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July 30, 2021

The Honorable Michael S. Regan, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

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

Dear Administrator Regan:

The Washington State Department of Ecology (Ecology) is encouraged by the Notice of Intent published by the U.S. Environmental Protection Agency (EPA) to review and revise the 2020 Clean Water Act Section 401 Certification Rule (2020 EPA Rule). Ecology, the designated water quality authority and Section 401 certifying agency in Washington State, has expressed strong opposition to this Rule since its inception. Today, almost one year after it was finalized, the 2020 EPA Rule has produced precisely what was expected: regulatory uncertainty, unnecessary delays, and challenges in protecting water quality. **We urge EPA to repeal this rule outright.**

For 50 years, states have stewarded Section 401 authority responsibly and without issue. The 2020 Rule was promulgated on the false premise that some states, including Washington, misused their Section 401 authority. In reality, these alleged misuses represented nothing more than the proper application of Section 401 authority that resulted in denial of projects that do not meet federal and state standards for water quality. The 2020 EPA Rule was a solution in search of a problem that has created untenable burdens on state certifying authorities, local industries, small businesses, and our shared constituents —all for no discernable benefit.

The 2020 EPA Rule is nothing short of a rewrite of the Clean Water Act (CWA), undermining states' authority and responsibility to protect our waters. Contrary to clear Congressional intent and case law on state authority, EPA's Rule:

- allows federal agencies to establish unrealistic timeframes for Section 401 certification decisions;
- grants federal agencies unprecedented authority over state denials and conditions;
- redirects the states' enforcement authority to federal agencies;
- does not allow for practical, common sense necessities like modifications; and
- narrows the scope of 401 review.

These changes are antithetical to the purposes of the Clean Water Act. There, Congress made clear that the authority for Section 401 certification belongs with the states. It also made clear that states

may regulate beyond federal standards. The EPA rule takes away the cooperative element of cooperative federalism and improperly subverts state authority to regulate pollution within its own borders. The impacts are not just hypothetical. In Washington, rule implementation is already harming local businesses on the heels of an economic downturn due to the COVID-19 pandemic. Additionally, it is creating unnecessary delays in what should be simple certification approvals. At a time when the federal government is planning to make infrastructure investments in our communities, we cannot afford these delays.

In the coming months, Ecology will be asked to make decisions on Section 401 certifications that will provide approval for projects that will last decades. We will be asked to do so while constrained by a rule that is too narrow for an adequate review of the full scope of water quality impacts. The negative effects to our natural resources from these activities will not stop while the 2020 rule is under revision. Because of the 2020 EPA Rule, some of these activities may be authorized by federal agencies without the opportunity for states to weigh in on projects with significant impacts to their waters. For these reasons, we reiterate our request that EPA swiftly repeal this misguided and illegal 2020 EPA Rule. If EPA does not repeal the rule, EPA must act with all haste in its revision process to minimize the significant risks that the 2020 rule poses to water quality across the nation. As long as the 2020 rule remains on the books, these significant risks will persist.

Thank you again for your leadership on this issue. While repeal continues to be our top priority, we have prepared the responses below to the specific questions listed in the Notice of Intent. If you have any questions, please do not hesitate to reach out to Sharlett Mena, Special Assistant to the Director, at Sharlett.Mena@ecy.wa.gov or (360) 688-6229.

Sincerely,

Laura Watson
Director

Pre-filing meeting requests.
EPA has requested information regarding 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.

- **The requirement for a pre-filing meeting request should be eliminated, or at minimum, be revised so that the requirement is optional.**

While there is utility for a pre-filing meeting for larger, more complex projects, it is not necessary for certifying agencies to receive this advance notification for every routine project. Receipt of a pre-filing meeting requests imposes a burden in that it requires extra resources to receive, respond to and document the request, determine whether or not a pre-filing meeting is necessary, and

conduct outreach to the federal permitting agency.

In Washington State, we are fortunate to have built successful relationships through liaison programs to aid in streamlining processes while ensuring that projects meets regulatory requirements. We have such a relationship with the Washington Department of Transportation (WSDOT). WSDOT, along with other project proponents, are concerned that the pre-filling requirement has increased the permitting issuance times. While pre-application coordination can prevent delays and increase processing efficiency, WSDOT has experienced the opposite in implementing the pre-filing meeting request. This added step has resulted in confusion, process duplication, permitting delays, and increased costs to Washington State.

As explained above, the pre-filing meeting requests have created confusion and are an undue burden on project proponents. If the intent is to streamline and ensure effective review, these steps do the opposite. Another example, the Clean Water State Revolving Fund (CWSRF) works with many underserved and minimally resourced communities, some of which are addressing infrastructure work without the benefit of environmental consultants, access to the Internet, or sources that can provide expert regulatory guidance. As a result, these communities are sometimes caught unaware of the requirement to pre-file prior to submitting a certification request, which results in delays that can impact funding, affect quality of life, create an undue economic burden, increase risk of harm, and result in construction delays for critical projects. Project proponents have expressed deep concern about this requirement, and their ability to get projects completed in a timely manner. Since the majority of the pre-filing meeting requests we receive are typically covered under the U.S. Army Corps of Engineers (Corps) Nationwide Permit Program it is not advantageous to receive a pre-filing meeting request without first understanding the Corps' permitting pathway. Given the volume of pre-filing meeting requests received, it is not possible to complete this coordination prior to receiving a request, which we believe was EPA's intent. Ecology has a history of successful coordination with the Corps such that the Rule does not facilitate project review for the majority of projects, but instead acts as an impediment.

Certification request.
The rule defines a certification request as ''a written, signed, and dated communication that satisfies the requirements of [section] 121.5(b) or (c).'' Id. at 121.1(c). Among other issues, 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.

- **Certifying authorities should be the entities responsible for defining what constitutes a certification request.**

Defining the certification request as ''a written, signed, and dated communication that satisfies the requirements of [section] 121.5(b) or (c)'' has been problematic both for Ecology and project proponents. The certifying authority should determine what is adequate for the project. This should not be dictated by a federal agency, nor is it appropriate for a federal agency to have the authority to limit what data and information a certifying authority can require. As we have seen

through our engagement with the Corps during the 2021 reissuance of the nationwide permits, federal agencies do not have the expertise to determine what constitutes compliance with state laws and regulations.

In implementing these requirements, we have found that emphasis on determining if the request is valid has created a workload issue for our staff and confusion to project proponents. Previously, state certifying authorities were able to review documents and request additional information throughout our review *if needed*, working with the project proponents and other agencies *if needed*. For many routine projects, the defined list exceeds the information necessary for our review. We have heard from project proponents that they are not prepared to submit all required information at the time of the certification request, resulting in changes to their budgets and timelines to accommodate the request.

Reasonable period of time.
The rule requires the federal licensing or permitting agency to determine the reasonable period of time using a series of factors, provided that the time does not exceed one year from the date a certifying authority receives a certification request. EPA is concerned that the rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests and limits the factors that federal agencies may use to determine the reasonable period of time. EPA is 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.

- **EPA should restore Congressional intent of giving states up to one year to act on a certification request.**

In crafting Section 401 (and its predecessor, Section 21(b) of the Water Quality Improvement Act of 1970), Congress recognized that the robust review of federally licensed and permitted projects reserved to states requires a reasonable period of time to accomplish. Congress expressly defined the reasonable period of time for states to act on 401 certifications as up to one year. *Id*.; *see also* 33 U.S.C. § 1341(a)(1). Despite this clear direction from Congress, the 2020 EPA Rule unlawfully authorizes federal permitting agencies to set what they deem sufficient review time, which adds yet another level of uncertainty for certifying agencies and project proponents.

As Congress intended it should be up to the states to determine when a complete application is received, thereby triggering the "reasonable period of time" clock. Due to the wide variety of projects that require a Section 401water quality certification, states must have the authority to determine the reasonable period of time, provided that the state acts within the statutory one-year limit. If the rule is not repealed, the reasonable period of time should say "not to exceed one year" to align with the language in the CWA.

Review times cannot be adequately assessed or determined by an entity that does not have direct experience with a diverse portfolio of projects of varying scope. States have such experience and

expertise on Section 401. Certifying agencies typically work with project proponents throughout the review period. This allows the proponent the opportunity to gather and update information as necessary throughout the process. It increases the likelihood of a favorable outcome. Therefore, states should be allowed to determine what a reasonable period of time is to act on a certification request. This is what Congress intended.

Washington State receives an average of 400 Section 401 water quality certification requests every year. It is important to note that not all certification requests are the same — each request is different and carries unique implications that must be examined based on the specific characteristics of the water bodies and proposed project and federal permit in question. However, some Section 401 applications require more time because the project is unusually complicated or the project proponent fails to furnish sufficient information. EPA's approach to a "reasonable period of time" in the 2020 Rule does not consider these individualized circumstances.

In practice, some federal agencies have taken a rigid approach to implementing this aspect of the Rule. In the recent renewal of the U.S. Army Corps of Engineers (Corps) Nationwide Permit Program the Corps determined the reasonable period of time to review 57[1] nationwide permits to be 60 days. Requests from certifying authorities to extend the timeframe were not granted. In past renewal cycles, state and federal agencies had time to work collaboratively with each other, tribes, and interested stakeholders on the renewal process. Because of this expedited review, certifying authorities did not have the opportunity to get rule clarification from EPA or discuss draft decisions with the Corps, resulting in the Corps not understanding the states' decisions and "declining to rely" on their programmatic Section 401 decisions. The end result is that the states are put in a position of issuing thousands of individual Section 401 certifications per year. This will result in significant negative impacts to project proponents, as well as delays in infrastructure projects, including restoration projects intended to benefit the environment.

Section 401 certification decisions involve an iterative process of reviewing an application for necessary information and accuracy. Thorough reviews may even be dependent on the time of year and often include verifying an application's accuracy with seasonally-timed field investigations, which sometimes take a few months to complete. For example, accurate wetlands delineation work typically cannot be accomplished in dry summer months. Thus, if a project that affects a wetland submits the required wetland delineation report in late summer, confirmation of the finding of that delineation report may need to occur months later, in early spring, when wetland hydrologic conditions are likely to be present. Therefore, the states are in the best position to determine what a reasonable period of time is to obtain the necessary information to ensure that state water quality is protected.

Scope of the certification.
The rule limits the scope of certification, which includes both the scope of certification review under CWA Section 401(a) and the scope of certification conditions under CWA Section 401(d), to ''assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.'' Id. at 121.3. The rule defines ''water quality requirements,'' as the ''applicable provisions of [sections] 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

[1] 57 nationwide permits represent the 52 nationwide permits in the 2017 program, plus the five new nationwide permits proposed in the renewal. The count does not include nationwide permits 26 and 47 which are "reserved".

States.'' Id. at 121.1(n). Among other issues, EPA is concerned that the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality. 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.

- **EPA should restore the scope of review that Congress intended and allow the states to review all of the water quality impacts associated with the project, not just point source discharges.**

Section 401 empowers states to approve, condition, or deny applications to ensure that construction and operation of a project will not degrade our waters. When a project proponent seeks an individual Section 401 certification, any actions necessary to protect water quality are included as conditions in the certification, which are then incorporated into the federal permit. As Congress intended, the scope of this review is not limited to point source discharges. Section 401 certifications address discharges from project operations that are not covered under other federal permits. For example, hydropower projects implicate a broad range of water quality impacts from the project as a whole that are unassociated with any specific point-source discharge. Dams specifically contribute to increased water temperature from decreased water flows within streams and decreased flow rates caused by ponding behind dam structures. Dam reservoirs also cause resuspension of shoreline sediments due to wave action and pool level fluctuations and overall vegetation loss, reducing shading and increasing temperatures.

It is crucial that we maintain water quality in Washington in order to protect endangered salmon and other species, improve degraded waters particularly in communities with environmental justice concerns, protect tribal treaty resources, and avoid exacerbation of water quality impacts due to climate change. The Clean Water Act gives states the ability to condition Section 401 certifications for all water quality impacts, without restriction. The rule's narrow scope of certification and conditions prevents state and tribal authorities from adequately protecting their water quality. In some instances, this may exempt a project from review.

The narrow scope of certification in the rule directly conflicts with two seminal Section 401 court cases. In 1994, the U.S. Supreme Court unequivocally held that the scope of 401certification applies to the activity as a whole, not solely point source discharges. *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology,* 511 U.S. 700 (1994) (PUD No. 1). Twelve years later, the Court reiterated this principle in S*. D. Warren* Co. *v. Maine Bd. of Environmental Protection,* 547 U.S. 370 (2006). For projects requiring a Federal Energy and Regulatory Commission (FERC) license, nearly all of the analysis and conditions in a Section 401 certification focus on other "activities as a whole" that impact water quality and are therefore necessary to uphold state's authority to protect state waters. Despite this clear case law, the EPA narrowed scope of Section 401 to apply only to point-source discharges in the rule. Doing so effectively prohibits states from prescribing conditions that

address impacts from the project activities as a whole rather than only those impacts that result from a specific point source discharge. If EPA does not repeal the rule, it must revise the rule to allow states to protect water quality from the ''activity as a whole'' consistent with Supreme Court case law.

Certification actions and federal agency review.
The rule requires that certifying authorities include specific information when granting certification, granting certification with conditions or denying certification. Id. at 121.7(c)–(e). Additionally, the rule requires federal agencies to review certifying authority actions to determine whether they comply with the procedural requirements of CWA Section 401 and the 401 Certification Rule. Id. at 121.9. Among other issues, EPA is 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 no substantive and easily fixed procedural concerns identified by the federal agency. 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.

- **Congress did not grant federal agencies review or veto authority over states' 401 decisions.**

Through the Clean Water Act, Congress reserved to states the authority to protect their waters. Congress did not grant authority to federal agencies to review whether state decisions comply with the procedural or substantive requirements of Section 401. Id. at 121.9. Not only does this constitute an illegal power grab by federal agencies, but allows a federal agency to declare that a state or tribe's certification or conditions are waived, even for procedural concerns that can be easily fixed by the certifying authority.

Ecology has experienced this firsthand when we recently learned that the Corps incorrectly interpreted one of our state certification conditions in the Nationwide Permit Program renewal as a reopener and therefore "declined to rely on" our Section 401 certification decisions for the nationwide permits. This will force Ecology to issue individual 401 certifications for hundreds or even thousands of projects annually that would otherwise have fallen under the programmatic 401 certifications. This unfortunate result would have been avoided if EPA's 2020 rule was not on the books.

Federal agencies simply do not have the authority to waive or reject Section 401 certifications or conditions. As has been the case for 50 years, project proponents and federal permitting agencies can appeal the 401 decision if they deem the conditions inappropriate. Delegating review of a state's Section 401 conditions to the federal agency directly contradicts the CWA's plain language that conditions of a 401 "shall become conditions of the federal permit" (33 U.S.C. § 1341(d)). It also undermines the CWA framework of cooperative federalism and significantly undermines the relationship between certifying authorities and federal agencies, who have successfully worked together for decades.

Washington is a water state. We have a large number of wetlands, hundreds of lakes, hundreds of miles of marine shoreline, and thousands of miles of rivers and streams. We are proud to be home to the Columbia River, the fourth largest river in the country, and the Puget Sound, one of our nation's largest estuaries. Washington residents are deeply connected to our waters and many of us rely on clean water for our livelihoods and recreational enjoyment. Maintaining clean water is also critically important to Washington's tribal nations in the exercise of their treaty rights. Like other states, Washington State is in the best position to determine what is needed to ensure that state waters are protected.

Enforcement.
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.

- **Section 401 certifying authority's compliance and enforcement authorities and processes must be recognized as part of any revised rule.**

The EPA rule does not provide a role for certifying authorities to enforce certification conditions, and instead provides that federal agencies are responsible for enforcing certification conditions that are incorporated into a federal license or permit. Id. at 121.11(c). This usurpation of state enforcement authority fails to recognize our state authority to enforce our own certification conditions. The underlying goal of the CWA and of Section 401 certifications is ensuring ongoing water quality over the life of a federal license, not simply ensuring that a project complies with water quality standards at a single moment in time.

If EPA does not repeal the rule, the revised rule must recognize that 401 certifying authorities have their own compliance and enforcement authorities and processes. The conditions in a certification are in place to protect our waters and we must be able to enforce them. This role has been recognized in Airport Communities Coalition v. Graves, 280 F. Supp. 2d 1207 (W.D. Wash. 2003) where the decision reiterated that a state Section 401 certification is an "independently enforceable order such that at the end of the judicial review process, there are independent state requirements above and beyond federal requirements." The certifying authority must have the ability to work directly with the project proponent on continued compliance with 401 conditions. Additionally, implementation or adaptive management conditions should not be left to the federal agency to manage. Taking this role from the certifying agency increases risk to waters and adds yet another layer of uncertainty for project proponents and the public in understanding how the resource is protected.

Federal agencies do not have the capacity, nor do they have the expertise and familiarity with state rules and regulations to enforce certification conditions. Historically, federal agencies rely on Ecology to enforce Section 401 conditions and provide information to the federal agencies for their own enforcement efforts. It is highly unlikely that federal agencies can now effectively assume an increased burden of monitoring state conditions in future Section 401 certifications. That is why states frequently include a state enforcement provision in certifications. This

independent state enforcement provision is based on state law, which EPA does not have the authority to override and is another example of federal regulatory overreach that undermines the cooperative federalism embodied in the CWA.

Modifications.
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.

- **EPA must reinstate the 401 certifying authority's ability to modify or amend a certification.**

The 2020 rule removed the 1971 provision that allowed for modifications where agreed upon by the certifying authority, federal agency, and EPA. See 85 FR 42220 (July 13, 2020). In an apparent and clumsy attempt to prevent certifying agencies from extending the reasonable period of time, the rule has created an undue burden for project proponents and the certifying agencies through this unnecessary prohibition of modifications or reopener clauses. Reopener clauses are used in other approvals such as Section 106 National Historic Preservation Act Consultation, and allow for a streamlined, well-tracked approval process where once the project and approval are initiated, they can be modified as necessary, tracked, and documented over the phases of a project through time. Removing the ability to re-open and modify a 401 certification based upon new information or changed circumstances ensures that the 401 certification will meet its intended purpose of protecting water quality.

Prior to the 2020 EPA Rule, certifying agencies had the opportunity to modify a Section 401 certification that had been approved for a particular type of construction method when another is available with lesser impacts. For many of our project proponents, once they get on site, the project scope may be minimized, or they may find impacts to be increased. This recently came up in the review of a project where the proponent wanted to use a fish window not authorized in the certification. As we have no way of modifying without issuing a new certification, the project is excessively delayed and will not be constructed this year as they cannot meet the fish window.

Removing the certifying authorities' ability to be flexible in coordination with a project proponent is arbitrary and problematic for project proponents and certifying agencies alike. For example, the scope of transportation projects can be complex and can change both during and after planning for a variety of reasons. Common changes to transportation projects include new geotechnical data that affects the project design, changes to the landscape before or during construction, unknown structures unearthed during construction, and modifications to construction limits or revised bridge demolition procedures. EPA needs to restore the certifying agencies ability to modify existing certifications. This will provide the necessary flexibility required for complex project delivery – while still protecting the environment.

Of particular impact to our state, is the Corps' incorrect interpretation of our state certification conditions in the nationwide permit renewal as a reopener and its subsequent decision to "decline to rely on" our 401 certification decisions for the nationwide permits. As a result, individual

Section 401 certifications are required for projects where a programmatic Section 401 decision has already been issued. This will result in uncertainty and delay for a wide range of infrastructure projects such as culvert replacement as well as beneficial wastewater, sewer, and stormwater projects. Needless to say, this is bad for fish and the environment. If we had the ability to amend or modify our decisions, we could work with the Corps and fix what they perceive as an issue.

Neighboring jurisdictions.
The rule addresses the so-called ''neighboring jurisdiction'' process in CWA Section 401(a)(2), including interpreting the timeframe in which a federal agency must notify EPA for purposes of Section 401(a)(2) and providing process requirements for the agency's analysis and the neighboring jurisdictions' review and response. 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.

- **EPA needs to reconsider this requirement or provide the resources to implement it.**

The EPA does not have the resources to process these in a timely manner. As such, this adds yet another unnecessary delay for the project proponent's timeline. This has been very problematic for project proponents in our state. Especially those working under tight timelines who did not factor in this potential additional 30-day period for the neighboring jurisdiction review.

If EPA retains the ability to determine if a permit "may affect" adjacent of downstream waters prior to affording Section 401(a)(2) authority, it should be required to publish criteria for making the decision and be appealable by the affected jurisdiction. When Section 401(a)(2) authority is recognized and EPA presents in a hearing the conditions necessary to comply with neighboring jurisdiction regulations, the federal issuing agency should be required to incorporate conditions as written rather than "in such manner as may be necessary to insure compliance with applicable water quality requirements".

Specifically, the Washington State Department of Transportation (WSDOT) has concerns about the neighboring jurisdiction process as detailed below. There is concern over the lack of scope and predictability of criteria under consideration. If the rule is not repealed, WSDOT suggests that the Rule include defined criteria as a basis for the federal agency to determine if coordination with a neighboring jurisdiction or jurisdictions is appropriate. Some criteria for making this determination may include the type of project (e.g., new alignment vs. modifying and maintaining existing infrastructure), thresholds or categories for impacts, size and quality of aquatic resources (e.g., project impacts to a large river may be more likely to affect neighboring jurisdictions than project impacts to a small stream or wetland), and project proximity to neighboring jurisdictions.

Data and other information.
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.

- **Section 401 certifying authorities must be allowed to require the information that is necessary to protect its states waters.**

While the state of Washington does not have a 401 rule, we have longstanding practices in place to work cooperatively with federal agencies and project proponents to gather the information we need to make 401 decisions. In another swipe at cooperative federalism, the 2020 EPA Rule has undermined these practices.

Each state has developed processes and applications which require project proponents to submit detailed information related to the proposed project and its potential impacts, including impacts to water quality. In Washington, the required information is substantially more in depth than what project proponents are now required to submit to start the 401 review clock pursuant to the 2020 EPA Rule. Under the 2020 rule, proponents of individual licenses or permits need only identify the location and nature of potential discharges, along with the receiving water(s), and a description of how the proponent plans to monitor and "treat, control, or manage" the discharge. 40 C.F.R. § 121.5(b). For general licenses or permits, proponents need only identify the "number of discharges expected to be authorized by the proposed general license or permit each year." 40 C.F.R. §121.5(c). Under the 2020 EPA Rule, project proponents can submit this minimal information to certifying authorities well before information required in the state application submittal.

Taken together, project proponents are able to start the 401 clock with far less information than states could historically ask for in order to appropriately evaluate and address potential water quality impacts from proposed projects. This truncated timeline means that certifying authorities may be forced to make Section 401 decisions without critical documentation that is often developed for projects that also require Section 401 certification. For just one example, environmental reviews conducted under both the National Environmental Policy Act (NEPA) and the State Environmental Policy Act (SEPA) provide critical information for Ecology's review of water quality impacts. Washington law provides that if any non-exempt permits are required for a project that also requires Section 401 certification, the certification cannot occur unless the SEPA process has been completed by the lead agency. So, in other words, Ecology will be required to conduct its Section 401 review either before the bulk of materials that actually describe the water quality impacts (typically gathered during SEPA) are complete, or be in conflict with state law. Because of this (especially with regard to larger and more complex projects) Ecology is forced to evaluate and complete Section 401 certification requests without adequate information. This forces Ecology to either broadly condition project proposals in anticipation of "worst-case-scenario" impacts, or deny requests outright because of lack of information. Rather than make the process more efficient, the 2020 Rule has resulted in more uncertainty and more delay.

In sum, Ecology strongly urges EPA to repeal the 2020 401 rule. 401 has been effectively implemented for 50 years. Unfortunately, the 2020 rule has hindered rather than advanced that effective implementation. If the rule is not repealed, it needs to be significantly revised to comport with the plain language and intent of Section 401 of the Clean Water Act.