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

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**Re: Comments on Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Docket ID No. EPA-HQ-OW- 2021-0302).**

To Whom It May Concern:

Please accept these comments developed by the Nevada Division of Environmental Protection (NDEP) on behalf of the Nevada Department of Conservation and Natural Resources in response to the U.S. Environmental Protection Agency (EPA) Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Docket ID No. EPA-HQ-OW- 2021-0302) which addresses Executive Order 13990 (Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis). These comments are in response to the components of the 401 Certification Rule EPA plans to reconsider and revise for consistency with the principles outlined in the Executive Order and the agency's legal authority.

The State of Nevada is obligated to protect waters of the State as authorized in both the Nevada Revised Statutes (NRS) and Nevada Administrative Code (NAC). The 401 Certification process is an effective tool to not only ensure the compliance of a federally permitted or licensed project with water quality requirements in the Clean Water Act, NRS, and NAC, but also upholds the State's role of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters consistent with the intent of the Clean Water Act. The State of Nevada has been in compliance with the new 401 Certification Rule since its issuance in September 2020, and during this time the State's ability to comprehensively protect water quality using the 401 Certification process has been adversely affected through the new Rule's narrow scope of review and other items identified herein. While implementing the new 401 Rule, NDEP has identified efficiencies as well as shortcomings regarding the protection of jurisdictional waters of the U.S. that flow through the State. Any revisions to the 401 Rule should take into consideration the following comments:

**Scope:** The scope of the 401 Certification review should include all categories of discharge associated with an activity as a whole. To fully consider a project's impacts to water quality, Certification review should include, at a minimum:

- short- and long-term sources of pollution,
- direct and indirect impacts,
- implementation and operation of a project,
- upstream and downstream impacts,
- non-point sources of pollution,
- impacts to waters of the U.S. *and* waters of the State, and

- upland placement of dredged and excavated materials.

*It is imperative for a certifying authority to consider all potential water quality impacts of a project, as defined in section 401(d) of the Clean Water Act. Within the scope of the current rule, point source discharges are to be verified for impacts to federally jurisdictional waters; however without consideration of the activity as a whole, a project cannot be guaranteed to comply with federal and state water quality requirements thus degrading the effectiveness of federal protections afforded to our nation's waters. The rule should be revised to incorporate authority for review of potential impacts to water quality that a project imposes, in order to empower certifying authorities to adequately protect water quality.*

**Authority to Condition:** *Any condition, standard, or limitation that a certifying authority develops to control or abate water pollution related to an activity should not be able to be changed or eliminated at the discretion of the federal agency issuing the license or permit. If a condition is developed as part of a Certification, the federal permitting agency should not be able to waive or deny Certification or appurtenant conditions as long as such requirement is at least as stringent as the Clean Water Act (as outlined in Clean Water Act Section 510). Additionally, under the current Rule, when the federal permitting agency asserts that a certifying authority does not meet the Rule's procedural requirements, a certification or denial will be deemed by the federal permitting agency to be permanently waived without the opportunity for the certifying authority to remedy deficiencies. A certifying authority should only waive its authority if it provided written notification of such waiver or has failed to act on a Certification request within a reasonable period of time. Certifying authorities should have the opportunity to respond to and remedy deficiencies identified by the federal permitting agency. Taking a collaborative approach to develop a Certification between the federal permitting agency and the certifying authority will strengthen the pursuit of restoring and maintaining the chemical, physical, and biological integrity of waters of the U.S.*

**Condition Enforcement and Compliance:** *The current rule dictates that the federal permitting agency is responsible for enforcing Certification conditions and restricts the certifying authority's ability to ensure an applicant's compliance with conditions in a Certification. Limited staff, time, and funding for federal permitting agencies to enforce conditions of a Certification limits the effectiveness of the 401 process and presents significant concerns regarding project implementation and water quality impacts of certified projects. A certifying authority should have the ability to monitor projects and require post-implementation reporting to ensure compliance with applicable conditions, water quality standards, and designated beneficial uses of the affected water body.*

**Required Information:** *The Rule enumerates an insufficient and minimal list of information project proponents are required to provide in a Certification Request. The Rule does not require project applicants to provide information related to water quality impacts caused by the proposed activity as a whole. Regardless of whether such information is sufficient to fully evaluate water quality impacts—the requested information is limited to whatever can be produced and evaluated within the reasonable period time, which does not necessarily allow for enough information or time for a certifying authority to evaluate impacts to water quality. This structure will lead certifying authorities to more frequently deny Certifications and require an applicant to restart the Certification process to either allow more time for review or require applicants to submit more project details. The certifying authority, not the federal permitting agency, should decide what constitutes a complete and sufficient application which initiates the Reasonable Period of Time to make defensible Certification determinations.*

**Reasonable Period of Time:** The Certification Request step requires the federal permitting agency to determine the Reasonable Period of Time (RPOT) a certifying authority has to issue a determination, and these timelines have been reasonable for small-scale projects. However, for larger and more complex projects these RPOTs can lead to unnecessary burdens placed on both the applicant and the certifying authority in the case where more project details are needed from the applicant to make a determination but are not submitted in time. In this scenario, the certifying authority would have to deny Certification to allow more time to review project details which requires the applicant to restart the Certification process, including the mandatory 30-day pre-filing meeting wait period. Currently, certifying authorities are allotted a 60-day review for General Permits and a 90-day review for Individual Permits to coordinate with applicants as well as federal, state, and local agencies to issue a Certification determination. *Defining the RPOT solely as “not to exceed one year”, would decrease unnecessary project delays, would conserve State resources and time, and would allow for more efficient coordination between applicants and the certifying authority.*

**Removing the 30-day Pre-Filing Meeting Wait Period:** The pre-filing meeting is a great tool to engage with applicants during the early stages of the Certification process regarding project details. Pre-filing meetings are also beneficial for applicants to ask questions about the Certification process as it relates to their projects. *Retaining this meeting requirement would be preferred. However, the 30-day mandatory timeframe is an additional administrative step that should be removed.* Applicants are not required to submit project details during the pre-filing meeting step which limits the effectiveness of the pre-filing meeting and leads to confusion for applicants. Additionally, in the case where projects are eligible for waivers, an applicant is still required to wait 30 days before the certifying authority can issue a waiver for the project, which hinders the efficiency of the Certification process. *Submission of complete project applications to initiate the Certification process in combination with a project meeting shortly after the submission of the complete application would be a more effective and efficient alternative.*

**Reopener Conditions:** Conditions that allow modification of a Certification (“reopeners”) can be a valuable tool in the 401 Certification process that allows certifying authorities the ability to adapt to changing circumstances. Projects that undergo significant alteration to the scope, timeframe, or location must be able to be reviewed by a Certifying authority to re-verify compliance with state and federal water quality requirements of the project as a whole. Currently, any reopener language contained in a Certification is prohibited and any reopener language in a Certification is subject to the federal permitting agency waiving that condition (Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 134 (July 13, 2020) (to be codified at 40 CFR pts. 121, III, L)). This is neither appropriate, nor protective of water quality. This structure allows applicants to modify the scope of a project following issuance of a Certification without the opportunity for a certifying authority to determine if the modification will have the same level of impact as the originally certified activities. *Certifying authorities must be provided the ability to develop conditions, including reopener conditions, as necessary, to ensure compliance with state and federal water quality requirements; anything less is completely untenable.*

**Neighboring Jurisdiction Review:** Upon issuance of a Certification by a certifying authority which may affect a neighboring jurisdiction, the EPA assumes responsibility for reviewing a project’s impacts to inter-state waters. This review and consultation with the neighboring jurisdiction are wholly at the discretion of the EPA, which not only undermines a state’s ability to verify compliance with state regulation but is also counter to cooperative federalism principles and prevents coordination between states and tribes. Furthermore, a 30-day response time is provided to the EPA by the Army Corps of Engineers, with no response (affirmative or negative) being required by the end of that period. This

could reasonably result in a failure to convey important information to a neighboring state merely from an overwhelming workload or position vacancy at the EPA regional office. *Prior to the issuance of a federal license or permit, neighboring jurisdictions must be consulted when a project may impact interstate waters to prevent regulation violations of the impacted jurisdiction. This process can be facilitated by the EPA but should not be at the discretion of the EPA, and the Army Corps of Engineers should be required to ensure any necessary consultation has occurred prior to permit issuance.*

Nevada Division of Environmental Protection appreciates the opportunity to provide comments regarding the 401 Certification Rule's substantive and procedural components and commends the EPA's pursuit to promote efficiency and certainty in the Certification process which also supports cooperative federalism principles integral to the protection of our Nation's waters.

Sincerely,



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