August 2, 2021

Attorneys General of Idaho, Washington State, Colorado, Hawaii, Nevada, New Mexico, South Dakota, and Northern Marianas Island

Via Federal eRulemaking Portal

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

RE: Comments on CWA 401 Rule, Docket ID No. EPA-HQ-OW-2021-0302

Dear Administrator Regan:

The undersigned state attorneys general offer the following comments in response to the EPA's announcement of intent to revise the 2020 Clean Water Act (CWA) Section 401 Certification Rule (2020 Rule). The comments address EPA's request for feedback on "whether the rule appropriately considers cooperative federalism principles central to CWA Section 401," 86 F.R. 29542 (June 2, 2021), and whether "certain procedural components of the rule improve, or impede, the certification and licensing/permitting processes." *Id*. The comments recommend improvements to the 2020 Rule that will promote better, more efficient permitting of certification requests by states while at the same time respecting Congress' clear and unambiguous intent that states have the primary responsibility to ensure discharges from federally authorized projects comply "with applicable water quality requirements."

CWA SECTION 401 COOPERATIVE FEDERALISM PRINCIPLES:

In enacting the CWA, Congress purposefully designated states as co-regulators under a system of cooperative federalism that recognizes state interests and authority. Indeed, Section 101, the first section of the CWA, expressly states Congress's intent 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…Federal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent,

> reduce, and eliminate pollution in concert with programs for managing water resources.

33. U.S.C. § 1251(b). This declaration of intent reflects Congress's understanding that a one-size-fits all approach to water management and protection does not reflect the practical realities of geographic and hydrologic diversity among the states.

Nowhere is Congress's intent to establish a system of cooperative federalism in which states and authorized tribes are delegated the primarily responsible for maintaining water quality within their boundaries more clearly stated than Section 401 of the CWA. As explained by the EPA:

> Section 401 of the CWA requires that, for any federally licensed or permitted project that may result in a discharge into waters of the United States, a water quality certification be issued [by states and authorized tribes] to ensure that the discharge complies with applicable water quality requirements.1

Yet, in adopting the 2020 Rule, EPA unilaterally took upon itself the role of defining and limiting state and tribal certification processes. The consequence of EPA's unilateral action is a process that frustrates rather than streamlines state and tribal certification of federally authorized projects.

The following recommendations suggest modifications to the 2020 Rule that will achieve the mutually desired goal of providing a fair, transparent and timely process for certification of federal projects consistent with Congress' intent in delegating to the states 401 certification authority.

RECOMMENDATIONS FOR CHANGES TO 2020 RULE.

1. Timing of Pre-filing Meeting and Certification Requests Relative to the Federal Permitting or Licensing Process

Both pre-filing meeting and certification requests are mistimed under the 2020 Rule because they typically come before the federal permitting or licensing agency has issued even draft permit or license conditions. Without knowledge of the baseline federal requirements for the activity, states and authorized tribes will be required to devote their already-limited time and resources to evaluating and addressing water quality impacts that the federal permit or license conditions may adequately address.

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1 Fact Sheet, Clean Water Act 401 Certification Final Rule, available at: https://www.epa.gov/sites/default/files/2020-06/documents/overview_fact_sheet_for_the_clean_water_act_section_401_certification_rule.pdf

For example, in Idaho, the Army Corps of Engineers has required permit applicants to seek certification before the Corps decides whether a nationwide permit—the majority of which have been certified by the Idaho Department of Environmental Quality—will be required for the activity. In cases where the Corps later decides a nationwide permit with an existing certification is applicable, the Department expends time and resources on a certification process that proves entirely unnecessary.

This timing issue should be addressed by amending the definitions of "receipt" or "certification request." For instance, if "receipt" is defined to occur when the certifying authority verifies in writing that it has all information necessary to proceed with a certification decision, the entire "reasonable period of time" would be available for the certifying authority's substantive decision making and associated public processes. Or, if "certification request" is defined to include the information listed in 40 C.F.R. § 121.7, plus any additional information required by the certifying authority, the certifying authority would likewise be able to devote the entire "reasonable period of time" to certification decision making instead of using a portion of the time seeking and evaluating necessary additional information from applicants.

Further, EPA should abandon its reliance on *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2009), and reject the 2020 Rule's conclusion that *Hoopa Valley* bars withdrawal and resubmittal of 401 certification applications except for the limited circumstance where a proposal has materially changed. As courts have increasingly recognized, *Hoopa Valley* is a very narrow decision that is limited to its "fairly egregious set of facts." *See, e.g., N.C. Dep't of Envtl. Quality v. F.E.R.C.*, __ F.4th __, 2021 WL 2763265, at *8 (4th Cir. 2021). Because Section 401's waiver provisions were only concerned with a certifying authority refusing to act altogether, states do not waive Section 401 authority when they actively work with project proponents to ensure that information necessary for an informed (and defensible) 401 certification decision is developed regardless of whether that process strays over Section 401's one-year timeline. *Id*. at *8-9.

Even under this framework, Section 401's waiver provision remains a limiting principle and bulwark against purposeful inaction or delay by certifying authorities as federal agencies remain free to declare waiver where, on a case-by-case basis, a federal agency determines such motives exists.

2. Reasonable Period of Time

Certifying authorities are in the best position to know how much time (not to exceed one year) is reasonable for action on a certification request. Across the country, substantive, and procedural requirements for certifying authorities vary widely. Yet, the 2020 Rule provides no role for certifying authorities in setting the "reasonable period of time" for their actions. In addition, the decision on whether to allow more time (up to the one-year statutory maximum) is left to the discretion of the federal permitting or licensing agency. Federal control of the timeline for certification decisions increases the likelihood of: (1) involuntary waiver, which does not serve Congress's goal of giving states primary authority to control pollution of their water resources, 33 U.S.C. § 1251(b); or (2) certification denial, which prevents the federal process from moving forward. Neither of these outcomes is beneficial to federal, state, or private interests.

The federal permitting or licensing agency should defer to each state on the "reasonable period of time" to certify a given permit or license, subject to the one-year statutory maximum.

3. Enforcement

The enforcement provision in the section 401 regulations, 40 C.F.R. § 121.11, does not recognize, and could be read as precluding or denying, states' authority to

enforce their certifications and the underlying water quality standards or other appropriate requirements of state law. Such a constraint violates section 510 of the CWA, which preserves states' authority to, among other things, "enforce . . . any standard or limitation respecting discharges of pollutants" so long as the standard or limitation is not less stringent than established minimum federal standards. 33 U.S.C. § 1370. To address this, the 401 regulations should expressly recognize that the certifying authority may enforce certification conditions to the extent authorized by law and that nothing in the regulations impairs that authority.

4. Modification

When changes to a previously certified activity are proposed, certifying authorities must have the opportunity to verify whether the proposed modification will comply with water quality standards and other applicable requirements. The same is true for changes in state law (e.g., new, or revised water quality standards) or the condition of the affected waters. For these reasons, state certifications routinely include a condition that reserves the right of a state agency to modify, amend, or revoke the certification if it determines that, due to changes in relevant circumstances—including without limitation, changes in project activities, the characteristics of the receiving water bodies, or state WQS—there is no longer reasonable assurance of compliance with WQS or other appropriate requirements of state law. EPA's prior Section 401 regulations long allowed this practice, almost certainly because Section 401 itself embraces the need for certifying authorities to adapt 401 certifications to changing conditions. *See* 33 U.S.C. § 1341(a)(3) (expressly allowing revocation or modification of certification regarding changed conditions related to operational permits authorized under a construction certification).

The 401 regulations should restore this tool and expressly allow for reopener conditions to facilitate compliance verification and, if the certifying authority deems it necessary, imposition of additional conditions on, or a new certification for, the activity.

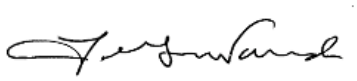
5. Waiver

The 2020 Rule purports to grant federal agencies the authority to declare waiver of certification conditions, entire certifications, or even denials of certification in circumstances far beyond what Congress authorized. The 2020 Rule states that the "certification requirement … shall be waived" for the mere failure or refusal to follow EPA's content and formatting prescriptions or comply with unspecified "other procedural requirements of section 401." 40 C.F.R. §§ 121.9(a)(2)(ii)–(iv), (b). These waiver provisions exceed EPA's authority and are unnecessary.

Congress delegated authority to states and authorized tribes to certify federally authorized projects. Section 401 provides that waiver occurs only if the certifying authority "fails or refuses to act on a request for certification within a reasonable period of period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). Nowhere in Section 401 did Congress grant EPA the authority to create additional grounds for waiver. Nor did Congress grant federal permitting and licensing agencies the authority to alter or deem waived any conditions in a timely certification—a principle consistently upheld by the courts. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 648 (4th Cir. 2018) ("[T]he plain language of the Clean Water Act does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, even if the Corps reasonably determines that the alternative condition is more protective of water quality."); *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 111 (2d Cir. 1997) (holding that FERC "does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are

inconsistent with the terms of § 401"); *U.S. Dep't of Interior v. F.E.R.C.*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates.").

We appreciate the opportunity to provide comments on the 2020 Rule; however, given the clear federalism implications of the 2020 Rule, we respectfully request EPA, in addition to accepting comments on the Rule, engage in real and meaningful consultation with states and tribes as part of its review and revision of the 2020 Rule.



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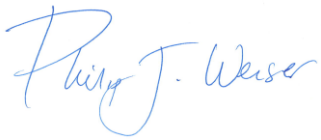

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