provision for modification of 401 certifications is causing significant problems and inefficiencies. In California, the 2020 Rule has led to confusion over whether California may modify conditions related to an emergency safety project on the Lake Fordyce Dam where an aspect of the approved proposal was determined to be unsafe. CA Decl. ¶¶ 22–34. At present, and after shifting positions multiple times, the Corps

is denying California's and the project proponent's request to amend the 401 certification for the project to accommodate the change in design, leading to significant delays to this critical project. *Id.* ¶¶ 35–50; *see also* WA Decl. ¶ 29; NY Decl. ¶ 29 (Sheeley) (applicants must submit entirely new applications solely for the modified elements resulting in two water quality certifications for one project).

- The 2020 Rule severely limits the amount of information that a project proponent must supply in order for a certification request to trigger the countdown for the “reasonable period of time” in which state action must be completed. *See* 40 C.F.R. § 121.5(b). This portion of the 2020 Rule prohibits the certifying authority from determining when it has enough information about a proposed project such that the application can be deemed complete; instead, a project proponent is considered to have submitted a complete request so long as the minimal information required by the 2020 Rule is provided, and without regard to the requirements of state administrative procedures or the quality, descriptiveness, or completeness of the submitted materials. NC Decl. ¶¶ 10-11; WA Decl. ¶¶ 26-29. As a result, the “reasonable period of time” clock may begin counting down well in advance of when a certifying authority has the information necessary to adequately review the potential impacts to water quality. NC Decl. ¶ 11; WA Decl. ¶ 27. Moreover, while the 2020 Rule does permit a certifying authority to request additional information it deems necessary for an adequate (and legally defensible) review of the proposal, the clock for the state's review does not reset when that information is provided. EPA's solution to this is for certifying authorities to simply *deny* the certification request. 85 Fed. Reg. at 42,273. Thus, where state administrative procedures require an applicant to provide additional information, state agencies must choose between complying with state administrative procedures (and risk waiving their authority under the 2020 Rule) or complying with the 2020

Rule (and risk being sued for noncompliance with state law). *See* N.Y. Decl. ¶¶ 30, 34 (Sheeley); WA Decl. ¶ 28. This leads to inefficiencies, project delays, and wasted staff time. N.Y. Decl. ¶¶ 30, 32 (Sheeley); NC Decl. ¶ 11; NM Decl. ¶ 21; OR Decl. ¶ 7.

Now that it is clear that EPA intends to revisit the 2020 Rule, applicants and administrative agencies are left in further limbo as they consider whether and how to adapt state procedures to the dictates of the 2020 Rule. EPA should move expeditiously to repeal the 2020 Rule in full. As EPA has acknowledged, the 2020 Rule adopted an erroneous interpretation of section 401 that is antithetical to cooperative federalism. EPA should therefore repeal the 2020 Rule in its entirety, returning state agencies to the status quo that existed for almost 50 years between the enactment of section 401 and the promulgation of the ill-conceived 2020 Rule. From this blank slate, EPA can consider whether and how to promulgate replacement regulations that respect the role of states in the cooperative federalism structure of the Clean Water Act. If EPA determines to develop a replacement rule rather than first repealing the 2020 Rule, EPA should move as expeditiously as possible to promulgate that replacement.

II. EPA SHOULD CLARIFY THAT STATE CERTIFICATION AUTHORITY UNDER SECTION 401 APPLIES TO A PROJECT AS A WHOLE AND THAT “ANY OTHER APPROPRIATE REQUIREMENT OF STATE LAW” MEANS ANY STATE WATER QUALITY REQUIREMENTS

EPA seeks comment on the 2020 Rule’s “interpretation of the scope of certification and certification conditions.” 86 Fed. Reg. at 29,543. The 2020 Rule purports to limit the scope of section 401 certification, both as related to the scope of certification review and the scope of conditions imposed by certifying authorities under 33 U.S.C. § 1341(d) to assure that an applicant for a federal license or permit will comply with applicable effluent limits and any other appropriate requirement of State law. *See* 40 C.F.R. §§ 121.1(n), 121.3. The 2020 Rule provides that “[t]he scope of a Clean Water Act section 401 certification is limited to assuring that a

discharge from a Federally licensed or permitted activity will comply with water quality requirements.” *Id.* “Discharge” under the 2020 Rule is “a discharge from a point source into a water of the United States.” *Id.* § 121.1(f). The 2020 Rule defines “water quality requirements” to mean “applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.” *Id.* § 121.1(n).

EPA is correct to express concern that “the rule’s narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality.” 86 Fed. Reg. at 29,543. These scope limitations are among the most environmentally harmful—and legally indefensible—provisions of the 2020 Rule. Taken together, these provisions have profound implications for states’ abilities to protect their waters. Moreover, these provisions run counter to the Clean Water Act, congressional intent, case law, and decades of EPA’s own prior interpretations of the scope of section 401 authority. EPA based its limitation on the scope of 401 certification review and conditions in the 2020 Rule almost entirely on the minor modification in language between section 401(a)(1) as incorporated into the Clean Water Act in 1972 and the language that previously existed in section 21(b) of the Water Quality Improvement Act. Specifically, EPA claimed in the preamble to the 2020 Rule that exchanging the word “activity” with “discharge” in section 401(a)(1) indicated Congress’ intent to drastically narrow the scope of section 401 review to only those impacts that flow from specific point-source discharges to Waters of the United States. 85 Fed. Reg. at 42,232. In doing so, EPA claimed that this abrupt change in policy was based on a “holistic” review of section 401’s history. That interpretation is incorrect, as discussed below

EPA should eliminate the 2020 Rule’s scope limitations in 40 C.F.R. §§ 121.1 and 121.3. Any revised rule should confirm that states may consider all potential impacts to water quality from a proposed activity, both direct and indirect, over the entire life of the project. Any revised rule also should clarify that “water quality requirements” include any applicable requirements of state law related to water quality, not just those that are related to point source discharges to “waters of the United States.”

A. Section 401 Preserves Broad State Authority Over Water Quality Impacts from Federally Licensed Projects

In adopting the 2020 Rule, EPA asserted that its limitation on the scope of state authority under section 401 was based on a “holistic” review of the Clean Water Act’s history. EPA’s interpretation of that history in the 2020 Rule, however, was incorrect, and the revised rule should restore section 401 to its original, intended purpose and scope—authorizing broad state authority to protect water quality within state boundaries.

The purpose of the Clean Water Act is as broad as it is ambitious, vastly expanding the tools available to states and the federal government in dealing with entrenched water pollution. In presenting the conference report, Senator Muskie laid out the urgency of the task in no uncertain terms:

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.³

³ Statement of Senator Muskie, *reproduced in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 161 (1973) (“Legislative History Vol. 1”).

As to the Act's objective to "restore and maintain the chemical, physical and biological integrity of the nation's waters[.]" Senator Muskie proclaimed this objective was "not merely the pious declarations that Congress so often makes in passing its laws; on the contrary, this is literally a life or death proposition for the Nation."⁴

To effectuate its goals, Congress understood that the federal government could not act alone. Thus, the Clean Water Act is infused with principles of "cooperative federalism," creating a partnership between the federal government and state and tribal governments to protect the nation's waters. In section 101, the Clean Water Act declares that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b).

That policy carries throughout the Clean Water Act in a "carefully constructed ... legislative scheme" that "impose[s] major responsibility for control of water pollution on the states." *District of Columbia v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) (noting that the 1972 Clean Water Act "recognize[s] that the States should have a significant role in protecting their own natural resources"). The Act "anticipates a partnership between the States and the Federal Government," in which the states are responsible for promulgating water quality standards that "establish the desired condition of a waterway." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Indeed, section 303 of the Act effectively leaves it to the states, subject to baseline federal standards, to determine the level of water quality they will require for their waterbodies and the

⁴ *Id.* at 164.

means and mechanisms through which they will achieve and maintain those levels. 33 U.S.C. § 1313. And, section 510 of the Act expressly sets the boundary of state authority in broad terms: “nothing in [the Act] shall ... preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution” so long as state water quality standards and controls that are not “less stringent” than federal ones. 33 U.S.C. § 1370. It is against this backdrop that EPA must construe section 401 and revise the 2020 Rule.

Section 401 is the lynchpin of Congress’ legislative scheme to preserve state authority to address a “broad range of pollution.” *S.D. Warren CO. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 386 (2006). The provisions now codified in section 401 originated as section 21(b) of the Water Quality Improvement Act of 1970. As noted in the House Report for that legislation, section 21(b) was created to “provide reasonable assurance ... that no license or permit will be issued by a federal agency for any activity ... that could in fact become a source of pollution.”⁵ Similarly, the Senate Report decried the fact that “[i]n the past, these [federal] licenses and permits have been granted without any assurance that [state] standards will be met or even considered.”⁶

Less than two years later, these same safeguards were carried forward in section 401 of the Clean Water Act almost verbatim and with only “minor” changes.⁷ In doing so, Congress again stated its desire to ensure that all activities authorized by federal permits and impacting

⁵ H.R. Rep. No. 91-127, at 24 (1969), *reproduced in* 1970 U.S.C.C.A.N. 2691, 2697.

⁶ S. Rep. No. 91-351, at 3 (1969) (emphasis added).

⁷ Senate Debate on S.2770 (Nov. 2, 1971), *reproduced in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1394 (1973) (Legislative History Vol. 2).

water quality would comply with “State law” and that “Federal licensing or permitting agencies [could not] override State water quality requirements.”⁸ At no time in the process of incorporating section 21(b) into section 401 did Congress indicate a desire to weaken state authority. In fact, the opposite is true: Congress added language in section 401(d) to clarify that, not only must a federally licensed or permitted activity comply with water quality standards, it must also comply with “any other appropriate requirement of State law” imposed by the certifying authority. *See* 33 U.S.C. § 1341(d). The conference report on section 401 noted that subdivision (d) largely carried forward the version passed by the House except that “Subsection (d), which requires a certification to set forth effluent limitations, other limitations, and monitoring requirements necessary to insure compliance with sections 301, 302, 306, and 307, of this Act, *has been expanded to also require compliance* with any other requirement of State law.”⁹

In short, as EPA now notes, section 401 endows states and tribes “with a powerful tool to protect the quality of their waters from adverse impacts resulting from federally licensed or permitted projects.” 86 Fed. Reg. at 29,542. The revised rule should reestablish and reaffirm this “powerful tool” consistent with Congressional policy, the statutory text, and applicable caselaw.

B. In the 2020 Rule, EPA Departed from Its Longstanding Interpretation of Section 401 As Preserving Broad State Authority Pertaining to All Water Quality Impacts from Federally Licensed Projects

The 2020 Rule is also contrary to EPA’s longstanding interpretation of Section 401. Far from being the first “holistic” review of section 401, the 2020 Rule in fact rejected decades of

⁸ S. Rep. 92-414, at 69, *reproduced in* Legislative History Vol. 2, at 1487.

⁹ S. Conf. Rep. 92-1236, at 138, *reproduced in* Legislative History Vol. 1 at 321 (emphasis added).

consistent interpretation by EPA of the scope of section 401 that considered statutory text, legislative history, relevant state laws, and overall impacts to water quality.

As early as 1985, EPA closely examined section 401's history and reached the opposite conclusion from the 2020 Rule¹⁰ In the context of a marina construction in North Carolina, EPA addressed whether state review under section 401 properly included both construction and operational impacts of a proposed project and whether review was limited solely to the impacts from point source discharges. In answering these questions, EPA looked closely at the legislative history and language of both section 21(b) and section 401, including an analysis of the use of the term "discharge" in section 401(a). EPA concluded that the purpose of section 401—as had been the purpose of section 21(b)—is to allow states to review all of the water quality impacts of federally approved projects, both point and non-point, over the entire life of the project.¹¹

On the threshold question of whether operational impacts should be considered, EPA found that, based on the plain text of the statute, "[w]hatever the ambiguity of section 401(a)(1), section 401(a)(3) makes it clear that a certification issued for a construction license may address possible impacts of the subsequent operation of the facility, even when that operation will itself be subject to another federal license."¹² EPA reached this conclusion, in part, because section 401(a)(3) "necessarily contemplates" such a review by providing that section 401 certification for construction also satisfies certification for subsequent operation of the same activity.¹³ EPA also found this interpretation supported by the legislative history, which "noted that the almost

¹⁰ Memorandum from Catherine A. Winer, EPA Water Division, to David K. Sabock, EPA Standards Branch (Nov. 12, 1985).

¹¹ *Id.* at 2-4.

¹² *Id.* at 2.

¹³ *Id.*, citing 33 U.S.C. § 1341(a)(3).

verbatim predecessor of section 401(a)(3) was intended to ensure that sufficient planning was done early ... to avoid violations of water quality standards from *subsequent operation*.”¹⁴

As to whether review should be limited to point source discharges only, EPA noted the tension between the 1970 Act’s use of “activity” and the 1972 Act’s change to “discharge.”¹⁵ EPA concluded, however, that the legislative history does not establish that Congress intended a radical shift in state authority with that change. For one, multiple references in the legislative history to section 21(b) being reincorporated into section 401 with only “minor changes” strongly counsel against any interpretation that would clearly constitute a *major* shift from the broad scope of review originally set out in section 21(b).¹⁶ Moreover, EPA determined that there is, in fact, an obvious reason for the use of the term “discharge” and that would constitute a “minor” change. Specifically, the change in language simply alluded to “the addition of references to newly-created effluent limitation requirements.”¹⁷ Indeed, the legislative history of the 1977 amendments to section 401 confirm that “no significance attached to the differences in wording that occurred in 1972” when the 1977 Conference Report summarized section 401 as ensuring “[a] federally licensed or permitted activity ... must be certified to comply with State water quality standards.”¹⁸

EPA’s 1985 analysis and conclusion serve as a powerful rebuke to the 2020 Rule. EPA found that “the overall purpose of section 401 is clearly ‘to assure that Federal licensing or permitting agencies cannot override State water quality requirements.’” *Id.* Because violations of those requirements may “just as easily arise from some other source of pollution ... as from the

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* n. 4.

discharge itself,” limiting section 401 certification to just water quality impacts from potential point source discharges “not only has no support in the legislative history but also would not serve the stated purpose of the section.”¹⁹

EPA’s section 401 guidance has historically taken the same expansive view of state authority under section 401 that is counseled by a plain reading of the Act, its legislative history, and applicable case law. Following a push for states to do more to protect wetlands, EPA first adopted section 401 guidance in 1989, when it issued a handbook for states and tribes on applying section 401 to projects with potential wetlands impacts.²⁰ In pressing upon states and tribes the importance of 401 certifications as a tool to prevent wetland degradation, EPA addressed the history, purpose, and scope of 401 authority.

EPA’s 1989 Guidance began by noting that section 401 “is written very broadly with respect to the activities it covers” and encompasses “any activity, including, but not limited to, the construction or operation of facilities which *may* result in *any discharge*.”²¹ EPA explained that the broad purpose of the water quality certification requirement, per Congress’s instruction, “was to ensure that no license or permit would be issued for an activity that through inadequate planning or otherwise could in fact become a source of pollution.”²² With regard to the scope of state review, EPA stated that “all of the potential effects of a proposed activity on water quality – direct and indirect, short and long term, upstream and downstream, construction and operation – should be part of a State’s [401] certification review.”²³ By way of example, the 1989 Guidance

¹⁹ *Id.*

²⁰ See Office of Water, EPA, *Wetlands and 401 Certification—Opportunities and Guidelines for States and Eligible Indian Tribes* at 22 (Apr. 1989) (“1989 Guidance”).

²¹ *Id.* at 20 (emphasis original).

²² *Id.*, quoting 115 Cong. Rec. H9030 (April 15, 1969) (House debate); 115 Cong. Rec. S29858-59 (Oct. 7, 1969) (Senate debate).

²³ *Id.* at 23.

illustrated a number of conditions that states had successfully placed on 401 certifications, including sediment control plans, stormwater controls, protections for threatened species, and noxious weed controls, with “few of these conditions . . . based directly on traditional water quality standards.”²⁴ EPA noted that “[s]ome of the conditions are clearly requirements of State or local law related to water quality other than those promulgated pursuant to the [Clean Water Act] sections enumerated in Section 401(a)(1).”²⁵ All, however, found their source outside of federal law or standards.²⁶

EPA issued additional guidance on section 401 in 2010.²⁷ As it did in 1989, EPA continued to interpret section 401 as a broad mandate for states to consider all water quality impacts from a proposed activity. EPA stated that, “[a]s incorporated into the 1972 [Clean Water Act], § 401 water quality certification was intended to ensure that no federal license or permit would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate [the Act’s] provisions.”²⁸ EPA highlighted the Supreme Court’s decision in *PUD No. 1* to confirm that certifying authorities’ section 401 review included the ability to “impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the [Act] and any other appropriate requirements of state or tribal law.”²⁹ With regard to the scope of other state laws that a certifying authority could consider, EPA stated that “[i]t is important to note that, while EPA-approved state and tribal

²⁴ *Id.* at 24, 54-55.

²⁵ *Id.* at 24.

²⁶ *See id.*

²⁷ EPA, Office of Wetlands, Oceans, and Watersheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (Apr. 2010) (“2010 Guidance”).

²⁸ 2010 Guidance at 16.

²⁹ *Id.* at 18, *citing PUD No. 1*, 511 U.S. at 712.

water quality standards may be a major consideration driving § 401 decision[s], they are not the only consideration.”³⁰

Unlike the 1989 and 2010 Guidance, when EPA promulgated the 2020 Rule it arbitrarily and unlawfully failed to consider the impact its drastic changes would have on state administrative laws or water quality. Instead, EPA justified a sudden reversal in nearly 50 years of consistent interpretation by EPA on a narrow interpretation of section 401’s text and case law that was advanced to reach a result dictated by an Executive Order aimed at promoting energy infrastructure (not protecting water quality). *See Promoting Energy Infrastructure and Economic Growth*, Presidential Executive Order 13,868, 84 Fed. Reg. 15,495 (April 10, 2019). In crafting a new rule, EPA should return the balance of federal-state authority to the status quo that existed for decades prior to the 2020 Rule’s adoption.

C. The 2020 Rule’s Narrow Interpretation of the Scope of States’ Section 401 Authority Is Contrary to Supreme Court Precedent

Further, the 2020 Rule is contrary to longstanding Supreme Court precedent interpreting the post-1972 statutory language. In *PUD No. 1*, proponents of a dam project challenged the State of Washington’s authority to impose a minimum stream flow requirement unrelated to the specific discharges that triggered section 401 certification requirements. 511 U.S. at 704-705. The Court rejected this argument. First, relying on the plain language of sections 401(a) and 401(d), the Court concluded that section 401 permits certification conditions and limitations that apply to the activity as a whole (and not only those tied to the discharge):

The language of [section 401(d)] contradicts petitioners’ claim that the State may only impose water quality limitations specifically tied to “discharge.” The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose “other limitations” on the project in general to assure compliance

³⁰ *Id.* at 16.

with various provisions of the Clean Water Act and with “any other appropriate requirement of State law.”

Id. at 711-712. Next, the Court also declined to narrowly define the scope of “any other appropriate requirement of State law.” *See id.* at 713. Instead, the Court held that “States may condition certification upon *any limitations* necessary to ensure compliance with state water quality standards or *any other* ‘appropriate requirement of State law.’” *Id.* at 713-14 (emphases added). In a concurring opinion, Justice Stevens noted that “[n]ot a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State’s power to regulate the quality of its own waters more stringently than federal law might require.” *Id.* at 723 (Stevens, J., concurring).

Based on that analysis, the Court held, among other things, that projects must comply with designated uses. *Id.* at 715 (“[U]nder the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.”). The Court also rejected the project proponent’s invitation to otherwise limit the State’s regulatory authority to impose conditions in a section 401 certification. *See id.* at 712-13, 722 (rejecting project proponent’s argument that 401 certification conditions must be tied to potential discharges and declining to hold that the State’s minimum flow requirements conflict with FERC’s hydroelectric licensing authority). The narrow scope of state authority under section 401 adopted by EPA in the 2020 Rule flies in the face of *PUD No. 1*.

Over a decade after *PUD No. 1*, the Court re-affirmed that “State certifications under § 401 are essential in the scheme to preserve state authority to address the *broad range of pollution* [impacting state waters].” *S.D. Warren Co.*, 547 U.S. at 386 (emphasis added). When a hydropower dam operator sought to evade section 401 state certification by arguing that its dams did not “discharge” into the river, the Court rejected the operator’s arguments. *Id.* at 375-76

(“discharge” under section 401 broader than “discharge of a pollutant”). In doing so, the Court held that section 401 “was meant to ‘continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.’” *Id.* at 380, quoting S. Rep. No. 92-414, at 69 (1971).

D. The 2020 Rule’s Narrow and Unlawful Scope of Section 401 Certification Review Is Harming State Water Quality

The 2020 Rule hamstring[s] state authority under the Clean Water Act and undermines—or in some cases eliminates—state environmental protections that have been applied to control the water quality impacts of federally approved projects for decades. Prior to the 2020 Rule, section 401 certifications considered *all* potential water quality impacts of a proposed project, both direct and indirect and over the project’s full operational life. *See PUD No. 1*, 511 U.S. 700. Parallel to that scope, and consistent with the Clean Water Act’s requirement that section 401 certifications include “any” conditions necessary to assure compliance with “appropriate” requirements of state law, state section 401 certification conditions long sought to assure that all aspects of a proposed project would comply with applicable state water quality laws. *See e.g.* NC Decl. ¶¶ 16-22, WA Decl. ¶ 8, NV Decl. ¶ 4.

Thus, for example, there was no question that a state could impose minimum flow conditions on a dam necessary to protect aquatic species habitat even if those conditions were not directly associated with any specific point source discharge from the dam. *See PUD No. 1*, 511 U.S. at 711-12. Or that states might include erosion and sediment control measures designed to address nutrient and sediment pollution. NC Decl. ¶¶ 16-22. This broad scope of state 401 certification review and conditions was long viewed as the cornerstone of the Clean Water Act’s system of cooperative federalism and reflected the incontrovertible fact that Congress intended

section 401 to “provide reasonable assurance ... that no license or permit will be issued by a federal agency for any activity ... that could in fact become a source of pollution.”³¹

The impacts of the 2020 Rule’s unlawful narrowing of scope occur across a wide spectrum of activities requiring approvals from various federal agencies and are, thus, far too numerous to document here. By way of illustration, however, the harm of the 2020 Rule’s scope limitation is perhaps most acutely felt in the context of hydropower licensing and relicensing. In addition to point source impacts, dams are significant sources of other harms to water quality. Without proper mitigation measures, dams cause increased water temperature resulting from decreased water flows within streams and decreased flow rates as a result of ponding behind dam structures. WA Decl. ¶ 7; NY Decl. ¶ 13 (Gosier); Cal. Decl. ¶¶ 76, 79-80. Dam structures alter flow in rivers and creeks downstream of hydroelectric dams, cause fluctuations of water levels within the impoundment created by dams, kill fish passing through hydroelectric turbines, and prevent the upstream movement of fish and other water or wetland-dependent wildlife. NY Decl. ¶ 13 (Gosier); Cal. Decl. ¶¶ 79-80. Dam reservoirs also lead to vegetation loss, reducing shading and increasing temperatures, and wave impacts within reservoirs increase turbidity and sedimentation. WA Decl. ¶ 7; Cal. Decl. ¶¶ 79-80. These impacts, in turn, can result in a host of adverse impacts, including further temperature increases, smothered aquatic habitat, interference with predation patterns, and lower oxygen levels. WA Decl. ¶ 7; NY Decl. ¶ 15 (Gosier); Cal. Decl. ¶¶ 76, 79-80. Increased turbidity triggered by dams can also cause an increase in toxin mobility, including PCBs and other “forever chemicals,” due to increased absorption of these chemicals to sediment particles. WA Decl. ¶ 7.

³¹ H.R. Rep. No. 91-127, at 24 (1969), reprinted in 1970 U.S.C.C.A.N. 2691, 2697.

Typically, states and tribes have relied on the section 401 certification process to mitigate or eliminate these and other impacts. For example, certifying authorities included in section 401 certifications requirements to mitigate vegetation loss, geoengineer shorelines to decrease erosion, and discharge from deeper in reservoir water columns where temperatures are lower.³² WA Decl. ¶ 8. NY Decl. ¶ 15 (Gosier); Cal. Decl. ¶ 78.

Conversely, failure to apply these protections can be enormously detrimental. For instance, in Washington alone three hydropower dams on the Skagit River will require 401 certifications between now and the spring of 2023. WA Decl. ¶ 10. The Skagit is home to numerous anadromous fish species, including Chinook salmon—a threatened species and the primary source of food for the endangered Southern Resident Orca population in Puget Sound.³³ *Id.* Because Chinook and other salmonids are extremely sensitive to thermal stress, even relatively small temperature increases cause intense physical distress, with most perishing once water temperatures reach the upper 70 degrees Fahrenheit. *Id.* As such, interfering with Washington’s ability to apply conditions to minimize adverse temperature (among other) impacts negatively impacts its Southern Resident Orca recovery efforts. *Id.*

Other states will suffer similar harms if the scope of section 401 certification is not restored. California, like much of the West, is experiencing extreme drought conditions and is struggling to maintain its rivers at a temperature habitable for salmonids and native fishes. Cal. Decl. ¶¶ 53, 79-

³² Additionally, because hydropower licenses can last up to 50 years, the ability to revisit and modify 401 certifications to adapt to changing conditions (such as modifications to state water quality standards) provided the critical ability for states to adjust conditions for these long-term projects as new research and data establish needs for further or modified protections. WA Decl. ¶¶ 9-10, 11; NY Decl. ¶¶ 11, 15 (Gosier); Cal. Decl. ¶72. As discussed in Section IV.C below, EPA should restore provisions allowing certifying authorities to modify 401 certifications.

³³ Southern Resident Orcas are in severe decline and threatened with extinction. The iconic Puget Sound population is down to only 73 individuals, its lowest level in over four decades. WA Decl. ¶ 10.

80. Even under non-drought conditions, climate change projections indicate that temperatures will rise, directly affecting salmonids survival and also affecting species through climate-induced changes in food, water, and habitat availability. *Id.* ¶ 79. Thus, temperature management is a current and increasingly important issue in many hydropower-related certifications where inaction for decades could result in permanent water quality impairments and impacts to threatened, endangered, or other aquatic species of concern. A narrowing of the scope of section 401 certifications hamstring California's efforts to control these impacts right when they are needed most.

North Carolina regularly relies on section 401 to control nutrient loading and excess sedimentation, two of the most harmful threats to North Carolina's water quality and the cause of many of the impacts discussed above, including destruction of aquatic habitat and increased pollution transport. NC Decl. ¶¶ 16-22, 33. Colorado estimates that the vast majority of conditions it utilizes under section 401 to control adverse water quality impacts from water supply reservoirs are called into question by the 2020 Rule's scope limitations. CO Decl. ¶ 6.

These and countless other examples highlight the potential harms to water quality that will continue to incur if EPA does not re-align the 401 Rule with congressional intent, applicable case law, and decades of its own prior policy. EPA should thus eliminate the 2020 Rule's attempted limits on the scope of § 401 certifications and their conditions. In the alternative, should EPA determine it will undertake only revisions to the 2020 Rule, it should revise 40 C.F.R. §§ 121.1(n) and 121.3 to restore the agency's long-standing prior interpretation of section 401's scope and conditions as applicable to the proposed activity as a whole.

III. EPA SHOULD ELIMINATE ANY FEDERAL REVIEW OF THE SUBSTANCE OR CONTENTS OF CERTIFICATIONS

EPA requests input regarding “whether it is appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose,” and “whether federal agencies should be able to deem a certification or conditions as ‘waived,’ and whether . . . federal agencies may reject state conditions.” 86 Fed. Reg. 29,543. The answer to these questions, as made clear by the plain language and legislative history of section 401 along with multiple court decisions, is a resounding “no.” Federal agencies have no authority to second-guess the sufficiency of state denials or conditions. Accordingly, EPA should repeal the sections of the 2020 Rule that require state 401 decisions to include certain information, 40 C.F.R. § 121.7(c), (e), and that purport to authorize federal agencies to deem denials or conditions that do not include this information waived, *id.* § 121.9.

A. Section 401 Does Not Authorize Federal Agencies to Review and Second-Guess State Denials or Conditions

The 2020 Rule requires federal permitting or licensing agencies to review certifying authority actions to determine whether they comply with the procedural requirements of section 401 and the 2020 Rule. *Id.* at § 121.9. Notably, the 2020 Rule allows federal permitting or licensing agencies to deem certification waived for various reasons, including potentially minor procedural concerns. *Id.* In practice, this opens the door for the federal permitting or licensing agency to inappropriately substitute its own judgment regarding a certification condition for that of the certifying authority. *Id.* This approach is not only bad policy (as state water quality can be permanently degraded when waivers of state certifications are found following minor or technical mistakes), it is unlawful.

The plain language of section 401 provides that “[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived.” 33 U.S.C. § 1341(a)(1). Even if this direct command could be subject to more than one interpretation, the following sentence leaves no doubt: “No license or permit shall be granted if certification has been denied by the State[.]” *Id.* Thus, the plain and unambiguous language of the statute gives states the final authority to make decisions on certification requests, precluding review of timely state certification denials by federal agencies.

Although the plain language of section 401 is dispositive, legislative history further demonstrates that Congress intended state section 401 decisions to be final and unreviewable by federal agencies. The House Report on section 401 states that “[d]enial of certification by a State . . . results in a *complete prohibition* against the issuance of the Federal license or permit.”³⁴ Moreover, “[i]f a State refused to give a certification, the courts of that State are the forum in which the applicant must challenge the refusal.”³⁵ The Senate Report likewise provides that “[s]hould . . . an affirmative denial occur” by a State “no license or permit could be issued” by the federal agency “unless the State action was overturned in the appropriate courts of jurisdiction.”³⁶

Courts as well have consistently recognized that section 401 “mean[s] exactly what it says: that *no* license or permit . . . shall be granted if the state has denied certification.” *United States v. Marathon Development Corp.*, 867 F.2d 96, 101 (1st Cir. 1989). Section 401 entitles a state agency to “conduct its own review” of a project’s “likely effects on [state] waterbodies” and to determine “whether those effects would comply with the State’s water quality standards,”

³⁴ H. Rep. 92-911, at 122, *reproduced in* Legislative History Vol. 1 at 809 (emphasis added).

³⁵ *Id.*

³⁶ S. Rep. 92-414, at 69 *reproduced in* Legislative History Vol. 2 at 1487.

Constitution Pipeline Co., LLC v. New York State Dep't of Env'tl. Conservation, 868 F.3d 87, 101 (2d Cir. 2017), *cert. denied* 138 S. Ct. 1697 (2018). A state certifying agency may deny certification because a project will not comply with state water quality standards and “effectively veto[]” that project. *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), *cert. denied* 555 U.S. 1046 (2008). In short, in enacting section 401 Congress “intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.” *Keating v. Fed. Energy Regulatory Comm'n*, 927 F.2d 616, 622 (D.C. Cir. 1991).

Similarly, if the state water quality agency grants a section 401 certification with conditions, the federal licensing agency has no authority to reject or second-guess those conditions. Section 401(d) provides that any state certification “*shall* become a condition on any Federal license or permit.” 33 U.S.C. § 1341(d). “This language leaves no room for interpretation. ‘Shall’ is an unambiguously mandatory term, meaning, as courts have uniformly held, that state conditions *must* be conditions” of the federal permit. *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 645-46 (4th Cir. 2018). Indeed, “[e]very Circuit to address this provision has concluded that ‘a federal licensing agency lacks authority to reject [state Section 401 certification] conditions in a federal permit.’” *Id.* at 646 (quoting *Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n*, 545 F.3d 1207, 1218 (9th Cir. 2008); *see also Am. Rivers, Inc. v. Fed. Energy Regulatory Comm'n*, 129 F.3d 99, 107 (2d Cir. 1997) (rejecting FERC’s argument that it possessed authority to determine whether state conditions were within the scope of section 401, noting that statutory language of 401(d) is “mandatory” and “unequivocal”). In short, under section 401 the federal agencies’ “role . . . is limited to awaiting and then deferring to the final decision of the state.” *City of Tacoma, Wash. v. Fed. Energy*

Regulatory Comm'n, 460 F.2d 53, 68 (D.C. Cir. 2006). EPA must align its regulations with the plain language of section 401, as interpreted by every Circuit to consider the issue, as requiring that federal agencies incorporate conditions imposed by state section 401 certifications into the applicable federal permit.

Applicants are not left without recourse, though: “Any defect in a state’s section 401 water quality certification can be redressed” in state court. *Marathon Development Corp.*, 867 F.2d at 102; *see also Alcoa Power Generating Inc. v. Fed. Energy Regulatory Comm’n*, 643 F.3d 963, 971 (D.C. Cir. 2011) (“a State’s decision on a request for section 401 certification is generally reviewable only in State court.”). State section 401 decisions “turn[] on questions of substantive environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence.” *Keating*, 927 F.2d at 622-23.

EPA’s attempt in adopting the 2020 Rule to defend federal oversight over state decisions as “entirely procedural” misses the point. 85 Fed. Reg. at 42,267. Section 401 provides the sole circumstance in which a state’s section 401 authority will be deemed waived: where the state “fails or refused to act on a request for certification” within the waiver period. 33 U.S.C. § 1341(a)(1). And yet the 2020 Rule provides—with no statutory support—that waiver may occur where the state fails to act within the waiver period *or* where the State fails to comply with the requirements of the 2020 Rule regarding the contents of state 401 certifications. *See* 40 C.F.R. § 121.9(a)(2). EPA cannot through rulemaking simply expand the statutory waiver provision of section 401 to include timely denials that do not include EPA-dictated information, regardless of whether EPA considers such information “procedural” in nature. EPA’s next rulemaking must therefore rescind these improper attempts to expand section 401’s waiver provisions and return all parties to the well-known status quo that preceded promulgation of the 2020 Rule.

B. The Federal Agency Review Requirement Is Already Harming State Water Quality

EPA is now rightly “concerned that a federal agency’s review may result in a state or tribe’s certification or conditions being permanently waived as a result of nonsubstantive and easily fixed procedural concerns identified by the federal agency.” 86 Fed. Reg. at 29,543. Indeed, that is exactly what happened when the Army Corps recently sought section 401 certifications for a suite of nationwide permits for activities occurring under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899 and that allegedly have “minimal impacts” to water quality. *See* 33 U.S.C. § 1344(e); 33 C.F.R. § 330.1(b); 86 Fed. Reg. 2,744. The Army Corps relied on the 2020 Rule to upend state authority over these important, streamlined permits by rejecting a number of section 401 certifications that included “re-opener” clauses and in at least one case eliminating state section 401 authority entirely based on the state’s inadvertent failure to include the so-called “procedural” elements set forth in 40 C.F.R. § 121.7.

The Army Corps’ actions on the nationwide permits pursuant to the 2020 Rule have significant economic and environmental consequences. For one, without programmatic section 401 certifications for these permits, projects that would otherwise qualify for streamlined permit procedures must now be processed individually, defeating the purpose of the nationwide permit system and overwhelming both Army Corps staff and state certifying authorities. WA Decl. ¶¶ 19-20; NM Decl. ¶ 22; CA Decl. ¶ 17. For example, in Washington, the invalidation of the nationwide aquaculture permits resulted in a flood of individual 401 certification requests for shellfish growing operations. WA Decl. ¶ 20. Because the planting of shellfish seed must occur during specific, narrow windows of the growing season, timely permitting is essential, and the failure to begin these projects during the limited planting window can doom a grower for a season

or even permanently. *Id.* ¶ 21. To meet the unprecedented demand for individual aquaculture permits and associated certification requests, Washington was forced to hire new staff and reassign existing employees. *Id.* ¶ 22. While this expenditure of extra resources has allowed Washington to keep pace with the surge (for now), the Army Corps has been unable to keep up with this increase and has notified Washington and its growers of a potential two-year delay in processing individual permits, which may force a number of growers out of business. WA Decl. ¶ 23. Similarly, California projects that the Army Corps' invalidation of California's general water quality certifications of the nationwide permits, purportedly due to the 2020 Rule will require California to process approximately 135 additional individual water quality certifications that would otherwise have been addressed by the general water quality certifications. CA Decl. ¶ 17.

Moreover, at least one waiver determination made by the Army Corps pursuant to the 2020 Rule has effectively eliminated section 401 authority altogether. In North Carolina, the Army Corps used the 2020 Rule to declare waiver and refused to accept North Carolina's denial of certification for seven nationwide permits based on the state's inadvertent failure to include the rationale for the denial during the rushed and unusual 2020 nationwide certification process. NC Decl. ¶¶ 28–29. When North Carolina tried to remedy its omission, the Army Corps stated that it had “no choice” under the 2020 Rule other than to declare waiver. NC Decl. ¶ 28. Three of these permits are final, and North Carolina expects the other four to be final in the coming months. NC Decl. ¶ 28. As a result of the Army Corps' waiver decision under the 2020 Rule, North Carolina is prevented from using its section 401 authority to apply state water quality requirements to projects covered under these permits. NC Decl. ¶¶ 29-30. And these negative impacts will not stop now that EPA has committed to reviewing the 2020

Rule: the Army Corps is on target to renew 40 additional nationwide permits in the coming year and has indicated its intent to follow the same procedure, based on the 2020 Rule. NC Decl. ¶ 30.

Because it far oversteps the authority provided by section 401 and is harming state water quality, the 2020 Rule’s federal agency review requirement should be repealed in its entirety.

IV. EPA SHOULD CLARIFY THAT STATES HAVE UP TO ONE YEAR TO ACT ON SECTION 401 REQUESTS THAT ARE COMPLETE PURSUANT TO STATE ADMINISTRATIVE LAWS

EPA seeks comment on “the process for determining and modifying the reasonable period of time” for state review of certification requests. 86 Fed. Reg. at 29,543. We urge EPA to clarify that the reasonable period of time is up to and including one year from receipt of a complete application.

A. EPA Should Eliminate the 2020 Rule’s Provision Giving Federal Agencies Authority to Dictate the “Reasonable Period of Time”

EPA is rightly “concerned that the [2020 Rule] does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certifications requests.” 86 Fed. Reg. at 29,543. The 2020 Rule purports to authorize federal agencies to “establish the reasonable period of time either categorically or on a case-by-case basis” and leaves it up to the relevant federal agency to approve any extension requests. 40 C.F.R. § 121.6(a), (d). The 2020 Rule also purports to *prohibit* state agencies from requesting that project proponents withdraw certification requests or take “any action to extend the reasonable period of time.” *Id.* § 121.6(e). These limitations on state authority are inconsistent with the language and intent of section 401 and are contrary to decades of prior agency practice.

Neither the language nor the legislative history of Section 401 authorizes federal agencies to dictate the timeframe for certification review to state agencies. Section 401 provides that a

state waives its authority to issue, condition, or deny a section 401 certification *only* if the state “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.” 33 U.S.C. § 1341(a)(1). The statute imposes no further restrictions on the timeframe or scope of a state’s review of a section 401 application. The purpose of the waiver provision is to “insure that sheer inactivity by the State . . . will not frustrate the Federal application.”³⁷ Far from suggesting that the reasonable period of time should be dictated by federal agencies, in adopting the waiver provision, Congress rejected a proposal that would have empowered federal agencies to establish the reasonable period of time for state action.³⁸

In a new rule, EPA should clarify that the reasonable period of time for review of certification requests is up to and including one year and cannot be shortened by the federal permitting agency. State agencies process thousands of section 401 certification requests each year, the vast majority of which are resolved in fewer than 60 days. *See* N.Y. Dec. ¶20 (Sheeley). However, additional time is sometimes necessary for review, for example when a certifying agency must wait for the federal agency to complete an environmental review of the project pursuant to NEPA, *see North Carolina Dep’t of Env’t Quality v. Fed. Energy Regulatory Comm’n*, ___ F.4th ___, 2021 WL 2763265 (4th Cir. 2021) (*NCDEQ v. FERC*), when a project applicant fails to comply with agency requests for information, *see Constitution Pipeline Co., LLC v. N.Y. State Dep’t of Env’t Conservation*, 868 F.3d 87, 102 (2d Cir. 2017), when the project requires additional time for soliciting public input, or when a natural disaster or other unforeseen circumstance causes a large increase in applications and corresponding decrease in

³⁷ H.R. 92-911, *reproduced in* Legislative History Vol. 1 at 809.

³⁸ *Compare* Public Law 91-224, at 18 (April 3, 1970), *with* House Debate on H.R.4148, *reproduced in* Congressional Record—House, at H.2691 (April 16, 1969).

available agency resources. The state agency—not the federal permitting agency—is in the best position to determine how much time is reasonable for review of certification requests.

An applicant dissatisfied with the speed of agency review may petition a federal agency for a case-specific finding of waiver, *see Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017), or may contest compliance with state procedures pursuant to state law. *See Alcoa Power Generating Inc.*, 643 F.3d at 971 (“a State’s decision on a request for section 401 certification is generally reviewable only in State court”); *Marathon Development Corp.*, 867 F.2d at 102 (“Any defect in a state’s section 401 water quality certification can be redressed. The proper forum for such a claim is state court, rather than federal court, because a state law determination is involved.”). But it is not the place of federal agencies under the cooperative federalism approach created by the Clean Water Act to dictate the timeline of state certification review in advance, especially when Congress has already established in section 401 a one-year limit for certifying authority action.

B. EPA Should Clarify That Only an Application That Is “Complete” Pursuant to State Administrative Procedures Can Commence the Section 401 Waiver Period

EPA should also clarify that only a *complete* application, as defined by state administrative procedures, triggers the start of the waiver period. Section 401 ties the start of the waiver period to the agency’s “receipt” of a “request” for certification. 33 U.S.C. § 1341(a)(1). Section 401 is silent as to what constitutes a “request” for certification sufficient to start the waiver period. The Fourth Circuit has recognized that the statute is therefore ambiguous “regarding whether an invalid as opposed to only a valid request for water quality certification will trigger § 401(a)(1)’s one-year waiver period.” *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 728 (4th Cir. 2009).

EPA’s prior guidance documents have recognized that section 401 could be interpreted as requiring a “complete application” to trigger the start of the waiver period. In the 1989 Guidance, EPA noted that the plain language of section 401 gives states “a reasonable period of time (which shall not exceed one year)” to act on a certification request.³⁹ EPA advised states to adopt regulations to ensure that applicants submit sufficient information to make a certification decision and encouraged requirements that “link the timing for review to what is considered a receipt of a complete application.”⁴⁰ As one example, EPA favorably cited to a Wisconsin regulation requiring a “complete” application before the agency review period begins.⁴¹ The same regulation stated that the agency would review an application for completeness within 30 days of receipt and allowed the agency to request any additional information needed for the certification.⁴²

EPA’s 2010 Guidance likewise maintained “[g]enerally, the state or tribe’s §401 certification review timeframe begins once a request for certification has been made to the certifying agency, accompanied by a complete application.”⁴³ To illustrate, EPA referred to regulations from Oregon establishing a detailed list of information for applicants to provide.⁴⁴

Other federal agencies have also interpreted section 401 as requiring an administratively complete application to trigger the waiver period. For example, Army Corps’ regulations require the district engineer to determine “that the certifying agency has received a valid request for certification” before determining whether waiver has occurred. 33 C.F.R. § 325.2(b)(1)(ii).

³⁹ 1989 Guidance at 31.

⁴⁰ *Id.*

⁴¹ *Id.*, citing Wisconsin Administrative Code, NR 299.04.

⁴² *Id.*

⁴³ 2010 Guidance, at 15-16.

⁴⁴ *Id.* at 16.

Historically, the Army Corps interpreted the requirement for a “valid” request to mean a request “made in accordance with State laws” inasmuch as “the state has the responsibility to determine if it has received a valid request.” *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986); see *AES Sparrows Point*, 589 F.3d at 729-30 (upholding the Army Corps requirement for a “valid,” interpreted synonymously with “complete,” application). But since the promulgation of the 2020 Rule, Army Corps has interpreted a “valid” request to be any request that complies with the barebones requirements of 40 C.F.R. § 121.7, eliminating the states’ role. FERC, as well, at one point interpreted section 401’s waiver period as commencing when a state agency determine that the request was acceptable for processing. See *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, 52 Fed. Reg. 5,446, 5,446 (Feb. 23, 1987).⁴⁵ EPA should eliminate the regulatory uncertainty and clarify that only an application that is complete pursuant to state administrative procedures triggers the start of the waiver period.

There are many good policy reasons for requiring a complete application before the statutory waiver period commences. For a “certification request” to be meaningful, the states need sufficient information to determine whether the project will comply with water quality standards and requirements. Requiring state agencies to act within a year of receiving any section

⁴⁵ Although the Second Circuit has upheld FERC’s current interpretation of the waiver period as commencing upon the receipt of *any* request, however facially deficient, that decision was made in the absence of any applicable EPA regulation. See *N.Y. State Dep’t Env’t Conservation v. Fed. Energy Regulatory Comm’n*, 884 F.3d 450, 455-56 (2d Cir. 2018) (*NYSDEC v. FERC*). Moreover, although the decision purports to be based on the “plain language” of the section 401 waiver provision, it fails entirely to consider the Fourth Circuit’s conclusion that the same language is ambiguous. Compare *id.*, with *AES Sparrows Point LNG*, 589 F.3d at 728. EPA should confirm that the nature of a “request” sufficient to commence the waiver period is ambiguous, and clarify that only a complete application, as determined under state administrative law, triggers the waiver period.

401 application, however perfunctory or incomplete, could force agencies into making premature decisions based on incomplete information.

Section 401 also requires state certifying agencies to “establish procedures for public notice in the case of all applications for certifications” and for public hearings on certain applications. 33 U.S.C. § 1341(a)(1). Many states require a complete application to trigger public notice and comment, *see, e.g.*, N.Y. ECL § 70-0109(2)(a), because a complete application is necessary to give the public a meaningful opportunity for review. *See, e.g., Ohio Valley Envt’l Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D.W.Va. 2010) (noting that “[c]ompletion and public notice are inextricably linked”). After public notice and comment, state agencies must review any public comments and determine whether a public hearing is required or appropriate, respond to the comments, and decide whether the application should be granted, granted with conditions, or denied. A state agency required to act within one year of receiving an incomplete application may not be able to conclude that a project would comply with state standards and could be forced to act on an application before this public notice and comment process has concluded (or even commenced). *See, e.g., N.Y. State Dep’t of Envt’l Conservation v. Fed. Energy Regulatory Comm’n*, 991 F.3d 439, 443 (2d Cir. 2021) (upholding FERC’s finding that state agency waived its section 401 authority where it required an additional month to complete notice and comment process). Accordingly, only a complete application can trigger the one-year waiver period and ensure that states can fully and lawfully exercise their authority under section 401. The undersigned states urge EPA to codify this common-sense requirement for a complete application in its revised rule.

Nor should applicants be concerned that requiring a complete application to trigger the waiver period will result in unwarranted certifying agency delay. As an initial matter, state

agencies operating pursuant to EPA's prior guidance documents have an established record of completing their administrative review of section 401 requests in a timely manner. For example, of the more than 4,000 requests received by the New York DEC, the vast majority are issued in under 60 days. N.Y. Decl. ¶20 (Sheeley). Moreover, many state administrative procedures include provisions for the timely processing of permit applications. *See, e.g.*, NY Environmental Conservation Law (ECL) § 70-0109. And, as noted above, *see* p. 28, *supra*, applicants concerned with a state agency's compliance with state procedures regarding whether a complete application has been submitted would retain the authority to bring an action in state court challenging the agency's compliance with state law. *See Alcoa Power Generating Inc.*, 643 F.3d at 971; *Marathon Development Corp.*, 867 F.2d at 102.

**C. EPA Should Eliminate the 2020 Rule's Limitation on the Use of
Withdrawal and Resubmittal to Extend the Reasonable Period of Time**

Additionally, EPA should repeal its attempt in the 2020 Rule to limit whether and when applicants can withdraw certification requests. *See* 40 C.F.R. § 121.6(e). Nothing in the text or legislative history of section 401 suggests that an applicant is prohibited from withdrawing and resubmitting an application, regardless of whether that process has been discussed beforehand with the certifying agency.

The process of withdrawal and resubmittal has long been used, without controversy, by applicants and state agencies where it is clear that additional time is required. *See, e.g., Islander East Pipeline Co., LLC v Connecticut Dep't of Env't'l Protection*, 482 F.3d 79, 87 (2d Cir. 2006). Often, this involves the applicant withdrawing and resubmitting on its own initiative in order to provide additional information, *see id.*; *NCDEQ v. FERC*, 2021 WL 2763265, at *10-11; but sometimes the state agency asks the applicant to withdraw and resubmit its request if the applicant wants to avoid a denial, *see Constitution Pipeline*, 868 F.3d at 94. There are also

circumstances in which, even after submitting a complete application, applicants then submit new, additional information or different proposals. Depending on the nature of the new submittals, states may need additional time to adequately review them. The Second Circuit has specifically explained that if a state requires more time to review a section 401 request, it may “request that the applicant withdraw and resubmit the application.” *NYSDEC v. FERC*, 884 F.3d at 456.

Until 2019, EPA recognized and accepted this process as a way to avoid premature denials of water quality requests. *See* 2010 Guidance, at 13. EPA’s decision in the 2020 Rule to *forbid* state agencies from asking applicants to withdraw and resubmit certification requests, 40 C.F.R. § 121.6(e), relies on an overly broad reading of the D.C. Circuit decision in *Hoopa Valley Tribe v. FERC*, which rejected a contractual arrangement between an applicant and state agencies to use the withdrawal-and-resubmittal process to indefinitely suspend review of a water quality certification request. 85 Fed. Reg. at 42,261, citing *Hoopa Valley Tribe*, 913 F.3d 1099, 1103-04 (D.C. Cir. 2019), *cert. denied* 140 S. Ct. 650 (2019). But, the D.C. Circuit made clear that its decision was limited to the “coordinated withdrawal-and-resubmission scheme” before it, and that it was not “resolv[ing] the legitimacy” of other arrangements. *Id.* at 1103-04. More recently, the Fourth Circuit stated what the undersigned states have long maintained: “*Hoopa Valley* is a very narrow decision flowing from a fairly egregious set of facts, where the state agencies and license applicant entered into a written agreement that obligated the state agencies, year after year, to *take no action at all* on the applicant’s § 401 certification request.” *NCDEQ v. FERC*, 2021 WL 2763265 at *8 (emphasis in original).

In addition to describing the narrow nature of the *Hoopa Valley* decision, the Fourth Circuit in *NCDEQ v. FERC* noted that the waiver provision had to be considered in the broader

context of section 401: “while the purpose of § 401’s one-year review period was to prevent States from delaying federal projects by taking no action on certification requests, the purpose behind § 401 itself and its certification requirement is ‘to assure that Federal licensing or *permitting agencies* cannot override state water quality requirements.’” *Id.* (quoting *Sierra Club*, 909 F.3d at 635). As a practical matter, as well, the Fourth Circuit noted that “[o]rdinarily . . . the applicant’s withdrawal of its certification request would end the agency’s obligation to review the application, and the prior withdrawal would have no effect on the review period available for a subsequent application.” *NCDEQ v. FERC*, 2021 WL 2763265, *7.

Indeed, the Fourth Circuit suggested that even a broader interpretation of the State’s role under section 401 might be permissible. Specifically, while section 401 requires a certifying authority to “*certify* or deny compliance with water quality standards,” the waiver provision only permits waiver where a certifying authority “fails or refuses *to act* on a request for certification within a year.” *Id.* at *9, *citing* 33 U.S.C. § 1341(a)(1) (internal quotations omitted) (emphasis original). The Court suggested that a state taking “significant and meaningful action on a certification request within a year of its filing” does not waive certification authority even if *final* certification does not occur within that timeframe. *Id.* The court further found this interpretation supported by the purpose of the Clean Water Act as a whole (to preserve primary state authority over state water quality) and the waiver period in particular (to prevent “seer inactivity” by states). *Id.* Considering that section 401 could be read as not even requiring *final* state action within one year, requiring an applicant to submit a complete application and allowing state agencies to request an applicant to withdraw and resubmit an application are eminently reasonable.

Because the 2020 Rule misconstrued the text and legislative history of Section 401 and took an overly broad view of the holding in *Hoopa Valley*, EPA should repeal the prohibition on state agencies requesting that applicants withdraw and resubmit applications. If the EPA decides to promulgate a replacement rule, EPA should specifically clarify that the withdrawal and resubmittal process, whether initiated at the state agency's request or by the applicant's own motivation, can be a permissible method for extending the review time.

V. EPA SHOULD REITERATE THAT STATE ADMINISTRATIVE PROCEDURES GOVERN SECTION 401 REQUESTS

The States have previously explained how the 2020 Rule infringes upon state administrative procedure by dictating the timing and scope of state review. *See* 2019 Multistate Comments, at 33-39. Nonetheless, the 2020 Rule purports to impose restrictions on state administrative procedures by (1) requiring a mandatory 30-day pre-filing request, 40 C.F.R. § 121.4; (2) dictating the contents of certification requests, *id.* § 121.5, the timeframe for state agency review, *id.* § 121.6, and the contents of the state agency's final section 401 decision, *id.* § 121.7; and (3) prohibiting state agencies from modifying or enforcing section 401 certifications, *id.* § 121.11. As explained below, EPA should respect the federal-state division of responsibility contemplated by section 401 and withdraw its unlawful attempt to usurp state' authority to require that applicants comply with state administrative procedures.

A. If Pre-Filing Meeting Requests Are Retained At All, EPA Should Make Them Optional and the 30-Day Waiting Period Should Be Eliminated

EPA seeks comment on the utility of the 2020 Rule's pre-filing meeting request, including "whether the minimum 30 day timeframe should be shortened in certain instances." 86 Fed. Reg. at 29, 543. We urge EPA to abandon the pre-filing meeting provisions. States already engage with applicants prior to filing when appropriate and the Rule's requirements have

hindered, not helped, those efforts. If EPA decides to retain some form of this provision, it should make the 30-day pre-filing request provision optional, not mandatory.

The 2020 Rule's 30-day pre-filing request requirement is causing unnecessary administrative confusion and delay. The vast majority of section 401 certification requests are for small-scale projects, where pre-filing meetings would be unnecessary. NY Decl. ¶23 (Sheeley). Many of these projects require multiple permits or certifications from state and federal agencies. *Id.* Most applicants are individuals or small businesses that have little experience with state administrative procedures. *Id.* Accordingly, applicants often seek section 401 certification and related permits at the same time, without realizing they need to request a pre-filing hearing 30 days earlier. NY Decl. ¶ 25 (Sheeley). In these circumstances, state agencies must deny the section 401 request merely because the applicant failed to comply with the pre-filing requirement, resulting in unnecessary and duplicative work for the applicant and the agency. *Id.*

The 30-day pre-filing requirement also fails to provide an option for shortening the review period in the case of emergency or other necessity that requires prompt agency action on a section 401 request. Many state administrative procedures include a process for expedited review of permit applications on an emergency basis. *See, e.g.*, 6 N.Y. Code of Rules and Regulations (N.Y.C.R.R.) § 621.12. The 2020 Rule, however, includes no such emergency provision. Thus, environmentally beneficial projects that need to be performed on an expedited basis—such as wildfire restoration and recovery projects, cleaning up pollution discharges, stream bank repairs, and other in-water remediation work—are subject to the 30-day pre-application clock. Oregon Decl. ¶¶5-6; NC Decl. ¶9; NY Decl. ¶25. Accordingly, the states urge that the pre-filing requirement be eliminated or made optional.

B. EPA Should Clarify That Review of Certification Requests Must Comply with State Procedural Requirements

In revising the 2020 Rule, EPA should return to the States the authority to enforce and follow their own administrative procedures in reviewing certification requests. Except for requiring states to provide for public notice and, in appropriate cases, public hearings on certification requests, section 401 does not require states to follow a particular procedure in reviewing requests for certification. *See* 33 U.S.C. § 1341(a)(1); *United States v. Cooper*, 482 F.3d 658 (4th Cir. 2007), quoting 33 U.S.C. § 1251(b) (“In the CWA, Congress expressed its respect for states' role through a scheme of cooperative federalism that enables states to ‘implement ... permit programs’”). Accordingly, courts have long-recognized that a state reviewing a section 401 request may apply the appropriate state administrative procedures. *See, e.g., Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 755 (4th Cir. 2019) (“State Agencies have broad discretion when developing the criteria for their section 401 Certification.”); *Berkshire Env'tl Action Team, Inc. v. Tennessee Gas*, 851 F.3d 105, 113 (1st Cir. 2018) (finding “no indication” in section 401 that Congress “intended to dictate how” a state agency “conducts its internal decision-making before finally acting”); *Delaware Riverkeeper Network v. Secretary of Penn. Dep't of Env'tl Protection*, 833 F.3d 360, 368 (3d Cir. 2016) (“the Water Quality Certification is by default a state permit, and the issuance and review of a Water Quality Certification is typically left to the states”); *City of Tacoma*, 460 F.3d at 67-68 (noting that federal agency's role in state decision to issue section 401 certification is “limited” and that federal agency is not in a position to second-guess the state's application of state procedural standards to the applicant).

The states have decades of experience in enforcing their own administrative procedures, many of which have developed to provide for expeditious and streamlined review of permit

applications. These procedures differ in the particulars, but share common characteristics. Initially, a state reviews a section 401 application to ensure that it includes sufficient information for meaningful review by the state agency and the public.⁴⁶ A state that receives a deficient or incomplete application may require the applicant to provide additional information.⁴⁷ The process of obtaining required information is not entirely within the reviewing agency's control, and applicants can frustrate the timeframe for review by failing to provide requested materials necessary to the state's review of the application.⁴⁸ In some cases, states also must await completion of federal and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications.⁴⁹ This environmental review can be "a critical part of the information" needed by a state to "evaluate [a certification] request." *NCDEQ v. FERC*, 2021 WL 2763265, at *13. Once sufficient information supporting an application has been received for a state to deem an application complete, section 401 requires states to provide public notice and, where a state deems appropriate, public hearings.⁵⁰ Typically, public notice must be accomplished through

⁴⁶ See, e.g., 314 Code of Massachusetts Regulations (C.M.R.) § 9.05(3); 6 New York Code of Rules and Regulations (N.Y.C.R.R.) § 621.7(a)(2), (g); 15A North Carolina Administrative Code (N.C.A.C.) § 02H.0503; 250 Rhode Island Code of Regulations (R.I.C.R.) § 150-05-1.17; Vermont Admin. Code (Vt. A.C.) § 16-3-301:13.11; Conn. Gen. Stat. 22a-6h; Cal. Code Regs. (Ca.C.R.) tit. 23, §§ 3855-3861.

⁴⁷ See, e.g., N.Y. Environmental Conservation Law § 70-0109(2)(a); see also 310 C.M.R. § 4.10(8)(g)3.a.-b.; 314 C.M.R. § 9.05(1); 6 N.Y.C.R.R. § 621.7(a), (f); 250 R.I.C.R. § 150-05-1.17(B), (D); Vt. A.C. § 16-3-301:13.3(c)(3); Or. Admin. R. 340-048-0032(2).

⁴⁸ See, e.g., *Constitution Pipeline*, 868 F.3d at 103

⁴⁹ See, e.g., Ca.C.R. tit. 23, §§ 3836(c), 3837(b)(2) (projects subject to section 401 water quality certification must be reviewed under the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., as appropriate, before approval by the State Water Resources Control Board or the Regional Water Quality Control Boards); 6 N.Y.C.R.R. § 621.3(a)(7) (an application is not considered complete until a negative declaration or draft environmental impact statement have been prepared pursuant to state environmental quality review act, ECL article 8).

⁵⁰ 33 U.S.C. § 1341(a)(1).

publication in one or more local newspapers as well as in official agency publications.⁵¹ In almost all cases, states must hold a public comment period ranging from fifteen to forty-five days.⁵² To ensure meaningful public review, states appropriately provide extensions of public comment periods for significant projects.⁵³ The period of public participation may be further extended in situations where states receive requests for a public hearing.⁵⁴ After the public comment period and any public hearings are complete, the state agency must review and, in many cases, respond to the public comments received before making a certification determination.⁵⁵

⁵¹ See, e.g., N.J.A.C. 7:7A-17.4, 7:7-24.5; 6 N.Y.C.R.R. § 621.7(a)(2), (c); 15A N.C.A.C. § 02H.0503(a); 250 R.I.C.R. § 150-05-1.17 (D)(1)(a); 9 Va. Admin. Code (Va.A.C.) § 25-210-140(A).

⁵² See, e.g., 5 Col. Code of Regulations § 1002-82.5(B)(1) (30 days); Conn. Gen. Statutes Ann. § 22a-6h(a) (30 days); 314 C.M.R. § 9.05(3)(e) (21 days); N.J.A.C. 7:7A-19.6; 6 N.Y.C.R.R. § 621.7(b)(6) (15 to 45 days); 250 R.I.C.R. § 150-05-1.17(D)(2) (30 days); Va. Code § 62.1-33.15:20(C) (45 days for state agencies to provide comment); 9 Va.A.C. § 25-210-140(B) (30 days for public comment); Vt. A.C. §§ 16-3-301:13.3(c), 13.11(c) (30 days); 23 Ca.C.R. § 3858(a) (at least 21 days).

⁵³ See, e.g., Cal. State Water Resources Control Bd., Draft Water Quality Certification Comment Deadline Extended for Application of Southern California Edison Co. (Sept. 27, 2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/big_creek/docs/final_bc_ceqa_draft_cert_notice_extended.pdf; N.Y. Dep't of Env'tl. Conservation, Notice of Supplemental Public Comment Hearing and Extension of Public Comments on Application of Transcontinental Gas Pipe Line Company, LLC (Feb. 13, 2019), https://www.dec.ny.gov/enb/20190213_not2.html.

⁵⁴ See, e.g., Conn. Gen. Stat. 22a-6h(d) (applicant may request public hearing within 30 days of publication of a tentative determination); 250 R.I.C.R. § 150-05-1.17(D)(3) (providing for a mandatory public hearing if enough requests are received, notice of which must be provided fourteen days prior to date of hearing); 15A N.C.A.C. §§ 02H.0503(d), 0504 (notice of public hearing must be given thirty days prior to date of hearing, and record of public hearing must be held open for thirty days after the date of hearing); Vt. A.C. § 16-3-301:13.3(g), (h) (public hearing may be requested during public comment period, and notice of public hearing must be given thirty days before date of hearing).

⁵⁵ See, e.g., 310 C.M.R. § 4.10(8)(g) 3.b.; 205 R.I.C.R. § 150-05-1.17(D)(4); Or. Admin. R. 340-048-0042(5).

By promulgating the 2020 Rule without regard for state administrative procedures, EPA has forced states to choose between violating their own administrative laws and procedures or violating the 2020 Rule. For example, in New York the general administrative procedures to be followed by the New York State Department of Environmental Conservation (NYSDEC) when reviewing a section 401 application are set forth by statute. *See* N.Y. Environmental Conservation Law § 70-0107(3)(d). That statute provides that a “complete application” is required before NYSDEC commences its review, and that the complete application must include an environmental review of the project. *See* Environmental Conservation Law § 70-0105(2). But the 2020 Rule provides no provision for NYSDEC to wait to make a section 401 determination until a project’s environmental review is complete.

EPA now correctly expresses concern that the 2020 Rule “constrains what states and tribes can require in certification requests, potentially limiting state and tribal ability to get information they may need before the CWA Section 401 review process begins.” 86 Fed. Reg. at 29,543. Indeed, the 2020 Rule identifies a barebones list of information that EPA deems sufficient to trigger the commencement of section 401’s waiver period. 40 C.F.R. § 121.5(b). EPA adopted this postcard-length list notwithstanding comments from many states detailing additional information required by state policy or regulations. *See* 2019 Multistate Comments, at 34-38. Consistent with the text of section 401, caselaw, and prior agency practice, EPA should repeal 40 C.F.R. § 121.5 and leave it to state agencies to determine what information is necessary for a section 401 request and what procedures states should follow in reviewing such requests.

C. EPA Should Clarify That State Agencies May Modify Section 401 Certifications Pursuant to State Procedures

EPA seeks feedback on “whether the statutory language in CWA Section 401 supports modification of certifications or ‘reopeners,’ the utility of modifications (e.g., specific

circumstances that may warrant modifications or ‘reopeners’), and whether there are alternate solutions to the issues that could be addressed by certification modifications or ‘reopeners’ that can be accomplished through the federal licensing or permitting process.” 86 Fed. Reg. at 29,543-544. From section 401’s inception, certifying authorities possessed the authority to modify or amend section 401 certifications. Indeed, the original section 401 regulations expressly permitted certifying authorities to “modify the certification in such a manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator.” *See* former 40 C.F.R. § 121.2(b). Although the 2020 Rule does not expressly prohibit certifying authorities from modifying or “reopening” section 401 certifications, in the preamble to the 2020 Rule, EPA rejected calls to maintain this longstanding practice as “inconsistent with section 401.” 85 Fed. Reg. 42,280. In doing so, EPA stated its conclusion that reopener conditions “are already proscribed by section 121.6(e) of the final rule.” 40 C.F.R. § 121.6(e) (purporting to prohibit certifying authorities from taking “any action to extend the reasonable period of time”).

As set out below, EPA should revise the 2020 Rule to expressly permit modifications to 401 certifications as a practical and efficient means of adapting to changed circumstances. Section 401 already provides explicit support for the modification of 401 certifications. Section 401(a)(3) states that certifications as to the construction of a facility also fulfill certification requirements with regard to any federal licenses or permits necessary for the facility’s operation. 33 U.S.C. § 1341(a)(3). In doing so, this section permits modifications of section 401 conditions attached to a permit or license to construct a facility as those conditions are carried over to a license or permit to operate the facility. Specifically, where changes have occurred to (A) the construction or operation of a facility, (B) the characteristics of the impacted waters, (C) the

water quality requirements of those waters, or (D) applicable effluent limits or “other requirements,” a certifying authority may revoke or modify a section 401 certification previously issued for construction of the facility. *Id.*

This provision is clear recognition of the need to adapt section 401 conditions to changing conditions on the ground—whether those conditions have changed because of actions by the project proponent, regulatory changes by the certifying authority, or physical changes to the protected resource itself. *See id.* There is no reason to believe that Congress intended this flexibility with regard to operation of a facility authorized under a certification for its construction while not allowing the same flexibility with regard to operational certifications not associated with a construction certification. Indeed, prior to 2020, both EPA’s regulations and its policy positions expressly recognized that flexibility. EPA should return this flexibility and practicality to the section 401 rule.

Certifying authorities have long relied on modification to existing 401 certifications as a practical and economical means of dealing with changed circumstances. Modifications are a common-sense and necessary aspect of the section 401 process under a variety of situations. To begin with, most modifications involve relatively minor issues and, in many cases, become necessary when an applicant’s own assumptions about aspects of a proposed project turn out to be incorrect. For example, some projects requiring section 401 certification involve in-water work with a very specific work window in order to minimize impacts to aquatic species and habitat. As a project moves forward, the proponent may determine that work outside the originally-proposed window is necessary and will propose an alternate, but still permissible, timeframe. With the 2020 Rule in place, even these simple changes are unavailable, and

applicants are required to start the whole process over again by reapplying for and obtaining a new 401 certification—a process that is inefficient and unnecessary.

Modifications often become critically necessary when it comes to long-term projects such as hydroelectric dams or large pipeline projects where operational impacts occur over many decades. EPA’s 2010 Guidance spelled the benefits out in detail, noting that adaptive management and reopeners help to “anticipate and address potential future changes in the circumstances used as the basis for the 401 certification decisions.” 2010 Guidance at 27. This also allows regulators and the licensee “to collaborate on ‘fine tuning’ required environmental measures within a ... prescribed range.” *Id.* For that reason, states have long used reopener provisions and/or adaptive management where changes in water quality standards or other considerations are anticipated over the lifespan of a section 401 certification. “For example, in response to a 401 certification adaptive management condition, FERC may require in a license a minimum flow between 100 and 500 cubic feet per second to protect a particular resource and within that range of flow the licensee and certifying agency make flow decisions on a reoccurring basis depending on the conditions occurring at the time.” *Id.* Some states, like Oregon, “regularly include[] re-opener clauses when certifying Corps permits and under state law may modify the certification, with public comment, if water quality standards change.” *Id.*

Reopener conditions also allow states to adapt to situations quickly or otherwise respond to changes in circumstances or changes in project proposals. For example, in California, a certification typically will include a term permitting modifications: (1) to incorporate changes in technology, sampling, or methodologies; (2) if monitoring results indicate that Project activities could violate water quality objectives or impair beneficial uses; (3) to implement any new or revised water quality standards and implementation plans adopted or approved pursuant to the

Porter Cologne Water Quality Control Act or section 303 of the Clean Water Act; and (4) to require additional monitoring and/or other measures, as needed, to ensure that Project activities meet water quality objectives and protect beneficial uses. The term identifies reasonable circumstances where changed conditions necessitate an evaluation of both existing water quality protections and potential measures to ensure that water quality requirements continue to be met.

Indeed, until the 2020 Rule, certifying authorities, along with federal partner agencies, long used “reopener” clauses and/or “adaptive management” to ensure that section 401 certifications kept pace with changing circumstances. As noted, EPA’s prior regulations expressly allowed modifications to existing 401 certifications. And, in its 2010 Guidance, EPA favorably included a description of reopener use in a section dedicated to recommendations on effective section 401 conditions. 2010 Guidance at 27. EPA should return this flexibility and practicality to the section 401 rule.

EPA in its 2020 Rule cited the one-year time limitation in section 401’s waiver provision as justification for disallowing modifications to section 401 conditions. But, this argument reads far too much into section 401’s waiver provision at the expense of the Clean Water Act’s broader (and more critical) goal of protecting water quality. Reopening or modifying a certification *after* it has been granted has nothing to do with the time period for actually granting the certification. A modification based on, for instance, a change to the project or changed water quality requirements does not implicate Congress’ concern over states failing to take action on a certification request. Even more, disallowing such modifications plainly frustrates the Clean Water Act’s preservation of states’ authority to protect their waters and section 401’s goal of assuring that federal licensing and permitting agencies cannot override state water quality protections.

In sum, reopeners are the “practical solution” to the problem of changed circumstances. As set out above, these conditions worked well for decades prior to 2020 and are well within the statutory framework. EPA should restore this important, common-sense tool.

D. EPA Should Clarify That State Agencies Retain Authority to Enforce Section 401 Certification Conditions

EPA seeks comment on “enforcement of CWA Section 401,” including “the roles of federal agencies and certifying authorities in enforcing certification conditions” and “whether the statutory language of CWA Section 401 supports certifying authority enforcement of certification conditions under federal law.” 86 Fed. Reg. at 29,543. The undersigned States support repeal of the 2020 Rule’s prohibition on state enforcement authority, *see* 40 C.F.R. § 121.11(c), and clarification that state certifying authorities possess concurrent authority with federal agencies to enforce certification conditions. Indeed, this is the interpretation EPA had accepted until 2019. *See* 2010 Guidance, at 32-33.

The text of section 401 makes clear that “the Water Quality Certification is by default a state permit” that may be enforced by the state. *Delaware Riverkeeper Network*, 833 F.3d at 368. Section 401 requires an applicant to provide the federal agency licensing a proposed project with “a certification from the State” that the project will comply with state water quality standards and requirements. 33 U.S.C. § 1341(a)(1). In other words, the applicant must obtain a *state* certification before obtaining the *federal* license or permit. To be sure, any condition set forth in a section 401 certification “shall become a condition on any Federal license or permit” subject to section 401. *Id.* § 1341(d). But the fact that federal agencies gain the authority to enforce section 401 certification conditions as part of the federal permit does not somehow displace the state’s authority to enforce the certification directly. Indeed, in most if not all cases it will be the state

water quality agency that is in a better position to understand and enforce the requirements of state laws set forth in a section 401 certification.

Section 401 of the federal Clean Water Act operates in a manner consistent with the purposes of the Act only if it permits state enforcement of certification conditions. The 2020 Rule’s strained statutory interpretation regarding enforcement of 401 conditions effectively eliminates a state’s ability to protect water quality within its borders. The Eastern District of California rejected a similarly illogical interpretation—one that would have made FERC the exclusive enforcer of Federal Power Act (FPA) license conditions that it was required to impose at the request of and for the benefit of the secretaries of various federal agencies:

The notion that the Secretaries for whom § 797(e) conditions are created could not enforce those conditions in the district courts under 16 U.S.C. 825p would undermine the legislative structure of the FPA. The FPA makes mandatory the conditions imposed by the Secretaries. 16 U.S.C. § 797(e). FERC must accept and include such conditions in its licenses even where it disagrees with them. . . . This mandatory requirement cannot logically be reconciled with a finding that only FERC can enforce such conditions, administratively and non-judicially.

United States v. S. California Edison Co., 300 F. Supp. 2d 964, 980–81 (E.D. Cal. 2004)

(emphases added). This same reasoning applies to section 401: federal agencies must accept state certification conditions, *see pp. 27-28, supra*, and for those conditions to have force the state agencies must be allowed to enforce them.

VI. EPA SHOULD ENCOURAGE OTHER FEDERAL AGENCIES TO CONFORM THEIR SECTION 401 PROCEDURES TO EPA’S FORTHCOMING RULE

EPA seeks comment on “whether concomitant regulatory changes should be proposed and finalized by relevant federal agencies.” 86 Fed. Reg. at 29,544. Currently, states face different and inconsistent regulations amongst the various federal agencies that primarily deal

with section 401 certifications. If EPA elects to promulgate a new rule, the undersigned states urge EPA to encourage other agencies to conform their section 401 regulations to any revised EPA rule once it is issued.

In particular, EPA should ensure that other federal agencies recognize and accept state agencies' primary authority to determine the reasonable period of time (of up to one year) necessary to act on section 401 requests, as discussed above. Under the current regime, different federal agencies have defined the "reasonable period" for state action differently. FERC, for example, has explicitly defined the "reasonable period" for state action under section 401 to be the full year. *See* 18 C.F.R. §§ 4.34(b)(5)(iii), 5.23(b)(2), 157.22(b). But the Army Corps has established a 60-day timeframe for some section 401 decisions, even on significant regulatory actions. *See* 33 C.F.R. § 325.2(b)(1)(ii). Since 2019, Army Corps has enforced the 60-day deadline strictly for a wide variety of permits, including some with potentially significant and widespread environmental impacts. *See Timeframes for Clean Water Act Section 401 Water Quality Certifications and Clarification of Waiver Responsibility*, Regulatory Guidance Letter No. 19-02 (Aug. 7, 2019). For example, when the Army Corps recently re-issued a number of its nationwide general permits, it declined to grant time extensions for state review, resulting in rushed state decisions and, in some cases, inadvertent waiver by state agencies that failed to act in compliance with the 2020 Rule within 60 days. *See* Section III.B, *supra*.

EPA should also encourage other federal agencies to recognize that the reasonable period of time commences only upon receipt of a complete application, as defined by state law, and that the reasonable period of time is likewise defined by state law. *See* Section IV.B, *supra* (discussing regulatory uncertainty regarding whether agency may require complete application to trigger the waiver period).

EPA should also clarify for other federal agencies that state certifying authorities may request that applicants withdraw and resubmit section 401 requests if more time is required for state review, subject to the requirement that the process be used in a reasonable manner. FERC, in particular, has recently announced a “general principle” barring use of the withdrawal-and-resubmittal process, even in cases where the relevant state agency was engaged in an active and ongoing administrative review. *See, e.g.,* Order on Voluntary Remand, *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, ¶ 31 (Aug. 28, 2019). This “general principle” has no basis in the text or legislative history of Clean Water Act § 401 and is inconsistent with the limiting language set forth in *Hoopa Valley*, and with the case law in the Second Circuit and Fourth Circuit authorizing the use of the withdrawal and resubmittal process. *See* Section IV.C, *supra*.

CONCLUSION

The 2020 Rule was flawed and ill-conceived from the start, and EPA should repeal it and return to the status quo that had worked for almost 50 years prior to the promulgation of the 2020 Rule. If EPA issues a new section 401 rule, it should return primary authority for section 401 decisionmaking to the States as described above. Whatever EPA does, it should move quickly—the 2020 Rule is causing harm every day it remains in effect.

Dated: August 2, 2021

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ATTACHMENT A:

Comment Letter from Attorneys General of the States of Washington, New York, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the District of Columbia, and the Commonwealths of Massachusetts, Pennsylvania, and Virginia, Docket ID No. EPA-HQ-OW-2019-0405
(Oct. 21, 2019)

**ATTORNEYS GENERAL OF THE STATES OF WASHINGTON, NEW YORK,
CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS,
MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO,
NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, WISCONSIN, THE
DISTRICT OF COLUMBIA, AND THE COMMONWEALTHS OF MASSACHUSETTS,
PENNSYLVANIA, AND VIRGINIA**

October 21, 2019

By U.S. Mail, E-mail, and Electronically

Attn: Environmental Protection Agency

Office of Wetlands, Oceans and Watersheds, Office of Water

John T. Goodin, Director

1200 Pennsylvania Avenue, N.W.

Washington, D.C. 20460

RE: Proposed Rule Updating Regulations on Water Quality Certifications, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket ID No. EPA-HQ-OW-2019-0405

Dear Administrator Wheeler and Mr. Goodin:

The undersigned Attorneys General submit these comments on the Environmental Protection Agency's (EPA) proposed rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket ID No. EPA-HQ-OW-2019-0405. We have grave concerns over the proposed rule's attempt to unlawfully curtail state authority under section 401 of the Clean Water Act.

In the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, Congress recognized the critical and primary role that states play in protecting and enhancing the waters within their respective borders. Congress preserved states' broad, pre-existing powers to adopt the conditions and restrictions the states deem necessary to protect state waters, so long as a state does not adopt standards that are less protective than federal standards. *See* 33 U.S.C. § 1370.

An essential component of Congress' preservation of state authority in the Clean Water Act is section 401, 33 U.S.C. § 1341 ("section 401"), authorizing states to conduct an independent review of the water-quality impacts of projects that require a federal permit and ensuring that those projects do not violate state water quality laws. To those ends, Congress specifically prohibited federal agencies from approving projects if a state denied a water quality certification under section 401, *id.* § 1341(a)(1), and authorized states to include conditions necessary to ensure compliance with any "appropriate requirement of State law." *Id.* § 1341(d). Certification conditions are binding conditions on the federal permit. *Id.* Section 401, thus, prevents the federal government from using its licensing and permitting authority to approve projects that could violate state water quality laws.

EPA has long acknowledged and respected the Act's preservation of state authority, especially under section 401. In fact, until revised earlier this year, every EPA guidance document for state section 401 certifications issued by EPA—spanning three decades and four administrations—

recognized states' broad authority to condition or deny federally permitted or licensed projects within their borders pursuant to section 401. Indeed, EPA's 1989 guidance emphasized that "[t]he legislative history of [section 401] indicates that the Congress meant for the States to impose whatever conditions on [federally permitted projects] are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns."¹

There has been no change in the Clean Water Act since EPA made this statement in its 1989 guidance. And, in the interim, Supreme Court precedent has only confirmed broad state authority under section 401. But now, called to action by an Executive Order designed to promote energy infrastructure rather than protect water quality, EPA proposes an interpretation of section 401 that is inconsistent with the Clean Water Act and would unlawfully usurp state authority to protect the quality of waters within their borders.

Every provision of the proposed rule appears designed to curtail state authority under section 401. First, the proposed rule would unlawfully limit state certification authority to point source discharges from proposed projects into navigable waters, even though the plain language of section 401, as interpreted by the Supreme Court, authorizes states to ensure that the proposed activity *as a whole* does not violate state water quality standards. Second, contrary to the clear language of section 401, which allows states to impose restrictions necessary to ensure compliance with "any other appropriate requirement" of state law, the proposed rule would restrict state conditions to those necessary to ensure compliance with a narrow set of EPA-approved water quality standards. Third, the proposed rule would allow federal agencies to disregard timely-issued denials and state-imposed conditions on certification applications, even though the plain language of section 401, as interpreted by every court to consider the issue, provides that timely state denials and conditions are binding on federal agencies and subject only to judicial review. Fourth, the proposed rule would dictate the timing and scope of state review of certification applications, despite the fact that section 401 only requires that states act within a "reasonable" period of up to one year. And fifth, the proposed rule would improperly intrude into the realm of state administrative procedures by specifying the contents of a section 401 request and state determination, notwithstanding whatever contrary procedural requirements states may have enacted.

EPA must veer from this course. As set out in the comments below, EPA's proposed rule violates the Clean Water Act and applicable case law interpretation of the Act's clear statutory language. If promulgated, the proposed rule will also violate the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"). Moreover, the proposed rule represents bad policy that will create far more problems for project proponents than it purports to solve—all to the detriment of water quality and states' rights. We urge EPA to withdraw the proposed rule.

¹ See EPA, Office of Water, *Wetlands and 401 Certification, Opportunities and Guidelines for States and Eligible Tribes*, at 23 (Apr. 1989) (1989 Guidance). The 1989 Guidance is attached to this letter as Attachment C.

TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY	5
II.	THE PROPOSED RULE CONFLICTS WITH THE STATES’ BROAD AUTHORITY UNDER THE CLEAN WATER ACT TO INDEPENDENTLY EVALUATE THE WATER QUALITY IMPACTS OF FEDERALLY-PERMITTED PROJECTS.....	8
A.	The Plain Language of the Clean Water Act Establishes Broad State Authority.....	8
B.	The Act’s Legislative History Confirms That Congress Intended States to Exercise Broad Authority Over Federal Projects Impacting State Waters.....	10
C.	The Proposed Rule Disregards or Misinterprets Long-Standing Case Law that Has Upheld States’ Broad Authority Under Section 401 Pursuant to the Plain Language of the Clean Water Act.....	11
D.	The Proposed Rule Contrasts Sharply With Nearly 50 Years of EPA’s Interpretation of State Authority Under Section 401.....	13
III.	EPA’S PROPOSED RULE CONFLICTS WITH THE CLEAN WATER ACT AND SEVERELY ERODES STATE AUTHORITY TO PROTECT STATE WATERS UNDER SECTION 401	16
A.	EPA’s Unlawful Proposal to Limit State Authority under Section 401 to Ensuring that Point Source Discharges Comply with EPA-Approved Water Quality Standards Contravenes the Clean Water Act, Congressional Intent, and Case Law.....	17
i.	Section 401 does not limit the scope of State review to discharges from point sources. .	17
ii.	Section 401’s reference to “any other appropriate requirements of state law” is not limited to EPA-approved standards.	20
B.	The Proposed Rule’s Attempt to Impose Federal Agency Control over State Section 401 Determinations Upends the Cooperative Federalism Approach Enshrined in the Clean Water Act.....	23
i.	Section 401 prohibits federal agencies from issuing federal permits if a state has denied a water quality certification.	23
ii.	EPA’s Proposal to Institute Control and Oversight of State Conditions Imposed in Water Quality Certifications Runs Afoul of the Clean Water Act and Controlling Judicial Precedent.....	25
C.	EPA’s Attempt to Restrict the Timing and Scope of State Review of Section 401 Requests Conflicts with the Plain Language and Legislative Intent of the Clean Water Act.....	29
D.	EPA’s Proposal Would Violate the Clean Water Act by Dictating the Scope and Substance of State Administrative Procedures.	33
IV.	IF ADOPTED, EPA’S PROPOSED RULE WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.....	38

- A. The Proposed Rule Is Not in Accordance with Law..... 39
- B. EPA Lacks Statutory Authority to Promulgate the Proposed Rule. 40
- C. The Proposed Rule Is Arbitrary and Capricious and an Abuse of Discretion. 41
 - i. EPA failed to consider the relevant factors related to implementing section 401 and did not provide a rational basis for the proposed rule..... 41
 - ii. EPA failed to provide a reasoned explanation for the change in its position on a section 401 implementation. 42
 - iii. The proposed rule does not consider and analyze alternatives. 44
- V. CONCLUSION..... 44

I. EXECUTIVE SUMMARY

The proposed rule is the product of a Presidential Executive Order explicitly aimed not at protecting water quality, but at “promoting energy infrastructure.” See *Promoting Energy Infrastructure and Economic Growth*, 84 Fed. Reg. 15,495 (Apr. 10, 2019). The Executive Order identified unspecified “confusion and uncertainty” arising from “[o]utdated Federal guidance and regulations” as the reason for directing EPA to promulgate new section 401 regulations pursuant to a prescribed timeline. *Id.* at 15,496. Following the Executive Order, many of the undersigned states submitted a letter to EPA, urging it not to weaken its existing section 401 regulations and guidance, questioning the need for changes to a certification process that had been followed effectively for decades, and providing details relating to the various and differing administrative procedures that must be followed by states reviewing section 401 certification requests.²

Ignoring the states’ concerns, EPA proceeded to issue a revised guidance document purporting to significantly narrow state authority under section 401 by restricting the timing and scope of state review of certification applications.³ Again, many of the undersigned states objected to the restrictions EPA purported to place on their authority, and urged EPA to comply with the plain language and intent of section 401.⁴ The states’ objections again went unheeded, and EPA proceeded to issue the proposed rule, which goes even further than the 2019 Guidance in curtailing state authority and violating section 401.

The proposed rule conflicts with the plain language and legislative intent of section 401 and the Clean Water Act, relevant judicial precedent, and foundational principles of administrative law. Its flaws are manifest and multiple:

- By proposing to limit the certifying authority of state agencies to point source discharges from projects, 84 Fed. Reg. at 44,120 (proposed 40 C.F.R. §§ 121.3, 121.5), EPA ignores the plain language of section 401 as interpreted by the U.S. Supreme Court. Although the requirement for a project proponent to obtain a section 401 certification is triggered by a potential discharge, once a certification is required the State must ensure that the *applicant* will comply with state water quality standards and requirements, 33 U.S.C. § 1341(a)(1), (d). The Supreme Court interpreted this unambiguous language to mean that states may impose limitations “on the activity as a whole,” not just on specific discharges. *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700, 711 (1994) (*PUD No. 1*). Because the Supreme Court’s interpretation—which has been followed by lower courts and EPA for the last 25 years—was based on the plain language of section 401, EPA cannot now adopt a contrary interpretation. See *Nat’l Cable & Telecomm.*

² Response by New York Attorney General Letitia James, et al., to EPA’s Request for Pre-Proposal Recommendations Regarding Clean Water Act Section 401 Water Quality Certifications, Docket ID EPA-HQ-OW-2018-0855-0059 (May 24, 2019) (Attachment A).

³ EPA, Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (June 7, 2019) (2019 Guidance).

⁴ Letter from Attorneys General of California, et al., to Administrator Wheeler (July 25, 2019) (Attachment B).

Ass'n v. Brand X Internet Serv., 545 U.S. 967, 984 (2005) (*Brand X*) (court interpretation of unambiguous statutory provision “forecloses a contrary agency construction”).

- By proposing to require states to consider *only* EPA-approved water quality standards when imposing limitations on section 401 certifications, 84 Fed. Reg. at 44,120 (proposed 40 C.F.R. §§ 121.1(p), 121.3, 121.5), EPA contradicts the plain language of section 401, which authorizes states to ensure compliance with specific provisions of the Act as well as “any other appropriate requirement of state law.” 33 U.S.C. § 1341(d). Because the specific provisions of the Act listed in section 401(d) include all EPA-approved water quality standards, EPA’s new interpretation would render the clause “any other appropriate requirement of state law” superfluous and meaningless. EPA’s new position also departs from decades of agency practice and interpretation without adequate explanation, and conflicts with Congress’ intent in the Clean Water Act to preserve broad state authority to enforce state water quality requirements that are more restrictive than federal standards.
- By proposing to authorize federal agencies to ignore a state’s timely denial of a certification application, 84 Fed. Reg. at 44,121 (proposed 40 C.F.R. § 121.6(c)), EPA ignores the plain language of section 401, which provides that “[n]o license or permit shall be granted if certification has been denied by the State,” 33 U.S.C. § 1341(a)(1). The legislative history confirms that Congress intended for a state’s denial of certification to act as a “complete prohibition” on issuance of a federal permit.⁵ Courts have consistently held that section 401 empowers states to block projects that would adversely impact state water quality, even if those projects would otherwise receive federal approval. *See, e.g., S.D. Warren Co. v. Maine Bd. of Env’tl Protection*, 547 U.S. 370, 380 (2006) (*S.D. Warren*). The remedy available to project applicants when a state denies their section 401 certification request is judicial review of that denial in a court of appropriate jurisdiction.⁶ *See, e.g., Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011).
- Similarly, by proposing to authorize federal agencies to ignore state-imposed limitations in a timely-issued certification, 84 Fed. Reg. at 44,121 (proposed 40 C.F.R. § 121.8), EPA ignores the plain language of section 401, which provides that a state certification, including any state-imposed conditions, “shall become a condition on any Federal license or permit.” 33 U.S.C. § 1341(d). Courts have universally interpreted the plain language of section 401 as prohibiting federal agencies from reviewing the propriety of state-imposed limitations included in certifications. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 645-56 (4th Cir. 2018); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107-108 (2d Cir. 1997). As with section 401 denials, project proponents remain free to

⁵ H. Rep. 92-911, at 122, *reproduced in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 809 (1973) (“Legislative History Vol. 1”).

⁶ S. Rep. 92-313, at 69 *reproduced in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1487 (1973) (“Legislative History Vol. 2”).

seek judicial review of conditions they believe are improper in the appropriate court. *See Am. Rivers, Inc. v. FERC*, 129 F.3d at 112.

- By proposing to restrict the timing and scope of state review under section 401, 84 Fed. Reg. at 44,120-21 (proposed 40 C.F.R. §§ 121.1(h),(n), 121.4, 121.7), EPA exceeds its authority under the Act, which provides that a state waives its section 401 authority *only* if it “fails or refuses” to act within a reasonable period time of up to one year, 33 U.S.C. § 1341(a)(1). The legislative history of this waiver provision makes clear that it was intended only to prevent a state’s “sheer inactivity” from delaying federal decision-making.⁷ Out of this limited goal, EPA improperly asserts authority to force states to act in an artificially short time period based on minimal information and without any opportunity to obtain more time for review. Nothing in the text and history of section 401, or in the cases EPA selectively cites, supports EPA’s restrictive approach.
- EPA also seeks to upend state administrative procedures, in violation of the Clean Water Act, by dictating various requirements of state decision-making under section 401, including the contents of certification requests, 84 Fed. Reg. at 44,119-20 (proposed 40 C.F.R. § 121.1(c)), the scope and timing of state administrative review, *id.* at 44,120 (proposed 40 C.F.R. §§ 121.3, 121.4), and the contents of state determinations on certification requests, *id.* at 44,120-21 (proposed 40 C.F.R. § 121.5(d), (e)). Except for requiring states to provide for public notice and, in appropriate cases, public hearings, section 401 does not dictate state administrative procedures. 33 U.S.C. § 1341(a)(1). This is consistent with the Clean Water Act’s goal to “preserve” the states’ primary authority over state water quality decisions, 33 U.S.C. § 1251(b), and courts have consistently held that states may follow their own administrative procedures when reviewing section 401 requests. *See, e.g., Berkshire Env’t Action Team, Inc. v. Tennessee Gas Pipeline Co.*, 851 F.3d 105, 113 (1st Cir. 2017); *Delaware Riverkeeper Network v. Secretary of Penn. Dep’t of Env’t Protection*, 833 F.3d 360, 368 (3d Cir. 2016). Many of the undersigned states have previously provided EPA with information regarding the wide array of administrative procedures and requirements that they apply to section 401 requests. *See* Attachments A & B. Rather than respect those procedures, however, the proposed rule would force states to change them, in some cases through legislative enactments, to comply with EPA-dictated requirements that have no basis in the Clean Water Act.
- The proposed rule violates the Administrative Procedure Act because it is contrary to law, arbitrary and capricious and an abuse of discretion, and without statutory authority. As described above, the proposed rule violates the plain language of section 401 and the Clean Water Act in a host of ways. By seeking to limit how states exercise their authority under section 401, EPA’s proposed rule exceeds the agency’s statutory authority “to prescribe such regulations as are necessary to carry out [the EPA Administrator’s] functions under [the Clean Water Act.]” 33 U.S.C. § 1361(a). EPA’s proposed rule goes

⁷ H.R. 92-911, at 122, *reproduced in* Legislative History Vol. 1, at 809.

far beyond establishing how EPA will carry out its functions under the Act, instead intruding upon the “responsibilities and rights” Congress expressly reserved to the states. *See* 33 U.S.C. § 1251(b). EPA simply does not have the statutory authority to promulgate regulations that, for example, dictate the scope of state review of section 401 certifications or threaten to nullify state section 401 certification decisions that a federal agency concludes fall outside of EPA’s narrowly-defined scope of water quality impacts.

- Moreover, EPA fails to consider any water-quality impacts relevant to the agency’s implementation of section 401 and the Clean Water Act in general. EPA also fails to explain why it is changing its position from prior section 401 regulations and guidance that have been applied by the agency for decades to implement the statutory text. Despite the concerns voiced by many of the undersigned states since EPA announced its intent to amend its regulations and guidance, EPA utterly fails to analyze the affects the proposed rule would have on the states and their section 401 administrative procedures. The President’s desire to promote energy infrastructure is an insufficient reason to upend decades of effective administrative practice. Moreover, because the proposed rule is inconsistent with the authority granted to EPA by Congress in the Clean Water Act, EPA does not have statutory authority to issue it.

For these reasons, the undersigned states strongly object to the proposed rule. Given the numerous flaws of the proposed rule and the lack of evidence that existing section 401 regulations and procedures are inadequate, EPA should abandon its current effort and should withdraw the proposed rule.

II. THE PROPOSED RULE CONFLICTS WITH THE STATES’ BROAD AUTHORITY UNDER THE CLEAN WATER ACT TO INDEPENDENTLY EVALUATE THE WATER QUALITY IMPACTS OF FEDERALLY-PERMITTED PROJECTS

EPA’s attempt to curtail state authority in numerous key areas with the proposed rule is incompatible with the well-established broad authority that states have under the Clean Water Act to protect the quality of their waters. This section discusses the broad scope of state authority under section 401, as established by the Clean Water Act’s plain language and legislative history, and as consistently applied by the courts and EPA for almost 50 years. The specific ways in which the proposed rule conflicts with the statute are discussed in Points III and IV, *infra*.

A. The Plain Language of the Clean Water Act Establishes Broad State Authority.

In the proposed rule, EPA asserts that section 401 is ambiguous or silent on the scope of states’ authority to protect the waters within their boundaries. *See, e.g.*, 84 Fed. Reg. at 44.103-106. This assertion is unfounded. The intent of Congress is reflected in the plain language of the Act. From the outset, section 101 declares that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and

enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.” 33 U.S.C. § 1251(b).

To accomplish those goals, the Clean Water Act creates a “carefully constructed ... legislative scheme” that “impose[s] major responsibility for control of water pollution on the states.” *District of Columbia v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) (the 1972 Clean Water Act “recognize[s] that the States should have a significant role in protecting their own natural resources”). The Act “anticipates a partnership between the States and the Federal Government,” in which the states are responsible for promulgating water quality standards that “establish the desired condition of a waterway.” *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Indeed, section 303 of the Act effectively leaves it to the states, subject to baseline federal standards, to determine the level of water quality they will require and the means and mechanisms through which states will achieve and maintain those levels. 33 U.S.C. § 1313. And, section 510 of the Act expressly sets the boundary of state authority in broad terms: “nothing in [the Act] shall ... preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) *any requirement respecting control or abatement of pollution....*” 33 U.S.C. § 1370 (emphasis added).

In conjunction with these provisions, section 401 in particular is a critical component of Congress’ legislative scheme to preserve state authority. *See S.D. Warren*, 547 U.S. at 386. Section 401(a)(1) provides that “[a]ny applicant for a Federal license or permit to conduct any activity ... which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.” 33 U.S.C. § 1341(a)(1). Section 401(d) expands on this language by further stating that:

“[a]ny certification provided ... shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations ... and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1341(d).

In other words, while section 401(a)(1) refers to “any discharge” into navigable waters, section 401(d) is more broadly crafted to ensure that “any *applicant*” will comply with “any other appropriate requirement of State law.” *PUD No. 1*, at 711; *citing* 33 U.S.C. § 401(a)(1), (d) (emphasis added). Thus, while section 401(a)(1) “identifies the category of activities subject to certification—namely, those with discharges”—section 401(d) “is most reasonably read as authorizing additional conditions and limitations on the activity *as a whole* once the threshold condition, the existence of a discharge, is satisfied.” *Id.* at 711-12 (emphasis added). As set out in

Point III *infra*, by drastically curtailing state authority under section 401, EPA’s proposed rule conflicts with the plain language of the Act and its broad reservation of states’ rights.

B. The Act’s Legislative History Confirms That Congress Intended States to Exercise Broad Authority Over Federally Permitted Projects Impacting State Waters.

EPA’s attempt to curtail state authority in its proposed rule also contradicts the legislative history of both section 401 and the Act as a whole. To begin with, the proposed rule fails to acknowledge—let alone implement—the broad remedial purpose of the Act. The purpose of the Clean Water Act was as broad as it was ambitious, vastly expanding the tools available to states and the federal government in dealing with entrenched water pollution. In presenting the conference report, Senator Muskie laid out the urgency of the task in no uncertain terms:

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.⁸

As to the Act’s intention to “restore and maintain the chemical, physical and biological integrity of the nation’s waters[,]” Senator Muskie proclaimed these objectives as “not merely the pious declarations that Congress so often makes in passing its laws; on the contrary, this is literally a life or death proposition for the Nation.”⁹

Congress adopted section 510 to ensure “that States, political subdivisions, and interstate agencies retain the right to set more restrictive standards and limitations than those imposed” by the Federal government. *People of State of Ill. ex rel. Scott v. City of Milwaukee, Wis.*, 366 F. Supp. 298, 301 n.3 (N.D. Ill. 1973); *Cf. United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance”). Along with section 510, section 401 is an equally important recognition of state authority that gave more teeth to Congress’ intent to preserve states’ power to protect water quality. It did so by broadly ensuring that the federal government itself would be powerless to preempt more restrictive state standards, even when it came to federal permitting and licensing decisions.

Congress first adopted section 401 as section 21(b) of the Water Quality Improvement Act of 1970. As noted in the House Report, section 21(b) was created to require state certification of “any activity of any kind or nature which may result in discharges into the navigable waters.”¹⁰ The House Report went on to state that federally permitted activities or operations frequently impact water quality and that section 21(b) was intended “to provide reasonable assurance ... that no license or permit will be issued by a federal agency for any activity that ... could in fact become a source of pollution.”¹¹ In considering the need for the same provision, the Senate Report decried the fact that “[i]n the past, these licenses and permits have been granted without

⁸ Legislative History Vol. 1 at 161.

⁹ *Id.* at 164.

¹⁰ H.R. Rep. No. 91-127, at 24 (1969), reprinted in 1970 U.S.C.C.A.N. 2691, 2710.

¹¹ *Id.* at 7, reprinted in 1970 U.S.C.C.A.N. 2691, 2697.

any assurance that the standards will be met or even considered.”¹² Accordingly, in enacting section 401, Congress sought to ensure that all activities authorized by federal permits and impacting water quality would comply with “State law” and that “Federal licensing or permitting agencies [could not] override State water quality requirements.”¹³

The legislative history evinces clear Congressional intent to broadly construe the state authority expressly preserved by section 401 to ensure that federal projects satisfy state requirements. In stark contrast to the legislative history, EPA’s assertion in the proposed rule that the 1972 Act’s permitting requirements for point-source discharges narrowed the focus of state certifications, 84 Fed. Reg. at 44,088, is without support. In fact, “[b]y introducing effluent limitations in the [Clean Water Act] scheme, Congress intended to improve enforcement, not to supplant the old system.” *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995), cert. denied 518 U.S. 1018 (1996). EPA’s narrow interpretation of state authority permeating its proposed rule is patently inconsistent with the legislative history.

C. The Proposed Rule Disregards or Misinterprets Long-Standing Case Law that Has Upheld States’ Broad Authority Under Section 401 Pursuant to the Plain Language of the Clean Water Act.

EPA concedes that its proposed rule diverges from Supreme Court precedent in *PUD No. 1*, 511 U.S. at 700. In an attempt to justify the proposed rule’s restrictions on state authority, EPA now asserts that the Court’s statutory interpretation was based on EPA’s prior interpretation rather than the plain, unambiguous text of the statute. See 84 Fed. Reg. at 44099. EPA misinterprets *PUD No. 1* and other case law that has consistently upheld broad state authority under section 401.

In *PUD No. 1*, the project proponents challenged the State of Washington’s authority to impose a minimum stream flow requirement unrelated to the specific discharges that triggered section 401 certification requirements. Relying on the *plain language* of Sections 401(a) and 401(d), the Court concluded that section 401 permits certification conditions and limitations that apply to the activity as a whole (and not only those tied to the discharge):

The language of [section 401(d)] contradicts petitioners’ claim that the State may only impose water quality limitations specifically tied to “discharge.” The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose “other limitations” on the project in general to assure compliance with various provisions of the Clean Water Act and with “any other appropriate requirement of State law.”

511 U.S. at 711. While the Court in *PUD No. 1* cited to EPA’s regulations and interpretations at the time of the decision as supporting the Court’s analysis of the statutory language, the Court’s

¹² S. Rep. No. 91-351, at 3 (1969) (emphasis added).

¹³ Legislative History Vol. 2 at 1487. This scope intent was clear throughout the legislative process. For just one example, the conference report broadly stated that, under section 401, “a State may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that State.” Legislative History Vol. 1 at 176.

reference to the agency's interpretation was secondary to the Court's reliance on the plain language of the Act. *See* Point III.A.i, *infra*.

Significantly, over a decade after *PUD No. 1*, the Court re-affirmed that "State certifications under § 401 are essential in the scheme to preserve state authority to address the *broad range of pollution* [impacting state waters]." *S.D. Warren Co*, 547 U.S. at 386. When a hydropower dam operator sought to evade section 401 state certification by arguing that its dams did not "discharge" into the river, the Court rejected the operator's arguments. *Id.* at 375-76 ("discharge" under section 401 broader than "discharge of a pollutant"). In doing so, the Court held that section 401 "was meant to 'continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.'" *Id.* at 380, quoting S. Rep. No. 92-414, at 69 (1971).

Additionally, and as discussed further below, EPA's proposal regarding what qualifies as "any other appropriate requirement of State law" is too narrow. *See* Point III.A.ii, *infra*. In this regard, though EPA's proposed rule attempts to cast *PUD No. 1* as a "narrow" holding, the Supreme Court in *PUD No. 1* declined to narrowly define the scope of "any other appropriate requirement of State law." *See* 511 U.S. at 713. Rather, the Court held that "States may condition certification upon *any limitations* necessary to ensure compliance with state water quality standards or *any other* 'appropriate requirement of State law.'" *PUD No. 1*, 511 U.S. at 713-14 (emphases added); *see also id.* at 723 (Stevens, J., concurring) ("Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require."). Among other things, the Court held that projects must comply with designated uses. *Id.* at 715 ("[U]nder the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards."). The *PUD No. 1* Court also rejected the project proponent's invitation to otherwise limit the State's regulatory authority to impose conditions in a section 401 certification. *See id.* at 712-13, 722 (rejecting project proponent's argument that 401 certification conditions must be tied to potential discharges and declining to hold that the State's minimum flow requirements conflict with FERC's hydroelectric licensing authority).

Further, as a general matter, the Circuit Courts have long recognized the breadth of State authority under the Clean Water Act and, in particular, section 401. In *Keating v. FERC*, the D.C. Circuit observed:

One of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act. . . . Through [section 401(a)(1)], Congress intended that the state would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.

927 F.2d 616, 622 (D.C. Cir. 1991). While the crux of the case addresses a state's compliance with section 401(a)(3) to revoke a prior certification, the Court contrasts those statutory constraints with a state's "freedom . . . to impose their own substantive policies in reaching

initial certification decisions. *Id.* at 623; *see also id.* at 624 (“It is true that the state, *alone*, decides whether to certify under section 401(a)(1).”) (emphasis added).

And once a certification decision has been made, the federal licensing agency’s role is largely limited to ensuring procedural compliance. *See* Point III.B.ii, *infra*. In fact, Circuit Courts have universally held that the use of “shall” in of section 401(d) *requires* any state conditions to become conditions on the Federal license or permit being sought. *See, e.g., Sierra Club v. U.S. Army Corp. of Engineers*, 909 F.3d at 645-46; *Am. Rivers, Inc.*, 129 F.3d at 107; *Cf. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 775 (1984) (rejecting a federal agency’s attempt to overcome similar plain statutory language related to mandatory conditions).

EPA’s proposed rule is counter to this long line of cases upholding states’ broad regulatory authority embodied in the plain language of the Clean Water Act.

D. The Proposed Rule Contrasts Sharply With Nearly 50 Years of EPA’s Interpretation of State Authority Under Section 401.

EPA has historically taken the same expansive view of state authority under section 401 that is counseled by a plain reading of the Act, its legislative history, and applicable case law. The proposed rule is a radical departure from EPA’s prior, long-held interpretations.

1989 Guidance

Following a push for states to do more to protect wetlands, EPA first adopted section 401 guidance in the George H.W. Bush administration when it issued a handbook for states and tribes on applying section 401 to projects with potential wetlands impacts.¹⁴ In pressing upon states and tribes the importance of 401 certifications as a tool to prevent wetland degradation, EPA addressed the history, purpose, and scope of 401 authority.

EPA’s 1989 Guidance began by noting that section 401 “is written very broadly with respect to the activities it covers” and encompasses “any activity, including, but not limited to, the construction or operation of facilities which *may* result in *any discharge* requires water quality certification.”¹⁵ EPA explained that the broad purpose of the water quality certification requirement, per Congress, “was to ensure that no license or permit would be issued for an activity that through inadequate planning or otherwise could in fact become a source of pollution.”¹⁶

With regard to the scope of state review, EPA stated that “all of the potential effects of a proposed activity on water quality – direct and indirect, short and long term, upstream and downstream, construction and operation – should be part of a State’s [401] certification

¹⁴ *See* Office of Water, EPA, *Wetlands and 401 Certification—Opportunities and Guidelines for States and Eligible Indian Tribes* at 22 (Apr. 1989) (“1989 Guidance”) (Attachment C).

¹⁵ *Id.* at 20 (emphasis original).

¹⁶ *Id.*, quoting 115 Cong. Rec. H9030 (April 15, 1969) (House debate); 115 Cong. Rec. S29858-59 (Oct. 7, 1969) (Senate debate).

review.”¹⁷ By way of example, the 1989 Guidance illustrated a number of conditions that states had successfully placed on 401 certifications, including sediment control plans, stormwater controls, protections for threatened species, and noxious weed controls, with “few of these conditions ... based directly on traditional water quality standards...”¹⁸ EPA noted that “[s]ome of the conditions are clearly requirements of State or local law related to water quality other than those promulgated pursuant to the [Clean Water Act] sections enumerated in Section 401(a)(1).” All, however, found their source outside of federal law or standards.¹⁹

Finally, EPA’s 1989 Guidance also addressed the timeframes for review and the “completeness” of applications for certification. EPA first noted that the plain language of section 401 gives states “a reasonable period of time (which shall not exceed one year)” to act on a certification request.²⁰ EPA advised states to adopt regulations to ensure that applicants submit sufficient information to make a decision and encouraged requirements that “link the timing for review to what is considered a receipt of a complete application.”²¹ As example, EPA favorably cited to a Wisconsin regulation requiring a “complete” application before the agency review time begins.²² The same regulation stated that the agency would review an application for completeness within 30 days of receipt and allowed the agency to request any additional information needed for the certification.²³

2010 Guidance

EPA issued additional guidance on section 401 in 2010.²⁴ Again, EPA viewed state authority under section 401 as expansive.

As it did in 1989, EPA continued to interpret section 401 as a broad mandate for states to consider all water quality impacts from a proposed activity. EPA stated that, “[a]s incorporated into the 1972 [Clean Water Act], § 401 water quality certification was intended to ensure that no federal license or permits would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate [the Act’s] provisions.”²⁵ EPA highlighted the Supreme Court’s decision in *PUD No. 1* so that states and tribes understood that section 401 review included the ability to “impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the [Act] and any other

¹⁷ *Id.* at 23. Each of these *EPA-suggested* mechanisms would fall outside EPA’s newly proposed scope, yet contrary to the APA, EPA neither mentions nor analyzes its departure from any of these suggestions. *See* Point III, *infra*.

¹⁸ *Id.* at 24, 54-55.

¹⁹ *See id.*

²⁰ *Id.* at 31.

²¹ *Id.*

²² *Id.*, *citing* Wisconsin Administrative Code, NR 299.04.

²³ *Id.*

²⁴ EPA, Office of Wetlands, Oceans, and Watersheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (Apr. 2010) (“2010 Guidance”) (Attachment D).

²⁵ 2010 Guidance at 16.

appropriate requirements of state or tribal law.”²⁶ On the scope of other state law to be considered, EPA stated that “[i]t is important to note that, while EPA-approved state and tribal water quality standards may be a major consideration driving §401 decision[s], they are not the only consideration.”²⁷ EPA’s 2010 Guidance also maintained EPA’s view that states should adopt regulations to require a complete application from applicants.²⁸ To illustrate, EPA used regulations from Oregon establishing a detailed list of information for applicants to provide.²⁹

Existing section 401 regulations

EPA’s existing regulations regarding state water quality certifications also embrace broad state authority. *See generally* 40 C.F.R. part 121. The regulations provide that states must certify that a permitted “activity”—not discharge—will comply with water quality standards. 40 C.F.R. § 121.2(a)(3). “Water quality standards” is defined broadly to include standards established pursuant to the Clean Water Act, as well as any “State-adopted water quality standards.” *Id.* § 121.1(g).

Consistent with the language and intent of the Clean Water Act, the existing certification regulations also do not interject federal oversight into the state administrative process. The regulations do not provide for federal agencies to reject state denials or conditional certifications on a case-by-case basis. With respect to the timing of state review, the regulations provide that a state waives its authority only if the state provides express written notification of waiver or “fail[s]” to act on a certification request within a reasonable period of time. 40 C.F.R. § 121.16(b).

The existing regulations also respect the variety of administrative procedures that states may employ in reviewing section 401 certification applications. The regulations impose no specific requirements on the contents of a section 401 denial, and provide only a few broad categories of information that should be included when a state grants a certification, including “[a] statement of any conditions which the certifying agency deems necessary or desirable” and “[s]uch other information as the certifying agency may determine to be appropriate.” 40 C.F.R. § 121.2(a). Even these broad requirements may be modified if the state, federal permitting agency, and EPA regional administrator agree on such a modification. *Id.* § 121.2(b). By respecting and not interfering with state administrative procedures, the existing regulations preserve the system of cooperative federalism established by the Clean Water Act.

EPA suggests that its existing regulations are out of date because they were first enacted pursuant to section 21(b) of the Water Quality Improvement Act of 1970, the precursor to section 401. *See, e.g.*, 84 Fed. Reg. at 44,081, 44,088-089 & n.16. But section 401 essentially carried forward section 21(b) with only “minor” changes.³⁰ Indeed, the then-EPA administrator described section 401 as “essentially the same” as section 21(b).³¹ EPA fails to explain how

²⁶ *Id.* at 18, *citing PUD No. 1*, 511 U.S. at 712.

²⁷ *Id.* at 16.

²⁸ *Id.* at 15-16.

²⁹ *Id.* at 16.

³⁰ Senate Debate on S. 2770 (Nov. 2, 1971), *reproduced in* Legislative History Vol. 2 at 1394.

³¹ Comments of EPA Administrator Ruckelshaus on H.R. 11895 and H.R. 11896 (Dec. 13, 1971), *reproduced in* Legislative History Vol 1, at 852.

these minor changes in the Clean Water Act justify the wholesale restructuring of the section 401 process envisioned in the proposed rule.

2019 Guidance and proposed rule

Against the backdrop of 50 years of EPA’s consistent position on section 401 and in response to an Executive Order designed to “promot[e] energy infrastructure,” 84 Fed. Reg. at 15,495, EPA in 2019 suddenly reversed course in its interpretation of section 401. First, EPA—over the objections of many states—withdraw replaced its 2010 Guidance with a terse new guidance document that purported to impose substantially shorter time limitations on state review, while at the same time narrowing the permissible scope of state review.³² Second, EPA—again despite objections—proceeded to issue the proposed rule, which goes even further than the 2019 Guidance in unraveling state authority under the Clean Water Act. It does so by further limiting the timing and scope of state review, while also authorizing federal agencies to simply ignore section 401 certificate conditions or denials if the federal agency determines that the state exceeded EPA’s narrowly defined scope of section 401.

EPA’s interpretation of section 401 as providing for broad state authority has been in place for almost 50 years—both in agency guidance and the existing regulations. During that time, states have processed a huge number of section 401 certification applications in a timely and non-controversial manner. Proof of the overall effectiveness of EPA’s existing regulations is found in the fact that EPA can only point to a small handful of cases as examples of the alleged “confusion” caused by the existing regulations.³³ In fact, it is EPA’s proposed rule and 2019 Guidance that will create confusion and uncertainty. EPA should withdraw the proposed rule.

III. EPA’S PROPOSED RULE CONFLICTS WITH THE CLEAN WATER ACT AND WOULD SEVERELY ERODE STATE AUTHORITY TO PROTECT STATE WATERS UNDER SECTION 401

EPA’s proposed rule conflicts with the Clean Water Act in at least four specific ways. First, EPA’s attempt to limit state authority to ensuring that point-source discharges to navigable waters comply with EPA-approved water quality standards violates the Clean Water Act’s plain language, legislative intent, and binding case law. Second, EPA’s attempt to authorize federal agencies to disregard state-imposed conditions in, or denials of, section 401 certifications violates the Clean Water Act’s plain language, legislative intent, and binding case law. Third, EPA’s attempt to narrow the timing and scope of a state’s review of section 401 requests violates the plain language of the Clean Water Act, and relies on an inappropriately selective reading of

³² EPA, *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes* (2019) (2019 Guidance).

³³ See 84 Fed. Reg. at 44,081 (noting that “litigation over the section 401 certifications for several high-profile infrastructure projects have highlighted the need for the EPA to update its regulations”); EPA, *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking*, at 11-12 (Aug. 2019) (referring to four specific cases where proposed rule might have resulted in more expeditious review of section 401 applications).

applicable case law. Fourth, EPA's proposed rule would interfere with states' ability to follow their own administrative procedures, contrary to the language and intent of the Clean Water Act.

A. EPA's Unlawful Proposal to Limit State Authority under Section 401 to Ensuring that Point Source Discharges Comply with EPA-Approved Water Quality Standards Contravenes the Clean Water Act, Congressional Intent, and Case Law.

EPA's proposed rule would limit state authority under section 401 to ensuring that point source discharges to navigable waterways comply with EPA-approved water quality standards. 84 Fed. Reg. at 44,120 (proposed 40 C.F.R §§ 121.1(g), (p), 121.3). EPA's cramped interpretation of state authority under section 401 violates the letter and spirit of the Clean Water Act, as interpreted by the Supreme Court.

i. Section 401 does not limit the scope of State review to discharges from point sources.

EPA proposes to limit the scope of section 401 certifications solely to impacts from specific discharges associated with a federally permitted activity, thus preventing states from basing certifications on the water quality effects of the activity as a whole. This is in direct contravention of the Clean Water Act, established Supreme Court precedent, and other case law.

As discussed above, the Supreme Court has interpreted the plain language of section 401 to permit states to assure that an "activity as a whole" complies with state water quality laws, not just any particular point-source discharge from that activity. *PUD No. 1*, 511 U.S. at 711-12. As the Court noted, there are clear and key differences in language between Sections 401(a) and 401(d) that are deliberate and must be given their full import to realize the intent of Congress. The Supreme Court also has held that the term "discharge" under section 401 must be interpreted according to its plain meaning ("flowing or issuing out") and is not as narrow as "discharge of a pollutant" (which has other elements). *See S.D. Warren*, 547 U.S. at 375-84 (citing Webster's New International Dictionary 742 (2d ed.1954)).

Despite these Supreme Court opinions, EPA proposes to limit the scope of section 401 certifications solely to point-source discharges to waters of the United States—a stance that cannot be reconciled with the Clean Water Act or applicable case law. EPA acknowledges that its proposed rule is contrary to *PUD No. 1*, but asserts that *Brand X*, 545 U.S. at 967, allows EPA to sidestep the Supreme Court's interpretation. EPA is wrong.

Brand X involved the Federal Communications Commission's (FCC) interpretation of terms used in the Communications Act of 1934. *Brand X*, 545 U.S. at 973-74. On appeal, the Ninth Circuit found itself bound by a prior decision that had construed those same terms in a manner contrary to that urged by the FCC.³⁴ *Id.* at 979-80; *citing Brand X*, 345 F.3d at 1128-1132. The Supreme Court reversed, finding that the Ninth Circuit was not bound by the prior decision because that decision never determined the terms were unambiguous in the first instance. *Brand X*, 545 U.S. at 982-83. As a result, the Court held that the FCC was entitled to propose its own interpretation and that the Ninth Circuit should have subjected that interpretation to the two-step

³⁴ At the time of the prior decision, *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000), the FCC was not a party to the action, nor had it made any effort (through rulemaking or otherwise) to interpret the terms. *Id.* at 876.

analysis for agency deference embodied in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Brand X*, 545 U.S. at 982-83.

EPA's reliance on *Brand X* to contradict *PUD No. 1* is misplaced. First, *Brand X* does not apply to the situation presented here—where a court has already construed the plain language of an *unambiguous* statute. As the *Brand X* Court made clear, “a precedent holding a statute to be unambiguous forecloses a contrary agency construction.” *Brand X*, 545 U.S. at 984, citing *Neal v. United States*, 516 U.S. 284 (1996). Here, both *PUD No. 1* and *S.D. Warren* directly relied on the text of the statute. See *PUD No. 1*, 511 U.S. at 711 (finding the “text refers to the compliance of the applicant, not the discharge”); see also *id.* (“The language of this subsection contradicts [the] claim that [a] State may only impose water quality limitations specifically tied to a ‘discharge.’”); *S.D. Warren*, 547 U.S. at 375-78 (applying ordinary meaning of “discharge” under section 401). While the *PUD No. 1* Court later noted—almost in passing—that EPA's 401 regulations were “consistent” with the Court's construction of section 401, that consistency was not central to the decision, and the Court's holding was premised on the plain text of the Act and is devoid of any reference to textual ambiguity. See *PUD No. 1*, 511 U.S. at 711-12; see also *S.D. Warren*, 547 U.S. at 377 (similar). EPA cannot create ambiguity where there is none; and it is only where a statute is ambiguous that an agency can fill in the gaps, whether contrary to a previous court decision or otherwise. See *Brand X*, 545 U.S. at 984.

Second, “it is far from settled that *Brand X* applies to prior decisions of the Supreme Court.” *MikLin Enterprises, Inc. v. Nat'l Labor Relations Board*, 861 F.3d 812, 823 (8th Cir. 2017). The holding in *Brand X* only explains “why a court of appeals' interpretation of an ambiguous provision in a regulatory statute does not foreclose a contrary reading by an agency.” *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring). That explanation is not, however, applicable to a decision by the Supreme Court because such a decision “would presumably remove any pre-existing ambiguity.” *Id.* In other words, while agencies may resolve ambiguous statutory provisions previously construed by lower courts, that opportunity is foreclosed once the Supreme Court has interpreted a statute—as is the case here—because there is no longer any other reasonable interpretation. See *id.*; see also *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488-89 (2012) (rejecting the government's argument that a prior Supreme Court decision finding statutory text to be ambiguous could be subjected to a *Chevron* analysis under *Brand X*).

Third, even if EPA's proposed rule was subject to a *Chevron* analysis, the rule fails to satisfy step two of *Chevron* because it does not represent a reasonable construction of the Act. EPA bases its departure from *PUD No. 1* (not to mention its own 50-year history of broadly construing state authority under section 401) exclusively on the fact that Congress removed the word “activity” from section 21(b)(1) of the 1970 Water Quality Improvement Act when Congress migrated that provision into the new section 401(a)(1). 84 Fed. Reg. at 44,088. EPA then asserts that this change somehow evinces a congressional intent to gut section 21(b)'s scope as it was incorporated into section 401.³⁵ *Id.*

³⁵ EPA's claim is baseless, especially when viewed in the context of the 1972 Act that—without question—sought to strengthen and vastly expand the then-existing universe of tools to be brought to bear on water pollution. See, e.g. Statement of Senator Muskie, reproduced in Legislative History Vol. 1 at 161.

This is incorrect. Section 21(b) and the nearly identical provisions of section 401 embody Congress' consistent intent that states exercise broad authority over all water quality impacts that would—or could—result from federally licensed or permitted activities. There is nothing in the legislative history to indicate that Congress intended the scope of state authority under section 401 to be less than the authority granted in section 21(b). Indeed, the evidence shows that Congress intended to *expand* upon that authority. Most critically, while section 401(a) modified section 21(b) to require any “discharge” to comply with certain provisions of the newly-reformulated Act, Congress added section 401(d) to broadly require that any “applicant” comply with the Act and “any other appropriate requirement of State law.”³⁶ 33 U.S.C. § 1341(d). Accordingly, there is no support in the Act's legislative history for EPA's assertion in the proposed rule that the 1972 Act's permitting requirements for point-source discharges narrowed the focus of state certifications as migrated into the 1972 Act.

Furthermore, congressional focus on ensuring the compliance of an “activity” was unwavering from the enactment of section 21(b) to its incorporation into section 401. From its inception, section 401 was described as requiring any “*activities* that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State for an evaluation.”³⁷ Consistent with this intent, EPA itself has long acknowledged that section 401 requires consideration of all water quality impacts from a proposed activity rather than only discharges from a “point source.” In section 401 guidance issued over 30 years ago, EPA stated that it is “imperative for a State review to consider all potential water quality impacts of the project, *both direct and indirect*, over the life of the project.”³⁸ This is especially important because a state's certification of a construction permit or license also operates as a certification for any federal permits or licenses needed for that project's operation.³⁹ EPA reaffirmed this stance as recently as 2010.⁴⁰ EPA's current departure from this long-standing interpretation is

³⁶ Notably, if a discharge from a point source must exist before a state can issue a section 401 certification, Congress's intent for section 401 to apply to all federally permitted activities that may become a source of pollution would be effectively thwarted, because the activity involved would *already* be subject to the Act's permitting provisions. *See* 33 U.S.C. § 1342. Congress, in contrast, intended section 401's scope to be broader than just federally-issued Clean Water Act permits. H Rep No. 91-127, *reprinted in* 1970 USCCAN 2691, 2697; *see also* H.R. Conf. Rep. No. 95-830, at 96, *reprinted in* Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act, Vol. 3, at 280 (1977) (“[A] federally licensed or permitted activity, *including discharge permits under Section 402*, must be certified to comply with state water quality standards.”) (emphasis added).

³⁷ Senate Debate on S. 2770 (Nov. 2, 1971), *reproduced in* Legislative History Vol. 2 at 1388 (emphasis added).

³⁸ 1989 Guidance, at 22 (emphasis added).

³⁹ *Id.*; 33 U.S.C. § 1341(a)(3).

⁴⁰ 2010 Guidance at 16-17.

without a rational basis, and EPA's claim that it took 50 years to notice differences between the 1970 and 1972 Acts strains credulity.⁴¹

Further, in determining what type of discharge triggers section 401, *S.D. Warren* rejected the idea that "discharge" under section 401 is as limited as the Act's primary prohibition—"discharge of a pollutant." 547 U.S. at 380. In particular, the Court reasoned that "discharge" in section 401 is "without any qualifiers." *See id.* In contrast, "discharge of a pollutant" is qualified by the elements in its definition, including an "addition" from a "point source." *See id.* at 380-81. Thus, an "addition" was not required under section 401: "[T]he understanding that something must be added in order to implicate § 402 does not explain what suffices for a discharge under § 401." *Id.* at 381. As with the "addition" element, the "point source" element is not required to trigger section 401 review and requirements.

In short, EPA's proposal to limit state review to discharges from point sources is inconsistent with the plain language of section 401 as interpreted by the Supreme Court in *PUD No. 1* and *S.D. Warren*. As a result, EPA should withdraw this rulemaking.

- ii. Section 401's reference to "any other appropriate requirements of state law" is not limited to EPA-approved standards.

The proposed rule also seeks to further limit state authority under section 401 by interpreting the phrase "any other appropriate requirement of state law" to mean only EPA-approved state regulatory programs under the Clean Water Act. 8484 Fed. Reg. at 44080, 44093, 44095, 44103-4, 44107, 44120. This interpretation contravenes the Act.

First, EPA's proposed limitation is nonsensical when viewed in conjunction with the plain language of section 401 and the Act as a whole. Section 401(d) provides that state 401 certifications are to assure compliance with:

any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this act, and with any other appropriate requirement of State law[.]

33 U.S.C. § 1341(d). Section 401 review also assures compliance with the water quality standards and implementation plans states are required to adopt under Section 303. *See, e.g., PUD No. 1*, 511 U.S. at 712-13, citing H.R. Conf. Rep. No. 95-830, at 96 (1977), reproduced in 1977 U.S.C.C.A.N 4326, 4471 (noting that "Section 303 is always included by reference where section 301 is listed"). The legislative history of the 1972 amendments confirms that this additional language was intended to expand water quality compliance conditions that may be added to certifications beyond federally-approved water quality standards and implementation plans: the Conference Report noted that the conference version of section 401 was largely the same as the version passed by the House, except that "Subsection (d), which requires a

⁴¹ Equally unconvincing is EPA's sudden desire to "holistically" review the statute and regulations for the first time in 50 years, particularly when such review conflicts with the statutory text and intent and established judicial precedent.

certification to set forth effluent limitations, other limitations, and monitoring requirements necessary to insure compliance with sections 301, 302, 306, and 307, of this Act, *has been expanded to also require compliance* with any other appropriate requirement of State law which is set forth in the certification.”⁴²

EPA’s proposed rule would render section 401’s requirement that state certifications assure compliance with “any appropriate requirement of state law” superfluous. *See* 33 U.S.C. § 1341(d). Such an interpretation is irrational and contradicts the statutory text. Because EPA-approved standards are included within the specific provisions identified in Sections 401(a) and (d), “any other appropriate requirement of State law” must refer to additional state standards, not just those approved by EPA under the Act. As EPA previously has explained, “[w]ater quality certifications under section 401 reflect not only that the licensed or permitted activity and discharge will be consistent with the specific CWA provisions identified in Sections 401(a) and (d), but also with ‘any other appropriate requirements of State [and Tribal] law.’”⁴³

Notably, this distinction was explicitly recognized in EPA’s 1989 Guidance, in which EPA recognized that section 401(d) gives states the authority to review projects for compliance with three separate categories of requirements: “with [federal standards]; with any State law provisions or regulations more stringent than [federal standards]; *and* with ‘any other appropriate requirement of State law.’”⁴⁴ EPA’s proposed rule renders Congress’ clear inclusion of “any other appropriate requirement of State law” either an extraneous duplication or a nullity, neither of which is proper. *See, e.g., Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883) (noting that courts must give effect to every clause and word of a statute, wherever possible).

Moreover, the scope of “other appropriate requirements of state law” is broad. As EPA explained in its 2010 Guidance, such requirements include items such as state erosion and sedimentation standards, construction and post-construction stormwater management, coastal protections, or state laws protecting threatened and endangered species.⁴⁵ Though the provisions appear disparate, they are, in fact, directly related to water quality. For instance, construction stormwater management is necessary to ensure that a wide variety of contaminants unearthed during the construction process and then carried in stormwater during a storm event do not enter the receiving water body, causing the water body’s quality to degrade. Sedimentation standards

⁴² S. Conf. Rep. 92-1236, at 138, *reproduced in* Legislative History Vol. 1 at 321 (emphasis added).

⁴³ 2010 Guidance at 21.

⁴⁴ 1989 Guidance at 23 (emphasis added).

⁴⁵ 2010 Guidance at 21.

address similar concerns. EPA’s proposed rule significantly undermines states’ abilities to effectuate protections such as these that are critical to the health of state waters.

Second, in limiting state review to only federally-approved standards, EPA’s proposed rule clashes with Congress’ explicit, long-standing desire for the Clean Water Act not to preempt state law:

“[N]othing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that . . . such State . . . may not adopt or enforce any [limitation] which is less stringent than the [limitation] under this chapter”

33 U.S.C. § 1370. This savings clause is broad—applying not only to discharges of pollutants, but also any pollution control or abatement requirement—and nothing in the clause excludes conditions imposed under section 401. As numerous courts have held, Sections 401 and 510 evince Congress’ clear intent not to preempt but to “supplement and amplify” state authority. *See, e.g., People of State of Ill. Ex rel. Scott v. City of Milwaukee, Wis.*, 366 F. Supp. 298, 301-302 (N.D. Ill. 1973), *citing United States v. Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt. 1973). Moreover, a federal statute is presumed to supplement rather than displace state law, especially where federal law invades core state functions or otherwise disrupts an area of traditional state regulation. *See, e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (“To displace traditional state regulation in such a manner, the federal statutory purpose must be “clear and manifest.”).

EPA’s proposed interpretation is also internally inconsistent. For example, EPA claims that it does not contest the Supreme Court’s holding in *PUD No. 1* that a state may condition section 401 certification on compliance with the state’s “designated uses” of the waterway. 84 Fed. Reg. at 44,097 n.30; *see PUD No. 1*, 511 U.S. at 715 (“a project that does not comply with a designated use of the water does not comply with the applicable water quality standards”). But EPA also complains that state agencies have included “non-water quality related” conditions such as “requiring construction of biking and hiking trails” or “creating public access for fishing” in their section 401 certifications. 84 Fed. Reg. at 44,094. However, many states have established “recreation” or “fishing” as the “designated use” for particular waterways. *See, e.g.*, 6 New York Code of Rules and Regulations (N.Y.C.R.R.) §§ 701.2-701.7 (designating “recreation” and “fishing” as best uses for various classes of state freshwaters). Ensuring that the public has access to a waterway – whether through surface trails or by fishing access point – is critical to maintaining these designated uses. But EPA would apparently consider such conditions to be outside the permissible scope of section 401, and thus allow federal agencies to simply ignore them.

EPA should abandon its proposal to limit “any other appropriate requirement of State law” to EPA-approved standards.

B. The Proposed Rule’s Attempt to Impose Federal Agency Control over State Section 401 Determinations Upends the Cooperative Federalism Approach Enshrined in the Clean Water Act.

Contrary to the plain language and legislative intent of the Clean Water Act, as well as established case law, the proposed rule unlawfully seeks to impose federal control over the scope of state water quality certifications. If promulgated, the proposed rule would authorize federal agencies to ignore state conditions on certifications and disregard state denials of certification requests if federal agencies deem such a denial to be beyond the narrow scope of certification proposed by EPA. This approach squarely conflicts with the Clean Water Act’s cooperative federalism framework and has no basis.

The plain language, legislative history, and judicial interpretation of section 401(a)(1) preclude EPA’s proposal to empower federal agencies to treat a state’s denial of a section 401 certificate “in a similar manner as waiver” if the federal agency determines that the denial is outside the “scope of certification” as defined by EPA or fails to include certain information required by EPA. 84 Fed. Reg. at 44,121.

i. Section 401 prohibits federal agencies from issuing federal permits if a state has denied a water quality certification.

First, the plain language of section 401 provides that “[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived.” 33 U.S.C. § 1341(a)(1). Even if this direct command could be subject to more than one interpretation, the following sentence leaves no doubt: “No license or permit shall be granted if certification has been denied by the State[.]” *Id.* Thus, the plain and unambiguous language of the statute gives states the final decision on certification requests, precluding review of state certification denials by federal agencies.

Second, although this plain language is dispositive, the legislative history of section 401 further demonstrates that Congress intended a state’s denial of certification to be final and unreviewable by federal agencies. The House Report on section 401 states that “[d]enial of certification by a State . . . results in a *complete prohibition* against the issuance of the Federal license or permit.”⁴⁶ Moreover, “[i]f a State refused to give a certification, the courts of that State are the forum in which the applicant must challenge the refusal.”⁴⁷ Similarly, the Senate Report on its proposed version of section 401 provides that “[s]hould . . . an affirmative denial occur” by a State “no license or permit could be issued” by the relevant federal agency “unless the State action was overturned in the appropriate courts of jurisdiction.”⁴⁸

Moreover, both the House and Senate versions of section 401 largely carried forward existing language from section 21(b) of the version of the Federal Water Pollution Control Act enacted in

⁴⁶ H. Rep. 92-911, at 122, *reproduced in* Legislative History Vol. 1 at 809 (emphasis added).

⁴⁷ *Id.*

⁴⁸ S. Rep. 92-414, at 69 *reproduced in* Legislative History Vol. 2 at 1487.

1970. *See* Federal Water Pollution Act, § 21(b) (1970), *enacted by* 84 Stat. 91, at 108, Public Law 91-224. In enacting section 21(b), Congress noted that “[d]enial of certification by a State . . . results in a complete prohibition against the issuance of the Federal license or permit.”⁴⁹ Again, Congress made clear that “[i]f a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge that refusal.”⁵⁰

Indeed, during the 1969 House debate on its version of the certification requirement, which at the time did not include a waiver provision, a Representative asked “is it not possible that a State, for reasons other than water pollution, may refuse to grant such certification or simply fail to act upon it? If so, what could the applicant do?”⁵¹ A member of the Public Works committee responded that although “there was a possibility that this could happen” it was “assumed . . . that all of the people involved in connection with this pollution control would be acting in good faith.”⁵² But the committee member further noted that “if the applicant has reason to feel that [its] rights have been interfered with the judicial procedures available now in the State courts to require action by the State would be available to the applicant.”⁵³ After the waiver provision was added to the House bill, a congressperson noted that although the waiver provision would *not* “protect an applicant against arbitrary action by a State agency,” the “normal appeals procedures to the courts will protect a license applicant” in the “rare case” of arbitrary state action.⁵⁴

This legislative history recognizes, in no uncertain terms, that a state’s denial of a section 401 certification would operate as a “complete prohibition” on a federal agency issuing the relevant permit or license, reviewable only by a court of competent jurisdiction. Federal agencies simply do not have the authority to overrule or ignore state denials.

Courts have consistently recognized that the plain language of section 401(a)(1) “mean[s] exactly what it says: that *no* license or permit . . . shall be granted if the state has denied certification.” *United States v. Marathon Development Corp.*, 867 F.2d 96, 101 (1st Cir. 1989). The Supreme Court has noted that section 401 “was meant to ‘continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.’” *S.D. Warren*, 547 U.S. at 380 (quoting S. Rep. No. 92-414, p. 69 [1971]). Section 401 entitles a state agency to “conduct its own review” of a project’s “likely effects on [state] waterbodies” and to determine “whether those effects would comply with the State’s water quality standards.” *Constitution Pipeline Co., LLC New York State Dep’t of Env’tl. Conservation*, 868 F.3d 87, 101 (2d Cir. 2017), *cert. denied* 138 S. Ct. 1697 (2018). Where the state agency determines that a project will not comply with state water quality

⁴⁹ Conf. Rep. on H.R. 4148, *reproduced in* Congressional Record—House, H.2315, at H.2330 (March 24, 1970).

⁵⁰ *Id.*

⁵¹ House Debate on H.R.4148, *reproduced in* Congressional Record—House, at H.2608 (April 15, 1969).

⁵² *Id.* at H.2609.

⁵³ *Id.*

⁵⁴ House Debate on H.R.4148, *reproduced in* Congressional Record—House, at H.2691 (April 16, 1969).

standards, it can “effectively veto[]” the project, even if the project “has secured approval from a host of other federal and state agencies.” *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), *cert. denied* 555 U.S. 1046 (2008). In short, Congress “intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.” *Keating*, 927 F.2d at 622.

Courts have also recognized and enforced Congress’ intent to require that applicants seek review of section 401 denials in a court of appropriate jurisdiction. State decisions to grant or deny a request for a water quality certification “turn[] on questions of substantive environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence.” *Keating*, 927 F.2d at 622-23. The federal agencies’ “role [in the section 401 state review process] is limited to awaiting and then deferring to, the final decision of the state.” *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006). In short, a state’s denial of a section 401 certification is reviewable in the court of appropriate jurisdiction, not before any federal agency. *See Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) (“a State’s decision on a request for section 401 certification is generally reviewable only in State court”); *Marathon Development Corp.*, 867 F.2d at 102 (“Any defect in a state’s section 401 water quality certification can be redressed. The proper forum for such a claim is state court, rather than federal court, because a state law determination is involved.”).

By treating a state denial of a section 401 certification as a waiver of state review, the proposed rule seeks to undo the core purpose of section 401—to prevent federal agencies from railroading states into accepting projects that adversely impact water quality. A state that has denied a section 401 certification request within the waiver period has not waived its authority, although its decision remains subject to judicial review.⁵⁵ The heavy-handed approach presented in the proposed rule is counter to the statute and should be withdrawn.

ii. EPA’s Proposal to Institute Control and Oversight of State Conditions Imposed in Water Quality Certifications Runs Afoul of the Clean Water Act and Controlling Judicial Precedent.

Similarly, the plain language, legislative history, and judicial interpretation of section 401(d) preclude EPA’s proposal to empower federal agencies to determine, on a case-by-case basis, whether state-imposed conditions on a certification are within the “scope” of section 401, as defined by EPA.

The plain language of section 401(d) provides that any condition imposed in a state certification “shall become a condition on any Federal license or permit” for which it is issued. The use of the word “shall” unambiguously connotes a “command” that “imposes a mandatory duty” on federal agencies. *Kingdomware Technologies, Inc. v. United States*, ___ U.S. ___, 136 S. Ct. 1969, 1977 (2016). Section 401 provides no exception to this plain command for situations in which a federal agency believes a state has exceeded its authority under section 401, and EPA’s contrary interpretation violates the plain language of the statute. *See, e.g., Escondido Mut. Water Co.*, 466

⁵⁵ *See* Legislative History Vol. 1, at 809; Legislative History Vol. 2, at 1487.

U.S. at 779 (requiring the federal agency to incorporate mandatory conditions, stating “nothing in the legislative history or statutory scheme is inconsistent with the plain command of the statute that licenses issued within a reservation by the Commission pursuant to [Federal Power Act] § 4(e) ‘shall be subject to and contain such conditions as the Secretary’ . . . shall deem necessary”).

The legislative history of section 401 confirms that appropriate state courts—not federal agencies—are the forum for challenging state conditions on certifications that an applicant believes are unlawful. The Senate report on section 401 noted that “the provision makes clear that any water quality requirements established under State law . . . shall through certification become conditions on any Federal license or permit.”⁵⁶ The committee noted that “[t]he purpose of the certification mechanisms provided in this law is to assure that Federal licensing or permitting agencies *cannot override* State water quality requirements.”⁵⁷ And yet EPA, in the proposed rule, attempts to do exactly that: allow federal agencies to override state determinations made pursuant to state law.

Confirming the plain language and legislative history, courts interpreting section 401 have *universally* held that federal agencies lack the authority to second-guess conditions imposed by states in water quality certifications.

In *PUD No. 1*, all nine justices of the Supreme Court agreed that federal agencies are bound by state section 401 decisions. The majority noted that “[t]he limitations included in the certification become a condition on any federal license.” *PUD No. 1*, 511 U.S. at 708. The dissenting justices went further, noting that “[b]ecause of § 401(d)’s mandatory language, federal courts have uniformly held that [federal agencies have] no power to alter or review § 401 conditions, and that the proper forum for review of those conditions is state court.” *Id.* at 734 (Thomas, J., dissenting). In other words, “Section 401(d) conditions imposed by State” are “binding” on federal agencies. *Id.*

Courts of Appeals interpreting section 401(d) have reached similar conclusions. As of the date of these comments, the First, Second, Third, Fourth, Ninth and District of Columbia Circuits have all recognized that state-imposed conditions are not subject to federal agency review. No Circuit has reached the contrary conclusion. In fact, as early as 1982, the First Circuit recognized that “courts have consistently agreed” that “the proper forum to review the appropriateness of a state’s certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state’s certification.” *Roosevelt Campobello Intern. Park Comm’n v. U.S. Env’tl Protection Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982). This conclusion, the First Circuit held, was “supported by the statutory scheme of the Clean Water Act” that sought to preserve state authority to impose requirements and conditions more stringent than those required by the federal government. *Id.* Courts of Appeals to consider the issue over the next decade agreed that federal agencies lacked authority to second-guess or review conditions imposed by state water quality certification, which must be reviewed in state court. *See U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992)

⁵⁶ Senate Rep. 92-414, at 69, reproduced in Legislative History Vol. 2, at 1487.

⁵⁷ *Id.* (emphasis added).

(“FERC may not alter or reject conditions imposed by states through section 401 certificates.”); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3d Cir. 1988) (“only the state may review the limits which it sets through the [section 401] certification process.”).

In *American Rivers v. FERC*, the Second Circuit rejected FERC’s refusal to incorporate several conditions imposed by the State of Vermont on hydropower plants’ section 401 certificates. 129 F.3d at 102-103. FERC argued that the conditions—which included reserving to the state the right to reopen the certification when appropriate, to review and approve any significant changes to the project, and to approve final erosion-control plans before construction commenced—were “beyond the scope” of the State’s section 401 authority. *Id.* The Second Circuit rejected this approach, concluding that “the statutory language is clear” and “unequivocal, leaving little room for FERC to argue that it has authority to reject state conditions it finds to be *ultra vires*.” *Id.* at 107. The Second Circuit also rejected FERC’s various attempts to avoid the “mandatory language” of section 401(d), concluding that nothing in section 401 delegated to FERC “the authority to decide which conditions are within the confines of § 401(d) and which are not.” *Id.*; *see also id.* at 110-111 (FERC “does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401.”). The Court observed that “applicants for state certification may challenge in courts of appropriate jurisdiction any state-imposed condition that exceeds a state’s authority under § 401.” *Id.* at 112.

Most recently, the Fourth Circuit rejected the Army Corps’ attempt to impose its own water quality condition of a specific project “in lieu of” a condition imposed by the State of West Virginia on the applicable nationwide permit. *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d at 645-46. The Fourth Circuit rejected the Army Corps’ attempt to invoke agency deference, holding that the “plain language” of section 401(d) “leaves no room for interpretation.” *Id.* at 644-45. Observing that “[e]very Circuit to address this provisions has concluded that ‘a federal licensing agency lacks authority to reject [state section 401 certification] conditions,’” the Fourth Circuit concluded that “[t]he plain language of the statute does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, *even if* the Corps determines that the alternative condition is more protective of water quality.” *Id.* at 646, quoting *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1218 (9th Cir. 2008) (emphasis added).

In a similar context with virtually identical statutory text, the U.S. Supreme Court admonished a federal permitting agency for ignoring such clear statutory language to include mandatory conditions from the Department of the Interior in its federal license. *See Escondido Mut. Water Co.*, 466 U.S. at 779. The Court found no room in this language to argue otherwise, finding no “clear expressions of legislative intent to the contrary.” *See id.* at 772. As discussed in Point II of this letter, there is no support in the Act’s legislative history for EPA’s proposal to disregard or overrule state conditions or denials of section 401 certifications. In fact, the Clean Water Act legislative history demonstrates that the clear statutory terms mean what they say. Accordingly, any reviewing court will likely find, as the Supreme Court did in *Escondido*, that this statutory arrangement makes sense given state certifying agencies’ familiarity with its water-quality standards and reservation of right to determine what conditions are necessary for adequate protection of its waters. *Cf. Escondido Mut. Water Co.*, 466 U.S. at 778–79 (“The fact that in reality it is the Secretary’s, and not the Commission’s, judgment to which the court is giving

deference is not surprising since the statute directs the Secretary, and not the Commission, to decide what conditions are necessary for the adequate protection of the reservation. There is nothing in the statute or the review scheme to indicate that Congress wanted the Commission to second-guess the Secretary on this matter.”).

EPA attempts to disregard the clear case law by asserting that its counter-textual and unsupported interpretation of Section 401 is entitled to *Chevron* deference and couching the proposed rule as the agency’s first “holistic” analysis of section 401. 84 Fed. Reg. at 44,103-104. EPA’s invocation of *Chevron* deference is misplaced because the judicial precedent is based on the plain language of the Clean Water Act. For example, although *American Rivers* and *Sierra Club* specifically dealt with the authority of FERC and the Army Corps, respectively, the decisions were based on the plain language of section 401. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Nor is *Snoqualmie Indian Tribe v. FERC* to the contrary. 545 F.3d 1207 (9th Cir. 2008). There, the Ninth Circuit held that FERC could impose *additional* conditions on a federal permit, if those conditions “do not conflict with or weaken the protections provided by” the state’s water quality certification. *Id.* at 1218-19 (emphasis added). The Ninth Circuit recognized that “a federal licensing agency lacks authority to reject” state-imposed water quality certification “conditions in a federal permit,” but concluded that “FERC did not reject” the state-imposed standards in that case, but “incorporated them in its [federal] License and strengthened them.” *Id.* at 1218. No amount of “holistic” analysis can contradict the plain language of the statute. *See U.S. Ent’l Protection Agency*, 573 U.S. 302, 328 (2014) (“[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”).

EPA’s attempts to manufacture ambiguity in the statute by suggesting that Congress intended to allow EPA to define the term “condition” under section 401. *See* 84 Fed. at 44,105-106. This argument fails because it misconstrues the structure of section 401(d). Section 401(d) provides that a states’ certification may set forth “any effluent limitations and other limitations,” along with “monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply” with appropriate state standards and requirements. 33 U.S.C. § 1341(d). The *certification*, in turn, “shall become *a condition* on any Federal license or permit.” *Id.* (emphasis added). In other words, states impose “limitations” and “monitoring requirements” in a certification, and the certification itself then becomes “a condition” on the federal permit. There is no ambiguity in this arrangement, which requires that the certification is incorporated whole cloth into the federal license or permit. *See Am. Rivers*, 129 F.3d at 107.

EPA is similarly wrong in claiming that courts have recognized federal authority to review the substance of state denials of or conditions on section 401 certifications. *See* 84 Fed. at 44,106. The authority of federal agencies to review state section 401 certifications is narrow and limited to ensuring that the state complies with the specific procedural requirements set forth in section 401. *See Alcoa Power Generating Inc.*, 643 F.3d at 971 (“A water quality certification is reviewable in federal court, however, at least to the extent section 401 itself imposes requirements that a state must satisfy”). Thus, in *City of Tacoma*, the D.C. Circuit held that FERC had “an obligation to confirm, at least facially, that the state has complied with section 401(a)(1)’s public notice requirements.” 460 F.3d at 67-68. The Court, however, also recognized the “rule” that “the decision whether to issue a section 401 certification generally turns on

questions of state law” and “FERC’s role is limited to awaiting, and then deferring to, the final decision of the state.” *Id.* at 67. “Otherwise,” the Court cautioned, “the state’s power to block the project would be meaningless.” *Id.* *City of Tacoma* thus stands for the proposition that federal agencies must take basic steps to ensure that states comply with the procedural public notice requirement that is explicitly set forth in section 401.

In *Keating*, the State had already issued a section 401 certification to the applicant, but then attempted to revoke that certification. *Keating*, 927 F.2d at 622-23, 625. The D.C. Circuit held that, in a case where the federal permit requiring a section 401 certification had already been issued, FERC had an obligation to confirm that the state complied with the procedures set forth in section 401(a)(3) for withdrawing the certification. *Id.* at 623-24. The Court recognized the “freedom the states may have to impose their own substantive policies in reaching initial certification decisions,” but concluded that “the picture changes dramatically once that decision has been made and a federal agency has acted upon it.” *Id.* at 623. *Keating* therefore has no application to cases where a state has not yet acted a certification request.

EPA’s suggestion that federal agencies have struggled to enforce state certifications conditions, 84 Fed. Reg. at 44,116, misses the point. The remedy for federal agencies unhappy with the system of cooperative federalism created by the Clean Water Act must be legislative, not administrative. In any case, enforcement of certification conditions may also be initiated by the appropriate states through state law administrative remedies or through citizen lawsuits. *See* 33 U.S.C. § 1365(a). After all, “the Water Quality Certification is by default a state permit,” and states may enforce their own permits. *Delaware Riverkeeper Network v. Secretary of Penn. Dep’t of Env’tl Protection*, 833 F.3d 360, 368 (3d Cir. 2016).

None of the cases cited by EPA in the proposed rule suggested that federal agencies have authority to review the *substance* of state-imposed section 401 conditions to determine whether they comply with EPA’s view of the appropriate scope of the statute. In short, the proposed rule utterly conflicts with case law limiting federal agency review of state certification decisions.

C. EPA’s Attempt to Restrict the Timing and Scope of State Review of Section 401 Requests Conflicts with the Plain Language and Legislative Intent of the Clean Water Act.

Section 401 provides that a state waives its authority to issue, condition, or deny a section 401 certification *only* if the state “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.” 33 U.S.C. § 1341(a)(1) (the “waiver provision”). The statute imposes no further restrictions on the timeframe or scope of the State’s review of a section 401 application. Out of this modest restriction, EPA attempts to craft a procedural and substantive gauntlet that states must navigate if they wish to avoid inadvertently waiving their section 401 authority.

EPA attempts to justify its counter-contextual approach by suggesting that the language “fails or refuses to act” should be read to mean *both* “a fail[ure] or refus[al] to act” *and* “a fail[ure] or refus[al] to act [within the statute’s permissible scope].” 84 Fed. at 44,110. As an initial matter, EPA’s proposed interpretation would impermissibly add words to the statute. Moreover, EPA’s

proposed interpretation violates the Congressional intent behind the waiver provision, which was intended only to prevent “sheer inactivity” by the state, not to authorize federal agencies to interject themselves into every aspect of state administrative review. Indeed, when the waiver provision was first added it was acknowledged that *any* state action within the required time period—even an arbitrary and capricious one—would not constitute a waiver.⁵⁸

The waiver provision first appeared in 1970, when section 21(b) was added to the Federal Water Pollution Control Act. *See* Public Law No. 91-224, 84 Stat. 91, at 108 (April 3, 1970). Section 21(b) combined state certification requirements from a house bill (H.R.4148) and senate bill (S.7) that took different approaches to the timing requirement. The original version of the House bill (H.R.4148) reported from the Public Works Committee to the House did not include any limitation to the timeframe of state review.⁵⁹ In response to concerns that a state could block federally approved projects by simply not acting on an application for a water quality certification, the bill was amended to provide that “[i]f an affected State . . . fails to act to certify or refuses to certify within a reasonable period of time as determined by the licensing or permitting agency . . . the certification requirements of this subsection shall be waived.”⁶⁰ The amendment was intended to “guard[] against a situation where the [certifying state] simply sits on its hands and does nothing.”⁶¹

In considering the new waiver provision, members of Congress acknowledged its limited effect. The state would “not have any particular pressure to compel certification but it is put in the position . . . to do away with dalliance or unreasonable delay and to require a ‘yes’ or ‘no.’”⁶² Nor would the waiver provision “protect an applicant against arbitrary action by a State agency” – rather, the “normal appeals procedures to the courts will protect a license applicant.”⁶³ In other words, the state would be required to act on an application, but, once the state acted, any challenge to that action would have to go through regular judicial review procedures.⁶⁴ The Senate version of the state certification requirement (S.7) took a different approach to the timing issue, imposing a flat one-year limit on state action.⁶⁵ The Senate bill provided no further restrictions on the timing or substance of state certification decisions.

The final version of section 21(b) combined the two approaches by requiring the state to act “within a reasonable period of time (which shall not exceed one year).”⁶⁶ Notably, the final version of the bill did not adopt the House’s proposed language empowering federal agencies to

⁵⁸ House Debate on H.R.4148, *reproduced in* Congressional Record—House, at H.2691 (April 16, 1969).

⁵⁹ *See* House Rep. 91-127, at 42-43.

⁶⁰ House Debate, Congressional Record—House, at H.2689 (April 16, 1969).

⁶¹ *Id.* at H.2690.

⁶² *Id.*

⁶³ *Id.* at H.2691.

⁶⁴ *See id.*

⁶⁵ *See* S. Rep. 91-351, at 113.

⁶⁶ Public Law 91-224, at 18 (April 3, 1970).

establish the reasonable period of time.⁶⁷ The Conference Report noted that the waiver provision was included “[i]n order to insure that sheer inactivity by the State . . . will not frustrate the Federal application.”⁶⁸ The Conference Report also noted that “[i]f a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge that refusal.”⁶⁹

As noted above, when the Clean Water Act was reorganized and amended in 1972, the waiver provision was carried forward essentially unaltered in what is now section 401.⁷⁰ The House Report restated, verbatim, the original justification for the waiver provision: “to insure that sheer inactivity by the State . . . will not frustrate the Federal application.”⁷¹

Section 401 does not permit a federal agency to determine that a state has failed to “act” on the application simply because the federal agency believes the denial or conditions are outside of the EPA-dictated scope of section 401, as the proposed rule would allow. 84 Fed. Reg. at 44,120. A state that issues with conditions or denies a section 401 certification within the waiver period has not “fail[ed]” or “refus[ed]” to act on the request, and therefore has not waived its authority. 33 U.S.C. § 1341(a)(1). A state that timely denies certification or issues a certification with conditions has not engaged in the “sheer inactivity” sought to be prevented by the waiver provision. Indeed, the legislative history of section 401 is clear that Congress did not intend the waiver provision to allow federal second-guessing of the substance of state decision-making, which would remain subject to judicial review.⁷²

The waiver provision of section 401 also does not authorize EPA to arbitrarily limit the information that a state agency can request from an applicant. Under the proposed rule, a state’s time to act on a section 401 certification would begin to run upon receipt of seven basic items of information, and could not be paused or extended. *See* 84 Fed. Reg. at 44,099. Amongst those seven enumerated items are the applicant’s name and contact information, the relevant federal license of permit, and a statement affirming that the applicant is requesting a 401 certification, all of which are essentially administrative, not substantive, pieces of information. *Id.* This means states could not obtain more time for review even if, for example: (1) the state requires additional information to make an informed decision or comply with state administrative procedures; (2) the scope of the project substantially changes after the request is submitted; or (3) the initial request fails to correctly identify the number, location, or nature of potential discharges. Nothing in section 401 contemplates that the waiver provision was intended to artificially limit the

⁶⁷ *Id.*

⁶⁸ H.R. Conf. Rep. 91-940, *reproduced in* Congressional Record—House, at H.2330 (March 24, 1970).

⁶⁹ *Id.*

⁷⁰ 86 Stat. 816, at 877-78, Public L. No. 92-500 (Oct. 18, 1972).

⁷¹ H.R. 92-911, *reproduced in* Legislative History Vol. 1 at 809.

⁷² *See, e.g.,* H.R. Conf. Rep. 91-940, *reproduced in* Congressional Record—House, at H.2330 (March 24, 1970); *see also* Point III.B.ii, *supra* (plain language of section 401 prohibits federal oversight of state denials and certifications).

information a state could require from an applicant so that the state can make an informed decision. Preventing a state from “sit[ting] on its hands,” is quite different from *forcing* a state to make decisions in an artificially short time period based on insufficient, outdated, or incorrect information.⁷³

EPA also attempts to use the waiver provision and a selective reading of applicable case law to prohibit states from asking applicants to withdraw and resubmit applications in order to extend the time period for state review. 84 Fed. Reg. at 44,120. EPA’s sole authority for prohibiting the withdrawal and resubmittal process is *Hoopa Valley Tribe v. FERC*, in which the D.C. Circuit held that waiver had occurred where an applicant and states had, pursuant to a written agreement, repeatedly extended the timeframe for the states’ review of a water quality request for more than a decade by having the applicant purport to withdraw and resubmit the request via the same one-page letter. 913 F.3d 1099,1103-1105 (D.C. Cir. 2019), *petition for certiorari pending* Docket No. 19-257. But the D.C. Circuit was very clear that *Hoopa Valley* was limited to the “coordinated withdrawal-and-resubmission scheme” at issue in that case, and was not intended to prohibit withdrawal-and-resubmission generally, especially in circumstances where an applicant withdraws and resubmits a new “request.” *Id.* at 1103-04. EPA contorts this narrow holding to establish an unworkable rule that state agencies may *never* ask an applicant to withdraw and resubmit an application, regardless of the complexity of the project, any project changes over the course of state review, or the circumstances of that case.

Moreover, in flatly prohibiting the use of withdrawal and resubmission to extend the deadline for state action, EPA ignores authority from other circuits. In *N.Y.S. Dep’t of Env’tl Conservation v. FERC*, the Second Circuit held that if a state believes an applicant has submitted insufficient information, it could “request that the applicant withdraw and resubmit the application.” 884 F.3d 450, 456 (2d Cir. 2018) (*NYSDEC v. FERC*), citing *Constitution Pipeline*, 868 F.3d at 94 (in which “an applicant for a section 401 certification had withdrawn its application and resubmitted at the Department’s request—thereby restarting the one-year review period”). EPA’s statement that the Second Circuit did not “opine on the legality of such an arrangement” is simply wrong. 84 Fed. Reg. at 44,091 n. 19. To the contrary, the Second Circuit held out the withdrawal and resubmittal process as a way to ensure that a state can work with the applicant to refile in accordance with its requirements in cases where the applicant submits insufficient information, even in cases where the waiver period starts before a complete application has been received. 884 F.3d at 456. EPA now seeks to shut off the path of review held open by the Second Circuit by prohibiting states from obtaining more time for review by asking applicants to withdraw and resubmit their applications.

As a practical matter, EPA says nothing about what a State is to do if an applicant *voluntarily* withdraws an application and submits a new request. By failing to address issues related to voluntary withdrawal, the proposed rule creates more ambiguity and uncertainty. Must the state agency deny the now-withdrawn application within the original reasonable period? May the State treat a withdrawn and resubmitted application as a new request triggering a new waiver period if the applicant takes that step of its own volition, but not if the state suggested that more time is

⁷³ House Debate, Congressional Record—House, at H.2689 (April 16, 1969).

necessary for review? Must the State ensure that the request is sufficiently different to be considered a “new” request? If so, what should the State consider? EPA does not say.

Finally, nothing in the text or legislative history of section 401 gives EPA or other federal agencies the authority to establish federal oversight of deadlines for state action, as contemplated in section 121.4 of the proposed rule. 84 Fed. Reg. at 44,120. The plain language and legislative history of section 401 provide that states have “a reasonable period of time” of “up to one year” to act on certification requests. The language from the House version of the waiver provision that would have provided for federal authority to set deadlines was not included in the final version of the bill, which instead adopted the Senate’s maximum review period of one year. The “reasonable period” contemplated by section 401 must necessarily depend on a variety of factors, including the nature of the project and the requirements of state administrative law. Applicants or other parties dissatisfied with the length of time required for state review can—and have—made case-by-case arguments to the applicable federal agency that the state has waived its review. *See, e.g., Hoopa Valley Tribe*, 913 F.3d at 1102; *NYSDEC v. FERC*, 884 F.3d at 454. No further federal oversight of the timing of state section 401 review is permissible and proper.

In sum, the proposed rule leaves states with an untenable set of choices, each of which threatens the integrity of state waters: (1) grant a section 401 certification based on incomplete or inaccurate information (risking legal challenge from parties opposed to the proposed project); (2) grant the certification with conditions without knowing whether the federal agency will fully incorporate those conditions in the permit or license; (3) deny the certification and risk having the federal agency nevertheless conclude the state has waived, or being sued by the project proponent; or (4) explicitly waive and thus allow the project to be constructed without any assurance that it will comply with state water quality standards and requirements.

Moreover, EPA’s counter-textual approach is not necessary to ensure that state section 401 certifications do not delay federal licensing decisions. The vast majority of certifications are issued in a timely manner. In complex cases where the certification decision takes more time, the federal agencies involved regularly require more than a year to make a decision on the federal application. Rather than speed project implementation, the proposed rule will, in fact, lead to unnecessary denials of certification applications and an overall increase in litigation and uncertainty over projects for which section 401 certification is required.

D. EPA’s Proposal Would Violate the Clean Water Act by Dictating the Scope and Substance of State Administrative Procedures.

EPA’s proposed rule impermissibly intrudes on state authority to create and follow state administrative procedures when reviewing section 401 applications. Although EPA’s proposed rule only “recommends” that states “update” their procedural and substantive regulations, by attempting to dictate the contents of section 401 requests, the scope and timeframe of state review, and the contents of state decisions, EPA seeks to override every aspect of the state administrative process for section 401 certifications.

Except for requiring states to provide for public notice and, in appropriate cases, public hearings on certification requests, section 401 does not require states to follow a particular procedure in

reviewing requests for certification. *See* 33 U.S.C. § 1341(a)(1); *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007), quoting 33 U.S.C. § 1251(b) (“In the [Clean Water Act], Congress expressed its respect for states’ role through a scheme of cooperative federalism that enables states to ‘implement ... permit programs’”). Accordingly, courts have long recognized that a state reviewing a section 401 request may apply the appropriate state administrative procedures. *See, e.g., Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019) (“State Agencies have broad discretion when developing the criteria for their section 401 Certification.”); *Berkshire Env’t Action Team*, 851 F.3d at 113 (finding “no indication” in section 401 that Congress “intended to dictate how” a state agency “conducts its internal decision-making before finally acting”); *Delaware Riverkeeper Network*, 833 F.3d at 368 (“the Water Quality Certification is by default a state permit, and the issuance and review of a Water Quality Certification is typically left to the states”); *City of Tacoma*, 460 F.3d at 67-68 (noting that federal agency’s role in state decision to issue section 401 certification is “limited” and that federal agency is not in a position to second-guess the state’s application of state procedural standards to the applicant).

States have established a wide range of efficient and fair administrative procedures, which share certain features designed to enable the thorough review contemplated by section 401.⁷⁴ Initially, a state reviews a section 401 application to ensure that it includes sufficient information for meaningful review by the state agency and the public. A state that receives a deficient or incomplete application may require the applicant to provide additional information.⁷⁵ The process of obtaining required information is not entirely within the reviewing agency’s control, and applicants can frustrate the timeframe for review by failing to provide requested materials necessary to the state’s review of the application. *See, e.g., Constitution Pipeline*, 868 F.3d at 103. In some cases, states also must await completion of federal and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications.⁷⁶ Many states provide public notice, and where a state deems appropriate, public hearings once sufficient information supporting an application has been received for a state to deem an application complete. In many states, public notice must be accomplished through publication in one or more local newspapers as well as in official agency

⁷⁴ *See, e.g.*, 314 Code of Massachusetts Regulations (C.M.R.) § 9.05(3); 6 New York Code of Rules and Regulations (N.Y.C.R.R.) § 621.7(a)(2), (g); 15A North Carolina Administrative Code (N.C.A.C.) § 02H.0503; 250 Rhode Island Code of Regulations (R.I.C.R.) § 150-05-1.17; Vermont Admin. Code (Vt. A.C.) § 16-3-301:13.11; Conn. Gen. Stat. 22a-6h; 23 Cal. Code of Regulations (Ca.C.R.) §§ 3855-3861.

⁷⁵ *See, e.g.*, N.Y. Environmental Conservation Law § 70-0109(2)(a); *see also* 310 C.M.R. § 4.10(8)(g)3.a.-b.; 314 C.M.R. § 9.05(1); 6 N.Y.C.R.R. § 621.7(a), (f); 250 R.I.C.R. § 150-05-1.17(B), (D); Vt. A.C. § 16-3-301:13.3(c)(3); Or. Admin. R. 340-048-0032(2).

⁷⁶ *See, e.g.*, 23 Ca.C.R. §§ 3836(c), 3837(b)(2) (projects subject to section 401 water quality certification must be reviewed under the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., as appropriate, before approval by the State Water Resources Control Board or the Regional Water Quality Control Boards); 6 N.Y.C.R.R. § 621.3(a)(7) (an application is not considered complete until a negative declaration or draft environmental impact statement have been prepared pursuant to state environmental quality review act, ECL article 8).

publications.⁷⁷ In almost all cases, states must hold a public comment period ranging from fifteen to forty-five days.⁷⁸ To ensure meaningful public review, states appropriately provide extensions of public comment periods for significant projects.⁷⁹ The period of public participation may be further extended in situations where states receive requests for a public hearing.⁸⁰ After the public comment period and any public hearings are complete, the state agency must review and, in many cases, respond to the public comments received before making a certification determination.⁸¹

Many of the undersigned states previously provided information regarding their administrative procedures to EPA.⁸² But rather than respect states' authority to carry out states administrative procedures, the proposed rule seeks to impose EPA oversight and control over virtually every aspect of the state administrative process for section 401 certifications.

First, EPA's proposed new definition of "certification request" conflicts with the text of the Clean Water Act, Congressional intent, and case law. Under the Clean Water Act, a state agency's timeframe for issuing or denying a section 401 certification commences upon "receipt of such request [for certification]." 33 U.S.C. § 1341(a)(1). Yet the proposed rule—and specifically its reliance on receipt of a barebones "certification request" to trigger a state's certification review period—contradicts clear congressional intent and turns on its head EPA's

⁷⁷ See, e.g., 6 N.Y.C.R.R. § 621.7(a)(2), (c); 15A N.C.A.C. § 02H.0503(a); 250 R.I.C.R. § 150-05-1.17 (D)(1)(a); 9 Va. Admin. Code (Va.A.C.) § 25-210-140(A).

⁷⁸ See, e.g., 5 Col. Code of Regulations § 1002-82.5(B)(1) (30 days); Conn. Gen. Statutes Ann. § 22a-6h(a) (30 days); 314 C.M.R. § 9.05(3)(e) (21 days); 6 N.Y.C.R.R. § 621.7(b)(6) (15 to 45 days); 250 R.I.C.R. § 150-05-1.17(D)(2) (30 days); Va. Code § 62.1-33.15:20(C) (45 days for state agencies to provide comment); 9 Va.A.C. § 25-210-140(B) (30 days for public comment); Vt. A.C. §§ 16-3-301:13.3(c), 13.11(c) (30 days); 23 Ca.C.R. § 3858(a) (at least 21 days).

⁷⁹ See, e.g., Ca. State Water Resources Control Bd., Draft Water Quality Certification Comment Deadline Extended for Application of Southern California Edison Co. (Sept. 27, 2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/big_creek/docs/final_bc_ceqa_draft_cert_notice_extended.pdf; N.Y. Dep't of Env'tl. Conservation, Notice of Supplemental Public Comment Hearing and Extension of Public Comments on Application of Transcontinental Gas Pipe Line Company, LLC (Feb. 13, 2019), https://www.dec.ny.gov/enb/20190213_not2.html.

⁸⁰ See, e.g., Conn. Gen. Stat. 22a-6h(d) (applicant may request public hearing within 30 days of publication of a tentative determination); 250 R.I.C.R. § 150-05-1.17(D)(3) (providing for a mandatory public hearing if enough requests are received, notice of which must be provided fourteen days prior to date of hearing); 15A N.C.A.C. §§ 02H.0503(d), 0504 (notice of public hearing must be given thirty days prior to date of hearing, and record of public hearing must be held open for thirty days after the date of hearing); Vt. A.C. § 16-3-301:13.3(g), (h) (public hearing may be requested during public comment period, and notice of public hearing must be given thirty days before date of hearing).

⁸¹ See, e.g., 310 C.M.R. § 4.10(8)(g) 3.b.; 205 R.I.C.R. § 150-05-1.17(D)(4); Or. Admin. R. 340-048-0042(5).

⁸² See Attachments A and B.

own longstanding practice of requiring a complete application prior to the commencement of a state's certification review period.⁸³

Specifically, EPA proposes to define a “certification request” to include:

A written, signed and dated communication from a project proponent to the appropriate certifying authority that: (1) Identifies the project proponent(s) and a point of contact; (2) Identifies the proposed project; (3) Identifies the applicable federal license or permit; (4) Identifies the location and type of any discharge that may result from the proposed project and the location of receiving waters; (5) Includes a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat or control the discharge; (6) Includes a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received; and (7) Contains the following statement: “The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.”

84 Fed Reg. 44189-44120. But, EPA's interpretation of the trigger for section 401 certification review as requiring a written “certification request” accompanied by this limited set of information does not comport with section 401 or the Clean Water Act. Many states have specific—and much more robust—requirements for what must be included in an application for a state permit or certification before it can be considered administratively complete. *See, e.g.*, 6 N.Y.C.R.R. §§ 621.3, 621.4. An administratively complete application, in turn, is required in many states before public notice and comment on an application can begin. *See, e.g.*, N.Y. Environmental Conservation Law § 70-0109(2)(a); 6 N.Y.C.R.R. § 621.7(a)(2), (g). The minimal information required by the proposed rule for a certification request to trigger the review period is insufficient to allow states to fully evaluate the impacts of the proposed activity and associated discharges and take appropriate action to address these impacts.

Moreover, the benefits of requiring a complete application before the timeframe for section 401 review commences are numerous. For a “certification request” to be meaningful, the states need sufficient information to determine whether the project will comply with water quality standards and requirements. Requiring a complete application is necessary to provide public notice and obtain meaningful public comment.⁸⁴ After public notice and comment, state agencies review any public comments and determine whether a public hearing is required or appropriate, respond to the comments, and decide whether the application should be granted, granted with conditions, or denied. A state agency required to act within one year of receiving an incomplete application may not be able to conclude that a project would comply with state standards and could be

⁸³ *See* 2010 Guidance, at 15-16.

⁸⁴ *See, e.g., Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D. W. Va. 2010) (noting that “[c]ompletion and public notice are inextricably linked” and rejecting public notice and comment process undertaken on incomplete application).

forced to act on an application before this public notice and comment process has concluded (or even commenced). Accordingly, only a complete application can trigger the one-year waiver period and ensure that states can fully exercise their authority under section 401.

Under the proposed rule, applicants could frustrate a state's section 401 review by submitting an incomplete or deficient application and waiting until a few days before the expiration of the one-year period to "complete" an application with information required by the state. This approach deprives states of meaningful consideration and review within the one-year period. Requiring a complete application avoids this potential for gamesmanship.

Second, the proposed rule limits states' authority to seek additional information relevant to their certification decisions, contrary to section 401. Section 401(a)(1) requires that a state "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1). A state must not only establish such procedures; it must comply with them. *See City of Tacoma, Wa.*, 460 F.3d at 67-68. The Clean Water Act allows state agencies to follow state law when complying with section 401's public notice and hearing requirement, *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl Prot.*, 903 F.3d. 65, 75 (3d. Cir. 2018), *cert. denied* 139 S. Ct. 1648 (2019) (Clean Water Act section 401 provides states with discretion as to how they establish public notice and/or hearing procedures), and more broadly when determining whether to issue, condition, or deny a section 401 certification. *See Berkshire Env'tl. Action Team, Inc.*, 851 F.3d at 112-13, n.1 (Clean Water Act section 401 does not affect how agency conducts "internal decision-making before action"); *City of Tacoma*, 460 F.3d at 67-68) ("the decision whether to issue a section 401 certification generally turns on questions of state law"). Recognizing that meaningful state agency and public review cannot be rushed, Congress gave states a reasonable period—up to "one year"—to exercise this broad authority pursuant to state administrative procedures (including public notice and, if appropriate, hearings) when making a section 401 certification determination. 33 U.S.C. § 1341(a)(1). EPA's regulations must preserve the flexibility the Clean Water Act affords to states to design and comply with their own administrative processes when reviewing section 401 certification applications

Third, because the proposed rule restricts states' authority to extend the timeframe for agency review, it threatens to prevent states from complying with their obligation to ensure that applications are administratively complete and comply with public notice and comment requirements. Arbitrary federal oversight of the timing of state administrative actions subverts states' ability to ensure that administrative procedures are followed.

Fourth, proposed sections 121.5 and 121.6 of the proposed rule would also establish a list of elements that all state denials or conditional approvals must include, 84 Fed. Reg. at 44,120, notwithstanding any contrary state law requirements for the contents of administrative decisions. For example, conditional approvals would be required to state "whether and to what extent a less stringent condition would satisfy applicable water quality requirements." *Id.* Likewise, denials would be required to identify the "water quality data or information, if any, that would be needed to assure that the discharge from the proposed project complies with water quality requirements." 84 Fed. Reg. at 44,120. Fundamentally, it is the applicant's burden to show that a proposed project will comply with water quality requirements, not the state's burden to show how such

compliance might be achieved. *See* 33 U.S.C. § 1341(a)(1). Moreover, the purpose of section 401 is to protect state water quality, not to provide applicants with the “le[ast] stringent” method of satisfying water quality requirements. Many states have robust anti-degradation policies enacted pursuant to the Clean Water Act that *require* stringent protection of water quality standards, not just the bare minimum that a project applicant or the federal government might want to see. *See generally* 33 U.S.C. § 1313.

EPA’s proposed rule, if promulgated, would also force at least some states to enact legislation to amend their administrative procedures. For example, in New York the general administrative procedures to be followed by the New York State Department of Environmental Conservation (NYSDEC) when reviewing a section 401 application are set forth by statute. *See* N.Y. ECL § 70-0107(3)(d). That statute provides that a “complete application” is required before NYSDEC commences its review, and that the complete application must include an environmental review of the project. *See* N.Y. ECL § 70-0105(2). Under the proposed rule, NYSDEC would not be permitted to wait until it receives a complete application or an environmental review before its time period to act on a section 401 certification commences. Unless the Legislature amends the statute, NYSDEC would be forced to choose between violating state law by acting on a permit application that does not include an environmental review (and subjecting itself to lawsuit in state court), or denying the application and risking the relevant federal agency finding waiver.

EPA should abandon its proposal to define “certification request” narrowly and require that the time period for state review of certification applications begins once a state confirms that the application is complete. A complete “certification request” is one that includes all of the information a state agency requires to support the application and related determination. EPA should not attempt to dictate the contents of state administrative decisions on section 401 applications.

IV. IF ADOPTED, EPA’S PROPOSED RULE WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT

Agency rulemaking that is arbitrary and capricious, an abuse of discretion, without statutory authority, not in accordance with law, or not supported by substantial evidence is unlawful and must be vacated and set aside. *See* 5 U.S.C. § 706(2). EPA’s proposed rule fails to satisfy these standards.

As noted above, the proposed rule is unlawful. EPA’s attempts to limit the scope of state authority under section 401 goes against the plain language and legislative history of the statute and—by EPA’s own admission—is contrary to Supreme Court precedent. Further, EPA is well outside the bounds if its authority in its attempt to create federal oversight and veto authority over state section 401 certifications. In addition to these deficiencies, the proposed rule will also violate the APA by failing to: (1) consider and analyze relevant issues, including the Clean Water Act’s overarching objective to restore and maintain water quality; and (2) provide a reasoned explanation or rational basis for EPA’s decision to repeal the existing section 401 regulations without consideration of the states’ significant reliance on the existing regulations.

A. The Proposed Rule Is Not in Accordance with Law.

The proposed rule seeks to overhaul the long-established section 401 regulations and to limit state authority, which is in direct conflict with the text and intent of the CWA and applicable case law. As discussed in Points III and IV above, the proposed rule, if adopted, will: (1) restrict the information and the type of impacts that states can consider in evaluating section 401 applications; (2) curtail the states' ability to impose conditions on projects that ensure compliance with state law; (3) expand federal agencies' ability to find waiver of section 401 certification, depriving the states the ability to conduct section 401 review; and (4) institute federal review of state conditions on certifications and denials of certification requests. These restrictions, directly contradict both the CWA and established judicial precedent interpreting section 401. For that reason, the proposed rule is not in accordance with law and, if promulgated, will violate the APA. 5 U.S.C. § 706(2)(A).

The proposed rule also violates the Clean Water Act by limiting state enforcement of section 401 conditions. In addition to preserving the rights of individual states to *create* water quality standards, the Clean Water Act also provides states with the means to *enforce* those standards to achieve the objectives of that Act. *Cf.* 33 U.S.C. § 1251(a) (“The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”). Contrary to EPA’s suggestion, Congress did not intend in the Act for states to go through an empty exercise of imposing conditions in a water quality certification without authority to enforce those conditions. In effect, EPA is arguing that state certification serves as nothing more than statements of idle aspiration. That view is contrary to the structure of the Act, which preserves a central role for states—giving them the responsibility and right to protect and *maintain* water quality under federal law. *See S.D. Warren*, 547 U.S. at 386 (“Congress provided the States with power to enforce ‘any other appropriate requirement of State law,’ by imposing conditions on federal licenses for activities that may result in a discharge”) (citing 33 U.S.C. § 1341(d)); *PUD No. 1*, 511 U.S. at 707 (explaining that states “are responsible for enforcing water quality standards on intrastate waters”; describing those responsibilities as “primary enforcement responsibilities”). For such obligations to be meaningful, they must be enforceable by the state that imposed them, rather than exclusively by the relevant federal licensing agency that incorporates those conditions into the license obtained for the activity at issue. *See United States v. S. California Edison Co.*, 300 F. Supp. 2d 964, 980–81 (E.D. Cal. 2004) (“FERC must accept and include such conditions in its licenses even where it disagrees with them. . . . This mandatory requirement cannot logically be reconciled with a finding that only FERC can enforce such conditions, administratively and non-judicially.”).

Moreover, this interpretation does not align with the express terms in the citizen suit provision set forth in section 505 of the Act, which also provides states the means of enforcing certification conditions in civil actions taken in federal courts. 33 U.S.C. § 1365(a); *see also Deschutes River Alliance v. Portland Gen. Elec. Co.*, 249 F. Supp. 3d 1182, 1194 (D. Or. 2017) (holding any person may bring a suit for compliance with section 401 conditions as consistent with CWA text and legislative history). *Cf.* 33 USC § 1251(e). In short, EPA’s proposed rule limiting

enforcement to the applicable federal permitting agency fails in every respect and should be withdrawn.

B. EPA Lacks Statutory Authority to Promulgate the Proposed Rule.

An agency rule adopted in excess of or without statutory authority is unlawful and must be vacated and set aside. 5 U.S.C. § 706(2)(C). “It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In issuing the proposed rule, EPA relies on sections 401 and 501 of the Clean Water Act. 84 Fed. Reg. at 44,081. But section 401 does not give EPA any rulemaking authority, and under section 501(a) of the Clean Water Act, EPA is limited to prescribing “such regulations as are necessary to carry out [the Administrator’s] functions under [the] Act.” 33 U.S.C § 1361. Indeed, federal courts have long held that under the plain language of the Clean Water Act, EPA has no authority over state decisions on section 401 certifications. *See e.g., Am. Rivers Inc. v. FERC*, 129 F.3d 99, 111-12 (2d Cir. 1997) (FERC has no authority to reject state conditions on Section 401 certifications); *U.S. Dept. of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) (“FERC may not alter or reject conditions imposed by the states through section 401 certificates.”); *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 647 (4th Cir. 2018) (Congress “carefully prescribed the allocation of authority between federal and state agencies in the Clean Water Act” leaving the Army Corps with no statutory authority to change or reject conditions imposed by a state on a Section 401 certification).

The Proposed Rule goes well beyond the Congressional authorization to EPA to adopt regulations necessary to carry out the agency’s duties and responsibilities under the Clean Water Act and instead intrudes on the “responsibilities and rights” left by Congress to the states. 33 U.S.C. §§ 1251(b), 1341, 1361. As discussed in detail above, the Proposed Rule seeks to interpose federal oversight over every aspect of state review of Section 401 certification applications, from proscribing a postcard-length list of items to be included in a Section 401 request and severely curtailing state authority to obtain additional information, to ignoring state denials and conditions that do not comport with EPA’s narrowly defined “scope” of Section 401 review or include EPA-mandated information.

EPA’s attempt to regulate and usurp state administrative decisionmaking directly contradicts the Clean Water Act and section 401, which specifically contemplates that the *states* will establish administrative procedures governing their review of section 401 applications. *See* 33 U.S.C. 1341(a)(1) (requiring the appropriate “State or interstate agency” to “establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.”). Accordingly, EPA is not authorized to promulgate the proposed rule under sections 401 or 501 of the Act. *See Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (citation omitted) (“EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area.”). Accordingly, the Proposed Rule is *ultra vires* and must be withdrawn. *Iowa League of Cities v.*

EPA, 711 F.3d 844, 877-78 (8th Cir. 2013) (EPA legislative rules promulgated without valid statutory authority are *ultra vires* and violate the APA).

C. The Proposed Rule Is Arbitrary and Capricious and an Abuse of Discretion.

A regulation is arbitrary and capricious “if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983) (“*State Farm*”). That standard is met here.

- i. EPA failed to consider the relevant factors related to implementing section 401 and did not provide a rational basis for the proposed rule.

To pass muster under the APA’s arbitrary and capricious standard, agency rulemaking must be “based on a consideration of the relevant factors.” *State Farm*, 463 U.S. at 43. An agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Id.* Particularly relevant here, when EPA adopts Clean Water Act regulations, it cannot “ignore the directive given to it by Congress ... which is to protect water quality.” *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009).

EPA’s proposed rule falls well short of this requirement because it lacks analysis of water quality impacts and fails to consider whether the proposed rule, if adopted, will ensure the CWA’s overarching goal to protect water quality is met. *See id.* at 939-940 (a rule interpreting the Act to exclude prohibitions against discharges of certain pesticides was invalid because, among other reasons, EPA ignored the rule’s water quality impacts). The water quality impacts of the proposed rule could be severe if state agencies lose their broad authority to protect the quality of state waters. For example, by limiting states’ power to review and impose conditions under section 401 only to point-source discharges into navigable waters, EPA is stripping states of their authority to address impacts from non-point sources associated with an activity reviewable under section 401. Similarly, the proposed rule would preclude states from mitigating impacts to non-navigable state waters. When combined with EPA’s recent proposal to significantly narrow the definition of “navigable waters,” the effect of the proposed rule could be to leave a huge number of streams impacted by federal projects beyond state authority under section 401.⁸⁵ This could create massive regulatory gaps by removing water quality impacts from federal or state oversight, especially in cases where federal law pre-empts state water quality regulations. EPA’s failure to consider these potential impacts at all renders its action arbitrary and capricious.

EPA also wholly failed to evaluate the impact of the proposed rule on existing state regulations related to section 401 implementation. This is especially problematic in light of section 401’s clear directive that states must adopt regulations governing public notice and may promulgate

⁸⁵ See EPA and Army Corps, *Definition of “Waters of the United States”—Recodification of Pre-Existing Rules* (signed Sept. 12, 2019).

rules on public hearings related to certification applications. 33 U.S.C. § 1341(a)(1). Indeed, as the states informed EPA in its comments during the agency’s pre-proposal consultations, any revisions to the certification regulations will impact state regulations developed under section 401.⁸⁶ Rather than consider and analyze the impact of the proposed rule on existing state regulations adopted pursuant to section 401, EPA simply “recommends that states and authorized tribes update, as necessary, their own CWA section 401 regulations.” 84 Fed. Reg. at 44,080, 44,083. By its refusal to evaluate the proposed rule’s impact on state section 401 regulations, EPA “failed to consider an important part of the problem” and acted arbitrarily and capriciously. *See State Farm*, 463 U.S. at 43.

EPA repeatedly asserts that the key reason for the proposed rule is to increase predictability and timeliness in the section 401 certification process. 84 Fed. Reg. at 44,080, 44,081. But the agency does not provide any analysis demonstrating that existing section 401 regulations do not and cannot ensure predictability and timeliness in section 401 review. Nor does the agency explain how the proposed rule will, in fact, provide increased predictability in comparison. The agency’s reference to several section 401 denials that resulted in litigation over the last several years as evidence of the need to increase regulatory certainty and predictability justifying the proposed rule falls short of a reasoned explanation. *See id.* at 44,081. Given the sweeping changes the proposed rule seeks to implement, and the numerous gaps left in it by the agency, it is just as likely that the proposed rule will cause more confusion, unpredictability and delay in section 401 review than the well-established existing section 401 regulations. Indeed, the EPA acknowledges that the proposed rule, if adopted, is likely to engender protracted litigation impacting states, tribes, federal agencies. *Id.* at 44,083-84. The deliberate trading of one set of lawsuits for another provides no basis for promulgation of an agency rule. *See Organized Village of Kake v. United States Department of Agriculture*, 795 F.3d 956, 970 (9th Cir. 2005). For these reasons, EPA has failed to provide rational basis and reasonable explanation for the proposed rule.

ii. EPA failed to provide a reasoned explanation for the change in its position on a section 401 implementation.

Additional requirements apply to agency rulemaking when an agency changes its position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (“*Fox Television*”). While an agency is free to change its regulations, it “must at least ‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’” *Encino Motorcars, LLC v. Navarro*, ___ U.S. ___, 136 S.Ct. 2117, 2125-2126 (2016) (citing *Fox Television*). Moreover, “[i]n explaining its changed position, an agency must also be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” *Id.* “In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox Television Stations, Inc.*, 556 U.S. at 515-516.

While the proposed rule asserts on several occasions that it is EPA’s first effort to adopt comprehensive regulations implementing section 401, EPA acknowledges that the rules, if

⁸⁶ *See* Attachments A and B.

adopted, will replace EPA's long-standing certification regulations. 84 Fed. Reg. 44,081; *see* 40 C.F.R. Part 121. Those regulations were promulgated pursuant to section 21(b) of the Federal Water Pollution Control Act, which was "substantially" carried forward with only "minor changes" in section 401.⁸⁷ EPA fails to explain why the "minor" differences between section 21(b) and section 401 justify EPA's complete about-face on a host of relevant issues, including the permissible scope of section 401 certifications, the timeframe for state review, the need for a complete application before review commences, and the authority of federal agencies to review state section 401 decisions. Nothing in the modest changes Congress made between section 21(b) in 1970 and section 401 in 1972 supports EPA's sudden and drastic change in position. *See Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Additionally, EPA fails to provide any analysis regarding the states' significant reliance on the agency's existing regulations or evaluate the impact of the proposed regulatory change on state interests. EPA's existing certification regulations and guidance have provided a stable section 401 framework for decades. In reliance on that framework, and as set forth in the states' previous comments to EPA regarding the agency's plans to overhaul its section 401 regulatory program,⁸⁸ the states have based their own implementation of section 401 on the existing certification regulations and guidance and will be significantly impacted by EPA's abrupt policy reversals.⁸⁹ EPA's refusal to acknowledge and analyze the states' reliance interests affected by the proposed rule demonstrates that the agency has failed to provide a reasoned explanation for its changed position. An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X*, 545 U.S. at 981.

Nor does EPA provide a reasoned explanation for the need for wholesale regulatory changes to its section 401 regulations. The proposed rule is the result of an Executive Order intended to promote the development of energy infrastructure. *See* 84 Fed. Reg. at 44,081-82, citing 84 Fed. Reg. 15,495. That Executive Order points to unspecified "confusion and uncertainty" in the existing section 401 process that is "hindering the development of energy infrastructure." 84 Fed. Reg. at 15,496. Notably, the Executive Order says nothing about the prevention of water pollution. Although the current Administration may favor a policy of promoting energy infrastructure, that policy goal is not sufficient to authorize EPA to contradict or undermine the plain language and congressional intent of the Clean Water Act—particularly section 401—to preserve state authority over state water quality issues. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (President cannot use Executive Order to promote policy

⁸⁷ Legislative History Vol. 2, at 1394, 1487.

⁸⁸ *See* Attachments A & B.

⁸⁹ This issue is particularly acute in that subset of states lacking primacy over Section 402 National Pollutant Discharge Elimination System (NPDES) permitting because such states (and tribes) rely wholly on section 401 to address the water quality impacts from federally-permitted facilities. Creating those authorized programs now will require years for such states to authorize, fund, and staff.

goals in absence of statutory or constitutional authority); *id.* at 637-38 (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb”); *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013) (“[T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections.”).

iii. The proposed rule does not consider and analyze alternatives.

An agency must also consider alternatives to its proposed action, particularly when it proposes to reverse its policy. *State Farm*, 463 U.S. at 46-48 (rescission of automobile passive restraint requirements found arbitrary and capricious for agency failure to consider alternatives); *Ctr. For Science in the Pub. Interest v. Dep’t of Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986) (agency analysis reversing position “should include an explanation for the reversal which is supported by the record and a discussion of what alternatives were considered and why they were rejected”).

The proposed rule is a significant departure from the prior EPA position on section 401 implementation as set forth in the existing certification regulations and the previous section 401 Guidance. As discussed in detail in Points II and III above, the proposed rule seeks to dramatically curtail state authority to review projects subject to federal permits under section 401 and, if adopted, will limit states’ ability to ensure protection of state water resources. Yet, EPA has entirely failed to mention, let alone consider, a single alternative to its proposed rule. This failure demonstrates that the agency is acting in a manner that is arbitrary and capricious and in violation of the APA.

V. CONCLUSION

For the foregoing reasons, EPA should abandon and withdraw this rulemaking.

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ATTACHMENT B:

Letter from Attorneys General of California, Connecticut, Maryland, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Pennsylvania Department of Environmental Protection to EPA Administrator Andrew Wheeler Regarding Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (July 25, 2019)

**Attorneys General of California, Connecticut, Maryland, Maine, Massachusetts,
Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island,
Vermont, Washington, and Pennsylvania Department of Environmental Protection**

July 25, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, N.W.
Washington, D.C. 20460

**RE: Clean Water Act Section 401 Guidance for Federal Agencies, States and
Authorized Tribes**

Dear Administrator Wheeler,

The undersigned state attorneys general and environmental agency submit this letter to object to the “Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes” (“Guidance”) issued by the United States Environmental Protection Agency (“EPA”) on June 7, 2019.¹ EPA’s stated purpose for issuing the Guidance is to “facilitate implementation of Executive Order 13868 . . . by providing clarification on [the Clean Water Act] Section 401 requirements and procedures and the EPA’s existing regulations at 40 C.F.R. Part 121.”² EPA is responsible for implementing the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, through guidance and regulations that are consistent with the Act’s goals and framework.³ Disregarding this mandate, EPA issued the Guidance, which directly contravenes the language of the Clean Water Act and undermines Congressional intent. The Guidance improperly attempts to restrict the timing for state review of water quality certification applications under Section 401, to limit the information states can require to evaluate such applications, and to impose federal oversight of state decisions on certification applications. Although EPA initiated a stakeholder consultation process for anticipated revisions to Section 401 guidance and regulations, the Guidance was issued only two weeks after the close of the consultation process, which is not sufficient time to meaningfully consider stakeholder input. In fact, EPA did not address or incorporate the comments submitted by the undersigned.

The Guidance undermines the cooperative federalism framework of the Clean Water Act and directly contradicts both the language and intent of the statute as well as applicable case law;

¹ The Guidance is available at https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf.

² Guidance at 1-2.

³ See *Friends of the Earth, Inc. v. U.S. Env'tl. Protection Agency*, 446 F.3d 140, 144 (D.C. Cir. 2006); *Nat. Resources Def. Council, Inc. v. U.S. Env'tl. Protection Agency*, 822 F.2d 104, 122-123 (D.C. Cir. 1987).

and is without legal effect. To avoid confusion and unnecessary litigation, we respectfully request that EPA withdraw the Guidance and formally reinstate EPA's prior Section 401 guidance that was rescinded on June 7, 2019. In the alternative, we request that EPA revise the Guidance to rectify the deficiencies described below. In the meantime, the undersigned will endeavor to adhere to existing, binding statutory, regulatory and case law regarding Section 401, rather than the Guidance.

I. THE GUIDANCE ATTEMPTS TO UNLAWFULLY UNDERMINE THE STATES' BROAD AND INDEPENDENT AUTHORITY UNDER SECTION 401 TO EVALUATE FEDERAL PROJECT IMPACTS AND PROTECT STATE WATERS.

The Clean Water Act reflects Congress' policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" of waters within their borders.⁴ Consistent with this policy and the Clean Water Act's primary objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"⁵ Section 401 mandates that:

[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply [with applicable water quality requirements].⁶

A state's Section 401 certification "shall set forth any effluent limitations and other limitations . . . necessary to assure that any applicant for a Federal license or permit will comply" with the Clean Water Act, "and with any other appropriate requirement of State law."⁷ The certification "shall become a condition on any Federal license or permit" for which it is issued.⁸ "No license or permit shall be granted if the certification has been denied by the State . . ."⁹ Section 401(a)(1) also requires states to "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications."¹⁰ A state must not only establish such procedures for review of Section 401 applications; it must comply with them.¹¹

⁴ 33 U.S.C. § 1251(b); *see also id.* § 1370 (preserving states' right to adopt or enforce water quality protections more stringent than federal standards); *Pub. Util. District No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) ("[T]he Clean Water Act establishes distinct roles for the Federal and State Governments.")

⁵ 33 U.S.C. § 1251(a).

⁶ 33 U.S.C. § 1341(a)(1).

⁷ 33 U.S.C. § 1341(d).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See City of Tacoma, Wash. v. Fed. Energy Reg. Comm'n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006).

As the Supreme Court has recognized, “State certifications under § 401 are essential . . . to preserve state authority to address the broad range of pollution” impacting state water resources.¹² Yet, the Guidance improperly attempts to diminish this broad independent state authority. This is especially problematic for federally licensed hydroelectric and interstate natural gas projects, which are regulated by the Federal Energy Regulatory Commission (“FERC”) under licenses with decades-long terms that are largely exempt from state law regulation.¹³ As a result, Section 401 review is generally the only mechanism available to states to ensure that these projects, which can have significant impacts on water quality during construction and operation pursuant to their FERC licenses, are subjected to rigorous review and, where necessary, conditions to protect state water quality.

In addition, the water quality of a single waterbody or watershed may be impacted by multiple water development projects diverting surface waters for beneficial uses, including irrigation, municipal use, and hydropower. In some instances, one watershed may have projects subject only to state regulation as well as projects requiring federal approval, such as FERC licenses.¹⁴ Therefore, the states’ Section 401 review can help to ensure coordinated management of water quality impacts of FERC projects and other projects affecting the same water body or watershed.

EPA’s authority to implement the Clean Water Act must be exercised in a manner that “directly promotes the goals of the Act” and “is fully consistent with [its] framework.”¹⁵ By issuing the Guidance, EPA has failed to comply with this mandate. The Guidance conflicts with the Clean Water Act and undermines the Act’s principles of cooperative federalism by attempting to limit state review of applications for Section 401 certifications and to give federal agencies oversight of states’ certifications. In particular, the Guidance improperly instructs federal and state agencies to: (1) limit the statutorily-established period for states to act on Section 401 applications; (2) restrict the scope of information that states may require to fully evaluate applications; (3) make Section 401 certification decisions without incorporating review of project impacts under the National Environmental Policy Act (“NEPA”) into the Section 401 certification process; and (4) disregard states’ decisions on applications for Section 401 certifications under certain circumstances. As discussed below, these aspects of the Guidance

¹² *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006); *see also Keating v. Fed. Energy Reg. Comm’n*, 927 F.2d 616, 622 (D.C. Cir. 1991) (Section 401 is “[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them” under the Clean Water Act).

¹³ *California v. Fed. Energy Reg. Comm’n*, 495 U.S. 490, 506-507 (1990).

¹⁴ One such example is the Sacramento-San Joaquin Delta Estuary in California, where flows are affected by hundreds of projects in the upstream watersheds, including some very large dams with FERC licenses as well as dams and other projects without FERC licenses. The waters of the Estuary are impacted by changes in flow and temperature, salinity intrusion and harmful algal blooms that are the cumulative effect of so many diversions within the same watershed. Section 401 helps ensure coordinated management of this water body.

¹⁵ *See Nat. Resources Def. Council, Inc. v. U.S. Envtl. Protection Agency*, *supra* note 3, 822 F.2d at 122-123.

have no legal basis and are directly contrary to the cooperative federalism embodied in the Clean Water Act. EPA should therefore withdraw or revise the Guidance.

A. By Reversing EPA's Prior Position That State Review and Decisions under Section 401 Should Be Based on Complete Applications, the Guidance Undermines the Clean Water Act

In an attempt to limit state review of federal projects that require Section 401 certifications, EPA reversed its prior guidance regarding the timing for states' review of applications. Congress gave states "a reasonable period of time (which shall not exceed one year)" to exercise their broad authority to make a Section 401 certification determination.¹⁶ The time period for a state to issue or deny a Section 401 certification begins upon "receipt of such request [for certification]."¹⁷ In 2010, EPA issued guidance on Section 401 certifications ("2010 Guidance"), which recognized that the timeline for a state's review is triggered "once a request for certification has been made to the certifying agency, accompanied by a complete application."¹⁸ The 2010 Guidance appropriately established an objective approach to judging the completeness of Section 401 applications consistent with the language and intent of the Clean Water Act. In particular, the 2010 Guidance recognized "[t]he advantage of a clear description of components of a complete § 401 certification application is that . . . applicant and agencies alike understand when the review timeframe has begun."¹⁹ The requirement that an applicant must submit an application consistent with state law requirements in order to commence the Section 401 review process is also adopted by the United State Army Corps of Engineers ("U.S. Army Corps").²⁰ Requiring that a request for certification meet the prerequisites a state has set for a complete application "comports with the Clean Water Act's deference to the states in the water quality certification process."²¹

EPA's new Guidance unlawfully abandons the 2010 Guidance's "complete application" position. In the Guidance, EPA concludes that the use of the term "complete application" was "inappropriate" because that exact language is not itself in the text of the Clean Water Act.²² This reversal in position contorts the Act's clear intent to provide states with a reasonable period of time (up to one year) in which to evaluate a federal project's impacts and protect state water

¹⁶ 33 U.S.C. § 1341(a)(1).

¹⁷ *Id.*

¹⁸ U.S. Environmental Protection Agency, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (2010), at 15-16. A copy of the 2010 Guidance is attached as Exhibit 1 to this letter. EPA rescinded the 2010 Guidance on June 7, 2019. (EPA letter dated June 7, 2019), https://www.epa.gov/sites/production/files/2019-06/documents/letter_on_updated_cwa_401_guidance.pdf.)

¹⁹ *Id.* at 16.

²⁰ See 33 C.F.R. § 325.2(b)(1)(ii) (the one-year review period commences when "the certifying agency has received a valid request for certification"); *Final Rule for Regulatory Programs of the Army Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986) ("valid requests for certification must be made in accordance with State laws").

²¹ *City of Fredericksburg, Va. v. Fed. Energy Reg. Comm'n*, 876 F.2d 1109, 1112 (4th Cir. 1989).

²² Guidance at 3.

quality. EPA's changed position leads to the illogical outcome that states are now expected to make decisions under Section 401 based on deficient information.

There are many reasons why states need a complete application for Section 401 certification before the timeframe for review commences. A complete application is necessary to provide public notice and obtain meaningful public comment.²³ A complete application is also necessary to obtain all of the input a state needs for its decision, because without complete information states may be unable to determine whether water quality standards will be met. Otherwise, an applicant could frustrate a state's mandate to make Section 401 determinations by submitting an incomplete or deficient application and waiting until a few days before the expiration of the one-year period to submit a complete application, thereby depriving the state of the ability to meaningfully review the complete application and make a determination within the one-year period allowed by Section 401. Requiring a complete application avoids this potential for gamesmanship. Further, in the absence of a requirement that the applicant submit a complete application for Section 401 certification, states will be forced to deny incomplete applications in order to avoid waiver of Section 401 authority and ensure state water resources are protected. Therefore, EPA should revise the Guidance to omit the provision stating that any written request for certification triggers the Section 401 review period.

In addition, while the Guidance does not propose a specific timeframe for states to act on a certification application, it would reduce the amount of time states have to make their determinations. As noted above, establishing shorter timelines for review contradicts the Clean Water Act's intent²⁴ and also is unworkable given the wide variety of projects that may need a Section 401 certification. This is particularly true given the required public notice and potential public hearing components under state law, which can take a substantial amount of time depending on the proposed project's complexity.²⁵ States review thousands of Water Quality Certification applications each year. Once the public comment and any public hearing is complete, state agencies must review and, in many cases, respond to the public comments received before making a certification determination.²⁶ Some states also have procedures providing for administrative review of an agency determination on a Section 401 certification application, including a hearing, before that determination is deemed final.²⁷ Any review/waiver timelines proposed by EPA in future regulations must provide a reasonable interpretation of what constitutes a flexible timeframe, up to the one-year period authorized by the Clean Water Act, to allow states sufficient

²³ See, e.g., *Ohio Valley Env'tl. Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D. W. Va. 2009) (noting, "[c]ompletion and public notice are inextricably linked" and rejecting public notice and comment process undertaken on incomplete application).

²⁴ 33 U.S.C. § 1341(a)(1). Cf. *New York State Dep't of Env'tl. Conservation v. Fed. Energy Reg. Comm'n*, 884 F.3d 450, 456 (2d. Cir. 2018).

²⁵ See note 8, *supra*.

²⁶ See, e.g., 310 Code of Massachusetts Regulations (C.M.R.) § 4.10(8)(g) 3.b.; 205 Rhode Island Code of Regulations (R.I.C.R.) §150-05-1.17(D)(4).

²⁷ See, e.g., Col. Rev. Statutes (C.R.S.) § 25-8-302(1)(f); 5 Colo. Code of Regulations (C.C.R.) § 1002-21.4(A)(2)(d); 314 C.M.R. § 9.10(1); 23 C.C.R. §§ 3867-3869; see also *Berkshire Env'tl. Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 111-12 (1st Cir. 2017) (holding that a certification undergoing administrative appeal under Massachusetts law is not a final agency action).

time to review and act on applications.²⁸ Affording states the full one year period under the Clean Water Act, or at a minimum providing flexibility to easily extend the timeframe for review up to the one-year period, will ensure that, consistent with the goal and intent of Section 401, states have a meaningful opportunity to fully evaluate the potential impacts of federal projects and ensure state water quality is protected.

B. The Guidance Attempts to Unlawfully Limit the Scope of Information that States May Require to Fully Evaluate Section 401 Applications.

The Guidance states, “[t]o evaluate a certification request, a state or tribe should only need the application materials submitted for the federal permit or license.”²⁹ This statement contradicts Section 401, which authorizes states to determine, based on an application for a Section 401 certification, whether the project will impact state water quality and will comply with appropriate state law requirements.³⁰ In fact, the Guidance recognizes that “there is no statutory provision that prohibits a state or tribe from requesting specific information, or additional information, to help inform its decision on whether to issue, issue with conditions or deny certification . . .”³¹ As the Supreme Court has explained, the scope of states’ certification authority under Section 401 is not limited to ensuring compliance with the Clean Water Act, but also includes authority to impose conditions consistent with any applicable state law requirements.³² To accomplish this, it is necessary for states to require that applicants provide sufficient information to enable them to determine whether appropriate state law requirements are, or can be, met. Without such information, states would be unable to conduct proper review under Section 401. Accordingly, EPA’s instruction to the contrary undermines cooperative federalism and conflicts with the Clean Water Act.

C. The Guidance Incorrectly Suggests that State Section 401 Certification Review Need Not Be Coordinated with the NEPA Process.

In addition, the Guidance incorrectly recommends that states should issue certifications without first reviewing environmental documentation prepared for the project under NEPA.³³ EPA’s stated rationale for this recommendation is that the environmental documentation will include information on all environmental impacts, not just water quality impacts. This rationale makes no sense. Although NEPA review is not limited to water quality impacts, it nonetheless must include thorough consideration of water quality impacts and alternatives and mitigation measures to avoid those impacts.³⁴ This information is critical to informing a state’s decision on Section 401 applications and in establishing conditions of certification. Moreover, information on impacts on other natural resources may be relevant to setting conditions of certification. Where there are alternative ways of achieving water quality standards, a state may consider other environmental impacts in deciding between those alternatives.

²⁸ *Id.*

²⁹ Guidance at 4.

³⁰ 33 U.S.C. § 1341(d).

³¹ Guidance at 4.

³² *Pub. Util. District No. 1 of Jefferson Cty.*, *supra* note 4, 511 U.S. at 711-713.

³³ Guidance at 5.

³⁴ *See* 40 C.F.R. §§ 1502.14, 1502.16(h).

There are also circumstances where a state's assessment of a Section 401 application allows consideration of other factors in addition to water quality impacts. For example, in certain circumstances, EPA's antidegradation regulations authorize states to take into account overriding social and economic concerns when evaluating Section 401 applications.³⁵ Thus, states may consider a broader set of environmental impacts to determine whether social and economic concerns justify the reduction in water quality from a particular project. For this reason, states benefit from the full NEPA review before making a determination on a Section 401 application.

EPA's recommendation that a state act without the benefit of NEPA review is especially problematic where the state's procedural requirements include compliance with state environmental review laws, sometimes referred to as "state NEPAs," that require completion of environmental documentation before issuance of discretionary approvals.³⁶ To avoid unnecessary duplication, these state laws encourage preparation of joint state and federal environmental review documents.³⁷ This allows for collaboration between state and federal technical experts and a streamlining of the processes for applicants' compliance with state and federal environmental laws. If a state is required to issue Section 401 certification before NEPA environmental documentation is complete and made available, however, the state will have no choice but to initiate state environmental review before NEPA documents are available, an unnecessarily burdensome approach for both the state and the applicant. Therefore, EPA should omit from the Guidance the recommendation that states need not wait until completion of NEPA review to evaluate an application for Section 401 certification.

D. EPA's Attempt to Institute Federal Oversight of State Section 401 Decisions Undermines Cooperative Federalism and Conflicts with the Clean Water Act.

The Guidance unlawfully instructs federal agencies to evaluate whether "a state or tribe [has issued] a Section 401 certification with conditions beyond the scope of Section 401, i.e., conditions not related to water quality requirements, or has denied a water quality certification for reasons beyond the scope of Section 401" and "determine whether a permit or license should be issued with those conditions or if waiver has occurred."³⁸ This instruction clearly conflicts with the Clean Water Act and implementing regulations.

Federal agencies have no authority to review the scope or grounds for states' decisions on Section 401 certifications.³⁹ Indeed, Section 401 "was meant to 'continu[e] the authority of the

³⁵ See 40 C.F.R. §§ 131.6(d), 131.12(a)(2).

³⁶ See, e.g., Cal. Pub. Res. Code § 21000 *et seq.*; Wash. Rev. Code § 43.21C.150.

³⁷ See, e.g., Cal. Code Regs. tit. 14, §§ 15006 (j), 15220 *et seq.*

³⁸ Guidance at 4.

³⁹ See *Am. Rivers, Inc. v. Fed. Energy Regulatory Comm'n*, 129 F.3d 99, 107-08 (2d Cir. 1997) (rejecting argument that FERC "has the authority to review the legality of state-imposed § 401 conditions in the first instance"); *Roosevelt Campobello Int'l Park Comm'n v. U.S. Env'tl. Prot. Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982) ("federal courts and agencies are without authority to review the validity of the requirements imposed under state law or in a state's certification" under Section 401) (citations omitted).

State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.”⁴⁰ Section 401 entitles a state agency to “conduct its own review” of a project’s “likely effects on [state] waterbodies” and to determine “whether those effects would comply with the State’s water quality standards.”⁴¹ Congress “intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.”⁴² Federal agencies’ “role [in the Section 401 state review process] is limited to awaiting and then deferring to, the final decision of the state.”⁴³

As discussed above, Section 401 specifically allows states to impose conditions in certifications to ensure a project will comply with the Clean Water Act and “with any other appropriate requirement of State law.”⁴⁴ Any condition of the Section 401 certification “shall become a condition on any Federal license or permit.”⁴⁵ In fact, EPA General Counsel decisions previously “interpreted this provision broadly to preclude federal agency review of state certification.”⁴⁶ EPA’s Section 401 regulations provide that any “[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State.”⁴⁷ Moreover, the First Circuit noted that “courts have consistently agreed with this interpretation, ruling that the proper forum to review the appropriateness of a state’s certification is the state court.”⁴⁸ The Guidance acknowledges that “[s]ome courts in limited jurisdictions have concluded that the CWA does not authorize federal permitting agencies to reject conditions of a Section 401 certification . . .”⁴⁹ In fact, “[e]very Circuit to address the provision has concluded that ‘a federal licensing agency lacks authority to reject [state Section 401 certification] conditions in a federal permit.’”⁵⁰ In addition, federal agency

⁴⁰ *S.D. Warren*, *supra* note 12, 547 U.S. at 380 (quoting S. Rep. No. 92-414, p. 69 [1971]).

⁴¹ *Constitution Pipeline Co., LLC v. New York State Dep’t of Envtl. Conservation*, 868 F.3d 87, 101 (2d Cir. 2017).

⁴² *Keating*, *supra* note 12, 927 F.2d at 622; *see also Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), *cert. denied* 555 U.S. 1046 (2008).

⁴³ *City of Tacoma*, *supra* note 11, 460 F.3d at 67.

⁴⁴ 33 U.S.C. § 1341(d).

⁴⁵ *Id.*

⁴⁶ *See Roosevelt Campobello Int’l Park Comm’n*, *supra* note 39, 684 F.2d at 1056 (citing decisions of EPA General Counsel on the issue).

⁴⁷ 40 C.F.R. § 124.55(e).

⁴⁸ *Roosevelt Campobello Int’l Park Comm’n*, *supra* note 39, 684 F.2d at 1056.

⁴⁹ Guidance at 4.

⁵⁰ *Sierra Club v. U.S. Army Corps. of Engineers*, 909 F.3d 635, 645-46 (4th Cir. 2018), quoting *Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm’n*, 545 F.3d 1207, 1218 (9th Cir. 2008); *see also Am. Rivers, Inc.*, 129 F.3d at 107-08 (language of section 401(d) is “unequivocal” in divesting federal agencies of “authority to reject ‘unlawful’ state conditions”); *U.S. Dep’t of Interior v. Fed. Energy Reg. Comm’n*, 952 F.2d 538, 548 (D.C. Cir. 1992) (federal agency “may not alter or reject conditions imposed by the states through section 401 certificates”); *Keating*, *supra* note 12, 927 F.2d at 622 (federal agency properly refused to review the validity of a state’s decision to grant or deny a request for certification).

review of certifications undermines state self-governance by circumventing the institutional arrangements established under state law for judicial review of administrative action.⁵¹

As a model of cooperative federalism, the Clean Water Act explicitly grants *states* the right to make Section 401 decisions. Congress deliberately did not give the EPA or other federal agencies any authority to oversee or second-guess a state's decisions under Section 401. By instructing federal agencies to review the scope and grounds for state decisions on Section 401 certifications, the Guidance violates the Clean Water Act.

II. THE GUIDANCE IS NOT CONTROLLING.

The Guidance states “[i]n the event of a conflict between the discussion in this guidance and any statute or regulation, the guidance would not be controlling.”⁵² As set forth above, the Guidance conflicts with the Clean Water Act and for that reason, under its own terms, the Guidance is not controlling on EPA, other federal agencies, or the states. Thus, the Guidance can only serve to inject additional confusion and litigation into the existing Section 401 process. Indeed, application of the Guidance to the Section 401 certification process will leave the EPA and other agencies open to legal challenges based on the numerous inconsistencies and conflicts between the Guidance and the Clean Water Act.⁵³ In an attempt to avoid such legal challenges to the maximum extent possible, the undersigned will endeavor to adhere to existing, binding statutory, regulatory, and case law regarding Section 401, rather than the Guidance.

For the foregoing reasons, the undersigned state attorneys general and environmental agency respectfully ask that EPA withdraw the Guidance and reinstate EPA's 2010 Guidance. In the alternative, we request that EPA revise the Guidance to correct the objectionable provisions identified in this letter. Furthermore, we ask that EPA refrain from incorporating the improper positions in the Guidance in EPA's future revisions to Section 401 implementing regulations.

⁵¹ See generally *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (Congressional interference with a State's control over its institutions and governance “would upset the usual constitutional balance of federal and state powers.”)

⁵² Guidance at 2.

⁵³ Agency guidelines are entitled to limited deference by courts but only to the extent they have “power to persuade” based on the agency's “thoroughness evident in its consideration” of the issue, “the validity of its reasoning,” and “its consistency with earlier and later pronouncements” on the issue. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As discussed in this letter, the Guidance not only directly contradicts EPA's prior pronouncements related to Section 401 certifications but also is in direct conflict with the Clean Water Act, implementing regulations and applicable case law. The Guidance is therefore not entitled to deference.

Respectfully submitted,

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EXHIBIT 1

2010



Clean Water Act Section 401 **Water Quality Certification:** A Water Quality Protection Tool For States and Tribes



U.S. Environmental Protection Agency
Office of Wetlands, Oceans, and Watersheds

Background and Purpose

Based on two decades of case law and state and tribal program experience, the Environmental Protection Agency has substantially updated its handbook on Clean Water Act (CWA) §401 water quality certification and how states can use §401 certification to protect wetlands and other aquatic resources.

This new handbook, “Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes”, describes CWA §401 certification authorities, the way different state and tribal programs use certification, and how state and tribal certification programs leverage available resources to operate their certification programs.

While this new handbook is not a rule and does not create any legal requirements or set policy, it provides a wide-ranging description of §401 certification provisions and practices which may be helpful to states and tribes interested in using §401 as an effective water resource protection tool. This document does not substitute for CWA section 401 itself, or the relevant EPA (and other federal or state/tribal) implementing regulations. States, tribes, and federal licensing/permitting agencies may consider other approaches consistent with the CWA and those regulations. EPA retains the discretion to revise this handbook in the future.

Table of Contents

Background and Purpose	i
I. Introduction	1
II. Threshold Issues Regarding Clean Water Act §401 Certification	3
A. When CWA §401 Certification Applies	3
1. “Federal” Permit or License	3
2. Discharge	4
3. Waters of the U.S. and Waters of the State or Tribe.....	5
4. Point Sources	5
B. When Jurisdictions Have §401 Certification Authority	6
1. States and Authorized Tribes	6
2. States or Tribes Where a Discharge Originates.....	7
3. Other Affected States and Tribes	8
C. CWA Section 401 Certification Options	9
1. Grant	10
2. Grant with Conditions.....	10
3. Deny.....	10
4. Waive.....	11
III. The CWA 401 Certification Process	12
A. Timeframes and Opportunities for Review	12
1. When More Time is Needed.....	13
2. Certification Timeframe for Permits to Construct and Operate Facilities	13
B. Start of the 401 Certification Process	15
C. Scope of Analysis For §401 Certification Decisions	16
1. Basis for Certification Decisions – Generally	18
2. 401 Certification Consideration: Consistency With Water Quality Standards.....	19
3. 401 Certification Considerations: Effluent Guidelines, New Source Performance Standards and Toxics	20
4. 401 Certification Considerations: Consistency With Other Appropriate Requirements of State and Tribal Law.....	20
D. Conditioning Federal Licenses and Permits Through §401 Certification	21
1. Appropriate Conditions.....	22
2. Role of Monitoring and Mitigation	23
3. State and Tribal Laws and Certification Conditions.....	24
E. Certification Process	25
1. Regulations Describing §401 Certification	25
2. Certification Practices Viewed as Effective by States or Tribes.....	26
F. Issues Raised by General Permits, After-the-Fact Permits, and Provisional Permits.	29
G. Resolution of §401 Certification-Related Disputes	31
H. Enforcement of §401 Certifications	32
I. Suspension of §401 Certifications	33
IV. Leveraging Available Resources	35
A. Funding and Permit Fees	35
B. Staffing Sources	36

C. Data Sources	37
1. The Applicant.....	38
2. Other State, Tribal or Local Agencies	38
3. Federal Information Tools	38
4. Professional Societies and Private Sector Tools.....	41
Appendix A: Clean Water Act Section 401	43

Table of Figures

Figure 1. Certification Agency by Discharge Location.....	8
Figure 2. Downstream Agency Coordination.....	9
Figure 3. The Water Quality Certification Process.....	15
Figure 4. The Water Quality Standards Benchmark.....	18
Figure 5. Courts of Review for §401 Certifications	32

I. Introduction

Clean Water Act (CWA) §401 water quality certification provides states and authorized tribes¹ with an effective tool to help protect water quality, by providing them an opportunity to address the aquatic resource impacts of federally issued permits and licenses. This handbook explains the applicability and scope of §401, and provides practical examples drawn from state and tribal experiences about how §401 certification has been used to achieve their water quality goals.

Under §401, a federal agency cannot issue a permit or license for an activity that may result in a discharge to waters of the U.S. until the state or tribe where the discharge would originate has granted or waived §401 certification. The central feature of CWA §401 is the state or tribe's ability to grant, grant with conditions, deny or waive certification. Granting certification, with or without conditions, allows the federal permit or license to be issued consistent with any conditions of the certification.² Denying certification prohibits the federal permit or license from being issued.³ Waiver allows the permit or license to be issued without state or tribal comment. States and Tribes make their decisions to deny, certify, or condition permits or licenses based in part on the proposed project's compliance with EPA-approved water quality standards. In addition, states and tribes consider whether the activity leading to the discharge will comply with any applicable effluent limitations guidelines, new source performance standards, toxic pollutant restrictions, and other appropriate requirements of state or tribal law.⁴

U.S. Supreme Court in *S. D. Warren Co. v. Maine Board of Environmental Protection*

“State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed:

‘No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.’ 116 Cong. Rec. 8984 (1970).

These are the very reasons that Congress provided the States with power to enforce ‘any other appropriate requirement of State law,’ 33 U.S.C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge.”⁵

Examples of federal licenses and permits subject to §401 certification include CWA §402 NPDES permits in states where EPA administers the permitting program, CWA §404 permits for discharge of dredged or fill material issued by the Army Corps of Engineers (Corps), Federal

¹ Tribes may receive §401 certification authority when they receive Treatment As a State (TAS) status which is often at the same time as EPA approval of their water quality standards, as further discussed in *II.B.I. States and Authorized Tribe* below.

² CWA §401(a)(1); 33 USC1341(a)(1).

³ CWA §401(a)(1); .33 USC § 1341(a)(1).

⁴ CWA §401(d);.33 USC 1341(d).

⁵ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006). [Quote from the unanimous U.S. Supreme Court decision affirming the State of Maine's certification authority over a Federal Energy Regulatory Commission dam relicensing.]

Energy Regulatory Commission (FERC) hydropower licenses, and Rivers and Harbors Act §9 and §10 permits for activities that have a potential discharge in navigable waters issued by the Corps. Many states and tribes rely on §401 certification to ensure that discharges of dredge or fill material into a water of the U.S. do not cause unacceptable environmental impacts and, more generally, as their primary regulatory tool for protecting wetlands and other aquatic resources.⁶ In addition, §401 certification is often a state or tribe's only opportunity to review and appropriately condition or object to the federal permitting or licensing of a hydroelectric project.

Although §401 certification can be an effective tool for protecting water quality, it is limited in scope and application to situations involving federally-permitted or licensed activities that may result in a discharge to a water of the U.S. If a federal permit or license is not required, or would authorize impacts only to waters that are not waters of the U.S., the activity is not subject to CWA §401. Although §401 certification by itself is not a comprehensive water quality program for states and tribes, it can nevertheless be an effective water quality protection tool.

⁶ *State Wetland Program Evaluation: Phase I*, Environmental Law Institute, 2005; *State Wetland Program Evaluation: Phase II*, Environmental Law Institute, 2006.

II. Threshold Issues Regarding Clean Water Act §401 Certification

This chapter discusses a number of threshold issues regarding §401 certification. Section 401 certification does not apply to all permits or licenses associated with any aquatic resource, and this chapter clarifies the circumstances when §401 certification applies. The chapter also discusses which government agency may exercise §401 certification authority, and the ways in which concerns of downstream jurisdictions are taken into account during the §401 certification process.

A. When CWA §401 Certification Applies

The language of §401(a)(1) is written very broadly with respect to the activities it covers. It states:

Any applicant for a Federal license or permit to conduct *any* activity including, but not limited to, the construction or operation of facilities, which *may* result in *any discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates.⁷ [emphasis added]

As the statutory language indicates and courts have held, the permit or license must: (a) be issued by a federal agency, (b) for an activity that has the potential to discharge, (c) into a water of the United States, (d) from a point source⁸. This section will discuss each of these terms.

1. “Federal” Permit or License

In order for a §401 water quality certification to be required, the activity causing the discharge must be authorized by a permit or license issued by a federal agency.⁹ Federal licenses and permits most frequently subject to §401 water quality certification include CWA §402 (NPDES) permits issued by EPA¹⁰, §404 (dredge and fill) permits issued by the Corps, Federal Energy Regulatory Commission (FERC) hydropower licenses, and Rivers and Harbors Act (RHA) §9 and §10 permits issued by the Corps.

Temporary or “annual licenses” in effect while an application for permit renewal is under review might not require §401 certification where issuance of such temporary licenses is a “ministerial and nondiscretionary act.”¹¹ The most common example of such a license is the annual license renewals issued by FERC while existing hydroelectric dam license renewals are under review.¹² Where interim or other types of permits and licenses are involved, interested

⁷ CWA §401(a)(1); 33 USC 1341(a)(1).

⁸The Ninth Circuit Court of Appeals has interpreted §401 in light of its broader CWA context and has concluded the discharge must be from a point source to trigger §401. See Section II.A.4 below for more information.

⁹General EPA regulations define a license or permit for the purposes of §401 as, “any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into ...waters of the United States.” 40 CFR § 121.1(a).

¹⁰ As of March 2010, states in which EPA administers the §402 NPDES permit program include New Hampshire, Massachusetts, Idaho, and New Mexico.

¹¹ *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1134, 1136 (9th Cir. 2002), cert denied, 1245 S.Ct. 85 (2003).

¹² Handbook for Hydroelectric Project Licensing and 5 MW Exemptions from Licensing. Federal Energy Regulatory Commission. Appendix A: Federal Power Act, Part 1. Washington, DC. April 2004. pg A-20; Compliance Handbook. Division of Hydropower and Administrative Compliance. Federal Energy Regulatory Commission. March 2004. pg 89.

parties should consult with EPA, the state or tribal agency, and the federal permitting or licensing agency to determine whether §401 certification applies.

State or tribal implementation of a state permit program in lieu of the federal program does not “federalize” the resulting permits or licenses for purposes for §401. For example, when a state or tribe is approved to administer the §402 or §404 program, permitting authority resides with the state or tribe, not a federal agency, and 401 certification does not apply to those authorizations issued by the state or tribe. The CWA anticipates that states and tribes issuing those permits will ensure consistency with CWA provisions and other appropriate requirements of state and tribal law as part of their permit application evaluation.¹³ In addition, Corps regulations indicate that the Corps will seek 401 certification for Corps’ dredging projects involving a discharge into waters of the U.S. even though the Corps is not issuing itself a permit.¹⁴

2. Discharge

Another element required for §401 certification to apply is the potential for a discharge. It is important to note that §401 certification is triggered by the *potential* for a discharge; an actual discharge is not required. There does not have to be an actual discharge or a “discharge of a pollutant.” The statute states that, “[a]ny ... federal license or permit to conduct any activity ... which may result in a discharge.”¹⁵ Consequently, the discharge need not be a certainty, only that it “may” occur should the permit or license be granted. However, if no discharge may occur, no water quality certification is required. For example, when a RHA §10 permit is required for the hanging of power lines across a navigable river (RHA §10 water) without a potential discharge to the water, the Corps typically has not sought water quality certification.

In addition, the potential discharge does not need to involve an addition of pollutants. Section 401 certification can be triggered not only where there is discharge of a pollutant (such as would be authorized by §402 or §404 permits), but also where there is a discharge not involving addition of a pollutant, such as water released from the tailrace of a dam.¹⁶ As the U.S. Supreme Court has stated, “[w]hen it applies to water, ‘discharge’ commonly means a ‘flowing or issuing out’”¹⁷ and an addition of a pollutant is not “fundamental to any discharge.”¹⁸ A lower court has ruled that allowing more water to flow through a dam’s turbines is a discharge for §401 purposes.¹⁹ Two courts have found that a withdrawal of water or reduction in flow does not constitute a discharge.²⁰

¹³ In addition, similar requirements to address the effect of pollutants on downstream jurisdictions exist under CWA §402 and §404 programs when assumed by a State or Tribe. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046 (1992).

¹⁴ Under 33 CFR 336.1(a)(1), Corps practice is to seek 401 certification for their dredging projects.

¹⁵ CWA §401(a)(1); 33 USC 1341 (a)(1).

¹⁶ *See, e.g., Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 6-7 (9th Cir.(Or.) 1998 *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

¹⁷ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

¹⁸ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

¹⁹ *Alabama Rivers Alliance v. Federal Energy Regulatory Commission*, 325 F.3d 290, 295-6 (DC Cir 2003) in the case installing larger turbines in a hydroelectric dam was found to potentially result in a discharge of larger volumes of water through the dam, triggering water quality certification review.

²⁰ *Great Basin Mine Watch v. Helen Hankins BLM*, 456 F.3d 955, 963 (9th Cir 2006) in the context of the removal of all flow from a stream in Nevada for use in a gold mine; *State of North Carolina v. Federal Energy Regulatory Commission*, 112 F.3d 1175, 1187 (DC Cir 1997) in the context of withdrawing water from a lake for a municipal

3. Waters of the U.S. and Waters of the State or Tribe

The third element required for §401 certification to apply is that the potential discharge must be into a water of the U.S. The term “waters of the U.S.” is defined in EPA and Corps regulations, and applies to all CWA programs. The scope of waters of the U.S. protected under the CWA includes traditionally navigable waters and also extends to include interstate waters, territorial seas, tributaries to navigable waters, adjacent wetlands, and other waters.²² Since §401 certification only applies where there may be a discharge into waters of the U.S., how states or tribes designate their own waters does not determine whether §401 certification is required. Note, however, that once §401 has been triggered due to a potential discharge into a water of the U.S., additional waters may become a consideration in the certification decision if it is an aquatic resource addressed by “other appropriate provisions of state[tribal] law.”²³

4. Point Sources

In addition to the requirements for a federal permit or license and a discharge into a water of the U.S., some courts have indicated that the discharge

The Regulatory Definition of Waters of the U.S.

“(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.”²¹

water supply; the opinion in *Great Basin Mine Watch v. Helen Hankins BLM* also said that states may, but are not required to, regulate water withdrawals or set minimum stream flow standards in water quality certifications, at 963.

²¹ 40 CFR § 230.3(s); 33 CFR § 328.3(a).

²² *Id.* For discussion of evolution of the regulatory definition of “waters of the United States,” see Downing et al. Clean Water Act Jurisdiction: A Legal Review. Wetlands. Vol. 23. No. 3. 2003. p 477.

²³ See CWA §401(d), 33 USC 1341(d). Note that the Corps may consider a 401 certification as administratively denied where the certification contains conditions that require the Corps to take an action outside its statutory authority or are otherwise unacceptable. See, e.g., RGL 92-04, “Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits.”

²⁴ 40 CFR § 230.3(s); 33 CFR § 328.3(a).

must be from a point source.²⁵ The Ninth Circuit Court of Appeals in *ONDA v. Dombeck* held that, “[t]he term “discharge” in §1341 is limited to discharges from point sources.”²⁶ The CWA defines “point source” as “any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel...rolling stock ... or vessel...from which pollutants are or may be discharged.”²⁷ Bulldozers and similar equipment are considered point sources²⁸, as are the tailraces of dams.²⁹ While other Circuit Courts of Appeal have not addressed this question, the U.S. in briefs filed before the U.S. Supreme Court suggests that §401 requires the discharge to be from a point source.³⁰

B. When Jurisdictions Have §401 Certification Authority

Not all jurisdictions whose water may be affected by a federal permit or license have §401(a)(1) certification authority. Only the state or authorized tribe *where the discharge originates* has the authority to directly condition or prevent issuance of a federal permit or license.³¹ States and tribes downstream of the jurisdiction where a discharge originates do not have §401 authority. However, CWA §401(a)(2) provides neighboring states or tribes with an opportunity to object to, and make recommendations for, federal licenses and permits.³²

1. States and Authorized Tribes

The CWA directly grants all states §401 certification authority, and currently all states have retained their authority. In addition, U.S. territories are considered “states” under the CWA.³³

Tribes do not automatically have §401 authority, but may request it when granted “Treatment in the same manner As a State” (TAS) authority by EPA.³⁴ This often occurs when a tribe is authorized to administer the water quality standards program and has designated the tribal agency that will administer §401. No separate application is required. If granted, tribes possess the same certification authority and responsibilities as states. As of January 2010, 36 tribes had developed water quality standards approved by EPA and have been granted §401 certification

²⁵ “We hold that certification under § 1341 is not required for grazing permits or other federal licenses that may cause pollution solely from nonpoint sources.” *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 7 (9th Cir.(Or.) 1998).

²⁶ *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 5 (9th Cir.(Or.) 1998).

²⁷ 33 USC 1362(14); CWA §502(14); Case law has indicated that point sources also include bulldozers and similar equipment: *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922 (1983).

²⁸ *See, e.g., Avoyelles Sportsman's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).

²⁹ *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 6 (9th Cir.(Or.) 1998). Also supported by, *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006). *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 711 (1994).

³⁰ *See, e.g., Amicus brief of the United States in S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006), found at 2006 WL 53960 (January 9, 2006).

³¹ CWA §401(a)(1); 33 USC 1341(a)(1).

³² In some cases, such as when the backwater pool area for a reservoir extends into another state or tribe, neighboring states or tribes may comment without being downstream.

³³ CWA §502(3); 33 USC 1362(3): “The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.”

³⁴ CWA §401(a)(1); 33 USC 1341(a)(1).

authority.³⁵ Courts have held that tribal water quality standards and §401 certification authority extend to non-Indian fee land within a reservation.³⁶

Where the discharge originates within a jurisdiction without §401 authority, EPA is the certifying agency. Section 401(a)(1) states, “In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator [EPA].”³⁷ As a result, EPA typically acts as the certifying authority on tribal lands when the tribe lacks certification authority.

2. States or Tribes Where a Discharge Originates

The courts have interpreted §401 to mean that the state or tribe in which a discharge originates has §401 certification authority.³⁸ When a facility is located within one state but the end of its discharge pipe is located in the waters of another state, the jurisdiction where the discharge enters the waters of the U.S. has certification authority. The state with jurisdiction over the receiving waters has a direct interest in the quality of its resulting water quality, while the state in which the facility is located may have a variety of other concerns not directly related to the waters affected by the discharge. Similarly, the state where the discharge enters a “water of the U.S.” is likely better positioned to monitor and inspect for compliance with any 401 certification conditions on the discharger’s permit or license.

³⁵ Region 2: Saint Regis Mohawk Tribe. Region 4: Seminole of Florida; Miccosukee Tribe of Indians of Florida; Region 5: Mole Lake Band of the Lake Superior Tribe of the Chippewa Indians, Sokaogon Chippewa Community; The Fond du Lac Band of the Minnesota Chippewa Tribe; Grand Portage Band of the Minnesota Chippewa Tribe. Region 6: Ohkay Owingeh (Pueblo of San Juan); Pueblo of Acoma; Pueblo of Isleta; Pueblo of Nambe; Pueblo of Picuris; Pueblo of Pojoaque; Pueblo of Sandia; Pueblo of Santa Clara; Pueblo of Taos; Pueblo of Tesuque. Region 8: Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation; Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation;. Region 9: Big Pine Paiute Tribe of the Owens Valley; Bishop Paiute Tribe; Hoopa Valley Tribe; Hopi Tribe; Hualapai Tribe; Pyramid Lake Paiute Tribe; White Mountain Apache. Regions 6, 8 and 9: Navajo Nation. Region 10: Confederated Tribes of the Chehalis Reservation; Confederated Tribes of the Colville Reservation; Confederated Tribes of the Umatilla Indian Reservation of Oregon; Confederated Tribes of the Warm Springs Indian Reservation of Oregon; Kalispel Indian Community of the Kalispel Reservation; Lummi Nation; Makah Tribe; Port Gamble S’Klallam Tribe; Puyallup Tribe of Indians; and the Spokane Tribe of Indians.

³⁶ See, e.g., *State of Montana v. United States Environmental Protection Agency*, 137 F.3d 1135, 1141 (9th Cir 1998).

³⁷ 33 USC 1341(a)(1); CWA §401(a)(1).

³⁸ “[A] certification from the State in which the discharge originates or will originate” 33 USC 1341(a)(1); CWA §401(a)(1); “[O]nly required to obtain a certification from the state where the discharge originates.” *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-1484 (DC Cir 1990).

<u>Players in the Water Quality Certification Process</u>	
Origin of the Discharge	Certifying entity *
Within the borders of a state with a designated certification authority	→ State certifying agency
On tribal land that has been granted TAS and 401 certification authority	→ Tribal certifying agency
Within the borders of a state or tribal holdings where no certification authority exists	→ EPA
*Other states and tribes may be involved in the certification process through the downstream effects consultation process found in §401(a)(2).	

Figure 1. Certification Agency by Discharge Location

3. Other Affected States and Tribes

Although §401 certification authority rests with the jurisdiction where the discharge originates, neighboring states and tribes downstream³⁹ or otherwise potentially affected by the discharge have an opportunity to raise objections to, and comment on, the federal permit or license.⁴⁰ The EPA Administrator determines if a discharge subject to §401 certification “may affect” the water quality of other states or tribes, and EPA is required to notify those other jurisdictions whose water quality may be affected.⁴¹ The other jurisdictions are then provided an opportunity to submit their views and objections about the proposed license or permit and associated §401 certification. They may also request that the federal permitting or licensing agency hold a hearing at which, “the [EPA] Administrator shall ... submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency.”⁴² The federal licensing or permitting agency “shall condition such license or permit in such manner as may be necessary to ensure compliance with applicable water quality requirements.”⁴³ Recommendations from neighboring jurisdictions do not have the same force as conditions from a §401 certifying state. While the Federal agency must develop measures to address the downstream jurisdictions’ concerns, the agency may develop its own measures and does not need to adopt the downstream state or tribe’s specific recommendations without modification, as it would were they from the §401 certifying agency. If the Federal agency “cannot ensure compliance” with the other state or tribe’s water quality requirements, it “shall not issue such license or permit.”⁴⁴

³⁹ In some cases, such as when the backwater pool area for a reservoir extends into another state or tribe, neighboring states or tribes may comment without being physically downstream.

⁴⁰ CWA §401(a)(2), 33 USC 1341. Note that the CWA establishes processes to address the effect of pollutants on downstream stakeholders exist under CWA §§ 402 and 404 programs when assumed by a state or tribe. For example: *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046 (1992).

⁴¹ CWA §401(a)(2); 33 USC 1341(a)(2).

⁴² CWA §401(a)(2); 33 USC 1341(a)(2)

⁴³ CWA §401(a)(2); 33 USC 1341(a)(2).

⁴⁴ CWA §401(a)(2); 33 USC 1341(a)(2).

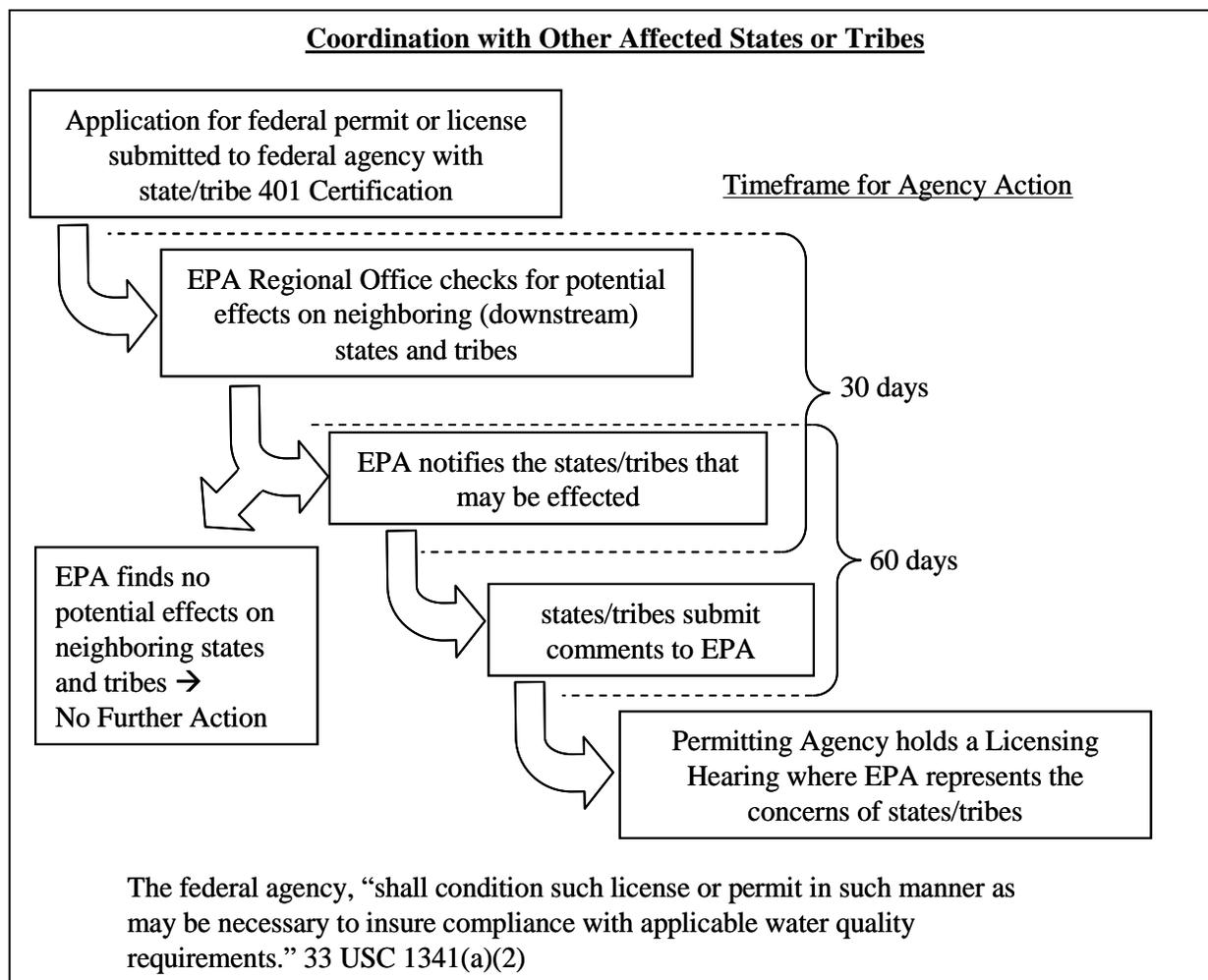


Figure 2. Downstream Agency Coordination

C. CWA Section 401 Certification Options

The central component of §401 certification is the state or tribe’s decision to grant, condition, deny or waive certification. In essence, the state or authorized tribal⁴⁵ agency decides whether the licensed or permitted activity and discharge will be consistent with a number of specifically identified CWA provisions: effluent limitations for conventional and non-conventional pollutants (§301 and §302), water quality standards (§303), new source performance standards (§306), and requirements for toxic pollutants (§307).⁴⁶ Section 401(d) requires inclusion of license or permit conditions to ensure compliance with these listed CWA provisions, as well as appropriate requirements of state or tribal law.⁴⁷ A state or tribe

⁴⁵ Tribes authorized to use §401 certification authority have developed water quality standards and designated an agency to administer the certification authority, as further discussed in *II.B.I. States and Authorized Tribes* above.

⁴⁶ 33 CWA §401(a)(1); USC 1341(a)(1).

⁴⁷ CWA §401(d); 33 USC 1341(d); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006); *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994).

certification is intended to ensure that all these provisions and requirements will be met. The following four subsections discuss each certification option.

1. Grant

The granting of §401 water quality certification to an applicant for a federal license or permit signifies that the state or tribe has determined that the proposed activity and discharge will comply with water quality standards as well as the other identified provisions of the CWA and appropriate requirements of state or tribal law. Granted certifications receive significant weight in the federal permitting or licensing agency's review of the project's potential impacts on water quality.⁴⁸ However, certification review and issuance does not fulfill environmental impact review requirements under the National Environmental Policy Act (NEPA), nor does it substitute for a dredged or fill permit from the Corps of Engineers or any other required CWA permit.⁴⁹

2. Grant with Conditions

States and tribes may include limitations or conditions in their certifications as necessary to ensure compliance with water quality standards and other provisions of the CWA and appropriate requirements of state or tribal law.⁵⁰ Conditions to protect water quality need not focus solely on the potential discharge. Once a potential discharge triggers the requirement for §401, the certifying agency may develop "additional conditions and limitations on the activity as a whole."⁵¹ Conditions placed in §401 water quality certifications must become conditions of the resulting federal permit or license.⁵² The federal agency may not select among conditions when deciding which to include and which to reject.⁵³ If the federal agency chooses not to accept all conditions placed on the certification, then the permit or license may not be issued.⁵⁴ Some federal agencies may decide to view the certification as denied, and administratively deny the permit without prejudice, if the conditions are viewed as beyond the agency's authority.⁵⁵

3. Deny

⁴⁸ Water Quality Standards Handbook. Second Edition. US EPA. August 1994. Chapter 7.6.3.

⁴⁹ Section 401 certification does not fulfill any requirements under NEPA, *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1125 (DC Cir. 1971); Section 401 certification does not substitute for other CWA permit requirements, *Monongahela Power Company v. John O. Marsh*, 809 F.2d 41, 53 (DC Cir 1987).

⁵⁰ 33 USC 1341(d); CWA §401(d); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006). *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994).

⁵¹ *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

⁵² CWA 401(d), 33 USC 1341(d).

⁵³ *American Rivers v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-111 (2d Cir, 1997).

⁵⁴ 33 USC 1341(a)(1); CWA §401(a)(1); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-111 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 868 (9th Cir 1993); *Puerto Rico Sun Oil Company v. United States Environmental Protection Agency*, 8 F.3d 73, 74-75 (1st Cir 1993); *Roosevelt Campobello International Park Commission v. United States Environmental Protection Agency*, 684 F.2d 1041, 1056 (1st Cir 1982); *US v. Marathon Development Corporation*, 867 F.2d 96, 99 (1st Cir. 1989).

⁵⁵ Note that the Corps may consider a 401 certification as administratively denied where the certification contains conditions that require the Corps to take an action outside its statutory authority or are otherwise unacceptable. See, e.g., RGL 92-04, "Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits."

States and tribes deny certification if the activity and discharge will not comply with the applicable sections of the CWA and appropriate requirements of state and tribal law.⁵⁶ The denial of §401 certification by a state or tribe prohibits the federal agency from issuing the permit or license in question.⁵⁷

4. Waive

States and tribes are authorized to waive §401 certification, either explicitly, through notification to the applicant, or by the certification agency not taking action. If action is not taken on a certification request, “within a reasonable time (which shall not exceed one year),” the state or authorized tribe has waived the requirement for certification. The amount of time allowed for action on a certification application is determined by the Federal agency issuing the license or permit, while the certifying agency determines what constitutes a “complete application” that starts the timeframe clock.⁵⁸ To avoid waiving inadvertently, a state or tribal agency receiving a request for certification should consult with the federal licensing or permitting agency to verify the time available for their certification decision. However, the onus for applying for water quality certification lies with the permit or license applicant, and waiver can not occur without a request for certification.⁵⁹

Under the CWA, waiver does not indicate a state or tribe’s substantive opinion regarding the water quality implications of a proposed activity or discharge. A state or tribe may waive certification for a variety of reasons, including a lack of resources to evaluate the application. Waiver merely means the federal permitting or licensing agency may continue with its own application evaluation process and issue the license or permit in the absence of an affirmative state or tribal certification.

**S. D. Warren Co. v. Maine Board of
Environmental Protection et al**

“Section 401 recast pre-existing law and was meant to ‘continu[e] the authority of the State ... to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.’ S.Rep. No. 92-414, p. 69 (1971). Its terms have a broad reach, requiring state approval any time a federally licensed activity ‘may’ result in a discharge (‘discharge’ of course being without any qualifiers here), 33 U.S.C. § 1341(a)(1), and its object comprehends maintaining state water quality standards.”⁶⁰

⁵⁶ 33 USC 1341(a)(1); CWA §401(a)(1).

⁵⁷ CWA 401(a)(1); 33 USC 1341(a)(1).

⁵⁸ The Fourth Circuit observed that certification agencies prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989); 33 USC 1341(a)(1); CWA §401(a)(1); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

⁵⁹ *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989).

⁶⁰ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843, 1851 (2006).

III. The CWA 401 Certification Process

The previous chapter discussed threshold issues affecting when CWA §401 certification applies and what certification options states and tribes have (grant, grant with conditions, deny, or waive). This section discusses some of the details of the §401 certification process, including receipt of an application, review by the state or authorized tribe⁶¹, and enforcement and dispute resolution issues. Where possible, the chapter illustrates its points with examples taken from state and tribal experiences.

A. Timeframes and Opportunities for Review

The federal permitting or licensing agency may set the certification response time limit to any “reasonable period of time (which shall not exceed one year).”⁶² If the certifying agency does not respond within the time limit, §401 certification is waived.⁶³ As discussed below, federal agencies have established varying timeframes up to one year. An initial step, therefore, is for the certifying agency to verify the amount of time it has for its §401 analysis.

Federal agencies may define what is a “reasonable time” for purposes of §401 certification of their permits or licenses, provided the period is less than one year in duration. For example, some Corps Districts provide a response period of 60 days for a §401 certification associated with a CWA §404 permit. FERC normally allows a full year for states and tribes to develop a §401 certification response. EPA regulations governing the certification of federally-issued CWA §402 NPDES permits allow states and tribes 60 days to issue certification.⁶⁴ EPA regulations applicable in other contexts suggest a time limit of six months.⁶⁵

Not all Corps Districts use a 90-day time frame for certification of 404 permits.⁶⁶ For example, while the Savannah Army Corps of Engineers (Corps) District has a self-imposed 120 day timeline for making permit decisions, it has placed no limit on receipt of state certification other than the statutory one year. Should Georgia not issue a §401 certification by the 120-day deadline for §404 permit issuance, the District may issue a provisional permit that is not valid unless the conditions listed on the cover page, such as obtaining §401 certification, are met.⁶⁷ Shorter certification timeframes apply in other places such as Florida, where the certification time limit is 90 days for individual Corps permits and 30 days for Corps Nationwide General Permits that did not receive categorical certifications.⁶⁸ For their part, state and tribal

⁶¹ Tribes authorized to use §401 certification authority have received “Treatment as a State” (TAS) status, and have designated an agency to administer the certification authority. As further discussed in *II.B.1. States and Authorized Tribes* above, typically authorized tribes also have developed EPA-approved water quality standards.

⁶² CWA §401(a)(1); 33 USC 1341(a)(1).

⁶³ CWA §401(a)(1); 33 USC 1341(a)(1); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

⁶⁴ 40 CFR §124.53(c)(3).

⁶⁵ 40 CFR §121.16(b). (“which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year.”)

⁶⁶ Corps Districts may establish agreements with states or tribes to have longer or shorter timeframes for water quality certification decisions than the 60 days provided in regulations. See, e.g., RGL 87-03.

⁶⁷ Savannah Corps District. Provisional permit cover sheet.

⁶⁸ CWA Section 404 Nationwide General Permits are certified as a category every five years at reissuance. If categorical certification is denied for any Nationwide permit, each individual project wishing to be authorized under the Nationwide permit would require 401 certification.

certification agencies may adopt procedural requirements regarding certification, for example specifying that the receipt of agency certification requests starts the certification review time period.⁶⁹ While such requirements may help ensure that states and tribes have adequate time for their 401 review, it is important that they note the time frame at the time the certification application is received and consult with the Federal licensing or permitting agency early about any concerns.

1. When More Time is Needed

In cases where the certifying agency believes it needs more information or time to review the license or permit before issuing a certification, and it has not been able to work out an appropriate time frame with the licensing or permitting Federal agency, states have tended to take two approaches. Some states on occasion have suggested the applicant withdraw and resubmit its application for certification (restarting the certification clock), as an alternative to denying certification based on gaps in analyses or information. This withdraw-resubmission process potentially gives the applicant and the §401 certifying agency time to produce requested reports, and is intended to give the certifying agency additional time to review the relevant information and issue a certification. Note that the withdraw-resubmission process can result in the federal agency being unable to act in a timely manner on permit or license applications. As an alternative approach, some states have denied §401 certification “without prejudice” when they lack data necessary for their analysis, and then encouraged the applicant to resubmit the application with the application fee waived as long as they continue to abide by the standard public notice requirements.⁷⁰

2. Certification Timeframe for Permits to Construct and Operate Facilities

Another issue related to timeframes occurs when one federal permit or license is required for the construction of a facility and a separate federal permit or license is required for its operation. Generally, §401 requires certification of the construction permit or license and then only notice of application for a permit or license to operate the new facility, unless construction and operation would be certified by a different state certification authority.⁷¹ Upon receiving notice of application for a permit or license to operate the new facility, the certifying agency has 60 days to determine if;

[T]here is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of this [CWA] title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which

⁶⁹ The Fourth Circuit observed that certification agencies prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

⁷⁰ This handbook does not endorse either of the two approaches, but emphasizes the need for coordination regarding necessary information early in the certification process in order to avoid denial or withdrawal due to data gaps. FERC believes that both of these approaches can often result in delays and impair FERC’s ability to act on hydropower license, relicense, and amendment applications in a timely manner.

⁷¹ CWA §401(a)(3); 33 USC 1341(a)(3); *Keating v. Federal Energy Regulatory Commission*, 927 F.2d 616, 623 (DC Cir 1991)(The statute allows a state to revoke a prior certification only within a specified time limit and only pursuant to certain defined circumstances.); *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997) (Section 401(a)(3) does not, however, require a state with certification rights pertaining only to the operation of a project to assert those rights at the time a construction permit is issued for the project).

such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements.⁷²

If the certifying agency does not respond within sixty days to the notice, the certification of construction of the facility also serves as certification of operation of the facility.⁷³ CWA §401 certification of any federal permit or license required for construction of a facility will satisfy §401 certification requirements for federal permits or licenses required for operation of the facility as well, if the certification agency finds the project has not changed in any of the ways laid out in §401(a)(3) discussed above.⁷⁴ Note that certification of construction cannot serve as certification of operation if the applicant has failed to provide notice to the certifying agency of: (1) the application for a permit or license to operate the facility, or (2) any proposed changes in the construction or operation of the facility that may result in a violation of effluent limitations (CWA §301), water quality related effluent limitations (CWA §302), water quality standards and implementation plans (CWA §303), national standards of performance (CWA §306), toxic and pretreatment effluent standards (CWA §307) or other appropriate requirements of state or tribal law.⁷⁵

In the case where construction requires a federal permit or license and §401 certification, but operation of the facility does not require a federal permit or license, the facility must provide an opportunity for the §401 certification authority:

[T]o review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated.⁷⁶

If the certifying agency finds that the operation of the facility will violate water quality requirements but will not trigger the review procedure under §401(a)(3) (change in construction, operation, or water quality requirements), the certifying agency notifies the federal agency that issued the permit or license authorizing construction of the facility. Then the “Federal agency may, after public hearing, suspend such license or permit.”⁷⁷ If suspension is issued, it shall remain in effect until the certifying agency provides notice to the federal agency that the facility will not violate the applicable water quality requirements.⁷⁸ To ensure that adequate consideration is given to water quality impacts of facility operation, as well as to minimize the need for such after-the-fact suspensions (which are solely at the discretion of the Federal agency), states should review all such impacts at the time of initial certification, and include conditions in their certifications to address them as appropriate.

⁷² CWA §401(a)(3); 33 USC 1341(a)(3).

⁷³ CWA §401(a)(3); 33 USC 1341(a)(3); *Keating v. FERC*, 927 F.2d 616, 623 (DC Cir 1991).

⁷⁴ *Keating v. FERC*, 927 F.2d 616, 624 (DC Cir 1991).

⁷⁵ *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989); CWA §401(a)(3); 33 USC 1341(a)(3); CWA §401(d); 33 USC 1341(d).

⁷⁶ CWA §401(a)(4); 33 USC 1341(a)(4).

⁷⁷ CWA §401(a)(4); 33 USC 1341(a)(4).

⁷⁸ CWA §401(a)(4); 33 USC 1341(a)(4).

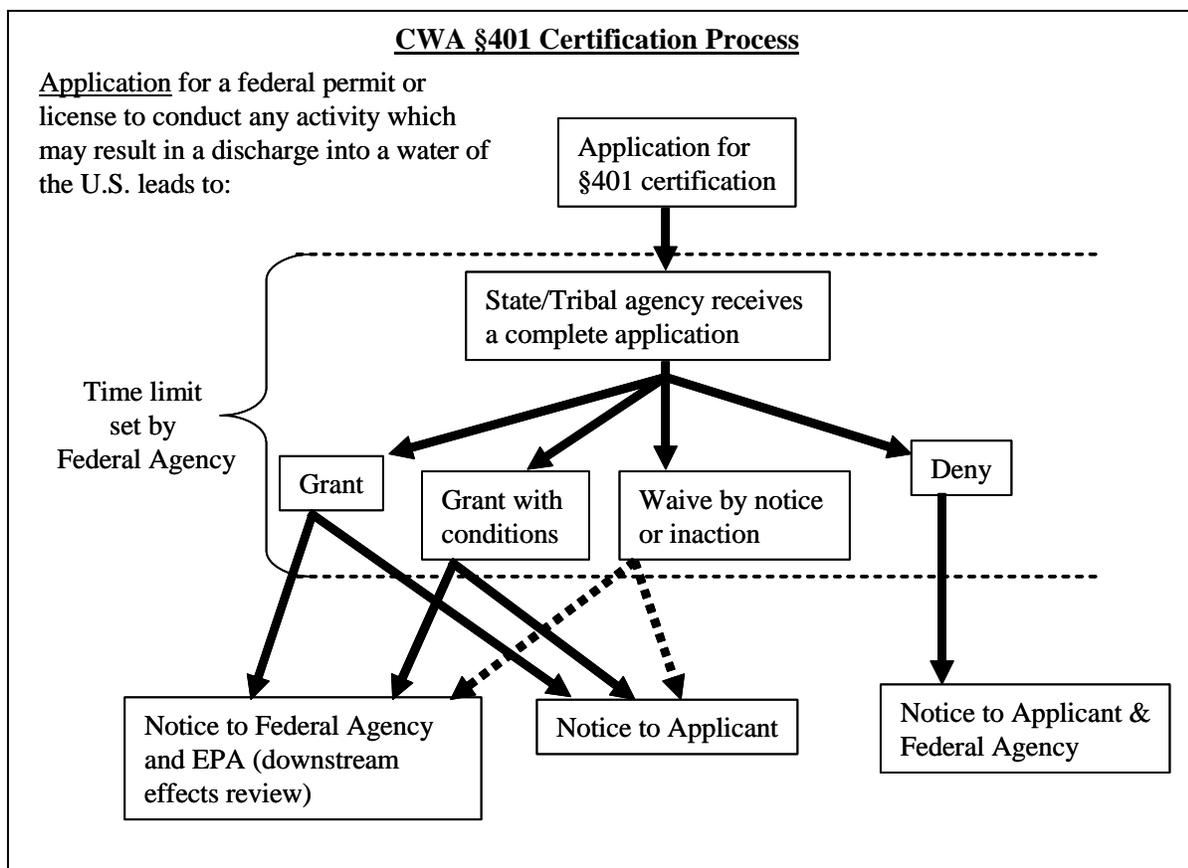


Figure 3. The Water Quality Certification Process

B. Start of the 401 Certification Process

Section 401 indicates that an application for a federal permit or license that may result in a discharge to waters of the U.S. cannot be considered complete unless accompanied by a grant or waiver of §401 certification.⁷⁹ “No license or permit shall be granted until the certification ... has been obtained or has been waived.”^{80, 81} As a result, the applicant is responsible for requesting the necessary §401 certification from the state or tribe.⁸²

States and tribes often establish their own specific requirements for a complete application for water quality certification.⁸³ Generally, the state or tribe’s §401 certification review timeframe begins once a request for certification has been made to the certifying agency,

⁷⁹ 33 USC 1341(a)(1); CWA §401(a)(1); *Puerto Rico Sun Oil Company v. EPA*, 8 F.3d 73, 74 (1st Cir 1993); *US v. Marathon Development Corporation*, 867 F.2d 96 (1st Cir. 1989).

⁸⁰ CWA §401(a)(1); 33 USC 1341(a)(1).

⁸¹ Note that the process in practice is not always linear. For example, FERC’s licensing regulations indicate that once the Commission determines that the application is complete, it issues a “Ready for Environmental Analysis” notice instructing the license applicant to request water quality certification from the state certifying agency within 60 days of notice issuance.

⁸² *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989).

⁸³ *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

accompanied by a complete application. A complete application for §401 certification typically includes the completed application for a federal license or permit, including detailed descriptions of the proposed project and anticipated aquatic resource impacts.⁸⁴ At times, the list of components of a complete application can be lengthy. For example, Oregon has identified a complete §401 certification application for a §404 permit as including: the legal name and address of activity owner or operator; legal name and address of the authorized representative; name and addresses of contiguous property owners; complete written description of activity, including maps, diagrams, and other information; names of affected waters, including wetlands and tributary streams; land use compatibility statement; identified steps that will be undertaken to prevent violation of water quality standards; copies of environmental information submitted to the federal licensing or permitting agency; confirm status of waters impacted by the project, including if they are on 303(d) lists or subject to a Total Maximum Daily Load (TMDL) calculation; evaluation of potential water quality standard violations or contribution to violation; and identification of mitigation measures.⁸⁵ Oregon also identifies additional information that may be required for projects in wetlands and streams and for hydropower projects.

The advantage of a clear description of components of a complete §401 certification application is that applicants know what they must be prepared to provide, and applicant and agencies alike understand when the review timeframe has begun.

C. Scope of Analysis For §401 Certification Decisions

U.S. Supreme Court in *PUD v Washington Department of Ecology*:

“Section 401(d) thus allows the State to impose ‘other limitations’ on the project in general to assure compliance with various provisions of the Clean Water Act and with ‘any other appropriate requirement of State law’ ... Section 401(a)(1) identifies the category of activities subject to certification--namely, those with discharges. And §401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”⁸⁸

When Congress enacted the water quality certification provisions in 1970, it wanted to ensure that no federal license or permit would be issued “for an activity that through inadequate planning or otherwise could in fact become a source of pollution.”⁸⁶ As incorporated into the 1972 CWA, §401 water quality certification was intended to ensure that no federal license or permits would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate CWA provisions. Specifically, the statute calls for states or tribes to base their certification on a consideration of whether the permit or license would be consistent with a list of CWA authorities including water quality standards and effluent limitations, as well as “any other appropriate

requirement of State [or tribal] law set forth in such certification.”⁸⁷ It is important to note that, while EPA-approved state and tribal water quality standards may be a major consideration driving §401 decision, they are not the only consideration.

⁸⁴ CWA §401(a)(1,3); 33 USC 1341(a)(1, 3); *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989).

⁸⁵ OAR 340-048-0020; see also <http://www.deq.state.or.us/wq/sec401Cert/process.htm#min>.

⁸⁶ 115 Cong. Rec. H9030 (April 15, 1969)(House debate); 115 Cong. Rec. S28958-59 (Oct. 7, 1969) (Senate debate).

⁸⁷ CWA §401(d); 33 USC 1341(d).

As noted in the previous section, the CWA indicates that §401 certification of a permit or license for the construction of any facility may fulfill the requirements for certification in connection with any other federal license or permit required for the operation of such facility.⁸⁹ In other words, certification of a construction permit or license generally also operates as certification for an operating permit or license. Thus, it is important for the §401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.⁹⁰ For example, certification of a new hydroelectric dam subject to licensing by FERC would consider water resource implications of both the dam’s construction and operation, for the life of the permit.

Three exceptions to this general rule of “one certification” exist. First, if the §401 certification of permits for project construction is from a different jurisdiction than where a potential discharge would originate during facility operation, then the federal operating permit would require an additional certification from the state or tribe in which the operational discharge would originate.⁹¹ The second exception exists where there have been unanticipated changes to the facility, receiving water quality, water quality standards, or other CWA requirements (see the box below).⁹² Third, the general rule does not apply if the applicant failed to provide notice to the certifying agency, “of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted.”⁹³ In short, certification of a permit or license for the construction of a facility will fulfill the requirements for certification of any other construction or operation permits or licenses for the facility as long as the potential impacts from construction and operation are within the same jurisdiction and there is no change in the facility, the receiving water, water quality standards or other CWA requirements.

Certification of Construction And Certification of Operation: CWA §401(a)(3)

“The certification obtained...with respect to the construction of any facility shall fulfill the...certification...for the operation of such facility unless, after notice to the certifying... agency...[the certifying] agency...notifies such [federal] agency within sixty days...that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying...agency... with notice of any proposed changes in the construction or operation of the facility...which changes may result in violation of section 301, 302, 303, 306, or 307 of this title.”

⁸⁸ *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

⁸⁹ 33 USC 1341(a)(3); CWA §401(a)(3); “The statute allows a state to revoke a prior certification only within a specified time limit and only pursuant to certain defined circumstances” *Keating v. Federal Energy Regulatory Commission*, 927 F.2d 616, 623 (DC Cir 1991); “Section 401(a)(3) does not, however, require a state with certification rights pertaining only to the operation of a project to assert those rights at the time a construction permit is issued for the project.” *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997).

⁹⁰ In *PUD I* the court found that, “activities—not merely discharges—must comply with state water quality standards.” *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

⁹¹ *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-1484 (DC Cir 1990).

⁹² 33 USC 1341(a)(3); CWA §401(a)(3); See also *Keating v. FERC*, 927 F.2d 616, 622 (DC Cir 1991).

⁹³ 33 USC 1341(a)(3); CWA §401(a)(3).

Section 401 applies to any federal permit or license for an activity that may discharge into a water of the U.S. The Ninth Circuit Court of Appeals has ruled that the discharge must be from a point source, and agencies in other jurisdictions have generally adopted the requirement.⁹⁴ Once these thresholds are met, the scope of analysis and potential conditions can be quite broad. As the U.S. Supreme Court has held, once §401 is triggered, the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law.⁹⁵

For example, water quality implications of fertilizer and herbicide use on a subdivision and golf course might be considered as part of a §401 certification analysis of a CWA §404 permit that would authorize discharge of dredged or fill material to construct the subdivision and golf course. Note that the Corps may decide to consider a certification with conditions it views as beyond its statutory authority as a denial, and not issue the section 404 or section 10 permit.⁹⁶

1. Basis for Certification Decisions – Generally

In order to obtain certification of any proposed activity that may result in a discharge to waters of the U.S., an applicant must demonstrate that the proposed activity and discharge will not violate or interfere with the attainment of any limitations or standards identified in §401(a) and (d). Specifically, the statute provides that an applicant for a federal license or permit obtain a certification that the discharge and activity is consistent with state or tribal effluent limitations (CWA §301), water quality related effluent limitations (CWA §302), water quality standards and implementation plans (CWA §303), national standards of performance (CWA §306), toxic and pretreatment effluent standards (CWA §307) and “any other appropriate requirement of State [or Tribal] law set forth in such certification.”⁹⁷

Water Quality Standards:
A benchmark for water quality protection

Standards provide the foundation for a broad range of water quality management activities including, but not limited to, monitoring under §§ 305(b) and listing /TMDL development under section 303(d), permitting under §§ 402 and 404, water quality certification under §401, and the control of non-point source pollution under §319. Standards also provide a benchmark for the assessment of wetland impacts. Such standards, however, are not the only consideration during a §401 certification analysis.

Figure 4. The Water Quality Standards Benchmark

Certifying agencies often develop procedures and a list of considerations that they deem necessary as part of their certification analysis to ensure compliance with the appropriate CWA provisions and requirements of state or tribal law related to the maintenance, preservation, or enhancement of water quality. For example, North Carolina has developed a list of assessment formulas and general certification conditions relating to project impacts, buffers, violation sites,

⁹⁴ *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 5 (9th Cir.(Or.) 1998); *ONDA v. U.S. Forest Service*, 550 F.3d 778 (9th Cir. 2008). Discussions with more than a dozen certification agencies in 2005 did not reveal one case of certification being given or required for federal permits or licenses for non-point source discharges into waters of the U.S.

⁹⁵ *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711-712 (1994); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

⁹⁶ See, e.g., RGL 92-04, “Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits.”

⁹⁷ CWA §401(d); 33 USC 1341(d).

stormwater, surface water classifications, dams and ponds, wetlands and others that are reviewed for applicability to each project, so that all projects are held to the same standards and undergo the appropriate level of scrutiny. In Georgia, coordination between the certifying agency and the state fish and wildlife agencies has led to certification conditions designed to protect state species of concern that are tied to water quality goals in state law. Texas and Virginia certifications both rely on “No Net Loss” goals laid out in statute or regulation when requiring adherence to the avoidance, minimization and mitigation standards found in the CWA §404(b)(1) guidelines.

Whatever the basis of the certifying agency’s decision, thorough and clear documentation of the information and rationale used to reach the decision will help to educate the applicant and the public of the importance of water quality protection. Equally important, thorough and clear documentation can help to ensure that the certification is defensible should it be challenged in court or during public comment.

2. 401 Certification Consideration: Consistency With Water Quality Standards

As noted above, water quality standards are often the starting point for determining an appropriate response to a §401 certification request. States and tribes adopt EPA-approved water quality standards pursuant to CWA §303, and base those standards on the waters’ use and value for “. . . public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.”⁹⁸ These water quality standards and the state’s and tribe’s §401 implementing regulations and guidelines are, perhaps, the most important tools for the implementation of §401. Note that water quality standards adopted by a state or tribe but not yet approved by EPA may still be relevant during the §401 certification process as “other appropriate requirement” of state or tribal law.⁹⁹

Water quality standards consist of designated uses, criteria (narrative and numeric), and an antidegradation policy, which together provide environmental benchmarks for each class of water body. In practice, narrative and numeric criteria are often the clearest benchmarks for assessment of potential project impacts.

Across the country water quality standards have been developed for different open water bodies such as lakes, rivers and estuaries. In most areas of the country, however, water quality standards have not been developed specifically for wetlands. Wetland types vary over a wide gradient of physical, chemical and biological conditions that do not always reflect the characteristics of adjacent open water bodies. Therefore, the application of open water standards to wetlands can present challenges. One way to help ensure comprehensive consideration of wetlands in the §401 certification process is by creating wetland-specific water quality standards. Several states rely on their antidegradation policies for developing certification conditions. South Carolina has developed an implementation manual for applying its antidegradation policy to wetlands which has helped them more comprehensively assess wetlands impacts.¹⁰⁰

⁹⁸ CWA §303(c)(2)(A); 33 USC 1313 (c)(2)(A).

⁹⁹ They fall under the, “other appropriate requirement of State law set forth in such certification” requirement of 33 USC 1341(d); CWA §401(d).

¹⁰⁰ Antidegradation Implementation for Water Quality Protection in South Carolina. Department of Health and Environmental Control, Bureau of Water. July 1998. <http://www.scdhec.net/environment/water/docs/antideg.pdf>

For more information on water quality standards see the *National Guidance on Water Quality Standards for Wetlands*¹⁰¹, the *Water Quality Standards Handbook*¹⁰², or Section II of the April 1998 Advance Notice of Proposed Rule Making seeking comments from interested parties on possible revisions to the Water Quality Standards Regulation at 40 CFR Part 131.¹⁰³

3. 401 Certification Considerations: Effluent Guidelines, New Source Performance Standards and Toxics

In addition to water quality standards, §401 certification decisions must reflect consistency with effluent guidelines, New Source Performance Standards (NSPS), the CWA's toxics provisions, and other considerations.¹⁰⁴

Effluent guidelines are national technology-based effluent limitations for the discharge of pollutants directly to surface waters and to publicly owned treatment works (POTWs).¹⁰⁵ Effluent guidelines are developed for a wide range of specific industrial sectors and discharges -- from manufacturing to agricultural and service industries. As of 2010, effluent guidelines have been issued for 55 industry sectors and subsectors.¹⁰⁶ National effluent guideline regulations typically specify maximum daily allowable concentration and a 30-day average for a pollutant that may be discharged by facilities within the targeted industry, often per unit of production.¹⁰⁷ Regardless of the quality of the receiving water, all permits must include effluent limitations at least as stringent as those called for under the effluent guidelines.¹⁰⁸ While effluent guidelines serve as a national minimum of pollution control, the CWA requires permitting authorities to develop more stringent water quality-based standards if the effluent guideline requirements are insufficient to meet water quality standards on a particular water body.¹⁰⁹

NSPS are technology-based discharge limits placed on new facilities. They are developed similarly to effluent guidelines, tailored to specific industrial sectors, and applicable nationwide regardless of the quality of the receiving water.¹¹⁰ As a general rule, NSPS are more stringent than effluent limitations guidelines placed on existing sources in the same industrial sector.

4. 401 Certification Considerations: Consistency With Other Appropriate Requirements of State and Tribal Law

¹⁰¹ National Guidance: Water Quality Standards for Wetlands. US EPA. July 1990. pvii. as Appendix B to Chapter 2 - General Program Guidance of the Water Quality Standards Handbook, December, 1983.

¹⁰² Water Quality Standards Handbook, Second Edition. US EPA. September 1993.

¹⁰³ Found on EPA's website at <http://www.epa.gov/waterscience/standards/laws.htm>; Federal Register: July 7, 1998 (Volume 63, Number 129), Page 36741-36806, From the Federal Register Online via GPO Access, wais.access.gpo.gov, DOCID:fr07jy98-27.

¹⁰⁴ CWA §404(a)(1); 33 USC 1341(a)(1).

¹⁰⁵ CWA §304(b); 33 USC 1314(b).

¹⁰⁶ See CWA section 307(b) and (c); and CWA section 402(a) (1); EPA's Industrial Limitations Guidelines <http://www.epa.gov/waterscience/guide/industry.html>.

¹⁰⁷ CWA section 307(b) and (c); and CWA section 402(a) (1); 40 CFR §425.01-§620 (effluent guidelines).

¹⁰⁸ Exceptions to this statement include where a facility is eligible for a variance from the effluent guideline limitation, such as under the Fundamentally Different Factors (FDF) variance, CWA §301(n), 33 USC 1311(n). Similar variances from effluent guidelines can be found at CWA § 301, 33 USC §1311. For a general discussion see: Water Quality Standards Handbook. Second Edition. US EPA. August 1994. Chapter 7.6.3.

¹⁰⁹ CWA §301(b)(1)(C), §303(e)(3)(A); 33 USC 131(b)(1)(C), 1313(e)(3)(A); 40 CFR 122.44(d). Effluent guidelines may be insufficient to meet water quality standards in a number of circumstances, such as where a particular waterbody receives discharges from numerous facilities, or flows are low during some times of the year.

¹¹⁰ CWA §306(b)(1)(B); 33 USC 1316(b)(1)(B).

Water quality certifications under §401 reflect not only that the licensed or permitted activity and discharge will be consistent with the specific CWA provisions identified in sections 401(a) and (d), but also with “any other appropriate requirements of State [and Tribal] law.”¹¹¹ Some State regulations explicitly identify considerations relevant for §401 certification, while others do not. For example, Ohio’s regulations state that certification may be denied if the activity will “result in adverse long or short term impact on water quality.”¹¹² Similarly, river designation under the Wild and Scenic Rivers Act might be a relevant consideration independent of a state or tribe’s water quality standards.¹¹³ For example, Georgia considers a suite of other state regulations under its review including compliance with the state Erosion and Sedimentation Act for buffer integrity, construction and post-construction stormwater management, and the adequacy of mitigation. In addition, the Georgia water quality certification authority also coordinates with the Coastal Resources Division to insure project compliance with coastal protection regulations. Another relevant consideration when determining if granting 401 certification would be appropriate is the existence of state or tribal laws protecting threatened and endangered species, particularly where the species plays a role in maintaining water quality or if their presence is an aspect of a designated use. Also relevant may be other state and tribal wildlife laws addressing habitat characteristics necessary for species identified in a waterbody’s designated use.

Similar to the discussion in section *III.C.2. 401 Certification Consideration: Consistency with Water Quality Standards*, protection of the cultural or religious value of waters expressed in state or tribal law can also be relevant to a certification decision, even when not included as part of a water quality standard.¹¹⁴

D. Conditioning Federal Licenses and Permits Through §401 Certification

States and tribes frequently place conditions on their water quality certifications when such conditions are deemed necessary to ensure compliance with the identified CWA provisions and any other appropriate requirements of state or tribal laws.¹¹⁵ These §401 certification conditions must be included in the resulting federal permit or license.¹¹⁶

Many state and tribal governments use §401 certification as one of their primary regulatory tools for protecting water quality.¹¹⁷ Some states frequently grant §401 certification unconditionally, while other states have a set of basic conditions involving Best Management Practices (BMPs) that are attached to most permits or licenses.¹¹⁸

¹¹¹ CWA §404(d); 33 USC §1341(d).

¹¹² OH ADC 3745-32-05 (B).

¹¹³ 16 USC §1271.

¹¹⁴ Ceremonial use standards were upheld by the 10th Circuit Court of Appeals in *Albuquerque v. Browner*, 97 F.3d 415, 423 (1996).

¹¹⁵ CWA §401(d); 33 USC 1341(d).

¹¹⁶ CWA §401(d); 33 USC 1341(d). *See also, e.g., American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 107 (2nd Cir 1997); *Department of Interior v. FERC*, 129 P.U.R.4th 632, 952 F.2d 548 (DC Cir 1992).

¹¹⁷ *State Wetland Program Evaluation: Phase I*, Environmental Law Institute, 2005; *State Wetland Program Evaluation: Phase II*, Environmental Law Institute, 2006.

¹¹⁸ *State Wetland Program Evaluation: Phase I*, Environmental Law Institute, 2005; *State Wetland Program Evaluation: Phase II*, Environmental Law Institute, 2006.

In addition to CWA-derived requirements, §401 certification conditions may be based on “any other appropriate requirement of State [or Tribal] law set forth in such certification.”¹¹⁹ The ability to condition §401 certifications has been used by states and tribes to ensure that water quality has been comprehensively addressed in the design and implementation of projects and that unavoidable impacts will be mitigated. For example, North Carolina regulators believe that the mitigation demanded in their §401 certification conditions, specifically the requirement for at least 1:1 restoration or creation for wetland loss, allows the goal of No Net Loss of wetlands to be met at the state level.

As stated earlier, all conditions in a §401 certification must be included in any resulting federal permit or license, and the federal agency must incorporate the conditions without amendment.¹²⁰ The U.S. Supreme Court stated in 2006, “[i]t is still the case that, when a State has issued a certification covering a discharge that adds no pollutant, no federal agency will be deemed to have authority under NEPA to ‘review’ any limitations or the adequacy of the §401 certification.”¹²¹ The federal permitting agency does not have authority to review and amend the conditions on a §401 certification. All conditions must be included in the permit or license or the permit or license may not be issued.¹²²

As discussed in the dispute resolution section below, federal courts have established that the state or tribal court system is the proper forum to review the substance of certification decisions¹²³, including the consistency of the conditions with CWA §401 and state or tribal water quality goals.¹²⁴ It is advisable that conditions placed on a §401 certification include a reference to the law or regulation that was the impetus for that condition.¹²⁵

1. Appropriate Conditions

Section 401 provides that:

Any certification provided under this section [401] shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [enumerated provisions of the CWA]... and with any other appropriate requirement of State law set forth in such certification.¹²⁶

¹¹⁹ CWA §401(d); 33 USC 1341(d).

¹²⁰ *American Rivers, Inc. v. FERC.*, 129 F.3d 99, 107 (2nd Cir 1997).

¹²¹ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006); Also supported by, *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1125 (DC Cir. 1971).

¹²² CWA §401(d); 33 USC 1341(d). *American Rivers* at 110-111.

¹²³ The Supreme Court has at least implied that a remedy may be had in federal court, at least with respect to certifications involving FERC hydro licenses. In *Jefferson County PUD*, 511 U.S. 700 (1994), the Court stated that “[i]f FERC issues a license containing a stream flow condition with which petitioners disagree, they may pursue judicial remedies at that time.” Since appeals of FERC licensing orders may be had only in the federal courts of appeals, this statement implies – perhaps confusingly – that the federal courts may examine the merits of conditions contained in a water quality certification in the context of reviewing a FERC order.

¹²⁴ *US v. Marathon Development Corporation*, 867 F.2d 96, 102 (1st Cir. 1989); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir 1982); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

¹²⁵ See e.g., 40 CFR 124.53(e)(2).

¹²⁶ 33 USC 1341(d); CWA §401(d).

Accordingly, a state or tribal certification should incorporate those conditions necessary to ensure a resulting federal license or permit will include effluent limitations at least as stringent as the applicable national technology-based guidelines established under the CWA, and as stringent as needed to attain and maintain water quality standards, including their designated uses and criteria. Under CWA §401(d) the water quality concerns to consider, and the range of potential conditions available to address those concerns, extend to any provision of state or tribal law relating to the aquatic resource.

Considerations can be quite broad so long as they relate to water quality. The U.S. Supreme Court has stated that, once the threshold of a discharge is reached (necessary for §401 certification to be applicable), the conditions and limitations included in the certification may address the permitted activity as a whole.¹²⁷

Certification may address concerns related to the integrity of the aquatic resource and need not be specifically tied to a discharge.

As the Supreme Court pointed out, “§401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”¹²⁸ For example, the Supreme Court upheld the imposition of minimum stream flows to support spawning salmon in the certification of a proposed hydroelectric dam in Washington State.¹²⁹

2. Role of Monitoring and Mitigation

Conditions accompanying §401 certifications may include monitoring requirements and compensatory mitigation if a state or tribe believes them necessary to comply with the CWA or appropriate requirements of state or tribal laws.¹³¹ Several states have included monitoring and reporting requirements as §401 conditions.¹³² Such requirements help the state determine whether water quality is being degraded. In addition, monitoring and reporting requirements allow agencies to assess the effect of operational practices and conditions on water quality in order to shape the development of certification decisions and conditions in the future. As an

The U.S. Supreme Court ruled in *PUD v. Washington Department of Ecology*. that:

“Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth “any effluent limitations and other limitations ... necessary to assure that *any applicant*” will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a “discharge.” The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose “other limitations” on the project in general to assure compliance with various provisions of the Clean Water Act and with “any other appropriate requirement of State law.” Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post*, at 1916, we see no such anomaly. Section 401(a)(1) identifies the category of activities subject to certification--namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”¹³⁰

¹²⁷ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).

¹²⁸ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).

¹²⁹ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).

¹³⁰ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 711-12 (1994).

¹³¹ CWA §401(d), 33 USC 1341(d).

¹³² Missouri, Confederated Tribes of the Warm Springs Reservation, and North Carolina, among others.

added benefit, monitoring and reporting helps applicants see and understand the impact, or averted impact, on water quality of their permitted actions. Monitoring and reporting helps to educate the regulated community about their impact on water quality and is essential for institutional learning to guide future certification decisions.

Mitigation requirements are often included in certification conditions to set the location, type, and extent of mitigation already required for a §404 dredge and fill permit or other permits. Although state and tribal certification regulations and conditions can require mitigation for any federal permit or license, mitigation is most commonly associated with CWA §404, under which EPA and the Corps follows the mitigation framework set out in the §404(b)(1) guidelines to evaluate applications for §404 dredge and fill permits. Missouri developed mitigation guidelines which regulators have implemented through CWA 401 certifications to increase the mitigation obtained from Corps permits. Some states have also elected to require mitigation in certifications for federal permits and licenses other than under §404, such as for FERC licenses. When mitigation is required for any permit or license, the state or tribe considers whether sufficient assurances should be incorporated into the certification to ensure the long-term functional success of the project. In North Carolina, for example, mitigation projects must be permanently protected by conservation easements or other similar protections.¹³³

3. State and Tribal Laws and Certification Conditions

State and tribal laws pertaining to water quality are used to guide decision making in the §401 certification process. As discussed above, conditions are developed to ensure compliance with the CWA or other appropriate requirements of state or tribal laws. State or tribal water quality standards, developed under the CWA and approved by EPA, are often the initial standard considered by states and tribes when drafting conditions. Also relevant is any state or tribal law establishing a more stringent standard or goal for water quality. Applicable state and tribal laws may establish quantitative standards, or narrative criteria that set qualitative goals. For example, Virginia has established a “No Net Loss” of wetland acreage and function goal in statute¹³⁴ and the state often relies on it when certifying wetlands projects to require avoidance, minimization, and - when necessary - mitigation measures.

Some states have laws that limit their agencies’ abilities to impose environmental requirements more stringent than those imposed by federal law, commonly referred to as “No More Stringent” laws. Section 401 certification programs in states with any type of restriction may wish to develop a process that ensures compatibility between their §401 certification and the limitation on stringency. Texas law prevents the state from permitting the discharge of dredged or fill material into waters of the state, but does not limit the state’s role in the 401 water quality certification process.¹³⁵ However, budget constraints led to a reduction in the resources available for the state’s 401 certification review activities. In response, the state developed a two-tiered system of review under a Memorandum of Agreement with the Corps. For projects under the impact thresholds identified as Tier 1, water quality certification is essentially waived by the state if the applicant self-selects one Best Management Practice (BMP) from each of three

¹³³ N.C. Division of Water Quality, Wetlands/401 Unit, Project Specific Condition List, July 2004 (Version 2). 18 pages; For more information on federal regulation, guidance and research on the use and performance of mitigation under the CWA and the Rivers and Harbors Act visit the <http://www.epa.gov/wetlandsmitigation/>.

¹³⁴ Code of Virginia § 62.1-44.15:21; Explained in regulation as “no net loss of wetland acreage and functions or stream functions and water quality benefits” 9VAC25-210-80.B.1(k)(5).

¹³⁵ Texas Water Code Title 2. Subtitle D. Chapter 26. Section 26.027(d).

classes to become conditions on their Corps permit.¹³⁶ While Texas does not individually review Tier 1 projects, it does develop the BMP options and requirements applicants must follow. Tier 2 projects receive individual state §401 water quality certification review.

E. Certification Process

CWA section 401 indicates that an applicant for a federal permit or license must include as part of the application for the federal permit a 401 certification or waiver¹³⁷, implying that federal agencies would not evaluate an application for a permit or license until the §401 certification decision is made. In practice, states and tribes frequently review certification requests while the federal permitting or licensing agency is reviewing the project application.¹³⁸

1. Regulations Describing §401 Certification

Although regulations or guidelines on implementation of §401 are not required under the CWA, establishing a procedure by which certification decisions are made, and clarifying what information will be used to make those decisions, helps educate and inform applicants and the public about the CWA 401 process and the importance of water quality protection. State and Federal Section 401 certification regulations and guidelines vary in their detail. Some define the specific quantitative and qualitative limitations or standards used to assess aquatic resource impacts, while others merely note where applications for §401 certification should be sent.

States that have developed implementation guidelines for making §401 certification decisions have found them very useful in helping to ensure the project applicant, agency staff, and the general public understand the §401 process and requirements. Some state and tribal laws and regulations define specific elements of the §401 certification process. For example, a particularly important component of the 401 process is a state or tribal definition of what constitutes a complete application. Because the timeframe for 401 certification review starts upon receipt of a complete application¹³⁹, inadvertent waiver due to passage of time is less likely where the standard for a complete application is well-defined.

California has defined a complete application as, “an application that includes all information and items and the fee deposit required.” California’s regulations identify a detailed list of required application information including: full contact information of applicant; technical description of full activity through the final stage; identification of all federal permits or licenses being sought and all supporting information and correspondence produced for those permits or license(s) both draft and final; the correct certification fee; and a complete project description.¹⁴⁰ The California regulation goes on to clarify that a complete project description identifies receiving waterbody(ies) and impacts, location, mitigation, all avoidance and minimization

¹³⁶ Memorandum of Agreement Between the U.S. Army Corps of Engineers and the Texas Natural Resource Conservation Commission on Section 401 Certification Procedures, August 17, 2000.

¹³⁷ CWA §401(a)(1); .33 USC §1341(a)(1).

¹³⁸ An example of how the process in practice is not always as linear as the CWA suggests is FERC’s licensing regulations. Under those regulations, once the Commission determines that the application is complete, it issues a “Ready for Environmental Analysis” notice instructing the license applicant to request water quality certification from the state certifying agency within 60 days of notice issuance.

¹³⁹ The Fourth Circuit observed that certification agencies prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

¹⁴⁰ CACR Title 23. Division 3. Chapter 28. Article 4. § 3856. Contents of a Complete Application.

efforts, and a brief list with the estimated adverse impacts of all projects implemented by the applicant within the last five years (or planned for implementation within the next five years) that are in any way related to the proposed activity or receiving water body(ies).¹⁴¹

The state of North Carolina's administrative code identifies the information required in an application for §401 certification, including maps and a description of the receiving waters, the discharge, the activity, and the applicant. In addition, North Carolina regulations reserve the right to request additional information and conduct on site investigations as deemed necessary by North Carolina Department of Environmental Health and Natural Resources.¹⁴²

State implementation guidelines may be codified in statute or regulations, or described in guidance. A description of the §401 certification implementation process typically addresses standard operating procedures (SOPs) and the scope of review in terms of applicable state provisions, effects over the lifetime of the project, and certifying the operation of the facility in the construction certification. In addition, maintaining a list of all of the laws, regulations, and guidance documents referenced during §401 review can help ensure consistent application of standing policies.

2. Certification Practices Viewed as Effective by States or Tribes

Certification practices vary across States and Tribes. Some states have explicit procedures calling for comprehensive documentation of the rationale used to make certification decisions, while others adopt a less formal approach. In general, several states have found that providing comprehensive and detailed information in certifications and guidance on the certification review process and standards of review allows 401 certification to serve as an effective water quality protection tool while minimizing administrative costs and maximizing public transparency.

a. Substance of Certifications

Although not all federal licenses and permits reviewed under §401 will warrant conditioning, §401 certification is an important (and, sometimes, the only) regulatory opportunity to address water quality in draft federal permits and licenses. Therefore, when necessary, states and tribes should seek to include conditions that protect against the full range of reasonably possible impacts.

Conditions placed on §401 certifications should be as specific as necessary to ensure that water quality will be protected. Conditions that enumerate "how" to address "what" potential adverse effect from "where" help all parties understand what is being called for. As a result, conditions that are specific are more likely to be consistent with water quality standards and protect aquatic resources in accordance with the water quality goals of the state or tribe. For example, where protection of sensitive fisheries is a concern, some states and tribes have found it helpful to specify minimum flow volumes or regimes and stocking practices including species, size class, number, frequency and location.

In some circumstances, the provisions states or tribes would wish to see reflected in the permit or license can be achieved through early discussions with the applicants, rather than through formally conditioning the 401 certification. Some states such as North Carolina and

¹⁴¹ CACR Title 23. Division 3. Chapter 28. Article 4. § 3856. Contents of a Complete Application.

¹⁴² 15A NC ADC 2H.0502.

Oregon use the comment period when project proponents are developing their applications for Corps and state permits to give applicants the chance to include in the project description the changes that are likely to be required anyway. The use of Best Management Practices (BMPs) and practices needed for Total Maximum Daily Load (TMDL) implementation are often added to projects during this stage. BMPs can include such actions as using constructed wetlands or bioretention areas rather than retention ponds for catching nutrients and sediments. A related action often recommended in Kansas is the creation of a lake protection plan for developments around old watershed dams that were previously used for flood control and agriculture.¹⁴³ The lake protection plans emphasize BMPs around the lake and informs the residents that discharges from the water body that cause water quality exceedences downstream may result in violations and enforcement actions. In addition, Kansas has developed a coordination group of most of the state and federal natural resource agencies that meets quarterly and shares information on BMPs, TMDLs, water quality standards, federal and state regulations including mitigation regulations, relevant literature references and similar resources useful to §401 and other programs. The group also works to coordinate technical assistance for permittees (of various programs) needing help understanding and implementing their permit requirements or state expectations.

In addition to carefully crafted and detailed conditions placed on the original permit, re-opener provisions and deed notifications have been used where the state or tribal certifying agency anticipates changes in water quality standards or other considerations. Section 401 certification conditions that call for interaction with the state or tribe when a specified action or condition occurs are often called ‘adaptive management’ conditions and may help to ensure that water quality goals are met under changing conditions. In the context of hydropower licensing adaptive management is a process in which the licensee and stakeholders collaborate on “fine tuning” required environmental measures within a Commission prescribed range. For example, in response to a 401 certification adaptive management condition, FERC may require in a license a minimum flow between 100 and 500 cubic feet per second to protect a particular resource and within that range of flow the licensee and certifying agency make flow decisions on a reoccurring basis depending on the conditions occurring at the time. Some states have included an adaptive management condition in their 401 certification for FERC hydroelectric licenses that require facility operators to get review and approval of a dredging management plan prior to dredging operations associated with the dam. Adaptive management in general helps to anticipate and address potential future changes in the circumstances used as the basis for the 401 certification decisions. For example, Oregon regularly includes re-opener clauses when certifying Corps permits and under state law may modify the certification, with public comment, if water quality standards change.¹⁴⁴

Another approach to extend the effect of 401 certification conditions is to require deed notifications to be placed on the land title for all remaining jurisdictional waters (and buffers where applicable). This helps to alert future land owners to permit requirements. As noted in section *III.C.1. Basis for Certification Decisions – Generally* above, North Carolina maintains a list of issues, evaluation tools and standard conditions including re-opener and deed notification provisions that are reviewed during every §401 certification evaluation.¹⁴⁵ In fact, North Carolina

¹⁴³ In Kansas this is common for old impoundments.

¹⁴⁴ Oregon Administrative Rules 340-048-0050.

¹⁴⁵ N.C. Division of Water Quality, Wetlands/401 Unit, Project Specific Condition List, July 2004 (Version 2). 18 pages.

includes a re-opener clause on almost all certifications issued. North Carolina §401 staff have also noted several applicants who indicated they saw the deed notification and realized they needed a certification.

b. Procedures used to Minimize the Administrative Burden of Certification

Many states and tribes have adopted procedures that minimize administrative burden by merging their 401 certification application and public notice process with those of the federal licensing or permitting agency. For example, many states and tribes have established joint applications and public notice arrangements with Corps Districts for CWA §404 permits and RHA §9 and §10 permits. Joint procedures help to ensure that all available project information is provided to all parties while simplifying the administrative requirements for applicants. Such procedures ensure that public comments on a project are collected at one time and provided to all relevant agencies. A number of states and tribes use the notice date as the start of the countdown to automatic waiver of certification, provided that they have received a complete application, which can be defined by the state or tribe.¹⁴⁶ A particular benefit of joint application and public notice requirements is that they help improve communication and coordination between the state and tribal agencies and the federal agencies while establishing a standard information requirement for both applications.

Close coordination with the federal permitting or licensing authority can provide certification agencies with valuable access to the applicant prior to the official request for certification. Several states, including Oregon, Georgia, Montana and Kansas, rely heavily on the pre-application consultation process to provide an opportunity to discuss potential water quality concerns and obtain changes to the proposed project prior to official application for a permit or license and certification. Kansas uses pre-application meetings for a variety of purposes. Along with the standard information gathering and dissemination function, Kansas also attempts to use pre-application meetings to discuss low-impact and smart growth design features with the applicant and other agencies involved. In addition, Kansas focuses on communication within affected watersheds to ensure that proposed projects will not disrupt other permitted activities in the watershed such as Public Water Supplies, Waste Water Treatment Plants and other permittees. Kansas has found that assessing a project in regard to the existing impacts and uses of the watershed is especially important when considering changes to channel morphology and other baseline conditions upon which other permittees or users rely. Montana uses pre-application meetings to discuss and distribute copies of their water quality standards, a stormwater / erosion control handbook, and information pertinent to other permits the applicant might need relative to other permitting authorities. Georgia works to have projects 'modified to address concerns' during the application process, so that the main water quality issues are addressed prior to final certification. Oregon provides information to the applicant on BMPs and fact sheets about water quality, including *Stormwater Management Plan Submission Guidelines for Removal/Fill Permit Applications Which Involve Impervious Surfaces*.¹⁴⁷

¹⁴⁶ See e.g., *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1111-1112 (4th Cir 1989). When invalidating a FERC license issued without a 401 certification, the Fourth Circuit referenced FERC's regulations (18 C.F.R. § 4.38(c)(2)) requiring water quality certification requests be made in compliance with state law. In this instance Virginia's application requirements for 401 certification defined a complete application.

¹⁴⁷ Oregon Department of Environmental Quality, *Stormwater Management Plan Submission Guidelines for Removal/Fill Permit Applications Which Involve Impervious Surfaces*. (2005).

Certification review can also take many forms within a state or tribal government. Some jurisdictions conduct certification review through one office for all projects (e.g. North Carolina, Nebraska, Georgia, Confederated Salish and Kootenai Tribes of the Flathead Reservation, and Pueblo of Sandia). Alternatively, other jurisdictions separate certification review into project type such as FERC license or Corps permit (e.g. Oregon or Montana). In addition, certification review may be a state or tribe's only regulatory look at a project affecting water quality or it may run parallel to review for other state or tribal permits.

U.S. v. Marathon Development Corporation:

“Neither the language nor the history of section 404(e) of the Clean Water Act (‘General permits [for dredged or fill material] on State, regional, or nationwide basis’), 33 U.S.C. § 1344(e), suggests that states have any less authority in respect to general permits than they have in respect to individual permits.”¹⁴⁸

As discussed more fully in the *Resolution of §401 Certification Related Disputes* section below, conditions on a federal permit or license are reviewable in state or tribal courts for consistency with water quality standards and other relevant laws. Certification practices discussed above, such as implementation procedures and evaluation criteria, will help to ensure the documentation of the §401 certification decision is thorough, making internal agency and even external legal review of a 401 certification decision easier.

F. Issues Raised by General Permits, After-the-Fact Permits, and Provisional Permits

The Clean Water Act authorizes general permits for activities that do not have significant environmental impacts either individually or cumulatively.¹⁴⁹ General Permits allow projects of a specifically defined type of impact or activity to proceed with limited or no individualized review. Some general permits require only notification to the Federal agency issuing the permit about a proposed project; others do not even require notification. General permits may be developed at and apply to a national or a smaller regional geographic scale. General permits are widely used in the Section 402 NPDES and section 404 permit programs.

A general permit may result in a discharge from a point source into a water of the United States, and as such is subject to the same §401 water quality certification requirements as individual permits, but at the point it is being initially issued and not as it is applied to particular projects. When a state or tribal agency is considering whether to provide §401 certification for a proposed general permit, the agency has the same options as it would for an individual permit or license —grant, deny, condition or waive.¹⁵⁰ Nationwide and Regional General Permits issued by the Army Corps of Engineers under CWA §404 are certified at the issuance and re-issuance of the general permit.

When certification is denied for a Nationwide or Regional General Permit, the District offices of the Army Corps of Engineers have responded primarily in two ways. In some instances Districts allow projects to be covered by a general permit provided the project proponent first

¹⁴⁸ *US v. Marathon Development Corporation*, 867 F.2d 96, 100 (1st Cir. 1989).

¹⁴⁹ *See, e.g.*, CWA §404(e); 33 USC 1344(e); 33 CFR § 330.1(b), 40 CFR §122.28(b)(2).

¹⁵⁰ Demonstrated in general practice nationwide and supported in the 1st Circuit Court of Appeals; *US v. Marathon Development Corporation*, 867 F.2d 96, 100 (1st Cir. 1989).

obtains §401 certification from the state or tribe, for a specific project to be covered by the general permit. The Corps often will issue a provisional authorization that only becomes effective when accompanied by a §401 water quality certification. In other cases, the certifying agency has worked with District to develop a more acceptable General Permit for which the state can provide a certification, that would not need additional certification review when specific projects are covered. When a state or tribe imposes conditions on a Nationwide or Regional General Permit, often the Corps District offices have responded by incorporating the conditions into a state- or tribe-specific version of the Nationwide Permit, or by requiring an individual §401 certification in order to qualify for the General Permit.

EPA-issued CWA §402 general permits are also reviewed by states and tribes under CWA §401. When a state or tribe denies certification the general permit is issued by the Regional Administrator with the notation that the following permit is not valid for that state or tribe's jurisdiction. In addition, if the state or tribe grants certification but imposes conditions on an EPA issued general permit, the conditions are attached to the general permit for application in that area.

If certification has been waived or granted for a general permit, any applicant approved to make use of that general permit faces no further certification review.¹⁵¹

Under limited circumstances, agencies have issued permits authorizing a discharge after a discharge has commenced. For example, after-the-fact permits are sometimes issued under CWA §404 for discharge of dredged or fill material into waters of the U.S. A state or tribe's §401 certification considerations for these after-the-fact permits should be conducted in the same manner as for normal pre-discharge permit applications. The burden of proof remains on the applicant to show that the requirements of the CWA have not been and will not be violated as a result of the activity.

Even in the case of after-the-fact permits, the state or tribe has the option of granting, denying, conditioning or waiving certification. If the applicant fails to adequately demonstrate that the fill activity did not and will not violate the CWA sections enumerated in §401 or any appropriate requirement of state or tribal law, certification should be denied. If certification is denied on an after-the-fact permit, the Corps may not issue a permit

¹⁵¹ Further certification review may be applicable as outlined in the certification conditions (if present) or under §401(a)(3) or (a)(4) .

American Rivers v. FERC:

“First, applicants for state certification may challenge in courts of appropriate jurisdiction any state-imposed condition that exceeds a state's authority under §401. In so doing, licensees will surely protect themselves against state-imposed *ultra vires* conditions. Second, even assuming that certification applicants will not always challenge *ultra vires* state conditions, the Commission may protect its mandate by refusing to issue a license which, as conditioned, conflicts with the F[ederal]P[ower]A[ct]. In so doing, the Commission will not only protect its mandate but also signal to states and licensees the limits of its tolerance.”¹⁵²

In some cases the permitting or licensing authority will issue a provisional authorization that only becomes effective when accompanied by a water quality certification. If certification is waived through the passage of time the applicant may then return to the permitting or licensing authority for a final authorization. If a certification is denied, the provisional authorization never becomes valid, and if certification is granted with conditions the provisional authorization is restricted by those conditions (with or without further modification by the permitting or licensing authority). Provisional authorizations are common in the context of Nationwide or Regional General Permits under CWA §404.

G. Resolution of §401 Certification-Related Disputes

Applicants or others who disagree with the 401 certification, including its conditions, may seek to have the decision reviewed and overturned. Complaints to the federal permitting or licensing agency are unlikely to be effective, since the agencies do not have authority to modify or overturn the state 401 certification. The initial forum for appealing a decision to grant, condition, or deny certification is often a state or tribe's courts or administrative appeals process for which the details are likely to vary among states and tribes. Some jurisdictions have an administrative appeals process that needs to be exhausted prior to proceeding to state or tribal court, while other jurisdictions do not.

Legal Review for §401 Certification

State or Tribal Courts

- Certification decision consistent with water quality standards; other enumerated CWA provisions; and appropriate provisions of state or tribal law

Federal Courts

- Timeframe for automatic waiver of certification
- Re-certification needed due to changes in circumstances outlined in §401(a)(3)
- Whether threshold conditions required for 401 certification to apply are met (i.e., federal permit or license, discharge, water of the U.S.)

Figure 5. Courts of Review for §401 Certifications

If a permit applicant wishes to challenge conditions included in a certification, the “only recourse is to challenge the state certification in state judicial proceedings.”¹⁵³ State or tribal

¹⁵² *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997).

¹⁵³ *US v. Marathon Development Corporation*, 867 F.2d 96, 102 (1st Cir. 1989); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir 1982); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

courts review §401 certification conditions for consistency with state or tribal water quality standards and other provisions of the state judicial proceedings.”¹⁵⁴ Review is typically limited to the question of whether the certifying agency’s decision is supported by the record and is consistent with applicable law (states and tribes often have a standard for administrative behavior similar to the arbitrary or capricious standard established for federal administrative actions).¹⁵⁵

Some issues regarding the §401 certification may be heard in federal administrative proceedings and courts.¹⁵⁶ For example, the federal permitting or licensing authority may review the procedural requirements of §401 certification, including whether the proper state or tribe has certified, whether the state or tribe complied with applicable public notice requirements, and whether the certification decision was timely.¹⁵⁷ In instances where federal permits were issued without the required §401 certification or certification conditions have not been enforced, the courts have found challenges under the citizen suit provisions of the CWA permissible on procedural grounds.¹⁵⁸

H. Enforcement of §401 Certifications

Enforcement practices for §401 certification vary across the country. Many states and tribes assert they may enforce 401 certification conditions using their water quality standards authority. While authority may be available, states and tribes may face challenges due to programmatic funding and support to carry out enforcement actions. Federal agencies also have the authority to enforce 401 certification conditions once incorporated as conditions in their permit or license.

401 certification conditions may be enforced by a variety of parties. The federal issuing agency may enforce the §401 certification conditions placed on permits or licenses as a mandatory requirement of the permit or license.¹⁵⁹ As discussed above, states and tribes assert they may enforce §401 certification conditions directly. In addition, the general public potentially may enforce 401 certification conditions as well; the 9th Circuit Court of Appeals notes that “nothing in the language of the Clean Water Act, the legislative history, or the implementing regulations restricts citizens from enforcing the same conditions of a certificate or permit that a State may enforce.”¹⁶⁰

A challenge with enforcement of 401 certification conditions arises from the fact that, as authors, the state or tribal certifying agency likely best understands what the condition requires

¹⁵⁴ *US v. Marathon Development Corporation*, 867 F.2d 96, 102 (1st Cir. 1989); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir 1982); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

¹⁵⁵ *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997).

¹⁵⁶ *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 107, 111-112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 867 (9th Cir 1993)

¹⁵⁷ *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-111 (2nd Cir 1997); *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006).

¹⁵⁸ *Oregon Natural Desert Association v. Michael P. Dombek*, 151 F.3d 945, 2 (9th Cir.(Or.) 1998); *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 988 (9th Cir 1995).

¹⁵⁹ See e.g., *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 108 (2nd Cir 1997) (“...§ 401(a)(5) of the CWA, 33 U.S.C. § 1341(a)(5), [FN20] which provides the licensing agency (in this case FERC) with authority to enforce the terms of a license--which pursuant to § 401(d) include a state's § 401 certification conditions--once such a federal license has issued.”)

¹⁶⁰ *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 988 (9th Cir 1995).

even though the condition is reflected in a permit or license issued by a federal agency. As a result, some federal agencies are reluctant to enforce 401 certification-derived conditions in their permits. State approaches to 401 certification violations vary. In New Mexico the State will find violations and report them to the Corps for enforcement action. North Carolina enforces violations to their own water quality standards and certification conditions. In Kansas the Corps enforces based on any conditions of the permit that they have jurisdiction over and then hands over the information to state and local authorities for compliance with any independent requirements, and if it is a water quality issue specific to a water quality compliance then enforcement is left to the state. If a Montana Water Quality Act violation occurs related to noncompliance with a 401 Certification condition, Montana's certification program writes the first letter identifying the violation and what needs to be done to reach compliance. If no action is taken the matter is directed to the Department of Environmental Quality Enforcement Division for further action. The Confederated Salish and Kootenai Tribes conduct the initial investigations and the Water Quality Program reports to the Corps, who then works alongside the Tribe on compliance assistance and enforcement when needed.

States and tribes may establish enforcement regulations and programs specifically for §401 certification, or instead simply expand the jurisdiction of existing enforcement programs. The California Water Code establishes civil liability for any person who violates §401 and criminal penalties for any person who knowingly or negligently violates §401, with a penalty chart for each.¹⁶¹

I. Suspension of §401 Certifications

Once a federal permit or license is issued with the required §401 certification, the certification can only be changed under limited circumstances.¹⁶² Certification “may be suspended or revoked by the federal agency...upon the entering of a judgment...that such facility or activity has been operated in violation of the applicable [CWA] provisions.”¹⁶³ This statutory provision suggests that a certifying agency can not revoke or suspend a certification without the action of the federal permitting or licensing authority. In contrast, if a certified permit or license is modified by the applicant or the federal agency, the certification agency has an opportunity to change conditions, but only those affected by the permit or license modification.¹⁶⁴

The federal permitting or licensing agency possesses very limited authority to review state or tribal water quality certifications to change final permit or license conditions after certification has been granted, even at the request of the certifying agency. If certification has already been granted for the construction of a facility and the certifying agency wants to either revise the certification of the construction or issue a new certification for the operation of the facility, the federal agency must assess whether the request for revision complies with §401(a)(3). The request for revision of a certification decision must be timely and in response to

¹⁶¹ Porter-Cologne Water Quality Control Act. CAWC. Division 7. Chapter 5.5. § 13385 Civil Liability. And § 13387 Criminal Penalties.

¹⁶² *Caribbean Petroleum Corporation v. EPA*, 28 F.3d 232, 235 (1st Cir 1994).

¹⁶³ CWA §401(a)(5), 33 USC 1341(a)(5); These provisions include of section 301, 302, 303, 306, and 307.

¹⁶⁴ Under these circumstances the certification agency receives the entire permit for review, even though only the conditions subject to the modification are reopened. *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 867 (9th Cir 1993).

changed circumstances since the issuance of the original certification.¹⁶⁵ The authority to review a final certification decision or the substance of conditions has been reserved to the state or tribal court system (as discussed above in the *Resolution of §401 Certification-Related Disputes* section). If the requirements of §401 (a)(3) have not been met, the federal agency may still use the information and recommendations from the certification agency in formulation of the federal permit or license, but they are not bound to follow the advice of the certifying agency.¹⁶⁶

¹⁶⁵ 33 USC 1341(a)(3); CWA §401(a)(3); *Keating v. FERC*, 927 F.2d 616, 621-622 (DC Cir 1991).

¹⁶⁶ 33 USC 1341(a)(3); CWA §401(a)(3); *Puerto Rico Sun Oil Company v. EPA*, 8 F.3d 73, 79 (1st Cir 1993); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

IV. Leveraging Available Resources

A §401 certification program still needs funding and adequate resources to be implemented fully, even with a solid foundation in federal and state or tribal law and an exemplary staff. This section discusses some of the approaches that states and tribes have taken to leverage available funding, staffing, and data sources.

A. Funding and Permit Fees

States and authorized Tribes¹⁶⁷ vary greatly in their implementation of the program and also in their funding sources which include such diverse sources as general government funds, certification fees, federal grants, and State Departments of Transportation (DOT). Many, but not all, states and tribes augment program budgets with application fees for §401 certification.¹⁶⁸

California Water Code §13160.1:
Federal Certificate Fee

“The state board may establish a reasonable fee schedule to cover the costs incurred...but is not limited to including, the costs incurred in reviewing applications...prescribing terms...and monitoring requirements, enforcing and evaluating compliance...and monitoring requirements, conducting monitoring and modeling, analyzing laboratory samples, reviewing documents..., and administrative costs...The fee schedule may provide for payment of a single fee...or for periodic or annual fees...”¹⁶⁹

States and Tribes establish the fee requirements, schedules and final allocation of the funds collected; practices vary across the country.

Fees vary amongst states and tribes in at least two respects: revenues return either directly to the 401 certification program or to a general fund, and fees are either based on project size or a flat fee. The state of California’s Regional Water Quality Control Boards requires filing fees for §401 certification and related state permits which includes a flat fee based on the activity and a

rate per the volume or area of impact.¹⁷⁰ The fee structure allows for part of the cost of the §401 certification program to be recovered through appropriately set fees that are directed to the California Water Rights Fund.¹⁷¹

In contrast to California, some other states are authorized to charge 401 certification fees that are remitted back to the program. For example, fees for water quality certification in Ohio go back to the agency’s surface water protection budget in accordance with Ohio Revised Code 3745-114 (C). There is a base fee of \$200 plus a review fee which is determined by the

¹⁶⁷ Tribes authorized to use §401 certification authority have Treatment as State (TAS) authority, and typically have developed water quality standards and designated an agency to administer the certification authority, as further discussed in *I.B.I. States and Authorized Tribes* on page 9.

¹⁶⁸ The CWA is silent on administrative fees for 401 certification, neither encouraging nor discouraging their use. Potential use of fees is more dependent on state and tribal law and custom.

¹⁶⁹ Porter-Cologne Water Quality Control Act. CAWC. Division 7. Chapter 3. Article 4. § 13160.1. Federal certificate fee.

¹⁷⁰ Title 23, Division 3, Chapter 9, Article 1, Sections 2200, 2200.4, 2200.5 And 2200.6 of the California Code of Regulations, for fee calculator see http://www.waterboards.ca.gov/water_issues/programs/cwa401/.

¹⁷¹ Porter-Cologne Water Quality Control Act. CAWC. Division 7. Chapter 3. Article 4. § 13160.1. Federal certificate fee.

magnitude of the impact and the funds go back into the agency budget.¹⁷² Ohio's administrative code also establishes that the state can "require that the applicant perform various environmental quality tests," at any point, "prior to the issuance of the §401 water quality certification or prior to, during, or after the discharge of dredged or fill material."¹⁷³

Missouri charges a flat fee of \$75 for any certification request. In contrast, for certification of Corps permits Oregon fees have been based on the amount of removal or fill above set thresholds, unless activities are exempt from fees. Oregon bases application fees for hydroelectric projects on the theoretical horsepower of the proposed project and uses them for the certification program's base funding. In addition, each applicant for hydropower 401 certification must pay for DEQ's costs to review the application and make a decision; these costs are invoiced and are separate from the annual fee.¹⁷⁴

North Carolina's permit fee for §401 certification is \$240 for an impact less than 150 feet of stream or 1 acre of wetlands and \$570 for larger impacts; any changes to or renewals of a certification require a new permit fee before processing will begin.¹⁷⁵ North Carolina also offers express permits, stormwater management plan review, and stream origin and perennial or intermittent determinations that are given priority and turned around twice as fast and cost roughly five times as much; permits and plan reviews starting at \$1000 and stream determinations starting at \$200 for 2 calls per property.¹⁷⁶ In Montana, certification fees are established in regulations as a minimum of \$400.00, or 1% of the gross value of the proposed project, not to exceed \$20,000.00.¹⁷⁷ Authority for certification fees in Montana is based in statutory authority granting ability to charge a fee sufficient to cover the direct and indirect costs of reviewing an application, conducting compliance inspections, monitoring water quality and preparing water quality rules or guidance documents, however in reality most projects eligible for certification in Montana are reviewed under state §318 authorities and assessed a \$250 fee.¹⁷⁸ Many tribal certification programs do not charge any fee for water quality certification.

B. Staffing Sources

States and tribes vary in staff sizes. States with independent permitting authorities for the aquatic resources covered under §401 and additional waters of the state can have very large staffs and budgets. North Carolina has upwards of 40 people working on §401 certification and their permitting program for aquatic resources not covered under the CWA. In contrast, Nebraska has a staff of one-half a Full Time Equivalent (FTE) to address both 401 water quality

¹⁷² Ohio Revised Code 3745-114: \$500 per acre of wetland; \$5 per linear foot or \$200, whichever is greater, for ephemeral streams; \$10 per linear foot or \$200, whichever is greater, for intermittent streams; \$15 per linear foot or \$200, whichever is greater, for perennial streams; \$3 per cubic yard of dredged or fill material for lakes.

¹⁷³ Ohio Revised Code 6111.

¹⁷⁴ Oregon Revised Statute §468.065, (2003).

¹⁷⁵ North Carolina Department of the Environment and Natural Resources, Wetlands/401 Certification Unit, 401 Water Quality Certification Fee Memorandum, <http://h2o.enr.state.nc.us/ncwetlands/fees.html> (accessed 5/4/06).

¹⁷⁶ NC Division of Water Quality, Wetland Buffer Program Express Review Fees (2004), found at http://h2o.enr.state.nc.us/ncwetlands/express_review.htm.

¹⁷⁷ Administrative Rule of Montana 17.30.201(6).

¹⁷⁸ Administrative Rule of Montana 17.30.201(6).

certification for discharges into waters of the US and letters of opinion for impacts to waters that are only state waters.¹⁷⁹

Some agencies that frequently request 401 certification have found it helpful to fund a position in the certification agency dedicated to their project requests. This seems particularly common with State DOTs.¹⁸⁰ Since DOTs are frequent applicants for certification and often involve large complex projects with fragmented impacts that demand significant time and resources to evaluate, they are often very interested in helping speed up the certification review. North Carolina and Oregon have arranged for §401 certification program staff to be funded by their DOT under the conditions that the staff almost exclusively work on DOT projects (ensuring immediate attention and therefore a quicker review turnaround) but answer and report exclusively to the certification program management. In Oregon, the 401 staff for certification of non-hydroelectric projects consists of two to three positions, one of which is periodically DOT funded. In North Carolina the certification program staff is roughly 40 people of which 11 are funded by the DOT. North Carolina also gets funding from other state programs and EPA grants. However resource constraints are handled at the state and tribal agency, the following information may help program staff obtain data and technical resources more easily and perhaps expand the recuperative effect of permit fees.

C. Data Sources

Certification decisions are based on the potential impacts to water quality goals as specified in water quality standards, other CWA provisions identified in Section III.C. *Scope of Review For §401 Certification Decisions* above, and other appropriate water quality based state or tribal laws and regulations.¹⁸¹ However, to support a 401 certification decision, the certifying agency may need additional information on the site, associated aquatic resources, or the effect of the potential impacts, than what may have been included in the application materials. The most relevant source of information to the §401 program is the water quality standards and the information used to develop them. Also helpful may be information used to develop or contained in a Total Maximum Daily Load (TMDL). In addition, other state and tribal departments and agencies such as those implementing the CWA §402 National Pollutant Discharge Elimination System program house information that could be applicable to the potential impacts associated with project proposals. Old certifications should also provide insight into not only the type and extent of information used in the past to assess similar projects but also potential sources of information on the resource, the potential impacts or the possible conditions that would mitigate the effects on water quality. Useful and important data may also be found outside the application and state government sources. For example, the professional community

¹⁷⁹ The letters of opinion identify that the project as proposed or with the listed changes / additions, likely will not violate title 117 Water Quality Standards, however these letters are not legally binding or directly enforceable.

¹⁸⁰ State DOTs and Port authorities also fund positions at in the US Army Corps of Engineers and other permitting agencies. However, no examples have been identified where private entities have funded state or tribal 401 certification positions.

¹⁸¹ 33 USC 1341(d); CWA §401(d); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006); *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994).

including the federal informational tools, professional societies, academic publications and trade journals contain copious amounts of information. But their usefulness is dependent on the extent to which the user can find the most salient information quickly.

1. The Applicant

Information provided by the applicant is the logical first resource to consult when evaluating a proposed project. Since time is often at a premium, the materials received from the applicant can not always be recreated by the certifying agency to ensure accuracy; therefore they must be trusted when verified against the best professional judgment of the staff and outside experts as needed. Several states and Corps Districts have developed lists of consultants and applicants who have established records of accurate submissions, which helps certifying agencies focus their verification efforts on less established or familiar applications and applicants. In some states such as Kansas, applicants must research other permitted impacts and uses in the watershed and alert them to the proposed project, helping to identify and address cumulative and cross project impacts in the watershed.

2. Other State, Tribal or Local Agencies

Other state, tribal and local agencies may also house relevant and valuable information for the certification process. Departments of Transportation conduct large studies of cumulative and secondary impacts to aquatic resources which can be a rich source of information on ways to analyze and address large projects with fragmented impacts. State natural resource inventories are often developed by the cooperative extension service and can provide detailed information on the natural resource base and conservation issues facing the region. Local governments may have developed watershed plans that could provide useful site specific data, many local watershed groups and monitoring efforts are registered through EPA's Adopt Your Watershed program and can be found by searching the website.¹⁸² Similarly, looking at the activities and experiences of neighboring state and tribal water quality certification programs, and their analysis could provide valuable information.

State Natural heritage programs are a good place to find detailed information on aquatic resources, plants, animals, communities, land cover and land ownership. The Natural Heritage Programs focus on providing information on the status and distribution of native animals and plants, emphasizing species of concern and high quality habitats such as wetlands. Heritage specialists collect, verify, and disseminate information to a broad community of users for many applications including the listing and delisting of threatened and endangered species and the development of environmental assessments. In addition, NatureServe works with the network of state (and international) natural heritage programs to provide information about rare and endangered species and threatened ecosystems.¹⁸³ NatureServe collects and manages detailed local information on plants, animals, and ecosystems, and develops information products, data management tools, and conservation services. NatureServe's publications include an analysis of the biodiversity value of geographically isolated wetlands in all 50 states which may be a useful starting point for assessing the habitat value of potentially impacted wetland resources.¹⁸⁴

3. Federal Information Tools

¹⁸² <http://cfpub.epa.gov/surf/locate/index.cfm>

¹⁸³ <http://www.natureserve.org/>.

¹⁸⁴ <http://www.natureserve.org/publications/isolatedwetlands.jsp>.

Many federal programs and agencies develop, collect, disseminate and produce informational tools that could provide valuable information to a certification decision. When using databases that may be more historical than current, it is always important to verify that the data remains valid. The United States Geological Survey (USGS) studies and provides information on a variety of topics including biology, geography, hydrology, geology, regional studies, natural hazards, the environment, and wildlife and human health.¹⁸⁵ The National Wetlands Inventory (NWI) produces and provides information on the characteristics, extent, and status of the nation's wetlands and deepwater habitats and other wildlife habitats.¹⁸⁶ The national wetland plant list, status and trends reports, and other reports focusing on national, geographic or resource specific areas are also available from the NWI.

EPA's Watershed Assessment, Tracking and Environmental Results (WATERS) tool unites water quality information from several independent and unconnected databases and displays the information in maps and reports.¹⁸⁷ The EPA programs covered in WATERS are: water quality standards, water quality inventory (§305(b) report), total maximum daily load (TMDL – §303(d) list), water quality monitoring, NPDES permits, safe drinking water, fish consumption advisories, nonpoint source pollution, nutrient criteria, beach program and vessel sewage discharge. One of the tools in WATERS is the EPA's EnviroMapper which provides access to environmental information in a geographic format.

EnviroMapper can display various types of environmental information, including air releases, drinking water, toxic releases, hazardous wastes, water discharge permits, and Superfund sites. EnviroMapper includes: federal, state, and local information about environmental conditions and features, facility and chemical-based information from the Envirofacts Warehouse, information about surface water features and their environmental condition, the Superfund program's National Priorities List sites, results from environmental sampling and monitoring in the New York City area in the aftermath of the events of September 11, 2001, information on demographic characteristics, and areas served by Brownfields Grantees and select brownfield's properties. It combines interactive maps and aerial photography to locate, display and query brownfield grant types and properties addressed by cities, counties, states, and tribes.

The Natural Resource Conservation Service (NRCS) provides technical expertise in such areas as animal husbandry and clean water, ecological sciences, engineering, resource economics, and social sciences. In particular, the NRCS' expertise focuses on soil science and natural resource conditions and trends in the United States, represented in soil surveys and the National Resources Inventory.¹⁸⁸ Technical guides are the primary scientific references for NRCS. They contain technical information about the conservation of soil, water, air, and related plant and animal resources. The technical guides used in each field office are localized so that they apply specifically to the geographic area for which they are prepared and are referred to as Field Office Technical Guides (FOTGs). The electronic FOTGs (eFOTGs) include automated data bases, computer programs, and other electronic-based materials and are broken into five sections of information: general information, soil and site information, conservation management

¹⁸⁵ <http://www.usgs.gov/science.html>.

¹⁸⁶ <http://www.nwi.fws.gov/>.

¹⁸⁷ <http://www.epa.gov/waters/about/index.html>.

¹⁸⁸ <http://www.nrcs.usda.gov/about/>.

systems, practice standards, and specifications and conservation effects.¹⁸⁹ The NRCS also provides soil survey information through their online mapping tool the Web Soil Survey.¹⁹⁰ Because 401 certification decisions may require consideration of soil characteristics which can affect the aquatic resource impacts of a proposed project, such as stormwater runoff.

Surf Your Watershed is an EPA web based service that helps to locate, use, and share environmental information about states and watersheds.¹⁹¹ Information is provided by 8 digit HUC (Hydrologic Unit Code) but can be accessed using stream name, state, city, zip code, tribe or county. Links to United States Census Bureau information and USGS data on stream flow, science, water use and selected abstracts are provided as well as information on the counties, American Heritage Rivers, National Estuary Programs, states, and watersheds upstream and downstream. Surf Your Watershed contains the following databases: Adopt Your Watershed, Wetlands Restoration Projects, American Heritage Rivers Service and SURF-Environmental Websites Database. Adopt Your Watershed is a database of watershed groups throughout the nation. You can search for a group in your area either by state, zip code, group name, keywords or even stream name. Wetlands Restoration Projects includes self reported information about ongoing wetlands projects organized by state and watershed. American Heritage Rivers Services is a multi-agency initiative to help communities find support for their rivers. The database offers a "yellow pages" directory of services to help communities revitalize their rivers environmentally, economically and culturally. SURF-Environmental Websites Database is a directory of websites dedicated to environmental issues and information. It is searchable by keywords, geography, organization, or even by the information medium.

The USGS' National Hydrography Dataset (NHD) is the underlying data maps for surf your watershed and many other geo-referenced programs however it can also be viewed independently of these other applications.¹⁹² The NHD is a comprehensive set of digital spatial data that contains information about surface water features such as lakes, ponds, streams, rivers, springs and wells. Within the NHD, surface water features are combined to form "reaches," which provide the framework for linking water-related data to the NHD surface water drainage network. These linkages enable the analysis and display of water-related data in upstream and downstream order. The NHD Viewer provides direct access to the NHD through an interactive web viewer.¹⁹³ In addition to the NHD, the USGS also collects surface water data nationally at thousands of sites. The information varies from historical only to daily values or even real time measurements. The USGS also houses a repository of water quality measurements and assessments taken at surface water monitoring stations and independent locations. Both the surface water and water quality information is available through the USGS's National Water Information System (NWIS) website.¹⁹⁴

EPA also hosts two data warehouses for water quality information, the Legacy Data Center (LDC), and STORET. The LDC is a static, archived database and STORET is an operational system actively being populated with water quality data. Both systems contain raw

¹⁸⁹ <http://www.nrcs.usda.gov/technical/efotg/>.

¹⁹⁰ <http://websoilsurvey.nrcs.usda.gov/app/>

¹⁹¹ <http://www.epa.gov/surf/>.

¹⁹² <http://nhd.usgs.gov/>.

¹⁹³ <http://nhd.usgs.gov/data.html>; or directly to the viewer at <http://nhdgeo.usgs.gov/viewer.htm>.

¹⁹⁴ Surface water monitoring: <http://waterdata.usgs.gov/nwis/sw>; Water quality monitoring: <http://waterdata.usgs.gov/nwis/qw>.

biological, chemical, and physical data on surface and ground water collected by federal, state and local agencies, Indian Tribes, volunteer groups, academics, and others. All 50 States, territories, and jurisdictions of the U.S. are represented in these systems. Both the LDC and STORET are web-enabled and available to the public.¹⁹⁵

The Federal Emergency Management Agency (FEMA) publishes flood hazard zone maps which may also be useful in 401 certification assessments. The FEMA Flood Insurance Rate Maps (FIRMs) available online are identified as FIRMette and are free on the Map Service Center website.¹⁹⁶

Note, the above geographic tools are not complete or definitive sources for location specific information. They have been developed using information reported by local, state and regional governments and non-governmental organizations. The presence or absence of information should be treated as informative but not a definitive indication of conditions on the ground.

4. Professional Societies and Private Sector Tools

In addition to state, tribal and federal programs and tools, private industry and professional organizations and their associated journals can provide very detailed information on individual aquatic resource types and impacts. The Society of Wetland Scientists (SWS)¹⁹⁷, American Water Resources Association (AWRA)¹⁹⁸, American Society of Limnology and Oceanography (ASLO)¹⁹⁹, American Fisheries Society (AFS)²⁰⁰, American Society of Ichthyologists and Herpetologists²⁰¹, North American Benthological Society²⁰², and the American Ornithologists' Union²⁰³ are a few such professional organizations that may provide access to valuable information for certification decisions and condition development. Non-profit organizations dedicated to watershed protection also produce many reports, technical guides, and often review and compare assessment methods focusing on everything from site design to watershed modeling and planning – one such organization is the Center for Watershed Protection²⁰⁴ and specifically its Stormwater Manager's Resource Center.²⁰⁵

The number of internet mapping tools available to the public has grown dramatically in recent years and offers users various types of information and levels of detail. Google Earth and Microsoft's Bing are the most popular examples of desktop mapping tools that are novice user friendly, allow for some integration of information from independent sources, and provide satellite imagery.²⁰⁶ For more advanced users Geographic Information System (GIS) platforms

¹⁹⁵ <http://www.epa.gov/storet/index.html>

¹⁹⁶ <http://msc.fema.gov/webapp/wcs/stores/servlet/FemaWelcomeView?storeId=10001&catalogId=10001&langId=-1>

¹⁹⁷ <http://www.sws.org/>.

¹⁹⁸ <http://www.awra.org/index.html>.

¹⁹⁹ <http://aslo.org/index.html>.

²⁰⁰ <http://www.fisheries.org/html/index.shtml>.

²⁰¹ <http://www.asih.org/>.

²⁰² <http://www.benthos.org/index.cfm>.

²⁰³ <http://www.aou.org/>.

²⁰⁴ <http://www.cwp.org/index.html>

²⁰⁵ <http://www.stormwatercenter.net/>

²⁰⁶ Microsoft Bing Maps <http://www.microsoft.com/maps/>; Google Earth <http://earth.google.com/>.

April 2010 Interim

allow users to import existing geo-referenced maps and datasets and create new, or manipulate existing, data layers to produce customized maps and geographic analysis.

Note, the use of any private software for official government business may require licensing fees and agreements.

Appendix A: Clean Water Act Section 401

33 USC 1341; CWA §401

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302 of this title, and there is not an applicable standard under sections 306 and 307 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 511(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or

permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 301, 302, 303, 306, or 307 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 301, 302, 303, 306, or 307 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 301, 302, 303, 306, or 307 of this title.

(6) Except with respect to a permit issued under section 402 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

ATTACHMENT C:

Response by Attorneys General of New York, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Connecticut Department of Energy and Environmental Protection, New York State Department of Environmental Conservation, North Carolina Department of Environmental Quality, and Pennsylvania Department of Environmental Protection to EPA's Request for Pre-Proposal Recommendations Regarding Clean Water Act Section 401 Water Quality Certifications, Docket ID No. EPA-HQ-OW-2018-0855 (May 24, 2019)

RESPONSE BY NEW YORK ATTORNEY GENERAL LETITIA JAMES, CALIFORNIA ATTORNEY GENERAL XAVIER BECERRA, COLORADO ATTORNEY GENERAL PHILIP J. WEISER, CONNECTICUT ATTORNEY GENERAL WILLIAM TONG, MAINE ATTORNEY GENERAL AARON M. FREY, MARYLAND ATTORNEY GENERAL BRIAN FROSH, MASSACHUSETTS ATTORNEY GENERAL MAURA HEALEY, MINNESOTA ATTORNEY GENERAL KEITH ELLISON, NEW JERSEY ATTORNEY GENERAL GURBIR S. GREWAL, NEW MEXICO ATTORNEY GENERAL HECTOR BALDERAS, NORTH CAROLINA ATTORNEY GENERAL JOSHUA H. STEIN, OREGON ATTORNEY GENERAL ELLEN F. ROSENBLUM, PENNSYLVANIA ATTORNEY GENERAL JOSH SHAPIRO, RHODE ISLAND ATTORNEY GENERAL PETER F. NERONHA, VERMONT ATTORNEY GENERAL THOMAS J. DONOVAN, JR., WASHINGTON ATTORNEY GENERAL ROBERT W. FERGUSON, CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, AND PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION TO EPA’S REQUEST FOR PRE-PROPOSAL RECOMMENDATIONS REGARDING CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATIONS

Docket ID: EPA-HQ-OW-2018-0855

The undersigned state attorneys general and environmental agencies submit this letter in response to EPA’s request for comments and recommendations as it considers revising its current guidance on state water quality certifications under Clean Water Act § 401¹ in response to the President’s “Executive Order on Energy Infrastructure and Economic Growth,” issued on April 10, 2019.² The Executive Order directs EPA to evaluate, among other things, “the appropriate scope of water quality reviews” as well as “the nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time,” in order to clear the way for energy development.³

We urge EPA not to weaken its existing guidance and regulations. Section 401 explicitly preserves states’ independent and broad authority to regulate the quality of waters within their borders. Neither the President’s Executive Order nor EPA’s guidance and regulations can contradict or undermine the plain language and congressional intent of section 401.⁴

¹ 33 U.S.C. § 1341 (section 401).

² 84 Fed. Reg. 15,495 (Apr. 15, 2019) (Executive Order).

³ Executive Order § 3(a)(ii), (v).

⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (President cannot use Executive Order to promote policy goals in absence of statutory or constitutional authority); *id.* at 637-38; (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb”); *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013) (“[T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections.”).

EPA's expedited and overly broad "consultation" process fails to provide adequate public notice and opportunity for comment. Additionally, revisions to EPA's existing guidance and regulations are wholly unnecessary, as states efficiently and effectively review thousands of water quality certifications each year. Any revisions to EPA's guidance or regulations must be consistent with the Clean Water Act, preserve the states' broad authority to protect water quality, maintain the flexibility contemplated by the Act for states to follow their own administrative processes, and not limit the one-year review period prescribed by Congress. EPA may not upend the well-established, statutorily mandated role of states in implementing the Clean Water Act's water quality protections within their borders.

I. EPA'S REVIEW OF ITS SECTION 401 GUIDANCE AND REGULATIONS UNDER THE EXECUTIVE ORDER IS PROCEDURALLY DEFICIENT

The process EPA is using to solicit input in response to the Executive Order is procedurally deficient and provides no meaningful notice or opportunity for public comment. EPA has broadly requested "pre-proposal recommendations" from states on "provisions that require clarification within section 401 and related federal regulations and guidance."⁵ EPA has not issued any actual proposal that states can evaluate and respond to with meaningful comments.

Nor has EPA identified with any specificity the issues on which it seeks comment in preparing to revise its guidance or regulations. EPA suggests that states should use the comment period to "provide feedback" following two multi-state conference calls hosted by EPA.⁶ But EPA's efforts to "engage with states" through these "meetings" (as EPA describes them) consisted of little more than two PowerPoint presentations raising more than a dozen broad issues, followed by unstructured discussions.⁷ Follow-up documents published by EPA to summarize the comments received during these discussions show 123 separate comments raised by the states on a range of issues, reflecting the confusion and lack of meaningful structure in EPA's process.⁸ It is impossible to provide meaningful input on the broad swath of section 401 issues raised by the Executive Order and the multi-state discussions during the two conference calls held by EPA on the short timeline EPA has afforded.

Additionally, the Executive Order requires EPA to issue guidance within only sixty days of the issuance of the Executive Order, *or June 8, 2019*, and to issue draft regulations sixty days

⁵ Memorandum from Lauren Kasparek (April 26, 2019) (Docket ID EPA-HQ-OW-2018-0855-0002).

⁶ *Id.*

⁷ *Id.*; *see also* Slideshow on Clean Water Act Section 401 Water Quality Certification: Follow-up State and Tribal Webinar (May 8, 2019) (Docket ID EPA-HQ-OW-2018-0855-0025); Slideshow on Clean Water Act Section 401 Water Quality Certification: Outreach, Feedback, & Next Steps (April 17, 2019) (Docket ID EPA-HQ-OW-2018-0855-0006).

⁸ *See* Follow-up State and Tribal Webinar, Written Input from Participants (May 8, 2019) (Docket ID EPA-HQ-OW-2018-0855-0024); State and Tribal Webinar, Written Input from Participants (April 17, 2019) (Docket ID EPA-HQ-OW-2018-0855-0022).

later, *or August 8, 2019*.⁹ EPA cannot possibly review—let alone meaningfully consider—the many substantive comments it receives on the plethora of issues at stake in the mere 17 days between the close of public comments and the Executive Order’s deadline for issuing new guidance.

EPA’s flawed public engagement process calls into question the legitimacy of any forthcoming guidance or regulatory revisions. If EPA amends its guidance and regulations (and it should not, for the reasons next discussed), it must provide legitimate and meaningful public notice and opportunity for comment.¹⁰

II. EPA’S REVIEW OF ITS SECTION 401 GUIDANCE AND REGULATIONS UNDER THE EXECUTIVE ORDER IS UNNECESSARY

There is no reason to revise EPA’s existing guidance because states are managing their section 401 responsibilities effectively and appropriately. The Executive Order relies on a purported need for revisions to the section 401 guidance and regulations because they are “outdated” and “are causing confusion and uncertainty.”¹¹ Further, statements from EPA Administrator Andrew Wheeler suggest revisions are necessary because states are not implementing section 401 consistently or faithfully.¹² These statements are incorrect.

Rather than exceeding their authority under section 401 or abusing the section 401 process, as the Executive Order and Administrator Wheeler seem to suggest, states efficiently and effectively handle a large volume of section 401 applications annually for a wide range of projects. For example, the New York State Department of Environmental Conservation issued 3,762 water quality certifications in 2018, 5,061 certifications in 2017, and 3,192 certifications in 2016.

⁹ Executive Order § 3(b), (c). *See also* Timeline, Slideshow on Clean Water Act Section 401 Water Quality Certification: Follow-up State and Tribal Webinar, at 10 (Docket ID EPA-HQ-OW-2018-0855-0025).

¹⁰ *See Prometheus Radio Project v. Fed. Comm’n Comm’n*, 652 F.3d 431, 450 (3d Cir. 2011), *cert. denied* 545 U.S. 1123 (2005) (meaningful opportunity for public comment “means enough time with enough information to comment and for the agency to consider and respond to the comments”); *Rural Cellular Ass’n v. Fed. Comm’n’s Comm’n*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (“The opportunity for comment must be a meaningful opportunity, . . . in order to satisfy this requirement, an agency must also remain sufficiently open-minded”); *Levesque v. Block*, 723 F.2d 175, 187 (1st Cir 1983) (“Public comment contributes importantly to self-governance and helps ensure that administrative agencies will consider all relevant factors before acting. To serve these purposes, notice and the opportunity for comment must come at a time when they can feasibly influence the final rule.”).

¹¹ Executive Order § 3.

¹² Press Release on EPA Implementation of Executive Order (April 10, 2019), *available at* <https://www.epa.gov/newsreleases/epa-takes-action-implement-president-trumps-energy-infrastructure-executive-order>.

In the rare circumstances where state certification decisions are challenged, ample administrative and judicial remedies are available. An applicant that objects to the substance of a state's determination under section 401 can seek administrative and court review.¹³ An applicant that believes a state has taken too long to review a section 401 application can raise that argument with the appropriate agency or court.¹⁴ Revision of EPA guidelines or regulations is not necessary to protect applicants' interests.

III. EPA MAY NOT IMPAIR STATES' WELL-ESTABLISHED AUTHORITY TO INDEPENDENTLY EVALUATE THE WATER QUALITY IMPACTS OF FEDERAL PROJECTS ON STATE WATERS

Any revision to EPA's guidance or regulations interpreting section 401 must recognize and preserve the state's primary and well-established authority to protect water quality within their borders. State agencies have "broad discretion" when developing the criteria for their section 401 certifications.¹⁵ The cooperative federalism system Congress established in section 401 makes clear that decisions relating to the scope of state agency review are vested in state agencies as long as they are at least as stringent as the Clean Water Act, not EPA or other federal agencies.¹⁶

The Clean Water Act reflects Congress' policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" of waters within their borders.¹⁷ Consistent with this policy and the Clean Water Act's primary objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"¹⁸ section 401 mandates that

¹³ See, e.g., *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006); *Islander E. Pipeline Co.*, 467 F.3d 295 (2d Cir. 2006) (*Islander East I*); *Constitution Pipeline Co. v. N.Y.S. Dep't of Env'tl. Conservation*, 868 F.3d 87, 90-91 (2d Cir. 2017), *cert. denied* 138 S. Ct. 1697 (2018); *King v. N.C. Env'tl. Mgmt. Comm'n*, 436 S.E.2d 865, 869 (N.C. App Ct. 1993); *Arnold Irrigation Dist. v. Dep't of Env'tl. Qual.*, 717 P.2d 1274, 1276-77 (Or. App. Ct. 1986).

¹⁴ See, e.g., *Millennium Pipeline Co. v. N.Y.S. Dep't of Env'tl. Conservation*, 860 F.3d 696, 701 (D.C. Cir. 2017) (holding that once state agency "has delayed for more than year" an applicant's remedy is to "present evidence of waiver" to relevant federal agency).

¹⁵ *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019).

¹⁶ See *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, Dep't of Interior*, 20 F.3d 1418, 1427 (6th Cir. 1994), *cert. denied* 513 U.S. 927 (1994) (Clean Water Act "sets up a system of 'cooperative federalism' in which states may choose to be primarily responsible for running federally-approved programs").

¹⁷ 33 U.S.C. § 1251(b); see also *id.* § 1370 (preserving states' right to adopt or enforce water quality protections more stringent than federal standards); *Public Util. Dist. No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994) (*PUD No. 1*) ("The Clean Water Act establishes distinct roles for the Federal and State Governments.").

¹⁸ 33 U.S.C. § 1251(a).

[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply [with applicable water quality requirements].¹⁹

Section 401 further provides that the state’s certification “shall set forth any effluent limitations and other limitations . . . necessary to assure that any applicant for a Federal license or permit will comply” with the CWA, “and with any other appropriate requirement of State law.”²⁰ The certification “shall become a condition on any Federal license or permit” for which it is issued.²¹ “No license or permit shall be granted if the certification has been denied by the State[.]”²²

The Supreme Court has recognized that “State certifications under § 401 are essential . . . to preserve state authority to address the broad range of pollution” impacting state water resources.²³ Indeed, section 401 “was meant to ‘continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.’”²⁴ Section 401 thus entitles a state agency to “conduct its own review” of a project’s “likely effects on [state] waterbodies” and to determine “whether those effects would comply with the State’s water quality standards.”²⁵ Where the state agency determines that a project will not comply with state water quality standards, it can “effectively veto[.]” the project, even if the project “has secured approval from a host of other federal and state agencies.”²⁶ Thus, Congress “intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.”²⁷

A state that denies an application for a section 401 certification is exercising its statutorily mandated authority to protect water quality under the cooperative federalism system established by the Clean Water Act. And because those decisions are subject to judicial review, there is no danger of states abusing their power or arbitrarily denying applications for section 401

¹⁹ *Id.* § 1341(a)(1).

²⁰ *Id.* § 1341(d).

²¹ *Id.*

²² *Id.*

²³ *S.D. Warren*, 547 U.S. at 386 (2006); *see also Keating v. Fed. Energy Reg. Comm’n*, 927 F.2d 616, 622 (D.C. Cir. 1991) (Section 401 is “[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them” under the Clean Water Act).

²⁴ *S.D. Warren*, 547 U.S. at 380 (quoting S. Rep. No. 92-414, p. 69 [1971]).

²⁵ *Constitution Pipeline Co.*, 868 F.3d at 101.

²⁶ *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), *cert. denied* 555 U.S. 1046 (2008) (*Islander East II*).

²⁷ *Keating*, 927 F.2d at 622.

certifications. Any attempt to subsume state authority within the federal regulatory process would violate the plain language and purpose of section 401.

IV. EPA MUST PRESERVE STATE AUTHORITY TO CONDITION CERTIFICATION ON COMPLIANCE WITH ANY “APPROPRIATE REQUIREMENT” OF STATE LAW

The Executive Order directs EPA to review its guidance and regulations and consider the “types of conditions that may be appropriate to include in a certification.”²⁸ Section 401 makes clear that when a state issues a section 401 certification, it “shall” include conditions sufficient to ensure that the applicant will comply not only with state water quality standards, but also with “*any other* appropriate requirement of State law.”²⁹ Thus, “Congress provided the States with power to enforce other appropriate State law by imposing conditions on federal licenses for activities that may result in a discharge.”³⁰ Accordingly, “federal courts and agencies are without authority to review the underlying validity of requirements imposed under state law or in a state’s certification.”³¹

EPA’s current guidance appropriately recognizes the wide range of state statutes and regulations that states have deemed “appropriate” under this provision, including laws protecting threatened or endangered species or cultural or religious values of waters.³² EPA cannot curtail the breadth of those state laws. Instead, any revision of the guidance or regulations must preserve the states’ broad authority to enforce appropriate state laws through section 401 conditions.

V. ANY REVISIONS TO EPA’S SECTION 401 GUIDANCE AND REGULATIONS MUST ENSURE THAT STATES CAN COMPLY WITH THEIR OWN ADMINISTRATIVE PROCEDURES WHEN REVIEWING SECTION 401 APPLICATIONS

The Executive Order directs EPA to evaluate several topics related to the timing and scope of state administrative review of section 401 applications, suggesting that EPA’s revised guidance might create federal restrictions on the timing and scope of state administrative processes.³³ This would be a mistake. EPA’s guidance and regulations must preserve the flexibility the Clean Water Act affords for states to design and comply with their own administrative processes when reviewing section 401 certification applications.

²⁸ Executive Order § 3(a)(iii), (v).

²⁹ 33 U.S.C. § 1341(d) (emphasis added); *see also PUD No. 1*, 511 U.S. at 713-14.

³⁰ *S.D. Warren*, 547 U.S. at 386 (citation omitted).

³¹ *Roosevelt Campobello Inter. Park v. U.S. Envtl. Prot. Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982).

³² 2010 Interim Guidance, at 21.

³³ Executive Order § 3(a).

Section 401(a)(1) requires that a state “establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.”³⁴ A state must not only establish such procedures; it must comply with them.³⁵ The Clean Water Act allows state agencies to follow state law when complying with section 401’s public notice and hearing requirement,³⁶ and more broadly when determining whether to issue, condition, or deny a section 401 certification.³⁷ Recognizing that meaningful state agency and public review cannot be rushed, Congress gave states a reasonable period—up to “one year”—to exercise their broad authority pursuant to state administrative procedures (including public notice and, if appropriate, hearings) when making a section 401 certification determination.³⁸

States have established a wide range of efficient and fair administrative procedures, which share certain features designed to enable the thorough review contemplated by section 401.³⁹ Initially, a state reviews a section 401 application to ensure that it includes sufficient information for meaningful review by the state agency and the public. A state that has received a deficient or incomplete application may require the applicant to provide additional information.⁴⁰ The process of obtaining required information is not entirely within the reviewing agency’s control: applicants can frustrate the timeframe for review by failing to provide requested materials necessary to the state’s review of the application.⁴¹ In some cases, states also must await completion of federal

³⁴ 33 U.S.C. § 1341(a)(1).

³⁵ See *City of Tacoma, Wa. v. Fed. Energy Regulatory Comm’n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006).

³⁶ *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl Prot.*, 903 F.3d 65, 75 (3d. Cir. 2018), cert. denied ___ U.S. ___, 2019 WL 1886047 (Apr. 29, 2019) (Clean Water Act section 401 provides states with discretion as to how they establish public notice and/or hearing procedures).

³⁷ See *Berkshire Envtl. Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 112-13, n.1 (1st Cir. 2017) (Clean Water Act section 401 does not affect how agency conducts “internal decision-making before action”); *City of Tacoma, Wa. v. Fed. Energy Regulatory Comm’n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006) (“the decision whether to issue a section 401 certification generally turns on questions of state law”).

³⁸ 33 U.S.C. § 1341(a)(1).

³⁹ See, e.g., 314 Code of Massachusetts Regulations (C.M.R.) § 9.05(3); 6 New York Code of Rules and Regulations (N.Y.C.R.R.) § 621.7(a)(2), (g); 15A North Carolina Administrative Code (N.C.A.C.) § 02H.0503; 250 Rhode Island Code of Regulations (R.I.C.R.) § 150-05-1.17; Vermont Admin. Code (Vt. A.C.) § 16-3-301:13.11; Conn. Gen. Stat. 22a-6h; 23 Cal. Code of Regulations (Ca.C.R.) §§ 3855-3861.

⁴⁰ See, e.g., N.Y. Environmental Conservation Law § 70-0109(2)(a); see also 310 C.M.R. § 4.10(8)(g)3.a.-b.; 314 C.M.R. § 9.05(1); 6 N.Y.C.R.R. §621.7(a), (f); 250 R.I.C.R. § 150-05-1.17(B), (D); Vt. A.C. § 16-3-301:13.3(c)(3).

⁴¹ See, e.g., *Constitution Pipeline*, 868 F.3d at 103.

and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications.⁴²

Once sufficient information supporting an application has been received for a state to deem an application complete, section 401 requires states to provide public notice and encourages public hearings.⁴³ Typically, public notice must be accomplished through publication in one or more local newspapers as well as in official agency publications.⁴⁴ In almost all cases, states must hold a public comment period ranging from fifteen to forty-five days.⁴⁵ To ensure meaningful public review, states appropriately provide extensions of public comment periods for significant projects.⁴⁶ The period of public participation may be further extended in situations where states receive requests for a public hearing.⁴⁷ After the public comment period and any public hearing

⁴² See, e.g., 23 Ca.C.R. §§ 3836(c), 3837(b)(2) (projects subject to section 401 water quality certification must be reviewed under the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., as appropriate, before approval by the State Water Resources Control Board or the Regional Water Quality Control Boards); 6 N.Y.C.R.R. § 621.3(a)(7) (an application is not considered complete until a negative declaration or draft environmental impact statement have been prepared pursuant to state environmental quality review act, ECL article 8).

⁴³ 33 U.S.C. § 1341(a)(1).

⁴⁴ See, e.g., 6 N.Y.C.R.R. § 621.7(a)(2), (c); 15A N.C.A.C. § 02H.0503(a); 250 R.I.C.R. § 150-05-1.17 (D)(1)(a); 9 Va. Admin. Code (Va.A.C.) § 25-210-140(A).

⁴⁵ See, e.g., 5 Col. Code of Regulations § 1002-82.5(B)(1) (30 days); Conn. Gen. Statutes Ann. § 22a-6h(a) (30 days); 314 C.M.R. § 9.05(3)(e) (21 days); 6 N.Y.C.R.R. § 621.7(b)(6) (15 to 45 days); 250 R.I.C.R. § 150-05-1.17(D)(2) (30 days); Va. Code § 62.1-33.15:20(C) (45 days for state agencies to provide comment); 9 Va.A.C. § 25-210-140(B) (30 days for public comment); Vt. A.C. §§ 16-3-301:13.3(c), 13.11(c) (30 days); 23 Ca.C.R. § 3858(a) (at least 21 days).

⁴⁶ See, e.g., Ca. State Water Resources Control Bd., Draft Water Quality Certification Comment Deadline Extended for Application of Southern California Edison Co. (Sept. 27, 2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/big_creek/docs/final_bc_ceqa_draft_cert_notice_extended.pdf; N.Y. Dep't of Env'tl. Conservation, Notice of Supplemental Public Comment Hearing and Extension of Public Comments on Application of Transcontinental Gas Pipe Line Company, LLC (Feb. 13, 2019), https://www.dec.ny.gov/enb/20190213_not2.html.

⁴⁷ See, e.g., Conn. Gen. Stat. 22a-6h(d) (applicant may request public hearing within 30 days of publication of a tentative determination); 250 R.I.C.R. § 150-05-1.17(D)(3) (providing for a mandatory public hearing if enough requests are received, notice of which must be provided fourteen days prior to date of hearing); 15A N.C.A.C. §§ 02H.0503(d), 0504 (notice of public hearing must be given thirty days prior to date of hearing, and record of public hearing must be held open for thirty days after the date of hearing); Vt. A.C. § 16-3-301:13.3(g), (h) (public hearing may be requested during public comment period, and notice of public hearing must be given thirty days before date of hearing).

are complete, the state agency must review and, in many cases, respond to the public comments received before making a certification determination.⁴⁸

Any revision to EPA's section 401 guidance and regulations must be sufficiently flexible to accommodate the variety of state administrative processes described above and ensure states can comply with state administrative procedural requirements. Any attempt by EPA to limit state review to particular materials or a particular timeframe (except as specifically set forth in section 401) may prevent the states from complying with their own administrative standards, preclude meaningful public notice and comment and thorough state review, and impermissibly intrude on the states' primary authority to protect their water quality.

Placing unnecessary limitations on the time-frame for state review will not result, as the Executive Order suggests, in more expedited approval of section 401 applications. If a state agency's review time is unnecessarily restricted by federal regulation or guidance, the agency may be forced to deny applications without prejudice. The applicants would then need to re-apply for a section 401 certification, triggering a new time-period for review and delaying a final decision on the application. A state agency that rushes to approve section 401 certifications pursuant to an arbitrary federal deadline could leave itself open to legal challenge from opponents of approved projects, leading to more project delays through litigation and the possible vacatur of section 401 certifications by the courts. Either situation will result in unnecessary delays and greater uncertainty in the regulatory process.⁴⁹

VI. EPA SHOULD CLARIFY THAT THE TIMEFRAME FOR STATE REVIEW OF A SECTION 401 APPLICATION COMMENCES ONCE A STATE DEEMS AN APPLICATION COMPLETE

A state agency's time for issuing or denying a section 401 certification commences upon "receipt of such request [for certification]."⁵⁰ To be consistent with section 401 and ensure that states can meaningfully exercise their authority to evaluate certification applications and protect state water quality as mandated by the Clean Water Act, EPA should clarify that only receipt of a complete application triggers commencement of the state review period.

The benefits of requiring a complete application before the timeframe for review commences are manifest. Requiring a complete application is necessary to provide public notice and obtain meaningful public comment.⁵¹ After public notice and comment, state agencies generally must review any public comments and determine whether a public hearing is required or

⁴⁸ See, e.g., 310 C.M.R. § 4.10(8)(g) 3.b.; 205 R.I.C.R. §150-05-1.17(D)(4).

⁴⁹ If EPA must issue new guidance, it should clarify that states have, by default, a full year to review Section 401 applications—an approach currently taken by the Federal Energy Regulatory Commission. 18 C.F.R. § 4.34(b)(5)(iii).

⁵⁰ 33 U.S.C. §1341(a)(1).

⁵¹ See, e.g., *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D. W. Va. 2010) (noting that "[c]ompletion and public notice are inextricably linked" and rejecting public notice and comment process undertaken on incomplete application).

appropriate, respond to the comments, and decide whether the application should be granted, granted with conditions, or denied. A state agency required to act within one year of receiving an incomplete application may not be able to conclude that a project would comply with state standards and could be forced to act on an application before this public notice and comment process has concluded (or even commenced). A complete application is also necessary to trigger the one-year waiver period and ensure that states can fully exercise their authority under section 401. Otherwise, applicants could frustrate the state’s mandate to make section 401 determinations by submitting an incomplete or deficient application and waiting until a few days before the expiration of the one-year period to complete their application, thereby depriving states of the ability to meaningfully review the complete application and make a determination within the one-year period. Requiring a complete application avoids this potential for gamesmanship.

Any revisions to EPA’s regulations should adopt the U.S. Army Corps of Engineers’ rule requiring that the time period for state review commences when an agency receives a *complete* application. The Army Corps’ regulations provide that “[i]n determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification.”⁵² When promulgating this regulation, the Army Corps noted generally that “valid requests for certification must be made in accordance with State laws[.]”⁵³ The Army Corps regulation requiring that agency to determine whether a state has received a “valid request” for a certification to trigger commencement of the one-year review period has been upheld as “reasonable” and “permissible in light of the statutory text” of section 401.⁵⁴ EPA should follow the Army Corps’ lead in this respect.

VII. EPA SHOULD CONTINUE TO PROVIDE APPLICANTS WITH THE FLEXIBILITY TO EXTEND ADMINISTRATIVE REVIEW THROUGH THE WITHDRAWAL AND RESUBMISSION OF APPLICATIONS

Any change to EPA’s section 401 guidance or regulations relating to timing should preserve applicants’ flexibility to functionally extend the timeframe for review by permitting the withdrawal and re-submittal of section 401 certification applications to commence a new review period. States sometimes require more than one year to review section 401 applications, especially for particularly large or complex projects or when an applicant fails to provide relevant information in a timely manner. Historically, applicants have chosen to withdraw and resubmit their section

⁵² 33 C.F.R. § 325.2(b)(1)(ii).

⁵³ *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986).

⁵⁴ *AES Sparrows*, 589 F.3d 721, 729 (4th Cir. 2009). In this respect, EPA should decline to follow the approach taken by FERC, which has interpreted the section 401 timeframe as commencing upon receipt of *any* written application, no matter how perfunctory or facially incomplete. *See* 18 C.F.R. § 4.34(b)(5)(iii); *Millennium Pipeline Company, L.L.C.*, 160 FERC ¶ 61,065 (Sept. 15, 2017). Although the Second Circuit upheld FERC’s interpretation of section 401, the Court did not hold that other interpretations of the triggering event would be impermissible. *See N.Y. State Dep’t of Env’tl. Conservation v. Fed. Energy Reg. Comm’n*, 884 F.3d 450, 455-56 (2d Cir. 2018) (*NYSDEC v. FERC*).

401 applications in order to make a new request for a certification, thus creating a new deadline for state action.⁵⁵ The withdrawal-and-resubmittal process is well-established and non-controversial in almost all cases.⁵⁶ The Second Circuit recently recognized the validity of this process, in noting that, if a state needs more time to review a request for a section 401 certification, it can “request that the applicant withdraw and resubmit the application.”⁵⁷ And EPA’s existing guidance, too, recognizes that the withdrawal-and-resubmittal process could be used to “restart[] the certification clock.”⁵⁸ Notably, an applicant that desires an expeditious decision remains free to decline to withdraw and resubmit its application, allowing the state to make a decision on the application as it then stands. Applicants therefore retain the power to ensure that the states act on their application within one year if they so choose, which is consistent with Congress’ intent when it adopted section 401 to protect applicants from a state’s “sheer inactivity” on its application.⁵⁹

⁵⁵ See, e.g., *Constitution Pipeline*, 868 F.3d at 94; *Islander E. Pipeline Co., LLC v. Conn. Dep’t of Env’tl. Prot.*, 482 F.3d 79, 87 (2d Cir. 2006) (*Islander East I*).

⁵⁶ The D.C. Circuit recently rejected the use of the withdrawal and resubmittal process where states and an applicant entered into a written agreement “to defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests” over more than a decade. *Hoopa Valley Tribe v. Fed. Energy Regulatory Comm’n*, 913 F.3d 1099, 1101 (D.C. Cir. 2019). The Court made clear, however, that its decision was narrow and resolving only the “single issue” of “whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification.” *Id.* at 1109 (emphasis added); *accord id.* at 1100-01. The Court expressly declined to determine whether, in different circumstances, the withdrawal and resubmittal of a section 401 application would “restart[] the one-year clock.” *Id.* at 1104. The period for a party to petition the U.S. Supreme Court for a writ of certiorari in that case has not yet expired.

⁵⁷ *NYSDEC v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018).

⁵⁸ EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, at 13 (2010).

⁵⁹ Conf. Rep. No 91-940, 91st Cong., 2d Sess. (1970), reprinted in U.S. Code Cong. & Ad. News 2712, 2741.

CONCLUSION

Revisions to EPA's section 401 guidance and regulations are not necessary. Any revisions that EPA decides to undertake must be consistent with the terms and intent of section 401, which preserves broad state authority over water quality issues.

Dated: May 24, 2019
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ATTACHMENT D:

Declarations Filed in Opposition to EPA's Motion for Remand Without Vacatur in *In re: Clean Water Act Rulemaking*, Case No. 20-cv-04636-WHA (N.D. Ca.)

- 1-Declaration of Eileen Sobeck, California State Water Resources Control Board
- 2-Declaration of Loree' Randall, Washington Department of Ecology
- 3-Declaration of Aimee M. Konowal, Colorado Department of Public Health and Environment
- 4-Declaration of Paul Wokoski, North Carolina Department of Environmental Quality
- 5-Declaration of Rebecca Roose, New Mexico Environment Department
- 6-Declaration of Paul Comba, Nevada Division of Environmental Protection
- 7-Declaration of Corbin J. Gosier, New York Department of Environmental Conservation
- 8-Declaration of Scott E. Sheeley, New York Department of Environmental Conservation
- 9-Declaration of Steve Mrazik, Oregon Department of Environmental Quality

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11
 12 **IN THE UNITED STATES DISTRICT COURT**
 13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14
 15 In Re
 16 Clean Water Act Rulemaking

CASE NO. 20-cv-04636-WHA
 (lead consolidated)
 Applies to all actions

17 **DECLARATION OF EILEEN**
 18 **SOBECK IN SUPPORT OF**
 19 **PLAINTIFFS' OPPOSITION TO**
 20 **MOTION FOR REMAND**

Courtroom: 12, 19th Floor
 Date: August 26, 2021
 Time: 12:00 P.M.

1 1. I am Eileen Sobeck, Executive Director of the State Water Resources Control
2 Board (“State Water Board” or “Board”). I submit this declaration to demonstrate that
3 California’s interests have been and are being adversely impacted by the rule entitled “Clean
4 Water Act Section 401 Certification Rule” (“401 Rule”) promulgated by the United States
5 Environmental Protection Agency (“U.S. EPA”) on July 13, 2020. Although U.S. EPA has
6 announced its intent to reconsider and revise the 401 Rule, it is unlikely to complete the
7 process until spring 2023 at the earliest. Thus, under the schedule proposed by U.S. EPA, the
8 harms experienced by California are ongoing and will continue, at a minimum, for multiple
9 years while the 401 Rule is in effect.

10 2. The 401 Rule has caused and will continue to cause considerable harm to the
11 State of California. Since the September 11, 2020 effective date of the 401 Rule, California’s
12 efforts to protect the state’s water quality have been, and will continue to be, drastically
13 impaired. In addition to the effects on California’s sovereign authority to protect water quality
14 and the resulting environmental harms, California has experienced administrative and
15 programmatic injury. As described below, the 401 Rule creates confusion and uncertainty,
16 complicates the certification process, and delays projects with public health and safety
17 implications. Moreover, the 401 Rule’s harms are particularly acute in the hydropower
18 licensing context, where federal licenses issued by the Federal Energy Regulatory Commission
19 (“FERC”) are in effect for up to 50 years. Without the ability to address the water quality
20 impacts of an activity subject to Section 401 certification as a whole and to modify conditions
21 to protect water quality during the decades-long term of the FERC license, permanent
22 environmental damage is likely to occur. These harms will continue to occur while the 401
23 Rule is in effect.

24 3. In preparing this declaration, I relied on my professional experience and training
25 which have provided me a strong basis to determine ongoing and future harms caused by the
26

1 401 Rule. If called upon to testify about the matters discussed herein, I could and would testify
2 competently hereto.

3 **PERSONAL BACKGROUND**

4 4. I have been employed as the Executive Director of the State Water Board since
5 2017. My duties and responsibilities include overseeing all divisions and offices of the State
6 Water Board, including the Division of Water Rights and the Division of Water Quality. The
7 Division of Water Rights is responsible for issuing Section 401 water quality certifications
8 (“certifications”) for activities or facilities subject to FERC licensing or involving the diversion
9 or use of water. The Division of Water Quality is responsible for issuing certifications related
10 to discharges not associated with a FERC license or appropriation of water. The Division of
11 Water Quality also coordinates certification responsibilities for the nine Regional Water
12 Quality Control Boards (“Regional Water Boards”).

13 5. Prior to joining the State Water Board, I headed the National Oceanic and
14 Atmospheric Administration as the Assistant Administrator at the United States Department of
15 Commerce from 2014 to 2017. Prior to that work, I served as the United States Department of
16 the Interior’s Acting Assistant Secretary for Insular Affairs (2012-2014) and its Deputy
17 Assistant Secretary for Fish, Wildlife and Parks (2009-2012). I also worked for 25 years at the
18 United States Department of Justice, ultimately serving as Deputy Assistant Attorney General
19 for Environment and Natural Resources, from 1999 to 2009. I received my Juris Doctor and
20 Bachelor of Arts degrees from Stanford University.

21 **CERTIFICATIONS ISSUED UNDER CLEAN WATER ACT SECTION 401**

22 6. Section 401 of the Clean Water Act (“Section 401”) requires that every
23 applicant for a federal permit or license for an activity that may result in a discharge to waters
24 of the United States provide a certification from the state in which the discharge occurs that the
25 activity will meet requirements adopted under specific Clean Water Act sections as well as
26

1 “other appropriate requirements of state law.” 33 U.S.C. § 1341(a), (d). Any conditions of
2 issuing such a certification become part of the federal permit or license. *Id.* § 1341(d).

3 7. Section 401 allows each state to designate an agency responsible for reviewing
4 and approving or denying water quality certification requests. 33 U.S.C. § 1341(a)(1). In
5 California, the State Water Board is the agency with certification authority. Cal. Water Code §
6 13160; Cal. Code Regs. tit. 23, §§ 3830-3838, 3855-3861, 3867-3869.

7 8. Section 401 is the means by which the State Water Board ensures federally
8 permitted or licensed projects meet state water requirements.

9 9. In California, the State Water Board and the nine Regional Water Quality
10 Control Boards (collectively, “Water Boards”) issue water quality certifications. The Water
11 Boards issue about 1,000 water quality certifications each year.

12 10. In the past three years, the Water Boards have issued almost 3,000 water quality
13 certifications related to discharges not associated with a FERC license.

14 11. In the past three years, the Division of Water Rights has issued 29 certifications,
15 including amendments, related to FERC licenses or other federal permits or licenses relating to
16 the diversion or use of water.

17 12. The Water Boards most commonly issue certifications for two types of federal
18 permits and licenses: (1) dredge or fill permits issued by the United States Army Corps of
19 Engineers (“USACE”) pursuant to Section 404 of the Clean Water Act; and (2) hydropower
20 licenses issued by FERC.

21 13. The State Water Board issues certifications for discharges that may fall under
22 the jurisdiction of more than one Regional Water Quality Control Board or involve an
23 appropriation of water, a hydroelectric facility where the proposed activity requires a FERC
24 license or amendment to a FERC license, or any other diversion of water for domestic,
25 irrigation, power, municipal, industrial, or other beneficial use.
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1 require the Water Boards to process approximately 135 individual water quality certifications
2 that would otherwise have been addressed by the general water quality certifications. The
3 estimated additional workload associated with these individual water quality certifications is
4 approximately 3,700 staff hours annually for each year the 401 Rule remains in effect. This is
5 roughly equivalent to two full-time staff who, as a result of the 401 Rule, will not be available
6 to work on other, higher water quality priorities for the Water Boards.

7 18. The Water Boards have also had to make programmatic adjustments due to the
8 401 Rule. For example, in some instances where the USACE has found waiver of the Water
9 Boards' Section 401 certification authority based on the 401 Rule, the Water Boards have had
10 to issue additional state water quality approvals, known as waste discharge requirements, to
11 protect water quality. These additional approvals result in greater resource expenditures for
12 largely the same result as under the prior rules.

13 19. Project proponents requesting water quality certification have disputed the
14 applicability of the 401 Rule. For example, some entities challenging certifications issued by
15 the Board have argued that the 401 Rule should be applied retroactively to applications or
16 requests filed before its effective date notwithstanding U.S. EPA guidance to the contrary.
17 This has led to increasingly adversarial proceedings, which result in additional delay and
18 expenditure of resources, even when the 401 Rule does not apply.

19 20. The USACE has also found conditions required to be included in certifications
20 pursuant to California law to be waived under the 401 Rule's requirements. The Emergency
21 Drought Salinity Barrier Project, described below in greater detail, is one such instance.

22 21. The 401 Rule has introduced a high level of uncertainty and confusion into the
23 certification process in California which inhibits, rather than promotes, the system of
24 cooperative federalism established by the Clean Water Act. Both the Lake Fordyce Dam
25 Safety Project and Emergency Drought Salinity Barrier Project, discussed below, show how
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1 this has required Water Boards staff to spend time and resources addressing questions and
2 situations created or left unanswered by the 401 Rule.

3 22. If it remains in effect, the 401 Rule will also have impacts on California’s water
4 quality that will last for multiple generations and may be irreversible. The discussion below
5 regarding certifications for FERC-licensed hydropower facilities demonstrates how the 401
6 Rule significantly restricts California’s ability to ensure that hydropower projects will comply
7 with water quality standards and other state law requirements. Due to the long terms of FERC
8 licenses, which can last up to 50 years, resulting environmental damage will last for decades
9 and possibly permanently.

10 **A. Lake Fordyce Dam Safety Project**

11 23. The Lake Fordyce project provides one example of how the 401 Rule has
12 created uncertainty and confusion, complicating the certification process and consuming
13 additional State Water Board staff resources and time, and delaying projects with public safety
14 implications.

15 24. Lake Fordyce Dam, initially constructed between 1873 and 1882 from soil and
16 rock material, has a long history of seepage. Previous efforts to reduce seepage by
17 constructing new design features and repair existing design features have been unsuccessful.

18 25. While all dams have some seepage, uncontrolled seepage is a safety concern as
19 it can lead to erosion, damage to concrete structures, and dam failure.

20 26. In California, the Division of Safety of Dams (“DSOD”) within the Department
21 of Water Resources regulates dams to prevent failure, safeguard life, and protect property.
22 Lake Fordyce Dam and Fordyce Reservoir are under the jurisdiction of DSOD.

23 27. DSOD has classified Lake Fordyce Dam as having an extremely high
24 downstream hazard potential, meaning that dam failure when Fordyce Reservoir (also referred
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1 to as Lake Fordyce) is full is expected to cause considerable loss of human life or result in an
2 inundation area with a population of 1,000 or more.

3 28. In 2005, DSOD instituted a seepage threshold for Lake Fordyce Dam. Seepage
4 at the dam exceeded this threshold in 2011, and DSOD subsequently required the owner of
5 Lake Fordyce Dam, Pacific Gas & Electric Company (“PG&E”), to submit a plan and schedule
6 to mitigate the seepage.

7 29. PG&E engaged in a multi-year planning and engineering effort to develop a
8 seepage mitigation plan as required by DSOD. As the seepage mitigation project proposed by
9 PG&E includes the discharge of dredged and fill material into waters of the United States,
10 PG&E applied to USACE for a Clean Water Act Section 404 permit.

11 30. On May 26, 2020, PG&E submitted a request for water quality certification to
12 the State Water Board. While Lake Fordyce Dam does not have hydropower production, it is
13 part of the FERC-licensed Drum-Spaulding Hydroelectric Project, which is owned and
14 operated by PG&E. Accordingly, the State Water Board received and processed PG&E’s
15 application for certification. *See* Cal. Code Regs. tit. 23, § 3855.

16 31. The State Water Board worked diligently to analyze the environmental and
17 water quality impacts of PG&E’s proposed seepage mitigation project. The Board requested
18 and received an extension of time until October 31, 2020 from the USACE to model project
19 impacts on turbidity and analyze whether compliance with California’s water quality standards
20 could be achieved.

21 32. The State Water Board was the California Environmental Quality Act
22 (“CEQA”) lead agency for the project. As part of the project’s CEQA process, on September
23 24, 2020, the State Water Board released a draft Initial Study/Mitigated Negative Declaration
24 for public review and comment. After considering the comments received, on October 30,
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1 2020 the State Water Board adopted a Mitigated Negative Declaration and Mitigation
2 Monitoring and Reporting Program.

3 33. On October 30, 2020, the State Water Board also issued a water quality
4 certification for the project, which set forth 29 conditions. These conditions were incorporated
5 into the Section 404 permit subsequently issued by USACE.

6 34. Project work was expected to begin in July 2021 and take place between July
7 and October for three construction years, with a possibility that limited activities would occur
8 in a fourth construction year.

9 35. On March 24, 2021, PG&E reached out to the State Water Board and USACE
10 to discuss changes to the project. Based on further engineering analysis, PG&E had
11 determined that one aspect of the previously approved project, cofferdam installation, would be
12 unsafe, and proposed changes related to this aspect of the project. PG&E subsequently
13 provided an overview of its proposed changes.

14 36. On May 18, 2021, State Water Board staff met with USACE's Sacramento
15 District to discuss and identify a potential procedural path for certifying and permitting
16 PG&E's proposed changes in light of the 401 Rule.

- 17 a. During the meeting, USACE's Sacramento District expressed the opinion that
18 the 401 Rule would apply, and that, under USACE's their interpretation of the
19 401 Rule, certifications cannot be amended or modified.
- 20 b. State Water Board staff explained that because the terms of the October 2020
21 certification did not allow for the implementation of PG&E's proposed changes,
22 the certification would need to be amended. Board staff also explained that,
23 based on a U.S. EPA Fact Sheet providing answers to frequently asked
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1 questions,¹ PG&E's proposed changes to this existing project should be
2 processed under the previously applicable Clean Water Act Section 401
3 regulations because PG&E had submitted its certification request prior to the
4 September 11, 2020 effective date of the 401 Rule. State Water Board staff
5 provided USACE's Sacramento District with a link to this U.S. EPA document
6 and requested that USACE consider U.S. EPA's and Board staff's positions.

7 37. On May 19, 2021, USACE's Sacramento District informed the State Water
8 Board that after internal discussion and debate, USACE management continued to interpret the
9 401 Rule as prohibiting modifications to a certification after issuance, even when the request
10 for certification was submitted before the effective date of the 401 Rule. According to
11 USACE, the key inquiry was whether "the modified activity constitutes as 'material change'
12 that has a potential to violate [water quality] standards without an update to the [certification]."
13 If so, USACE would consider it a new action subject to the procedural requirements of the 401
14 Rule.

15 38. On May 24, 2021, USACE's Sacramento District informed the State Water
16 Board that after discussing the State Water Board's position with management, the question
17 would be reviewed by officials at USACE's headquarters in Washington, D.C.

18 39. On May 27, 2021, USACE's Sacramento District informed the State Water
19 Board that Sacramento District management had agreed that certifications may be modified or
20 amended regardless of the date of issuance if the request for certification was received prior to
21 the September 11, 2020 effective date of the 401 Rule. USACE stated that it would be able to
22 modify the Section 404 permit and refer to an amended certification issued by the State Water
23 Board.

24
25 ¹ Available at https://www.epa.gov/sites/production/files/2020-06/documents/frequently_asked_questions_fact_sheet_for_the_clean_water_act_section_401_certification_rule.pdf.
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1 40. On June 3, 2021, the State Water Board communicated with PG&E and
2 USACE's Sacramento District, setting forth the steps and information necessary to move
3 forward and request an amendment to the October 2020 certification. The State Water Board
4 and PG&E subsequently engaged an environmental consultant to assess and analyze PG&E's
5 proposed changes as required by CEQA, discussed the scope of environmental review work
6 and documentation, and began the environmental review process.

7 41. On June 24, 2021, PG&E requested an amendment to the certification and
8 provided the necessary information. PG&E, the environmental consultant, and the State Water
9 Board subsequently executed a Memorandum of Understanding for Preparation of
10 Environmental Documents. On July 2, 2021, the State Water Board issued a notice of PG&E's
11 request for water quality certification amendment.

12 42. Board staff was actively engaged with the environmental consultant, reviewing
13 PG&E's proposed changes and analyzing their impacts when, on July 8, 2021, USACE's
14 Sacramento District requested a telephone meeting to discuss the project.

15 43. On July 9, 2021, USACE's Sacramento District informed the State Water Board
16 via telephone that officials at USACE's headquarters in Washington, D.C. had determined that
17 the 401 Rule applied to PG&E's proposed changes and, based on the USACE's interpretation
18 of the 401 Rule, the October 2020 certification could not be amended.

19 44. On July 15, 2021, USACE's Sacramento District emailed the State Water
20 Board, relaying guidance provided by USACE headquarters to USACE districts regarding
21 interpretation of the 401 Rule. The email explained that USACE districts had been instructed
22 that "in the absence of a 'material change' determination by the permitting agency [], proposed
23 project modifications (if approved) may proceed subject to the terms and conditions of the
24 existing [certification];" if, on the other hand, the permitting agency determines that proposed
25 project modifications do constitute a 'material change,' a new certification is required, and all
26

1 procedural requirements of the 401 Rule must be followed, beginning with a request for a pre-
2 filing meeting. With regard to the Lake Fordyce project, USACE explained that it had
3 determined that, absent additional information from PG&E or the State Water Board indicating
4 that a water quality standard or standards established in the existing certification would be
5 violated by PG&E's proposed changes, PG&E's proposed changes do not constitute a
6 'material change.' USACE did not specify a timeline for providing this additional information,
7 or a date on which its preliminary determination would become final. USACE did, however,
8 state that unless it made a 'material change' determination for the Lake Fordyce project, if the
9 State Water Board were to issue a certification amendment, USACE would not make that
10 amendment a binding condition of the USACE permit. The USACE also thanked the State
11 Water Board for its "continued patience and understanding" as USACE "navigate[s] the new
12 401 WQC rule."

13 45. Due to USACE's changed position, the State Water Board found itself yet again
14 faced with numerous questions left unanswered by U.S. EPA in the 401 Rule and
15 accompanying explanatory text in the preamble to the 401 Rule. *See* 85 Fed. Reg. at 42,210-
16 284.

17 46. Under USACE's most recent position, changes in certification conditions
18 needed as a result of changed circumstances, including changes in the project, cannot be
19 accomplished by amending the certification, and the certifying agency must instead issue an
20 entirely new certification. Previously, no applicant or federal agency has argued that the State
21 Water Board lacks authority to amend a certification in response to a request by the applicant.

22 47. Issuing an entirely new certification, including following the procedures and
23 making the findings required by the 401 Rule, would require the State Water Board to devote
24 much more time and resources than would be required for an amendment, even if there were
25 no changes made to the project. If the State Water Board issues a new certification under the
26

1 401 Rule, it would also run the risk that conditions of certification that are now in effect and
2 uncontested will be deemed waived by USACE based on the USACE's interpretation of the
3 limits on state authority adopted in the 401 Rule.

4 48. The State Water Board is currently evaluating potential paths for proceeding
5 with the certification process for PG&E's proposed changes to this project with public safety
6 implications. As PG&E has requested an amendment to the October 2020 certification, not an
7 entirely new certification, and has not requested a pre-filing meeting as required by the 401
8 Rule, the Board finds itself in an unprecedented procedural posture.

9 49. Staff and management from the Division of Water Rights and attorneys from
10 the Board's Office of Chief Counsel have had multiple internal meetings and exchanged
11 numerous emails to try to understand and discuss USACE's positions and find a way forward
12 with the certification process for this important public safety-related project. As the events
13 discussed in the preceding paragraphs show, even where the 401 Rule may not apply,
14 considerable State Water Board resources are being consumed due to uncertainty and
15 confusion introduced by the 401 Rule. This additional workload has also occurred at a time
16 when Board staff are extremely busy due to the extreme drought conditions in California.

17 50. USACE's varying positions on this project show that federal agencies are
18 struggling to interpret and apply the 401 Rule, further compounding the harm from the rule.

19 **B. Emergency Drought Salinity Barrier Project**

20 51. The Emergency Drought Salinity Barrier Project provides an example of how
21 the 401 Rule has created uncertainty and confusion, complicating and delaying the certification
22 process for an urgently needed project during a state of emergency.

23 52. San Francisco Bay and the Sacramento–San Joaquin Delta Estuary (“Delta”) are
24 the hub of California's water supply system and the most valuable estuary and wetlands system
25 on the West Coast, serving cities, farms, fishing communities, boaters, and fish and wildlife.
26

1 Water from the Delta is exported to more than 25 million people in the San Francisco Bay
2 Area, Southern California, and other areas of the state.

3 53. In 2021, extreme drought conditions and unusually warm temperatures depleted
4 the expected runoff from the Sierra-Cascade snowpack, resulting in a historic and
5 unanticipated reduction of water supply from reservoirs and stream systems, including the
6 Delta watershed. The extreme drought conditions created the risk of contamination of fresh
7 water supplies conveyed through the Delta, water scarcity, and degraded habitat for fish and
8 wildlife species.

9 54. On May 10, 2021, California Governor Gavin Newsom proclaimed a state of
10 emergency in multiple California watersheds, including the Delta. This proclamation directed
11 the Department of Water Resources (“DWR”) to take actions addressing potential salinity
12 issues, including the potential installation of emergency drought salinity barriers at locations
13 within the Delta to “conserve water for use later in the year to meet state and federal
14 Endangered Species Act requirements, preserve to the extent possible water quality in the
15 Delta, and retain water supply for human health and safety uses.” Additionally, the
16 proclamation suspended Water Code section 13247, which requires state agencies to comply
17 with water quality control plans approved by the State Water Board, and suspended CEQA for
18 actions taken pursuant to the directive.

19 55. As the project includes the discharge of dredged and fill material into waters of
20 the United States, DWR applied to USACE for a Clean Water Act Section 404 permit. DWR
21 sought, and received, emergency authorization from the USACE under Regional General
22 Permit 8 – Emergency Repair and Protection Activities (“RGP 8”) pursuant to Section 404. As
23 determined by the USACE, an emergency situation is “one which would result in an
24 unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and
25 significant economic hardship if corrective action requiring a Department of the Army permit
26

1 is not undertaken within a time period less than the normal time to process the request under
2 standard processing procedures.”

3 56. On May 14, 2021, DWR applied to the State Water Board for water quality
4 certification for the Emergency Drought Salinity Barrier Project. The certification request was
5 subject to the 401 Rule.

6 57. According to DWR, without the protection of the drought salinity barrier,
7 saltwater intrusions from the San Francisco Bay could render Delta water unusable for
8 agricultural needs, impair habitat for aquatic species, and affect roughly 25 million
9 Californians who rely on the export of this water for domestic use.

10 58. The purpose of the Emergency Drought Salinity Barrier Project is to control
11 saltwater intrusion into certain portions of the Delta and conserve water in upstream reservoirs
12 for other uses. The project involves installing embankment rock at a specific location in the
13 Delta.

14 59. On May 24, 2021, USACE determined that the reasonable period of time to
15 grant certification was 60 days, resulting in a certification deadline of July 13, 2021. However,
16 given the emergency drought conditions, DWR wanted to proceed with the project as soon as
17 possible.

18 60. On Friday, May 28, 2021, the State Water Board issued a certification for the
19 project, which set forth 25 conditions, including three conditions required by the California
20 Code of Regulations. The Board transmitted the certification electronically to DWR and
21 USACE.

22 61. Later that day, USACE sent an email to the State Water Board stating: “. . .
23 Conditions 10, 11, 15, 16, 20, 23, 24, and 25, do not contain a statement explaining why the
24 condition is necessary to assure that the discharge from the proposed project will comply with
25 water quality requirements. Therefore, these conditions do not meet the requirements of 40
26

1 CFR 121.7(d)(1).” USACE’s email requested additional information or rationale for the
2 enumerated conditions by noon on June 1, 2021.

3 62. Monday, May 31, 2021 was Memorial Day. To comply with USACE’s request,
4 State Water Board staff worked long hours over the holiday weekend to prepare the requested
5 information.

6 63. The State Water Board submitted the supplemental information requested by
7 USACE on June 1, 2021. The general conditions addressed monitoring and data accessibility
8 (Condition 10), compliance with the state and federal Endangered Species Acts (Condition 11),
9 compliance with applicable federal, state, or local laws (Condition 15); compliance in the event
10 that authorities and responsibilities are transferred to successor agencies (Condition 16), and
11 the scope of the Board’s approval (Condition 20). In addition, the certification included
12 standard conditions required by the Board’s regulations, providing for modification or
13 revocation on administrative or judicial review (Condition 23), the scope of the certification as
14 not applying to FERC-licensed hydroelectric facilities (Condition 24), and requiring total
15 payment of any fees (Condition 25). The Board provided a rationale for each condition and
16 explained that the conditions at issue address the scope and legal effect of the certification and
17 other legal requirements that may apply to the project.

18 64. Later on June 1, 2021, USACE responded, stating: “The supplemental
19 information you provided only includes the requisite information for conditions 10 and 16,
20 therefore, in accordance with 40 CFR 121.9(b), conditions 11, 15, 20, 23, 24, and 25 are
21 waived.”

22 65. Three of the conditions USACE found to be waived (conditions 23, 24 and 25)
23 are required by regulation to be included in water quality certifications. *See* Cal. Code Regs.
24 tit. 23, § 3860. These conditions place the permittee on notice that the certification action may
25 be modified or revoked following administrative or judicial review and ensure that any
26

1 applicant for a federal license or permit for an activity which may result in a discharge into
2 waters of the United States is subject to the appropriate state certification. The conditions also
3 require payment of a fee as a condition of certification, which in this case was based on the
4 discharge's threat to water quality and complexity.

5 66. In other certification proceedings involving nationwide permits, however,
6 USACE has accepted similar simple rationale as sufficient for these standard conditions
7 required by the State Water Board's regulation. This demonstrates the inconsistent application
8 of the 401 Rule within a single federal agency.

9 67. On June 2, 2021, the USACE authorized the proposed activity under RGP 8.

10 68. On June 2, 2021, DWR transmitted a notice of intent to begin construction
11 activities that evening.

12 69. The speed with which this certification progressed and with which DWR began
13 construction were in response to the urgent need for the Emergency Drought Salinity Barrier
14 Project to address conditions during a state-declared emergency. The State Water Board
15 expeditiously issued the certification consistent with past practices, its own regulations, and the
16 specific circumstances before it. Citing the 401 Rule, however, the USACE effectively
17 delayed an emergency drought project despite issuing its own emergency authorization for the
18 project. The uncertainty regarding conditions that are permissible in a certification under the
19 401 Rule (as well as variations in interpretations by different federal agencies or divisions of
20 federal agencies) resulted in an unnecessary and undesirable delay for this critical project.

21 70. Equally of concern, the 401 Rule impairs the state's sovereignty by impeding
22 the Water Boards' ability to impose conditions that will ensure that the proposed activity will
23 comply with water quality standards and other appropriate requirements of state law. As an
24 example, one of the conditions the USACE rejected based on 401 Rule provides that the
25 certification may be revised as required by decisions on administrative appeal and judicial
26

1 review. Allowing the 401 Rule to stay in place will effectively deprive the state courts of their
2 authority to grant relief in an action seeking judicial review of a water quality certification.
3 This is but one example of state law requirements that do not fit within the 401 Rule.

4 **C. FERC-Licensed Hydropower Facilities**

5 71. The 401 Rule has particularly grave implications for California's ability to
6 protect water quality in the hydropower licensing context, where FERC licenses are in effect
7 for multiple decades. In this context, the 401 Rule causes confusion, fosters uncertainty, and
8 creates inconsistencies for reasons similar to those described above. It also significantly
9 diminishes California's ability to protect water quality impacts resulting from the whole of the
10 hydropower activity and to modify the certification in light of changing circumstances over the
11 years.

12 72. Because the Federal Power Act preempts the field of hydropower regulation
13 absent an exception to preemption, and FERC project licenses are valid for a fixed period of up
14 to 50 years, water quality certifications for FERC license applications provide the State Water
15 Board with a singular opportunity to ensure compliance with the state's water quality standards
16 and other requirements. Many hydropower projects in California have operated under an
17 initial FERC license with limited water quality or environmental protection conditions for
18 decades because they were constructed and began operating prior to environmental laws such
19 as the Clean Water Act and CEQA.

20 73. Before the U.S. EPA completes its new Section 401 rulemaking in mid-2023,
21 Board staff anticipates receiving multiple requests for certification associated with FERC-
22 related projects, including FERC license applications, FERC-related maintenance projects, and
23 drought-related requests for flow variances. For example, by December 2022, staff expects
24 approximately four applications for FERC licenses, four applications for FERC-related
25 maintenance projects, and at least six requests for flow variances. These expected requests for
26

1 certification represent a considerable workload for staff, which is increased due to the
2 additional requirements imposed by the 401 Rule.

3 74. Through the adoption of water quality control plans, the Water Boards designate
4 the beneficial uses of water that are to be protected (such as municipal and industrial,
5 agricultural, and fish and wildlife beneficial uses), water quality objectives for the reasonable
6 protection of the beneficial uses and the prevention of nuisance, and a program of
7 implementation to achieve the water quality objectives. The Water Boards also employ other
8 state law authorities to protect water quality, such as waste discharge requirements.

9 75. Hydropower projects, however, present complex water quality issues that often
10 are not readily addressed through the state's other regulatory authorities, due to field
11 preemption by the Federal Power Act. The 401 Rule strips the state of its authority to fully
12 address impacts associated with activities reviewable under Section 401, but otherwise exempt
13 from state water quality regulation.

14 76. Hydropower projects cause water quality impacts that, depending on the
15 circumstances, may not be attributable to a point-source discharge. Common water quality
16 impacts resulting from hydropower operations and facilities include: changes in turbidity,
17 sediment, temperature, dissolved oxygen, algal productivity, siltation, and erosion; aquatic
18 habitat loss; barriers to fish passage; algal-produced toxins; alterations to stream
19 geomorphology; and reductions in stream flows.

20 77. California has more than 100 FERC-licensed hydropower facilities.

21 78. Prior to the 401 Rule, the State Water Board imposed, or considered the need
22 for certification conditions to protect water quality on project activities that fall outside the
23 typical understanding of point-source discharges, such as requirements for minimum instream
24 flows and ramping rates; temperature management; aquatic invasive species management;
25 plans for gravel replenishment, large woody material placement and other habitat measures;
26

1 reservoir operation plans; erosion and sediment management plans; and monitoring and
2 management of dissolved oxygen, mercury, pesticides, and other constituents of concerns.
3 Previously issued certifications have typically included management, monitoring, and
4 reporting measures to ensure compliance with water quality measures and to identify potential
5 modifications if circumstances change. The certifications also contained conditions to address
6 point source discharges. In its certifications, the State Water Board has historically reserved
7 authority to modify the conditions of the certification for specified reasons, including to
8 incorporate changes in technology, sampling, or methodologies, provide for adaptive
9 management, to implement new or revised water quality standards, or to otherwise ensure that
10 the continued hydropower facility operation does not violate water quality objectives or impair
11 beneficial uses. These reservations of authority provided the State Water Board with sufficient
12 assurance that the project would comply with water quality standards and other appropriate
13 requirements of state law throughout the term of its multi-decade FERC license.

14 79. As one specific example, temperature management can be a material issue
15 associated with hydropower facilities. Hydropower facilities (such as dams and reservoirs) and
16 their associated operations alter the temperature regime of rivers, often to the detriment of
17 cold-water species such as salmonids and other aquatic plants and animals that have adapted to
18 colder waters. Water stored in reservoirs greatly increases the surface area exposed to solar
19 heating and reduces the amount of water protected by shade. Large reservoirs “stratify” in
20 summer: the water is warmer at the surface and cooler below the thermocline in deeper waters.
21 Absent any control devices, or multi-level intakes, downstream temperature management is
22 primarily achieved directly through flow management. In addition to changes in temperature
23 due to reservoir storage and release, reservoirs also modify the temperature regime of
24 downstream reaches by diminishing the volume of water below diversions for hydropower
25 generation. Hydroelectric dams, which are generally built to take advantage of mountain
26

1 gradients, also can trap fish in the typically warmer, valley reaches of a river, absent effective
2 fish passage. Thus, in addition to the thermal impacts of the hydropower dams themselves, the
3 facilities can prevent fish from reaching waters of appropriate temperature upstream.

4 80. As a result, diversions, reservoir storage, and dams contribute to altered water
5 temperatures and flow regimes that negatively impact salmonids and other native fish,
6 encourage warm-water and non-native fishes, and alter the base of the food web. In addition,
7 such conditions allow undesirable and nuisance algae (e.g., *Microcystis*), and submerged
8 aquatic vegetation (e.g., *Egeria*) to become established and potentially widespread. In sum,
9 temperature impacts are directly related to hydroelectric facility construction and operations.
10 Thus, as appropriate, certifications include requirements for temperature management and
11 monitoring to ensure protection of water quality and beneficial uses of water.

12 81. Because FERC licenses are granted for decades, the State Water Board must act
13 comprehensively to protect the state's water quality in stream systems affected by FERC
14 projects. Prior to the 401 Rule, the State Water Board could condition certification to address
15 water quality impacts from the activity as a whole. While the 401 Rule remains in effect, it
16 will confine the State Water Board's authority to the regulation of point source discharges, thus
17 restricting the state's ability to protect beneficial uses and to address water quality problems
18 from nonpoint sources of pollution. Moreover, the 401 Rule impairs the California's ability to
19 protect water quality if water quality standards or other appropriate requirements of state law
20 are revised or adopted, through adaptive management of water quality parameters, or if
21 circumstances change over the decades that the FERC license is in effect. If the State Water
22 Board cannot act to protect water quality through water quality certification now, then the
23 harm to the state's water quality over the decades-long life of a FERC license is likely to be
24 permanent.

1 82. I declare under penalty of perjury under the laws of the United States that the
2 foregoing is true and correct, and that this declaration was executed on July 26, 2021 in
3 Sacramento, California.

4
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6 Eileen Sobeck
7 Executive Director
8 State Water Resources Control Board
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8
 9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12

13
 14 In re

15 Clean Water Act Rulemaking
 16
 17

Case: No. 20-cv-04636-WHA
 (consolidated)
 Applies to all actions

**DECLARATION OF LOREE’
 RANDALL IN SUPPORT OF
 PLAINTIFF STATES’ OPPOSITION
 TO DEFENDANTS’ MOTION FOR
 REMAND WITHOUT VACATUR**

Courtroom: 12, 19th Floor
 Date: August 26, 2021
 Time: 8:00 A.M.

ORAL ARGUMENT REQUESTED

18
 19
 20
 21
 22
 23 I, Loree’ Randall, declare under penalty of perjury under the laws of the State of Washington
 24 that the following is true and correct:

25 1. I am now and at all times mentioned herein have been a citizen of the United States
 26 and a resident of the State of Washington, over the age of 18 years, and competent to make this
 27 declaration. The following is based on my own personal knowledge and understanding.
 28

1 2. I am now and have been employed by the State of Washington, Department of
2 Ecology (Ecology), since October, 1984. For the last 20 years (beginning April, 2001), I have been
3 the Shorelands and Environmental Assistance Program Section 401/CZM Policy Lead. As the
4 Section 401 Policy Lead, I am familiar with Ecology’s procedures for processing Section 401
5 certification requests. Part of my duties include providing training and guidance on Section 401,
6 including recommendations to Ecology’s upper management when new rules or policies are
7 developed regarding section 401 certification. I also review requests for Section 401 Certification
8 under the Clean Water Act, coordinate with other staff and programs within Ecology in performing
9 that review, and draft section 401 decisions on behalf of Ecology. In addition, I review draft section
10 401 decisions made by other staff within Ecology and provide comments and technical assistance
11 to them.

12 3. Department of Ecology is the certifying agency in Washington State under
13 Section 401 of the U.S. Clean Water Act. As such, Ecology reviews and approves, approves with
14 conditions, or denies proposed projects, actions, and activities directly affecting waters of the
15 United States.

16 4. The Environmental Protection Agency’s (EPA) final Rule (2020 Rule), *Clean Water*
17 *Act Section 401 Certification Rule*, which took effect in September 2020, is a significant departure
18 from EPA’s prior 401 certification practice. It is already causing significant adverse impacts to
19 Washington State, its residents, and its waters. EPA’s decision to revise instead of repeal the 2020
20 Rule, with an estimated date of completion of Spring, 2023, will only exacerbate these harms as
21 regulated entities continue to seek 401 certifications prior to the Rule’s revision.

22 5. Ecology receives 401 requests daily, typically four hundred per year. However, this
23 year, Ecology’s 401 workload has nearly tripled. Each certification request Ecology receives is now
24 subject to the 2020 Rule and the administrative, fiscal and environmental concerns it raises. To
25 date, a little more than half way through the year, Ecology has received at least 393 new requests
26 (predominantly from state shellfish farmers due to the Nationwide Permit decision, explained
27 below), and reviewed and issued 396 certifications.

Scope:

1
2 6. EPA’s Rule dramatically curtails the scope of water quality impacts that Washington
3 can look at—and attempt to address—when it comes to reviewing project proposals. EPA’s 2020
4 Rule narrowly defines the scope of 401 certification as “limited to assuring that a discharge from a
5 federally licensed or permitted activity will comply with water quality requirements” and defines
6 “discharge” as from “a point source to a water of the United States.” 40 C.F.R. §§ 121.1(f), 121.3.
7 This is directly contrary to EPA’s and Ecology’s longstanding 401 practice and guidance that, in
8 line with relevant Supreme Court decisions, directed states to view *all* potential water quality
9 impacts from a project proposal, both upstream and downstream and over the entire life of the
10 project. For decades, Washington has used this clear, consistent authority to examine the full range
11 of water quality impacts from proposed projects and condition (or deny) projects accordingly, in
12 order to satisfy state law requirements applicable to both point and non-point water pollution.

13 7. For example, hydropower projects implicate a broad range of water quality impacts
14 from the project as a whole that are unassociated with any specific point-source discharge. Dams
15 specifically contribute to increased water temperature from decreased water flows within streams
16 and decreased flow rates caused by ponding behind dam structures. Dam reservoirs also cause
17 resuspension of shoreline sediments due to wave action and pool level fluctuations and overall
18 vegetation loss, reducing shading and increasing temperatures. Wave impacts within reservoirs also
19 cause increased turbidity and sedimentation. This, in turn, can result in further temperature
20 increases, smothered aquatic habitat, interference with predation patterns, and lower oxygen levels.
21 Increased turbidity can also cause an increase in toxin mobility, including PCBs and other “forever
22 chemicals,” due to increased absorption of these chemicals to sediment particles. These impacts are
23 unrelated to any particular discharge from the project, but can have significant detrimental effects
24 on water quality in and around project sites.

25 8. Typically, Section 401 is one of the primary mechanisms by which Ecology would
26 mitigate these water quality impacts—by including conditions necessary to assure compliance with
27 any “appropriate” requirements of state law and applicable state water quality laws. For example,
28

1 conditions to 401 certifications could include requirements to mitigate vegetation loss, geoengineer
2 shorelines to decrease erosion, and have the reservoir discharge point lower in the water column
3 where temperatures are lower.

4 9. These conditions are crucial as hydropower licenses can last up to 50 years. As such,
5 it becomes necessary to allow for 401 certifications to adapt to changing conditions (such as a
6 change in state water quality standards) and provide the critical ability to adjust water quality
7 protections as new research and data establish needs for further or modified water quality
8 protections during that time frame; however, this is another thing that the Rule does not allow. The
9 Rule prohibits the states from amending, modifying or having any type of reopener to deal with the
10 need to adapt to changes.

11 10. The 2020 Rule greatly complicates Washington's ability to implement these
12 protections. Washington is facing this reality now and will continue to as EPA works to revise the
13 Rule. For instance, three hydropower dams on the Skagit River will require 401 certifications
14 between now and Spring, 2023, when EPA proposes to revise the Rule. The Skagit River is home
15 to numerous anadromous fish species, including Chinook salmon, which is a threatened species
16 and the primary source of food for the endangered Southern Resident Orca population in Puget
17 Sound. Southern Resident Orcas are in severe decline and threatened with extinction. The Puget
18 Sound population is down to only 73 individuals, its lowest level in over four decades. To minimize
19 adverse impacts, such as temperature (among others), Washington relies on its section 401 authority
20 to impose conditions as a key part of its Southern Resident Orca recovery efforts.

21 11. Therefore, as explained above, because FERC licenses for dams last between 30-50
22 years, the lack of adequate water quality conditions attached to these licenses would have adverse
23 impacts for generations.

24 **Nationwide Permit Problems:**

25 12. Pursuant to 33 U.S.C. § 330.1(b), the Army Corps issues nationwide permits for
26 activities occurring under section 404 of the Clean Water Act and section 10 of the Rivers and
27 Harbors Act of 1899 with regard to certain activities that have "minimal impacts" to water quality.
28

1 13. Nationwide permits are considered “general” permits, and certifying authorities
2 typically make programmatic section 401 decisions that apply to all activities within their
3 respective jurisdictions issued under a nationwide permit, thereby eliminating the need for project
4 proponents covered under such a permit to seek individual section 401 certifications. Nationwide
5 permits are valid for a period of no more than 5 years, after which they are renewed. 33 U.S.C. §
6 1344(e)(2). Renewal triggers the need for re-certification under section 401.

7 14. After the 2020 Rule was finalized, the Corps moved to re-issue and re-certify the
8 Nationwide Permit Program, which included 16 Nationwide Permits covering oil and gas pipelines,
9 surface coal mining, residential development, and various aquaculture activities. *See* 86 Fed.
10 Reg. 2,744. On October 20, 2020, citing the new 401 Rule as justification, the Army Corps required
11 certifying authorities issue section 401 certifications on the Nationwide Permit Program while they
12 were still in draft form and were still subject to change—only just proposed for public comment a
13 few weeks earlier. The Corps also stated that, despite a long-standing agreement with Washington
14 allowing for a full year on all Corps-related 401 certifications, the reasonable period of time for
15 review would be limited to 60 days. Attached hereto as Exhibit A is a true and correct copy of the
16 October 14, 2020 letter to Laura Watson, Director of Washington State Department of Ecology,
17 from Michelle Walker, U.S. Army Corps of Engineers.

18 15. Washington, along with numerous other states, requested that the time period be
19 extended as authorized by both Corp and EPA regulations, but the Corps denied those requests.
20 Attached hereto as Exhibit B is a true and correct copy of the November 19, 2020 letter to Colonel
21 Alexander Bullock, U.S. Army Corps of Engineers, from Laura Watson, Director of Washington
22 State Department of Ecology. Also, attached hereto as Exhibit C is a true and correct copy of the
23 December 7, 2020 letter to Laura Watson, Direct of Washington State Department of Ecology,
24 from Colonel Alexander Bullock, U.S. Army Corps of Engineers.

25 16. Some of the implications of this were identified in a letter submitted by various
26 states, including Washington, to the Army Corps on May 11, 2021. Attached hereto as Exhibit D
27 is a true and correct copy of the May 11, 2021 letter to Lieutenant General Scott A. Spellmon, U.S.
28

1 Army Corp of Engineers from the Attorneys General of the States of Washington, California,
2 Connecticut, Maryland, New Mexico, Oregon, and the California State Water Resources Control
3 Board.

4 17. On July 8, 2021, the Council on Environmental Quality responded by letter agreeing
5 that the previous administration’s process to renew and revise the Nationwide permits was both
6 “unusual” and also “complicated an important process” by which states carry out responsibilities
7 to protect water quality. Attached hereto as Exhibit E is a true and correct copy of the July 8, 2021
8 letter from Brenda Mallory, Chair, Council on Environmental Quality, to State of Washington
9 Governor Jay Inslee.

10 18. Despite the short time frames, Ecology worked hard to review and provide
11 programmatic 401 certification decisions. Rather than accept these certifications, the Corps
12 “declined to rely” on them causing major impacts statewide.

13 19. For example, without programmatic 401 certifications, projects that would have
14 qualified before for the streamlined permit procedure must now be processed individually. Prior to
15 this, in 2020 Ecology’s programmatic decisions applied to roughly 472 of the nationwide permits
16 received from the Corps—only around 169 projects triggered an individual review. This allowed
17 staff time to thoroughly review and issue decisions. In sharp contrast, already in 2021, Ecology has
18 issued 396 individual decisions, 361 of these solely for aquaculture projects.

19 20. Ecology’s ability to review these requests in a thorough and timely manner is
20 essential to protecting Washington state’s environment and economy, but the significant increase
21 in applications and other procedural requirements of the EPA Rule has overwhelmed Ecology and
22 Army Corps partners. Additionally, the invalidation of the nationwide aquaculture permits resulted
23 in a flood of individual 401 certification requests for shellfish growing operations.

24 21. Because the planting of shellfish seed must occur during specific, narrow windows
25 of the growing season (usually between March and August), timely permitting is essential. Without
26 the necessary permits, growers cannot plant farms and are impacted for a season or, in some cases,
27 permanently.

28

1 nature of potential discharges, along with the receiving water(s), and a description of how the
2 proponent plans to monitor and “treat, control, or manage” the discharge. 40 C.F.R. § 121.5(b). For
3 general licenses or permits, proponents need only identify the “number of discharges expected to
4 be authorized by the proposed general license or permit each year.” 40 C.F.R. §121.5(c). Under the
5 Rule, project proponents can submit this minimal information to certifying authorities well before
6 information required in the JARPA is submitted.

7 27. Taken together, project proponents are able to start the 401 clock with far less
8 information than Ecology would typically have in order to appropriately evaluate and address
9 potential water quality impacts from proposed projects. This truncated timeline means that Ecology
10 may be forced to make 401 decisions without critical documentation that is often developed for
11 projects that also require 401 certification.

12 28. For just one example, environmental reviews conducted under both the National
13 Environmental Policy Act (NEPA) and the State Environmental Policy Act (SEPA) provide critical
14 information for Ecology’s review of water quality impacts. While 401 certifications themselves are
15 exempt from SEPA, Washington law provides that if any non-exempt permits are required for a
16 project that also requires 401 certification, the certification cannot occur unless the lead agency
17 completes the SEPA process. So, in other words, Ecology will be required to conduct its 401 review
18 either before the bulk of materials that actually describe the water quality impacts (typically
19 gathered during SEPA) are complete, or be in conflict with state law.

20 29. In all, because of this (especially with regard to larger and more complex projects)
21 Ecology is forced to evaluate and complete 401 certification requests without adequate information,
22 requiring Ecology either broadly condition project proposals in anticipation of “worst-case-
23 scenario” impacts, or deny permits outright because of lack of information. Rather than make the
24 process more efficient, the 2020 Rule has resulted in more uncertainty and more delay.

25 30. On top of this, this year alone, Ecology has already received 387 pre-filing meeting
26 requests (which are now required by the 2020 Rule without exception). Each request has multiple
27 steps associated with it. This is a significant workload increase for staff, who receive these requests,
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1 upload them to the Ecology database, check for “validity” under the new Rule, communicate with
2 both project proponents and the federal agency to determine the reasonable period of time, and
3 route them appropriately. None of this accounts for the applicant’s timing needs —the applicant
4 must wait the 30-day period before submitting the 401 certification request, making this pre-filing
5 meeting requirement disruptive and time consuming to say the least. Ecology has a number of
6 projects that have been working to receive funding just to learn that there is another time delay
7 causing the project to no longer be able to be constructed this year.

8 31. Overall, the 2020 Rule also caused the need for significant internal procedural
9 changes, which strains agency resources. In response to the changes, Ecology was forced to develop
10 all new 401 certification templates and forms, engage in significant staff training, re-design
11 webpages, draft focus sheets and completely alter databases to address the changes.

12 32. The 2020 Rule also removed the provision that allowed for modifications, which
13 has led to confusion and delay. For example, recently, Ecology issued a 401 certification with a
14 specific in water work window (also referred to as a fish window in order to protect salmonids),
15 based on information submitted by the applicant. Later, Ecology learned that the applicant had
16 provided conflicting information in their request and needed to conduct work outside the work
17 window that Ecology specified in the 401 certification. The applicant proposed a different work
18 window based upon U.S. Fish and Wildlife Service’s regulations. With the 2020 Rule in place,
19 Ecology is unable to modify, amend or change the 401 certification conditions. Therefore, the
20 applicant must start the whole process over again, reapply, and obtain a new 401 certification to
21 conduct the work as proposed.

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33. As described above, the 2020 Rule is harming Washington State now, in a multitude of ways. Leaving the Rule in place until at least early 2023 will only exacerbate these harms.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on July 23, 2021.

Signature: /s/ Loree' Randall

Printed name: Loree' Randall

Address: 300 Desmond Drive, Lacey WA 98403

Phone Number: 360-485-2796

ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1

I hereby attest that I have on file all holographic signatures corresponding to any signatures indicated by a conformed signature (/s/) within this e-filed document.

Executed this 23rd day of July 2021 in Olympia, Washington.

/s/ Kelly T. Wood
KELLY T. WOOD
Assistant Attorney General

EXHIBIT A

October 14, 2020 Letter



**DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, SEATTLE DISTRICT
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755**

Regulatory Branch

October 14, 2020

Ms. Laura Watson
Director, Washington State Department of Ecology
Post Office Box 47600
Olympia, Washington 98504

Reference: 2020 Nationwide Permits
401 Water Quality Certification

Dear Ms. Watson:

On September 15, 2020, the U.S. Army Corps of Engineers (Corps), Seattle District (Seattle District) published in the Federal Register its proposal to reissue the Nationwide Permits (NWP).

The Seattle District requests water quality certification under Section 401 of the Clean Water Act for the proposed issuance of those NWPs that may result in a discharge in waters of the United States where Ecology has 401 water quality certification authority in the State of Washington. The Seattle District believes the proposed NWPs meet Ecology's water quality requirements. However, we recognize that you may need to add conditions or require individual review for some activities to ensure compliance with water quality requirements.

In accordance with the U.S. Environmental Protection Agency's current water quality certification regulations at 40 CFR part 121, the Seattle District is providing the following information to comply with section 121.5(c) of those regulations:

(1) The Seattle District's point-of-contact for the proposed issuance of the NWPs is: Mr. Andrew Shuckhart, Phone: (206) 316-3822, Email: andrew.j.shuckhart@usace.army.mil. General NWP questions may also be submitted to NWP-SeattleTeam@usace.army.mil

(2) The proposed categories of activities to be authorized by the NWPs for which certification is requested are described in the text of the proposed NWPs. Nationwide permits numbered 15, 16, 17, 18, 21, 25, 29, 30, 34, 39, 40, 41, 42, 43, 46, 49, 50, and E would authorize activities that result in discharges of dredged or fill material and therefore 401 water quality

- 2 -

certification is required for those NWP. Nationwide permits numbered 3, 4, 5, 6, 7, 12, 13, 14, 19, 20, 22, 23, 27, 31, 32, 33, 36, 37, 38, 44, 45, 48, 51, 52, 53, 54, C, and D would authorize various activities, some of which may result in a discharge of dredge or fill material and require 401 water quality certification, and others which may not. Nationwide permits numbered 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B do not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States. In the case of NWP 8, it only authorizes activities seaward of the territorial seas.

(3) Enclosed is a copy of the text of the proposed NWP.

(4) Enclosed is a table that provides estimates of the annual number of times each of the proposed NWP may be used in the Seattle District. This estimate reflects the number of discharges anticipated to be authorized by each of the proposed NWP in a given year. A graph has also been enclosed to display the total amount of permits issued by the Seattle District during the 2017 NWP.

(5) A pre-filing meeting request was submitted to your office on September 14, 2020. A copy of the pre-filing meeting request is enclosed.

(6) The Seattle District hereby certifies that all information contained herein is true, accurate, and complete to the best of its knowledge and belief.

(7) The Seattle District hereby requests that the certifying authority review and take action on this 401 water quality certification request within the applicable reasonable period of time which the Seattle District has determined is 60 days.

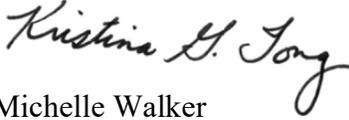
The Seattle District is proposing regional conditions for the proposed NWP. Enclosed is a copy of the Seattle District's public notice inviting public comment on the proposed regional conditions.

In accordance with the Corps' regulations at 33 CFR 330.4(c), if you deny water quality certification for certain activities authorized by the proposed NWP where Ecology has 401 water quality certification authority in the State of Washington, then the Corps will deny without prejudice authorization for those activities. Anyone wanting to perform such activities must first obtain an activity-specific water quality certification or waiver thereof from your office before proceeding under the NWP.

- 3 -

Thank you for your attention regarding this matter. We remain available to discuss issues or proposed conditions you may be considering for the NWP's. We look forward to working with your office on this effort.

Sincerely,


For Michelle Walker
Chief, Regulatory Branch

Enclosures

EXHIBIT B

November 19, 2020 Letter



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000

711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

November 19, 2020

Colonel Alexander Bullock
PO Box 3755
Seattle, WA 98124-3755

Dear Colonel Alexander Bullock:

I write to request an extension for water quality certifications of 57 nationwide permits (NWP), submitted to the Washington State Department of Ecology (Ecology) by the U.S. Army Corps of Engineers (Corps) on October 14, 2020, via letter. In your request, the Corps asserts that Ecology is limited to a window of sixty days for Ecology to grant, condition, or deny the certifications. We disagree that federal agencies have the authority to dictate to states the timeline for exercise of section 401 authority. But, even putting that disagreement aside, sixty days is insufficient for Ecology to review these requests and meet requirements under the U.S. Environmental Protection Agency's (EPA) new Clean Water Act §401 rule. For these reasons, we request an additional sixty days, extending the due date from December 13, 2020, to February 11, 2021.

The new §401 rule became effective on September 11, 2020, establishing new requirements that each condition included in a certification reference an existing water quality law or regulation. Because this is the first time that Ecology, as the certifying authority, will be required to reference laws and regulations when developing a Section 401 water quality certification, it is imperative that Ecology have sufficient time to review the NWP program and cite the appropriate laws and regulations. Our review must take into consideration: (1) major changes in many NWP permits; (2) changes in general considerations; (3) the addition of five new permits; and (4) any cumulative and interconnecting impacts from other recent federal rulemaking actions. As always, we must also consider input from the public.

Moreover, Ecology's certification decisions will apply for up to 5 years, until the next reissuance of the NWPs. Thus, we need to ensure that every effort be made now to exercise due diligence in considering the water quality laws and regulations as these pertain to Ecology's Section 401 certification decisions under the NWP Program. It benefits both Ecology and the Corps to develop solid and legally defensible permit decisions. Unfortunately, the sixty-day review and comment period is inadequate for this volume of review and analysis and will undermine our joint goal of well-informed and defensible decisions.

Finally, in past iterations of the NWP program, Ecology has worked closely with the Corps to review and develop appropriate regional conditions. In this renewal cycle, and in a reversal from what has been done in the past, we are being asked to issue decisions on draft regional conditions from the Corps. The requested extension of time will allow the Corps and Ecology to coordinate further on regional decisions and potential effects to our Section 401 certification decisions so that we can exercise our water quality certification authority and protect state waters.

Colonel Alexander Bullock

November 13, 2020

Page 2

Thank you for your prompt consideration of our request. I look forward to our continued partnership on this issue. If you have questions, please contact Ecology's lead on 401 water quality certifications, Loree' Randall at loreer.randall@ecy.wa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Watson", written in a cursive style.

Laura Watson

Director

EXHIBIT C

December 7, 2020 Letter



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SEATTLE DISTRICT
PO BOX 3755
SEATTLE, WA 98124-3755

DEC 07 2020

Regulatory Branch

Ms. Laura Watson, Director
Washington State Department of Ecology
Post Office Box 47600
Olympia, Washington 98504-7600

Dear Ms. Watson:

I am responding to your letter dated November 19, 2020, requesting an additional sixty days to provide water quality certification decisions on the 57 nationwide permits. I understand the importance of developing a solid and legally defensible decisions on this matter and I also completely understand the added complexity brought on because of the new Section 401 recently promulgated by the Environmental Protection Agency. The U.S. Army Corps of Engineers is pursuing an aggressive schedule for completion of the Nationwide Permit re-authorization and therefore, I cannot support your extension request. There is little room for delay in the reauthorization schedule and the water quality certifications are an important element of the process. Therefore, the 60-day period ends on December 13, 2020.

I appreciate your attention to this matter and if you have any additional questions, we have our next monthly call scheduled for December 11, 2020. Additional questions can also be directed to my Regulatory Branch Chief, Ms. Muffy Walker at (206) 764-6915 or michelle.walker@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read "Xander L. Bullock".

Alexander "Xander" L. Bullock
Colonel, Corps of Engineers
District Commander

EXHIBIT D

May 11, 2021 Letter

**ATTORNEYS GENERAL OF THE STATES OF WASHINGTON, CALIFORNIA,
CONNECTICUT, MARYLAND, NEW MEXICO, OREGON, AND THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

May 11, 2021

By U.S. Mail and E-Mail: Scott.a.spellmon@usacoe.army.mil
Attn: United States Army Corps of Engineers
Lieutenant General Scott A. Spellmon
55th Chief of Engineers and
Commanding General of the U.S. Army Corps of Engineers
441 G Street NW
Washington, D.C. 20314-1000

Re: State Section 401 Certifications of Nationwide Permits

INTRODUCTION

The undersigned States have significant concerns regarding the United States Army Corps of Engineers (the Corps) handling of the reauthorization of Nationwide Permits pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. We mince no words: the Corps' actions will cost jobs, millions of dollars in unnecessary delays, and will allow some projects to go forward without any conditions to protect state water quality, resulting in significant environmental degradation. Moreover, these actions are purportedly based on the United States Environmental Protection Agency's (EPA) 2020 section 401 regulation that: (1) is subject to review and potential rescission or significant revision pursuant to Executive Order 13990; and (2) even as written, the Corps is misapplying. It is not too late to correct these issues and repair the longstanding cooperative relationship between the States and the Corps in the implementation of the Clean Water Act. In fact, the impacts of these actions are wholly avoidable, and both the States and EPA have proposed ways in which this situation can be remedied. We urge the Corps to immediately engage with the States to address the concerns set out below.

BACKGROUND

On September 11, 2020, EPA's "Clean Water Act Section 401 Certification Rule," 85 Fed. Reg. 42210 (section 401 Rule), which drastically alters section 401 certification procedures, went into effect. Little more than a month later, on October 20, 2020, the Army Corps began requesting that certifying authorities issue section 401 certifications for more than 40 Nationwide Permits affecting tens of thousands of projects across the country. In doing so, the Corps took the unprecedented step of requesting that States certify draft Nationwide Permits that had only just been proposed for public comment a few weeks earlier and were thus still subject to change. Even though the existing Nationwide Permits would not have expired until 2022, the Corps stated that the reasonable period of time for certifying authorities to act on its request to certify all new Nationwide Permits was only 60 days, contrary to longer time periods allowed in previous years, and despite the fact that the Corps had express agreements with numerous states permitting up to one year for section 401 certification decisions. Numerous States requested that

May 11, 2021
Page 2

this time period be extended as authorized under the Corps' and EPA's regulations and section 401 of the Clean Water Act. In a departure from its long-established practice of granting requests for expansion of review periods for far less complex and onerous section 401 certification reviews, the Corps summarily denied the States' requests.

This brief review period provided no time for States to consult with the Corps regarding how it intended to interpret and apply the new section 401 Rule. Indeed, the Corps provided no advance notice to States that it intended to take unprecedented actions such as refusing to incorporate state certification conditions and finding waivers of state section 401 authority based on the section 401 Rule.

1. "Decline to Rely" Letters

Despite the unjustifiably short review period imposed by the Corps, the States worked to review the Nationwide Permits and provide their certification decisions by the required deadlines. Rather than accepting these certifications as mandated by the both the Clean Water Act and the section 401 Rule, the Corps issued, or threatened to issue, letters that "decline to rely" on many of the state 401 certifications. Though rationale for these letters is somewhat unclear, our understanding is that the Corps apparently believes that certain language within the section 401 certifications creates a "re-opener" for states to revisit their 401 certifications for the Nationwide Permits. In addition, in California, the Corps identified certain certification conditions as "not acceptable" because of a purported "inconsistency with Corps Regulations."

The impact of the "decline to rely" letters is significant. Because of the letters, projects that would otherwise qualify for the streamlined Nationwide Permit process and the programmatic certifications that the state agencies specifically developed for these projects must now obtain individual section 401 certifications in affected states, resulting in costly and unnecessary delays.

These "decline to rely" letters are both illegal and unfounded. To begin with, the law is abundantly clear as to the proper means and forum for resolving disputes over the legality of section 401 certification conditions. If the Corps has a substantive issue with a state's section 401 condition, its only options are to accept the condition as written or file a lawsuit in state court challenging the condition. *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (stating that federal agencies' "role [in the section 401 certification process] is limited to awaiting and then deferring to, the final decision of the state."); *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) ("a State's decision on a request for Section 401 certification is generally reviewable only in State court").

The preamble to the section 401 Rule clearly makes this point: "[t]he EPA's final regulatory text . . . contemplate[s] that the federal licensing or permitting agency will review certifications only to ensure that certifying authorities have included certain required elements

May 11, 2021
Page 3

and completed certain procedural aspects of a section 401 certification.” 85 Fed. Reg. 42267. If those requirements are met, “the federal agency must implement the certifying authority’s action, irrespective of whether the federal agency may disagree with aspects of the certifying authority’s substantive determination.” *Id.* at 42,268. As 40 C.F.R. § 121.10 expressly instructs, “[a]ll certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit.” The Corps cannot by unilateral action refuse to implement a state’s section 401 certification based on its own substantive disagreement with a particular certification condition.

Moreover, even if the “decline to rely” letters were procedurally valid, the Corps is incorrect in concluding that the certifications include re-opener provisions. While we do not agree that so-called “re-opener” provisions are unlawful, the specific language that the Corps found unacceptable falls into a few categories. Most of the objected-to language reflects the States’ concerns over being asked to certify Nationwide Permits with draft regional permit conditions. For that reason, the States’ section 401 certification decisions included provisions allowing them to revisit their certification to address final Nationwide Permit conditions that differ from the draft permit conditions. Other States, such as Washington and California, included language long used in prior Nationwide Permit 401 certifications stating that projects that do not qualify for Nationwide Permit coverage may need to obtain individual section 401 certifications.¹

Neither case creates the re-opener alleged by the Corps. For one, and as described in the preamble to the section 401 Rule, re-opener provisions are purportedly inconsistent with section 401 because such provisions would allow the certifying authority to “take an action to reconsider or otherwise modify a previously issued certification at some unknown point in the future.” 85 Fed. Reg. at 42,280. But regardless of whether this analysis is consistent with the Clean Water Act, neither of the certification conditions discussed above creates the re-opener alleged by the Corps because the conditions only allow the certifying authority to determine which projects fall within the proper scope of their certifications.

With regard to section 401 certification conditions allowing States to revisit the certification if the final permit conditions change, that language reflects the fact that the States were put in the untenable position of certifying Nationwide Permits when it was unclear as to what the final regional conditions would look like. It is our understanding that some States were not even provided draft regional conditions to evaluate. It should go without saying that States cannot provide final water quality certification of permits *that are not final*, and any interpretation of either section 401 or the section 401 Rule determining otherwise is manifestly unreasonable. A certification only applies to the permit as it was described in the request for

¹ Note that this letter does not discuss all the States’ section 401 certification conditions that the Corps has “declined to rely on” on the ground that they constitute “re-openers” in the Nationwide Permits context. Rather, the letter focuses on the most common examples of purported “re-opener” language.

May 11, 2021
Page 4

certification. To the extent that what was described in the request changes, the certification is no longer valid. In the end, however, the draft conditions in most States were adopted unchanged. Thus, and as has been pointed out to the Corps repeatedly, most States' concerns over the need to revisit the final Nationwide Permits have been eliminated and the language in question rendered moot.

The Corps' concerns are similarly unfounded with regard to language stating that projects that do not qualify for Nationwide Permit coverage may need to obtain individual certifications. This language was used by California not as a condition that is imposed on dischargers that seek coverage under a Nationwide Permit, but simply as a reservation of rights. In Washington, the language in question was simply carryover language from prior certifications and that had indeed rarely—if ever—been invoked during the decades in which such language was in place. Washington has repeatedly offered to remove the conditions or agree not to invoke them. Despite these offers, the Corps has inexplicably refused to meaningfully engage with Washington on resolving the issue.

In both cases, the Corps should do what multiple States have urged: simply acknowledge that the conditions in question do not create a re-opener of the Nationwide Permit certifications, rescind the “decline to rely” letters, and not issue additional letters. In the alternative, we request that the Corps either re-open public comment on the final Nationwide Permits or extend its reasonable period of time determination, and allow States to supplement their certifications for the limited purpose of removing and/or clarifying the language at issue.

2. Waiver Determinations

In addition to the “decline to rely” letters, the Corps also issued waivers to several of the States' Nationwide Permit section 401 certifications based on alleged failures to comply with Section 121.7 of the section 401 Rule. This section of the rule purports to grant federal agencies the authority to declare waiver where certifying authorities fail to provide written explanations and citations to legal authority for the conditions imposed in their section 401 certification. In one case, the Corps declared waiver with regard to a State that failed to include certain material required by the section 401 Rule as result of a simple clerical error. That state swiftly sought to correct the error, only to be rebuffed by the Corps.

The federal government's authority to declare waiver based on federal procedural requirements is—at best—highly questionable. In drafting this provision of the section 401 Rule, EPA cited no authority for this position. Indeed, this portion of the rule flies in the face of congressional intent, applicable case law, and the foundation of “cooperative federalism” upon which the Clean Water Act is built. By the plain language of the Act, a State waives its section 401 authority only by “failing or refusing to act.” 33 U.S.C. § 1341(a)(1). An error of not marking off a procedural checkbox is not equivalent to “failing or refusing to act” on a

May 11, 2021
Page 5

certification request. *See id.* Even if EPA does not rescind this provision of the section 401 Rule in the coming months, we have every confidence that it will be invalidated by the court in the States' pending legal challenge to the rule.

Placing legal deficiencies aside, however, the Corps' waiver declarations represent bad governance and are a slap in the face to the Corps' State partners. Impacted States where the Corps has declared waiver have requested an opportunity to remedy alleged procedural defects. The Corps has refused for reasons that defy logic. The Corps' assertion that it cannot allow certifying authorities to supplement section 401 certification decisions in the absence of regulations governing that process is clearly erroneous. The preamble to the section 401 Rule preserves federal agencies' authority to allow States to remedy purportedly deficient denials. 85 Fed. Reg. at 42,269. There is also nothing in the Clean Water Act that forbids an agency from allowing a state to correct a non-substantive clerical error in a certification decision. It is important to note that the Corps' requests for certifications of the Nationwide Permits were among the first to be received by the States after the section 401 Rule took effect. It is thus patently unreasonable for the Corps' to refuse to allow any flexibility to the States considering there were, and still are, many questions and uncertainties regarding the application of the rule.

More importantly, even if supplementation was substantive, allowing the States to supplement is well within the Corps' authority, especially under the circumstances here. The Clean Water Act allows state certifications to occur within a "reasonable period of time (which shall not to exceed one year)." 33 U.S.C. § 1341(a)(1). While we disagree with this portion of the section 401 Rule, the rule authorizes the Corps to determine what constitutes a reasonable amount of time within that one-year timeframe. Because the Corps' certification requests were received by the States several months ago, we are still well within the one-year window authorized by the Clean Water Act. Neither section 401 itself nor the section 401 Rule prevent the Corps from extending its reasonable period determination to allow the States to supplement their certification decisions. Section 401 requires certification to occur before a federal license or permit authorizes an "activity." *Id.* A Nationwide Permit by itself does not authorize anything until an applicant applies for, and is granted, coverage. As such, limitations on modifying section 401 certifications contained in other subsections of section 401 do not apply to a state's programmatic certification of a general permit. The Corps, therefore, has clear authority to extend its arbitrary 60-day timeframe for certifying authorities to supplement certification decisions for the Nationwide Permits. Its refusal to do so here is unreasonable and unacceptable.

CONCLUSION

In summary, the Corps must change course and engage with the States to find solutions to the current Nationwide Permit situation—a situation that is the direct result of the Corps' misapplication of an already haphazard section 401 Rule that may be rescinded or significantly revised in coming months. Refusal to rectify the situation will result in significant harm to the

May 11, 2021
Page 6

environment, regulated parties, impacted industries, and impacted states. We look forward to your response.

SIGNATURES

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General of Washington

By: /s/ Kelly T. Wood
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Managing Assistant Attorney General
Washington Office of the Attorney General
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FOR THE STATE OF CALIFORNIA and
THE CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD

ROB BONTA
Attorney General of California

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Attorney General of Connecticut

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FOR THE STATE OF MARYLAND

BRIAN FROSH
Attorney General of Maryland

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E-mail: jbhoward@oag.state.md.us

May 11, 2021
Page 7

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico

By: /s/ William Grantham
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Assistant Attorney General
New Mexico Office of the Attorney General
Consumer and Environmental Protection Div.
201 Third Street NW, Suite 300
Albuquerque, NM 87502
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FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon

By: /s/ Paul Garrahan
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301-4096
Telephone: (503) 947-4593
E-mail: paul.garrahan@doj.watate.or.us

cc: Radhika Fox
Principle Deputy Administrator
Office of Water
United States Environmental Protection Agency
Fox.Radhika@epa.gov

EXHIBIT E

July 8, 2021 Letter



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

July 8, 2021

Governor Jay Inslee
Washington

Dear Governor Inslee,

Thank you for your May 17, 2021 letter to President Biden regarding the U.S. Army Corps of Engineers Nationwide Permits and water quality certification by states and Tribes under section 401 of the Clean Water Act. I appreciate your commitment to work in good faith with federal partners on water quality.

As you note in your letter, the 2020 Clean Water Act Section 401 Certification Rule is under review at the Environmental Protection Agency (EPA) in accordance with Executive Order 13990. As part of this review, EPA held listening sessions on June 14, 15, 23, and 24, 2021. As you also note, the Nationwide Permit renewals initiated under the previous administration are in process, and your comments regarding the interaction between the Certification Rule and the Nationwide Permits are timely.

The process undertaken by the previous administration to renew and revise Nationwide Permits was in many ways unusual. The timing for renewal of the permits occurred earlier than in previous renewals, 401 certification was requested on proposed permits rather than final ones, and requests for extensions of the reasonable period of time by which to submit 401 certifications were declined. Without question, this approach has complicated an important process by which the federal government, states, Tribes, and territories carry out shared responsibilities to protect water quality.

We are grateful for your participation in the ongoing processes and look forward to working with you as this matter unfolds.

Thank you,

A handwritten signature in black ink that reads "Brenda Mallory".

Brenda Mallory
Chair

1 **PHILIP J. WEISER**
 2 **ATTORNEY GENERAL OF COLORADO**
 3 ANNETTE M. QUILL, 27683 (*PRO HAC VICE*)
 4 SENIOR ASSISTANT ATTORNEY GENERAL
 5 CARRIE NOTEBOOM, 52910 (*PRO HAC VICE*)
 6 FIRST ASSISTANT ATTORNEY GENERAL
 7 RALPH L. CARR COLORADO JUDICIAL CENTER
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14
 15 IN THE UNITED STATES DISTRICT COURT
 16
 17 FOR THE NORTHERN DISTRICT OF CALIFORNIA

18 In re

19 Clean Water Act Rulemaking

20 Case: No. 20-cv-04636-WHA
 21 (consolidated)
 22 Applies to all actions

23 **DECLARATION OF AIMEE M.**
 24 **KONOWAL IN SUPPORT OF PLAINTIFF**
 25 **STATES' OPPOSITION TO**
 26 **DEFENDANTS' MOTION FOR REMAND**
 27 **WITHOUT VACATUR**

28 Courtroom: 12, 19th Floor
 Date: August 26, 2021
 Time: 8:00 A.M.

ORAL ARGUMENT REQUESTED

I, Aimee M. Konowal, declare as follows:

1. I currently hold the position of Watershed Section Manager at the Water Quality Control Division of the Colorado Department of Public Health and Environment. I have held this position for 5 years, and prior to this position I worked for 20 years in various management and technical staff roles in the Watershed Section including managing the Environmental Data Unit and as technical staff assessing water quality and developing water quality standards. My current job responsibilities include supervising

1 three units with 30 technical staff in the Watershed Section. The Watershed Section is responsible for a
2 variety of programs including Colorado’s 401 Certification Program.

3
4 2. I submit this declaration in support of the Plaintiffs States’ opposition to EPA’s motion for
5 remand without vacatur. I have personal knowledge of the facts stated herein and can testify to them if
6 called as a witness. The 401 certification rule promulgated by EPA in 2020 (the “2020 Rule”) threatens to
7 strip Colorado of its ability to protect its valuable water resources from the operational impacts of large
8 water supply projects. These projects are essential for providing water for various beneficial uses in our
9 semi-arid state, and they will become even more critical as the state’s population continues to grow.
10 Colorado relied on EPA’s prior rule of nearly 50 years to impose conditions on water supply projects to
11 ensure they are protective of water quality both during construction and through long-term operation. Time
12 is of the essence; Colorado cannot afford to operate under the 2020 Rule for an undefined period of time
13 while EPA considers its regulatory options.

14
15 3. Colorado has received an average of 14 certification requests per year since 2015. Since
16 September 2020, Colorado has received 13 certification requests. As mentioned above, Colorado’s largest
17 and most complex 401 certifications are conditional certifications of large water supply projects, which are
18 triggered by the need for a 404 dredge and fill permit from the U.S. Army Corps of Engineers. Since
19 2012, Colorado has issued 4 such certifications, and we are currently working on 3 projects of similar
20 scope that will require 401 certifications in the relatively near future.

21
22 4. The water quality impacts from water supply projects in Colorado fall within 3 broad
23 categories: (1) water quality in new or expanded reservoirs; (2) changes to water quality downstream of
24 new reservoir releases; and (3) changes to water quality as a result of increased diversions to fill new or
25 expanded reservoirs. For each of our certifications of major water supply projects, we have included
26 conditions addressing some or all these concerns. For example:

- 1 a. **New and Expanded Reservoirs:** In past certifications, Colorado has required multiple years of
2 monitoring in expanded reservoirs following project completion, background data collection in
3 new reservoirs beginning even before the reservoirs are full, and the development of adaptive
4 management plans to address project-related water quality impairments if they occur in the future.
5 These conditions are critical to ensuring that reservoir water quality can support aquatic life,
6 recreational, agricultural, and drinking water uses. In addition, conditions requiring monitoring of
7 fish tissue mercury help protect public health and are especially important in new or expanded
8 reservoirs, where fish tissue mercury tends to increase shortly after the reservoir begins to fill.
9
- 10 b. **Releases from Reservoirs:** Colorado has imposed certification conditions designed to prevent
11 increases in water quality parameters, such as stream temperature, increases in the concentrations
12 of heavy metals, and nutrients resulting from natural biogeochemical processes that occur at the
13 bottom of reservoirs. These conditions have generally included monitoring, establishment of an
14 adaptive management plan, and the development of plans to address project-related impairments,
15 should they occur. These plans have often relied on the construction of multi-level outlet works to
16 manage the quality of releases.
17
- 18 c. **Increased Water Diversions:** Every water supply project Colorado involves increased diversions.
19 Diversions change the relative proportion of streamflows that come from various sources; thus,
20 increased diversions can have a major effect on water quality when they cause the proportion of
21 downstream flow coming from relatively polluted sources to increase. Furthermore, diversions
22 reduce the amount of flow available in the original waterbody, making streams more susceptible to
23 warming and less hospitable for aquatic life. To account for these impacts, Colorado has imposed
24 conditions requiring extensive temperature, aquatic life, *E. coli*, and nutrients monitoring along
25 with the development of adaptive management strategies, ranging from curtailment of diversions
26 to stream restoration and enhancement, to address project-related degradation in water quality.
27
- 28 5. Under the 2020 Rule, Colorado likely does not have the ability to impose *any* of these

1 conditions because they concern the operation of the “activity as a whole” rather than the discharge that
2 triggered the federal permitting requirement. As a result, Colorado is severely limited in its ability to
3 protect its streams and reservoirs from the major impacts that water supply projects can have on stream
4 temperature and water quality. Furthermore, project proponents now have less incentive to include
5 protective measures, such as multi-level outlet works and environmental flow releases, in their project
6 proposals. These costly, complex measures are critical to protecting water quality from project-related
7 impacts and to developing adaptive management strategies. However, only the 401 certification provides a
8 mechanism through which these measures can be enforced to ensure compliance with state water quality
9 requirements; thus, in its absence, project proponents feel less regulatory pressure to incorporate these and
10 other water quality mitigation measures in their projects from the outset. Besides the major implications
11 for aquatic life downstream of water supply projects, such as increased stream temperatures, reduced
12 flows, and higher concentrations of certain metals and nutrients related to increased diversions and/or
13 reservoir releases, this also undermines public health given that most water supply projects are designed to
14 increase public water supplies. For example, relatively pristine water is typically diverted to storage in
15 reservoirs, where certain biogeochemical processes can reduce water quality. At the same time, reducing
16 flows from high quality sources to the stream results in increased contributions from relatively low quality
17 sources, such as stormwater outfalls, non-point sources (*e.g.*, agricultural fields), and tributaries flowing
18 through developed areas. These impacts can lead to increased concentrations of arsenic, iron, and
19 manganese above water supply diversions and to increased concentrations of *E. coli* in recreational areas.
20 In addition, the unique aquatic environment in large, recently constructed or expanded reservoirs can lead
21 to spikes in fish tissue mercury concentrations. These reservoirs are often open to public fishing. Under the
22 2020 Rule, Colorado would lose its ability to condition new water supply projects to account for these
23 impacts.
24

25
26 6. Colorado’s concern with the 2020 Rule is perhaps best illustrated by a conditional 401
27 certification for the Northern Integrated Supply Project (NISP). The certification request was evaluated
28 under previous federal rule, and the certification was issued in January 2020. NISP is a water supply

1 project involving the construction of two new reservoirs and increased diversions from a highly managed
 2 river system. Proposed discharges into waters of the United States during construction triggered the need
 3 for a 404 permit. Colorado coordinated with the applicant and the Army Corps of Engineers to formulate
 4 30 conditions designed to protect water quality during construction and operation of the project:

- 5
- 6 • Conditions 1 through 7 require monitoring, modeling, and mitigation to address in-stream
 7 temperature impacts associated with increased diversions and reservoir releases. Some reaches of
 8 the stream are already impaired due to high temperatures, and modeling suggests that the project
 9 could increase warming in certain locations. These impacts are primarily associated with increased
 10 diversions.
- 11 • Conditions 8 and 9 involve baseline monitoring in the new reservoirs and require mitigation in the
 12 event of water quality impairments. Protecting water quality in these reservoirs is necessary to
 13 ensure that they can support their likely designated uses (drinking water, recreation, aquatic life,
 14 and agriculture).
- 15 • Conditions 10 through 15 require monitoring for the potential impacts of reservoir releases on
 16 water quality in downstream waters.
- 17 • Conditions 16 through 25 address the impacts of increased diversions on in-stream arsenic,
 18 copper, *E. coli*, and nutrient concentrations. These conditions were necessary because the project
 19 is expected to increase the proportion of stream flow that comes from relatively polluted sources,
 20 not because of project-related discharges.
- 21 • Conditions 26 and 27 require monitoring for mercury in fish tissue. If mercury concentrations are
 22 above standards, the project proponent must post fish consumption advisories. Mercury
 23 concentrations in fish tissue are often high in new reservoirs, and notifying the recreating public is
 24 critical to protecting public health.
- 25 • Conditions 28 and 29 require monitoring for macroinvertebrates to measure the effects of
 26 mitigation strategies and to detect and mitigate for any project impacts on aquatic life. Such
 27 impacts would be associated with project operations, such as diversions and reservoir releases.
- 28 • Condition 30 requires submission of relevant portions of the applicant’s stormwater management
 plan for construction of water pipeline stream crossings and submission of any related monitoring
 data.

21 Under the 2020 Rule, however, all but *one* of these conditions (Condition #30) would likely be considered
 22 outside of the scope of the 401 certification because they do not relate to the discharge that triggered the
 23 need for a federal 404 dredge and fill permit. Instead, these 29 conditions relate to the operation of the
 24 project, or the “activity as a whole,” consistent with U.S. Supreme Court directives and EPA’s practice
 25 under the previous federal rule.

26 7. In addition to the federal 401 framework, Colorado’s 401 certification program operates
 27 pursuant to the Colorado Water Quality Control Commission’s Regulation #82 (5 C.C.R. 1002-82).
 28

1 Several provisions of Regulation #82 are arguably inconsistent with the 2020 Rule and will need to be
2 revised if the federal rule remains unchanged. Colorado has not yet sought to revise Regulation #82
3 because of the uncertainty surrounding the status of the rule (in light of the ongoing litigation over the rule,
4 the change in presidential administrations, and EPA's stated intent to revise the rule). Leaving the 2020
5 Rule in place while remanding it to the agency would continue this uncertainty, or require Colorado to
6 update its regulations multiple times as the rule changes in the future.

7
8 8. Under Regulation #82, Colorado is required to perform antidegradation reviews for
9 projects receiving 401 certifications. Antidegradation reviews for most water supply projects require
10 protection against "significant degradation," which is defined generally as degradation to water quality
11 that erodes the difference between baseline conditions and the applicable standard; in other words,
12 significant degradation occurs before water quality exceeds standards. Increased diversions and other
13 changes in flow associated with water supply projects can cause significant degradation of temperature,
14 nutrients, and other water quality constituents. Under the 2020 Rule, however, Colorado would be barred
15 from developing conditions that address these impacts. In this way, Colorado could not comply with its
16 own state water quality regulations because of the narrower scope of the 2020 Rule.

17
18 9. Regulation #82 assumes that adaptive management is a permissible strategy for providing
19 "reasonable assurance" that a project will comply with water quality standards. This is consistent with the
20 prior rule, which required certifying authorities to provide "[a] statement that there is a reasonable
21 assurance that the activity will be conducted in a manner which will not violate applicable water quality
22 standards" as part of its certification. The 2020 Rule, by contrast, limits the scope of the state certification
23 to "assuring that a discharge from a Federally licensed or permitted activity will comply with water quality
24 requirements." To the extent that the "will comply" language of the new rule precludes the "reasonable
25 assurance" approach, both the language in Regulation #82 and the overall framework for certifying large
26 water supply projects will need to be significantly altered. Regulation #82 frequently refers to developing
27 conditions that address the potential impacts from operation of the project as a whole. The narrowed
28

1 scope of the 2020 Rule suggests that this language (and Colorado's associated process for certifying large
2 projects) would have to change to be consistent with the vastly narrowed scope of the federal rule.

3
4 10. If the 2020 Rule remains in place while EPA proceeds with a new rulemaking, Colorado
5 will likely experience harm to its water resources as a result of the limited scope of conditions available
6 for large water supply projects that are currently under development in our state. Colorado cannot afford
7 to wait for EPA to undergo what could be a lengthy rulemaking process while the 2020 Rule remains in
8 place.

9
10 I declare under penalty of perjury under the laws of the United States that the foregoing is true and
11 correct and that this declaration was executed on July 21, 2021.

12 Signature: 

13 Printed name: Aimee M. Konowal

14 Address: 4300 Cherry Creek Drive South Denver CO 80209

15 Phone Number: 720-284-2370

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10
 11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13
 14
 15 In re

16 Clean Water Act Rulemaking

Case: No. 20-cv-04636-WHA
 (consolidated)
 Applies to all actions

**DECLARATION OF PAUL WOJOSKI
 IN SUPPORT OF PLAINTIFF STATES'
 OPPOSITION TO DEFENDANTS'
 MOTION FOR REMAND WITHOUT
 VACATUR**

Courtroom: 12, 19th Floor
 Date: August 26, 2021
 Time: 8:00 A.M.

ORAL ARGUMENT REQUESTED

17
 18
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 23
 24 I, Paul Wojoski, declare as follows:

25
 26 1. I am the supervisor of the 401 and Buffer Permitting Branch of the Division of Water
 27 Resources. I have been in this role since March of 2020 and previously served as the acting
 28

1 supervisor for approximately 5 months in 2019. Prior to my current position, I was a Senior
2 Environmental Specialist in the 401 and Buffer Permitting Branch.

3 2. I have a Bachelor's of Science in Biology with an emphasis in Computation Science
4 from Wofford College awarded in 2005. I carry North Carolina Surface Water Identification
5 Training and North Carolina Wetland Assessment Method Training Certifications.

6 3. As the Branch Supervisor, I am responsible for coordinating staff and overseeing
7 review of applications for 401 water quality certifications, State waters permits, riparian buffer
8 authorizations and variances. I also coordinate staff and oversee stream, wetland, and buffer
9 mitigation and nutrient offset projects. I am the primary point of contact for state rulemakings
10 related to the 401 water quality certification program, riparian buffer protection program and state
11 waters permitting programs. I provide technical expertise on Federal rulemakings and national
12 issues impacting these programs. I also provide leadership and technical expertise for coordination
13 of these programs across seven regional offices to ensure consistent and uniform application of
14 these programs.

15 4. I have personal knowledge of all facts stated in this declaration, and if called to
16 testify, I could and would testify competently thereto.

17 5. I make this declaration in support of the above captioned challenge to the final action
18 of the United States Environmental Protection Agency ("EPA") to promulgate the "Clean Water
19 Act Section 401 Certification Rule," published at 85 Fed. Reg. 42,210 (Jul. 13, 2020) ("Rule") and
20 in support of the Plaintiff State's Response in Opposition to EPA's motion to remand without
21 vacatur. As explained below, the State of North Carolina has already been significantly prejudiced
22 by the challenged rule. Most notably, the Army Corps of Engineers ("Corps")—after the
23 promulgation of the Executive Orders directing the reconsideration of the Rule—relied on the Rule
24 to determine that North Carolina had waived its authority to issue state certifications for three Army
25 Corps Nationwide Permits even though North Carolina complied with the terms of the Clean Water
26 Act in taking final action on the Corps' request.

27 6. If allowed to remain in place while EPA reconsiders the rule, the challenged rule
28 will continue to prejudice the State of North Carolina and its residents by placing into question

1 North Carolina's ability to include conditions that are critical to the protection of water quality in
2 the State of North Carolina into Section 401 certifications for federally-approved projects, imposing
3 significant and resource-intensive administrative burdens, and needlessly delaying environmentally
4 beneficial projects.

5
6 **The Rule Imposes Significant Unnecessary Burdens on North Carolina 401 Program.**

7 7. During the ten months the Rule has been in place, the Rule has already imposed a
8 significant burden on North Carolina's 401 water quality certification program. By imposing
9 onerous requirements on NCDEQ's certification process, the Rule has forced and will continue to
10 force the agency to divert resources away from protecting water quality in order to comply with
11 these new requirements.

12 8. During a typical year, North Carolina DWR reviews over 1,600 401 certification
13 applications. At each stage of the review process, the Rule has increased the burden on the state
14 often with no appreciable benefit.

15 9. Before the application can even be submitted the Rule requires the submission of a
16 pre-filing meeting request. This pre-filing meeting request is required without regard to whether
17 the request would serve any purpose whatsoever. The request must be filed thirty days before the
18 application can be submitted—no exceptions. This means that even time-sensitive environmentally
19 beneficial projects, like cleaning up hog waste that has discharged into protected wetlands,
20 emergency stream bank repair, or installing groundwater corrective action measures that require
21 work in protected waterways have an additional thirty days added to the application clock no matter
22 what. The requirement has resulted in delays even beyond thirty days where applicants have
23 submitted applications without the pre-filing meeting request and DWR has had to deem otherwise
24 complete applications incomplete simply because the applicant filed to comply with the pre-filing
25 meeting request requirement. Because the pre-filing meeting rules only apply to 401 certification
26 requests, and not federal permits, the requirement causes an otherwise coordinated process to
27 become disjointed. The relevant federal agency continues to process the permit application, but on
28 the 401 side, the applicant must submit its pre-filing request, wait 30 days, and then re-file before

1 proceeding. All of these issues result in unnecessary delays and administrative burdens. These
2 issues have already arisen in North Carolina and will continue to arise if the Rule is allowed to stay
3 in place.

4 10. The Rule also sets an unreasonable start date for the State's review of the
5 certification request. For example, the Final Rule contains an exclusive list of materials necessary
6 for a certification request to be deemed complete. § 121.5. That list omits materials that North
7 Carolina has deemed necessary to complete an application. Among the notable items excluded
8 from the Final Rule but included in North Carolina's 401 certification regulations are

9
10 (1) "a description of the receiving waters, including type (creek, river, swamp, canal,
11 lake, pond, or estuary) if applicable; nature (fresh, brackish, or salt); and wetland
12 classification,"

13 (2) "a map(s) or sketch(es) with a scale(s) and a north arrow(s) that is legible to the
14 reviewer and of sufficient detail to delineate the boundaries of the lands owned or
15 proposed to be utilized by the applicant in carrying out the activity; the location,
16 dimensions, and type of any structures erected or to be erected on the lands for use
17 in connection with the activity; and the location and extent of the receiving waters,
18 including wetlands within the boundaries of the lands," and

19 (3) an application fee.

20
21 *Compare* § 121.5 with 15A NCAC 02H .0502(a).

22
23 11. This information is essential to conducting an appropriate review. Being forced to
24 request this information from each applicant will drain staff resources and eat in to the time allotted
25 for review of the application. For some cases, this is likely to result in the State having an
26 inadequate amount of time to review an application before being required to act upon it or risk
27 waiving its certification authority.

1 12. Once the application is submitted, the Rule purports to give the Federal Agency
2 unilateral authority to dictate the timing of North Carolina's review of a certification request. The
3 Rule directs the Federal Agency to set the timeline for North Carolina's review without consulting
4 North Carolina at all about the time it will need. If this timeline is insufficient, North Carolina must
5 devote additional time and staff resources to requesting an extension from the Federal Agency.
6 During the ten months the rule has been in effect, DWR staff has been forced to devote significant
7 time to correspondence with federal agencies requesting extensions and working out an agreed
8 upon approach for the new Rule.

9 13. Notably, although the Rule sets forth several factors the Federal Agency is required
10 to consider in determining what amount of time is needed, it does not reference the need for a public
11 hearing as one of those factors. § 121.6(c). If there is significant public interest, North Carolina's
12 401 certification rules requires a public hearing to be held. Public notice must issue at least thirty
13 days before such a hearing, and the record must be open for public comment at least thirty days
14 after such a hearing. *See* 15A NCAC 02H .0503(f). At least one federal agency, the Army Corps,
15 has taken the position that the need for a public hearing *cannot be considered* in determining the
16 reasonable period of time.

17 14. When this Rule was first proposed, North Carolina was in the final stretches of a
18 lengthy and time-consuming process to update its 401 certification rules. As they stand, these state
19 rules are inconsistent with the Rule in a number of respects. This has resulted in confusion for staff
20 and the regulated community. For example, applicants must now ensure that their requests contain
21 all the elements required by both North Carolina's state rules and the federal Rule. Under EPA's
22 proposed timeline, North Carolina would be forced to choose between updating its rules to conform
23 to a Rule that it knows is likely to change or leaving in place its existing rules and continue to waste
24 time and resources managing the confusion caused by the inconsistency.

25 15. North Carolina DWR has already been forced to hire an additional administrative
26 staff person specifically to deal with the increased administrative burden of the Rule. It has also
27 been forced to divert significant information technology and database management resources to
28

1 address the complexities caused by the Rule's requirements and the decoupling of previously
2 coordinated processes the Rule has necessitated.

3
4 **The Rule Will Continue to Harm North Carolina's Water Quality By Limiting North
5 Carolina's Authority to Condition 401 Certifications**

6 16. Based on the Supreme Court's decision in *PUD No. 1 of Jefferson County v.*
7 *Washington Dep't of Ecology*, 511 U.S. 700 (1994) (PUD No. 1), and subsequent EPA guidance,
8 North Carolina has long included conditions in its water quality certifications designed to address
9 the impact to water quality of the federally approved project as a whole.

10 17. These kinds of conditions are particularly important measures in addressing
11 sediment and nutrient pollution—two of the most significant threats to North Carolina's water
12 quality.

13 18. Nutrient-related (nitrogen and phosphorus) pollution is a water quality issue
14 throughout the State. Although nutrients are necessary for aquatic ecosystems, an overabundance
15 of nitrogen and phosphorus can lead to algal blooms and fish kills.

16 19. Excess sedimentation from construction projects is a continuing concern in North
17 Carolina and can be a serious problem for aquatic species such as mussels and fish. Excessive silt
18 and sediment loads can have numerous detrimental effects on aquatic resources including
19 destruction of spawning habitat, suffocation of eggs, and clogging of gills of aquatic species.
20 Pollutants such as toxins, bacteria, and nutrients—particularly phosphorus—bind to sediment
21 particles and are transported into streams, where they can accumulate in the sediment and impact
22 aquatic organisms.

23 20. Because of these water quality concerns, North Carolina includes conditions in its
24 401 certifications to address nutrient and sediment pollution from federally licensed projects.

25 21. As just one example, 401 certifications issued by the State of North Carolina
26 generally include a condition that the project must use erosion and sediment control measures
27 designed, installed, operated, and maintained in accordance with the most recent version of the
28 *North Carolina Sediment and Erosion Control Planning and Design Manual*. Without these

1 measures, the effects of sedimentation—destruction of spawning habitat, suffocation of eggs,
2 clogging of gills of aquatic species, and increased toxins and nutrients—will increasingly harm
3 North Carolina’s waterways.

4 22. The Final Rule limits the scope of a 401 certification to “assuring that a [point
5 source] discharge from a federally licensed or permitted activity will comply with water quality
6 requirements.” It calls into question the ability of North Carolina to include these conditions in its
7 401 certifications.

8
9 **Federal Agencies Are Continuing to Rely on the Rule to Inappropriately Curtail State
Authority under Section 401.**

10 23. On October 19, 2020, DWR received a request from the Corps for 401 water quality
11 certifications for over forty Nationwide Permits (“NWP”), which includes their permit conditions,
12 thirty-two proposed general conditions, and proposed regional conditions (401 certification
13 request).

14 24. Although the existing NWPs that these new NWPs would replace do not expire until
15 2022, the Corps’ 401 certification request dictated that DWR would have only 60 days to review
16 *all 40 requests*. When DWR requested an extension based on the volume and complexity of the
17 request, DWR’s request was denied without explanation.

18 25. On December 18, 2020, DWR provided a timely 401 certification response for all
19 the proposed NWPs. DWR denied the Corps’ request for certification of seven NWPs, but
20 inadvertently failed to include the rationale required by the Rule. The effect of DWR’s denial
21 would have been to allow DWR to include state water quality conditions on an individual project
22 basis for projects that were able to rely on the NWP for federal purposes.

23 26. On January 13, 2021, the Corps published a number of final NWPs—including three
24 of those for which DWR inadvertently omitted the explanation for its denial—in the Federal
25 Register indicating that they would become final on March 15, 2021 and would expire five years
26 from the effective date.

1 27. After the January publication, DWR was notified of its omission. On February 19,
2 2021, DWR formally requested to be allowed to supplement its 401 decision to include the basis
3 for its denials. NCDWR explained that it had been on an unreasonably short deadline and the
4 supplementation would cause no delay because the NWP's were not even slated to take effect until
5 March 15.

6 28. Nonetheless, the Corps rejected DWR's request. It took the position that the Rule
7 left it "no choice" and that it was required to deem the State's water quality certification authority
8 waived. *See* Collected Correspondence attached as Attachment A.

9 29. As a result of the Corps' actions taken in express reliance on the Rule, any project
10 that proceeds under these three NWP's during the next five years will do so without any state water
11 quality conditions.

12 30. It is my understanding that the Corps intends to finalize the remaining NWP's by the
13 end of this year and will take the same position with respect to the other four NWP's for which
14 NCDWR inadvertently failed to include an explanation for the denial.

15

16 **North Carolina Will Suffer Undue Prejudice if the Rule is Left in Place.**

17 31. If EPA is allowed to leave the Rule in place while it reconsiders it over the next two
18 years, the Rule will cause North Carolina undue prejudice.

19 32. North Carolina typically processes over 1600 401 certification applications in a
20 year. If the Rule remains in effect, it will call into question the ability of North Carolina to include
21 in each of these 401 certifications critical conditions necessary to protect against sediment and
22 nutrient pollution. Because most of these projects receive only one federal license, and thus only
23 one 401 certification, this 401 certification may well be the only opportunity to include those
24 conditions for the lifetime of the project.

25 33. Casting doubt on this authority is particularly concerning due to the significant
26 projects that are likely to be under review by the State in the coming years—including several
27 significant highway projects. If the 401 certifications for those projects cannot be conditioned

28

1 based on the potential water quality impacts of the project as a whole, North Carolina's water
2 quality is likely to suffer negative impacts for many years to come.

3 34. In addition to the substantive constraints on State authority, the administrative
4 burdens placed on the State by the Final Rule have had significant impacts and those impacts will
5 continue to grind on the State's resources. Agency staff and resources that could and should have
6 been devoted to protecting North Carolina's water quality instead has been and will continue to be
7 spent on seeking extensions of time from federal agencies and ensuring compliance with procedural
8 requirements of the Rule.

9 35. The Rule will also impact the State's citizens. Every project in the state, regardless
10 of size, complexity or urgency, is forced to needlessly wait an additional thirty days to submit its
11 application. These delays impose costs on both the State and its citizens and they are costs that are
12 imposed by allowing the Rule to remain in effect.

13 I declare under penalty of perjury under the laws of the United States that the foregoing is
14 true and correct and that this declaration was executed on [date] July 21, 2021.

15
16 Signature: Paul Wojoski

17 Printed name: Paul Wojoski

18 Address: 1617 Mail Service Center, Raleigh NC 27619

19 Phone Number: (919) 704-9015
20
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28

Attachment A



NORTH CAROLINA
Environmental Quality

ROY COOPER
Governor

MICHAEL S. REGAN
Secretary

S. DANIEL SMITH
Director

February 19, 2021

Scott McLendon, Chief
Regulatory Division, Wilmington District
US Army Corps of Engineers
69 Darlington Avenue
Wilmington NC 28403-1343
Delivered via email

Subject: NCDWR's Addendum to its December 18, 2020 401 Certification Response for USACE Nationwide Permits

Dear Chief McLendon,

Recently, the North Carolina Department of Environmental Quality's Division of Water Resources (DWR) became aware that it had failed to include explanations for its decision to deny certain of the U.S. Army Corps of Engineers' (USACE) 401 certification requests for USACE Nationwide Permits (NWP). DWR hereby requests that you consider the attached Addendum A as an addendum to DWR's December 18, 2020 401 certification response, related to the USACE's 401 certification request for NWPs.

BACKGROUND

On September 11, 2020, the federal "Clean Water Act Section 401 Certification Rule" (Federal Rule) became effective, which significantly impacts states' 401 certification procedures.¹ Shortly thereafter, on October 19, 2020, DWR received USACE's request for 401 water quality certifications for over forty NWPs, which includes their permit conditions, thirty-two proposed general conditions, and proposed regional conditions (401 certification request). Although the existing NWPs that these new NWPs would replace do not expire until 2022, USACE's 401

¹ Along with several other states, North Carolina has challenged this rule as unlawful in litigation that is currently pending. *State of California et al v. Wheeler*, 3:20-cv-04869-WHA (N.D. Cal.). The rule has also been expressly identified by the Biden administration as a rule that is currently under review by the incoming administration. See List of Agency Actions for Review, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.



certification request stated that the reasonable period of time for DWR's review for all of these NWP's was only 60 days.²

Due to the expedited deadline imposed on DWR, on October 29, 2020, DWR timely requested an extension of time from USACE to take action on the NWP's.³ In its request, DWR noted the sheer volume of the USACE's 401 certification request and the significance of the request, given that NWP's and DWR's corresponding 401 general certifications are used to permit over 1,600 projects in North Carolina each year. DWR also noted that the USACE's proposal includes significant changes to permitting thresholds in a number of the NWP's. These revised permitting thresholds would have significant impacts on the way the 401-404 permitting process works and thus would require additional time for DWR review. DWR also noted the USACE's unprecedented procedure of requesting DWR to certify *draft* NWP's that were still out for public comment and subject to change after DWR had made its 401 certification decision.

On November 19, 2020, the USACE summarily denied DWR's request for an extension of time. This denial had the effect of forcing DWR to, within 60 days: 1) review USACE's 401 certification request for over forty draft NWP's that include significant changes to permitting thresholds; 2) draft 401 general certifications for those NWP's that DWR was going to certify including new requirements imposed by the new Federal Rule; 3) solicit public comment on the draft 401 general certifications as required by State law; and 4) finalize the 401 general certifications and render a final decision on the entirety of USACE's certification request.

On December 18, 2020, DWR provided a timely 401 certification response for all the proposed NWP's. DWR denied the USACE's request for certification of seven NWP's, which results in each project utilizing those seven NWP's requiring an individual 401 certification rather than a general certification. Several weeks later, DWR was made aware that its denials failed to include an explanation for the denial under the new Federal Rule.⁴

REQUEST TO ALLOW SUPPLEMENTATION

DWR hereby requests that it be allowed to supplement its previous denials to provide the required explanation. The preamble to the Federal Rule preserves federal agencies' authority to allow states to remedy purportedly deficient denials. *See* 85 Fed. Reg. at 42269 (noting that federal agencies may "create procedures whereby certifying authorities may remedy deficient conditions or denials"). DWR asks that USACE exercise that authority and allow DWR to supplement the certification denials as specified in Addendum A.

Allowing supplementation is appropriate in light of the extremely limited time frame provided to DWR for reviewing the substantial number of requests. Moreover, allowing supplementation

² Based on USACE's 401 certification request, USACE is relying on the new Federal Rule to, for the first time, impose a 60-day deadline on DWR's review. So, the USACE both applied to DWR and then decided for itself what a "reasonable period of time" was for DWR to review USACE's own application.

³ Requests for extension of time are expressly addressed by the new Federal Rule at 40 CFR §121.6 and the USACE has granted extensions of time to DWR for other projects.

⁴ *See* 40 CFR §121.7(e).

will not result in any delay. Of the denials issued by DWR, only NWP 21, 43, and 50 have been published in the Federal Register, and these will not become effective until March 15, 2021. The other four NWPs (17, 34, 38, and 49) that DWR denied have not even been published in the Federal Register. None of the proposed regional conditions have been published.

Please contact Paul Wojoski at 919-707-9015 or Paul.Wojoski@ncdenr.gov with any questions.

Sincerely,

A handwritten signature in cursive script that reads "S. Daniel Smith".

S. Daniel Smith, Director
Division of Water Resources

cc: Henry Wicker, USACE (via email)
Todd Bowers, EPA (via email)
DWR 401 & Buffer Permitting Unit

ADDENDUM TO DWR's DECEMBER 18, 2020 CERTIFICATION RESPONSE

Nationwide Permit #17 – Hydropower Projects

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina's surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

Discharges, including in-stream structures, machinery, and channel diversions, necessary for the construction of hydropower facilities typically disrupts the natural function of a stream and preclude the stream from maintaining usages, such as aquatic life survival and maintenance of biological integrity. These projects also have significant potential to violate water quality standards, including temperature, dissolved oxygen, and turbidity. Therefore, DWR cannot certify that the discharges authorized under this NWP will comply with water quality standards without project specific review under an individual 401 certification.

Nationwide Permit #21 – Surface Coal Mining Activities

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

Mine drainage and the discharge of processing wastewater and/or stormwater contains chemicals and/or byproducts such as sulfuric acid and dissolved iron. The discharge from these activities with these parameters present would indicate a high potential for violations of water quality standards listed in 15A NCAC 02B .0211. Therefore, DWR cannot certify that the discharges authorized under this NWP will comply with water quality standards specified in 15A NCAC 02B .0208 or .0211 without project specific review under an individual 401 certification.

Nationwide Permit #34 – Cranberry Production Activities

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

DWR does not have empirical data or experience relating to the water quality impacts stemming from cranberry production activities in North Carolina and is, therefore, unable to certify that discharges authorized under this NWP will comply with water quality standards. Project specific review under an individual 401 certification is required.

Nationwide Permit #38 – Cleanup of Hazardous and Toxic Waste

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

As indicated in the NWP activity description, projects eligible for coverage under NWP 38 involve disturbance of land or water where hazardous and/or toxic chemicals are present. The discharges that result from these activities have a high potential for violations of water quality standards for a variety of the standards listed in 15A NCAC 02B .0211, such as metals, hardness, toxic substances, pesticides, etc; therefore, DWR cannot certify that discharges authorized under this NWP will comply with water quality standards specified in 15A NCAC 02B .0208 or .0211. Project specific review under an individual 401 certification is required.

Nationwide Permit #43 – Stormwater Management Facilities

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

Surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

Stormwater management facilities are constructed to treat stormwater runoff from impervious surfaces that may contain oils, deleterious substances or other wastes, as well as hazardous or toxic materials. Treatment of such chemicals through stormwater management facilities constructed within waters of the State would involve discharges which would have significant potential to cause violations of water quality standards for parameters listed in 15A NCAC 02B .0211 as well as others. Therefore, DWR cannot certify that discharges authorized under this NWP will comply with water quality standards, specifically with regards to aquatic life propagation, survival and maintenance of biological integrity, without individual review in all circumstances, regardless of type or size of impacts.

Nationwide Permit #49 – Coal Remining Activities

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

DWR does not have empirical data or experience relating to the water quality impacts stemming from coal remining activities in North Carolina and is, therefore, unable to certify that discharges authorized under this NWP will comply with water quality standards. Project specific review under an individual 401 certification is required.

Nationwide Permit #50 – Underground Coal Mining Activities

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

DWR does not have empirical data or experience relating to the water quality impacts stemming from underground coal mining activities in North Carolina and is, therefore, unable to certify that discharges authorized under this NWP will comply with water quality standards. Project specific review under an individual 401 certification is required.



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, WILMINGTON DISTRICT
69 DARLINGTON AVENUE, WILMINGTON, NORTH CAROLINA 28403

February 26, 2021

District Commander
Wilmington District
69 Darlington Avenue
Wilmington, NC 28403

To: HQ USACE, State of North Carolina, and the Environmental Protection Agency:

The Wilmington District requested water quality certifications under Section 401 of the Clean Water Act (401 WQC) for the proposed reissuance of those Nationwide Permits (NWP) that may result in a discharge in waters of the United States in the State of North Carolina, specifically NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 57 and 58, on October 19, 2020.

The North Carolina Division of Water Resources (NCDWR) conditionally approved 401 WQCs for NWPs 12, 29, 39, 40, 42, 44, 48, 51, 52, 57 and 58. The Wilmington District has reviewed NCDWR's issuance of the 401 WQCs for these NWPs and has determined that the 401 WQCs satisfy the requirements set forth in 40 CFR § 121.7(d)(2). Furthermore, the Wilmington District has determined that all 401 WQC conditions for these NWPs are acceptable in accordance with 33 CFR § 330.4(c), comply with the provisions of 33 CFR § 325.4, and will be included as Regional Conditions.

The NCDWR denied 401 WQCs for NWPs 21, 43 and 50 on December 18, 2020. However, in accordance with the U.S. Environmental Protection Agency's (EPA's) current WQC regulations at 40 CFR Part 121, the Wilmington District has determined that waiver of the 401 WQC requirement has occurred for NWPs 21, 43 and 50 due to the State of North Carolina's failure to comply with other procedural requirements of section 401, per 40 CFR 121.9(a)(2)(iv). Specifically, the denials of these NWPs did not meet the requirements of 40 CFR 121.7(e)(2).

The Corps will rely on the issued 401 WQCs, and issue authorizations for the discharges into waters of the United States for NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 57 and 58. Thank you for your coordination and efforts on the re-issuance of the NWPs.

Sincerely,

Scott McLendon

Scott McLendon
Chief, Regulatory Division
Wilmington District



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, WILMINGTON DISTRICT
69 DARLINGTON AVENUE, WILMINGTON, NORTH CAROLINA 28403

March 29, 2021

Mr. S. Daniel Smith, Director
Division of Water Resources
NC Department of Environmental Quality
1617 Mail Service Center
Raleigh, North Carolina 27699

Dear Mr. Smith:

Please reference your letter dated February 19, 2021, in which you provided an addendum to the December 18, 2020 Water Quality Certifications (WQC) for several Nationwide Permits (NWP) for which the Water Quality Certifications were denied (NWP 17, 21, 34, 38, 43, 49, 50). The purpose of this addendum was to provide an explanation to justify the denied WQCs for the NWP. As you are aware, failure to provide justification for the denial of a WQC does not comport with new 401 WQC Rule (40 CFR 121.7 (e)(2)) and we have no choice but to consider the WQC's for these NWP waived.

The Federal Register notice for the final rule in Section III (g)(2)(e)(3), concerning remedy of deficient conditions and denials, states that "the Agency has determined not to include in the final rule an express allowance for certifying authorities to remedy deficient conditions after the certification action is taken." This section of the final rule also states that Federal agencies can allow certifying authorities to remedy deficient conditions and denials in their own water quality certification conditions. However, as the Corps does not have its own specific water quality certification regulations that would allow for the submittal of supplemental information to remedy deficient conditions and denials, we have no choice but to consider the subject WQCs waived, consistent with the 401 Rules.

The Corps will rely on the issued 401 WQCs for the remaining NWP's, and provide authorizations for discharges into Waters of the United States for NWP's 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 57 and 58. Thank you for your coordination and efforts on the re-issuance of the NWP's. Please do not hesitate to contact me if you have any questions concerning this correspondence.

Sincerely,

Scott McLendon

Scott McLendon
Chief, Regulatory Division
Wilmington District

Electronic Copy furnished:

Todd Bowers, Region IV EPA (via e mail)

1 HECTOR BALDERAS
Attorney General of New Mexico
2 WILLIAM GRANTHAM
Assistant Attorney General
3 Office of the Attorney General
4 201 Third Street NW, Suite 300
Albuquerque, NM 87102
5 Telephone: (505) 717-3520
wgrantham@nmag.gov
6

7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10
11 In re

12 Clean Water Act Rulemaking

Case: No. 20-cv-04636-WHA
(consolidated)
Applies to all actions

13 **DECLARATION OF REBECCA**
14 **ROOSE IN SUPPORT OF PLAINTIFF**
15 **STATES' OPPOSITION TO**
16 **DEFENDANTS' MOTION FOR**
17 **REMAND WITHOUT VACATUR**

Courtroom: 12, 19th Floor
Date: August 26, 2021
Time: 8:00 A.M.

18 **ORAL ARGUMENT REQUESTED**
19
20

21 I, Rebecca Roose, state and declare as follows:

22 1. My name is Rebecca Roose. I am over 21 years of age and am fully competent and duly
23 authorized to make this Declaration. The facts contained in this Declaration are based on my
24 personal knowledge and are true and correct.

25 2. I am employed as the Deputy Cabinet Secretary of Administration at the New Mexico
26 Environment Department (Department or NMED).
27
28

1 3. In my role as Deputy Cabinet Secretary, I oversee the Water Protection Division, which
2 includes four bureaus: the Ground Water Quality Bureau, the Surface Water Quality Bureau,
3 the Drinking Water Bureau, and the Construction Programs Bureau. I have been employed by
4 the Department for over two years, including two years as Water Protection Division Director.
5 Prior to joining the Department in 2019, I worked for the U.S. Environmental Protection
6 Agency (EPA). At EPA Headquarters, I devoted 13 years to supporting EPA, states, and tribes
7 with implementation of Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (Clean
8 Water Act or CWA) programs. Specifically, I drafted and defended National Pollutant
9 Discharge Elimination System (NPDES) program regulations and effluent limitations
10 guidelines promulgated pursuant to CWA Section 402, provided oversight of states'
11 implementation of NPDES, pretreatment and CWA Section 319 nonpoint source control
12 programs, and developed policy and training for compliance inspections of NPDES permittees
13 and CWA Section 311 spill prevention, control and countermeasures facilities. During my
14 tenure at EPA, I served as a national expert on NPDES requirements for Concentrated Animal
15 Feeding Operations, NPDES program requirements for authorized states, and NPDES
16 compliance monitoring policy. I earned my law degree and natural resources law certificate
17 from the University of New Mexico in 2004.

18 4. The New Mexico Legislature designated the Water Quality Control Commission
19 (Commission) as the "state water pollution control agency for this state for all purposes of the
20 federal [Water Pollution Control] act." N.M. STAT. ANN. § 74-6-3(E) (2007). The
21 Commission has the duty to "adopt water quality standards for surface and ground waters of the
22 state" and to develop and implement a comprehensive water quality management program and
23 continuing planning process. N.M. STAT. ANN. §§ 74-6-4(B) and (E) (2009). Since the
24 Commission has no technical staff, responsibilities for water quality management activities are
25 delegated to constituent agencies, primarily the Department. See N.M. STAT. ANN. § 74-6-
26 4(F). Responsibilities for activities involving surface waters are delegated to the Department's
27 Surface Water Quality Bureau.
28

1 5. The Department serves as agent of the state in matters of environmental management and
2 consumer protection. N.M. STAT. ANN. § 74-1-6(E) (2009). The purpose of the Department is
3 "to ensure an environment that in the greatest possible measure will confer optimum health,
4 safety, comfort and economic and social well-being on its inhabitants; will protect this
5 generation as well as those yet unborn from health threats posed by the environment; and will
6 maximize the economic and cultural benefits of a healthy people." N.M. STAT. ANN. § 74-1-2
7 (1997).

8 6. The Surface Water Quality Bureau of the Department is responsible for preserving,
9 protecting, and improving the quality of New Mexico's surface waters through development and
10 refinement of water quality standards; monitoring and assessment of water bodies; point source
11 regulation and nonpoint source management; watershed restoration; and overseeing
12 unauthorized discharges to surface waters, disposal of refuse in watercourses, and spill-cleanup.
13 The Department, in review of the National Hydrology Dataset, finds that approximately 7% of
14 the state's rivers and streams are perennial, 4% are intermittent, with the remaining 89% being
15 ephemeral. In addition, New Mexico has approximately 89,000 acres of significant public lakes
16 and reservoirs and 845,000 acres of wetlands.

17 7. New Mexico's **Water Quality Standards** (Standards) define water quality goals by
18 designating uses for rivers, streams, lakes and other surface waters, setting criteria to protect
19 those uses, and establishing anti-degradation provisions to preserve water quality. 20.6.2 New
20 Mexico Administrative Code (NMAC); 20.6.4 NMAC. The Standards are adopted by the
21 Commission pursuant to N.M. STAT. ANN. § 74-6-4(D) and approved by EPA pursuant to the
22 Clean Water Act. As such, New Mexico's Standards are enforceable under both state and
23 federal law.

24 8. Pursuant to Section 401 of the CWA, the Department is the state agency charged with
25 certifying federal permits issued by EPA and U.S. Army Corps of Engineers (USACE). N.M.
26
27
28

1 STAT. ANN. § 74-6-5(B) (2009), 20.6.2.2001-2003 NMAC. The EPA and USACE maintain
2 primacy over CWA activities in New Mexico, and both NPDES permits and dredge and fill
3 (Section 404) permits are issued by these federal agencies, respectively.

4 9. The Department's role under CWA Section 401 is to ensure that these federal permits
5 comply with the requirements of state law in order to maintain and protect water quality within
6 our borders. Specifically, for each 401 certification the Department conducts a thorough
7 technical review of the proposed NPDES or Section 404 permit conditions in relation to state
8 Water Quality Standards to support one of four actions: grant, grant with condition(s), deny, or
9 waive. The CWA Section 401 certification is part of a larger water quality protection effort that
10 is an integral part of the CWA. New Mexico has been applying this process successfully for
11 decades.

12 10. I have been involved in implementation of reviewed the EPA's Clean Water Act Section
13 401 Certification Rule (401 Rule), which was published in the Federal Register on July 13,
14 2020 and became effective September 11, 2020. I have knowledge and experience that allow
15 me to understand the impacts of the 401 Rule on the Department and surface water quality in
16 New Mexico.

17 11. As a state that does not have authority over CWA permitting programs within its borders,
18 New Mexico is disproportionately impacted by the 401 Rule. For example, from 2017 through
19 2019 the Department certified 46 federal CWA Section 402 permits, along with the NPDES
20 Construction General Permit in 2019 and NPDES Multi-Sector General Permit in 2020, which
21 combined cover over a thousand permitted discharges throughout New Mexico. In addition,
22 during 2018 and 2019, the Department certified six federal CWA Section 404 standard
23 individual permits (IPs), two Section 404 regional general permits (RGPs), and confirmed
24 numerous Section 404 nationwide permits (NWPs), which represent the majority of
25 certification actions under Section 404 in New Mexico. In December 2020, NMED certified or
26 certified with conditions 56 proposed NWPs consistent with State law and regulations. Because
27 the USACE rejected these NWP certifications as described in paragraph 22 below, currently,
28

1 anyone wanting to perform activities under an NWP issued in March 2021 must first obtain an
2 activity-specific Section 401 certification from the Department.

3 12. Typical activities requiring CWA Section 404 permits include: construction of flood
4 control and stormwater management facilities, mining, grading, intake/outfall structures, road
5 crossings, pipelines; construction of boat ramps, docks, piers, shoreline or bank stabilization,
6 and fish habitat; construction of revetments, groins, breakwaters, levees, dams, dikes, drop-
7 structures and weirs; placement of riprap, culverts, and footings; and, in some cases, dredging
8 and other excavation require approval when there is a discharge that results in more than
9 incidental fallback (33 C.F.R. 323.2(d)(1)) of dredged or excavated material.

10 13. Section 401 certification authority is crucial for New Mexico to:

- 11 • Ensure regulated activities comply with state Standards;
- 12 • Assist regulated entities, EPA, and USACE with implementation and protection of state
13 Standards;
- 14 • Identify and correct errors in publicly noticed draft permits;
- 15 • Ensure that the state's Standards are successfully implemented into permits in a timely
16 manner; and
- 17 • Ensure that any other appropriate requirements of state law are met, such as:
 - 18 • water rights considerations under Small Municipal Separate Storm Sewer System
19 (sMS4) permits,
 - 20 • cultural or religious value of water,
 - 21 • protection of a waterbody's designation under the Wild and Scenic Rivers Act,
 - 22 • state regulations dealing with Outstanding National Resource Waters protection,
 - 23 • implementation of temporary standards (i.e., variances),
 - 24 • required in-stream flows for threatened and endangered species pursuant to the
25 Endangered Species Act, and
 - 26 • implementation of state general criteria (i.e., applicable to all waters).

27 14. The value of healthy surface waters in New Mexico is both cultural and economic. New
28 Mexico's diverse waters recharge aquifers, provide important ecological and hydrological

1 connections, support an amazing variety of wildlife and aquatic life, maintain drinking water
2 resources, and sustain critical economic activity (e.g., hunting, fishing, rafting, and agriculture).
3 The state’s lakes, reservoirs, rivers, streams and wetlands are essential to future vitality of the
4 agricultural, outdoor recreation, and tourism industries.

5 15. Under the CWA, Congress explicitly recognizes states’ primary authority to protect and
6 manage water resources, purposefully designates states as co-regulators, and clearly expresses
7 its intent to:

8 ...recognize, preserve, and protect the primary responsibilities and rights of States
9 to prevent, reduce, and eliminate pollution, to plan the development and use
10 (including restoration, preservation, and enhancement) of land and water
11 resources, and to consult with the Administrator in the exercise of his authority
12 under this Act.

13 16. The 2020 401 Rule undermines states’ primary authority to protect and manage their
14 water resources. The restrictions imposed by the new rule allow the federal agency to (1)
15 determine the timing, (2) proclaim deficiencies, and (3) unilaterally reject or veto a state’s
16 certification or condition(s) and issue the permit regardless of the state’s requirements. If the
17 certification or condition(s) are rejected or considered “waived” and the federal license or
18 permit is issued, any subsequent action by a state or tribe under Section 401 to grant, grant with
19 condition, or deny the permit has no legal force or effect. Furthermore, there is no mechanism
20 for the state or tribe to appeal the EPA or USACE final permitting action. It is hard to imagine a
21 set of procedural mechanisms that would undermine the intent of state and tribal certification
22 more than these provisions that remain in effect today.

23 17. The 2020 401 Rule interprets CWA Section 401 to apply only to discharges. This
24 interpretation diverges from past EPA positions and at least one Supreme Court opinion, which
25 found CWA Section 401 certifications apply to *activities*, not merely discharges. *PUD No. 1 of*
26 *Jefferson County and City of Tacoma v Washington Department of Ecology*, 511 U.S. 700
27 (1994). In addition, nearly 50 years of state and federal practice, as well as numerous Court of
28 Appeals decisions (e.g., *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997)), support

1 previous interpretations and reasoning, contrary to the 2020 401 Rule. This deficiency in the
2 2020 Rule is most pronounced under Section 404, but also impacts the NPDES program. The
3 Department typically conditions best management practices (BMPs) in the state's 401
4 certifications related to the relevant regulated "activity."

5 18. The 2020 401 Rule significantly limits New Mexico's ability to impose and enforce
6 conditions that protect and maintain state Water Quality Standards. The state is dependent on
7 the federal agency to accept conditions that do not apply to the discharge but will undoubtedly
8 protect water quality. For example, the Department issued a conditional water quality
9 certification for Regional General Permit (RGP) 16-01 on February 11, 2021. In a response
10 letter, USACE highlighted various "concerns" with the certification, such as:

- 11 • requiring permittees to notify the Department and allowing the Department to conduct
12 compliance evaluations to ensure the project activities comply with the certification,
- 13 • requiring permittees to implement all practicable and reasonable BMPs related to
14 "...issues that are within the purview of the Corps..." (e.g., discharges within wetlands and
15 requirements for post-construction monitoring), and
- 16 • referring permittees to other potential requirements under state regulations for dewatering
17 activities and Section 402 of the CWA for activities that disturb one or more acres.

18 USACE noted the agency would incorporate the Department's certification by reference in the
19 General Conditions and include it as an attachment; however, USACE also stated that:

- 20 • "[t]he [water quality certification] is not a mechanism for providing oversight of the
21 Corps' Regulatory Program, nor is that the role of the certifying authority,"
- 22 • "...the Corps will inform the regulated public that mitigation and monitoring requirements
23 are determined by the Corps on a case-by-case basis," and
- 24 • "... it should be noted that the Corps has discretionary authority for enforcement of any
25 conditions associated with a [Department of the Army] permit".

26 This response clearly indicates that under the USACE's implementation of the 2020 401 Rule,
27 the state of New Mexico is not considered a co-regulator and the Section 401 certification is an
28 administrative exercise with no real technical or policy implications. These restrictions on state

1 certification effectively transfer all the authority and decision-making power to the federal
2 government and drastically weaken and undermine states' authority to manage and protect
3 water quality within their borders.

4 19. State experts, not federal agencies, should determine the conditions required to protect the
5 state's water quality and the time needed to appropriately and completely certify a project. It
6 should be up to the state to determine which conditions are necessary to comply with their
7 Standards, as it has been for the past 50 years.

8 20. Under the 2020 401 Rule, the certification clock is established by the federal agency and
9 does not stop when there are insufficient data and information for the state to make an informed
10 and appropriate certification decision. Effectively, this means that an unresponsive permit
11 applicant could delay submittal of data requested by the Department such that the Department is
12 forced to complete its certification without critical information to inform the water quality
13 impact analysis. Under the 2020 401 Rule, such delays do not prevent the Administrator from
14 taking action on a certification request even where the state requests additional information and
15 time.

16 21. The 2020 401 Rule forces states to review incomplete applications and increases the
17 likelihood of denials. It is well documented by EPA and USACE that the majority of permitting
18 delays are due to the lack of response by an applicant. EPA and USACE regularly request
19 additional information from applicants in order to process applications, and it often takes weeks
20 to months for an applicant to comply with the request. Under the 2020 401 Rule, incomplete
21 applications and unresponsive applicants may result in the state denying certification of some
22 permits rather than face litigation risk by certifying an incomplete application, an outcome that
23 reduces regulatory certainty.

24 22. The 2020 401 Rule has resulted in a substantial and unjustified increase in workload on
25 the Bureau that unnecessarily limits NMED's ability to protect water quality through
26 implementation of state standards and burdens the regulated community. Acting in reliance on
27 the 2020 Rule, in February 2021 the USACE "declined to rely on" the Department's
28 certification of 16 Nationwide Permits (NWPs), for which the USACE had requested

1 certification in October 2020. The USACE cited the preamble to the 2020 Rule at 85 Fed. Reg.
2 42210, 42279 in finding that New Mexico's certification of these permits was invalid because it
3 contained a purported "re-opener" clause. As a result, the USACE is requiring individual
4 certifications for all activities that would otherwise fall under the 16 NWP's finalized and issued
5 by the USACE in March 2021. USACE has stated its intention to finalize later this year the
6 remaining NWP's covered by New Mexico's December 2020 certification, at which time the
7 USACE will similarly "decline to rely on" the state's certification, thereby rejecting state
8 conditions to protect surface waters. Moreover, despite entreaties from New Mexico's
9 Governor, Attorney General, and Congressional delegation, the USACE has refused to allow
10 the Department to revise, reconsider, or amend its certification.

11 23. Absent intervention or reversal of the USACE's February 2021 decision, the Department
12 will continue to be forced to conduct individual certifications for NWP activities for the five-
13 year permit terms, i.e., through 2026. For example, the Department is currently in the process of
14 certifying a relatively simple project to install a pedestrian bridge and boat dock at Alto Lake
15 under NWP 42. A relatively simple review and confirmation that would have taken two hours
16 to a full day if USACE had incorporated state conditions into the final permit is now taking
17 weeks under the USACE's imposed requirement of an individual certification. Requiring
18 individual certifications for each project under a NWP involves repeated effort by at least seven
19 technical and administrative NMED staff to ensure the public is notified in accordance with the
20 applicable state and federal laws. The technical work that goes into NMED's certification
21 requires additional time and staff resources to draft, review, and finalize by the deadline, i.e.,
22 the reasonable period of time to certify. NMED lacks funding to hire new staff to cover this
23 increased workload and pay for a significant increase in newspaper publications. Lack of
24 funding will place additional pressure on existing staff and cause the state to choose between
25 various federal permitting actions when allocating limited water quality certification resources.
26 In addition, infrastructure projects that have been in the planning phase for years may now need
27 to reevaluate their schedules and budgets to accommodate the need to get individual
28 certifications for projects previously covered by the NWP program and associated state

1 certifications. If, due to resource constraints within NMED, individual certifications are not
2 timely issued, they are considered waived and water quality and public health will suffer as a
3 result.

4 24. The 2020 401 Rule increases the burden on the state by requiring programmatic and
5 regulatory changes to meet the Rule's additional provisions. Putting additional limitations and
6 requirements on states, such as mandatory meetings, shortened certification times, and limits on
7 when and what a state can request, places emphasis on the bureaucratic process instead of the
8 water quality certification itself.

9 25. Finally, the combination of the 2020 401 Rule with the Navigable Waters Protection Rule,
10 which became effective on June 22, 2020, significantly diminishes the state's ability to control
11 and protect its waters and puts the majority of waters and wetlands in the state at risk for
12 degradation, including waters used for drinking water, irrigation, and recreation.

13 26. Approximately 40% of New Mexicans rely on surface water as a drinking water source.
14 The loss of stream and wetlands protections under the Navigable Waters Protection Rule in
15 combination with the weakening of a state's ability to adequately review and certify projects
16 under the 2020 401 Rule threaten water quality. As a result, the cost to treat drinking water and
17 maintain drinking water infrastructure will increase to invest in additional water treatment
18 infrastructure and other costly technologies, such as desalination and ultrafiltration, to provide
19 clean, safe water for drinking.

20
21 I declare under penalty of perjury under the laws of the United States that the foregoing is true
22 and correct and that this declaration was executed on July 22, 2021.

23 Signature: _____

24 Printed name: Rebecca Roose

25 Address: 1190 S. St. Francis Drive, Santa Fe, NM 87505

26 Phone Number: (505) 827-2855

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8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 In re

12 Clean Water Act Rulemaking

Case: No. 20-cv-04636-WHA
 (consolidated)
 Applies to all actions

**DECLARATION OF PAUL COMBA IN
 SUPPORT OF PLAINTIFF STATES'
 OPPOSITION TO DEFENDANTS'
 MOTION FOR REMAND WITHOUT
 VACATUR**

Courtroom: 12, 19th Floor
 Date: August 26, 2021
 Time: 8:00 A.M.

ORAL ARGUMENT REQUESTED

21 I, PAUL COMBA, declare as follows:

22 1. I am employed by the Nevada Division of Environmental Protection (NDEP), as the
 23 Bureau Chief of the Bureau of Water Quality Planning (BWQP). I have been the Bureau Chief
 24 since October 4, 2016. The BWQP issues Clean Water Act Section 401 water quality certifications
 25 and conducts statewide monitoring of surface waters.

26 2. I have personal knowledge of all facts stated in this declaration, and if called to
 27 testify, I could and would testify competently thereto.

1 3. Section 401 authorizes states to review discharges to surface waters to ensure that
2 state water quality standards are not violated. The 2020 401 Certification Rule is preventing NDEP
3 staff from adequately reviewing, certifying with appropriate conditions, monitoring, and evaluating
4 the final impact of 404 projects.

5 4. The limitation in scope of 401 review to point sources prevents NDEP staff from
6 adequately reviewing the potential impacts of proposed projects as a whole, including impacts from
7 nonpoint sources (NPS) that are project related. Violations of state water quality standards could
8 reasonably be the result.

9 5. Limitation of reviewing impacts of point sources prevents NDEP staff from
10 requiring Best Management Practices (BMPs) throughout the entire project area which may
11 reasonably result in construction debris and sediment being discharged from the project site.

12 6. Under the current structure of the 401 Certification Rule, if the scope of the project
13 is modified following issuance of a Certification, NDEP staff do not have the opportunity to re-
14 evaluate and determine whether the modification will have the same level of impact as the original
15 certified activity. As the certifying authority, NDEP should have the ability to re-issue the
16 Certification with additional conditions, if warranted, to ensure protection of water quality when
17 the modified activity is predicted to have a greater environmental impact.

18 7. Changes in the 401 Certification Rule prevent NDEP staff from requiring
19 monitoring and final reporting, therefore overall impacts of 404 projects are not known.

20 8. The above items 3–7 impede NDEP staff’s adequate review of 404 projects and may
21 reasonably result in violations to state water quality standards.

22 9. The US Environmental Protection Agency’s 2020 401 Certification Rule has the
23 potential to cause harm to Nevada’s waterways. Although we anticipate other State of Nevada
24 environmental statutes and local jurisdictions may be able to require steps to prevent potential water
25 quality impacts identified herein as examples, NDEP’s position is that this weakening of the
26 401 State Certification program does not meet the requirements or intent of the Clean Water Act.

27 10. NDEP has provided verbal testimony regarding specific concerns and requests for
28 revision to the 401 Certification Rule at the US EPA’s June 14, 2021, national listening session, at

1 a second US EPA listening session with the Western States Water Council on June 23, 2021, and
2 will submit a formal written response by the August 2, 2021, deadline.

3 11. One of NDEP's main concerns regarding the Rule that has the most potential to
4 harm Nevada's waterways is the limitation in scope of 401 State Certifications. The Rule restricts
5 consideration and conditioning to point source discharges. Eliminating consideration and
6 conditioning of impacts from the entire project, particularly related to NPS, has the potential to
7 result in substantial negative impacts to surface waters. NPS stormwater discharges during
8 construction activities can deliver sediment-laden runoff to surface waters if temporary BMPs do
9 not function as intended, are not appropriately installed, or are not maintained. Additionally, upon
10 project completion, stormwater runoff from impervious surfaces conveyed to streams untreated will
11 likely contain a mix of pollutants typical of runoff generated on roadways. Limiting the scope of
12 the 401 Certification process complicates NDEP's ability to protect Nevada's surface waters from
13 pollutants resulting from direct discharges as well as nonpoint sources. The US EPA and US Army
14 Corps of Engineers (ACOE) should be collaborative co-regulators to ensure continued and
15 consistent protection of a state's surface water resources.

16 12. Another of NDEP's main concerns is the prevention of State staff from monitoring
17 projects during implementation and preventing NDEP from requiring final reporting to ensure that
18 a project was adequately stabilized after construction. The Federal entity has the right to inspect
19 projects during construction, and to inspect the operations of completed projects, but due to
20 understaffing, these inspections are unlikely to occur. As co-regulators in protection of the
21 environment among the US ACOE, the US EPA and the States, the partnership should extend to
22 an allowance for State project inspectors to provide oversight of US ACOE 404-permitted projects,
23 particularly regarding State 401 Certification project elements.

24 13. NDEP staff compared 401 Water Quality Certifications for two projects in the same
25 geographic location and with similar environmental concerns to illustrate the difference in
26 certification conditions allowed before the 2020 401 Rule and after the Rule was promulgated.
27 Both projects involve a jurisdictional waterway (Steamboat Creek) which traverses the areas for
28 these projects. Soils within the Steamboat Creek channel and floodplain have been contaminated

1 by historical mining and milling operations that were located upstream and used mercury
 2 amalgamation to recover gold and silver from Comstock deposit ores. Over time, residual mercury
 3 as well as other metal pollutants have been conveyed downstream to the project areas via Steamboat
 4 Creek through normal sediment transport, and subsequent flood events have deposited mercury in
 5 the adjacent floodplain of the project areas.

6 The Regional Transportation Commission (RTC) Southeast Connector was a 4.5 mile, 6-lane road
 7 construction project that primarily runs parallel Steamboat Creek and the associated
 8 floodplain. The water quality certification for the RTC Southeast Connector Project was issued
 9 under the pre-2020 401 Rule. The Talus Valley Planned Development will be a 20-year planned
 10 residential and commercial development in areas adjacent to Steamboat Creek and the associated
 11 floodplain. The 401 Water Quality Certification for the Talus Valley Project which was drafted
 12 under requirements of the post-2020 401 Rule has not been issued yet.

13 The results of the comparison for 401 State Certifications and US ACOE 404 permit elements and
 14 potential impacts are displayed in the table below:

Condition	RTC Southeast Connector (Pre-2020 401 Rule)	Talus Valley Planned Unit Development (Post-2020 401 Rule)	Difference
Mercury Impacts	Possible contamination was addressed over entire project area. Soils exceeding established mercury levels required to be excavated and sequestered to reduce potential for exposure. Excavated material required to be controlled as prescribed in the Soil Management Plan that was part of the 404 Permit.	Possible contamination addressed only where a point source discharge may affect Thomas Creek, a tributary water to Steamboat Creek. 401 Certification incorporates the Mercury Materials Handling Plan by reference, requiring mitigation measures of mercury concentrations exceeding established levels.	401 Certification for Talus Valley PUD was not able to consider and condition possible impacts of mercury mobilization to surface waters from the entire project site. Certification conditions limited to area where potential point source discharge may occur.

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Condition	RTC Southeast Connector (Pre-2020 401 Rule)	Talus Valley Planned Unit Development (Post-2020 401 Rule)	Difference
Water Quality Standards (WQS)/Beneficial Uses	401 Certification considered impacts from point and diffuse sources to WQS/Beneficial Uses of the entire project.	Review and conditions restricted to point source discharges and only the area downstream of the point source was conditioned to prevent impacts.	401 Certification for Talus Valley PUD was not able to evaluate the overall project and potential impacts to WQS/Beneficial Uses from all sources of pollution. Certification conditions to address impacts from diffuse sources of pollution not included as a result of Rule's prohibition to a State's consideration of projects as a whole.
Best Management Practices (BMPs)	401 Certification considered impacts to the entire area and required photographs of conditions and BMPs before, during and after construction on a quarterly basis. A condition requiring special attention paid to BMPs preventing sediment from being discharged and transported downstream was included.	401 Certification required that work in or adjacent to waters of the State are performed in such a way that minimizes point source discharges of pollutants. BMPs to control and mitigate point source inputs of pollutants are required to be implemented and functional prior to commencement of work and maintained and modified throughout the duration of work.	401 Certification for Talus Valley PUD could not require BMPs that were not directly related to a point source discharge. BMPs are cumulative structural and non-structural controls to prevent nonpoint source pollution; an inability to require them on the whole project area, nor the ability to require regular documentation and reporting could have detrimental impacts to surface waters due to mobilization of contaminants such as mercury.

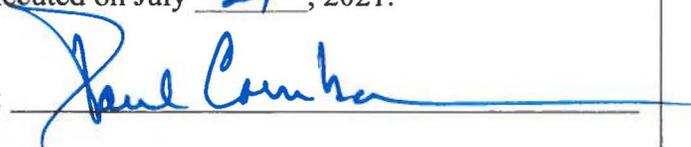
Condition	RTC Southeast Connector (Pre-2020 401 Rule)	Talus Valley Planned Unit Development (Post-2020 401 Rule)	Difference
Project Modification	401 Certification conditioned that any modifications to the original project submittal be reviewed and approved by staff before implementation.	401 Certification is disallowed from having any “reopener clauses,” or it may be waived or denied by the Army Corps of Engineers.	Changes to the scope of the Talus Valley PUD review or subsequent amendment isn’t allowed to be conditioned to require staff review or reissuance of the 401 Certification to reflect project operations.
Post-Construction	Final report required so post-construction site stability can be determined.	Condition requiring all temporary and excess materials be removed from the site and affected areas returned to pre-construction elevations and contours.	Under the Rule, there is no ability to require the project proponent to provide post-construction reporting for the certifying authority to determine whether post-construction site-stabilization conditions have been adequately met. Failure to stabilize the site can result in water quality impacts from nonpoint source pollution.
Monitoring	Copies of Discharge Monitoring Reports submitted to NDEP’s Bureau of Water Pollution Control (BWPC) required to be submitted to 401 staff.	No monitoring requirements allowed per the Rule.	401 Certification for Talus Valley PUD lacks monitoring reporting requirements. Impacts of the project on surface water during implementation will be unknown.
Final Report	Copy of Final Report submitted to BWPC required to be submitted to 401 staff.	No final report requirement allowed per the Rule.	401 Certification for Talus Valley PUD lacks final reporting requirements. Status of project post-construction will be unknown.

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14. Due to the potential environmental harm to Nevada waterways resulting from implementation of the Rule, NDEP supports rescission of the rule pending revision of the Rule.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on July 21, 2021.

Signature: 

Printed name: Paul Comba, Chief, Environmental Programs

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10 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11
 12 In re

13
 14 Clean Water Act Rulemaking

Case No. 3:20-cv-04636-WHA
 (consolidated)
 Applies to all actions

**DECLARATION OF CORBIN J.
 GOSIER IN SUPPORT OF PLAINTIFF
 STATES' OPPOSITION TO
 DEFENDANTS' MOTION FOR
 REMAND WITHOUT VACATUR**

Courtroom: 12, 19th Floor
 Date: August 26, 2021
 Time: 8:00 A.M.

ORAL ARGUMENT REQUESTED

20
 21 **DECLARATION OF CORBIN J. GOSIER**

22 I, Corbin J. Gosier, declare, under penalty of perjury under the laws of United States, that
 23 the following statements are true and correct to the best of my knowledge and belief and are
 24 based on my personal knowledge or information supplied to me by others:

25 1. I am the Aquatic Habitat Program Manager within the Division of Fish and Wildlife
 26 in the New York State Department of Environmental Conservation (DEC). I submit this
 27
 28

1 declaration to demonstrate the harms that the State of New York will experience if the “Clean
2 Water Act Section 401 Certification Rule” (the 2020 Rule) remains in effect until at least 2023.

3 **I. SUMMARY**

4 2. I understand that EPA has announced its intent to revisit and either revise or replace
5 the 2020 Rule. However, I also understand that EPA has asked this Court to leave the 2020 Rule
6 in effect until a new rule is promulgated, which EPA does not expect to occur until at least 2023.
7

8 3. As explained below, the 2020 Rule is causing harm right now. By limiting DEC to
9 regulating point-source discharges into navigable waterways, the 2020 Rule has the effect of
10 casting doubt upon the propriety of conditions that DEC has historically determined to be
11 necessary to ensure compliance with state water quality standards. In particular, conditions that
12 DEC deems necessary to omit or limit in order to comply with the 2020 Rule will become part of
13 any federal permit issued during this period, which could include multi-decade licenses for a
14 number of largescale hydroelectric projects.
15

16 4. The harms described herein could be avoided by vacating the 2020 Rule and restoring
17 the federal-state status quo that was in effect for almost 50 years prior to the issuance of the 2020
18 Rule.

19 **II. PERSONAL BACKGROUND AND EXPERIENCE**

20 5. I am the Aquatic Habitat Program Manager within the Division of Fish and Wildlife.
21 I have held this position since 2018. My duties include providing direction for DEC’s Protection
22 of Waters program which includes Permitting of Stream Disturbance and Excavation / Filling
23 within Navigable Waters, 401 Water Quality Certificates, Instream Flow, Wild, Scenic and
24 Recreational Rivers Act, Hydroelectric Power, and Renewable Energy.
25

26 6. I received a Bachelor of Science degree in Environmental and Forest Biology from
27 the State University of New York, College of Environmental Science and Forestry in 2000.
28

1 7. I have more than 20 years of experience working in DEC's regional and central
2 office, of which, more than 15 years of experience have been on matters related to water quality
3 certifications and the protection and restoration of aquatic habitats including streams, lakes,
4 freshwater wetlands.

5
6 8. Over my career at DEC, I have reviewed dozens of projects involving the issuance of
7 a Section 401 Water Quality Certificate. Between 2004 and 2018, I was one of three DEC
8 biologists working under New York's Environmental Remediation Programs tasked with the
9 review of various remediation and restoration projects (both state and federally led projects) to
10 ensure substantive requirements of waterbody (ECL Article 15) and wetland (ECL Article 24)
11 regulations were met. For most of these projects individual 401 WQCs were required.

12
13 9. Currently, I provide support to DEC's nine regions on matters related to Protection of
14 Waters permitting, including WQCs. Recently, I was in a lead role for the Division of Fish and
15 Wildlife in discussions with the two local Army Corps of Engineers districts (Buffalo and New
16 York) regarding the development of regional conditions and DEC's December 2020 blanket
17 Section 401 Water Quality Certificate. Additionally, I oversee the ecological review hydropower
18 projects reviewed by the Federal Energy Regulatory Commission (FERC) and have been
19 involved in the review of other major energy generation projects, primarily wind and solar.

20
21 **III. NEW YORK STATE'S SECTION 401 PROGRAM BEFORE THE 2020 RULE**

22 10. New York State is rich in water resources. Its freshwater resources include more than
23 87,000 miles of rivers and streams, nearly 7,900 lakes and ponds totaling about 690,000 acres
24 (not including Great Lakes), and over 400 miles of Great Lakes coastline. The marine waters of
25 the state include more than 1,530 square miles of estuaries, as well as about 120 linear miles of
26 Atlantic Ocean coastline. Additionally, approximately six million residents draw drinking water
27 from abundant groundwater resources in the state and rely on that water source to be free of
28

1 contaminants. Water quality, in a majority of these waters, supports the full range of usages,
2 including sources of water supply for drinking, culinary or food processing, fishing, primary and
3 secondary contact recreation, and industrial and agricultural applications. In addition, these
4 waters are suitable for fish, shellfish, and wildlife survival and propagation. Nevertheless, there
5 are waters that are affected by some level of water quality impact caused by various human
6 activities that impair their suitability for particular uses. Specific water bodies are therefore
7 assigned letter classifications and standards based on their suitability for various uses, ranging
8 from AA (the highest quality water with the most designated uses) to D (indicating impaired
9 water quality suitable for fewer designated uses).¹ In addition, approximately 34% of New York's
10 streams have been officially designated as trout waters, thereby requiring the application of more
11 stringent requirements to protect the water quality essential for their survival and reproduction of
12 these ecologically sensitive and recreationally important group of species.

15 **Hydropower Projects**

16 11. Most Section 401 Water Quality Certifications involve the review of relatively small
17 projects with limited impacts on aquatic resources. However, some projects involve the potential
18 for significant impacts on water quality and require significant staff time and effort. For example,
19 the review of individual hydropower licenses requires significant staff effort because of the
20 complicated FERC review process and because the projects involve the potential for significant
21 impacts on aquatic resources. A standard hydropower license is issued for thirty years, meaning
22 any impacts from operation of the hydroelectric project will last for thirty years before being
23 subject to renewal and additional review. A section 401 water quality certification is the primary
24 way that DEC ensures that a federally licensed hydroelectric project will comply with state water
25 quality requirements. As of the date of this declaration, DEC is reviewing 40 projects in various
26
27

28 ¹ See 6 N.Y.C.R.R. Part 701.

1 stages of the hydroelectric licensing process. Sixteen of these projects are going through the
2 critical study and/or settlement stages of the FERC review process where New York relies on its
3 401 authority to protect natural resources.

4 12. DEC has historically used its authority under Section 401 to obtain information
5 necessary to ensure that hydropower projects will comply with state water quality requirements.
6 Licenses to construct and operate hydropower projects are generally issued by the Federal Energy
7 Regulatory Commission (FERC), meaning opportunity for state review and approval may be
8 limited.
9

10 13. Hydroelectric projects can have significant adverse impacts on state water quality
11 from construction and operational activities. Construction impacts can include the release of
12 sediment during excavation or other construction activities located in or near the waterbody. In
13 some cases, these sediments are contaminated with harmful chemicals or heavy metals further
14 exacerbating the impacts on water quality. Of particular concern are operational impacts that are
15 not limited to point source discharges but can include alterations of flow downstream of
16 hydroelectric dams, fluctuations of water levels within the impoundment created by hydroelectric
17 dams, mortality of fish passing through the turbines generating electric power, and prevention of
18 upstream movement by fish and other water or wetland dependent wildlife.
19

20 14. DEC has used the Section 401 Water Quality Certification process to require
21 alterations in project operations to protect state water quality. For example, many hydropower
22 licenses include conditions requiring “run of river” operations where projects maintain similar
23 upstream and downstream flows. These flow characteristics are drastically different from
24 “pulsing” operations where downstream water is released in an intermittent manner. Pulsing
25 projects can have significant impacts on aquatic organisms from drastic changes in water flow
26 and impoundment water levels.
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1 through the waterway to lay the pipeline (referred to as the open trench method) or drill under the
2 waterway (known generically as trenchless methods). Either of these techniques can adversely
3 impact water quality.

4 18. Additionally, because the pipeline is likely to cross the same stream multiple times or
5 cross multiple waterbodies within the same watershed, the pipeline can have cumulative impacts
6 to downstream water quality that are greater than the combined individual impacts of each
7 crossing. For example, the release of turbid water when excavating open trenches at multiple
8 locations will result in the degradation in water quality across the watershed, thus impacting a
9 greater percentage of the streams in that watershed, leading to greater damage to the biological
10 integrity of the stream system. These cumulative impacts threaten state water quality, but
11 transcend individual point source discharges into the waters of the United States.

12 **Dredging Projects**

13
14
15 19. New York State relies on the Section 401 Water Quality Certification process to
16 ensure that New York water quality standards are maintained when the Army Corps conducts
17 navigational dredging. Federal dredging projects can have a profound impact on New York's
18 waterways and the only tool available to influence those projects and ensure state water quality
19 standards are being maintained is the 401 certification.

20
21 20. DEC routinely issues a 401 certification to the Army Corps of Engineers for
22 navigational dredging on the Hudson River. DEC requires the Army Corps of Engineers to
23 conduct a detailed analysis of sediment contaminants and especially PCB contamination for the
24 Hudson River. Sediment sample collection and analyses are not only time consuming but are also
25 expensive. These sediment analyses are necessary to determine the appropriate best management
26 practices for dredging and the most environmentally sound disposal options.

1 requirements contained in §121.7 leading to a decision by FERC that New York waived its
2 authority to issue a WQC.

3 23. DEC is currently reviewing 40 projects for hydropower relicensing. At least ten of
4 these projects have section 401 certification requests pending before DEC or anticipated to be
5 submitted in the near future. The Rule could restrict the Department's ability to review and
6 minimize adverse impact to water quality that are not related to point source discharges for these
7 projects, and could limit the Department's ability to complete its review. Even if the Rule is
8 ultimately struck down by the Courts, these hydropower projects will have received 30-year
9 operating licenses that are insufficient to protect state water quality, resulting in long-term or
10 permanent impacts to state water quality.

12 Pipelines

13 24. The Department also expects to receive section 401 requests for new natural gas
14 pipeline infrastructure before EPA projects it will promulgate a replacement rule in 2023. For
15 example, in March 2021, Transcontinental Gas Pipe Line Company, LLC told FERC that it
16 intended to submit a new section 401 request for the Northeast Supply Enhancement (NESE)
17 project "later this year," despite have previous section 401 requests denied by both New York and
18 New Jersey.³ If the 2020 Rule remains in effect until 2023 and the applicant follows through on
19 its stated intent to FERC, the new section 401 request would be subject to the limitations of the
20 2020 Rule.

23 Dredging Projects

24 25. The Rule jeopardizes the incorporation of requirements and conditions necessary to
25 protect state water quality into dredging permits issued to the Army Corps. Under the Rule, the
26 Corps could unilaterally make the determination that the certification failed to comply with the
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28 ³ 86 Fed. Reg. at 16,200.

1 requirements of 40 C.F.R. § 121.7. Or Army Corps could unilaterally determine that DEC’s
2 review time was unreasonable under the “reasonable period of time” clause and could decide that
3 providing time to sample and analyze sediment is excessive and unreasonable. However, without
4 sample results in the Hudson, the areas of higher PCB contamination would not be identified
5 prior to dredging.

6
7 26. Historically there has been tension between New York and Army Corps regarding the
8 appropriate use of work windows to protect fish and other aquatic organisms. While overlapping
9 exclusion periods can be difficult, the Rule jeopardizes New York’s ability to protect fish best
10 usages of New York’s waters by giving Army Corps the final decision regarding what is beyond
11 the scope of certification.

12 **V. CONCLUSION**

13
14 27. The 2020 Rule is harming New York State right now. Leaving it in place until at least
15 early 2023 will exacerbate these harms as DEC tries to comply with a rule EPA has already
16 announced it intends to revise or replace. This Court should vacate the 2020 Rule and return the
17 regulatory status quo in effect for the 50 years prior to promulgation of the 2020 Rule.

18
19 I declare under penalty of perjury under the laws of the United States that the foregoing is
20 true and correct and that this declaration was executed on July 22, 2021.

21
22 Signature: Corbin J. Gosier

23 Printed name: Corbin J. Gosier

24 Address: New York State Department of
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26 625 Broadway
27 Albany, NY 12233-4756

28 Phone Number: (518) 402-8872

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 9

10 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11
 12 In re

13
 14 Clean Water Act Rulemaking

Case No. 3:20-cv-04636-WHA
 (consolidated)
 Applies to all actions

15 **DECLARATION OF SCOTT E.**
SHEELEY IN SUPPORT OF
PLAINTIFF STATES' OPPOSITION TO
DEFENDANTS' MOTION FOR
REMAND WITHOUT VACATUR

16
 17 Courtroom: 12, 19th Floor
 18 Date: August 26, 2021
 Time: 8:00 A.M.

19
 20 ORAL ARGUMENT REQUESTED

21 **DECLARATION OF SCOTT E. SHEELEY**

22 I, Scott E. Sheeley, declare, under penalty of perjury under the laws of United States, that
 23 the following statements are true and correct to the best of knowledge and belief and are based on
 24 my personal knowledge or information supplied to me by others:

25 1. I am the Chief Permit Administrator in the New York State Department of
 26 Environmental Conservation (DEC). I submit this declaration to demonstrate the harms that the
 27
 28

1 State of New York will experience if the “Clean Water Act Section 401 Certification Rule” (the
2 2020 Rule) remains in effect until at least 2023.

3 **I. SUMMARY**

4 2. For decades, DEC used its authority under section 401 of the Clean Water Act, 33
5 U.S.C. § 1341, in conjunction with state administrative procedures and authority, to protect the
6 physical, chemical, and biological health of New York’s waterways and wetlands. EPA
7 promulgated the 2020 Rule over the objections of the State of New York, and apparently without
8 regard to how the 2020 Rule would impact state water quality and administrative procedures. I
9 understand that EPA has announced its intent to revisit and either revise or replace the 2020 Rule.
10 However, I also understand that EPA has asked this Court to leave the 2020 Rule in effect until a
11 new rule is promulgated, which EPA does not expect to occur until at least 2023.
12

13 3. As explained below, the 2020 Rule is causing harm right now by increasing
14 administrative burdens for DEC employees who are responsible for reviewing the thousands of
15 section 401 certification requests. Staff time that could be devoted to other important program
16 activities must instead be devoted to complying with the requirements of the 2020 Rule, even
17 though EPA expects to revise the rule. Additionally, the 2020 Rule has created confusion for
18 applicants for section 401 certifications, resulting in unnecessary delay and additional –
19 sometimes duplicative – work for applicants. Moreover, because the 2020 Rule was promulgated
20 without regard to state administrative procedures, DEC staff and applicants alike are forced to
21 follow one set of procedures for section 401 certification requests, and a separate set of
22 procedures for other permit applications.
23

24 4. The harms described herein could be avoided by vacating the 2020 Rule and restoring
25 the federal-state status quo that was in effect for almost 50 years prior to the issuance of the 2020
26 Rule.
27
28

1 **II. PERSONAL BACKGROUND AND EXPERIENCE**

2 5. I am the Chief Permit Administrator in the New York State Department of
3 Environmental Conservation (DEC). Working in DEC's central office headquarters in Albany,
4 New York I am responsible for developing policy and guidance for the Division of
5 Environmental Permits in the processing of environmental permit applications, including
6 applications for Section 401 Water Quality Certification. Most permit applications are processed
7 by the Division of Environmental Permits in DEC's regional offices, of which there are nine, each
8 supervised by a Regional Permit Administrator. I provide guidance on permitting matters to the
9 nine Regional Permit Administrators, including guidance on the processing of applications for
10 Section 401 Water Quality Certification.
11

12 6. I have a Bachelor of Science degree in Biology/Environmental Science from Taylor
13 University in Upland, Indiana, and a Master of Science degree in Environmental and Forest
14 Biology from the State University of New York, College of Environmental Science and Forestry
15 in Syracuse, New York.
16

17 7. I have been an employee of DEC since 1998, working in the Division of
18 Environmental Permits as an Environmental Analyst since that time. I have worked 10 years in
19 the DEC Region 3 office in New Paltz, New York, 11 years in the DEC Region 8 office in Avon,
20 New York, and 2 years in the DEC Central Office in Albany, NY. Since 2003 I have also been
21 designated as a Permit Administrator¹, with authority to review and issue decisions on all state
22 environmental permits subject to the provisions of the New York State Uniform Procedures Act,
23 including those applications processed by subordinate staff who are not designated as Permit
24

25
26 _____
27 ¹ Deputy Regional Permit Administrator 2003-2008 in DEC Region 3, Deputy Regional
28 Permit Administrator 2008-2010 in DEC Region 8, Regional Permit Administrator 2010-2019 in
DEC Region 8, Deputy Chief Permit Administrator 2019-2020 in DEC Central Office, and Chief
Permit Administrator 2020-Present in DEC Central Office.

1 Administrators. In addition to Section 401 Water Quality Certifications, environmental permits
2 subject to the provisions of the New York State Uniform Procedures Act include state-regulated
3 freshwater wetlands; state-regulated tidal wetlands; state-regulated protected streams and
4 navigable waters; state-regulated wild, scenic and recreational rivers; coastal erosion
5 management; taking of state-listed threatened and endangered species; mined land reclamation;
6 dam safety; water withdrawal; solid waste management; state pollutant discharge elimination
7 system (SPDES); air pollution control; hazardous waste management; and radiation control.

8 Processing these applications includes, where necessary, meeting with applicants and regulatory
9 agency partners, ensuring public notice requirements are met, responding to public comments and
10 inquiries, ensuring requirements related to historic preservation and coastal zone management are
11 met, and ensuring that all applications subject to the Uniform Procedures Act for a given project
12 are reviewed together.
13
14

15 8. During my work in DEC's regional offices, I have reviewed and issued individual
16 Section 401 Water Quality Certifications for various projects and verified project coverage under
17 DEC's applicable blanket Section 401 Water Quality Certifications. Since 1998 I have personally
18 been assigned the processing of over 400 applications for Section 401 Water Quality Certification
19 and have been the reviewer and responsible for issuing the final decision on hundreds more
20 applications. In my role as the Chief Permit Administrator in DEC's Central Office, I am also
21 responsible for the review and issuance of decisions on blanket Section 401 Water Quality
22 Certifications for regional and nationwide permits issued by the U.S. Army Corps of Engineers
23 under Section 404 of the Clean Water Act.
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1 12.4-acre threshold contained in the State’s Freshwater Wetlands Act, or otherwise lie outside the
2 Freshwater Wetlands Act.

3 12. The New York State Legislature enacted the Protection of Waters Act (ECL Article
4 15, Title 5) in 1972 to regulate physical disturbance and filling in certain waterbodies, including
5 protected streams and navigable waterways. *See* ECL §§ 15-0501, 15-0505. Article 15 recognizes
6 that New York is rich with valuable water resources, and directs the Department, as stewards of
7 the environment, to preserve and protect certain lakes, rivers, streams, and ponds. These rivers,
8 streams, lakes, and ponds are necessary for fish and wildlife habitat; drinking and bathing; and
9 agricultural, commercial and industrial uses. In addition, New York's waterways provide
10 opportunities for recreation; education and research; and aesthetic appreciation. Certain human
11 activities can adversely affect, even destroy, the delicate ecological balance of these important
12 areas, thereby impairing the uses of these waters.

13
14
15 13. New York State regulates physical disturbance to the bed and banks of about 43% of
16 New York Streams under ECL § 15-0501 by limiting jurisdiction to certain streams, namely
17 streams with a water quality classification or standard of AA, AA(T), AA (TS), A, A(T), A(TS),
18 B, B(T), B(TS), C(T), or C(TS). The designation of “T” describes waters that provide habitat in
19 which trout can survive and grow while “TS” describes waters that provide conditions for trout to
20 spawn and reproduce. Physical disturbance to the bed or banks of the remaining 57% of the
21 streams with a classification of “C” or “D” are not regulated under section 15-0501. Although an
22 additional 10-15% of streams are afforded some protection under another section of state law
23 through the regulation of excavation and fill below mean high water (ECL § 15-0505), roughly
24 40% of streams in New York are not protected from physical disturbance under New York State
25 Law. As part of a comprehensive strategy, New York has used Section 401 of the Clean Water
26 Act to span the gap in regulatory controls to protect water quality in these streams. Without this
27
28

1 comprehensive strategy, 40% of New York streams would not receive the high level of protection
2 necessary to assure that water quality standards are achieved.

3 14. DEC regulations provide that an applicant for a section 401 certification “must
4 demonstrate compliance” with state water quality standards, as well as “state statutes, regulations
5 and criteria otherwise applicable to such activities.”⁴ Thus, in order for DEC to issue a Section
6 401 Certification, an applicant must submit sufficient information to demonstrate compliance
7 with all applicable water-quality-protection requirements. Among other things, state law requires
8 an applicant to minimize environmental harms to waterbodies from the disturbance of stream
9 beds⁵, or the discharge of fill or excavation within navigable waters⁶. An applicant also must
10 avoid any discharge of waste or increase in turbidity that will impair the best uses of a
11 waterbody⁷.

12 **New York State Administrative Procedures**

13
14
15 15. DEC’s permitting process follows procedures established by the Uniform Procedures
16 Act (UPA), *see* ECL article 70, and implementing regulations, *see* 6 N.Y.C.R.R. part 621. The
17 goals of the UPA include: “fair, expeditious and thorough administrative review of regulatory
18 permits”; elimination of “inconsistencies and redundancies”; establishment of “reasonable time
19 periods for administrative agency action on permits”; encouragement of “public participation in
20 government review and decision-making processes”; and replacement of individual permit
21 reviews with “a comprehensive project review approach.” ECL § 70-0103. As described below,
22 the UPA’s goals are now being thwarted by the 2020 Rule.
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25
26

27 ⁴ 6 N.Y.C.R.R. § 608.9.

⁵ ECL § 15-0501

⁶ ECL § 15-0505

⁷ 6 N.Y.C.R.R. §§ 701.1, 703.2

1 16. The UPA includes requirements for the contents of a certification application, including
2 an environmental review under the State Environmental Quality and Review Act (SEQRA), ECL
3 article 8. *See* ECL § 70-0105(2); 6 N.Y.C.R.R. § 621.3(a)(7). The UPA also establishes
4 timeframes for state review of permit applications, and requirements for public notice and
5 comment on certain applications. *See* ECL § 70-0109; 6 N.Y.C.R.R. §§ 621.6-621.8. Importantly,
6 these timeframes are tied to DEC’s receipt of a *complete* application, including an environmental
7 review pursuant to SEQRA and other supporting information sufficient to evaluate the
8 environmental impacts of a project. *See* ECL § 70-0109(2); 6 N.Y.C.R.R. § 621.7(a), (f).

9
10 17. Section 401 certification applications are specifically listed as being subject to the
11 UPA. ECL § 70-0107(d); 6 N.Y.C.R.R. § 621.1(e). In addition to the general application
12 requirements of the UPA, DEC may request that the applicant for a section 401 certification
13 provide “a properly completed application and supporting documentation for any required federal
14 permits or licenses.” 6 N.Y.C.R.R. § 621.4(e)(2).

15 **IV. NEW YORK STATE’S SECTION 401 PROGRAM PRIOR TO THE 2020 RULE**

16
17 18. DEC reviews proposed projects near New York waterbodies for compliance with all
18 applicable regulatory requirements. This comprehensive review involves a collaborative effort
19 among several Divisions within DEC that primarily includes the Division of Fish and Wildlife,
20 the Division of Environmental Permits, and the Division of Water. Each Division reviews an
21 application under their specific area of expertise. For example, the Division of Fish and Wildlife
22 focuses on physical disturbance to waterbodies and resulting hydrologic changes, as well as
23 impacts on fish and wildlife resources.

24
25 19. DEC generally issues permits, including Section 401 Water Quality Certificates, with
26 conditions to assure compliance with regulatory standards. In rare situations, DEC is forced to
27
28

1 deny permits and certifications when applicants do not provide all necessary information to
2 evaluate the impacts on aquatic resources or when projects cannot meet regulatory standards.

3 20. Many applications received by DEC involve the concurrent review and issuance of
4 permits and certifications using authority granted under state statutes (e.g., Article 15-Protection
5 of Waters, Article 24-Freshwater Wetlands, Article 25-Tidal Wetlands) and under federal statutes
6 (e.g., Section 401 of the Clean Water Act). Annually, DEC processes approximately 4,300 Article
7 15 applications, 1,270 Article 24 applications, and 1,180 Article 25 applications. In addition,
8 DEC issues approximately 4,050 individual Section 401 Water Quality Certificates each year.
9 Historically, the vast majority of section 401 requests have been granted within 60 days from
10 receipt of a complete application.
11

12 21. During the almost 50 years between enactment of section 401 and promulgation of
13 the 2020 Rule, DEC relied upon section 401 to ensure that applicants for federally licensed
14 projects provided sufficient information to DEC to ensure that they would comply with state
15 water quality requirements. DEC also relied upon section 401 to ensure that federally licensed
16 projects would comply with conditions sufficient to protect state water quality. The 2020 Rule has
17 hampered DEC's ability to comply with its own administrative requirements or fulfill with its
18 substantive obligation to protect state water quality.
19

20
21 **V. NEW YORK STATE'S EXPERIENCE WITH IMPLEMENTING THE 2020 RULE**

22 22. The 2020 Rule became effective in September 2020, and almost immediately created
23 confusion and uncertainty in DEC's section 401 program. Procedures that had been relied upon
24 since section 401 was enacted had to be revised. The result has been an increase in workload,
25 delays, and confusion for DEC staff and applicants alike.

26 23. Of the more than 4,000 section 401 certification requests DEC receives each year, the
27 vast majority are for small-scale projects with limited water quality impacts. Many applicants
28

1 must apply for multiple federal and state permits for the same project. Additionally, many
2 applicants are homeowners or other individuals with little experience with DEC’s administrative
3 process. Accordingly, DEC has developed procedures to streamline these applications. For
4 example, DEC and the Army Corps developed a “Joint Application” form that could be used by
5 an applicant to apply to DEC and Army Corps for any necessary permits.
6

7 24. The 2020 Rule establishes a list of nine specific pieces of information that must be
8 included in a section 401 certification request. 40 C.F.R. § 121.5(b). This list was promulgated
9 without regard to DEC’s existing Joint Application form or its requirements for permit
10 applications, which includes a variety of additional information but does not necessarily include
11 some of the specific language dictated by the 2020 Rule. *See, e.g.*, 6 N.Y.C.R.R. § 621.3(a)(7) (a
12 permit application is not complete until any required environmental review under the State
13 Environmental Quality Review Act (SEQRA) is complete); *id.* § 621.4(e) (specific requirements
14 for section 401 requests). Accordingly, the Department has been forced to develop a
15 “supplemental” form that applicants must complete in addition to the Joint Application. In other
16 words, the 2020 Rule has *increased* the administrative burden on applicants and the Department.
17

18 25. The 2020 Rule also *mandates* that at least 30 days prior to submitting a section 401
19 request, applicants submit a request for a pre-filing meeting with DEC. 40 C.F.R. § 121.4(a).
20 Although applicants are encouraged to request preapplication conferences under state law, 6
21 N.Y.C.R.R. § 621.5, such a request is not mandatory nor is there a required 30-day “waiting
22 period.” Thus, this is an additional regulatory burden imposed upon applicants. Many section 401
23 applicants are not familiar with the pre-filing process or with administrative procedures in
24 general, and justifiably assume that by submitting a complete Joint Application form they can
25 commence DEC review. Unfortunately, under the 2020 Rule DEC must reject these applications
26 for failure of the applicant to request a pre-filing meeting. The applicant must then request a pre-
27
28

1 filing meeting and then wait 30 days to re-file their section 401 request. The result is that DEC's
2 review is delayed and the applicant is often frustrated and confused. The 2020 Rule also includes
3 no process by which the 30-day pre-filing request requirement can be waived if, for example, an
4 emergency requires prompt review of a section 401 request. Although the UPA allows DEC to
5 issue emergency authorizations, including water quality certifications, to address situations that
6 pose an immediate threat to life, health, property, or natural resources, 6 N.Y.C.R.R. § 621.12, the
7 2020 Rule includes no such exception to the 30-day pre-filing meeting request requirement.
8

9 26. The 2020 Rule has also increased the workload for DEC staff reviewing section 401
10 requests, meaning that they have less time to perform other programmatic duties necessary to
11 protect the State's environment. For example, the 2020 Rule establishes a list of information that
12 must be included in any state section 401 decision. 40 C.F.R. § 121.7. A section 401 decision that
13 does not include this information could be rejected by the relevant federal licensing agency. 40
14 C.F.R. § 121.8. In effect, the 2020 Rule imposes federal requirements on state administrative
15 procedures. Accordingly, in addition to following all applicable state procedures, DEC staff now
16 must take additional steps to ensure that section 401 decisions comply with the 2020 Rule.
17

18 27. To take one example, the 2020 Rule requires that any section 401 certification that
19 includes conditions include "[a] statement explaining why the condition is necessary to assure
20 that the discharge from the proposed project will comply with water quality requirements" and a
21 citation to the relevant state law. 40 C.F.R. § 121.7(d). "Water quality requirements" is defined to
22 mean various Clean Water Act provisions "and state or tribal regulatory requirements for point
23 source discharges into waters of the United States." *Id.* § 121.1(n).
24

25 28. Historically, DEC could impose conditions on section 401 certifications necessary to
26 ensure that a project, as a whole, would comply with "any appropriate" requirements of state law,
27 which would include, among other things, water quality requirements under the Freshwater
28

1 Wetlands Act and the Protection of Waters Act. Under the 2020 Rule, in order to ensure a section
2 401 certification is accepted by a federal permitting agency, DEC must first determine whether
3 the specific state law at issue qualifies as a “water quality requirement” under EPA’s restrictive
4 definition and then must explain how a condition is related to that requirement. Accordingly, even
5 standard conditions require a substantial time commitment for administrative review if DEC does
6 not want to risk having a certification rejected by the relevant federal agency.
7

8 29. The 2020 Rule also provides no mechanism for an applicant to request and for a
9 certifying agency to modify an issued section 401 certification. Historically, if the scope or extent
10 of a proposed project changes, the applicant could provide supplemental information to DEC,
11 which could then be used to review and issue a modification to the previously issued certification.
12 However, EPA guidance provided on the 2020 Rule⁸ indicates that the Rule includes no
13 mechanism for an applicant to request modification of an existing a water quality certification nor
14 for a certifying authority to grant such a request. This has created significant administrative
15 uncertainty for DEC and for applicants. DEC has effectively been forced to require that applicants
16 submit entirely new water quality requests (after complying with the mandatory 30-day prefiling
17 request requirement) solely for the modified elements, resulting in two water quality certifications
18 for the same project. This is a waste of DEC’s resources and the applicant’s time.
19

20
21 30. Not only does the 2020 Rule upend state administrative procedures, generating
22 additional work for DEC staff, but it imposes strict time limits on DEC’s review. Under the 2020
23 Rule, the timeframe for DEC’s review is dictated not by state administrative procedures, but by
24 the federal licensing agency. *See* 40 C.F.R. § 121.6. Army Corps has taken this invitation to
25 enforce a 60-day time limit for state review. *See* 33 C.F.R. § 325.2(b). Prior to the 2020 Rule,
26

27
28 ⁸ EPA state and tribal webinars provided in 2020 and posted on the EPA website at
<https://www.epa.gov/cwa-401/2020-rule-implementation-materials>

1 Army Corps had given state agencies significant latitude to determine when a “valid” section 401
2 request had been submitted and the period of time for review began. Now, however, Army Corps
3 generally requires a decision within 60 days, even for potentially significant permitting decisions.
4

5 31. As one example of the impacts of the 2020 Rule, in October 2020 – less than a month
6 after the 2020 Rule became effective – Army Corps proposed to re-issue all of its nationwide
7 permits, which are blanket authorizations for a variety of projects that Army Corps determines do
8 not require project-specific permits. DEC was required to determine whether to grant, condition,
9 or deny these nationwide permits within 60 days. Although DEC requested an extension of time
10 to complete its review, Army Corps denied that request. Accordingly, DEC had to review the
11 modified nationwide permits, make initial decisions on whether to grant, condition or deny
12 certification, publish public notice and review public comments, and issue final decisions that
13 complied with both state administrative procedures and the 2020 Rule, all within 60 days. The
14 Department completed this task, but it required a significant increase in staff resources over prior
15 certification decisions for nationwide permits. Additionally, Army Corps ultimately decided *not*
16 to re-issue all of the nationwide permits, meaning some of DEC’s water quality decisions were
17 unnecessary.
18

19 VI. HARMS RELATED TO LEAVING THE 2020 RULE IN PLACE UNTIL 2023

20 Administrative Procedures

21
22 32. As described in the preceding section, adapting the 2020 Rule to state administrative
23 procedures is a time-consuming and imprecise process. First, DEC staff must ensure that a section
24 401 request was preceded by at least 30 days by a pre-filing meeting request. Second, DEC staff
25 must ensure that a section 401 request includes the nine specific pieces of information and
26 boilerplate language required by the 2020 Rule. Third, DEC staff must work with their
27 supervisors and program attorneys to ensure that any decision on the section 401 request complies
28

1 with the timeframe and content requirements of the 2020 Rule. Meanwhile, DEC staff must
2 continue to process applications for any related permits pursuant to the UPA. At each step of this
3 process, the 2020 Rule requires additional staff and agency resources over and above DEC's
4 historical section 401 process, which had been subject to natural development and streamlining
5 over the preceding 50 years. 34. In addition to these administrative burdens, the Rule significantly
6 impedes DEC's CWA 401 authority by limiting the impacts that DEC can evaluate to point source
7 discharges, and by limiting the types of state law that can be considered in order to protect water
8 quality. Additionally, by giving federal agencies the authority to veto conditions or certifications
9 for ostensibly procedural violations, the Rule raises the possibility that certification conditions
10 and denials will be ignored by federal agencies.

11
12 33. The 2020 Rule will also constrain DEC's ability to fully evaluate the water quality
13 impacts of proposed projects. Under the 2020 Rule, the "reasonable period" for DEC's review of
14 a water quality request – 60 days in the case of Army Corps permits, longer in other instances –
15 commences when DEC receives nine specific pieces of information. 40 C.F.R. § 121.5. But the
16 minimum requirements for a section 401 request under the 2020 Rule fails to include information
17 essential to evaluating water quality impacts of a project. For example, the 2020 Rule lacks any
18 requirement that an applicant accurately identify the extent of the waters affected by the proposal,
19 a fundamental component of any project requiring a jurisdictional determination from the Army
20 Corps.
21

22
23 34. The 2020 Rule also fails to require that an applicant wait until an environmental
24 review pursuant to SEQRA or NEPA has been completed prior to applying for a water quality
25 certification, leaving DEC without an important piece of information mandated by statute and
26 regulation. *See* ECL § 70-0105(2); 6 N.Y.C.R.R. § 621.3(a)(7). Also unlike the UPA, 6
27
28

1 N.Y.C.R.R. § 621.4(e)(2), the 2020 Rule does not even provide for DEC to obtain the same
2 information from the applicant that has submitted to the federal licensing agency.

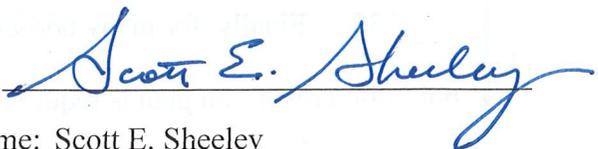
3 35. Finally, for many non-energy projects regulated by New York State, a stormwater
4 pollution prevention plan is required and essential to determining whether impacts to water
5 quality will be adequately addressed. The 2020 Rule does not require any of this information or
6 provide a method for DEC to obtain it, leaving open the possibility that applicants will trigger the
7 waiver period with barebones requests that comply with the 2020 Rule but do not include
8 sufficient information for DEC to evaluate the project's water quality impacts.

10 36. Even the provision of the 2020 Rule requiring EPA to determine whether proposed
11 projects will impact neighboring jurisdictions, 40 C.F.R. § 121.12, has been slowing the
12 implementation of 401 certifications. Under that provision, Army Corps or other federal agencies
13 must wait *at least* 30 days before accepting and implementing a water quality certification issued
14 by a certifying authority, to give EPA an opportunity to make a determination regarding impacts
15 to neighboring jurisdictions. *Id.* § 121.12(b). In cases where EPA finds that an impact may occur,
16 implementation of the certification in the federal agency's decision is delayed a further 60 days
17 while the neighboring state reviews the project impacts. *Id.* § 121.12(c). The result is that federal
18 agencies cannot accept and implement a water quality certification for between 30 and 90 days
19 after DEC issues it. This delay is somewhat ironic considering Army Corps generally gives DEC
20 just 60 days to issue, condition, or deny certification.

23 VII. CONCLUSION

24 37. The 2020 Rule is harming New York State right now. Leaving it in place until at least
25 early 2023 will exacerbate these harms as DEC tries to comply with a rule EPA has already
26 announced it intends to revise or replace. This Court should vacate the 2020 Rule and return the
27 regulatory status quo in effect for the 50 years prior to promulgation of the 2020 Rule.
28

1 I declare under penalty of perjury under the laws of the United States that the foregoing is
2 true and correct and that this declaration was executed on July 22, 2021.

3
4 Signature: 

5 Printed name: Scott E. Sheeley

6 Address: New York State Department of
7 Environmental Conservation
8 625 Broadway
9 Albany, New York 12233-1750

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 In re
11 Clean Water Act Rulemaking

Case: No. 20-cv-04636-WHA
(consolidated)
Applies to all actions

**DECLARATION OF STEVE MRAZIK
IN SUPPORT OF PLAINTIFF STATES'
OPPOSITION TO DEFENDANTS'
MOTION FOR REMAND WITHOUT
VACATUR**

Courtroom: 12, 19th Floor
Date: August 26, 2021
Time: 8:00 A.M.

ORAL ARGUMENT REQUESTED

DECLARATION OF STEVE MRAZIK

I, Steve Mrazik, under penalty of perjury, declare as follows:

21 1. I am currently employed by the Oregon Department of Environmental Quality
22 (ODEQ) as the Watersheds and Section 401 Certifications Manager. In that position, I supervise
23 staff that review applications for certifications described in Section 401 of the Federal Water
24 Pollution Control Act (Clean Water Act), 33 U.S.C. § 1341, to decide whether to issue or deny
25 the certifications. Previously, I have been employed by the Department in several other positions,
26 including as Technical Services Manager, Technical Services Project Manager, Water Quality
27 Monitoring Coordinator, and Water Quality Specialist. I hold a bachelor's degree in Zoology
28 from the University of Wisconsin – Madison.

1 2. I have personal knowledge of all facts stated in this declaration, and if called to
2 testify, I could and would testify competently thereto

3 3. The primary state policy regarding water quality is stated in Or. Rev. Stat.
4 § 468B.015 as follows:

5 Whereas pollution of the waters of the state constitutes a menace to public health and
6 welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life and
7 impairs domestic, agricultural, industrial, recreational and other legitimate beneficial
8 uses of water, and whereas the problem of water pollution in this state is closely
9 related to the problem of water pollution in adjoining states, it is hereby declared to
10 be the public policy of the state:

11 (1) To conserve the waters of the state through innovative approaches, including
12 but not limited to the appropriate reuse of water and wastes;

13 (2) To protect, maintain and improve the quality of the waters of the state for
14 public water supplies, for the propagation of wildlife, fish and aquatic life and for
15 domestic, agricultural, industrial, municipal, recreational and other legitimate
16 beneficial uses;

17 (3) To provide that no waste be discharged into any waters of this state without
18 first receiving the necessary treatment or other corrective action to protect the
19 legitimate beneficial uses of such waters;

20 (4) To provide for the prevention, abatement and control of new or existing water
21 pollution; and

22 (5) To cooperate with other agencies of the state, agencies of other states and the
23 federal government in carrying out these objectives.

24 4. The Department performs the Water Quality Certifications described in Section 401
25 of the Clean Water Act as part of its work to fulfill the primary state policy stated above in Or.
26 Rev. Stat. § 468B.015.

27 5. In September of 2020 EPA promulgated a significantly revised Clean Water Act
28 Section 401 Rule (Rule). The Rule introduced significant procedural and substantive changes
that impact how ODEQ engages with applicants and develops and enforces certifications intended
to protect water quality and in doing so results in harm to the environment and economy.

 6. One procedural change included in the Rule is a mandatory 30-day request for a pre-
filing meeting prior to an application. This requirement became immediately problematic for
Oregon as the Rule went into effect while Oregon was experiencing historic widespread wildfires
in the fall of 2020. Once fires were contained and individuals and communities focused on

1 recovery, the 30-day prefiling meeting request requirement became a regulatory hurdle as the
2 Rule contained no provisions for addressing emergency permitting requests. Even if the agency
3 decides not to meet with the applicant, an application cannot be filed until 30 days following the
4 request from the applicant. As a result, important restoration and recovery projects were delayed
5 so that the new Rule processes could be implemented.

6 7. The Rule requires federal agencies to set deadlines and dictate limits on the time the
7 state agency has to issue a certification or waive review, which often results in challenges for
8 agency-applicant coordination. Oregon has had an extremely significant increase in the number
9 of certification denials issued under the Rule due to lack of sufficient information provided by
10 applicants to demonstrate compliance, and a subsequent lack of time for applicants to provide
11 additional information to address such deficiencies. From September 2019 to June 2021 Oregon
12 issued approximately 102 denials. In the prior twenty years (1999-2019) Oregon issued
13 approximately five denials. Under the prior rule, DEQ would work with applicants on identifying
14 and resolving outstanding information needs in order to complete review of the project. This new
15 requirement, combined with missing information or unavoidable final changes to project details,
16 is resulting in applicants needing to re-start the clock and re-do the entire certification application
17 process. This need for denials and new applications results in inefficiencies and additional costs
18 for applicants and agency resources.

19 8. The Rule attempts to limit the state's ability to review impacts to water quality that
20 may arise from the project through the narrowed definition of a "discharge." Limiting the state's
21 review in this way could reduce state's ability to consider important impacts such as those arising
22 from changes to stormwater patterns or increased water temperature resulting from overall project
23 impacts. This aspect of the Rule could result in significant environmental harm to the state of
24 Oregon.

25 9. The Rule limits state enforcement options by giving the federal action agency the
26 authority and discretion to enforce state requirements. Federal agencies often lack staff capacity
27 and water quality expertise to realistically undertake enforcement or inspection activities beyond
28 their existing inspection and inspection efforts. These changes could undermine states' authority

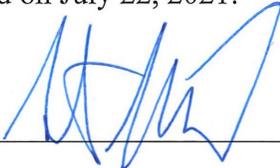
1 to enforce the conditions of the state certification and in doing so render the certifications
2 ineffective to protect water quality and cause environmental harm to the state of Oregon.

3 10. The Rule will require that Oregon expend state resources to update its current
4 Section 401 Water Quality Certifications rules at Oregon Administrative Rules at Chapter 340,
5 Division 48. Oregon's existing rules provide a minimum timeline for review of applications at
6 OAR 340-048-0042 and lists requirements for applications at OAR 340-048-0020 that are now
7 inconsistent with the Federal Rule. These inconsistencies are leading to confusion for applicants
8 and will require that Oregon expend state resources in reviewing and revising the regulations.

9 11. For the reasons described above the Rule is causing environmental and economic
10 harm to the state of Oregon.

11 12. I understand that EPA has now announced its intent to revise the Rule. However,
12 EPA has not yet proposed any specific changes to the Rule. Moreover, EPA projects that final
13 revised rule will not be in place until *at least* 2023. I understand that EPA has asked to keep the
14 Rule in place while it is reviewed. If this occurs, the harms and confusion created by the Rule
15 will continue for at least another two years.

16 I declare under penalty of perjury under the laws of the United States that the foregoing is
17 true and correct and that this declaration was executed on July 22, 2021.

18
19 Signature:  _____

20 Printed name: Steve Mrazik

21 Address: 1240 SE 12th Ave, Portland, Oregon, 97214

22 Phone Number: (503) 229-6414