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

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8-Declaration of Scott E. Sheeley, New York Department of Environmental Conservation
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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 40 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 Rule[10] 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 the1977 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

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[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 hamstrings 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 hamstrings 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 Envtl. 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 is 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 Envt'l 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 Envt'l 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).

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[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 Envt'l 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 Envt'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 prefiling request provision optional, not mandatory.

The 2020 Rule's 30-day prefiling 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 prefiling 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 prefiling 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 Envt'l 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 Envt'l 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 Envtl .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). *F*ERC 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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