NATIONAL WILDLIFE FEDERTION
THEODORE ROOSEVELT CONSERVATION PARTNERSHIP · TROUT UNLIMITED

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Submitted electronically via regulations.gov

Re: SECTION 401 CERTIFICATION PROPOSED RULE DOCKET ID NO. EPA-HQ-OW-2019-0405

On Friday, August 8, 2019, the U.S. Environmental Protection Agency (EPA) announced plans to issue a proposed rule revising regulations related to Section 401 of the Clean Water Act (CWA or the Act), a tool used by states and tribes (when this comment letter references states, it also intends to include tribes as well where that is legally appropriate) to protect state and tribal resources from the impacts of federally permitted development.[1] The proposed rule would modify existing practices to dramatically limit the authority of states and tribes to protect their water resources, including important aquatic habitats such as wetlands and coldwater resources. The National Wildlife Federation (NWF), Theodore Roosevelt Conservation Partnership (TRCP), and Trout Unlimited (TU) strongly oppose these proposed changes.

NWF, TRCP, and TU represent millions of Americans who fish, hunt, recreate, wildlife watch, and otherwise enjoy the tremendous water resources and aquatic habitats of this nation. These organizations and their chapters and affiliated organizations across the country have decades of experience advocating for clean waters and healthy aquatic habitats so wildlife and communities can thrive. As such, NWF, TRCP, and TU have developed expertise and experience with the implementation and enforcement of Section 401 as a vital tool for the protection of water resources and the wildlife and people that depend on these resources.

Hunters and anglers understand that they need clean water in order to pursue their hunting and fishing passions. Every year, over 49 million Americans head into the field to hunt or fish, and the hunting and fishing industries in the United States directly employ 1.3 million Americans. The economic benefits of hunting and fishing – which total $200 billion a year – are especially pronounced in rural areas, where money brought in during fishing and hunting seasons can be enough to keep small businesses operational for the entire year.

In 2018, TRCP conducted a poll on water issues which found:

[1] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (proposed Aug. 22, 2019) (to be codified 40 C.F.R. Part 121).

- 92 percent of sportsmen and women want the federal government to strengthen or maintain current standards for clean water protections.
- 93 percent of hunters and anglers believe that the Clean Water Act has been a positive thing for our country.

CWA Section 401 gives states and tribes a critical say in ensuring that federally licensed or permitted activities that discharge into waters of the state comply with water quality standards and applicable state laws that protect water resources. In practice, Section 401 gives states a vital role in protecting waters from impacts of projects that could have a significant effect on waters and aquatic habitat such as: dams and diversions; interstate energy and infrastructure projects, including pipelines, hydropower projects, and roads and other development. Unless the state issues a 401 certification or waives certification, a federal agency may not issue a permit for the proposed activity.[2] As importantly, a state may condition such certification to ensure that state waters are protected and those conditions must be followed.

The power of states to reject 401 applications, or to place strong protective conditions on projects as a part of approving a 401 certification, including minimum instream flows, fish passage requirements, and sediment and temperature control conditions, has been instrumental in carrying out the goals of the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Carefully crafted certifications help ensure the maintenance of the chemical, physical and biological conditions for cold-water fish species like trout and salmon need to thrive, as well as that projects do not cut off access to or degrade fish and wildlife habitat, and that protections are in place to eliminate, minimize, or mitigate serious risks to water quality and habitat that a project might cause, such as spills or erosion.

This is not about stopping development, although in rare cases that may be the ultimate outcome, rather it is about making sure that development is done right. The 401 certification process gives states a voice in federal project reviews and ensures that developers take steps to prevent significant, long-term impacts on fisheries. Often, the 401 certification process is the best and only opportunity to ensure that such projects will be permitted and designed in a manner that avoids the impairment of streams and rivers, and that any impact is adequately mitigated.

For example, in the context of hydropower relicensing, the 401 certification process has helped to advance several favorable, widely-supported settlements resulting in new project licenses with conditions included to protect state and tribal resources. Agreements protecting major California watersheds, such as the Sacramento and San Joaquin, were secured, in part, due to Section 401certification. In Maine, the Section 401 program was a critical tool during the relicensing process for hydropower operations on the Penobscot River. The Section 401 program allowed the state to protect its water resources, pushing parties to develop creative solutions that support hydropower energy development while also protecting water quality. The result was one of the

[2] The most common licenses or permits that may be subject to Section 401 certification are by far are CWA Section 404 permits for the discharge of dredged or fill material, and Rivers and Harbors Act Sections 9 and 10 permits issued by the Corps. U.S. ENVTL. PROT. AGENCY, ECONOMIC ANALYSIS FOR THE PROPOSED CLEAN WATER ACT SECTION 401 RULEMAKING FROM THE EPA, 6-7 (2019). Next would be Section 402 NDPES permits where EPA rather than a state or tribe issues the permit. The next most common class of projects needing certification are FERC licensed hydropower and interstate natural gas pipeline projects.

greatest watershed restoration projects in the country, with 1,000 miles of habitat opened to use by Atlantic salmon and other fish, while all of the hydropower lost to the removal of two obsolete dams was replaced by upgrades at other dams in the watershed.

This state certification process rarely results in the denial or undue delay of projects. As EPA's Economic Analysis shows, the vast majority of certifications (about 60,000 annually of the roughly 65,000 certification requests) are for general permits and licenses, where a state or tribe may propose conditions but not denial, and rarely take even six months to issue. In fact, the overwhelming majority of Section 401 certifications involve discharges of dredged and fill material by the Corps of Engineers where the process works efficiently and smoothly. Pipeline and large energy infrastructure projects – a major concern of this proposed rule – represent a mere handful of Section 401 certifications. Yet, over the last few years, a small number of these high-profile energy infrastructure projects have been denied by states who have appropriately exercised their Section 401 authority to protect state waters from the risks of these projects.

Executive Order 13868 (April 10, 2019), entitled "Promoting Energy Infrastructure and Economic Growth" directed EPA to propose this rule. The Executive Order instructed EPA to do the following:

(1) Issue guidance for federal permitting agencies and state and authorized tribal authorities to "modernize previous guidance" and clarify existing CWA Section 401 requirements; and

(2) Propose new rules modernizing the agency's CWA Section 401 implementing regulations by August 8, 2019.

The proposed rule, like the guidance EPA issued in June, proposes restrictions on state and tribal authority to condition Section 401 permits.[3] The EPA rulemaking would codify this guidance, despite significant comments and concerns raised by states and tribes and other stakeholders in response to the guidance. Because the guidance suffers from the same legal flaws in the proposed rule, EPA must also withdraw the guidance, regardless of how it proceeds here.

This proposed rule is hardly the first attempt by the current Administration to dramatically weaken the ability of the Clean Water Act to protect waters and aquatic habitat. Specifically, a recently proposed "Waters of the U.S." rulemaking would eliminate federal protection of pollution into many headwater streams and wetlands.[4] Curiously, while the dramatic rollback of protections for headwater streams and wetlands touts the important role of states in protecting their state waters, this proposed rule makes little mention of such a role for states and seeks to undermine directly the ability to states to protect their waters. The common denominator of these two rulemaking efforts is the weakening of Clean Water Act protections and reducing effective oversight of development.

[3] *See generally* U.S. ENVTL. PROT. AGENCY, CLEAN WATER ACT SECTION 401 GUIDANCE FOR FEDERAL AGENCIES, STATES & AUTHORIZED TRIBES (2019).
[4] Revised Definition of "Waters of the United States," 84 Fed. Reg. 4151 (proposed Feb. 14, 2019).

Introduction

The EPA's proposed rule, "Updating Regulations on Water Quality Certification," undermines the states' ability to protect their waters under Section 401 of the CWA. The proposed regulations reverse 47 years of precedent based on the water protection goals of the CWA, EPA's interpretation of the statute, the statute's legislative history, and case law do not support this impermissible weakening of basic state safeguards designed to facilitate energy infrastructure development. The proposed rule, if promulgated, would unnecessarily put countless communities and species that depend on water quality and aquatic habitat at risk.

The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[5] The Act also seeks the elimination of "discharge of pollutants into the navigable waters"[6] and the achievement of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."[7] The Act seeks to achieve these goals through a strong cooperative federalism partnership that "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution" of their waters.[8]

Section 401 is central to this state-federal partnership, and a key instrument to achieving the water protection goals of the Act. The Section gives states broad authority to ensure that federally licensed and permitted projects protect state and tribal waters and comply with state law. Specifically, it provides that:

> 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, *shall* provide the licensing or permitting agency *a certification from the State* in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with [applicable water quality standards.] … *No license or permit shall be granted if certification has been denied by the State*, interstate agency, or the Administrator, as the case may be.[9]

The Act provides that state certification is to "set forth any effluent limitations and other limitations … [as] … necessary to assure that any [federally licensed or permitted project] will comply … [with both the Clean Water Act and] … with any other appropriate requirements of State law."[10]

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[5] 33 U.S.C. § 1251(a) (2019).
[6] 33 U.S.C. § 1251(a)(1).
[7] 33 U.S.C. § 1251(a)(2).
[8] 33 U.S.C. § 1251 (a)-(b).
[9] 33 U.S.C. § 1341(a)(1) (emphasis added).
[10] 33 U.S.C. § 1341(d).

The regulatory framework under the Clean Water Act is dependent on this delegation of primary responsibility to the states.[11] The Supreme Court has recognized that Section 401 is "[o]ne of the primary mechanisms through which the states may assert the broad authority" reserved to them over the stewardship of their waters.[12] Courts have repeatedly recognized the state's authority under Section 401 to be a broad one that extends beyond – rather than is constrained by – federal jurisdiction. As Justice Stevens explained: "[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. In fact, the Act explicitly recognizes States' ability to impose stricter standards."[13]

In establishing the Clean Water Act, Congress recognized that states and tribes have broad authority to protect their waters and aquatic habitat. This broad authority has been reinforced through decades of administrative practice and judicial precedent.

The proposed rule takes aim at this long-standing, judicially and statutorily supported authority, conflicting with the fundamental goals of the Act. Indeed, it does not hide this fact. As a primary reason for proposing the rule, EPA cites to Executive Order 13868, described above. This order does not relate to water quality protection. Instead, the order seeks "to encourage greater investment in energy infrastructure in the United States by promoting efficient federal permitting processes and reducing regulatory uncertainty."[14] In the explanatory text for the proposed rule, EPA offers that, per the Executive Order, Section 401 is in need of new regulations because it has been identified "as one source of confusion and uncertainty hindering the development of energy infrastructure."[15]

The proposed rule has three main effects, all of which weaken states' ability to protect their waters:

- **First, it impermissibly restricts states' and tribes' decision making process by limiting conditions that they can place on projects** to conditions that relate to the discharge and not the activity as a whole – a position that has been rejected by multiple courts, including the Supreme Court.[16]
- **Second, the proposed rule illegally gives the federal government the authority to overrule a state's or tribe's certification**. Federal agencies, often with no or little expertise regarding water quality protection, would now have the ability to override state 401 certifications they view as inconsistent with the new rule. Furthermore, when such

[11] *Keating v. Fed. Energy Rg. Comm'n*, 927 F.2d 616, 622 (D.C. Cir. 1991).
[12] *Id*.
[13] *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 723 (1994) (Stevens, J., concurring) (citing 33 U.S.C. § 1311(b)(1)(C)).
[14] Laurie Barr, *EPA Updating Regulations on Water Quality Certification*, FACEBOOK (Oct. 18, 2019), https://www.facebook.com/notes/laurie-barr/epa-updating-regulations-on-water-quality-certification/2682436075101336/
[15] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,081-82 (proposed Aug. 22, 2019) (to be codified 40 C.F.R. Part 121).
[16] *See* 511 U.S. at 712.

an override occurs, states or tribes would not have the opportunity to revise, modify or contest these non-expert agency decisions.

- **Third, it allows for the placement of unreasonable time limits** on the statutorily-defined period in which states must act on a Section 401 permit application and the information they have to base a decision on. Under the proposed rule, the time frame for agency review would be constrained to one year or less (less time can be set by the federal agencies). Moreover, the time for review starts at the date of a request from the applicant, no matter how incomplete the application is or how much additional information needed for states and tribes to make their decisions. The proposed rule would not allow extensions of time for additional study, and no opportunity for withdrawal and resubmit. And any denial is without prejudice (placing the burden on states to deal with applicants who repeatedly abuse the process).

For the reasons articulated below, these changes and other flaws in the proposed rule defy the plain language of Section 401, contradict the purpose of the statute, and are arbitrary and capricious. As described below, the proposed rule also violates the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).

The Proposed Rule Ignores the Clean Water Act's Cooperative Federalism Structure.

The proposed rule must first be placed into the context of the CWA as an exercise of cooperative federalism. It undermines this pillar of the Act in its attempt to constrain state water quality certification authority in order to promote energy infrastructure development.

In order to give states a strong role in protecting their waters, the CWA gives primary authority for certain actions to states and tribes and also preserves many existing state powers. For example, Congress expressly recognized the close relationship between CWA programs and state authority over land and water. Section 101(b) of the Act[17] acknowledges and preserves state authorities over both land and water. That Congress uses the phrase "land and water resources" in Section 101(b) is an explicit acknowledgment of the deep inter-relationship between regulating land, including, for example, riparian areas, and regulating water to protect and restore its chemical, physical and biological integrity.[18] Interestingly, EPA and the U.S. Corps of Engineers cited Section 101(b) sixteen times in the preamble to their proposed dramatic redefinition of the phrase "waters of the U.S." earlier this year – often to make the point that states can regulate on their own what the federal agencies choose not to protect. By contrast,

[17] *See* 33 U.S.C. §1351(b) (2019).

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

[18] 33 U.S.C. § 1351(a).

EPA fails to cite Section 101(b) even once in this proposed rule wherein the agency is trying to limit the same state authority to protect rivers and streams.[19]

The U.S. Supreme Court has described the CWA's cooperative federalism in *Arkansas v. Oklahoma*: "The Clean Water Act anticipates a partnership between the states and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[20] As cited above, Justice Stevens explained in *PUD No. 1*, "[T]he Act explicitly recognizes States' ability to impose stricter standards [than federal law]."[21] The Act also includes Section 510, a parallel provision, in its enforcement section,[22] which states that:

> Nothing in this chapter shall (1) preclude or deny the right of any state … to adopt or enforce (A) any standard or limitation respecting discharges of pollutants or (B) any requirement respecting control or abatement of pollution; except [one that] is less stringent than the effluent limitation or other limitation, effluent standard, prohibition, pretreatment or standard of performance [set] under this chapter.

The theme of broad authority of states to protect their land and waters has echoed throughout CWA jurisprudence. For example, in *Solid Waste Agency of Northern Cook County. v. U.S. Corps of Engineers*, the U.S. Supreme Court five-justice majority overturned EPA's and the Corps' "Migratory Bird Rule" because it might significantly impinge on states' traditional and primary power over land and water use.[23] The Court cited Section 101(b), saying, "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use … of land and water resources …'"[24]

Section 101(b) is viewed as so central to the Act that justices have argued about whose interpretation of other CWA provisions is most consistent with it. In *Rapanos v. United States,*[25] the plurality contended that its definition of "waters of the United States" was the proposed one because it was consistent with §101(b):

> This statement of policy was included in the Act as enacted in 1972, [so] plainly referred to something beyond the subsequently added state administration [of a 404] program. But the expansive theory advanced by the Corps, rather than "preserv[ing] the primary rights and responsibilities of the States," would have brought virtually all "plan[ning of] the development and use . . . of land and water resources" by the States under federal control.[26]

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[19] Updating Regulations on Water Quality Certification, 84 Fed. Reg. *et. seq.*
[20] *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (citing 33 U.S.C. 1251(a)).
[21] *See* 511 U.S. at 723 (1994) (Stevens, J., concurring).
[22] 33 U.S.C. §1370 (2019).
[23] *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001).
[24] *Id.* at 174.
[25] *Rapanos v. United States*, 547 U.S. 715 (2006).
[26] *Id.* at 737.

> **…** [C]lean water is not the *only* purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions.[27]

Assistant EPA Administrator for Water, David Ross, testifying in September of this year before the House Committee on Transportation and Infrastructure, Subcommittee on Water, acknowledged that states have the best understanding of their water resources. Therefore, it is important to provide states with sufficient resources so that the federal and state agencies can manage the nation's water resources cooperatively.[28] He also specifically recognized that states can and should regulate what is important to them in terms of their water resources.[29]

Despite the centrality of cooperative federalism to the Act and the importance of a strong state role of its waters and land, this proposed rule seeks to turn that structure on its head. Instead, and as described below, the proposed rule would improperly bind and constrain states and tribes in a manner that both substantively and procedurally impairs their ability to protect their waters effectively through the Section 401 certification process.[30]

EPA fails to provide a "reasoned explanation" for upending 47 years of precedent in a manner that ignores the statute's plain purpose and meaning.

Promoting Energy Infrastructure Development is not a Reasoned Explanation for the Proposed Rule.

Section 401 certification process confers the power to protect water quality to the states, territories, and authorized tribes – the certifying authorities. As noted above, Executive Order 13868, which spurred EPA to propose these rules, has increasing the energy infrastructure in the United States as its primary goal. Not surprisingly, given the purpose of the Executive Order, the proposed rule seeks to limit the states, territories, and tribes' authority to protect their land and waters through the 401 certification process with little regard for water protection. However,

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[27] 33 U.S.C. § 1251(b) (2019).

[28] *Hearing Before the Subcomm. On Water Resources and Environment*, 116th Cong. (2019) (statement of Assistant EPA Administrator for Water, David Ross).

[29] *Id.* In this regard, the CWA expressly directs EPA to provide states funding for prevention, reduction, and elimination of pollutants. *See*, 101(b) above, fn 1, as well as CWA § 206(a), 33 U.S.C. § 1256(a). In addition, CWA § 101(g) expressly preserves to the states their traditional authority to allocate their waters, while also directing federal agencies to "cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." 33 U.S.C. § 1251(g). The way courts have interpreted § 101(g) may also be a useful analogy to EPA's question in the proposed rule as to whether states certifications violate the dormant commerce clause by interfering with interstate commerce. Just like there's a difference with § 101(g) preservation of state water rights systems and the legitimate exercise of CWA permitting authority to protect and improve water quality, there's a difference between a state using 401 certification conditions to protect water quality and the federal government assuring a free flow of goods across state lines. Environmental conditions – and even occasional limitations on specific acts of commerce to protect public health and welfare – simply do not conflict with interstate commerce. If anything, ensuring that interstate commerce does not adversely affect public health strengthens the public's faith in commerce and government. Not all mines should be dug, nor dams built. If an activity is dangerous, it is equally dangerous whether it crosses state lines or not.

[30] EPA asks in the proposed rule whether it should force states to reconcile their different authorities. States having different rules is part of our federal system. Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,099 (proposed Aug. 22, 2019) (to be codified 40 C.F.R. Part 121). The danger of reconciliation in this context could be a race to the bottom which would not protect the nation's waters.

a policy to advance energy infrastructure does not justify overturning a rule that has, for nearly a half-century, allowed states, tribes, and federal agencies to partner in ways that advance the goals of the Clean Water Act.

Where Congress sets an agency's authority and "[w]here Congress has established a clear line, the agency cannot go beyond it…"[31] To determine whether an agency went beyond Congress's intent "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[32] "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[33] "[T]he new policy is permissible under the statute, [when] there are good reasons for it…."[34]

A good reason for an agency to adjust its interpretation of its delegated authority might be new factual findings that contradict a prior policy.[35] However, "[i]n all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements."[36] "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider [or] entirely failed to consider an important aspect of the problem…."[37]

As the Supreme Court stated, "[i]t would be arbitrary or capricious to ignore [prior policy]. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[38] In the proposed rule, EPA would brush aside 47 years of policy consistent with the Act's plain language and purpose to dramatically constrict states' and tribes' ability to protect water quality from federally licensed projects. As stated above, EPA's primary basis for this radical change is to effect an order designed to promote energy infrastructure, by eliminating regulations that protect water quality but may cause some entities "confusion and uncertainty hindering the development of energy infrastructure."[39]

This is not a reasoned explanation; it is a bald attempt to elevate an unrelated policy objective over the one prescribed to EPA by Congress. It provides no basis to sweep away 47 years of consistent policy application that is based on the statute's plain language and Supreme Court (and other courts) jurisprudence. Such a policy reversal without a reasoned explanation is

[31] *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).
[32] *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).
[33] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines, Inc*. v. *United States*, 371 U.S. 156, 168 (1962)).
[34] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).
[35] *Id.*
[36] 401 U.S. at 413-14 (citing 5 U.S.C. §§ 706 (2)(A), (B), (C), (D) (1964 ed., Supp. V)).
[37] 463 U.S. at 43.
[38] 556 U.S. at 515-16.
[39] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080, 44082 (proposed Aug. 22, 2019) (to be codified 40 C.F.R. Part 121).

impermissible. It falls outside the scope of the statute as EPA "relied on factors which Congress has not intended it to consider."[40]

The Economic Analysis Shows Section 401 is Not a Hindrance to Development.

The reason expressed in the Executive Order – that Section 401 places a hindrance on development – does not support EPA's own economic analysis. EPA failed to draw "a 'rational connection between the facts found and the choice made.'"[41] EPA's economic analysis shows that "denials are uncommon."[42] The analysis notes that seventeen states average zero denials per year and others deny projects rarely.[43] The economic analysis also cites data that the average processing time for certification was 132 days, and incomplete requests were the leading reason for delay.[44]

The analysis additionally shows that many projects don't even require individual-level review. For instance, over 95 percent of the Corps of Engineers CWA Section 404 permits are issued pursuant to general permits. This is important because most certifications are for Section 404 permits. As the economic analysis reports, states certify over 50,000 general and over 2,500 individual CWA Section 404 and River and Harbor Act permits annually. Meanwhile, states only issue certification for a total of 8,623 general and 1,905 individual permits or licenses of all other types per year.[45] Many states do not certify all or any projects issued under Section 404 general permits on a project by project basis.[46] Furthermore, for Section 402 permits, Section 401 review only comes into play when the EPA is the authority issuing the permit, a role EPA assumes in only three states (Massachusetts, New Hampshire, and New Mexico), seven United States territories, and some tribal areas.[47] This means that in 47 states, Section 401 certification cannot delay Section 402 permit issuance. Furthermore, Federal Energy Regulatory Commission (FERC) review of interstate gas pipelines and hydropower projects are also shown to be quite rare.[48]

What the economic analysis does suggest is that this proposed rule is impermissibly being driven due to a handful of energy projects where states exercised their Section 401 authority to protect water resources.[49] Clean Water Act safeguards do not prohibit industry and construction; rather, they help to ensure that development proceeds in a manner that avoids, minimizes, and mitigates impacts to water bodies. At best, it is both unwise and inappropriate to upend a well-crafted system of cooperative federalism that has given states and tribes power to protect aquatic habitat

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[40] 463 U.S. at 43.
[41] *Id.* (citing 371 U.S. at 168).
[42] U.S. ENVTL. PROT. AGENCY, ECONOMIC ANALYSIS FOR THE PROPOSED CLEAN WATER ACT SECTION 401 RULEMAKING FROM THE EPA, 6 (2019).
[43] *Id*.
[44] *Id*.
[45] *Id*. at 7 (demonstrating that counting general and individual permits under Clean Water Act Section 404 and the Rivers and Harbors Act, makes even more inadequate EPA's Economic Analysis for this proposed rule. Not only does it provide no estimate of economic impact, but the four case studies it presents each involve a FERC-licensed pipeline).
[46] *Id*. at 7-8.
[47] *Id*. at 8.
[48] *Id*. at 9.
[49] *Id*. at 11.

and waters for nearly a half-century due to frustration over a small number of recent controversial projects.

The economic analysis also looks solely at the negative economic impacts of a handful of proposed projects. It does not look at the economic impacts, positive or negative, of the vast universe of federal projects needing Section 401 certification, nor does it analyze any economic impacts from water quality degradation avoided. Water quality supports many local industries, has a direct tie to public health costs, and is a critical driver of the $887 billion outdoor economy.[50] This economy is responsible for over 7.5 million American jobs.[51] This also leads to substantial tax revenue, as the outdoor economy generates $65.3 billion and $59.2 billion for the federal and state governments, respectively.[52] These economic impacts are not properly examined.

A "Holistic" Reading of the Act does not Support the Proposed Rule.

EPA offers a weak attempt to justify this reversal based on the argument that EPA has never before taken a "holistic" approach to interpreting the statute. In reality, this characterization does not hold water. As detailed below, EPA's new "holistic" reading of the of Act contradicts the Supreme Court and every federal court to consider important questions regarding the implementation of Section 401, such as the scope of state authority over an activity and whether a federal permitting agency can ignore or override such a denial or condition.

Additionally, EPA has already spoken twice on the application of Section 401 in the broader context of the Act, both of which EPA cites in the proposed rule's preamble. In 1989, the EPA – then under another Republican administration – published a 73-page memo, which focused on wetlands, that acknowledges the vast power states have under Section 401. The memo states that Section 401 establishes an "operative federal/State program and it increases the role of States in decisions regarding the protection of natural resources."[53] Furthermore, it states that Section 401 "*gives States extremely broad authority to review proposed activities* in and/or affecting State waters (including wetlands) and, in effect, to deny or place conditions on federal permits or licenses that authorize such activities."[54] In *PUD No. 1*, the seven-member Supreme Court majority cited the handbook, which is consistent with the Clean Water Act. The proposed rule is not.

Second, is EPA's 45-page 2010 Handbook. While EPA suggests in the preamble that water quality standards (WQS) are the touchstone of the Clean Water Act, it ignored that WQS have both a technical and social component. As it previously recognized in the 2010 Handbook, "protection of the cultural or religious value of waters expressed in state or tribal law can also be relevant to a certification decision, even when not included as part of a water quality standard."[55]

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[50] OUTDOOR INDUSTRY ASSOCIATION, *The Outdoor Recreation Economy*, 5 (2017), https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf.
[51] *Id*. at 2.
[52] *Id*.
[53] U.S. ENVTL. PROT. AGENCY, WETLANDS AND 401 CERTIFICATION: OPPORTUNITIES AND GUIDELINES FOR STATES AND ELIGIBLE INDIAN TRIBES, 5 (1989).
[54] *Id*.
[55] *Id*. at 21.

This is consistent with the multi-faceted nature of water quality standards. While numeric criteria may be technical, there are social components to many designated uses and certainly to the analysis required pursuant to EPA's and the states' anti-degradation policies. An agricultural designated use is usually applied where there is an agricultural activity, just as recreation designations are typically applied where there are activities such as fishing, swimming, and boating. Arguments over the appropriate recreation designation often involve evidence of fishable/swimmable – or something less.[56]

EPA's proposed rules fall outside the scope of Chevron *deference.*

EPA cites *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) to justify the proposed rule changes.[57] Although *Chevron* clearly grants an administrative agency latitude, such latitude is not absolute.[58] *Chevron* uses a two-part test.[59] First – and foremost – if the language of a statute is plain, then the agency must do what the plain language requires.[60] Only if Congress has not addressed the issue directly might an agency interpretation receive deference.[61] The court serves as a check on agency interpretation and determines whether such interpretation is "based on a permissible construction of the statute."[62] An impermissible construction, by contrast, is "arbitrary, capricious, or manifestly contrary to the statute."[63]

Section 401 of the CWA contains plain and unambiguous language and EPA is bound to such language.[64] The statute grants states and tribes the authority to grant, condition, deny, or waive water quality certifications. It prohibits a federal agency from issuing a license or permit for activities that may result in a discharge to the Nation's waters prior to the issuance of a 401 certification by the authorized certification authority unless the certifying authority waives its ability to issue the permit.[65] Also, the certifying authority can add "any effluent limitations and other limitations, and monitoring requirements" to assure compliance with the Act.[66] Finally, the statute does not provide for federal agency review or change to a state or tribal certification.

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[56] The State of Colorado's recreation use classifications distinguish the level of protection for Recreation Class 1 waters, which are safe for contact sports that may result in ingestion like swimming and rafting, from Reclamation Class 2 waters, which get a lesser level of protection, because the only known recreational activities involve no more than wading. 5 CCR 1008-31.

[57] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,092 (proposed Aug. 22, 2019) (to be codified 40 C.F.R. Part 121).

[58] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984); *see also Ethyl Corp. v. EPA*, 541 F.2d 1, 34-35 (D.C. Cir. 1976) ("This is not to say, however, that [the court] must rubber stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was 'based on consideration of the relevant factors.' Moreover, it must engage in a 'substantial inquiry' into the facts, one that is 'searching and careful.'").

[59] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984).

[60] 467 U.S. at 842.

[61] *Id*. at 843.

[62] *Id*.

[63] *Id*. at 844.

[64] *See Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("We start, of course, with the statutory text, and procedd from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.").

[65] 33 U.S.C. § 1341(a)(1) (2019).

[66] 33 U.S.C. § 1341(d) (2019).

In this proposed rule, by contrast, EPA would strip the states of their specifically prescribed authority, a clear departure from Congressional intent. Even if one were to argue that the CWA's language was not direct, the interpretation is still arbitrary and capricious. The statute speaks to broad state power and the protection of the nation's waterways. EPA, as discussed above, fails to articulate a purpose for this rule that is consistent with the purpose and goals of the Act, or a purpose supported by the facts. To promulgate this proposed rule on such bases would be arbitrary and capricious.

The Proposed Rule Would Illegally Limit the Scope of 401 Certification Conditions.

The Proposed Rule Would Impermissibly Limit State and Tribal Conditions to the Discharge as Opposed to the Activity.

The proposed rule's Section 121.3 would illegally limit conditions states can place on federally licensed and permitted projects to "EPA-approved state CWA regulatory program provisions" associated with the discharge, not the broader activity as a whole. This would radically curtail current practice – which the Supreme Court has upheld – and dramatically limit states' power to protect their waters from federal projects that threaten water quality and aquatic habitat.

The Supreme Court in *PUD No. 1* interpreted the unambiguous language of Section 401 to allow states and tribes to apply conditions to a licensed or permitted activity as a whole, rejecting a dissenting view that states and tribes could only apply such conditions to a discharge.[67] Other commenters address in detail why EPA's reliance on *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) does not give it a reason to ignore Supreme Court precedent (see, e.g., comments of Southern Environmental Law Center et al.). Just as importantly, EPA conveniently ignores that the language of Section 401 is not ambiguous; it gives states clear authority to regulate activities, not just discharges. As the majority recognized in *PUD No. 1*, the CWA's use of the term "discharge of a pollutant" creates a mere "threshold condition" for state certification, not a limitation.[68] Moreover, Section 401(a) does not even require an actual discharge; rather the statute triggers certification when a discharge "may result." It does not follow that Congress intended to limit state authority to an action that Congress did not even require to be present.

While Section 401(a) sets a threshold condition for regulation, Section 401(d) makes clear that conditions can apply to the applicant – not just the discharge. As the Supreme Court stated in *PUD No. 1*, it "expands the State's authority to impose conditions on the certification of a project" that expand beyond the threshold "discharge."[69] The Court went on to conclude that Section 401(d) "authoriz[es] additional conditions and limitations on the activity as whole once the threshold question, the existence of a discharge, is satisfied."[70] As such, a state may "impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law.'"[71]

[67] *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 713-14 (1994).
[68] *Id*. at 711-12.
[69] *Id*. at 711.
[70] *Id*. at 712.
[71] *Id*. at 711.

Section 121.1 of the proposed rule seeks to further illegally restrict state and tribal certification authority by defining "discharge" to mean "a discharge from a point source into navigable waters." The Supreme Court, in *S.D. Warren,* already spoke to this issue and found that a "discharge" for the purposes of Section 401 authority is broader than a "discharge of pollutants," a separate statutorily defined term with different meaning and applicable to different implementing sections of the Act, primarily Sections 402 and 404.[72] In *S. D. Warren*, the Court ruled a dam that discharges water, which would not be a pollutant under the Clean Water Act, still triggers a 401 certification because Congress did not mean "discharge" for the purposes of Section 401 to be limited to "discharge of a pollutant."[73] This is consistent with the statutory language, where Congress did not qualify "discharges" as "*point source* discharges." Section 502(12) of the Act defines a 'discharge' as including discharges of one or more pollutants. Given basic precepts of statutory construction, Congress by using the word "include," did not intend to limit the term "discharge" solely to point source discharges.[74]

In the context of Section 401 authority, this has substantial consequences as significant projects affecting water resources and dependent species, such as dam re-licensing under FERC, often result in a discharge, but not a discharge of a pollutant. EPA cannot re-write the statute, ignore the ruling of the Supreme Court in *S.D. Warren*, and wipe away a critical role for states and tribes in certain federal licensing and permitting processes via this proposed rule. Yet, that is precisely what the agency is proposing to do.

States and tribes have placed conditions on an activity as a whole as a critical tool for protecting state waters and lands from the impacts of federally permitted and licensed projects. For instance, for Section 404 permits, such conditions reflect states' attempts to conform permits to EPA's Section 404(b)(1) guidelines. Examples include a 2001 Colorado certification for the Arapahoe Basin Ski Area where the applicant agreed to pay $15,000 to fund the cleanup of an abandoned mine hot spot elsewhere in the watershed. EPA also imposed a condition in a Section 402 permit for a mine in Arizona that the applicant clean up an upstream abandoned mine.[75] In that case, Arizona only provided its certification after EPA added two conditions to the draft Section 402 permit, requiring the applicant: (1) to make additional groundwater discharges that would augment Pinto Creek stream flows, and (2) to remediate sources of copper loading from an upstream inactive mine.

The Proposed Limitation Seeks to Improperly Limit State and Tribal Conditions to those Based on EPA-approved Water Quality Standards.

The proposed limitation to EPA-approved water quality standards would bar state or tribal certification conditions necessary to protect wetlands and many other "special aquatic sites" like the riffle-pool complexes that healthy trout fisheries need. This result would occur because only about half of the states have adopted water quality standards – criteria or use designations – for wetlands (or other special aquatic sites). This is especially problematic because, as noted in the

[72] *S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 375-76 (2006).
[73] *Id.* at 383-85.
[74] 33 U.S.C.S. § 1362(12) (2019).
[75] See, *Friends of Pinto Creek v USEPA* 504 F3 1007 (9th Cir 2007).

economic analysis, the vast majority of Section 401 certifications are for Section 404 permits, which condition the discharge of dredged and fill materials to rivers, streams, and wetlands.

The limitation to EPA-approved water quality standards could also bar many conditions related to sediment and erosion control. These are needed to protect waters from construction site non-point source runoff that may result in exceedances of turbidity or salinity (often stated as "total dissolved solids" or TDS) standards. In some cases, states have entirely separate statutory schemes for sediment and erosion control that are not part of water quality statutes. Therefore, they would not have been submitted to EPA for approval. An example is Georgia's Erosion and Sedimentation Act, cited in EPA's 2010 Section 401 Handbook, through which the state imposes conditions related to buffer integrity, construction and post-construction stormwater management, and the adequacy of mitigation.

In addition, disallowing conditions beyond "EPA-approved state CWA regulatory program provisions" is likely to lead to results that are not only less consistent with the goals of the Clean Water Act, but it will also create a potential expense for applicants.[76] This is because states may be more likely to outright deny certifications rather than condition certifications. For example:

1. Even where there are EPA-approved water temperature criteria, EPA has refused in the past. For example, in Montana, to approve a state TMDL that proposed improving flow conditions or planting trees in a riparian zone as ways to meet the criteria. Presumably, EPA would find such responses inappropriate in Section 401 certification conditions, too. Yet, either strategy is likely to be less costly to an applicant than the installation of chillers for a discharge.
2. If a new pipeline, bridge, or other project would eliminate public access to a reach with fishery and recreation designations, including because of legitimate security needs associated with the permitted activity, the least costly and potentially easiest alternative for an applicant may be to compensate for the loss of the designated use by providing fishing access elsewhere, i.e., up or downstream.
3. Other state authorities may include protection of state-listed species, floodplain management, wetlands mitigation banking, and in-lieu fee programs, especially in the context of a project needing a Section 404 permit that the Corps evaluates under the Section 404(b)(1) guidelines. Conditions related to any of these may protect state water use designations and water quality.[77]
4. Advances in water system science have led managers to embrace adaptive management for protecting water resources. This approach begins with an initial action, but assumes

[76] EPA's Economic Analysis provides zero information on the costs of the proposed rule change, to states, applicants or any beneficiaries of clean water, even for the few case studies it highlights. *See* U.S. ENVTL. PROT. AGENCY, ECONOMIC ANALYSIS FOR THE PROPOSED CLEAN WATER ACT SECTION 401 RULEMAKING FROM THE EPA, *et seq.* (2019).

[77] *See* U.S. ENVTL. PROT. AGENCY, OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES, 23 (2010).

additional future actions, based on the actual effects of the first action.[78] The proposed rule may preclude conditions that rely on adaptive management.

5. In *Sierra Club v. [VA] State Water Control Board*, 898 F3d 383 (4th Cir. 2018), the state-imposed a number of conditions to protect its waters' quality from uplands activities associated with laying a pipeline that needed a FERC license as well as a Corps' Section 404 permit. These conditions included: protection from landslides associated with blasting; addressing acidic silt; general erosion and sediment controls; inspections and monitoring; notice before starting land disturbance activities; notice of the location of the pipeline path, including lay down areas and points where the applicant expected to do construction activity in streams or wetlands. For example, even though Virginia had not finished its stormwater analysis, it decided it could give reasonable assurance and certify the pipeline with conditions because the certification would require the applicant to return for further approvals as its plans became more certain. Such an adaptive management approach allowed the pipeline to proceed even though neither the applicant, the state, nor FERC could anticipate all the potential discharges and water quality effects at the time the state finalized its certification. State soil erosion and sediment management authorities are commonly used in Section 401 certifications to protect water quality, as the 2010 Handbook notes.
6. Conditions that affect water quality protections needed under other state and federal statutes, for example, to:
    - Ensure preservation of outstanding values of rivers designated wild or scenic.
    - Effect the protections required in state or federal coastal protection statutes (like the federal Coastal Zone Management Act).
    - Protect or restore sensitive aquatic-dependent species listed under state laws or the Endangered Species Act whose presence may be part of the reason for a specific use designation in a state's water quality standards, including by imposing minimum flows or requiring fish stocking.

In sum, EPA proposed section 121.3 – *Scope of certification* would not only violate the plain meaning of the Act, it would result in significant harm to water quality and aquatic habitat.

EPA Cannot Provide Federal Agencies with an Override of State 401 Water Quality Certification.

The language in Section 401(a) and pertinent case law supports the understanding that federal agencies cannot override the states.

By giving federal agencies the power to determine whether state conditions were based on the scope delineated by the proposed rule, the proposed rule would effectively allow federal agencies to override state and tribal water quality certifications in contradiction to the Act and established case law. Courts have made clear that this is illegal. The mandatory language of the Act plainly states that: "No license or permit *shall* be granted until the certification required by this section has been obtained or has been waived;" certification conditions "*shall* become a condition on any

[78] *See, e.g.*, U.S. ENVTL. PROT. AGENCY, OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES, 27 (2010).

federal license or permit;" "no license or permit *shall* be granted if certification has been denied by the state."[79] The EPA itself has acknowledged that this language binds federal agencies: "[l]imitations contained in a State certification must be included in an NPDES permit. EPA has no authority to ignore State certification or to determine whether limitations certified by the State are more stringent than required to meet the requirements of State law."[80]

Likewise, the Supreme Court recognized in *PUD No. 1 of Jefferson County* that a "State may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards."[81] Circuit Courts have echoed this, consistently reaffirming that states have wide discretion to condition projects. For instance, the Ninth Circuit ruled that:

> The plain language of Section [401] of the Clean Water Act 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 NWP—i.e., the Corps "may not *alter or reject* conditions imposed by the states."[82]

Similarly, the Second Circuit recognized that "The [Clean Water Act] has … expressly require[ed] [an agency] to incorporate into its licenses state-imposed water-quality conditions."[83] The court stated this in blocking six hydropower projects licensed by FERC, as the projects did not comport with Vermont's conditions.[84] Likewise, the Fourth Circuit held that Maryland did not act arbitrarily and capriciously when it denied a natural gas marine import terminal under Section 401, as "Maryland examined the relevant data pertaining to the effect on water quality in the area[] … and articulated a satisfactory explanation for its denial on that basis…"[85] Further Circuit Court precedent has been consistent in upholding the broad authority of states to determine and attach conditions to permitting decisions, as well as the binding nature of those conditions.[86]

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[79] 33 U.S.C. 1341(a)(1) (emphasis added).
[80] Decision of the General Counsel on Matters of Law pursuant to 40 C.F.R. § 125.36(m), No. 58, March 29, 1977.
[81] *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 715 (1994).
[82] *Sierra Club v. United States Army Corps of Eng'rs*, 909 F.3d 635, 645 (4th Cir. 2018) (citing *United States Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) (emphasis added)).
[83] *Am. Rivers v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997).
[84] *Id.* at 101-02.
[85] *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 733 (4th Cir. 2009).
[86] *See Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273 (1st Cir. 1996) (Clean Water Act provides federal floor, not ceiling, on water quality standards; if a state seeks to approve a standard less stringent than federal CWA's floor supervising federal agencies and courts have independent responsibility to attach further conditions to ensure compliance with minimum CWA standards; state permitting decisions are not challengeable by federal agencies); *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 102 (2d Cir. 1997) (holding that review of conditions applied by states must become conditions in the license administered by the federal agency, and that as states may set water quality standards more stringent than federal CWA, review of the appropriateness of conditions is within the purview of the state courts and not the federal agency); *City of Tacoma, Washington v. F.E.R.C.*, 460 F.5d 53, 59 (D.C. Cir. 2006) (similarly, though also finding that FERC has a right to ensure that the certifying state followed the procedural notice requirements of 401 certifications, the court held that review of conditions applied to permits were the sole purview of state courts and not federal agencies).

Legislative History Shows that Congress Did Not Intend for Federal Agencies to Override State Certifications.

The legislative history also shows that EPA's proposed regulation contradicts the Act. When discussing a strong role for states, the Senate Report states:

> In addition, the provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit. *The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements*.[87]

The Senate Report went on the explain that:

> It should also be noted that the Committee continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State or jurisdiction of the interstate agency. *Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the Atomic Energy Commission, Federal Power Commission, or the Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction*.[88]

When Congress first discussed Section 401, a Senator explained that because of Section 401:

> No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.[89]

Thus, the legislative history illustrates Congress's intent that Section 401 gives states the ability to protect their waters from federally licensed or permitted projects whether or not the federal agency agreed with the state's certification decision.

EPA's Reading of the Statute is Untenable.

The proposed rule – specifically Sections 121.6(b), 121.6(c), and 121.8 – would turn Section 401 on its head, effectively giving the federal government the power to override a state decision. EPA attempts to justify this proposed change through a tortured reading of the phrase "fail or refusal to act." The proposed rule defines "fail or refuse to act" to mean "the certifying authority

[87] S. REP. NO. 92-414, *as printed in* 1972 U.S.C.C.A.N. 3668, 3735.
[88] *Id*. at 3735.
[89] *S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (citing 116 Cong. Rec. 8984 (1970).

actually or constructively fails or refuses to grant or deny certification, or waive the certification, or waive the certification requirement, within the scope of certification and within the reasonable period of time."[90] "Constructively" is not defined, but the preamble indicates that it means a certifying authority fails or refuses to act "in a way Congress intended" or "acts outside the scope of certification," this constitutes a constructive failure or refusal to grant or deny certification.[91]

The proposed rule's definition inappropriately expands what constitutes "failure to act" and restricts the states' time to act.

Under Section 401, a state waives its certification authority only if it "fails or refuses to act on a request for certification, within a reasonable time period (which shall not exceed one year) after receipt of such request." This language does not tie a state's action to any substantive requirements. The legislative history shows that Congress intended the waiver provision to prevent states from exercising a de facto veto over a proposed project through *sheer inactivity*.[92]

Under this construct, federal agencies could deem a certification waived, even if timely issued by the certifying entity, simply based on the federal agency's own judgment about whether the contents or scope of the certification comply with these new, overly constrained rules.

To re-define "failure to act" to include a constructive failure based on a federal agency's evaluation of the substance of a certifying agency action exceeds the federal agency's authority under Section 401.

This is an untenable reading of the Act. A failure or refusal to act is just that, the lack of or refusal to certify, condition, or deny a federal license. There is simply no support for EPA's argument that the language it cites is meant to give agencies such as FERC or the Department of Transportation, which have no Clean Water Act authority or expertise in water quality, the power to override a state or tribal determination that, only with the state's or tribe's conditions will the activity comply with applicable provisions of the Act including water quality standards or other applicable state law. EPA's reading of the Act is arbitrary and capricious.

A State Court – not a federal agency – is the appropriate arbiter to determine whether a state exceeded its power under Section 401.

The plain language of Section 401 and pertinent case law make clear that a State Court serves as the appropriate check on a State's authority under Section 401. Conversely, a federal agency has no authority to assess whether a state exceeded its power under Section 401. By giving federal agencies the power to check a state's decision under Section 401, the proposed rule would create further confusion in the administration of Section 401.

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[90] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,110.
[91] *Id.*
[92] "[T]he Conference Report on Section 401 states that the time limitation was meant to ensure that 'sheer inactivity by the State ... will not frustrate the Federal application.' H.R. Rep. 91–940, at 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2741. Such frustration would occur if the State's inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding." *Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963, 972 (D.C. Cir. 2011).

Since the states provide certification pursuant to state water quality standards and other applicable state law provisions, it follows that state court is the proper forum to resolve disputes regarding state certification.[93] Circuit Courts have uniformly held that state courts are the sole venue to determine whether a state exceeded its authority under Section 401.[94] Even Justice Thomas's dissent in *PUD*, which the EPA invokes heavily, concedes this, as he writes "that the proper forum for review of [Section 401] conditions is state court."[95]

Having the state court as a sole arbiter of Section 401 decisions not only adheres to the spirit of the statute, but promotes consistency. If an applicant did not know which standards – state or a federal agency's – would apply, the applicant would not know which standards to meet.

The Proposed Rule Prescribes a Process that is Arbitrary and Capricious and Unworkable.

The Proposed Rule Improperly Restricts the Time and Information Available to States.

The proposed rule would place procedural constraints on states that would severely limit their ability to exercise their authority under Section 401 by limiting the time and information available to states. First, the proposed rule would give agencies the ability to dramatically reduce the one-year statutory clock that state agencies have to complete the certification process.[96] Section 121.4 of the proposed rule provides that the federal agency will determine the timeline for review, based on the federal agency's evaluation of the complexity of the project, potential for discharge, and the potential need for additional study. These are determinations that should be made by the state, not the federal agency.

Under the proposed rule, the statutory timeline for issuing a final certification starts upon receipt, by the certifying authority of a "certification request," rather than the receipt of a "complete application" or "complete request" as determined by the certifying authority. "Certification request" is further defined in the proposed rule.[97] This proposed new definition does not require an application to contain what states need to effectively move forward with their certification process. For instance, the proposed definition fails to require any environmental study or data be included. The requirements are so basic in nature that this new definition will do little or nothing

[93] *See Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("Such a decision presumably turns on questions of substantive state environmental law - an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence.").
[94] *See Roosevelt Campobello Int'l Park Com. v. United States EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) ("the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification"); *NRDC v. United States EPA*, 279 F.3d 1180, 1188 (9th Cir. 2002) ("the EPA does not act as a reviewing agency for state certification, and the proper forum for review of state certification is through applicable state procedures"); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3d Cir. 1988) ("only the state may review the limits which it sets through the certification process); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989) ("The proper forum for such a claim is state court, rather than federal court, because a state law determination is involved.").
[95] *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 734 (1994) (J. Thomas dissenting)
[96] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080, 44101 (proposed Aug. 22, 2019) (to be codified 40 C.F.R. Part 121) (federal agency shall establish the reasonable period).
[97] *Id.* at 44101.

to address the issue of applications with insufficient data or which lack an included study to allow for meaningful review by the certifying entity.

As importantly, the proposed rule would start the clock for completing a Section 401 certification at the time the request for certification is submitted – even where the application lacks the data necessary for the state to make a determination regarding certification. The federal agency will also determine the date of receipt of the request (the start of the review period).[98]

Further, the EPA proposes a 30-day limit following the date of the certification request during which the certifying agency may request additional information from the applicant. There is no provision allowing additional time to complete studies, limiting the agencies to information which can be acquired and evaluated within the established review period. The rule also limits the scope of the information that can be requested.[99]

The proposed rule also prohibits states from waiting until adequate information is available to start the clock on their window for review. Section 121.4(f) would prohibit the state from requesting withdrawal or other action to restart the clock. This would expressly prohibit the practice of allowing applicants to withdrawal and resubmit an application in order to restart the one-year clock, a practice that is commonly used to allow applicants and permitting agencies time to collect the necessary data and to engage in multi-stakeholder processes that may last more than one-year. This is inconsistent with longstanding practice in the FERC licensing context, where an applicant's withdrawal of a state certification request before a year has elapsed precludes state waiver. This practice has become an essential tool to allow states to work with applicants to ensure applicants provide adequate information upon which to conduct review. The effect may be to force the states to issue denials because the request for certification and any supplemental information provided by the applicant does not provide enough information to find compliance with water quality standards.

The rule further constrains state and tribal authority by placing the burden of proof on the certifying entity – both for justifying study and information requests, as well as for justifying conditions imposed on an issued certification.[100] The proposed rules require state certification agencies to justify any conditions and to explain whether a less stringent condition could satisfy water quality requirements.[101] This is inconsistent with the statute and pertinent case law.[102]

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[98] *Id*. At 4420 (the federal agency shall provide the date of receipt of the certification request.)
[99] *See supra* discussion on scope 13-15.
[100] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,120 (proposed Aug. 22, 2019) (to be codified 40 C.F.R. Part 121) (any action to grant, grant with conditions, or deny a certification request must … [include] a statement explaining why the condition is necessary … [or, if denying] the specific water quality data or information needed …).
[101] *Id*. at 44,120 (proposed Aug. 22, 2019).
[102] *See e.g., Roosevelt Campobello Int'l Park com. V. United States* EPA, 684 F.2d 1041, 1056 (1st Cir. 1982) ("the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification"); *NRDC v. United States EPA*, 279 F.3d 1180, 1188 (9th Cir. 2002) ("the EPA does not act as a reviewing agency for state certification, and the proper forum for review of state certification is through applicable state procedures"); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3d Cir. 1988) ("only the state may review the limits which it sets through the certification process); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st

Such an interpretation is unworkable in the real world, would reward an applicant's deliberately failing to provide information needed for a state or tribe to make a reasoned decision and deprives states of a meaningful opportunity to exercise its Section 401 authority.[103]

Extensions of time: EPA requests comment on whether extensions of time should be allowed beyond one-year from receipt. The answer is a definite yes, particularly considering that what EPA is currently contemplating to be "reasonable time" could be significantly shorter than the current statutory time frame of not to exceed one-year. As discussed elsewhere in these comments, the amount of time needed to review, evaluate, and process a request for water quality certification can vary based on many factors, including the complexity of the project and the level of information available to adequately evaluate the effects of a proposed action. For projects that are well-studied, with clearly defined actions and well-researched impacts, the process of evaluating the proposed action and issuing appropriate conditions may be straightforward. For more complicated projects with lesser-known impacts, additional information, and in some cases additional studies, may be necessary. This is particularly important in the context of long-term authorizations, such as for hydropower projects with terms of 30-50 years. If the EPA would seek to impose a shortened time-frame for review, then the appropriate approach would be to start the clock upon the certifying agency's determination that they have the information needed to complete their review and certification process. Such an approach would allow states to inform applicants of what information will be needed to ensure for timely review.

The Proposed Rule Improperly Restricts state and tribal discretion in action on a certification request. Section 121.5 –Action on Certification Request– holds that states and tribes may approve, approve with condition, deny, or waive (explicit or implicit) a permit. The rule limits the ability of states to deny with prejudice, to withdraw and resubmit, or extend time – all tools that give states and applicants the ability to understand issues and resolve complex situations. These restrictions have serious real-world consequences.

Eliminates the ability to "deny with prejudice." The effect of denial of certificate – Section 121.6(a) – would impermissibly preclude the certifying agency from denying a certification request with prejudice: "[a] certification denial shall not preclude a project proponent from submitting a new certification request, in accordance with the substantive and procedural requirements of this part." Under Section 401, a state is permitted to deny a certification request

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Cir. 1989) ("The proper forum for such a claim is state court, rather than federal court, because a state law determination is involved.").

[103] In addition to what EPA has listed as necessary components of a Section 401 certification application, § 121.1(c) should include:

a. A description of the impacts to the receiving waters and that portion of the watershed that may affect WQS in the receiving waters (including the receiving water body's use designation and what info may be required for a/d review).

b. Existing documentation or reports showing prior contamination at the proposed federally licensed or permitted project site. Not only did states and tribes request this addition, but if the information exists the administration's policy for "one federal decision" pretty much requires that it be included.

c. All the info from 1st permit/license should be submitted too – as well as any info showing changes from that info (e.g., if there's been clean up)

for a given project with prejudice if it determines the proposed project cannot be conditioned in a manner that will assure compliance with applicable water quality standards. This approach allows a state to preserve resources that would be frustrated by requiring review of substantially similar certification requests for the same project once it determines the project cannot comply with applicable water quality standards.

Denials and conditions of issued certifications are impermissibly subject to federal override. As discussed in detail above, Sections 121.6(c) (permit denials) and 121.8(a)(2) (conditions) of the proposed rule would usurp state and tribal discretion by requiring federal agencies to review the validity of any denials and any conditions included in an approved certification and to override the state or tribal decision.

What's worse, the proposed rule does not provide any allowance for certifying entities to "cure" any portions of their certification order that the federal agencies, in their own view, determine are inconsistent with these new rules. Even if a federal agency chose to offer the opportunity for revision (there is no requirement that such opportunity be provided), it appears that the certifying entity would still be constrained by the established time frame, making it extremely unlikely that they would have time to revise the determination before the deadline, which then would result in a waiver by failure to act. This is wholly inconsistent with statute and case law that clearly direct federal agencies to incorporate certification conditions.

The Proposed Rule is at Odds with the One Federal Decision Executive Order.

This proposed structure is also fundamentally at odds with the One Federal Decision Executive Order (OFD).[104] The administration has argued that a coordinated decision process would be more effective and efficient for all federal permit and license applications. The administration has offered to allow states to become part of the process. The only way that this can work is then to allow states to use the jointly produced analyses. This proposed rule would stand in the way of that outcome.

For example, if there is only one Environmental Impact Statement (EIS), and the state is part of that process, the state should not issue its certification before the lead federal agency finishes the EIS, regardless of when the applicant submits its request for certification. The states should receive the same amount of time as other agencies are provided (under OFD) to take final action after the EIS – 60 days. Forcing a premature certification would virtually require denial based on an inability to determine implications with confidence because of incomplete information. That is not in the applicant's best interest. OFD gives federal agencies two years to do EIS and ROD. States should not have to act before EIS is complete.[105] Since EPA's economic analysis shows that states usually certify in less than six months, this should not present problems for

[104] Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug 15, 2017) (Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, OFD, provides that (1) for infrastructure projects requiring authorization from more than one federal agency, one federal agency is required to take the "lead" on the project, and is responsible for navigating the project through the federal environmental review and authorization process; (2) all involved federal agencies agree to a permitting timetable and (3) all involved federal agencies record their individual decisions in a single record of decision, unless specific conditions specified in the EO are present.

[105] Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug 15, 2017) ("OFD").

project proponents, provided that the clock for certification starts based on a valid, i.e., complete, request.

EPA appears to see the value in encouraging pre-application discussions, as it seems to do by requiring them in the proposed rule Section 121.12 for the relatively few situations where EPA provides certification rather than a state or tribe. EPA should thus direct applicants to meet with a state or tribe certifying authority before formally applying for certification, if the state or tribe requests such meetings. As EPA noted in its 2010 handbook,[106] in some circumstances, the provisions states or tribes would wish to see reflected in the permit or license can be achieved through early discussions with an applicant, for example, by having the applicant include the conditions as part of its proposed compliance with the Corps' Section 404(b)(1) guidance, rather than through formally conditioning the Section 401 certification.

As the handbook also noted:

> Several states, including Oregon, Georgia, Montana and Kansas, rely heavily on the pre-application consultation process to provide an opportunity to discuss potential water quality concerns and obtain changes to the proposed project prior to official application for a permit or license and certification. Kansas uses pre-application meetings for a variety of purposes. Along with the standard information gathering and dissemination function, Kansas also attempts to use pre-application meetings to discuss low-impact and smart growth design features with the applicant and other agencies involved. In addition, Kansas focuses on communication within affected watersheds to ensure that proposed projects will not disrupt other permitted activities in the watershed such as Public Water Supplies, Waste Water Treatment Plants and other permittees. Kansas has found that assessing a project in regard to the existing impacts and uses of the watershed is especially important when considering changes to channel morphology and other baseline conditions upon which other permittees or users rely. Montana uses reapplication meetings to discuss and distribute copies of their water quality standards, a stormwater/erosion control handbook, and information pertinent to other permits the applicant might need relative to other permitting authorities. Georgia works to have projects 'modified to address concerns' during the application process, so that the main water quality issues are addressed prior to final certification. Oregon provides information to the applicant on BMPs and fact sheets about water quality, including *Stormwater Management Plan Submission Guidelines for Removal/Fill Permit Applications Which Involve Impervious Surfaces*.[107]

If such pre-application meetings with states and tribes happened at the request of the state or tribe, EPA further acknowledged in the proposed rule that only the state or tribe could determine that the purposes of the meetings had been accomplished, and that applicant was ready to apply, it might mitigate the one-year deadline for action that EPA seeks to impose with complete

[106] U.S. ENVTL. PROT. AGENCY OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, *CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES*, 26, 2010.
[107] *Id.* at 28.

rigidity. Alternatively, EPA should allow states to not to accept any application as submitted if the application is incomplete, for example, by not having provided information for every required section of an application, and/or to open the application submission form only to applicants that the state or tribe deems ready to apply based on pre-application meetings.

The preamble of the proposed rule states, appropriately, that, "A certifying authority may choose to deny certification if it is unable to certify that a proposed activity would be consistent with applicable water quality requirements" because of a lack of necessary information.[108] Unfortunately, Section 121.5(e) of the proposed rule does not reflect the preamble. Rather, the rule would flip the burden of proof when an applicant fails to provide the state enough information for the state to determine if the proposed activity will adversely affect the state's waters, by requiring the state not only to cite a specific regulatory or statutory water quality requirement that would not be met, but also what information the applicant would need to provide the state to cure the deficiency. This would make it harder for states to deny certification in instances where the applicant has not provided enough information for the state to make a determination.

States and tribes told EPA during pre-issuance consultation they lack the staff needed to run their 401 programs already, let alone with tighter time frames and less money. Meanwhile, EPA continues to try to reduce the funding it provides states. Federalism cannot work without enough funding for both state and federal regulators to do the jobs Congress assigned them.

The OFD MOU encourages lead agencies to "seek cooperation of state agencies" and suggests lead agencies:

> invite any relevant State, local or tribal agency with Federal authorization decision responsibilities for a major infrastructure project to be a cooperating agency. Lead agencies will seek to secure such State, local or tribal agency's commitment to comply with the Permitting Timetable and such other obligations of a cooperating agency under this MOU as the lead agency may deem appropriate and necessary for the project, if necessary by the execution of a separate written agreement with such agency.[109]

As noted in EPA's 2010 handbook,[110] the combining of state Section 401 notice and comment processes with federal notice and comment is a valuable streamlining. The proposed rule would jettison this administration improvement, but the preamble provides no reason for doing so. Without an explicit reason provided, one is left to imply that the only reason may be improper – i.e., to constrain a state's ability to have the time needed to gather all of the information required for a reasoned decision, prepare a certification, receive public comments, and amend its proposed certification decision as a result thereof.

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[108] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,103 (proposed Aug. 22, 2019) (to be codified 40 C.F.R. Part 121).

[109] Dep't of the Interior, *et al.*, Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (2018). https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf.

[110] U.S. ENVTL. PROT. AGENCY OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, *CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES*, 28, 2010.

The Proposed Rule Fails to Comply with the National Environmental Policy Act (NEPA).

The proposed rules constitute a major federal action; consequently, EPA should have drafted an environmental assessment to analyze the proposed rule's impact.

When Congress enacted the National Environmental Policy Act (NEPA) in 1970, one of its stated goals was "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of [humankind]."[111] "'The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies to take a 'hard look' at environmental consequences,'"[112] "What constitutes a 'hard look' cannot be outlined with rule-like precision. At a minimum, it should encompass a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail."[113] "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct."[114]

To achieve NEPA's goals, when an agency conducts a "major Federal action[] significantly affecting the quality of the human environment" it must prepare an environmental assessment (EA).[115] A "[m]ajor Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility;[116] this includes "new or revised agency rules, regulations, plans, policies, or procedures."[117] If an assessment performed by a federal agency shows that a project will have significant environmental impacts, regulations issued by the Council on Environmental Quality (CEQ) (which oversees the NEPA regulatory requirements) direct agencies to prepare both a draft EIS, which must be circulated for review and public comment, and a final EIS that responds to those comments.[118]

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[111] 42 U.S.C. § 4321.
[112] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe*, 427 U.S., at 410, n. 21).
[113] *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005) (citing *Robertson*, 490 U.S. at 350).
[114] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).
[115] 42 U.S.C. § 4332(C).
[116] 40 C.F.R. § 1508.18.
[117] 40 C.F.R. § 1508.18(a); *accord* 40 C.F.R. § 1502.4(b) (stating that an EIS "may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations").
[118] 40 C.F.R. § 1502.9(a)–(b) (2006). If a project does not have significant impacts, agencies are still required to document this in a short document known as a "Finding of No Significant Impacts," or FONSI. 40 C.F.R. § 1508.13; 23 C.F.R. § 771.121 (2006).

EPA must prepare an EA with the proposed regulations, not at a future date.[119] In *Am. Pub. Transit Asso. v. Goldschmidt,*[120] the D.C. Circuit examined the Department of Transportation regulations for handicapped individuals on public transit.[121] The court concluded that the regulations were unquestionably a major federal action, thus subject to NEPA regulation.[122] The Court noted:

> A regulatory program requiring hundreds or perhaps thousands of actions each significantly affecting the . . . environment" must itself be regarded as "significantly affecting the . . . environment" within the meaning of the statute. The fact that numerous individual EIS's will be required for many particular projects initiated pursuant to this national program does not diminish its potential environmental effect nationwide; rather, it attests to it. Moreover, it seems obvious that in addition to what is conceded this program may have a cumulative effect which is greater than the sum of its individual effects.[123]

EPA failed to adhere to NEPA requirements by not complying with NEPA prior to publishing the regulations. First, the regulations are "actions with effects … which are potentially subject to Federal control and responsibility" since the regulations give the federal government the power to veto a state's veto and curbs a state's ability to put conditions on a project. Second, the proposed regulations constitute a major federal action as the § 1508.18(a) explicitly lists "new or revised agency rules [and] regulations."[124]

EPA references Executive Order 13868 titled Promoting Energy Infrastructure and Economic Growth as motivation for the amended regulation.[125] EPA writes that the Executive Order's "purpose is to encourage greater investment in energy infrastructure in the United States…"[126] Moreover, EPA notes that the current regulations are "hindering the development of energy infrastructure."[127] The Executive Order itself cites the United States "abundant supplies of coal,

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[119] *Cf. Aberdeen & R. R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP),* 422 U.S. 289, 320 (1975)

> NEPA provides that "such [environmental impact] statement… shall accompany the proposal through the existing agency review processes" (emphasis added in original)…. [I]t must accompany the "proposal…." [T]he time at which the agency must prepare the final "[environmental impact] statement" is the time at which it makes a recommendation or report on a proposal for federal action. Where an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing.

[120] 485 F. Supp. 811 (D.D.C. 1980).
[121] *Am. Pub. Transit Asso. v. Goldschmidt,* 485 F. Supp. 811, 813 (D.D.C. 1980); judgment rev'd on other grounds, 655 F.2d 1272 (D.C. Cir. 1981).
[122] *Am. Pub. Transit Asso. v. Goldschmidt,* 485 F. Supp. 811, 832-33 (D.D.C. 1980); judgment rev'd on other grounds, 655 F.2d 1272 (D.C. Cir. 1981); *see also Humane Soc. of U.S. v. Johanns,* 520 F. Supp. 2d 8 (D.D.C. 2007) (holding that regulation authorizing operation of fee-for-service horse slaughter operation was a major federal action).
[123] *Am. Pub. Transit Asso. v. Goldschmidt,* 485 F. Supp. 811, 833 (D.D.C. 1980); judgment rev'd on other grounds, 655 F.2d 1272 (D.C. Cir. 1981).
[124] 40 C.F.R. § 1508.18(a).
[125] *See* Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080, 44081 (proposed Aug. 22, 2019).
[126] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,082 (proposed Aug. 22, 2019).
[127] *Id.* at 44,082.

oil, and natural gas"[128] and that "[t]he United States will continue to be the undisputed global leader in crude oil and natural gas production for the foreseeable future."[129]

EPA addresses explicitly that their motivation is not more efficient or effective protection of the nation's waters, but the expediting of energy projects. EPA states that interstate natural gas pipelines are some of "[t]he most common examples of licenses or permits that may be subject to section 401 certification"[130] EPA and cite pipelines as projects that usually require multiple states' approval, thus a need for more uniform regulations.[131] However, pipelines face the potential to spill. From 1986 through 2013 there were almost 8,000 "significant"[132] spills; these totaled over $7 billion in damages.[133] Naturally, states would want to safeguard their waters from this.

For example, when a pipeline company proposed to build a pipeline in New York but did not adhere to New York's preferred method for crossing water bodies, New York denied the permit.[134] Certification was denied based on lack of a comprehensive and site-specific analysis including how deeply the pipeline would be buried beneath the 250 streams along the proposed 124-mile long corridor. Pipes can become exposed in stream beds if not buried deeply enough affecting stream channel stability and fixing the problem after-the-fact can lead to further damage to the stream. A second instance of a state expressing its sovereignty came when an applicant sought a permit to build liquefied national gas facilities and associated pipelines in Oregon.[135] In denying the project, Oregon cited that the applicant "did not provide details for spill containment for Terminal"[136] and did not "design[] and locate[] spill containment controls in [a] manner to prevent a spill from causing a violation of the toxic substance standard."[137]

These examples constitute ways states have "prevent[ed] or eliminate[d] damage to the environment."[138] Meanwhile, the proposed regulations will curtail the ability of states to address these impacts. EPA is clear that expediting pipeline construction is a motivating factor in the amended regulations, yet did not conduct an EA to demonstrate the potential environmental harm this rule could cause. The prospect of a spill raises environmental concerns, which the agency must address through NEPA. Should a spill damage a critical habitat area or a state's drinking

[128] Exec. Order No. 13868, 3 C.F.R. § 1 (April 10, 2019).
[129] *Id*.
[130] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,100-01 (proposed Aug. 22, 2019).
[131] *Id*. at 44102.
[132] "Significant" incidents include those in which someone was hospitalized or killed, damages amounted to more than $50,000, more than 5 barrels of highly volatile substances or 50 barrels of other liquid were released, or where the liquid exploded or burned.
[133]OR Dep't of Envtl. Quality, *Evaluation and Findings Report, Section 401 Water Quality Certification for the Jordan Cove Energy Project* (2019),
[134] *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 91-92 (2d Cir. 2017).
[135] OR Dep't of Envtl. Quality, *Evaluation and Findings Report, Section 401 Water Quality Certification for the Jordan Cove Energy Project*, 1 (2019)
[136] *Id*. at 44.
[137] OR Dep't of Envtl. Quality, *Evaluation and Findings Report, Section 401 Water Quality Certification for the Jordan Cove Energy Project*, 1, 72 (2019). .
[138] 42 U.S.C. § 4321.

water, the federal government would be forced to "regret its decision after it is too late to correct."[139]

EPA Failed to consult with FWS & NMFS under Section 7 of the ESA.

EPA has failed to comply with the requirements of the Endangered Species Act (ESA).[140] Section 7(a)(2) of the ESA requires EPA to consult with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively the Services) to "insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [critical] habitat."[141] Agency "action" is broadly defined in the ESA's implementing regulations to include "(b) *the promulgation of regulations . . .*"[142] Once the consultation duty is triggered, agencies must use the "best scientific and commercial data available" in completing the consultation process.[143]

Any agency action that may affect a listed species or its critical habitat triggers the consultation requirement. The threshold for a finding of "may affect" is extremely low: "any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement."[144] The potential impact on ESA listed species from the proposed rule easily clears this threshold. However, EPA has not consulted with the Services on the impacts of this proposed rule. It must do so.

The proposed rule could potentially impact many species listed as threatened or endangered pursuant to the ESA. For instance, states have used Section 401 certification to condition projects, such as hydroelectric dam projects, to ensure that they accommodate the needs of sensitive listed species such as several species of salmon. Such conditions – which may not be directly related to the discharge or may be disagreed with by the federal agency – could include fish ladders, provisions to reduce erosion and sedimentation, and flow requirements (which was at issue in *PUD No. 1*). Restricting states' and tribes' abilities to impose such protective conditions could eliminate or degrade salmon habitat, affecting listed salmon or modifying critical habitat for such species.

Likewise, hindering a state's ability to protect habitat could impact downstream species as well. Listed orca in the Puget Sound depend on healthy salmon populations for foraging. Impeding the states' and tribes' ability to protect such populations could impact the foraging success of listed orca, in turn impacting the species. Similarly, erosion, sedimentation, spill, or other concerns associated with pipeline projects could impact a host of listed species that depend on

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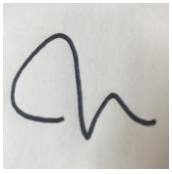
[139] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).
[140] 16 U.S.C. § 1531 *et seq.*
[141] 16 U.S.C. § 1536(a)(2).
[142] 50 C.F.R. § 402.02 (emphasis added).
[143] 16 U.S.C. § 1536(a)(2).
[144] Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 FR 19,926, 19,949 (June 3, 1986); U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook (March 1998) at xvi (defining "may affect" as "the appropriate conclusion when a proposed action may pose any effects on listed species ….").

wetlands, are vulnerable to pipeline spills or leaks, or require specific conditions to thrive that could be impacted by increased turbidity, suspended solids, reduced oxygen levels, or the like.

Conclusion

NWF, TRCP, and TU again thank you for the opportunity to comment on this proposed rule. We recommend withdrawing the proposed rule in addition to the 2019 guidance as they are both arbitrary and capricious exercises of power that will unnecessarily and impermissibly impede states' and tribes' authority to protect waters resources and aquatic habitat and the fish, wildlife, and outdoor pursuits valued by our members and sportsmen and women across the country.

Sincerely,



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