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VIA FEDERAL eRULEMAKING PORTAL

Lauren Kasparek, Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

**RE: Docket ID EPA-HQ-OW-2022-0128
Comment of Delaware Riverkeeper Network and Maya K. van Rossum,
the Delaware Riverkeeper, on the Proposed Clean Water Act Section
401 Water Quality Certification Improvement Rule**

Dear Ms. Kasparek,

Thank you for the opportunity to provide comment on the U.S. Environmental Protection Agency's ("EPA's") Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule ("Proposed Rule").¹ The Proposed Rule, when finalized, will replace the previous administration's Clean Water Act Section 401 Certification Rule ("2020 Rule"),² a regulatory action that violated the law and eviscerated the Clean Water Act's Section 401 program.

The Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper, (collectively, "DRN") submit the following comments in support of the portions of the Proposed Rule that restore and strengthen the Section 401 process. DRN also encourages further revisions in keeping with the overall purpose of Section 401 that will improve the function of the certification process.

Delaware Riverkeeper Network is a Pennsylvania non-profit organization established in 1988 and has more than 25,000 members. DRN members include individuals concerned about the protection and restoration of the Delaware River, and its tributaries, habitats and resources. DRN's members are dedicated to preserving and improving the cultural, historic

¹ 87 Fed. Reg. 35,318 (June 9, 2022).

² 85 Fed. Reg. 42,210 (July 13, 2020).

and environmental resources of the Delaware River watershed. DRN's mission is to protect and restore the Delaware River, and its tributaries, habitats and resources. To achieve these goals, DRN organizes and implements stream bank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River watershed—an area which includes portions of Pennsylvania, New York, New Jersey and Delaware—and on the national level when necessary to achieve its mission.

Maya K. van Rossum, the Delaware Riverkeeper, is a full-time privately funded ombudsman responsible for the protection of the waterways in the Delaware River Watershed. Ms. van Rossum advocates for the protection and restoration of the cultural, historical, ecological, recreational, commercial and aesthetic qualities of the Delaware River and its tributaries, habitats and resources. As the Delaware Riverkeeper, Ms. van Rossum serves on a number of the region's water quality committees, including the Delaware River Basin Commission's Water Quality Advisory Committee, and on New Jersey's Stormwater Focus Group. Ms. van Rossum also serves as a member of the Area Plan Committee and the Area Maritime Security Committee, both of which are committees of the United States Coast Guard, the Philadelphia Group. Maya van Rossum regularly visits the Delaware River for personal and professional reasons.

The Delaware River is the longest undammed river east of the Mississippi. It flows for 330 miles from New York State, through Pennsylvania, New Jersey, and Delaware, into the Atlantic Ocean. The Delaware River watershed is 13,539 square miles and supplies drinking water to approximately five percent of the nation's population. The Delaware River region has been subjected to the effects of the shale gas fracking boom, particularly through expansion of the natural gas pipeline network from the Marcellus Shale to the densely populated areas within the watershed and beyond. Environmental impacts of pipeline construction include land cover change, deforestation, sedimentation and erosion, water quality degradation, stream degradation, wetland loss, and air emissions. The Delaware River estuary, home to the federally-listed endangered Atlantic sturgeon, is also vulnerable to the siting of natural gas export facilities.

DRN's thousands of members, and Ms. van Rossum, all enjoy the water quality and bucolic surroundings of the Delaware River, its tributaries and its watershed. DRN members boat, fish, canoe, bird watch, hike and participate in other recreational activities throughout the watershed. DRN's members have been harmed by the 2020 Rule's infringement on state authority to protect the Delaware River and its supporting environment.

The 2020 Rule was a deregulatory action that circumscribes the ability of the Delaware River watershed states (New York, New Jersey, Pennsylvania, and Delaware) to protect their waters beyond point source discharge regulations, creates a mechanism that allows Federal agency to deem a certification and/or its conditions "waived," deprives these states of their authority to enforce certification conditions, permits the EPA to decline to analyze the effects of a discharge on a neighboring state, and limits a neighboring state's authority to impose additional conditions on a Federal license or permit.

Because the 2020 Rule strips the ability of states to comprehensively protect water resources from Federally licensed or permitted activities, the water resources of the Delaware River watershed are vulnerable to degradation. In addition, DRN's procedural interests are harmed by the 2020 Rule because it limits the scope of a state's review, and thus DRN and its members are deprived of information they otherwise would have received about the impact of federally licensed or permitted activities.

DRN filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania challenging the 2020 Rule.³ EPA filed a motion for voluntary remand of the 2020 Rule, which was granted in August 2021.⁴

Thus, while DRN is pleased that EPA is in the process of replacing the 2020 Rule, we urge EPA to finalize the Proposed Rule as soon as possible, with a clear statement repudiating the 2020 Rule's illegality. Doing so will ensure that federal agencies, states, and tribes can once again enjoy the cooperative federalism scheme of Section 401 as it has existed for decades, and so that stakeholders such as DRN are no longer harmed by the 2020 Rule.

I. SUMMARY OF COMMENTS

The unlawful 2020 Rule went beyond the bounds of EPA's rulemaking authority to gut the protections provided by Congress to states and tribes from Federal projects that would affect water quality. Although the Proposed Rule continues to regulate outside the bounds of EPA's functions under the Clean Water Act,⁵ the Proposed Rule vastly improves upon the 2020 Rule's warped interpretation of Section 401.⁶

Should EPA issue a final rule that regulates beyond its own core functions under the statute, DRN recommends that the final rule include the modifications suggested in Sections IV through VIII of this comment.

II. EPA SHOULD PROMPTLY ISSUE A FINAL RULE THAT REPUDIATES THE UNLAWFUL 2020 RULE

The 2020 Rule as it currently stands is a bald overreach of federal agency authority that has precipitated a suite of devastating consequences: for state and tribal authority over Section 401 certifications and the certification processes; for the Constitutional separation of powers; and for members of the public for whom the effects of water quality impairment are most immediately felt. The 2020 Rule illegally re-wrote Section 401 and is emphatically contrary to the plain language of the Clean Water Act—the interpretation of which had, prior to the Rule's promulgation, remained undisturbed for nearly fifty years.

³ See *Delaware Riverkeeper Network v. U.S. Env'tl. Prot. Agency*, No. 2:20-cv-03412 (E.D. Pa.).

⁴ *Del. Riverkeeper Network v. U.S. Env'tl. Prot. Agency*, No. 2:20-cv-03412 (E.D. Pa. Aug. 6, 2021).

⁵ See Section III, *infra*.

⁶ See Section IV, *infra*.

We call upon EPA now to fully repudiate the illegal and ill-conceived provisions promulgated to further the economic goals of the prior administration. EPA can heed this task by quickly finalizing the Proposed Rule. Any additional time that the 2020 Rule remains on the books is a gift to project proponents who will waste no time capitalizing on state and tribes' impermissibly restricted ability to condition certifications according to the requirements of state law at a time when environmental concerns are made all the more urgent due to rapidly-accelerating climate change. Put simply, the states, tribes, public, and environment cannot afford to wait nearly a year for EPA to restore the plain-meaning interpretation of Section 401.

III. CONGRESS DID NOT DELEGATE TO EPA THE AUTHORITY TO INTERPRET SECTION 401 VIA REGULATION OUTSIDE OF ITS OWN FUNCTIONS WITHIN THAT SECTION.

EPA does not have unlimited rulemaking authority under the Act. Section 401 provides no section-specific rulemaking authority to further define the certification process. Thus, the only rulemaking authority that the EPA can rely upon is the following language from Section 501 of the Act: "The Administrator is authorized to prescribe such regulations as are necessary to carry out *his* functions under this chapter."⁷

In the preamble to the proposed 2020 Rule, EPA openly acknowledged:

Section 401 does not provide an express oversight role for the EPA with respect to the issuance or modification of individual water quality certifications by certifying authorities, other than the requirement that the EPA provide technical assistance under section 401(b) and the limited role the EPA is expected to play for ensuring the protection of other states' waters under section 401(a)(2).⁸

Thus, when Section 501's grant of rulemaking authority is applied to the Administrator's functions in Section 401, there is a very narrow set of regulations that the EPA could potentially propose and enact. This is because Section 401 provides a very limited role for the Administrator. Under Section 401, the Administrator:

- Issues certifications if no state or interstate agency has the authority to issue a certification, Section 401(a)(1); *see also* 401(a)(3) and (a)(4) (Administrator stands in position of state or interstate agency, as is applicable);
- Determines whether a discharge "may affect . . . the quality of the water of any other State" and must notify such states; if a hearing is held regarding the discharge, the

⁷ 33 U.S.C. § 1361(a)(emphasis added).

⁸ Updating Regulations on Water Quality Certification, U.S. Env'tl. Prot. Agency, 84 Fed. Reg. 44,080, 44,117 (Aug. 22, 2019).

Administrator also must submit evaluations and recommendations at that hearing, Section 401(a)(2); and

- “[S]hall, upon the request of” any federal, state, or interstate entity, provide “relevant information on applicable effluent limitations, or other limitations, standards, [and other requirements]” and “shall,” when requested by any federal, state, or interstate entity, “comment on any methods to comply with such” requirements, Section 401(b).

According to EPA’s reasoning in the preamble to the final 2020 Rule, “all states have authority to implement section 401 certification programs.”⁹ The Act does not, however, require states and tribes to receive approval from the Administrator for their Section 401 certification programs, in contrast to other programs under the Act (*e.g.*, Section 402 and Section 404 permits).¹⁰ Thus, the Administrator has no role in issuing certifications in the place of states and tribes under Section 401, or overseeing states’ and tribes’ Section 401 certification programs. The Act similarly does not authorize any other federal agency to execute such oversight.

Therefore, the only subsections within Section 401 that relate to the Administrator’s authority to promulgate regulations “as are necessary to carry out his functions under this chapter” are: 1) EPA’s role under Section 401(a)(2) as to neighboring states; 2) its role in providing guidance and comment (when requested) under Section 401(b); and 3) any certifications EPA issues on behalf of tribes without certification authority, and on lands that are exclusively federally-owned.¹¹ EPA even admitted as much.¹² Beyond these, EPA has no functions in Section 401 for which it is authorized to promulgate regulations.

When a “statute gives an agency broad power to enforce all provisions of the statute,” that authority is clearly granted.¹³ Language such as “[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter,”¹⁴ or a delegation of authority to prescribe such regulations as “are necessary or proper to effectuate the purposes of this subchapter,”¹⁵ are examples of such broad powers.¹⁶ “When Congress chooses to delegate a power [beyond the statute’s specific grants

⁹ Clean Water Act Section 401 Certification Rule, U.S. Env’tl. Prot. Agency, 85 Fed. Reg. 42,210, 42,269 (July 13, 2020) (hereinafter “2020 Rule”).

¹⁰ See 33 U.S.C. §§ 1342(b), 1344(g).

¹¹ *Id.*

¹² See 2020 Rule, 85 Fed. Reg. at 42,278. The gifting of oversight, including review of state certification conditions, to federal agencies appears to have been EPA’s attempt to get around this open admission. Yet, for the reasons stated herein, that fails also. Among other things, if EPA has no “express oversight role,” then it is illogical that any other agency would be able to step into a non-existent role under Section 401.

¹³ *Gonzales v. Oregon*, 546 U.S. 243, 258–59 (2006).

¹⁴ 47 U.S.C. § 201(b).

¹⁵ 15 U.S.C. § 1604.

¹⁶ See *Gonzales*, 546 U.S. at 258–59.

of authority], it does so not by referring back to the administrator’s functions but by giving authority over the provisions of the statute he is to interpret.”¹⁷

EPA is thus only authorized to promulgate regulations necessary to carry out its functions under Section 401. Conversely, EPA is not authorized to promulgate regulations governing the certifying authorities’ or Federal agencies’ functions under Section 401. Thus, the final rule should be confined only to EPA’s own duties. In the event that EPA decides to go beyond those bounds, DRN provides the following comments on the substantive provisions of the Proposed Rule.

IV. THE PROPOSED RULE IS A POSITIVE STEP FORWARD IN RESTORING THE COOPERATIVE FEDERALISM FRAMEWORK OF SECTION 401

The Proposed Rule vastly improves upon the 2020 Rule’s framework and interpretation of Section 401. Under the Proposed Rule, certifying authorities would once again have the ability to define the requirements to obtain certification, would engage in a comprehensive review of the activity as a whole and all of the activity’s potential effects on water quality, and would not be subject to a Federal agency second-guessing the basis for its decision.

A. The Proposed Rule appropriately gives certifying authorities the ability to define what must be included in a request for certification and how such a request must be submitted.

In the 2020 Rule, EPA created a one-size-fits-all definition of “certification request” that would automatically trigger a certifying authority’s obligation to act on the request.¹⁸ That mechanism deprives certifying authorities of the ability to determine when a request contains sufficient information to act upon, and risks regulatory uncertainty. The stated goal of the 2020 Rule’s limited definition of a “certification request” was to “clarify[] the timeframe for certifying authorities to act on certification requests,” and to create “more predictability in the certification process, including certainty about when project proponents should expect a decision on a certification request.”¹⁹

However, the 2020 Economic Analysis that accompanied the 2020 Rule stated that due to a lack of data, EPA was “unable to estimate how many projects are delayed” by the current practice of certifying authorities requiring a “complete application.”²⁰ In the preamble to the final 2020 Rule, EPA posited that the change would not result in more denials, because it does not “limit[] the ability of a certifying authority to collect additional information from a project proponent” and because it includes “a mandatory pre-filing meeting request, which will allow project proponents and certifying authorities to begin

¹⁷ *Id.* at 264–65 (interpreting 21 U.S.C. § 871(b), which reads: “The Attorney General may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this chapter.”).

¹⁸ *See* 40 C.F.R. § 121.5 (2022).

¹⁹ 2020 Economic Analysis at 22.

²⁰ *Id.* at 15.

early conversations”²¹ At the same time, in its 2020 Economic Analysis, EPA agreed that “the list of information and materials required in a certification request is not an exhaustive list of materials that may be necessary to make a certification decision.”²² Additionally, the 2019 Economic Analysis acknowledged that the restrictive definition of what constitutes a certification request “may lead to more denials.”²³

In a survey of thirty-one states conducted by the Association of Clean Water Administrators, the average length of time states took to complete a certification after receipt of a complete application was 132 days, and results also showed that certification denials were rare. States cited the primary reason for delay as incomplete requests from project proponents.²⁴ Under the current regime of the 2020 Rule, certifying authorities are incentivized to immediately deny certification requests as soon as they realize that additional information is needed, in the hopes that the project proponent will re-submit a certification request with the missing information and the “reasonable period of time” will be re-set.

In the Proposed Rule, EPA has taken substantial steps to cure this regulatory infirmity by making clear that the contents of, and the procedure for submitting, a certification request are defined by the certifying authority. DRN generally supports the Proposed Rule’s definition of “receipt,”²⁵ as modified below:

(k) *Receipt* means the date that a **complete** request for certification, as defined by the certifying authority, is documented as received by a certifying authority in accordance with the certifying authority’s applicable submission procedures.

This modification would strengthen and make clear that requests with missing information do not determine the relevant date of receipt, and that the reasonable period of time does not begin until a complete request for certification has been received by the certifying authority. As EPA explains in the preamble to the Proposed Rule, “a state requirement for submittal of a complete application, when the contents of such complete application are clearly defined in regulation, will not necessarily lead to a ‘subjective standard.’”²⁶

Inclusion of the word “complete” would not run afoul of the Second Circuit’s opinion in *New York State Department of Environmental Conservation v. FERC*,²⁷ as the concept of “completeness” is not inherently subjective, and can be defined by the information requested

²¹ 2020 Rule, 85 Fed. Reg. at 42,263.

²² 2020 Economic Analysis at 26.

²³ 2019 Economic Analysis at 15.

²⁴ See Association of Clean Water Administrators, Comment Letter on Proposed Rule—Updating Regulations on Water Quality Certification (Oct. 21, 2019).

²⁵ See Proposed Rule § 121.1(k), 87 Fed. Reg. 35,377.

²⁶ Proposed Rule, 87 Fed. Reg. at 35,334.

²⁷ 884 F.3d 450 (2d Cir. 2018).

by regulation or on a form. EPA recognizes this in its Proposed Rule, stating that *NYSDEC* “does not preclude EPA or other certifying authorities from defining—in advance—those contents a certification request must contain.”²⁸

Should a requester have information available that it fails to provide at the time of its request, the fact of that availability is objectively determinable and should render the previously-determined “receipt” date invalid. In the event of a true “supplemental information” request from a certifying authority—that is, where the certifying authority is requesting information that was not required by regulation or form and was not available to the requestor at the time of submission—then the “reasonable period of time” would continue to run from the date of the initial receipt.

EPA should also make clear that if an activity is substantially changed by the requestor, re-submission of a request is required.

B. The Proposed Rule correctly interprets the broad language of Section 401 and Supreme Court precedent to allow review of an “activity as a whole.”

Proposed Rule Section 121.3 states that “when a certifying authority reviews a request for certification, it shall evaluate whether the activity as a whole will comply with all applicable water requirements.”²⁹ DRN supports the definition of “activity as a whole” as “any aspect of the project activity with the potential to affect water quality.”³⁰ DRN also supports the broad definition of “water quality requirements” in the Proposed Rule to mean “any limitation, standard, or other requirement under sections 301, 302, 303, 306 and 307 of the Clean Water Act, any Federal and state or tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or tribal law.”³¹

There is no question that Section 401 grants to certifying authorities the ability to review the activity as a whole when determining whether the activity complies with “any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification”³² This broad language has consistently been interpreted and applied as allowing a certifying authority to review a project’s impacts on water quality.

In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,³³ the Supreme Court interpreted the scope of Section 401 in the context of a certification that required a

²⁸ Proposed Rule, 87 Fed. Reg. at 35,334.

²⁹ Proposed Rule § 121.3, 87 Fed. Reg. at 35,378.

³⁰ Proposed Rule § 121.1(a), 87 Fed. Reg. at 35,377.

³¹ Proposed Rule § 121.1(m), 87 Fed. Reg. at 35,377.

³² 33 U.S.C. § 1341(d).

³³ 511 U.S. 700 (1994).

hydroelectric project to maintain a minimum stream flow to protect salmon and steelhead. The Court analyzed the plain language of Section 401 as a whole, noting that § 401(a) refers solely to a “discharge,” while § 401(d) refers to the “applicant,” thus concluding that § 401(d) allows the certifying authority to impose conditions on the project in general.³⁴ The Court held that while § 401(a) “identifies the category of activities subject to certification—namely, those with discharges”—§ 401(d) “is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”³⁵

By its plain language, § 401(a)(1) requires that a certifying agency ensure compliance with § 303 of the Clean Water Act, the section that governs state water quality standards.³⁶ State water quality standards “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based on such uses.”³⁷ Water quality standards must “protect the public health or welfare, enhance the quality of water and serve the purposes” of the Clean Water Act, “taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.”³⁸ States first establish “designated uses” for particular water bodies, then set specific “criteria” to protect those uses.³⁹ Criteria are “elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.”⁴⁰ In addition, EPA’s antidegradation policy, which was incorporated into the Clean Water Act in 1987,⁴¹ essentially prevents states from allowing water quality to degrade below specified levels.⁴²

Based on the plain language and legislative history of the Clean Water Act, the Court held that “ensuring compliance with § 303 is a proper function of the § 401 certification” and that “state water quality standards adopted pursuant to § 303 are among the ‘other limitations’ with which a State may ensure compliance through the § 401 certification process.”⁴³ “Accordingly, under 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.”⁴⁴ The Court declined to speculate on “what additional state laws, if any, might be incorporated” by § 401(d)’s reference to “any other appropriate requirement of State law,” but concluded that “at a minimum, limitations pursuant to state water quality standards adopted pursuant to § 303 are ‘appropriate’ requirements of state law.”⁴⁵ Ultimately, the

³⁴ *Id.* at 711.

³⁵ *Id.* at 711–12.

³⁶ 33 U.S.C. § 1341(a).

³⁷ *Id.* § 1313(c)(2)(A).

³⁸ *Id.*

³⁹ 40 C.F.R. §§ 131.10, 131.11.

⁴⁰ 40 C.F.R. § 131.3(b).

⁴¹ *See* 33 U.S.C. § 1313(d)(4)(B).

⁴² *See* 40 C.F.R. § 131.12.

⁴³ *PUD No. 1*, 511 U.S. at 712–13.

⁴⁴ *Id.* at 715 (The applicable water quality standards include “both the designated uses and the water quality criteria of the state standards.”).

⁴⁵ *Id.* at 713.

Court held that “pursuant to § 401, States may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other ‘appropriate requirement of State law.’”⁴⁶

In a concurring opinion, Justice Stevens emphasized that “[f]or judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not 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.”⁴⁷

In practice, EPA, certifying authorities, and project proponents have all understood that a certifying authority reviews a broad scope of impacts caused by the activity as a whole. In 1989, EPA published a handbook to assist certifying authorities in drafting Section 401 certifications for wetlands.⁴⁸ In that handbook, EPA described the scope of the certifying authority’s review under § 401(a) as broad, stating that “it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.”⁴⁹ As an example, the handbook cited a FERC hydroelectric project on the Susquehanna River in Harrisburg, Pennsylvania. “The impact considered [by the then Pennsylvania Department of Environmental Resources] were not just from the discharge initiating the certification review, but water quality impacts from the entire project.”⁵⁰ EPA emphasized 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 a part of a State’s certification review.”⁵¹

In describing the type of conditions that may be placed on a certification pursuant to § 401(d), EPA explained that “[t]he legislative history of the subsection indicates that the Congress meant for the States to impose whatever conditions on the certification are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns.”⁵² Citing conditions imposed by the State of Maryland to a fill project, EPA explained:

While few of these conditions are based directly on traditional water quality standards, all are valid and relate to the maintenance of water quality or the designated use of the waters in some way. Some of the conditions are clearly requirements of State or local law related to water quality other than those promulgated pursuant to the CWA sections enumerated in Section 401(a)(1). Other conditions were

⁴⁶ *Id.* at 713–14 (emphasis added).

⁴⁷ *Id.* at 723 (Stevens, J., concurring).

⁴⁸ See Office of Water, U.S. Env’tl. Prot. Agency, EPA 843-B-89-100, Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes (April 1989) (“1989 Wetlands Guidance”).

⁴⁹ *Id.* at 22.

⁵⁰ *Id.*

⁵¹ *Id.* at 23.

⁵² *Id.* at 23.

designed to minimize the project's adverse effects on water quality over the life of the project.⁵³

In 2010, EPA updated its Section 401 guidance.⁵⁴ Addressing the scope of Section 401, the 2010 Handbook explained that “Section 401 applies to any federal permit or license for an activity that may discharge into a water of the U.S.”⁵⁵ “Once these thresholds are met, the scope of analysis and potential conditions can be quite broad.”⁵⁶ Citing *PUD No. 1 of Jefferson County*, the 2010 Handbook directed that “the conditions and limitations included in the certification may address the permitted activity as a whole. Certification may address concerns related to the integrity of the aquatic resource and need not be specifically tied to a discharge.”⁵⁷

EPA stated that “[t]he granting of § 401 water quality certification to an applicant for a federal license or permit signifies that the state or tribe has determined that the proposed activity and discharge will comply with water quality standards as well as the other identified provisions of the CWA and appropriate requirements of state or tribal law.”⁵⁸ The 2010 Handbook makes clear that “while EPA-approved state and tribal water quality standards may be a major consideration driving § 401 decision, they are not the only consideration.”⁵⁹ Accordingly, “[w]ater quality certifications . . . reflect not only that the licensed or permitted activity and discharge will be consistent with the specific CWA provisions identified in sections 401(a) and (d), but also with ‘any other appropriate requirements of State [or Tribal] law.’”⁶⁰ An example of a “relevant consideration . . . is the existence of state or tribal laws protecting threatened and endangered species, particularly where the species plays a role in maintaining water quality or if their presence is an aspect of a designated use. Also relevant may be other state and tribal wildlife laws addressing habitat characteristics necessary for species identified in a waterbody’s designated use.”⁶¹ Another relevant consideration may be “protection of the cultural or religious value of waters expressed in state or tribal law . . . even when not included as part of a water quality standard.”⁶²

In its final rule, EPA should specifically and explicitly reject the discharge-only framework of the 2020 Rule as inconsistent with the plain language of Section 401 and Supreme Court precedent. The 2020 Rule unlawfully restricts the scope of a certifying authority’s review as “limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.”⁶³ “Water quality

⁵³ *Id.* at 24.

⁵⁴ See Office of Wetlands, Oceans, and Watersheds, U.S. Env’tl. Prot. Agency, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (2010) (“2010 Handbook”).

⁵⁵ *Id.* at 18

⁵⁶ *Id.*

⁵⁷ *Id.* at 23 (citing *PUD No. 1*, 511 U.S. at 712).

⁵⁸ *Id.* at 8 (emphasis added).

⁵⁹ *Id.* at 16.

⁶⁰ *Id.* at 21 (alteration in original) (quoting 33 U.S.C. § 1341(d)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ 40 C.F.R. § 121.3 (2022).

requirements” is defined in the 2020 Rule 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.*”⁶⁴

The Supreme Court held in *PUD No. 1 of Jefferson County* that because § 401(d) “allows States to impose limitations to ensure compliance with § 301 of the Act,” and “[s]ection 301 in turn incorporates § 303 by reference, . . . state water quality standards adopted pursuant to § 303 are among the ‘other limitations’ with which a State may ensure compliance through the § 401 process.”⁶⁵ The enforcement of water quality standards, however, is not achieved solely through limitations on point source discharges. “[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 applicable water quality standards.”⁶⁶ The Supreme Court has concluded, based on the unambiguous language of the statute, that a “certification requirement that an applicant operate the project consistently with state water quality standards—i.e., consistently with the designated uses of the water body and the water quality criteria—is both a ‘limitation’ to assure ‘compl[iance] with . . . limitations’ imposed under § 303, and an ‘appropriate’ requirement of state law.”⁶⁷ Thus, the plain language of Section 401 requires a broad consideration of an entire activity’s impacts on water quality.

C. The Proposed Rule appropriately minimizes the role of Federal agencies in reviewing a certifying authority’s decision.

As stated previously in this comment, Section 401 was created as a check on Federally-approved activities that would otherwise contribute to water quality problems within a certifying authority’s jurisdiction. The precursor to Section 401 first appeared as Section 21(b) of the Water Quality Improvement Act of 1970,⁶⁸ which amended the Federal Water Pollution Control Act (“FWPCA”).⁶⁹ That section read:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State[] in which the discharge originates or will originate . . . that there is reasonable assurance, as determined by the State or interstate agency that such activity will be conducted in a manner which will not violate applicable water quality standards.⁷⁰

⁶⁴ *Id.* § 121.1(n) (emphasis added).

⁶⁵ 511 U.S. at 712–13.

⁶⁶ *Id.* at 715.

⁶⁷ *Id.*

⁶⁸ Pub. L. No. 91-224, § 21(b), 84 Stat. 91, 108 (1970).

⁶⁹ Act of June 30, 1948, c. 758, 62 Stat. 1155.

⁷⁰ Pub. L. No. 91-224, § 21(b), 84 Stat. 91, 108 (1970).

The section also provided that if the certifying authority “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.”⁷¹

In 1972, Congress substantially amended the FWPCA.⁷² These amendments constituted the modern-day Clean Water Act. Congress’ purpose in doing so was to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁷³ While empowering the Federal government to comprehensively address water pollution, Congress also sought 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.”⁷⁴

Accordingly, Congress explicitly preserved state authority to regulate more stringently than the EPA in Section 510 of the Clean Water Act.⁷⁵ By addressing both point and nonpoint source pollution, and utilizing the authorities of both the Federal and State governments, “[t]he ‘major purpose’ of the Amendments was ‘to establish a comprehensive long-range policy for the elimination of water pollution.’”⁷⁶ Thus, “in construing the Act, ‘the guiding star is the intent of Congress to improve and preserve the quality of the Nation’s waters. All issues must be viewed in the light of that intent.’”⁷⁷

The 2020 Rule unlawfully shifted authority to Federal agencies to reject certification decisions based on a substantive legal review of the justifications for those decisions.⁷⁸ This directly contradicted the overall structure and purpose of Section 401, as well as specific language in Section 401(d) that requires the federal agency to accept all conditions—they “shall become a condition on any Federal license or permit subject to the provisions of this

⁷¹ *Id.*

⁷² Pub L. 92-500, 86 Stat. 816 (1972).

⁷³ 33 U.S.C. § 1251(a).

⁷⁴ 33 U.S.C. § 1251(b).

⁷⁵ Except as expressly provided in this chapter, nothing in this chapter shall (1) 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; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States. 33 U.S.C. § 1370.

⁷⁶ *City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 318 (1981) (quoting S. Rep. No. 92-414, at 95).

⁷⁷ *Kennecott Copper Corp. v. Env'tl. Prot. Agency*, 612 F.2d 1232, 1236 (10th Cir. 1979) (quoting *Am. Petroleum Institute v. Env'tl. Prot. Agency*, 540 F.2d 1023, 1028 (10th Cir. 1976)).

⁷⁸ 40 C.F.R. §§ 121.9, 121.7. Section 121.9 redefined “waiver” to include a failure to comply with substantive regulatory requirements contained in section 121.7.

section.”⁷⁹ In addition, the Clean Water Act expressly dictates the circumstances under which Section 401 requirements are waived: when the certifying authority fails or refuses to act on a request for certification within the reasonable period of time.⁸⁰ These circumstances include both an express waiver (refusal to act within the reasonable period of time) and an unintentional waiver (failure to act within the reasonable period of time). The Second Circuit has made clear that while a Federal agency “may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period,” it “does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401.”⁸¹

Section 121.9(a) of the Proposed Rule states:

To the extent a Federal agency reviews a certification decision for compliance with Clean Water Act section 401, its review is limited to evaluating whether:

- (1) The certification decision indicates whether it is a grant, grant with conditions, denial, or express waiver;
- (2) The proper certifying authority issued the certification decision;
- (3) The certifying authority provided public notice on the request for certification; and
- (4) The certification decision was issued within a reasonable period of time, as defined at § 121.6.⁸²

DRN supports a limited and ministerial role for Federal agencies’ review to ensure that the agency is in receipt of a final certification decision from the correct certifying authority. DRN does not support the definition of “reasonable period of time” in Proposed Rule section 121.6.⁸³

Section 121.9(b) of the Proposed Rule, however, should permit a certifying authority to rectify a failure to meet the elements identified in paragraphs (a)(1) or (3) even if the “reasonable period of time” has passed.⁸⁴ A certifying authority must be given the time necessary to remedy the deficiency—especially if the deficiency is related to public notice—otherwise the public is shut out of the certification process. Public participation in certification decisions is an essential element of the process, as made clear by the statutory requirement to “establish procedures for public notice in the case of all applications for certification.”⁸⁵

⁷⁹ 33 U.S.C. § 1341(d) (emphasis added).

⁸⁰ See 33 U.S.C. § 1341(a)(1).

⁸¹ *Am. Rivers, Inc. v. Fed. Energy Regulatory Comm’n*, 129 F.3d 99, 110–11 (2d Cir. 1997).

⁸² Proposed Rule § 121.9(a), 87 Fed. Reg. at 35,378–79.

⁸³ See Section VI, *infra*, regarding DRN’s position on Section 401’s timing provisions. The suggestions made here are in the event that EPA chooses to retain its narrow interpretation of waiver.

⁸⁴ See *id.*

⁸⁵ 33 U.S.C. § 1341(a)(1).

For example, the Fourth Circuit has held that the withdrawal and resubmission of a certification request that extended the final decision beyond the one-year statutory limit did not constitute a waiver where the withdrawal and resubmission was for the purpose of accommodating public notice and comment.⁸⁶ In addition, if the final decision of the certifying authority is unclear on its face whether it is a grant, grant with conditions, denial, or waiver, the certifying authority should be given time to clarify its decision even if it was issued on the last day of the “reasonable period of time.” To do otherwise would elevate form over substance and thwart the purpose of Section 401.

V. THE PROPOSED RULE SHOULD BE REVISED TO MATCH THE STATUTORY LANGUAGE DESCRIBING SECTION 401’S JURISDICTIONAL TRIGGER

Section 401(a)(1) of the Clean Water Act states that applicants for a Federal license or permit to conduct “any activity . . . which may result in any discharge into the navigable waters” must obtain a certification. With this language, Congress plainly stated when the requirements of Section 401 would apply.

The 2020 Rule unlawfully constrained the statutory term “discharge” to “a discharge from a point source into a water of the United States.”⁸⁷ In the Proposed Rule, EPA commits the same legal error by a different mechanism. In Section 121.2 of the Proposed Rule, rather than proposing a definition for “discharge,” EPA modifies the statutory language in Section 401(a)(1) by adding a requirement that the triggering discharge must be from a point source:

Certification or waiver is required for any license or permit that authorizes an activity which may result in a discharge from a point source into a water of the United States.⁸⁸

This modification is unwarranted, clashes with both the plain language of the statute and Supreme Court precedent, and needlessly complicates implementation of Section 401.

As EPA recognizes, Section 401 first appeared as Section 21(b) of the Water Quality Improvement Act of 1970,⁸⁹ a provision that was meant to address the issue of federally-authorized activities presenting an obstacle to the achievement of water quality standards.⁹⁰ Section 21(b) provided an important check on federal authority by allowing states to regulate an activity’s effect on water quality, and was born of the recognition that Federal agencies have a “responsibility . . . to protect water quality wherever their activities affect public waterways.”⁹¹ Thus, the focus of this provision was to assure compliance with water quality standards. That focus remained when 21(b) was incorporated as Section 401 in the 1972 Clean Water Act, and was reaffirmed in 1977 when Congress added an explicit

⁸⁶ See *North Carolina Dep’t of Env’tl. Quality v. FERC*, 3 F.4th 665, 672–73, 676 (4th Cir. 2021).

⁸⁷ 40 C.F.R. § 121.1(f) (2022).

⁸⁸ Proposed Rule § 121.2, 87 Fed. Reg. at 35,377.

⁸⁹ Pub. L. 91-224, 84 Stat. 91 (April 3, 1970).

⁹⁰ See Proposed Rule, 87 Fed. Reg. at 35,321.

⁹¹ S. Rep. No. 91-351, at 3 (Aug. 7, 1969).

reference to Section 303, which includes both the designated uses of a water and water quality criteria.⁹²

Regarding nonpoint sources of pollution, the Clean Water Act states that “it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.”⁹³ Within that framework, Congress sought 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.”⁹⁴ Congress explicitly preserved state authority to regulate more stringently than the EPA in Section 510 of the Clean Water Act:

Except as expressly provided in this chapter, nothing in this chapter shall (1) 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; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.⁹⁵

By addressing both point and nonpoint source pollution, and utilizing the authorities of both the Federal and State governments, “[t]he ‘major purpose’ of the Amendments was ‘to establish a comprehensive long-range policy for the elimination of water pollution.’”⁹⁶ Thus, “in construing the Act, ‘the guiding star is the intent of Congress to improve and preserve the quality of the Nation’s waters. All issues must be viewed in the light of that intent.’”⁹⁷

⁹² See H.R. Rep. No. 95-830 at 96 (1977); see also *PUD No. 1 of Jefferson Cty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 715 (1994).

⁹³ 33 U.S.C. § 1251(a)(7).

⁹⁴ *Id.* § 1251(b).

⁹⁵ *Id.* § 1370.

⁹⁶ *City of Milwaukee*, 451 U.S. at 318 (quoting S. Rep. No. 92-414, at 95).

⁹⁷ *Kennecott Copper Corp.*, 612 F.2d at 1236 (quoting *Am. Petroleum Institute*, 540 F.2d at 1028).

Accordingly, Section 401(a)(1) includes the broad term “any discharge,” which has been interpreted by the Supreme Court to be broader than the defined term “discharge of a pollutant,” which is limited to “any addition of any pollutant to navigable waters from any point source.”⁹⁸ Instead, the term “discharge” on its own in federal water law is interpreted in accordance with its plain meaning—a “flowing or issuing out.”⁹⁹ This holding was based on an interpretation of the statutory language alone, and the Supreme Court did not find that § 401 was ambiguous. In fact, the Court found that its definition of “discharge” was the “plain and ordinary meaning” of the term.¹⁰⁰

As EPA recognizes, the Supreme Court specifically rejected the argument that an “addition” was required to constitute a “discharge,” thus there is no reason (that is consistent with Supreme Court precedent) why the similarly specific “point source” must be present. The presence of a “point source” is indeed a component of the term “discharge of a pollutant,” but not a necessary component of the term “discharge” without qualification. Section 401(a)(1) even specifically includes the requirement that a discharge be “into the navigable waters,” while excluding the other two elements of the definition of a “discharge of a pollutant”—the addition of a pollutant, and the presence of a point source.

EPA gives no compelling reason to depart from clear statutory language, and even acknowledges that “[a]fter 50 years of implementing section 401, EPA’s experience is that Federal agencies and certifying authorities are well-versed in the practice of determining which Federal licenses or permits may result in discharges.”¹⁰¹ If regulators and stakeholders have no problem determining when 401 applies to an activity, then there is no basis for altering the well-understood statutory language.

By retaining the term “point source” in Proposed Rule § 121.2, EPA also risks confusion in the implementation of Section 401. “Point source” is defined by statute as “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”¹⁰² The use of the term “point source” thus includes the concept of an addition of pollutants—an interpretation of “discharge” that the Supreme Court and stakeholders have rejected.

Given that the triggering language of Section 401 is clear in the statute, EPA should either use that exact language in Proposed Rule section 121.2 or omit that section altogether. The Proposed Rule’s language as it stands contradicts the statute and Supreme Court precedent, and creates obstacles to the effective implementation of the Section 401 program.

EPA should not propose a specific process or procedure for project proponents, certifying authorities, and/or Federal agencies to follow in order to determine whether or

⁹⁸ See *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 375–76 (2006) (quoting 33 U.S.C. § 1362(12)).

⁹⁹ See *Id.* (citing Webster’s New International Dictionary 742 (2d Ed. 1954)).

¹⁰⁰ *Id.* at 377. See also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–86 (2005) (agency interpretation that conflicts with court’s plain language interpretation of a statute is not entitled to deference).

¹⁰¹ Proposed Rule, 87 Fed. Reg. at 35,328.

¹⁰² 33 U.S.C. § 1632(14).

not a federally licensed or permitted activity may result in a discharge and therefore require Section 401 certification. Project proponents should submit a request for certification to the certifying authority even if there is doubt. The certifying authority can always waive certification. Adding another procedure on top of the certification process will only lead to further delay and possible litigation.

VI. EPA SHOULD REVISE THE RULE TO MAKE CLEAR THAT A CERTIFYING AUTHORITY HAS UP TO ONE YEAR TO TAKE MEANINGFUL ACTION ON A CERTIFICATION REQUEST

The Proposed Rule as written provides a default 60-day “reasonable period of time” unless the Federal agency and certifying authority can come to an agreement on a different reasonable period of time.¹⁰³ The Proposed Rule also interprets the term “act” in Section 401 to mean one of four final outcomes of a certifying authority’s review: “grant certification, grant certification with conditions, deny certification, or expressly waive certification.”¹⁰⁴

The term “reasonable period of time” should not be defined by EPA or any other Federal agency. It would be a mistake to impose a nationwide “reasonable period of time” for a certain class of federal approvals, as water quality requirements vary greatly among jurisdictions. Additionally, different certifying authorities have different staffing levels, which may affect the speed at which 401 Certification decisions can be reached. EPA’s Economic Analysis for the Proposed Rule reveals that while some certifying authorities may not have an issue with the default 60 day timeframe, other certifying authorities may need a full year to reach a decision.¹⁰⁵ The reasonable period of time should be determined by the certifying authorities.

The so-called “collaborative approach” with the relevant federal agency is not collaborative at all. A federal agency could name a “reasonable” period of time, essentially taking a “my way or the highway” posture, and if the certifying authority does not agree, then the default is 60-days, which is 1/6th the maximum amount of time provided by the statute. This 60-day default is unreasonably short, especially considering that for nearly the past 50 years, a “reasonable period of time” was generally considered to be six months.¹⁰⁶ There should not be a default reasonable period of time beyond what is provided for in the statute. Each certifying authority has a different process for reviewing certification requests, and while 60 days may be reasonable for some, it may be too short for others. Thus, EPA should strike Proposed Rule Section 121.6 from the final rule.

Furthermore, the term “act” should not be restricted to final decisions by the certifying authority—as the Fourth Circuit recently explained in *dicta*:

¹⁰³ Proposed Rule § 121.5(b), (c), 87 Fed. Reg. at 35,378.

¹⁰⁴ Proposed Rule § 121.7(a), 87 Fed. Reg. at 35,378 .

¹⁰⁵ U.S. Env’tl. Prot. Agency, Economic Analysis for the Clean Water Act Section 401 Water Quality Certification Improvement Rule 16-17 (2022).

¹⁰⁶ See 40 C.F.R. § 121.16(b) (2019) (the reasonable period of time “shall generally be considered to be six months, but in any event shall not exceed one year”).

Section 401 requires the state agency to *certify* or *deny* compliance with water-quality standards. The waiver portion of the statute, however, uses a different verb and provides that a state waives its certification authority if it “fails or refuses *to act* on a request for certification” within a year.

....

If this reading of the statute is correct, a state would not waive its certification authority if it takes significant and meaningful action on a certification request within a year of its filing, even if the state does not finally grant or deny certification within that year.”¹⁰⁷

The D.C. Circuit has also recognized that Section 401’s legislative history explains the purpose of the time limitation was “to ensure that ‘sheer inactivity by the State . . . will not frustrate the Federal application.’”¹⁰⁸ In the final rule, EPA should adopt the Fourth Circuit’s interpretation of the time limitation and revise Proposed Rule Section 121.7(a) and (b) to use the term “decide on” rather than “act on.”

Overall, creating a strict timing requirement for certification decisions undermines the purpose of Section 401 and turns productive and effective regulatory cooperation between an applicant and a certifying authority into fodder for litigation between state and Federal agencies.¹⁰⁹ Absent sheer inactivity from a certifying authority, the lack of a final decision within one year of a certification request should not be deemed a “failure to act.”

VII. EPA SHOULD NOT REQUIRE A DRAFT LICENSE OR PERMIT TO BE PART OF A REQUEST FOR CERTIFICATION

By requiring an applicant to submit a draft Federal license or permit to the certifying authority, the Proposed Rule creates the risk that the certifying authority would have little input on the siting, design, and operation of the activity. As the legislative history associated with Section 401’s predecessor makes clear, the certifying authority was meant to have a role in the early planning process, not an after-the-fact thumbs up or down:

The committee hopes and expects that the communication between the applicant and the appropriate pollution control agency will develop at the earliest possible time, relative to the planning of any facility which will affect water quality. Site location is integral to effective implementation of the Nation’s water quality program. There are sites where no facility should be constructed, because pollution control technology is not adequate to assure maintenance and enhancement of water

¹⁰⁷ *North Carolina Dept. of Env’tl. Quality v. FERC*, 3 F.4th 655, 670 (4th Cir. 2021) (quoting 33 U.S.C. § 1341(a)(1)).

¹⁰⁸ *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

¹⁰⁹ *See, e.g. North Carolina Dept. of Env’tl Quality*, 3 F.4th 655, *Cal. State Water Res. Control Bd. v. FERC*, No. 20-72432 (9th Cir. Aug. 4, 2022)

quality. Those who make the decision on site location should be aware of this prior to making any investment in new facilities.¹¹⁰

The range of conditions that could be imposed in accordance with Section 401(d) would be limited, as the Federal agency, as a practical if not official matter, would already have completed its review and decisionmaking process. Instead, EPA should require that the applicant provide the certifying authority with a copy of its application to the Federal agency, so that the certifying authority has the same information that the Federal agency has as both proceed through their decisionmaking process.

DRN supports a requirement that the certification request include a copy of the application submitted to the Federal agency, so that the certifying authority would have at least the information the Federal agency has, plus (as required by Proposed Rule) “any existing and readily available data or information related to potential water quality impacts from the proposed project.”¹¹¹

VIII. EPA SHOULD BETTER CLARIFY THE CERTIFICATION MODIFICATION PROCESS TO MAKE CLEAR THAT CERTIFYING AUTHORITIES HAVE WIDE LATITUDE TO MODIFY CERTIFICATIONS

The Proposed Rule does not offer a clearly-defined modification process for certifying authorities. Though EPA has heralded a return to the 1971 Rule’s certification process, the current proposal falls short of clarifying certifying authorities’ ability to modify certifications. This ambiguity creates a risk that Proposed Rule Section 121.10 will be interpreted in a manner more restrictive than EPA intends. Certification modifications are consistent with Section 401. As will be discussed, modifications are: 1) supported by Section 401; 2) align with state and tribal certification authority as contemplated by the Act; and 3) promote a common-sense approach towards assuring that certifications respond to extant circumstances.

While there is no express language that specifically governs modifications within Section 401, Section 401(d) does confer broad authority to states and tribes to safeguard the quality of their waters. The use of conditions to revisit and modify a certification is a permissible exercise of state and tribal certification authority under Section 401(d).

In acting on a certification request, state and tribal authorities can include as conditions “any other appropriate requirement of State law” beyond the enumerated Clean Water Act-based provisions listed in Section 401(a)(1).¹¹² This statutory interpretation is supported by the holding in *P.U.D. No. 1*, in which the Court provided “limitations to assure compliance with state water quality standards are also permitted by [Section] 401(d)’s reference to ‘any other appropriate requirement of State law.’”¹¹³ Because modifications are often employed to

¹¹⁰ S. Rep. 91-351, at 8 (1969).

¹¹¹ Proposed Rule § 121.5(a), 87 Fed. Reg. 35,378.

¹¹² 33 U.S.C. § 1341(d) (emphasis added).

¹¹³ *P.U.D. No. 1*, 511 U.S. at 713 (emphasis added).

assure future compliance with water quality standards and Section 303 limitations, modifications easily constitute conditions well within the scope of states' and tribes' certifying authority.¹¹⁴

Modifications do not impermissibly extend the “reasonable period of time” during which a certifying authority must act on a certification because these conditions necessarily occur after the issuance of a certification, which is indisputably an action on certification. A certifying authority can both act on a request within a reasonable period of time and modify certification without violating Section 401(a)(1). Put simply, EPA should acknowledge and clarify that modifications function as conditions, which do not on their own extend the reasonable period of time.

Because certifying authorities are unable to predict material changes in extant circumstances, such as upgraded water quality standards, after the issuance of a certification, certifying authorities should enjoy wide latitude to modify certifications in a responsive manner. Section 401(d) supports this argument, and permitting modifications does not run afoul of a reasonable period of time.

State and tribes have enforcement authority over certifications because certifying authorities are authorized under Section 510 of the Act to enforce “any standard or limitation respecting discharges of pollutants” and “any requirement respecting control or abatement of pollution” unless expressly provided for in Act, as long as the standard, limitation, or requirement is as stringent as or more stringent than the Clean Water Act requires.¹¹⁵ For this reason, EPA must make abundantly clear that certifying authorities are not restricted in their ability to modify certifications.

As a practical matter, modifications permit certifying authorities and project proponents to engage in an adaptive management approach towards compliance with Section 401 and the enumerated sections of the Act that are incorporated by reference in that section. Without this type of mechanism, certifying authorities may have to wait several years—if not several decades—to compel compliance with the requirements of state and tribal law.¹¹⁶

Specific circumstances that may warrant modifications include, but are not limited to: changes in state law that occur within the span of a fifty-year FERC-issued hydropower facility license; updates to relevant designated uses and water quality criteria of the state's or tribe's standards; or material changes to the certified project itself (*e.g.*, construction, operation, or maintenance). Allowing state and tribal certifying authorities to include

¹¹⁴ See *S.D. Warren v. Bd. of Env'tl. Prot.*, 868 A.2d 210, 218 (Me. 2005) (explaining that the legally permissible “reopeners” were included as a precaution in case the conditions instituted are not sufficient to ensure compliance with state water quality standards and section 303, 33 U.S.C.A. § 1313, limitations”).

¹¹⁵ 33 U.S.C. § 1370.

¹¹⁶ See, *e.g.*, 16 U.S.C. § 799 (providing that FERC licenses for hydropower facilities and natural gas pipelines “shall be issued for a period not exceeding fifty years.”); see also, 33 U.S.C. § 1344(e)(2) (providing that no general permits issued under Section 404 of the Act “shall be for a period of more than five years after the date of its issuance . . .”); see also 33 U.S.C. § 1342(b)(1)(B) (providing that section 402 permits are for fixed terms not to exceed five years.).

modifications as a condition in their certifications is in line with the language of Section 401(d), better facilitates state and tribal enforcement authority, and is a common-sense approach to ensure certifications' continued compliance with state and tribal law. To be clear, the aforementioned circumstances that would warrant modifications are provided for illustrative purposes only. EPA should not define specific circumstances in which modifications are permitted and should instead permit certifying authorities the ability to modify certifications on a case-by-case basis.

DRN urges the EPA to rescind all restrictions on the modification process and restore state and tribal authority to ensure certifications' continued compliance with relevant water quality standards and other applicable requirements of state law.

IX. CONCLUSION

In closing, DRN urges the EPA to quickly finalize the Proposed Rule. The 2020 Rule was unnecessary, exceeded EPA's authority, and was contrary to the Act. The 2020 Rule precipitates significant harm to communities throughout the country and sacrifices water quality solely for the benefit of industry interests. Further, the Act does not contemplate the prioritization of economic concerns and efficiency over the health of the public and the environment. Rather, in enacting the Act, Congress recognized that pollution was detrimental not just to the health and well-being of the public, but to a functioning economy as well. It is the duty of EPA to rectify this legally indefensible rule and restore state and tribal certification and enforcement authority under Section 401 of the Act.

In finalizing the Proposed Rule, EPA should keep in mind its narrow rulemaking authority under the Act and confine its rulemaking to the Administrator's functions under Section 401. Should EPA choose to regulate beyond those confines, DRN requests that it adopt the suggestions made in this comment.

Thank you for your time.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Kacy C. Manahan', with a long horizontal flourish extending to the right.

Kacy C. Manahan
Senior Attorney