**COMMENTS OF THE ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, WISCONSIN, THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, THE DISTRICT OF COLUMBIA, THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD AND NINE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARDS ON THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S PROPOSED "CLEAN WATER ACT SECTION 401 WATER QUALITY IMPROVEMENT RULE," 87 FED. REG. 35,318 (JUNE 9, 2022)**

**DOCKET ID NO. EPA-HQ-OW-2022-0128**

**SUBMITTED: AUGUST 8, 2022**

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**EXECUTIVE SUMMARY**

The undersigned states (States) support the efforts of the U.S. Environmental Protection Agency (EPA), as reflected in the *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 87 Fed. Reg. 35,318 (June 9, 2022) (Proposed Rule), to revise the unlawful 2020 *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) (2020 Rule), and restore the federal-state balance that Congress intended in section 401 of the Clean Water Act, 33 U.S.C. § 1341. As set out below, our states believe that the Proposed Rule makes significant strides to address the 2020 Rule's many deficiencies. In particular, the activity-focused scope of the Proposed Rule is a necessary course-correction and welcome return to the legal and regulatory framework that successfully governed section 401 certifications for 50 years prior to promulgation of the 2020 Rule.

However, there are parts of the Proposed Rule that should be revised to meet EPA's stated goal to restore the federal-state balance envisioned in the Clean Water Act. For example, the Proposed Rule attempts to dictate the form, substance, and timeline for state review of section 401 certification requests in a way that will not serve efficiency and that runs counter to the Clean Water Act's recognition that states retain broad authority to protect waters within their jurisdictions. Section 401 preserves state authority to protect state water quality from impacts of federally licensed or permitted projects. It is the states that are most familiar with their waters, their industries, and their governmental partners. It is therefore most efficient for states to develop and apply appropriate administrative procedures, and the Proposed Rule should reflect this.

Many of the States have previously offered comprehensive comments regarding the balance of federal and state authority under section 401, which are attached to this comment

letter and are incorporated here by reference.[1] This comment letter responds specifically to the provisions of the Proposed Rule, as well as the areas on which EPA has solicited comment. Our States offer the following general recommendations, which are described in detail below:

- We strongly support EPA's proposal to restore state authority under section 401 to impose conditions on the licensed or permitted activity as a whole, rather than discharges only. *See* proposed § 121.3. As EPA describes in the Proposed Rule's preamble, 87 Fed. Reg. at 35,342-346, the "activity as a whole" interpretation of section 401 best gives effect to the text, legislative history, and purpose of section 401. We strongly oppose any attempt to retain the 2020 Rule's "discharge only" interpretation of section 401, which the Supreme Court held was foreclosed by "the language" of section 401 in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology* (*PUD No. 1*), 511 U.S. 700, 711 (1994).

- We oppose EPA's attempt to impose a default, one-size-fits-all reasonable period time of 60 days on state review of section 401 requests. *See* proposed § 121.6(c). States handle a wide variety of section 401 requests, and States have a similarly wide variety of administrative procedures that apply to their review of section 401 requests. Accordingly, any attempt to impose a default reasonable period of time is misguided. If EPA insists on imposing a default reasonable period of time, it should be much

[1] *See, e.g.,* Comments of the Attorneys General of California, Colorado, Connecticut, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the District of Columbia on 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), Docket ID EPA-HQ-OW-2021-0302 (Aug. 2, 2021) (Attachment A); Comment Letter from Attorneys General of the States of Washington, New York, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the District of Columbia, and the Commonwealths of Massachusetts, Pennsylvania, and Virginia, Docket ID No. EPA-HQ-OW-2019-0405 (Oct. 21, 2019) (2019 Multistate Comment) (Attachment B); Letter from Attorneys General of California, Connecticut, Maryland, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Pennsylvania Department of Environmental Protection to EPA Administrator Andrew Wheeler Regarding Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (July 25, 2019) (Attachment C); Response by Attorneys General of New York, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Connecticut Department of Energy and Environmental Protection, New York State Department of Environmental Conservation, North Carolina Department of Environmental Quality, and Pennsylvania Department of Environmental Protection to EPA's Request for Pre-Proposal Recommendations Regarding Clean Water Act Section 401 Water Quality Certifications, Docket ID No. EPA-HQ-OW-2018-0855 (May 24, 2019) (Attachment D).

longer than 60 days (at least 180 days). Additionally, EPA should clarify that the reasonable period of time can be modified not only by an agreement on a case-by-case basis, but also by a categorical agreement between a state and the permitting federal agency, or by a federal agency's regulations for certain project types. *See* 18 C.F.R. § 5.23(b)(2); § 157.22(b) (in FERC proceedings, reasonable period of time is one year). Finally, we support EPA's decision to remove the 2020 Rule's categorical prohibition on applicants withdrawing and resubmitting their applications.

- We oppose EPA's attempts to dictate the administrative procedures to be employed by States reviewing section 401 requests, including the contents of requests for certification, *see* proposed § 121.5, and the contents of certification decisions. *See* proposed § 121.7. Neither the Clean Water Act, in general, nor section 401, specifically, authorize EPA to require states to follow a particular procedure in reviewing requests for certification, other than requiring states to establish procedures for public notice and, in appropriate cases, public hearings on certification requests. *See* 33 U.S.C. §§ 1341(a)(1), 1361(a). And courts have consistently recognized that states reviewing section 401 requests may apply their own administrative procedures. *See, e.g.*, *Berkshire Envt'l Action Team, Inc. v. Tennessee Gas*, 851 F.3d 105, 113 (1st Cir. 2018) (finding "no indication" in section 401 that Congress "intended to dictate how" a state agency "conducts its internal decision-making before finally acting"); *Delaware Riverkeeper Network v. Secretary of Penn. Dep't of Envt'l Protection*, 833 F.3d 360, 368 (3d Cir. 2016) ("the Water Quality Certification is by default a state permit, and the issuance and review of a Water Quality Certification is typically left to the states").

- Notwithstanding the limits to EPA's authority to impose state administrative procedures, we generally appreciate the additional flexibilities included in the Proposed Rule, but recommend that EPA incorporate into the final rule several further flexibilities for certifying agencies. First, EPA should require applicants to submit a complete application pursuant to state administrative law before the reasonable period of time begins to run. Second, rather than require that the contents of a section 401 request be defined "in regulation," *see* proposed § 121.5(b), EPA should merely require that the contents be defined by the certifying state, whether by statute, regulation, or policy document. Third, EPA should not require the consent of federal agencies before a state may modify a section 401 certification and should not limit the timeframe in which states may modify section 401 certifications.

- We agree that federal review of certification decisions is limited to "ensuring decisions will meet certain facial statutory requirements." 87 Fed. Reg. at 35,355. The 2020 Rule's attempt to impose federal oversight over state section 401 certifications caused serious problems, such as federal agencies declaring certifications waived due to accidental and technical non-compliance with the 2020 Rule or declaring that they

would simply "decline to rely" on certain certifications. *See* Attachment E, at 44-46.[2] However, the requirement for certifying agencies to provide proof of public notice, proposed 40 C.F.R. § 121.9(a)(3), goes beyond the facial requirements of section 401, which merely requires that States enact procedures for public notice. We suggest EPA modify the final rule to more closely track the requirements of section 401 by requiring states to affirm that they have followed applicable state procedures regarding public notice, rather than requiring proof of public notice.

- We recommend that EPA remove the language providing that states may require 401 certification only when an activity "may result in a discharge *from a point source*." *See* proposed § 121.2 (emphasis added). The text of section 401 refers to "any discharge," a term which the Supreme Court has recognized should be broadly interpreted. *See S.D. Warren Co. v. Maine Bd. of Envt'l. Protection*, 547 U.S. 370, 376 (2006). Rather than add a limitation that is not found in the statute, the States recommend that the final rule tracks the language of section 401.

## I. INTRODUCTION

### A. The Clean Water Act, in General, and Section 401, in Particular, Establish Broad State Authority Over State Water Quality.

The States appreciate EPA's recognition that states have a key responsibility and authority under the Clean Water Act (subject to a federal baseline) to "prevent, reduce, and eliminate pollution." 87 Fed. Reg. at 35,322, quoting 33 U.S.C. § 1251. That policy carries throughout the Clean Water Act in a "carefully constructed … legislative scheme" that "impose[s] major responsibility for control of water pollution on the states." *District of Columbia v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) (noting that the 1972 Clean Water Act "recognize[s] that the States should have a significant role in protecting their own natural resources"). The Clean Water Act "anticipates a partnership between the States and the Federal Government," in which the states are responsible for promulgating water quality standards that "establish the desired condition of a

[2] Attachment E includes various declarations from state water quality officials filed in connection with litigation against EPA over the 2020 Rule. They have been compiled into a single attachment and consecutively numbered for ease of reference.

waterway." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Indeed, section 303 of the Act effectively leaves it to the states, subject to baseline federal standards and approval, to determine in the first instance the level of water quality they will require for waterbodies under state jurisdiction and the means and mechanisms through which they will achieve and maintain those levels. 33 U.S.C. § 1313. And, section 510 of the Act expressly sets the boundary of state authority in broad terms: "nothing in [the Act] shall … preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution" so long as state water quality standards and controls that are not "less stringent" than federal ones. 33 U.S.C. § 1370. Indeed, "[n]ot a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require." *PUD No. 1.*, 511 U.S. at 723 (Stevens, J., concurring).

Section 401 is the lynchpin of Congress' legislative scheme to preserve state authority to address a "broad range of pollution." *S.D. Warren Co.*, 547 U.S. at 386. Section 401 requires that "[a]ny applicant for a Federal license or permit" for "any activity" that "may result in any discharge into navigable waters" must obtain a certification from the state in which such discharge might occur that the "any such discharge will comply" with various provisions of the Clean Water Act. 33 U.S.C. § 1341(a)(1). Additionally, section 401 provides "[a]ny certification" issued by a state "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure" that the "applicant" will comply with provisions of the Clean Water Act and "with any other appropriate requirement of State law." *Id.* § 1341(d). Any conditions included in a section 401 certification will become conditions of the federal

license or permit. *Id.* "No license or permit shall be granted if certification has been denied by the State[.]" *Id.* § 1341(a)(1).

### B. For Fifty Years the States Implemented Section 401 Successfully and Any Allegations of Abuse Are Baseless.

For the 50 years between the enactment of section 401 in 1972 and the 2020 Rule, state water quality agencies diligently processed thousands of section 401 requests each year with little controversy. The vast majority of section 401 certifications were issued promptly – often in 60 days or less – with the most common cause of delay being the applicant's failure to provide necessary information. *See* EPA, Economic Analysis For the Clean Water Act Section 401 Water Quality Certification Improvement Rule (Economic Analysis), at 16-17; Attachment E, at 114 (New York issues more than 4,000 certifications each year, the "vast majority" of which are "granted within 60 days"). And, indeed, most section 401 certifications were granted, with only a handful of denials issuing each year. *See* Economic Analysis, at 14-15.

Beginning around 2016, prompted by a handful of high-profile section 401 denials, some project applicants and industry lobbyists began claiming that states were "abusing" their section 401 authority. Such claims of abuse are not, and never have been, true.

First, some members of the regulated industry have claimed that states were relying on non-water-quality related criteria to deny section 401 certifications. That is false. In fact, the handful of denials industry claims to be "abuses" were denied based on reasons related to water quality. *See Mountain Valley Pipeline v. N.C. Dep't of Envt'l Quality*, 990 F.3d 818, 831 (4th Cir. 2021) (North Carolina denied certification for the Mountain Valley Pipeline Southgate extension "for the express aim of preventing needless harm to the State's rivers, streams, and wetlands"); *NYSDEC v. FERC*, 884 F.3d 450, 454 (2d Cir. 2018) (New York denied certification for the Millennium Valley Lateral pipeline, based on the Department's conclusion that an

intervening change in law rendered the project's environmental review, and thus certification request, incomplete as a procedural matter); *Constitution Pipeline Co. v. N.Y. State Dep't of Envt'l Conservation*, 868 F.3d 87, 96 (2d Cir. 2017) (New York denied certification for the Constitution Pipeline based "principally on Constitution's failure to provide information with respect to stream crossings"); *Lighthouse Res. Inc. v. Inslee*, No. 3:18-cv-05005 (RJB), 2018 WL 6505372, at *4 (W.D. Wa. Dec. 11, 2018) (Washington denied certification for the Millennium coal export project because "the State did not have reasonable assurance that the proposed terminal would meet applicable water quality standards").

Second, some members of the regulated industry have claimed that states inappropriately delayed their review of section 401 requests. *See* Comments of the National Hydropower Association on EPA's Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, Docket No. EPA-HQ-OW-2021-0302, at 7-8 (Aug. 2, 2021) (NHA Comment Letter). That is also incorrect. To the contrary, delays have consistently resulted from the conduct of applicants. *See California State Water Resources Control Bd. v. FERC* (*SWRCB v. FERC*), ___ F.4th ___, 2022 WL 3094576, at *12 (9th Cir. 2022) (applicants "chose to withdraw and resubmit their certification requests because they had not complied with California's [environmental review] regulations"); *N.Y. State Dep't Envt'l Conservation v. FERC* (*NYSDEC v. FERC*), 991 F.3d 439, 450 (2d. Cir. 2021) (applicant "flimflammed" the State by agreeing to give the State an additional month to complete its notice and comment process, but, after the State denied certification, thinking better of its commitment "and walk[ing] away"); *Constitution Pipeline Co.*, 868 F.3d at 103 (applicant "persistently refused to provide information" requested by the State). Indeed, especially in the case of hydropower dam

relicensing, the applicant has an incentive to delay state certification in order to avoid more stringent certification conditions. *See SWRCB v. FERC*, 2022 WL 3094576, at *11.

Third, some members of the regulated industry have complained about states imposing conditions that are allegedly unrelated to water quality concerns, such as to "develop and maintain public recreational facilities and opportunities; to monitor, study, or enhance fish and wildlife populations; or to address pollutants that flow in the project from upstream sources." NHA Comment Letter, at 21-23. But these objections misunderstand the nature of state water quality requirements. Many states regulate water quality by ensuring that water remain suitable for certain "designated uses," which may include uses such as "recreation" or "fishing." *See, e.g.,* 6 New York Code of Rules and Regulations (N.Y.C.R.R.) §§ 701.2-701.7. Ensuring that the public has access to a waterway – whether through surface trails or by fishing access point – is critical to maintaining these designated uses. Inasmuch as construction of a hydroelectric dam or other large-scale infrastructure project may interfere with these designated uses, conditions that require the applicant to minimize these impacts are, in fact, critical to maintaining state water quality standards.

Moreover, in the handful of cases when project applicants have alleged improper certification decisions or delay by state agencies, they have been fully capable of protecting their rights under section 401 through the traditional framework of administrative and judicial review, as the caselaw makes abundantly clear. *See, e.g., Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179 (D.C. Cir. 2022); *North Carolina Department of Environmental Quality v. FERC*, 3 F.4th 655 (4th Cir. 2021); *NYSDEC v. FERC*, 991 F.3d at 439; *Constitution Pipeline Co.*, 868 F.3d at 103.

Finally, even if true, the handful of alleged instances of "abuse" would be but a tiny fraction of the total number of section 401 certifications issued by states and provide no support for wholly jettisoning 50 years of consistent practice in line with section 401's text and purpose.

### C. The 2020 Rule Severely Curtails State Authority to Protect Water Quality in Order to Promote Energy Infrastructure and Harms the States.

Notwithstanding the false claims of abuse, the prior Administration, urged on by industry, issued an Executive Order directing EPA to revise its section 401 regulations in order to "promot[e] energy infrastructure." 84 Fed. Reg. 15,495 (April 10, 2019). Various hydropower and natural gas industry groups, by their own admission, then "successfully convinced" EPA to pursue this non-water-quality-related directive to promulgate the 2020 Rule in order to "thwart" state review under Section 401. *See* Stay Application, Supreme Court Docket No. 21A539, at 25.

The harm caused by the 2020 Rule was immediate and dramatic. States and tribes struggled to adjust their administrative procedures to the requirements of the 2020 Rule. *See generally* Attachment E, at 1-125. For example, the U.S. Army Corps of Engineers (Army Corps) relied on the 2020 Rule in declining to honor agreements it had made with states regarding the timeframe of state review for nationwide dredge and fill permits issued under Clean Water Act Section 404, 33 U.S.C. § 1344, instead demanding that the certifications be issued within 60 days. Attachment E, at 27; Letter from the Texas Commission of Environmental Quality (Aug. 2, 2021) (reporting that the 2020 Rule "caused considerable implementation confusion" in Texas and "brought about the breakdown of a long-standing, formally established and cooperative process" between Texas and the Army Corps).[3]

[3] *Available at* https://www.regulations.gov/comment/EPA-HQ-OW-2021-0302-0079

The Army Corps' attempt to re-issue dozens of nationwide permits (NWPs) shortly after the 2020 Rule became effective resulted in administrative chaos and unnecessary harm to state water quality. Attachment E, at 37-38. Relying on the 2020 Rule, the Army Corps requires states to make section 401 decisions within 60 days or else waive their section 401 authority. *Id.* at 27. The Army Corps rejected requests from various states to extend the reasonable period of time, notwithstanding the unfamiliar requirements of the 2020 Rule. *Id.* at 38-41. States were forced to increase staffing and dedicate additional resources in order to comply with this restrictive timeframe, and in most cases made their determinations within the required timeframe. Attachment E, at 28, 65, 118. But even so, the Army Corps unilaterally notified some states – again relying on the 2020 Rule – that it would "decline to rely" on certain section 401 certifications that included conditions the Army Corps considered unauthorized under the 2020 Rule. Attachment E, at 44-47. Without general section 401 certifications for these NWPs, projects that would otherwise qualify for streamlined permit procedures must now be processed individually, defeating the purpose of the nationwide permit system and overwhelming both Army Corps staff and state certifying authorities. Attachment E, at 5-6, 28, 86-87. For example, in Washington, the invalidation of the nationwide aquaculture permits resulted in a flood of individual section 401 certification requests for shellfish growing operations. Attachment E, at 28. Because the planting of shellfish seed must occur during specific, narrow windows of the growing season, timely permitting is essential, and the failure to begin these projects during the limited planting window can doom a grower for a season or even permanently. *Id*. To meet the unprecedented demand for individual aquaculture permits and associated certification requests, Washington was forced to hire new staff and reassign existing employees. *Id*. at 29. Similarly, the Army Corps' invalidation of California's general water quality certifications of the

nationwide permits, purportedly due to the 2020 Rule, required California to process many additional individual water quality certifications that would otherwise have been addressed by the general water quality certifications. Attachment E, at 5-6.

Moreover, at least one waiver determination made by the Army Corps pursuant to the 2020 Rule effectively eliminated section 401 authority altogether. In North Carolina, the Army Corps used the 2020 Rule to declare waiver and refused to accept North Carolina's denial of certification for seven nationwide permits based on the state's inadvertent failure to include the rationale for the denial during the rushed and unusual 2020 nationwide certification process. Attachment E, at 65-66. When North Carolina tried to remedy its omission, the Army Corps stated that it had "no choice" under the 2020 Rule other than to declare waiver. Attachment E, at 66, 76-77. As a result of the Army Corps' waiver decision under the 2020 Rule, North Carolina was prevented from using its section 401 authority to apply state water quality requirements to projects covered under these permits. Attachment E, at 66.

Although states generally were able to return to the familiar pre-2020 status quo after the District Court for the Northern District of California vacated the 2020 Rule in October 2021, Attachment E, at 128, 138, the Supreme Court's stay of that decision in April 2022 means these the harms caused by the 2020 Rule have returned and will continue while the 2020 Rule remains in place. *Id.* at 142-43, 148-50.

## II. SCOPE OF CERTIFICATION

### A. EPA's Proposal to Return to the Long-Standing Interpretation of Section 401 as Authorizing States to Place Conditions on a Regulated Activity as a Whole Is Consistent with the Statute and Supreme Court Precedent.

The undersigned states strongly support EPA's proposal to define the permissible scope of states' section 401 authority as applying to the certified "activity as a whole." *See* proposed

§ 121.3. This is consistent with the approach taken by states in implementing section 401 for decades before the 2020 Rule. Moreover, defining the scope of section 401 to cover the "activity as a whole" was endorsed by the Supreme Court in *PUD No. 1* as the "most reasonable" interpretation of the statute.

Defining the scope of state authority under section 401 as applying to the certified activity as a whole is also necessary to ensure that the statute's purpose of allowing states to address the "broad range of pollution" affecting their waters is fulfilled. *S.D. Warren Co.* 547 U.S. at 386. For example, hydroelectric dams are a significant source of water quality impacts, not all of which are necessarily tied to a specific discharge. Without proper mitigation measures, dams cause increased water temperature resulting from decreased water flows within streams and decreased flow rates as a result of ponding behind dam structures. Attachment E, at 19-20, 25, 100. Dam structures alter flow in rivers and creeks downstream of hydroelectric dams, cause fluctuations of water levels within the impoundments created by dams, kill fish passing through hydroelectric turbines, and prevent the upstream movement of fish and other water or wetland-dependent wildlife. Attachment E, at 20-21, 100. Dam reservoirs also lead to vegetation loss, reducing shading and increasing temperatures, and wave impacts within reservoirs increase turbidity and sedimentation. Attachment E, at 20-21, 25. These impacts, in turn, can result in a host of adverse effects, including further temperature increases, smothered aquatic habitat, interference with predation patterns, and lower oxygen levels. Attachment E, at 19-21, 25, 101. Elevated turbidity triggered by dams can also cause an increase in toxin mobility due to heightened adsorption of these chemicals to sediment particles. Attachment E, at 25.

For decades, states and tribes have relied on the long-standing interpretation of section 401 as allowing states to impose conditions on the activity as a whole to mitigate or eliminate

these and other impacts from hydroelectric dams. For example, certifying authorities have included in section 401 certifications requirements needed to mitigate vegetation loss, geoengineer shorelines to decrease erosion, and discharge from deeper in reservoir water columns where temperatures are lower.[4] Attachment E, at 19-20, 25-26, 101. Similarly, temperature management conditions are essential to ensure that hydroelectric dams do not negatively affect cold-water species such as salmon. Attachment E, at 14, 20-21. There is no question that these conditions are appropriate under an "activity as a whole" interpretation of section 401, but it is unclear whether they would be considered proper under the "discharge only" interpretation.

These and many other examples highlight the practical importance of a returning to the common-sense, Supreme Court-endorsed interpretation of section 401 as authorizing states to impose conditions on the activity as a whole.

### B. The 2020 Rule's "Discharge-Only" Interpretation of Section 401 Is Inconsistent with the Structure and Intent of Section 401.

The States strenuously oppose retention of the "discharge-only" interpretation of section 401's certification scope adopted in the 2020 Rule. *See* 87 Fed. Reg. at 35,345. As EPA's own legal analysis in the preamble establishes, *id.* at 35,342-346, the "discharge only" interpretation is inconsistent with the text, structure, and legislative history of section 401.

First, section 401(d) broadly authorizes states to impose conditions to ensure that the "applicant" complies with appropriate water quality standards. 33 U.S.C. § 1341(d). In *PUD No.*

[4] Additionally, because hydropower licenses can last up to 50 years, the ability to revisit and modify section 401 certifications to adapt to changing conditions (such as modifications to state water quality standards) provided the critical ability for states to adjust conditions for these long-term projects as new research and data establish needs for further or modified protections. Attachment E, at 18, 26, 99-101. As discussed in Section IV.C below, EPA should restore provisions allowing certifying authorities to modify section 401 certifications.

*1*, the Supreme Court held that the "language" of section 401(d) "contradicts" the interpretation of section 401 as being limited to discharges only. 511 U.S. at 711. Instead, the text of section 401(d) "allows the State to impose 'other limitations' on the project in general." *Id.* The Court did not hold that there was any ambiguity in the statute requiring a deference analysis and its opinion did not turn on deference; instead, the Court merely noted as additional support that its 'view of the statute' was 'consistent' with EPA's 1971 regulations and, unsurprisingly, that the interpretation was entitled to deference because it was reasonable. *Id.* at 712. EPA should acknowledge that the Supreme Court has expressly ruled out the "discharge-only" interpretation of section 401 in favor of the "activity as a whole" interpretation.

Second, as EPA acknowledges, 87 Fed. Reg. at 35,345, the legislative history of the 1972 amendments to the Federal Water Pollution Control Act contradicts the 2020 Rule's narrow "discharge-only" interpretation of section 401. As noted above, the provisions codified in section 401 originated as section 21(b) of the Water Quality Improvement Act of 1970. The House Report for section 21(b) explains that the section was created to "provide reasonable assurance … that no license or permit will be issued by a federal agency for any activity … that could in fact become a source of pollution." H.R. Rep. No. 91-127, at 24 (1969), *reproduced in* 1970 U.S.C.C.A.N. 2691, 2697. Similarly, the Senate Report decried the fact that "[i]n the past, these [federal] licenses and permits have been granted without any assurance that [state] standards will be met or even considered." S. Rep. No. 91-351, at 3 (1969) (emphasis added). Less than two years later, these same safeguards were carried forward in section 401 of the Clean Water Act almost verbatim and with only "minor" changes. Senate Debate on S.2770 (Nov. 2, 1971), *reproduced in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1394 (1973) (Legislative History Vol. 2). In doing so, Congress again stated its desire to ensure

that all activities authorized by federal permits and impacting water quality would comply with "State law" and that "Federal licensing or permitting agencies [could not] override State water quality requirements." S. Rep. 92-414, at 69, *reproduced in* Legislative History Vol. 2, at 1487.

At no time in the process of incorporating section 21(b) into section 401 did Congress indicate a desire to weaken state authority. In fact, the opposite is true: Congress added language in section 401(d) to clarify that, not only must a federally licensed or permitted activity comply with water quality standards, it must also comply with "any other appropriate requirement of State law" imposed by the certifying authority. *See* 33 U.S.C. § 1341(d). The conference report on section 401 noted that subdivision (d) largely carried forward the version passed by the House except that "Subsection (d), which requires a certification to set forth effluent limitations, other limitations, and monitoring requirements necessary to insure compliance with sections 301, 302, 306, and 307, of this Act, *has been expanded to also require compliance* with any other requirement of State law." S. Conf. Rep. 92-1236, at 138, *reproduced in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 321 (1973) (emphasis added). Thus, the legislative history actually indicates that Congress intended to expand the scope of state authority under section 401.

### C. EPA's Modification of Section 401's "Any Discharge" Language To Include Only "Point Sources" Is Unnecessary.

The States support EPA's proposal to clarify that, consistent with the Supreme Court's ruling in *S.D. Warren Co.*, a discharge triggering a 401 certification does "not require the addition of pollutants." 87 Fed. Reg. at 35,328. However, the States do not support EPA's modification of the language in the statute through the addition of the words "from a point source" in proposed section 121.2.

Section 401 broadly requires certification for any federally licensed or permitted project that may result in "any discharge." 33 U.S.C. § 1341(a)(1). The Clean Water Act notes that "discharge" includes "discharge of a pollutant" or "discharge of pollutants," which requires the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12), (16). As the Supreme Court noted in *S.D. Warren Co.*, a "discharge" must be broader than a "discharge of a pollutant" or "discharge of pollutants," or else it would be unnecessary to specifically define those terms – the generic term "discharge" could be used throughout. *S.D. Warren Co.*, 547 U.S. at 375. Accordingly, the Court in *S.D. Warren Co.* concluded that "discharge," as used in section 401, does not require the addition of a pollutant. *Id.* at 375-376. But by the same logic, a "discharge," as used in section 401, does not necessarily have to be from a "point source." The States recognize that some caselaw and EPA guidance have suggested that a discharge under section 401 should be limited to "point sources." But EPA has failed to identify any compelling need to depart from the statutory language and codify this additional limitation into the regulatory text. The States recommend that EPA remove the phrase "from a point source" from the final version of § 121.2 and instead rely upon the text of the statute as interpreted by the courts.

**D. EPA's Definition of "Activity as a Whole" Should Include Anything That Is Part of the Project That Requires a Federal License or Permit.**

With respect to EPA's proposed definition of "[a]ctivity as a whole" in proposed § 121(a), the States note that by defining this term with reference to "the project activity," EPA has created a circular definition. EPA should delete the word "activity" from the definition to avoid confusion. Additionally, EPA should define "project" to clearly reference the entirety of whatever is being permitted or licensed by the relevant federal agency.

EPA specifically seeks comment on how "activity" would apply to two hypothetical hydroelectric dams: Facility A, which has yet to be constructed and requires multiple federal permits and approvals; and Facility B, which is an existing dam that only requires a section 402 permit prior to commencing operation. 87 Fed. Reg. at 35,346. In both situations, the applicant will be required to obtain a section 401 certification, including any necessary conditions, on whatever activities are being authorized by the relevant federal permits. Accordingly, for Facility A, the certification will apply to both the construction and the operation of the dam. For Facility B, however, certification conditions will apply only to the prospective operation of the dam. However, it is possible that in order to comply with applicable water quality requirements, the dam will be required to implement structural or operational modifications.

## III. REASONABLE PERIOD OF TIME

### A. The Proposed 60-Day Default Reasonable Time Period Is Unwarranted and Unreasonable.

Although the undersigned States appreciate EPA's attempt to include additional flexibility in how the reasonable period of time for state review is established, we strongly object to the proposed rule's categorical 60-day default reasonable time period for state review. *See* proposed § 121.6(c). Instead, the States recommend that EPA remain silent on the reasonable period of time, allowing states to apply their own administrative procedures, subject to the statutory one-year maximum period of time.

The Proposed Rule encourages federal agencies to "jointly agree" with state water quality agencies on the period of time required for state certification review. However, by imposing a 60-day default period that applies in the absence of an agreement, *see* proposed § 121.6(c), the proposed rule effectively allows the federal agency to dictate the reasonable period of time by simply withholding consent to a longer period of time. Although many section 401 reviews *are*

complete within 60 days, the wide variety of federal permits requiring section 401 certification and the variety of state administrative procedures that apply to such requests make such a one-size-fits-all reasonable time period inappropriate and unnecessary. EPA's attempt to list situations in which the reasonable period of time would be extended, proposed § 121.6(c), highlights the fact-specific nature of each certification request. For example, if public notice requirements require more than 60 days for state review, requiring the state to act within 60 days in the first instance is unreasonable.

EPA's proposal to impose a one-size-fits-all reasonable period of review in the new rule is inconsistent with EPA's stated goal to "better reflect the cooperative federalism framework." 87 Fed. Reg. at 35,320. Section 401(a)(1) requires that a state "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1). Recognizing that meaningful state agency and public review cannot be rushed, Congress gave states a reasonable period—up to "one year"— to exercise their broad authority pursuant to state administrative procedures (including public notice and, if appropriate, hearings) when making a section 401 certification determination. *Id.*

States have established a wide range of efficient and fair administrative procedures, which share certain features designed to enable the thorough review contemplated by section 401, but which demonstrate why a default 60-day reasonable period of time is not practicable.[5] Initially, a state reviews a section 401 application to ensure that it includes sufficient information

[5] *See, e.g.*, 314 Code of Massachusetts Regulations (C.M.R.) § 9.05(3); 6 N.Y.C.R.R. § 621.7(a)(2), (g); 15A North Carolina Administrative Code (N.C.A.C.) § 02H.0503; 250 Rhode Island Code of Regulations (R.I.C.R.) § 150-05-1.17; Vermont Admin. Code (Vt. A.C.) § 16-3-301:13.11; Conn. Gen. Stat. 22a-6h; 23 Cal. Code of Regulations (Ca.C.R.) §§ 3855-3861.

for meaningful review by the state agency and the public. A state that has received a deficient or incomplete application may require the applicant to provide additional information.[6] The process of obtaining required information is not entirely within the reviewing agency's control: applicants can frustrate the timeframe for review by failing to provide requested materials necessary to the state's review of the application.[7] In some cases, states also must await completion of federal and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications.[8]

Once sufficient information supporting an application has been received for a state to deem an application complete, the public notice and comment process will usually take additional time. Typically, public notice must be accomplished through publication in one or more local newspapers as well as in official agency publications.[9] In almost all cases, states must hold a public comment period ranging from fifteen to forty-five days.[10] To ensure meaningful

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[6] *See, e.g.*, N.Y. Environmental Conservation Law § 70-0109(2)(a); *see also* 310 C.M.R. § 4.10(8)(g)3.a.-b.; 314 C.M.R. § 9.05(1); 6 N.Y.C.R.R. §621.7(a), (f); 250 R.I.C.R. § 150-05-1.17(B), (D); Vt. A.C. § 16-3-301:13.3(c)(3).

[7] *See, e.g., Constitution Pipeline*, 868 F.3d at 103.

[8] *See, e.g.*, 23 Ca.C.R. §§ 3836(c), 3837(b)(2) (projects subject to section 401 water quality certification must be reviewed under the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., as appropriate, before approval by the State Water Resources Control Board or the Regional Water Quality Control Boards); 6 N.Y.C.R.R. § 621.3(a)(7) (an application is not considered complete until a negative declaration or draft environmental impact statement have been prepared pursuant to state environmental quality review act, ECL article 8).

[9] *See, e.g.*, 6 N.Y.C.R.R. § 621.7(a)(2), (c); 15A N.C.A.C. § 02H.0503(a); 250 R.I.C.R. § 150-05-1.17 (D)(1)(a).

[10] *See, e.g.*, 5 Col. Code of Regulations § 1002-82.5(B)(1) (30 days); Conn. Gen. Statutes Ann. § 22a-6h(a) (30 days); 314 C.M.R. § 9.05(3)(e) (21 days); 6 N.Y.C.R.R. § 621.7(b)(6) (15 to 45 days); 250 R.I.C.R. § 150-05-1.17(D)(2) (30 days); Vt. A.C. §§ 16-3-301:13.3(c), 13.11(c) (30 days); 23 Ca.C.R. § 3858(a) (at least 21 days).

public review, states appropriately provide extensions of public comment periods for significant projects.[11] The period of public participation may be further extended in situations where states receive requests for a public hearing.[12] After the public comment period and any public hearing are complete, the state agency must review and, in many cases, respond to the public comments received before making a certification determination.[13]

The range of administrative procedures described above demonstrate why a default, one-size-fits-all 60-day reasonable period of time is inappropriate and unworkable. Moreover, imposing a default 60-day reasonable period of time on state review will not result in more expedited approval of section 401 applications. Instead, the agency may be forced to deny applications without prejudice if it has not received necessary information or has not been able to complete its public notice and comment process. The applicants would then need to re-apply for a section 401 certification. A state agency that rushes to approve section 401 certifications pursuant to an arbitrary federal deadline could leave itself open to legal challenge from opponents of approved projects, leading to more project delays through litigation and the

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[11] *See, e.g.*, Ca. State Water Resources Control Bd., Draft Water Quality Certification Comment Deadline Extended for Application of Southern California Edison Co. (Sept. 27, 2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/big_creek/docs/final_bc_ceqa_draft_cert_notice_extended.pdf; N.Y. Dep't of Envtl .Conservation, Notice of Supplemental Public Comment Hearing and Extension of Public Comments on Application of Transcontinental Gas Pipe Line Company, LLC (Feb. 13, 2019), https://www.dec.ny.gov/enb/20190213_not2.html.

[12] *See, e.g.*, Conn. Gen. Stat. 22a-6h(d) (applicant may request public hearing within 30 days of publication of a tentative determination); 250 R.I.C.R. § 150-05-1.17(D)(3) (providing for a mandatory public hearing if enough requests are received, notice of which must be provided fourteen days prior to date of hearing); 15A N.C.A.C. §§ 02H.0503(d), 0504 (notice of public hearing must be given thirty days prior to date of hearing, and record of public hearing must be held open for thirty days after the date of hearing); Vt. A.C. § 16-3-301:13.3(g), (h) (public hearing may be requested during public comment period, and notice of public hearing must be given thirty days before date of hearing).

[13] *See, e.g.*, 310 C.M.R. § 4.10(8)(g) 3.b.; 205 R.I.C.R. §150-05-1.17(D)(4).

possible vacatur of section 401 certifications by the courts. Either situation will result in unnecessary delays and greater uncertainty in the regulatory process.

Rather than impose a "default" reasonable period of time on state review, EPA should allow states to process and determine section 401 requests on their own timeframes, subject to the statutory one-year maximum.

### B. If EPA Adopts a Default Reasonable Period of Time, the Period Should Be At Least 180 Days and Subject to Modification By Agreement or By a Federal Agency's Regulations.

If EPA insists on imposing a default reasonable period of time on state review shorter than the statutory one-year period, several important changes or clarifications are necessary. First, the default reasonable period of time should be at least 180 days, rather than the 60-day period under the Proposed Rule. Defining the reasonable period as 180 days would be more likely to give states sufficient time to obtain and review necessary information from the applicant and complete their public notice and comment process. Indeed, for 50 years prior to the promulgation of the 2020 Rule, EPA's regulations provided that six months "shall generally be considered to be" the reasonable period of time for EPA permits and licenses that required section 401 certification. 40 C.F.R. former § 121.16. While allowing states a full year would be preferable, 180 days would be consistent with EPA's prior practices.

Second, the final rule should explicitly provide that federal and state agencies can agree to categorical time periods for state review of certain types of permits, licenses, or projects, pursuant to written agreements. Prior to the 2020 Rule, many states had agreements with federal agencies regarding the timeframe for state review of water quality requests. These categorical agreements improve efficiency and predictability by allowing federal agencies, state agencies, and applicants to have an understanding of the reasonable period of time prior to submitting a

written request. After the 2020 Rule became effective, the Army Corps unilaterally jettisoned longstanding federal-state agreements regarding the timeframe for state review of certification requests subject to specific types of federal permits or licenses. Attachment E, at 27; Letter from the Texas Commission of Environmental Quality (Aug. 2, 2021).[14] Although EPA indicates that such agreements are permissible in the preamble to the Proposed Rule, 87 Fed. Reg. at 35,339, proposed § 121.6(b) states that the reasonable period of time must be agreed upon "within 30 days of receipt of a request," suggesting that categorical agreements entered into prior to the date of receipt would not satisfy the regulatory requirement. This should be corrected to make clear that categorical agreements, in addition to case-by-case agreements, are permissible.

Third, the final rule should also expressly clarify that, if a federal agency has a regulation or guidance document establishing a longer reasonable period of time for a particular type of water quality request, the federal agency's regulation or guidance document applies. For example, FERC has established by regulation that the reasonable period of time for state review of section 401 requests for hydropower and natural gas projects is one year. *See* 18 C.F.R. § 5.23(b)(2); § 157.22(b). Under the Proposed Rule, it is not clear whether such separate regulatory requirements for the reasonable period of time would apply rather than the new EPA regulation. EPA should clarify in the final rule that if other federal agencies establish longer reasonable periods of time, those periods apply.

Finally, the States support allowing for extensions of any default reasonable period of time. 87 Fed. Reg. at 35,340-41; proposed § 121.6(c), (d). The ability of a state to meet any given default deadline is necessarily affected by the complexity of the proposed project, staffing constraints, and applicant responsiveness, among other considerations. Listing all the factors that

[14] *Available at* https://www.regulations.gov/comment/EPA-HQ-OW-2021-0302-0079.

could result in a state needing more time for review is impossible. Accordingly, EPA should include a generic provision allowing for extensions of the reasonable period of time as necessary.

### C. EPA Need Not Specify Whether and When "Withdrawal and Resubmittal" of Applications May Be Permissible.

The States agree with the Proposed Rule's approach of not attempting to categorically prohibit or forbid the use of "withdrawal and resubmittal" to extend the timeframe for state review of water quality certification requests. *See* 87 Fed. Reg. at 35,341-42. Historically, this involved an applicant's withdrawal of a pending water quality application and submission of a new request in order to avoid a denial of the request. *See NYSDEC v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018). Applicants used this approach for many years without controversy, *see, e.g., Islander East Pipeline Co., LLC v Connecticut Dep't of Envt'l Protection*, 482 F.3d 79, 87 (2d Cir. 2006), but the 2020 Rule abruptly limited the practice, citing the D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC*, 1103-04 (D.C. Cir. 2019), *cert. denied* 140 S. Ct. 650 (2019). However, the 2020 Rule incorrectly interpreted *Hoopa Valley*, and more recent case law supports EPA's more restrained approach in the Proposed Rule.

First, *Hoopa Valley* did not announce a categorical rule forbidding withdrawal and resubmittal of section 401 certification requests. Rather, *Hoopa Valley* rejected a contractual arrangement between an applicant and state agencies to use the withdrawal-and-resubmittal process to indefinitely suspend review of a water quality certification request. 913 F.3d at 1103-04. But the D.C. Circuit made clear that its decision was limited to the "coordinated withdrawal-and-resubmission scheme" before it, and that it was not "resolv[ing] the legitimacy" of other arrangements. *Id.* at 1103-04. Thus, *Hoopa Valley* announced its own limitations.

Second, several more recent decisions have recognized the narrow nature of *Hoopa Valley*. In *North Carolina Department of Environmental Quality v. FERC*, the Fourth Circuit

recognized that "*Hoopa Valley* is a very narrow decision flowing from a fairly egregious set of facts." 3 F.4th 655, 669 (4th Cir. 2021). The Fourth Circuit declined to extend *Hoopa Valley* to a situation in which the project applicant "twice withdrew and then immediately resubmitted its certification requests," where there was "no idleness" on the part of the state agency." *Id.* More recently, the D.C. Circuit acknowledged *Hoopa Valley*'s limited scope and declined to extend it to a situation in which the water quality agencies denied certification without prejudice. *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1183 (D.C. Cir. 2022), *quoting NCDEQ v. FERC*, 3 F.4th at 669. In so holding, the court cited favorably the Fourth Circuit's categorization of *Hoopa Valley* as a case in which "the state agencies and the license applicant entered into a written agreement that obligated the state agencies, year after year, to take no action at all on the applicant's § 401 certification request." And just last week, the Ninth Circuit rejected FERC's conclusion that the California State Water Resources Control Board had waived its section 401 authority over several hydroelectric dams, where the applicants had withdrawn and resubmitted their section 401 requests. *California State Water Resources Control Bd. v. FERC*, 2022 WL 3094576.

Third, as a matter of policy, withdrawal and resubmittal allows states and project proponents to avoid denials of certification requests when an agency has not yet received all necessary information, or when state administrative processes such as public notice and comment have not yet run their course. The 2020 Rule limited this option for applicants to avoid a denial. The better approach is for states to manage and enforce their own administrative procedures. *See* pp. 21-23, *supra* (describing state administrative procedures).

In short, considering that the weight of federal caselaw favors the use of withdrawal-and resubmittal of certification in some circumstances, *see NCDEQ v. FERC*, 3 F.4th at 669;

*NYSDEC v. FERC*, 884 F.3d at 456, EPA's proposal to remain silent on the issue is appropriate and should be finalized.

## IV. STATE ADMINISTRATIVE PROCEDURES

The States appreciate EPA's attempt to increase the flexibility given to states regarding the administrative procedures to be followed when reviewing section 401 requests. Proposed §§ 121.4, 121.5, 121.7. However, the Clean Water Act does not authorize EPA to dictate the administrative processes to be followed by states in reviewing certification requests. Therefore, EPA should revise the final rule to allow states to process water quality requests pursuant to their own administrative procedures. But even if EPA has authority to dictate some aspects of the administrative procedures to be followed by states, the suggested revisions discussed below should be incorporated in the final rule to better accommodate state procedures.

### A. EPA Lacks Authority Under the Clean Water Act to Dictate State Administrative Procedures.

The Proposed Rule, like the 2020 Rule, proposes to establish procedures to be followed by states processing section 401 requests, such as the contents of requests for certification, *see* proposed § 121.5, and the contents of certification decisions. *See* proposed § 121.7. But EPA fails to identify any authority in the Clean Water Act (or any other statute) empowering it to promulgate regulations that override state administrative procedures. Except for requiring states to establish procedures for public notice and, in appropriate cases, public hearings on certification requests, section 401 does not require states to follow a particular procedure in reviewing requests for certification. *See* 33 U.S.C. § 1341(a)(1); *United States v. Cooper*, 482 F.3d 658 (4th Cir. 2007), quoting 33 U.S.C. § 1251(b) ("In the [Clean Water Act], Congress expressed its respect for states' role through a scheme of cooperative federalism that enables states to 'implement . . . permit programs'"). And EPA's general rulemaking authority under the

Clean Water Act only authorizes the Administrator "to prescribe such regulations as are necessary to carry out [the Administrator's] functions." 33 U.S.C. § 1361(a). But EPA has not identified why establishing generic procedures that may conflict with state administrative procedures is necessary to carry out any of EPA's functions under the Clean Water Act.

Courts have long recognized that a state reviewing a section 401 request may apply appropriate state administrative procedures. *See, e.g., Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 755 (4th Cir. 2019) ("State Agencies have broad discretion when developing the criteria for their section 401 Certification."); *Berkshire Envt'l Action Team, Inc. v. Tennessee Gas*, 851 F.3d 105, 113 (1st Cir. 2018) (finding "no indication" in section 401 that Congress "intended to dictate how" a state agency "conducts its internal decision-making before finally acting"); *Delaware Riverkeeper Network v. Secretary of Penn. Dep't of Envt'l Protection*, 833 F.3d 360, 368 (3d Cir. 2016) ("the Water Quality Certification is by default a state permit, and the issuance and review of a Water Quality Certification is typically left to the states"); *City of Tacoma*, *Wash. v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (federal agencies' review of section 401 decisions "is limited to awaiting and then deferring to, the final decision of the state"). In the absence of any clear statutory authority, EPA may not override state administrative procedures. *See, e.g.*, *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 544 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest'").

Beyond the lack of legal authorization, it also does not make sense for EPA to impose "one-size-fits-all" administrative procedures on state review of section 401 requests. Section 401 requests run the gamut from fairly minor and routine dredge and fill permits to massive hydropower and natural gas infrastructure projects. What works for some requests simply will not work for other requests. For example, EPA's proposed requirement that a state agency

granting a section 401 certification with conditions must explain "why each of the included conditions is necessary," proposed § 121.7(d)(3), will create additional work for state water quality agencies that are used to relying on broad conditions in many section 401 certifications. And including additional explanatory text could create confusion for applicants who just want to know what they need to do. An applicant who is not satisfied with the explanation provided by a state for certain conditions could always challenge them in state court, but there is no reason to require states to go through the motions of explaining every section 401 condition for every section 401 certification.

### B. If EPA Has Some Authority to Require Some State Administrative Procedures, the Final Rule Should Require a Complete Application Pursuant to State Law to Trigger the Section 401 Review and Waiver Period.

As noted above, the States do not believe EPA has authority to set the procedures to be followed by states in reviewing water quality certification requests. But assuming EPA does have some authority to impose administrative procedures, the Proposed Rule does not do enough to ensure that state agencies have sufficient information to make informed section 401 certification decisions. EPA should require that applicants must submit a complete application pursuant to state administrative law, including any required environmental reviews, before the reasonable period of time commences. In any case, EPA should clarify that applicants may not rely on the requirement to submit a draft permit in order to avoid meaningfully engaging with state agencies reviewing section 401 requests.

#### 1. EPA Should Require Applicants to Submit a Complete Application Pursuant to State Administrative Procedures in Order to Commence the Reasonable Period of Time for State Review.

The Proposed Rule is a vast improvement over the 2020 Rule when it comes to defining the contents of a request for a section 401 certification. By allowing state agencies to define the

contents of a request for certification, *see* proposed § 121.5(b), rather than mandating minimal contents for all requests, *see* 40 C.F.R. § 121.5, EPA has taken a step in the right direction to require applicants to comply with applicable state administrative regulations. But EPA should further require that only the receipt of a complete application, as defined by state administrative procedures, triggers the start of the reasonable period of time for state review.

Section 401 ties the start of the waiver period to the agency's "receipt" of a "request" for certification. 33 U.S.C. § 1341(a)(1). Section 401 is silent as to what constitutes a "request" for certification sufficient to start the waiver period. For a "certification request" to be meaningful, the states need sufficient information to determine whether the project will comply with water quality standards and requirements. Requiring state agencies to act within a year of receiving any section 401 request, however perfunctory or incomplete, could force agencies into making decisions based on incomplete information, thereby leading to water quality impacts and/or waste of state, federal and applicant resources.

EPA's prior guidance documents have recognized that section 401 could be interpreted as requiring a "complete application" to trigger the start of the waiver period. In the 1989 Guidance, EPA noted that the plain language of section 401 gives states "a reasonable period of time (which shall not exceed one year)" to act on a certification request. 1989 Guidance at 31. EPA advised states to adopt regulations to ensure that applicants submit sufficient information to make a certification decision and encouraged requirements that "link the timing for review to what is considered a receipt of a complete application." *Id.* As one example, EPA favorably cited to a Wisconsin regulation requiring a "complete" application before the agency review period begins. *Id*., *citing* Wisconsin Administrative Code, NR 299.04. The same regulation stated that the agency would review an application for completeness within 30 days of receipt and allowed

the agency to request any additional information needed for the certification. *Id*. EPA's 2010 Guidance likewise maintained that, "[g]enerally, the state or tribe's §401 certification review timeframe begins once a request for certification has been made to the certifying agency, accompanied by a *complete* application." 2010 Guidance, at 15-16 (emphasis added). To illustrate, EPA referred to regulations from Oregon establishing a detailed list of information for applicants to provide. *Id*. at 16.

Other federal agencies have also interpreted section 401 as requiring an administratively complete application to trigger the waiver period. For example, Army Corps' regulations require the district engineer to determine "that the certifying agency has received a valid request for certification" before determining whether waiver has occurred. 33 C.F.R. § 325.2(b)(1)(ii). Historically, the Army Corps interpreted the requirement for a "valid" request to mean a request "made in accordance with State laws" inasmuch as "the state has the responsibility to determine if it has received a valid request." *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986); *see AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 729-30 (4th Cir. 2009) (upholding the Army Corps requirement for a "valid," interpreted synonymously with "complete," application).[15] FERC, as well, at one point interpreted section 401's waiver period as commencing when a state agency determines that the request was acceptable for processing. *See Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, 52 Fed. Reg. 5,446, 5,446 (Feb. 23, 1987).[16] EPA should eliminate any regulatory uncertainty and clarify that only an application

[15] Since the promulgation of the 2020 Rule, the Army Corps has interpreted a "valid" request to be any request that complies with the barebones requirements of 40 C.F.R. § 121.7, eliminating the states' requirements for complete certification applications

[16] Although the Second Circuit has upheld FERC's current interpretation of the waiver period as commencing upon the receipt of *any* request, however facially deficient, that decision was made

that is complete pursuant to state administrative procedures triggers the start of the reasonable period of time.

As a practical matter, requiring a complete application pursuant to state administrative procedures is necessary to permit meaningful public review and comment as contemplated by section 401. 33 U.S.C. § 1341(a)(1). Many states require a complete application to trigger public notice and comment, *see, e.g.*, N.Y. Environmental Conservation Law § 70-0109(2)(a), because a complete application is necessary to give the public a meaningful opportunity for review. *See, e.g.*, *Ohio Valley Envt'l Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D.W.Va. 2010) (noting that "[c]ompletion and public notice are inextricably linked"). After public notice and comment, state agencies must review any public comments and determine whether a public hearing is required or appropriate, respond to the comments, and decide whether the application should be granted, granted with conditions, or denied. But a state agency required to act on an incomplete application may not be able to conclude that a project would comply with state standards and could be forced to act on an application before this public notice and comment process has concluded (or even commenced). Accordingly, only a complete application should trigger the reasonable period of time, to ensure that states can fully and lawfully exercise their authority under section 401.

Requiring a complete application to trigger the waiver period will not result in unwarranted delay by certifying agencies. As an initial matter, state agencies operating pursuant

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in the absence of any applicable EPA regulation. *See NYSDEC v. FERC*, 884 F.3d at 455-56. Moreover, although the decision purports to be based on the "plain language" of the section 401 waiver provision, it fails entirely to consider the Fourth Circuit's conclusion that the same language is ambiguous. *Compare id.*, *with AES Sparrows Point LNG*, 589 F.3d at 728. EPA should clarify that only a complete application, as determined under state administrative law, triggers the waiver period.

to EPA's prior guidance documents have an established record of completing their administrative review of section 401 requests in a timely manner. For example, of the more than 4,000 requests received by the New York DEC, the vast majority are issued in under 60 days. Attachment E, at 114. Moreover, many state administrative procedures include provisions for the timely processing of permit applications. *See, e.g.*, NY Environmental Conservation Law § 70-0109. And applicants concerned with a state agency's compliance with state procedures regarding whether a complete application has been submitted would retain the authority to bring an action in state court challenging the agency's compliance with state law. *See Alcoa Power Generating Inc. v. Fed. Energy Regulatory Comm'n*, 643 F.3d 963, 971 (D.C. Cir. 2011); *United States v. Marathon Development Corp.*, 867 F.2d 96, 102 (1st Cir. 1989). In sum, in the final rule EPA should clarify that only a complete application can enable the full state review contemplated by section 401.

**2. EPA Should Clarify That Submission of a "Draft Permit" Is Not a Substitute for Compliance with State Administrative Procedures and Submission of Information Required by State Law.**

The States appreciate EPA's intent behind requiring applicants to provide draft federal permits and relevant water quality data. *See* proposed § 121.5(a). However, we are concerned that the requirement to submit a draft permit could be construed by applicants as an excuse to delay applying for a water quality certification. State review of section 401 requests typically occurs simultaneously with federal agency review of the relevant federal permit. This simultaneous review allows for open communications between the federal agency, state agency, and applicant, and prevents an applicant from progressing too far in development of a project proposal that may not be approvable by the state. State section 401 review is not merely a "rubber stamp" (or "conditional rubber stamp") for a project that would otherwise be approved

by the relevant federal agency: rather, the state must "conduct its own review" of a projects' "likely effects" and "whether those effects would comply with the State's water quality standards." *Constitution Pipeline Co.*, 868 F.3d at 101. Submission of a draft permit in lieu of a complete certification request could improperly render state review an afterthought. If the draft permit requirement is retained, we ask that EPA make clear that this is not an excuse to delay coordination with the certifying agency. If this requirement is removed, EPA should require applicants to identify the specific federal permit they are pursuing for the project.

Moreover, a draft permit, standing alone, does not necessarily provide all the information required for meaningful state review of section 401 requests. For example, some state administrative procedures require an applicant to provide an environmental review document pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321, et seq., or equivalent state environmental statutes, as part of an application for a section 401 certification. *See* N.Y. Environmental Conservation Law § 70-0105(2); *SWRCB v. FERC*, 2022 WL 3094576, at *3 (describing California's requirement for an environmental review.). A complete environmental review is "a critical part of the information" states need to be able to fully "evaluate [an applicant's] certification request." *NCDEQ v. FERC*, 3 F.4th at 674. Considering that the scope of project activities and impact to state water resources may change during and in response to the environmental review process, it also does not make sense for a state agency to be forced to review (and possibly act) on a section 401 request while the environmental review is ongoing. The proposed rule does not indicate whether states may require environmental review documents prior to the commencement of the reasonable period of time. The final rule should clarify that states may require such materials.

The final rule should also clarify that, regardless of whether a draft permit has been prepared, state agencies may require the completion of any relevant federal studies or applications prior to the commencement of state section 401 review. For example, the certifying authority may need to know the extent of the Waters of the United States affected by the activity subject to the section 401 request. There is no reason to have the reasonable period of time commence before the jurisdictional determinations from the federal agency is made, which will only result in a rushed state review or an unnecessary denial of a section 401 request. Likewise, in some cases, a request for a section 401 request might not include the information that the federal agency requires for a complete application that would trigger the 401 requirement in the first place. *See* 33 CFR §§ 325.1(d), 325.3(a) (requirements for a complete 404 application to the Army Corps). It does not make sense to start the reasonable period of time for state review before the applicant has even submitted necessary information required by the federal agency.

Notably, EPA can avoid the need to define the types of information that may be necessary for meaningful state review by requiring applicants to provide a complete application pursuant to state administrative procedures, as recommended above.

### 3. EPA's Proposal to Require that the Contents of A "Request" for Certification Be Defined by "Regulation" Is Too Restrictive.

We appreciate EPA's proposal to increase states' flexibility to define the contents of requests for certification, but note that the requirement in the Proposed Rule that all contents be defined "in regulation" is too restrictive. *See* proposed § 121.5(b). Not all requirements for state administrative applications are spelled out in formally promulgated regulations. Some certifying authorities have contents dictated by statute, *e.g.*, N.Y. Environmental Conservation Law § 70-0105(2), and some by policy documents, *see* Ca. State Water Resources Control Bd., State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the

State;[17] Vt. Agency of Natural Resources, Section 401 Water Quality Certification Practice (Oct. 22, 2014).[18] EPA should make clear in the final rule that applicants must comply with applicable state administrative procedures, wherever set forth, in submitting section 401 requests.

EPA should also clarify that, in appropriate circumstances, a state may waive requirements for the contents of a request for certification, or may act in the absence of a formal request. This can occur, for example, when an applicant unilaterally withdraws a section 401 request in an attempt to avoid an adverse decision, *e.g.*, *Turlock Irrigation Dist.*, 36 F.4th at 1182, or when an applicant requires expedited review in order to proceed with a project in an emergency situation. Again, states are in the best position to determine when such unusual procedures may be required.

### C. Assuming EPA Has Some Authority to Provide for Some State Administrative Procedures, the Undersigned States Support Inclusion of Procedures for Modification of Section 401 Certifications.

The States support the inclusion of an option for modifications to certifications, but do not support the limitations on modifications in the Proposed Rule. *See* proposed § 121.10. The lack of procedure for modifications of certifications in the 2020 Rule has been a source of great difficulty for state agencies, which have had to issue entirely new section 401 certifications any time the scope of a certificated project changes. Attachment E, at 117. However, there are several areas in which EPA should adjust its proposed approach to certification modifications.

First, the States oppose a requirement for federal review and approval of modification language, *see* proposed § 121.10(b), because section 401 certifications are essentially state permits and are not subject to federal review or veto. *See* Section V, *infra*.

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[17] *Available at* https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html.

[18] *Available at* https://dec.vermont.gov/sites/dec/files/wsm/rivers/docs/Section401_WQ_Cert_Practice.pdf.

Second, the States do not believe a time limit is necessary for modifications, *see* 87 Fed. Reg. at 35,362, as some federal permits subject to certification are in effect for many years, and changes requiring modification could occur at any time. The Clean Water Act recognizes that the needs and conditions of water bodies change, and sets forth requirements for periodic review and updates for both discharge permits and for planning activities, like water quality standard setting and Total Maximum Daily Loads. But hydropower licenses are issued for up to 50 years, and natural gas pipeline certifications remain in effect indefinitely. Accordingly, limiting state authority to modify section 401 certifications at some point in the future would prevent states from re-assessing a project's impacts in light of changed conditions over the lifetime of a long license.

Third, EPA should acknowledge that certifications or waivers may be modified or revoked as required by decisions on judicial review, including decisions in administrative appeals that must be exhausted before seeking judicial review. Otherwise, judicial review in state court would be meaningless, inconsistent with the respect for state law and state institutions embodied in section 401.

## V. FEDERAL AGENCY REVIEW

The States are generally supportive of EPA's attempt to limit federal review of state certification decisions to "ensuring decisions will meet certain facial statutory requirements." 87 Fed. Reg. at 35,355. However, the requirement for certifying agencies to provide proof of public notice, proposed 40 C.F.R. § 121.9(a)(3), goes beyond the facial requirements of section 401. Our States would oppose any additional requirements for federal review of state certification decisions.

### A. The States Agree That Federal Authority to Review State Section 401 Decisions Is Limited to Ensuring Facial Compliance with the Statute.

One of the most problematic aspects of the 2020 Rule was its provision allowing federal agencies to veto state certification decisions based on alleged noncompliance with the 2020 Rule. *See* 40 C.F.R. § 121.9. Notably, the 2020 Rule allows federal permitting or licensing agencies to deem certification waived for various reasons, including potentially minor procedural concerns. *Id*. In practice, this opens the door for the federal permitting or licensing agency to inappropriately substitute its own judgment regarding a certification condition for that of the certifying authority. *Id.* This provision resulted in federal agencies finding inadvertent waivers of state certification authority as well as the U.S. Army Corps' assertion that it would "decline to rely" on certain state certification that included allegedly improper "re-opener" clauses. *See* Attachment E, at 28, 65-66. This approach is not only bad policy (as state water quality can be permanently degraded when waivers of state certifications are found following minor or technical mistakes), it is unlawful and should not be included in EPA's final rule.

The plain language of section 401 provides that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived." 33 U.S.C. § 1341(a)(1). Even if this direct command could be subject to more than one interpretation, the following sentence leaves no doubt: "No license or permit shall be granted if certification has been denied by the State[.]" *Id.* Thus, the plain and unambiguous language of the statute gives states the final authority to make decisions on certification requests, precluding review of timely state certification denials by federal agencies.

Courts have consistently recognized that section 401 "mean[s] exactly what it says: that *no* license or permit . . . shall be granted if the state has denied certification." *Marathon Development Corp.*, 867 F.2d at 101. A state certifying agency may deny certification because a

project will not comply with state water quality standards and "effectively veto[]" that project. *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), *cert. denied* 555 U.S. 1046 (2008). In short, in enacting section 401 Congress "intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating v. Fed. Energy Regulatory Comm'n*, 927 F.2d 616, 622 (D.C. Cir. 1991).

Likewise, section 401 does not authorize federal agencies to reject or second guess conditions included in water quality certifications. Section 401(d) provides that any state certification "*shall* become a condition on any Federal license or permit." 33 U.S.C. § 1341(d) (emphasis added). "This language leaves no room for interpretation. 'Shall' is an unambiguously mandatory term, meaning, as courts have uniformly held, that state conditions *must* be conditions" of the federal permit. *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 645-46 (4th Cir. 2018). Indeed, "[e]very Circuit to address this provision has concluded that 'a federal licensing agency lacks authority to reject [state section 401 certification] conditions in a federal permit.'" *Id.* at 646 (quoting *Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n*, 545 F.3d 1207, 1218 (9th Cir. 2008)); *see also Am. Rivers, Inc. v. Fed. Energy Regulatory Comm'n*, 129 F.3d 99, 107 (2d Cir. 1997) (rejecting FERC's argument that it possessed authority to determine whether state conditions were within the scope of section 401, noting that statutory language of 401(d) is "mandatory" and "unequivocal"). In short, under section 401 the federal agencies' "role . . . is limited to awaiting and then deferring to the final decision of the state." *City of Tacoma*, 460 F.2d at 68.

Importantly, this does not leave applicants without recourse, because "[a]ny defect in a state's section 401 water quality certification can be redressed" in state court. *Marathon Development Corp.*, 867 F.2d at 102; *see also Alcoa Power Generating Inc.*, 643 F.3d at 971 ("a

State's decision on a request for section 401 certification is generally reviewable only in State court."). State section 401 decisions "turn[] on questions of substantive environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence." *Keating*, 927 F.2d at 622-23. Accordingly, the States support EPA's goal of limiting federal review of water quality certifications to facial compliance with section 401.

### B. In Order to Limit Federal Review to Facial Compliance with Section 401, EPA Should Require That States Affirm They Have Complied with Their Public Notice Requirements, Rather Than Provide Proof of Public Notice.

The Proposed Rule requiers that state water quality agencies demonstrate to federal agencies that "[t]he certifying authority provided public notice on the request for certification." Proposed 40 C.F.R. § 121.9(a)(3). In this respect, the Proposed Rule exceeds what is required by section 401 and is therefore inconsistent with EPA's intent to limit federal review to "ensuring decisions will meet certain facial statutory requirements." 87 Fed. Reg. at 35,355. In the final rule, EPA should require that states affirm that they have complied with their public notice procedures.

Section 401(a)(1) requires states to "establish procedures for public notice in the case of all applications for certification," and for public hearings in appropriate cases. 33 U.S.C. § 1341(a)(1). However, establishing generally applicable procedures for public notice and, as appropriate, public hearings is not necessarily the same as providing public notice on every application. For example, New York has regulations that apply to all individual section 401 certification requests, but only require public notice on requests for "major projects." *See* 6 N.Y.C.R.R. § 621.7(a), (c). For applications for "minor projects," public notice and comment procedures "may be required . . . at the discretion of the department." *Id.* 621.7(g). Considering

that New York generally receives more than 4,000 requests for water quality certifications each year, this bifurcated public notice process is important for improving agency efficiency and has been upheld by state courts. *See Matter of Plante v. NYSDEC*, 277 A.D.2d 639, 642 (3d Dep't 2000); *Bigar v. Heller*, 91 A.D.2d 567, 567 (2d Dep't 1983). EPA should allow states to affirm compliance with their own public notice requirements, rather than mandate demonstration of public notice on all section 401 requests.

Nor does *City of Tacoma*, 460 F.3d 53, require proof of public notice for every section 401 certification. That case held that FERC was required "to obtain some minimal confirmation" that states have "compl[ied] with their public notice procedures, . . . at least in a case where compliance has been called into question." 460 F.3d at 68. But the court also warned against requiring federal agencies to "resolve disputes relating to whether the state's public notice procedures have been satisfied," instead merely holding that "where public notice has been called into question" the federal agency "has a role to play in verifying compliance with state public notice procedures at least to the extent of obtaining an assertion of compliance from the relevant state agency." *Id. City of Tacoma* thus authorizes federal agencies to obtain proof of compliance with state public notice procedures if such compliance has been questioned, but not to affirmatively require states to provide proof of public notice of every certification request.

As an alternative to the current requirement for a certifying authority to demonstrate that it "provided public notice," a better requirement would be for the certifying authority to affirm that it "complied with applicable public notice procedures," leaving it to the states to determine public notice requirements.

**CONCLUSION**

The Proposed Rule is a vast improvement over the unlawful 2020 Rule, and the undersigned States appreciate and support EPA's efforts to restore the federal-state balance under the Clean Water Act. However, the undersigned States ask EPA to include the additional flexibilities and clarifications described above in order to ensure that the federal-state balance is truly restored.

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