State of Louisiana

DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 94005
BATON ROUGE
70804-9005

Jeff Landry
Attorney General

August 2, 2021

Via Electronic Submission

Administrator Michael S. Regan
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: **Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29,541 (June 2, 2021) Docket No. EPA-HQ-OW-2021-0302**

Administrator Reagan:

As the chief legal officers of Louisiana, Alaska, Arkansas, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina and West Virginia . Our States are committed to protecting the quality of our waters. At the same time, our States are committed to fairness to citizens seeking permits, economic progress, development of natural resources, and our citizens rights to transport their products without arbitrary blockages by other states. We accordingly provide the following comments in response to EPA's Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29,541 (June 2, 2021).

I. Background

A. The Clean Water Act

Since 1970, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . ." Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91, 108 (Apr. 3, 1970). In 1972, Congress enacted a "total restructuring" and "complete rewriting" of the nation's water pollution control laws, including the provision requiring certification. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (quoting legislative history); *see also* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 877 (Oct. 16, 1972) (codified at 33 U.S.C. § 1341). Of particular relevance here, Congress narrowed the requirement from a certification "that such *activity* will be conducted in a manner which will not violate applicable *water quality standards*," 84. Stat. at 108 (emphasis added), to a certification only "that any such *discharge* will comply with *the applicable provisions of sections 301, 302, 306, and 307 of this Act,*" 86 Stat. at 877 (emphasis added).

B. Certain States Abuse Their 401 Certification Authority

Despite the statutory change, the Environmental Protection Agency ("EPA") failed to revise the regulations governing the required certification, which is known as a 401 Certification. As a result, EPA's regulations were incongruent with the new statutory language. *Cf.* NPDES; Revision of Regulations, 44 Fed. Reg. 32,854, 32,856 (June 7, 1979) (indicating need for updated certification rules). Certain states began using the incongruity and ambiguities in EPA's regulations to abuse their certification authority for the purpose of delaying or denying certifications on non-water quality grounds. In February 2019, Louisiana and other States wrote to EPA Administrator Wheeler about that abuse and requested that EPA "clarif[y] . . . the process by which federal and state regulatory authorities are expected to implement [Section 401]." Exh. 1. That weighty request was bolstered when, on April 10, 2019, President Trump issued an Executive Order noting that "[o]utdated Federal guidance and regulations regarding section 401 of the Clean Water Act . . . are causing confusion and uncertainty and are hindering the development of energy infrastructure." EO 13868, 84 Fed. Reg. 15,494 (Apr. 15, 2019). The President directed Administrator Wheeler to review EPA's Section 401 regulations, "determine whether any provisions thereof should be clarified," and "publish for notice and comment proposed rules revising such regulations, as appropriate and consistent with law." *Id.* Louisiana and other States then submitted additional comments in response to EPA's request for Pre-Proposal Stakeholder Engagement. Exhs. 2, 7.

Louisiana identified the State of Washington's denial of certification for a proposed coal facility, the Millennium Bulk Terminal, as a paradigmatic example of abuse. Exh. 1. The Governor of Wyoming later explained:

> Wyoming has been adversely impacted by the misapplication of other states' CWA Section 401 certifications. Our interest in a streamlined 401 certification process is founded by the fact that a large portion of Wyoming's economy depends on our ability to export our energy products to the markets that demand them, particularly markets located overseas in Asia. In the case of the Millennium Bulk Terminal, Washington State blocked the terminal's construction by inappropriately denying the State's Section 401 certification on account of non-water quality related impacts -- an illegal maneuver based on alleged effects that are outside of the scope of Section 401.

Exh. 4. The permit applicant for the proposed Millennium Bulk Terminal elaborated:

> Millennium sought a Clean Water Act, Section 401 water quality certification from the Washington Department of Ecology ("Washington Ecology") for nearly six years. As part of the 401 certification process, Millennium has spent over $15 million to obtain an environmental impact statement ("EIS"), which originally began as a dual EIS under the National Environmental Policy Act ("NEPA") and the Washington State Environmental Policy Act ("SEPA"), with the US Army Corps of Engineers as the lead agency under NEPA and with the Washington Ecology and Cowlitz County as co-lead agencies under SEPA. In September 2013, the state and federal agencies agreed to separate and prepare both a federal EIS and a state EIS.
>
> The state EIS concluded with respect to the Project that "**There would be no unavoidable and significant adverse environmental impacts on water quality.**"

* * * * *

> Washington Governor Jay Inslee, and others in his administration, including Washington Ecology Director Bellon, have expressed their belief that no fossil fuel infrastructure projects should ever be built in the State of Washington. Denying Millennium's 401 water quality certification was the way that they could impose their own personal policy preferences to ensure that no permits would be issued for the Project and they could stop sister states from exporting their products into foreign commerce.

Exh. 8.

Montana also objected to Washington's abuse of its discretion, and the dispute led to costly litigation when Wyoming and Montana sued the State of Washington. Other comments and judicial opinions made clear the Millennium Bulk Terminal denial was not an isolated abuse. *See, e.g.*, Exh. 9. Indeed, the State of Maryland went so far as to seek a multi-billion dollar "payment-in lieu" of imposing unachievable conditions unrelated to the discharge for which certification was sought – a demand that would ordinarily be considered extortion and which raises constitutional concerns. Ex. 10; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). The Federal Energy Regulatory Commission bluntly summarized the status quo: "[I]t is now commonplace for states to use Section 401 to hold federal licensing hostage." *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019).

C. EPA Adopts A Rule to Eliminate Ambiguity and Abuse

Citing the April 2019 Executive Order and Pre-Proposal Stakeholder Engagement, EPA published a proposed rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019), to, *inter alia*, limit the scope of 401 certification to water quality impacts from the discharge associated with the licensed or permitted project; interpret "receipt" and "certification request" as used in the CWA; reaffirm that certifying authorities are required by the CWA to act on a request for certification within a reasonable period of time, which shall not exceed one year; and specify the contents and effect of a certification or denial. Despite the short text of the proposed rule itself—less than four *Federal Register* pages—EPA provided a lengthy statutory and legal analysis.

Louisiana, joined by other states, provided extensive comments in support of the proposed rule. Exhs. 1-3. The Governor of Wyoming even testified before the Senate Committee on the Environment and Public Works in support of EPA's rule and parallel Congressional action. Thereafter, EPA published the final rule, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020) ("Rule"). The accompanying commentary acknowledged the Rule was driven by, *inter alia*, the 1972 statutory amendments, "litigation over the section 401 certifications for several high-profile projects," and "the need for the EPA to update its regulations to provide a common framework for consistency with CWA section 401 and to give project proponents, certifying authorities, and federal licensing and permitting agencies additional clarity and regulatory certainty." *Id.* at 42,211. The Rule went into effect on September 11, 2020.

D. President Biden Issues Executive Order 13990 and EPA Announces Its Intent to Reconsider the Clean Water Act 401 Certification Rule

On January 20, 2021, newly-elected President Biden issued Executive Order 13990. 86 Fed. Reg. 7,037 (Jan. 25, 2021). Among other things, that order revoked Executive Order 13,868 and directed agency heads to "immediately review all existing regulations, orders, guidance documents,

policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in section 1 of [that] order." *Id.* at 7,037. President Biden then directed that "[f]or any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions." *Id.* A "Fact Sheet: List of Agency Actions for Review" posted that same day to whitehouse.gov identified the Clean Water Act Section 401 Certification Rule as an action for review under Executive Order 13990. Exh. 11. Neither Executive Order 13990 nor the Fact Sheet identified any specific problem with the Clean Water Act Section 401 Certification Rule. Nevertheless, on June 2, 2021, EPA announced its Notice of Intent to Reconsider and Revise the Clean Water Act 401 Certification Rule "in accordance with" Executive Order 13990. 86 Fed. Reg. at 29,541.

II. General Comment

We are deeply troubled by EPA's reconsideration of a significant rule adopted less than one year ago. EPA offers only vague reasons for reconsideration: "[1] [t]he text of CWA Section 401; [2] Congressional intent and [3] the cooperative federalism framework of CWA Section 401; [4] [unspecified] concerns raised by [unidentified] stakeholders about the 401 Certification Rule, including [unspecified] implementation related feedback; [5] the principles outlined in the Executive Order; and [6] [unspecified] issues raised in ongoing litigation challenges to the 401 Certification Rule." 86 Fed. Reg. at 29542. Of course, "the text of CWA 401," "Congressional intent," and the "cooperative federalism" framework of CWA Section 401 were extensively addressed in connection with the Clean Water Act 401 Certification Rule, *e.g.*, 85 Fed. Reg. at 42,215-17, 42,226, and EPA expressly "determined that the final rule implements the fundamental statutory objectives of the CWA," 85 Fed. Reg. at 42,212. With respect to "implementation related feedback," we question whether any stakeholder has sufficient experience implementing a rule that has been in effect less than nine months to provide feedback warranting revision.

What remains are Executive Order 13990 and "issues raised in litigation" that has not yet seen briefing on the merits.[1] Neither provides a basis for reconsideration. EPA thus falls back on a dubious claim of "inherent authority to reconsider past decisions" and an assertion that "such a revised decision need not be based upon a change of facts or circumstances." 86 Fed. Reg. at 29542; *but see, e.g.*, *California v. Bernhardt*, 472 F. Supp. 3d 573, 600-01 (N.D. Cal. 2020) ("While the Executive branch holds the power to issue executive orders, an agency cannot flip-flop regulations on the whims of each new administration. The APA requires reasoning, deliberation, and process. These requirements exist, in part, because markets and industries rely on stable regulations."). Tellingly, EPA's Notice of Intent to Reconsider makes no mention of the well-documented abuses that preceded the Clean Water Act 401 Certification Rule or EPA's determination that "some certifying authorities [had] implemented water quality certification programs that exceed the boundaries set by Congress in section 401." 85 Fed. Reg. at 42,215.

We note the difficulty in providing detailed comments given the vagueness of EPA's rationales for reconsideration, EPA's failure to address the reasons supporting the Clean Water Act 401 Certification Rule, and the absence of proposed revisions.

[1] EPA has already sought remand without vacatur in each of the litigations challenging the 401 Certification Rule. That suggests EPA is merely undertaking a variation of its well-known practice of entering politically-driven resolutions of lawsuits filed by friendly activists. *See* Exh. 7.

III. Responses to Specific Requests for Comments

1. Pre-filing meeting requests

We note the short period of time the "pre-filing meeting request" requirement has been in effect and the certifying authority's discretion whether to hold such a meeting. *Cf.* 86 Fed. Reg. at 29,544 ("EPA is interested in . . . whether any major projects are anticipated *in the next few years* that could benefit for or be encumbered by the 401 Certification Rule's procedural requirements.").

2. Definition of "certification request"

The Rule defines a certification request as "a written, signed, and dated communications that satisfies the requirements of [40 C.F.R.] 121.5(b) or (c)." 40 C.F.R. 121.1(c). Those sections in turn specify information that must be included in a certification request.

Soliciting input on these topics, the EPA expresses its concern that the Rule may "limit[] state and tribal ability to get information they may need before the CWA Section 401 review process begins," 86 Fed. Reg. at 29,543, and the waiver clock starts to run. We believe the existing definition appropriately balances a certifying authority's need for adequate information to evaluate the request and the project proponent's ability to obtain and submit the information. To the extent additional information is necessary, a certifying authority can request that information from a project proponent.

EPA suggests revisions to the definition could allow a certifying authority to determine when it has received sufficient information to begin the waiver clock, providing essentially no limitation on the period for review. *Cf.* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."). Adequacy of the complete information package is a separate question from whether a certification request has been submitted. Congress made clear that the permitting process should not take more than one year, and the maximum time set by statute is keyed to receipt of a request for certification, not detailed information. *See* 85 Fed. Reg. at 42,235 (citing, *inter alia*, 33 U.S.C. 1341). Revision on this point would be contrary to Congress' clear intent, implicate Due Process, and would dramatically hinder the permitting process.

There appears to be no rationale for a change. Certifying authorities can request information from applicants. If the applicant fails to provide that information, the certifying authority can issue a denial. The check on such a denial is the Rule's requirement that "the denial must describe the specific water quality data or information, if any that would be needed to assure the discharge from the proposed project will comply with water quality requirements" or "that would be needed to assure that the range of discharges will comply with water quality requirements." 40 C.F.R. 121.7(e)(1)(iii), (2)(iii). In short, rational project proponents are unlikely to refuse to provide information requested by a certifying authority if withholding that information will only result in a denial.

The Undersigned States advocated for the existing limits on an open-ended time period to determine whether an application is complete. EPA agreed and revised the certification process; it now provides a system by which certifying authorities receive notice of a request before that request is filed, have the ability to seek information from a project proponent, have a definite period of time to act on that information, and – consistent with Due Process – must identify specific missing

information if a denial is due to insufficient information. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("[T]he decision maker should state the reasons for his determination and indicate the evidence he relied on."). The process set forth in the Rule helps prevent the abuses and arbitrary denials that led some of the Undersigned States to urge EPA to adopt the Rule in the first place. *See, e.g.*, Henry J. Friendly, "Some Kind of Hearing," 123 UNIV. PA. LAW REV. 1267 1292 (1975) ("A written statement of reasons, almost essential if there is to be judicial review, is desirable on many other grounds. The necessity for justification is a powerful preventive of wrong decisions. The requirement also tends to effectuate intra-agency uniformity . . . ."). And, with regard to projects that cross state lines (like pipelines or interstates) or that serve broader geographical regions (like solar farms or wind farms), the Rule prevents one state from using bureaucratic games to effectively veto a project that has significant economic effects across an entire region.

3. Reasonable period of time

Congress specified that "[i]f the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. 1341(a)(1). The Rule accordingly provides that "[t]he Federal agency shall establish the reasonable period of time either categorically or on a case-by-case basis" which "shall not exceed one year from receipt," 40 C.F.R. 121.6, *i.e.*, one year from "the date a certifying request is document as received by a certifying authority, 40 C.F.R. 121.1(m). The Rule then identifies broad factors the Federal agency "shall consider" in establishing the reasonable period of time: "(1) the complexity of the proposed project; (2) the nature of any potential discharge; and (3) the potential need for additional study or evaluation of water quality effects from the discharge." 40 C.F.R. 121.6(c).

EPA expresses concern that the Rule does not allow certifying authorities a sufficient role in setting the timeline for review and limits the factors agencies can use to determine reasonable period of time. In fact, the Undersigned States have expressed the *opposite* concern – that allowing all 50 States (and other certifying authorities) to establish different timeliness for review increases instability and inefficiency. Further, where additional time is demonstrably necessary, the Rule provides as a safety valve that that "[t]he Federal agency may extend the reasonable period of time at the request of a certifying authority or a project proponent." 40 C.F.R. 121.6(d).

Notably, both EPA and the Army Corps of Engineers have determined that a reasonable period of time should generally be less than one year. *See* 33 CFR 325.2(b)(1)(ii) (60 days); 40 C.F.R. § 121.16(b) (6 months); 40 C.F.R. § 124.53(c)(3) (60 days). Having a Federal agency set the reasonable period of time serves to minimize the arbitrary delays and bureaucratic gamesmanship that were at the heart of the Undersigned States' concerns. EPA should continue to have Federal agencies establish the reasonable period of time, as they have done for decades consistent with judicial and administrative precedent. *See, e.g.*, *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) ("Thus, while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year."); *Constitution Pipeline Company, LLC,* 164 FERC P 61029 (F.E.R.C.), 2018 WL 3498274 (2018) ("[T]o the extent that Congress left it to federal licensing and permitting agencies, here the Commission, to determine the reasonable period of time for action by a state certifying agency, bounded on the outside at one year, we have concluded that a period up to one year is reasonable.").

EPA implicitly raises the question of when does a certifying authority waive certification. The Rule recognizes clear, bright lines, *i.e.*, the certification request review period has a clear beginning, a definite end, and a tangible consequence for a certifying authority's failure to act. The Rule is thus consistent with Congress imposition of a clear time limit. *See* 33 U.S.C. § 1341(a)(1). Congress did not qualify the statutory language to allow the certifying authority to delay the commencement of, toll, extend, or otherwise alter or modify that timeframe after the request is received. *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455–56 (2d. Cir. 2018) ("The plain language of Section 401 outlines a bright-line rule regarding the beginning of review . . . . It does not specify that this time limit applies only for 'complete' applications."). EPA should ensure that any revisions to the 401 Certification Rule affirm the statute's "bright-line" waiver rule.

4. Scope of Certification

The Rule makes clear that "[t]he scope of a Clean Water Act section 401 certification is limited to assuring that a discharge . . . will comply with water quality requirements," 40 C.F.R. 121.3, which are in turn defined as "applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States," 40 C.F.R. 121.1(n). The scope of certification defined in the 401 Certification Rule is reasonable and is consistent with the Clean Water Act.

EPA seeks input on the Rule's interpretation of the scope of certification and conditions, and the definition of "water quality requirements" as it relates to the statutory phrase "other appropriate requirements of state law," including but not limited to, whether the agency should revise its interpretation of scope to include potential impacts to water quality not only from the "discharge" but also from the "*activity as a whole*." EPA further expresses concern that the "narrow scope" of certification may prevent state and tribal authorities from adequately protecting their water quality.

The interpretation of the statute in the Rule is correct; is consistent with the *ejusdem generis;* and *noscitur a sociis* canons; is consistent with the presumption that statutory amendments are intended to have real and substantial effect, *Stone v. INS*, 514 U.S. 386, 397 (1995); and is permissible under *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). Undersigned States note that any interpretation that allows certifying authorities to make certification decisions based on matters unrelated to water quality (*e.g,* greenhouse gas emissions, transportation impacts, project need, etc.) would not only be an unreasonable interpretation of the statute, but would create boundless discretion and inject ambiguity. While States value their right to be "incubators of democracy" in the development of their own laws and policies, the objectives of the Clean Water Act are not well-served by ambiguity and state-by-state policy. Notably, EPA does not mention the Rule's justification that "some certifying authorities have included conditions in a certification that have nothing to do with effluent limitations, monitoring requirements, water quality, or even the CWA," "such as requirements for biking and hiking trails to be constructed, one time and recurring payments to State agencies for improvements or enhancements that are unrelated to the proposed . . . project, and public access," or its well-founded conclusion that such actions are not authorized by Section 401. 85 Fed. Reg. at 42,256-257.

5. Certification Actions and Federal Agency Review

As EPA notes, the Rule provides that certifying authorities may take one of four actions on a certification request: grant certification, grant certification with conditions, deny certification, or waive certification. EPA seeks input as to "whether there is any utility in requiring specific components and information for certifications with conditions or denials." 86 Fed. Reg. at 29543. As noted above, a decision maker's stating "the reasons for his determination and . . . the evidence he relied on" are basic requirements of Due Process. *Goldberg*, 397 U.S. at 271. Such information is also essential for judicial review and is a powerful preventive of wrong decisions. Friendly, "Some Kind of Hearing," 123 UNIV. PA. LAW REV. at 1292. And particularly in the case of denials, a complete statement of the basis for denial facilitates a proponent being able to traverse the denial via a new certification request. The Rule thus properly requires information regarding conditions and denials to be included in a certifying authority's action on a certification request. 40 C.F.R. 121.7.

EPA expresses concern "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 or easily fixed procedural concerns identified by the federal agency." 86 Fed. Reg. at 29,543. The Rule provides for waiver on "failure or refusal to satisfy the requirements" of certain provisions. 40 C.F.R. 121.9. The phrase "refusal to satisfy" implies that any "failure" may be timely corrected. This requirement serves to police certifying authorities compliance with EPA's procedural rules via a mechanism that is quicker and less costly than judicial review.

6. Enforcement

EPA provides no legal analysis for its suggestion that the CWA citizen suit provision may apply to section 401. We are thus left blind as to EPA's theory. We note, however, that the citizen suit provision expressly recognizes that it is limited by the States' sovereign immunity. *See* 33 U.S.C. § 1365.

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Please don't hesitate to contact me with any questions or concerns. The point of contact for this matter is Deputy Solicitor General Scott St. John, stjohnj@ag.louisiana.gov, 225-485-2458.

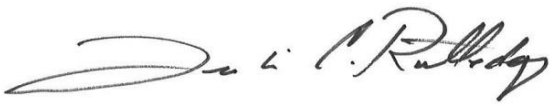
With kind regards,

Patrick Morrisey
West Virginia Attorney General

Jeff Landry
Louisiana Attorney General

Treg Taylor
Alaska Attorney General

Lynn Fitch
Mississippi Attorney General



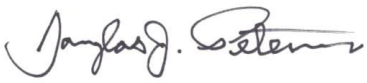
Leslie Rutledge
Arkansas Attorney General

Eric S. Schmitt
Missouri Attorney General

Todd Rokita
Indiana Attorney General

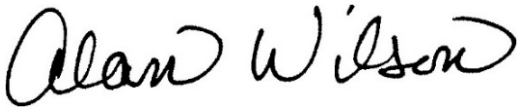
Austin Knudsen
Montana Attorney General

Derek Schmidt
Kansas Attorney General



Doug Peterson
Nebraska Attorney General

Daniel Cameron
Kentucky Attorney General



Alan Wilson
South Carolina Attorney General