



August 2, 2021

Lauren Kasparek
Oceans, Wetlands and Communities Division, Office of Water (4502-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2021-0302

Dear Ms. Kasparek,

The Colorado Department of Public Health and Environment submits these comments in response to the U.S. Environmental Protection Agency's ("EPA's") request for written feedback on its June 2, 2021 Notice of Intention To Reconsider and Revise the Clean Water Act Section 401 Certification Rule ("2020 Rule"). Colorado is pleased that EPA is revisiting the 2020 Rule and that this Administration has expressed a sincere desire to consider input from states and other certifying authorities regarding the legality of the 2020 Rule, as well as practical experience with its implementation.

We also appreciate this Administration's commitment to the principle of cooperative federalism as stated in the June 2nd notice, and we value our partnership with EPA and other federal permitting/licensing agencies. We would like to take this opportunity to share Colorado's unique perspective on the 401 rule in terms of certifying large-scale water supply infrastructure projects. As explained further below, the 2020 Rule severely restricts our ability to ensure that such projects are operated in a manner that is protective of water quality. We urge EPA to seriously consider Colorado's concerns in the spirit of cooperative federalism that is central to Section 401 of the Clean Water Act ("CWA"), and to revise the 2020 Rule to address these concerns.

I. Consideration of the Rule under the Framework of Cooperative Federalism

The principle of cooperative federalism and the primary authority of states to manage and protect their water resources are paramount concepts reflected in numerous provisions of the CWA. For example, Section 101(b) confirms Congress' overarching policy: "[T]o recognize, preserve, and protect the primary responsibilities of the States to prevent, reduce and eliminate pollution [and] to plan the development and use ... of water resources...." 33 U.S.C. § 1251(b). Section 510(1) further emphasizes the central role of states under the Act, providing that "nothing in this chapter shall preclude or deny the right of any State ... 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 they are at least as stringent as any federal counterpart. 33 U.S.C. § 1370(1). Section 510(2) goes on to say that nothing in the Act shall "be construed as impairing or in any



manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” 33 U.S.C. § 1370(2).

Section 401 of the Act adheres to these overarching principles through establishment of a clear framework intended to maintain the states’ primary authority to protect the quality of their water resources from impacts associated with federally permitted projects. 33 U.S.C. § 1341. As noted by the Senate Committee on Public Works during the passage of the 1972 amendments to the Act, “[T]he purpose of the certification mechanism provided in [Section 401] is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.” S. Comm. on Public Works, S. Rep. 92-414, at 69 (1971). The United States Supreme Court—along with numerous federal and state courts—have consistently upheld the concept of independent state authority under Section 401. *See, e.g., S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 386 (2006) (“State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution.”).

Again, we urge EPA to make cooperative federalism a focal point in its consideration of revisions to the 2020 Rule.

II. 401 Certification in the Context of Colorado’s Water Supply Projects

Because of its semi-arid climate and its status as a headwaters state, Colorado and its water providers (namely municipalities and water districts) are continuously seeking creative storage and allocation solutions to promote optimal water use, while at the same time protecting the quality of the state’s scarce water resources. Since most of Colorado’s precipitation falls in the form of snow, water must be captured and stored in lakes and reservoirs when and where the snow melts. The water is then delivered through pipelines and ditches to urban and agricultural centers where the water is ultimately put to beneficial use. The state’s population is expected to double by 2050, and there has been a marked increase in construction and expansion of reservoirs in recent years to strengthen Colorado’s water storage and supply infrastructure in order to meet the State’s increasing water demands.

Since 2012, Colorado’s certifying agency, the Water Quality Control Division (“WQCD”) of the Colorado Department of Public Health and Environment, has granted four conditional certifications for large-scale water supply projects. At least 3 more water projects are currently going through the National Environmental Policy Act (“NEPA”) process and will be seeking 401 certification from the WQCD in the relatively near future.

Each of these projects requires a Section 404 dredge and fill permit issued by the U.S. Army Corps of Engineers (“USACE”), which is triggered by the construction or enlargement of reservoirs, and, in some cases, construction of water supply pipelines across streambeds. These projects are critical for meeting the needs of our quickly growing cities and for continuing to support a robust agricultural industry. At the same time, Colorado recognizes that operation and management of these projects, namely diversion of water and releases from reservoirs, can have detrimental impacts to the designated uses of our waterways. Colorado’s well-established 401 certification process under Water Quality Control Commission Regulation #82 (5 C.C.R. 1002-82) provides a robust mechanism for Colorado to strike a balance between these sometimes competing interests.

To this end, Colorado has been overwhelmingly successful in collaborating with federal agencies, project applicants, interested stakeholders, and state agencies such as Colorado Parks and Wildlife,

to ensure that the ongoing operation of these water infrastructure projects does not degrade water quality. The state's involvement with these projects begins long before it receives an application for 401 certification. The WQCD typically takes part in the NEPA processes as a "cooperating agency," during which it becomes familiar with the proposed project and provides input on state water quality requirements. During the 401 certification process, Colorado works with applicants to craft conditions that are intended to address the concerns of pertinent state and federal agencies and other interested parties.

As explained in detail below, the 2020 Rule drastically limits Colorado's ability to impose such protective conditions on water supply projects. Accordingly, we urge EPA to reinstate the longstanding authority of states to impose conditions related to the operation of the "activity as a whole," consistent with Supreme Court precedent, as opposed to being limited to the discharge that triggers the need for a federal permit/license in the first instance.

III. Explanation of Colorado's Main Areas of Concern

Colorado has four main concerns with the 2020 Rule as it relates to our certification of complex water supply projects:

- (1) the scope of 401 certifications should extend to the "activity as a whole" as it did prior to the 2020 Rule, instead of being limited to the discharge that triggers the need for the federal permit;
- (2) the definition of "water quality requirements" should be broadened to encompass the full scope of state law requirements to ensure consistency with the Clean Water Act;
- (3) the "reasonable assurance" standard, or an alternative that makes room for adaptive management to address future unforeseeable impacts, should be reinstated; and
- (4) the period of time for certifying authorities to complete certifications needs to remain flexible (up to one year) to accommodate certification of our large complex water projects.

Concern #1: The scope of 401 certifications must encompass the "activity as a whole."

Colorado's primary concern with the 2020 Rule is its drastic limitation on the scope of 401 certifications. The 2020 Rule departed from EPA's longstanding practice and the Supreme Court's directive in *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) that 401 certifications apply to the "activity as a whole," instead limiting the scope of certifications to the "discharge from a Federally licensed or permitted activity." 40 C.F.R. 121.3. In the context of our water supply projects, this means that Colorado can only evaluate impacts from the dredge and fill activity, or in other words, the initial construction of the project. It precludes any consideration of the long-term operation of the project, which is where the major water quality impacts from such projects occur. This limitation seriously undermines the state's ability to protect our water resources.

To illustrate, Colorado's last certification for a water project, which was issued under the previous rule in January 2020, included 30 conditions to mitigate against predicted water quality impacts from the project's operation, including water diversions, filling two large new reservoirs, and releases from a dam. All but one of these conditions - the one covering construction of pipelines - likely would have been considered outside the scope of the 2020 Rule. These conditions included extensive monitoring, modeling, and mitigation requirements addressing a variety of potential water quality impacts, including, but not limited to:

- Increased stream temperatures associated with increased diversions and reservoir releases;
- Poor water quality in newly constructed reservoirs designed to support aquatic life, recreation, water supply, and agricultural uses;
- Increased concentrations of heavy metals, *E. coli*, and nutrients related to increased diversions of relatively clean water and releases of poor quality water from reservoirs;
- The presence of high concentrations of mercury in fish tissue related, in part, to biogeochemical processes that occur as large reservoirs fill; and
- Degradation of aquatic life habitat due to increased diversions and poorer water quality.

For these reasons, we encourage EPA to codify in a revised rule the *PUD No. 1* holding that state authority in the context of 401 certifications covers the "activity as a whole."

Concern #2: States must have the ability to impose protective conditions under their own laws.

Second, Colorado is concerned that the 2020 Rule places unlawful limits on state authority to craft appropriate certification conditions based on their own laws to ensure protection of their waterbodies. Under the 2020 Rule, states are limited to imposing conditions related to "water quality requirements,"¹ which is narrowly defined in the rule as "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." 40 C.F.R. 121.1(n) (emphasis added). The definition of "water quality requirements" in the 2020 Rule effectively limits Colorado's ability to certify water supply projects because it no longer allows for conditions to mitigate impacts or degradation associated with hydromodification of stream systems (from diversions) and filling of new or expanded reservoirs. Colorado has historically worked with project proponents to craft creative conditions, such as managing the timing and depth of reservoir releases and instream flow targets, while balancing their statutory right to put adjudicated quantities of water to beneficial use. These conditions would arguably not fit within the definition of "water quality requirements" because they are not intended to mitigate the impacts of the point source discharge that triggered the need for the federal license/permit.

Thus, in revisiting the 2020 Rule, EPA should strive for consistency with the language in Section 401(d) of the Act, which authorizes states to "assure compliance with any other appropriate requirement of state law." 33 U.S.C. § 1341(d). This phrase represents Congress' acknowledgement that the states are in the best position to apply their own tailored requirements to protect their water resources. If EPA chooses to define or clarify the term "any other appropriate requirement of state law," it should bear in mind that states such as Colorado have a wide variety of regulatory tools

¹ For example, 40 C.F.R. 121.7(d)(1)(i) requires that certifying authorities include in their conditional certifications: "A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements."

at their disposal to mitigate against the impacts of the “activity as a whole,” and these tools are not necessarily limited to mitigating impacts from “point source discharges.”

For example, in our certification of a water supply project known as the Windy Gap Firming Project, issued in March 2016, Colorado imposed conditions requiring mitigation of increased stream temperatures associated with the project through an adaptive management program involving an extensive monitoring network, strategic releases of cool water from reservoirs, and environmental flow releases. Recognizing the potential for these mitigation efforts to increase manganese concentrations, Colorado developed a creative approach requiring careful study of the sources and behavior of manganese in the area and precluding the use of certain temperature mitigation strategies if they were likely to increase manganese concentrations.

Similarly, in our certification of the Northern Integrated Supply Project (another large water supply project), issued in January 2020, Colorado incorporated the applicant’s voluntary commitments to a number of project design features, such as environmental flow releases and a reservoir outlet capable of releasing water from different depths, as enforceable conditions to ensure the protection of water quality in the impacted river. We also required the implementation of an adaptive management program designed to provide the greatest benefit to in-stream water quality while recognizing the applicant’s need to meet its water supply obligations. In these ways, 401 certifications have provided Colorado with a flexible, adaptable tool with which it can impose complex conditions to protect water quality in accordance with state law without compromising the state’s abilities to meet its water supply needs. By limiting the variety of state laws that 401 certifications can enforce, the 2020 Rule strips the 401 certification program of its flexibility, leaving Colorado without the regulatory tools it needs to ensure water quality protection.

Additionally, the ability to impose conditions related to impacts from diversions and other forms of hydromodification is imperative for water supply projects to be able to comply with the state’s antidegradation rule. See Regulation #31.8, Basic Standards and Methodologies for Surface Water (5 CCR 1002-31). Colorado relies on water quality modeling to predict impacts associated with future project operation. Where such modeling predicts significant degradation of water quality, Colorado has historically imposed conditions such as channel restoration, riparian habitat improvement, and aquatic habitat enhancement, which are designed to offset the predicted degradation through the concept of “net environmental benefit.” See 5 CCR 1002-82.5(a)(1)(A). For example, the 401 certification for the Northern Integrated Supply Project included a condition requiring that the applicant perform stream channel and habitat improvements, such as enhancing riparian vegetation and improving channel morphology, along a one-mile reach of the Cache La Poudre River in Fort Collins. Similarly, the 401 certification for the Windy Gap Firming Project required that the applicant contribute \$2,000,000 to projects designed to improve aquatic habitat in the upper reaches of the Colorado River. In addition to providing net environmental benefit, such conditions also serve to mitigate project-related impacts to water quality from diversions, such as from increased sediment loads, increased nutrient concentrations, and increased water temperature. Again, these conditions designed to ensure compliance with Colorado’s antidegradation rule arguably would not be allowed under the 2020 Rule because they seek to mitigate water quality impacts from diversions, rather than point source discharges.

In sum, Colorado urges EPA to reconsider the excessively restrictive definition of “water quality requirements” in the 2020 Rule. The statutory language in Section 401(d) authorizing states to

impose conditions to ensure compliance with “any other appropriate requirement of state law” should be construed broadly in any new EPA rule to allow states flexibility to impose protective conditions consistent with their own laws.

Concern #3: The “inherent predictive nature” of certifications must be reflected in the language of the certification statement.

Colorado’s third concern with the 2020 Rule is the removal of the longstanding “reasonable assurance” standard from the previous regulation. The prior rule, in place since 1971, required certifying authorities to provide “[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards” as part of its certification. 40 C.F.R. 121.2(a)(3) (2019). The 2020 Rule, by contrast, requires certifications to assure that the “discharge from a Federally licensed or permitted activity will comply with water quality requirements.” 40 C.F.R. 121.7(b)(emphasis added).

The definitive “will comply” standard is at odds with Colorado’s reliance on water quality modeling to predict future impacts associated with the long-term operation of large water supply projects. It is also counter to the long-accepted tool of adaptive management as a protective backstop. *See, e.g., Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 659, 676 (Wash. 2004)(upholding adaptive management as a valid certification condition and recognizing that “the inherent predictive nature of a section 401 certification cannot be avoided; each 401 certification must address future events and the likelihood that those events will result in violations of water quality standards.”).

In evaluating the predicted impacts of the long-term operation of water supply projects, Colorado cannot be absolutely certain that water quality will never be impacted. There are simply too many unknown factors -- including the precise impacts of climate change on water quality and future changes to water quality standards -- to know with certainty that the project will always operate in compliance. Recognizing these practical limitations, Colorado includes extensive monitoring and adaptive management requirements in its conditional certifications to keep constant watch over the effects of project operation and circumstances that could not have been accurately anticipated at the time of certification. In short, in the event that water quality is degraded or exceedances/impairments occur as a result of unanticipated circumstances, project proponents are required to adjust operations to mitigate such impacts.

If EPA chooses to retain the current “will comply” language, Colorado urges the Agency to expressly recognize adaptive management as a valid condition to provide some degree of flexibility to an otherwise definitive standard. Assuming that EPA reinstates the proper scope of certifications as applying to the “activity as a whole,” Colorado will need to continue its reliance on adaptive management as a tool to ensure future compliance. If certifications for water projects require absolute certainty for compliance at the time of certification without recognizing adaptive management as an allowable means to address unforeseeable impairments, Colorado will likely be forced to deny certification for many critical water infrastructure projects.

In conclusion, Colorado urges EPA to return to the longstanding “reasonable assurance” standard. In the alternative, if EPA chooses to retain the 2020 Rule’s “will comply” language, Colorado requests that EPA explicitly recognize adaptive management as an appropriate means by which to assure long-term project compliance.

Concern #4: The timeframe to process certification requests must be flexible to account for complex projects.

Finally, as EPA reconsiders the 2020 Rule’s framework for establishing the “reasonable period of time”² for certifying authorities to process 401 certification requests, we encourage flexibility and recognition that certifications for complex water supply projects require a great deal of time to complete. Assuming that any new EPA rule adheres to the Supreme Court’s directive that 401 certifications apply to the “activity as a whole” (rather than being limited to the triggering discharge), Colorado will continue to need the entire one-year statutory time frame to properly evaluate certification requests for large water supply projects and to formulate protective conditions that can be upheld under the scrutiny of appeal. Indeed, the last four water supply projects that have undergone the certification process in Colorado have taken the entire year to process, even with several staff members, consultants, and an assigned attorney dedicating significant resources consistently throughout that entire period of time.

Colorado’s large water supply projects are often controversial and generate a large volume and wide range of public comments, which can be very technical in nature as local groups that oppose water projects hire consultants to conduct their own evaluations of project impacts. Colorado takes this public process seriously and is diligent in its efforts to consider and incorporate these comments into conditions, where appropriate. We also coordinate extensively with certification applicants and other interested state agencies such as Colorado Parks and Wildlife in crafting mitigating conditions -- a process that entails a great deal of email communication and numerous meetings to discuss a myriad of technical and legal aspects of certification conditions. For these reasons, Colorado requests that EPA prioritize project complexity as a main consideration as it revisits the timeframe for states to process certification requests. Any future guidance that EPA issues on this topic should also recognize the varying complexity of projects and explicitly allow flexibility to establish certification timeframes accordingly.

IV. Responses to EPA’s List of Topics

Below, Colorado responds specifically to each of the areas on which EPA requested comments.

1. *EPA is interested in the utility of the pre-filing meeting process to date, including but not limited to, whether the pre-filing meetings have improved or increased early stakeholder engagement, whether the minimum 30 day timeframe should be shortened in certain instances (e.g., where a certifying authority declines to hold a pre-filing meeting), and how certifying authorities have approached pre-filing meeting requests and meetings to date.*

Response

Overall, Colorado does not believe that the pre-filing meeting requirement substantially facilitates or detracts from the 401 certification process. Pre-filing meeting requests may encourage stakeholders to begin the certification process early, but applicants for larger projects have generally engaged with Colorado well in advance of submitting a certification request with or without such a requirement. For smaller projects with limited impacts, the pre-filing meeting requirement serves as little more than a “box-checking” exercise for applicants, since Colorado often declines to hold a meeting. If EPA chooses to retain this

² See 40 C.F.R. 121.6, “Establishing the reasonable period of time.”

requirement, it could be made more flexible to account for such projects. For example, EPA could reduce (or eliminate) the 30-day waiting period between submission of the prefling meeting request and submission of the certification request when the certifying authority declines to hold a meeting.

2. *The rule defines a certification request as “a written, signed, and dated communication that satisfies the requirements of [section] 121.5(b) or (c).” EPA is concerned that the 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. EPA is interested in stakeholder input on this definition and the elements of a certification request contained at 40 CFR 121.5, including but not limited to, the sufficiency of the elements described in 40 CFR 121.5(b) and (c), and whether stakeholders have experienced any process improvements or deficiencies by having a single defined list of required certification request components applicable to all certification actions.*

Response

To date, Colorado has not experienced any significant harms or benefits as a result of the 2020 Rule’s definition of a certification request. However, Colorado maintains its own list of certification request requirements (see 5 C.C.R. 1002-82.4) that does not mirror the 2020 Rule’s definition in all cases. For example, Colorado requires that applicants submit a copy of their 404 permit application as well as the statutorily mandated fee for 401 certification, but does not require “a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project” or any specific certification statements. Based on our experience, Colorado urges EPA to consider the extent to which such discrepancies create confusion among applicants and to propose a new rule that provides sufficient flexibility for certifying authorities to obtain all the materials they need to issue a certification.

3. *EPA seeking stakeholder input on the process for determining and modifying the reasonable period of time, including but not limited to, whether additional factors should be considered by federal agencies when setting the reasonable period of time, whether other stakeholders besides federal agencies have a role in defining and extending the reasonable period of time, and any implementation challenges or improvements identified through application of the rule’s requirements for the reasonable period of time.*

Response:

In addition to Colorado’s specific comments regarding the complexity of projects as described in Concern #4 of these comments, federal permitting/licensing agencies should also consider each state’s procedural requirements, such as public notice procedures. For example, delays beyond 60 days for final certification of “smaller” projects (i.e. projects that incur minimal costs and temporary water quality impacts) can occur depending on the timing of the certification request because the WQCD only has one opportunity at the beginning of each month to publish notice of draft certification determinations, which triggers a 30 day comment period.

4. *EPA is seeking stakeholder input on the rule’s interpretation of the scope of certification and certification conditions, and the definition of “water quality requirements” as it relates to the statutory phrase “other appropriate requirements of state law,” including but not limited to, whether the agency should revise its interpretation of scope to include potential impacts to water quality not only from the “discharge” but also from the “activity as a whole” consistent with Supreme Court case law, whether the agency should revise its interpretation of “other appropriate requirements of State law,” and whether the agency should revise its interpretation of scope of certification based on implementation challenges or improvements identified through the application of the newly defined scope of certification.*

Response

Colorado addresses these issues in detail under Concerns #1 and #2 in this comment letter.

5. *EPA is seeking stakeholder input on the certification action process steps, including but not limited to, whether there is any utility in requiring specific components and information for certifications with conditions and denials, whether it is appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose, and if so, whether there should be greater certifying authority engagement in the federal agency review process including an opportunity to respond to and cure any deficiencies, whether federal agencies should be able to deem a certification or conditions as “waived,” and whether, and under what circumstances, federal agencies may reject state conditions.*

Response

Colorado has historically requested input from the federal permitting agency regarding the enforceability of its conditions on large water supply projects. Therefore, Colorado does not believe that a regulatory provision requiring federal review of 401 certifications for substantive or procedural issues is necessary. Furthermore, even limiting the scope of federal review of certification actions to procedural compliance does not address the inconsistency between the 2020 Rule and the statute, which does not allow for federal review of state certification conditions; rather, 401 certifications “shall become a condition on any Federal license or permit.” However, if the revised rule retains any provision for federal review, it should either provide certifying authorities with an opportunity to remedy conditions that federal agencies deem deficient, or mandate that federal permitting agencies develop procedures for curing deficiencies. In the absence of such provisions, certifying authorities could lose the opportunity to establish reasonable protections for water quality for easily curable procedural reasons.

6. *EPA is interested in stakeholder feedback on enforcement of CWA Section 401, including but not limited to, the roles of federal agencies and certifying authorities in enforcing certification conditions, whether the statutory language in CWA Section 401 supports certifying authority enforcement of certification conditions under federal law, whether the CWA citizen suit provision applies to Section 401, and the rule’s interpretation of a certifying authority’s inspection opportunities.*

Response

At this time, Colorado has no comments on this issue, but we may choose to provide comments in the context of any future rule proposal.

7. *EPA is interested in stakeholder feedback on modifications and “reopeners,” including but not limited to, 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.*

Response

At this time, we do not believe that the 2020 Rule’s explicit prohibition of modifications and “reopeners” in 401 certification conditions will impact Colorado’s ability to issue 401 certifications with sufficiently protective conditions, including those that require adaptive management with Colorado’s oversight. However, we may choose to provide additional comments in the context of any future rule proposal.

8. *EPA is interested in stakeholder feedback on the neighboring jurisdiction process, including but not limited to, whether the agency should elaborate in regulatory text or preamble on considerations informing its analysis under CWA Section 401(a)(2), whether the agency’s decision whether to make a determination under CWA Section 401(a)(2) is wholly discretionary, and whether the agency should provide further guidance on the Section 401(a)(2) process that occurs after EPA makes a “may affect” determination.*

Response

At this time, Colorado has no comments on this issue, but we may choose to provide comments in the context of any future rule proposal.

9. *EPA is interested in receiving any data or information from stakeholders about the application of the 401 Certification Rule, including but not limited to, impacts of the rule on processing certification requests, impacts of the rule on certification decisions, and whether any major projects are anticipated in the next few years that could benefit from or be encumbered by the 401 Certification Rule’s procedural requirements. Additionally, EPA is interested in stakeholder feedback about existing state CWA Section 401 procedures, including whether the agency should consider the extent to which any revised rule might conflict with existing state CWA Section 401 procedures and place a burden on those states to revise rules in the future.*

Response

We are currently working with applicants on future certification requests for three major water supply projects. The 2020 Rule’s significant limitations on the scope of 401 certifications would greatly restrict Colorado’s ability to issue protective certifications, hindering our authority to consider water quality impacts from increased diversions and other operational components of large water supply projects. This issue is discussed in detail in Concerns #1 and #2 of this letter.

Regarding the 2020 Rule's procedural requirements, Colorado is concerned that retaining these requirements could force it to substantially revise its 401 Certification regulations. These regulations specify the elements required for a 401 certification request, describe the state's consideration of both construction and operation of the project, describe the role of adaptive management and monitoring conditions in certifications of large water supply projects, and outline public notice procedures. Making potentially significant regulatory changes to ensure consistency with federal rules would take a significant amount of time and resources. For this reason, Colorado recommends that EPA maintain some flexibility in a new rule that recognizes certifying authorities' investment in and experience with their already established certification procedures.

10. EPA is interested in hearing from stakeholders about facilitating implementation of any rule revisions. For example, given the relationship between federal provisions and state processes for water quality certification, should EPA consider specific implementation timeframes or effective dates to allow for adoption and integration of water quality provisions at the state level. Similarly, EPA is interested in receiving feedback on whether concomitant regulatory changes should be proposed and finalized simultaneously by relevant federal agencies (e.g., the Army Corps of Engineers, Federal Energy Regulatory Commission) so that implementation of revised water certification provisions would be more effectively coordinated and would avoid circumstances where regulations could be interpreted as inconsistent with one another.

Response

At this time, Colorado has no specific comments regarding how EPA should proceed with its rulemaking process. Overall, Colorado encourages EPA to consider the variety of agencies that may need to alter existing regulations in light of changes to the federal 401 certification rule. Colorado welcomes future opportunities to engage as a stakeholder and co-regulator in this matter.

We appreciate that EPA is reconsidering the 2020 Rule and look forward to continued engagement on this issue.

Sincerely,



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