The Association of State Wetland Managers, Inc.

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

Executive Director
Marla J. Stelk
32 Tandberg Trail, Suite 2A
Windham ME 04062
(207) 892-3399

Chair
Mark Biddle
DE Dept. of Natural Resources and Environmental Control
285 Beiser Boulevard, Suite 102
Dover, DE 19904
(302) 739-9939

Vice Chair
Jill Aspinwall
NJ Dept. of Environmental Protection
401 East State Street, 7th Floor
Trenton, NJ 08625
(609) 984-9736

Secretary
Amy Lounds
MI Dept. of Environment, Great Lakes, and Energy
525 W. Allegan Street
Lansing, MI 48933
(517) 331-7966

Treasurer
Lauren Driscoll
WA State Dept. of Ecology
PO Box 47600
Olympia, WA 98504
(360) 407-7045

Past Chair
Collis Adams
Adams Environmental Consulting, LLC
110 Pattee Hill Road
Goffstown, NH 03045
(603) 660-9797

Members at Large

Stacia Bax
MO Dept. of Natural Resources

Denise Clearwater
MD Dept. of the Environment

Andrew Robertson
Saint Mary's Univ. of Minnesota

Bill Ryan
OR Dept. of State Lands

Mary Ann Tilton
NH Dept. of Environmental Services

July 30, 2021

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

Via regulations.gov

Re: Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Docket # EPA-HQ-OW-2021-0302)

Dear Administrator Regan:

The Association of State Wetland Managers (ASWM) submits the following comments in response to the U.S. Environmental Protection Agency's (EPA) request for written feedback as EPA revises the Clean Water Act Section 401 Certification Rule, for inclusion in Docket ID No. EPA-HQ-2021-0302.

ASWM is a nonprofit professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland and aquatic resource protection programs. Since 1983, our organization and our member states and tribes have had longstanding positive and effective working relationships with federal agencies. As an association representing states and tribes as co-regulators tasked with implementation of regulations governing water quality, ASWM understands the complexity of the Clean Water Act (CWA). We have worked together with federal agencies in the implementation of regulatory and non-regulatory programs designed to protect our nation's aquatic resources, such as the CWA section 404 permit program for dredged or fill material, state and tribal water quality standards for wetlands, and CWA section 401 water quality certification of federal licenses and permits.

CWA section 401 provides that a federal agency cannot issue a license or permit that may result in a discharge to waters of the United States, unless the state or authorized tribe where the discharge would originate certifies the discharge would be consistent with water quality requirements or waives.[1] No 401 certification or waiver means no federal permit or license. The authority in section 401 is a direct grant from Congress to states (and tribes with "treatment in a similar manner as a state" (TAS) status) and does not require EPA program approval. The CWA relies on Section 401 to help ensure that federal licenses and permits are consistent with aquatic resource protection and goals of the Act.[2] Those goals cannot be met if regulations inappropriately limit the section 401 process and scope. Section 401 certification is a critical aquatic resource protection tool for many states and tribes. For example, ASWM data indicates that well over half of states rely on section 401 certification as their wetland protection program. ASWM believes that the 2020 Section 401 Certification Rule ("2020 Rule") inappropriately limited section 401 certification, for reasons discussed in our comments on the proposed rule dated October 21, 2019 (Docket ID No. EPA-HQ-OW--0405) or discussed below.

[1] CWA Section §401(a)(1), 33 U.S.C. §1341(a)(1).

[2] Congress intended section 401 to help ensure that all discharge activities authorized by federal agencies would comply with "state law" and that "Federal licensing or permitting agencies [could not] override State water quality requirements." *See* S.Rep. 92-313 at 69, *reproduced in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1487 (1973).

We strongly support EPA's intention to revise those regulations and submit this letter to assist in development of a proposed rule.

In its Notice of Intent to reconsider and revise the 2020 Rule, EPA indicated that it "seeks to revise the rule in a manner that promotes efficiency and certainty in the certification process … and that is consistent with the cooperative federalism principles central to CWA Section 401."[1] This is a welcome shift from the approach taken in the 2020 Rule. The 2020 Rule moved sharply away from cooperative federalism in its attempt to limit state and tribal use of section 401 as a water quality protection tool. The primary goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters,"[2] and the Act expressly recognizes the critical and important role states and tribes play in protecting and enhancing waters within their respective borders.[3] The CWA includes express provisions preserving state authority. For example, Congress maintained for each state the authority to adopt or enforce the conditions and restrictions the state considers necessary to protect its waters, provided those standards are not less protective than federal standards.[4] And, Congress in CWA section 401 expressly authorized states to independently review the water quality implications of projects that may result in a discharge requiring a federal license or permit to ensure such projects are consistent with water quality requirements.[5] ASWM hopes that CWA provisions such as these and the cooperative federalism approach reflected throughout the Act will serve as a guide for revising the 2020 Rule.

EPA's Notice of Intent acknowledges the extensive interest states and tribes have in a revised certification rule, and indicates EPA wants to ensure significant opportunities for input from these co-regulators as well as from stakeholders. ASWM welcomes opportunities for input into emerging section 401 certification policies. In addition to consulting with interested parties through the listening sessions discussed in the Notice of Intent, **ASWM encourages EPA to have a series of interactive meetings with co-regulator states and tribes that involve discussions on key issues, including potential implementation challenges and opportunities. Such meetings should include both discussion at the national level, as well as direct meetings between EPA Regions and the relevant states and tribes.** Such dialogues would be collaborative in nature and should be more helpful to EPA than receiving monologue input in the form of short statements at a listening session or in letters from interested parties. Also, discussions among regional, state, and tribal representatives will help ensure implementation challenges and opportunities are well-understood by national policymakers. ASWM would be very willing to participate in such discussions.

EPA's Questions for Consideration

EPA's Notice of Intent indicates it is considering revising the 2020 Rule, and solicits input on ten key issues:

1. Pre-filing meeting requests;
2. Certification request;
3. Reasonable period of time;
4. Scope of certification;
5. Certification actions and federal agency review;
6. Enforcement;
7. Modifications;

[1] 86 Fed.Reg. 29541, 29542 (June 2, 2021).

[2] CWA §101(a), 33 U.S.C. §125(a).

[3] "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…" CWA §101(b), 33 U.S.C. §125(b).

[4] CWA §510, 33 U.S.C. §1370.

[5] CWA §401(a), 33 U.S.C. §1341(a).

8. Neighboring jurisdictions;
9. Data and other information; and
10. Implementation and coordination.

This letter addresses each issue in turn, providing both background and policy recommendations.

1. Pre-Filing Meeting Requests

Under the 2020 Rule, a project proponent must request a meeting with the certifying authority at least thirty days prior to requesting a water quality certification. The certification request must include documentation of this pre-filing meeting request having been made. The certifying authority has discretion to not grant the meeting.[6] The pre-filing meeting is intended to ensure that certifying authorities receive early notification and have an opportunity to discuss the project and potential information needs before the statutory timeframe for review begins.[7]

ASWM has heard some concerns about delays caused by the pre-filing meeting requirement. For example, a few states have noted that response to an emergency requiring a federal permit or license would be delayed at least thirty days by this requirement. Others have stressed that the meeting request could arrive before a federal agency has determined a permit or license is even necessary.

The statutory maximum period for a 401 certification determination is one year, a short period for complex projects such as large dredge-fill projects or FERC-licensed hydroelectric dams. ASWM believes there is substantial benefit from the project proponent, certifying authority, and federal authorizing agency talking about the project in advance of starting the statutory certification clock. Parties could, for example, discuss details of the proposed project, information needs of the certification analysis, and how best to coordinate federal processes effectively with state or tribal process requirements. The result could be a better-informed water quality certification and smoother coordination between the certifying state or tribe and the federal agency. Pre-notification meetings may also reduce the need for a certifying authority to make additional information requests once the certification "reasonable period" has begun.

Recommendations:

ASWM recommends that a revised 401 certification rule retain the requirement for a pre-meeting request and the provision allowing a certifying authority to not grant the meeting request. The revised rule should not specify criteria for whether to grant a meeting or procedures for the meeting, but instead leave the details up to the state and tribal certifying authorities. We also recommend that the pre-notification meeting provision have an exception for discharges associated with emergency work, as well as for other discharges as deemed appropriate by the state or tribe. State and tribal certifying authorities are more familiar than EPA with aquatic resources in their jurisdiction, information necessary for an informed certification decision about those resources, and available administrative resources, and therefore are better positioned to decide if the specific project subject to 401 certification raises issues meriting advance discussion.

2. Certification Request

The 2020 Rule defines a "certification request" as having nine specific elements and provides that receipt of a request containing these elements starts the "reasonable period of time" available for the certifying

[6] 40 C.F.R §121.4.
[7] 85 Fed.Reg. 42210, 42241 (July 13, 2020).

authority's certification determination.[8] The nine elements include: (1) identification of project proponents and a point of contact; (2) identification of the proposed project; (3) identification of the applicable federal license or permit, (4) identification the location and nature of any potential discharge that may result from the project, and location of receiving waters; (5) description of any methods and means proposed to monitor the discharge, and measures to control, treat, or manage the discharge; (6) list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the project, including all approvals or denials already received; (7) documentation that a pre-filing meeting request was submitted at least thirty days prior to requesting certification; (8) a statement certifying the accuracy and completeness of enclosed data to the best of the signatory's personal knowledge; and (9) a statement that the project proponent is requesting a 401 certification.[9]

State and tribal certifying authorities have expressed concerns to ASWM and others that the elements in a "certification request" lack information necessary to assess the proposed project's consistency with water quality requirements. The preamble to the 2020 Rule acknowledges this lack by noting that "the components of a 'certification request' identified in the final rule are intended to be sufficient information to start the reasonable period of time but may not necessarily represent the totality of information a certifying authority may need to act on a certification request," and observes that a certifying authority may request and evaluate additional information within the reasonable period of time.[10] The ability of certifying authorities under the 2020 Rule to request additional information does not effectively address information gaps. The CWA limits the "reasonable period" to not exceed one year, which can be a short window in which to request additional essential information from the project proponent and complete a meaningful water quality analysis. Some agencies, such as EPA and the Army Corps of Engineers, further shorten the presumed reasonable period to sixty days, considerably less than the already short period of one year.[11]

The preamble to the 2020 Rule suggests that certifying authorities are limited to requesting additional information from project proponents that can be "produced and evaluated within the reasonable period of time"[12] regardless if such information is sufficient to fully evaluate water quality impacts and compliance with the CWA and other water quality requirements. Additionally, the definition of "certification request" does not speak to the breath and quality of information that must be included.[13] In summary, the 2020 Rule definition of "certification request" seems likely to start the reasonable period without adequate

[8] 85 Fed.Reg 42210, 42243 (July 13, 2020).

[9] 40 C.F.R. §121.5.

[10] 85 Fed.Reg. 42210, 42245 (July 13, 2020).

[11] 40 C.F.R. §124.53(c)(3) (reasonable period of time in the NPDES permit program is 60 days from the date the draft permit is mailed to the certifying State agency); 33 C.F.R. §325.2(b)(1)(ii) (Corps assumes waiver in section 404 program if certifying agency fails or refuses to act on a request for certification within sixty days after receipt). Both agencies allow an extension beyond the sixty-day period if unspecified circumstances may reasonably require a longer period not to exceed one year, and the Corps regulations also provide Districts may shorten the sixty-day period. *Id.*

[12] 85 Fed.Reg. 42210, 42246 (July 13, 2020). Limiting requests for additional information to that which can be produced and evaluated within the reasonable period of time could create an unfortunate incentive for project proponents: do not prepare studies in advance of a certification request that may identify potential water quality concerns because under the 401 certification process project proponents cannot be asked to do those studies if they take more than a reasonable period to complete and for the certifying authority to evaluate. The result will be a less informed water quality certification analysis or a sharp rise in certification denials, which run counter to the intention of Section 401 and goals of the Act.

[13] States cite the primary reason for delay as incomplete requests from project proponents. *See* Association of Clean Water Administrators, Comment Letter on Proposed Rule – Updating Regulations on Water Quality Certification (October 21, 2019).

information for the certifying authority to begin to make an informed analysis, and the certifying authority's ability to get additional information necessary to complete the analysis in a timely manner is limited. The result seems likely to be an increase in certification denials due to information gaps.

State and tribal regulations and public statements have identified some of the types of information necessary for a meaningful section 401 water quality analysis, such as: (1) information on all of the project's potential impacts to water quality, including effects on the water's chemical, physical, and biological integrity; (2) whether and to what extent the project might involve multiple discharges into the same receiving waters that could have cumulative effects; (3) methods of construction and operating procedures; (4) description of compensatory mitigation actions to offset foreseen impacts; and (5) pre-construction monitoring or assessment data of resource condition. Additional necessary information varies from project to project, depending on the project type and potential impacts.

The CWA indicates the "reasonable period of time" runs from receipt of a "request for certification" and cannot exceed one year.[14] ASWM agrees with EPA that the start and end dates of the "reasonable period of time" need to be clear and understood by all involved parties.

Recommendations:

ASWM recommends that a revised 401 certification rule include a definition of "request for certification" that includes data elements such as those listed in the 2020 Rule, but additionally indicates such data must be of sufficient quality and complete enough to support a 401 certification analysis. A list of elements in the definition of "request for certification" without any indication of the required breath and quality of information would, for the reasons above, limit the certifying authority's ability to complete a certification analysis. **We also strongly recommend that the revised rule provide that states and tribes may specify in their regulations additional elements** required for a "request for certification" that address issues within the scope of analysis and would be necessary to complete their 401 certification in a timely way that is legally and scientifically defensible. Additional elements from states and tribes could reflect local circumstances in a way a national rule cannot, reflecting issues such as those illustrated in the paragraph above. If additional elements in the definition of "request for certification" are provided in state or tribal regulations, those elements would be knowable by all involved parties and therefore could improve the quality of 401 water quality certifications while being less likely to be a source of misunderstanding or delay.

3. Reasonable Period of Time

CWA section 401 indicates that a state or tribe waives its certification authority if it "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request."[15] The CWA is silent on who should set the reasonable period of time.[16] The 2020 Rule defines "reasonable period of time" as "the time period during which a certifying authority may act on a certification request,"[17] established by the federal licensing or permitting agency either categorically or on a case-by-case basis.[18] When a federal agency is setting the reasonable period, the 2020 Rule

[14] CWA §401(a)(1); 33 U.S.C. §1341(a)(1)

[15] CWA §1341(a)(1); 33 U.S.C. §1341(a)(1).

[16] *Id.* EPA acknowledges the CWA silence in its preamble to the 2020 Rule, noting "[T]he statutory language of section 401 provides that a certification shall be waived if the certifying authority fails or refuses to act within the reasonable period of time, but the statute is silent on who should set the reasonable period of time." 85 Fed.Reg. 42210, 42259 (July 13, 2002).

[17] 40 C.F.R. §121.1(l); 85 Fed.Reg. 42210, 42258-61 (July 13, 2002).

[18] *Id.*

indicates the agency should consider the complexity of the proposed project, the nature of any potential discharge, and the potential need for additional study or evaluation of water quality effects from the discharge.[19] The Rule provides that certifying authorities or project proponents may request an extension but the period may not exceed one year from receipt.[20] The Rule also requires federal licensing or permitting agencies to notify the certifying authority in writing within 15 days of receiving a certification request, specifying the date of receipt, the applicable reasonable period, and the date upon which waiver will occur if the certifying authority fails or refuses to act.[21]

ASWM agrees it is important for the project proponent, certifying authority, and federal licensing or permitting agency to unambiguously understand when the reasonable period of time has started and when it will end. However, the concept of "reasonable period of time" raises several issues that should be addressed in a revised 401 certification rule. These issues include, for example: what is reasonable for a "reasonable period," who should establish what is the reasonable period, tolling the reasonable period, actions certifying authorities must complete during the reasonable period, and opportunities certifying authorities have to remedy a deficiency in a certification.

A. <u>What is Reasonable for a "Reasonable Period."</u>

As mentioned above, the CWA says a certifying authority must act within a "reasonable period of time (which shall not exceed one year) after receipt of a certification request." Reasonable periods currently vary among federal agencies. For example, EPA's National Pollutant Discharge Elimination System (NPDES) regulations provide that a reasonable period is "not to exceed 60 days from the date the draft permit is mailed to the certifying State agency…",[22] Corps of Engineers regulations provide "sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act,"[23] and the Federal Energy Regulatory Commission regulations provide a certifying agency must "den[y] or grant[] certification by one year after the date the certifying agency received a written request for certification."[24]

EPA has stressed the importance of predictability and timeliness in the 401 certification process,[25] and the CWA[26] and states stress the importance of a certification decision that is appropriately protective of water quality.[27] Currently there is no single default reasonable period, only that it not exceed one year. The current approach has resulted in confusion and data gaps that make 401 certification a less effective water quality tool.

[19] 40 C.F.R. §121.6(b); 85 Fed.Reg. 42210, 42259-60 (July 13, 2020).
[20] 40 C.F.R. §121.6(d); 85 Fed.Reg. 42210, 42260 (July 13, 2020).
[21] 40 C.F.R. §121.6(b); 85 Fed.Reg. 42210, 42259 (July 13, 2020).
[22] 40 C.F.R. §124.53(c)(3).
[23] 33 C.F.R. §325.2(b)(1)(ii).
[24] 18 C.F.R. §5.23(b)(2).
[25] "EPA seeks to revise the rule in a manner that promotes efficiency and certainty in the certification process…" 86 Fed.Reg. 29541, 29542 (June 2, 2021). *See also* Fed.Reg. 42210, 42210 (July 13, 2020), "The final rule is intended to increase the predictability and timeliness of CWA section 401 certification actions…"
[26] See, e.g., CWA §101(a), "The objective of [the CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and CWA §101(b), "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 …"
[27] *See, e.g.,* Complaint for Declaratory and Injunctive Relief, *State of California v. Wheeler* (N.D. Ca., July 21, 2020)

Recommendations:

ASWM recommends that the revised 401 Certification Rule establish the default reasonable period to be one year, unless project-specific circumstances suggest a shorter period is reasonable. Such a default would be responsive to EPA's stated goals, the CWA, and state and tribal interests: it would predictable, would help ensure timeliness, is consistent with statutory text, and would result in better water quality certification decisions by routinely providing more than a sixty-day period. To avoid surprises and allow planning, a revised rule should provide that **any determination that the reasonable period should be shorter than one year should be made very soon after of receipt of the certification request**, such as within fifteen days.

ASWM recommends the determination whether a period shorter than the one-year default would be reasonable should be arrived at in partnership by the federal agency and the state or tribal certifying authority. Considerations should include state or tribal requirements for public participation and procedure,[28] and substantive state or tribal requirements for environmental review. This would support better cooperative federalism, as emphasized by EPA in its statement that it "seeks to revise the rule in a manner that … is consistent with the cooperative federalism principles central to CWA section 401.[29] Such collaboration would help ensure a shorter timeframe would be achievable and consistent with state and tribal environmental and administrative requirements. **Considerations for determining if a shorter period is reasonable also could include those provided in the 2020 Rule for establishing a longer period than an agency-specific sixty-day default, in addition to the state and tribal requirements recommended above.[30]**

If EPA nonetheless concludes in the revised 401 certification rule that federal agencies should make a unilateral decision to have the reasonable period be other than the default, the revised certification rule should require the federal agency to notify the certifying authority in writing within 15 days of receiving notice of the certification request and include its basis for determining a shorter period is "reasonable." If the revised certification rule incorporates such a unilateral decision that shortens the reasonable period from the default year, the rule should ensure an opportunity for the certifying authority to respond if it disagrees with the federal agency determination and provide opportunity for reconsideration of the abbreviated time period.

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[28] State and tribal public comment provisions should be considered when determining the reasonable period of time. The 2020 Rule timing and certification request definition override the timing requirements for public notice and comment periods established in state and tribal law, which is inconsistent with section 401 and goals of the CWA. The CWA mandates public notice and provides for public hearings when appropriate in the 401 certification process. CWA §401(a)(1), 33 U.S.C. §1341(a)(1); see also CWA §101(e), §1251(e) ("Public participation . . . shall be provided for, encouraged, and assisted by the Administrator and the States."). Pursuant to that mandate, states have established public participation procedures as part of their section 401 programs. *See, e.g.,* 9 Va. Admin. Code § 25-210-140(B) (requiring that the public must be provided "at least 30 days" to comment on a draft Virginia Water Protection permit (which serves as the state's certification of a project under section 401)); *see also* Va. Code § 62.1-44.15:20(C) (requiring a 45-day comment period for state agencies to weigh in on section 401 conditions).

[29] 86 Fed.Reg. 29541, 29542 (June 2, 2021).

[30] "In establishing the reasonable period of time, the Federal agency shall consider: (1) complexity of the proposed project; (2) nature of any potential discharge; and (3) the potential need for additional study or evaluation of water quality effects from the discharge." 40 C.F.R. §121.6(c).

B. Stopping the Reasonable Period Clock.

The 2020 Rule provides that the reasonable period of time "does not pause or stop for any reason once the certification request has been received,"[31] citing for support the D.C. Circuit decision in *H*oopa *Valley Tribe v. FERC*.[32] States and tribes have raised concerns about this absence of a tolling provision in at least two contexts: when an applicant withdraws its request for certification, and when information is lacking that is critical to an informed certification decision.

The 2020 Rule categorically prohibits a certifying authority from requesting that an applicant withdraw a certification request or taking action independent of the federal licensing agency to extend the reasonable period of time.[33] The preamble acknowledges that project proponents often voluntarily withdraw and resubmit applications. EPA "expects voluntary withdrawals of certification requests to occur only when the project has materially changed … or is no longer planned. In such a case, a new request would initiate a new reasonable period of time and would not 'restart' the clock from a prior withdrawal request for certification."[34] The 2020 Rule does not, however, actually restrict withdrawal actions by project proponents to those situations or otherwise limit project proponents from voluntarily withdrawing certification requests. The 2020 Rule also does not define what kind of project change would be sufficiently significant to warrant submitting a new request that would restart the reasonable period, nor identify who decides that vague threshold has been reached. If a project proponent withdraws its request for certification for a reason that does not toll the reasonable period of time, what is the certifying authority supposed to be working on?

Recommendations:

ASWM recommends the revised 401 certification rule revisit the potential circumstances where tolling might be appropriate and for what length of time. State and tribal certifying authorities should be able to suggest or require that applications be withdrawn and resubmitted with better or more complete data. As noted in an amicus brief submitted by twenty states to the U.S. Supreme Court regarding the *Hoopa Valley* decision,

"[a]pplicants choose to withdraw and resubmit applications because they view it as being in their best interest. If the applicant believes a state agency is willfully delaying a project, the applicant always retains the option of not withdrawing its certification request and challenging any denial in court. But that rarely, if ever, occurs. Instead, applicants often prefer withdrawing a request to having it denied, which may delay and jeopardize funding for projects….In contrast, the D.C. Circuit's holding in this case, if allowed to stand, will force States to prematurely deny applications for complex projects in order to avoid being deemed to have waived their Section 401 certification authority."[35]

The *Hoopa Valley* decision, relied upon in the 2020 Rule, does not prohibit allowing certifying authorities to suggest or require a project proponent to withdraw its certification request; the decision merely prohibits a collusive scheme to evade the one-year deadline. A recent 4th Circuit decision in *North Carolina Department of Environmental Quality v FERC* characterized the *Hoopa Valley* case as a "very narrow decision flowing from a fairly egregious set of facts, where the state agencies and the license

[31] 85 Fed.Reg. 42210, 42262 (July 13, 2020).
[32] 913 F.3d 1099 (D.C. Cir 2019).
[33] 40 C.F.R. §121.(6)(e); 85 Fed.Reg. 42210, 42262 (July 13, 2020).
[34] 85 Fed.Reg. 42210, 42262 (July 13, 2020).
[35] Brief for the State of Oregon *et.al.,* in support of U.S. Supreme Court review of *California Trout, et al. v. Hoopa Valley Tribe, et.al.* (September 27, 2019).

applicant entered into a written agreement that obligated the state agencies, year after year to *take no action at all* on the applicant's §401 certification request."[36]

C. Actions a Certifying Authority Completes During the Reasonable Period

The 4th Circuit *North Carolina v FERC* decision raises another issue that a revised 401 certification rule should consider and clarify: what act must a certifying authority take during the reasonable period of time? In dicta, the 4th Circuit interpreted CWA section 401 as providing that a state would not waive its certification authority if it takes significant and meaningful action on a certification request within a year of its filing even if the state does not finally grant or deny certification within that year.[37] What constitutes an "act" is unclear under both the CWA and the 2020 Rule.

Recommendations:

ASWM recommends that a revised 401 certification rule clearly state what is considered an "act" on a certification request.

D. Opportunities to Remedy a Certification Deficiency.

The 2020 Rule does not include an express allowance for certifying authorities to remedy deficient conditions after the certification action is taken. Under the 2020 Rule, a federal licensing or permitting agency may create in its own water quality regulations a procedure under which certifying authorities may remedy deficient conditions or denials, provided such procedures do not exceed the statutory one year.[38] If a condition or denial is identified as deficient and is not remedied, the federal agency may consider the condition or certification denial as a waiver and proceed without addressing terms of the certification.[39]

ASWM has heard state and tribal concerns about opportunities to remedy a perceived certification deficiency, most recently in the context of the 2021 partial Nationwide General Permit (NWP) package. The Corps has not developed regulations addressing remedying certification conditions or denials deemed to be deficient, and as a result the practice for the NWPs varied among the districts between not allowing a certifying authority to remedy a deficient condition to allowing a certification authority additional time to remedy. In other words, the current undefined process has not worked predictably or well. Additionally, ASWM is concerned about federal agencies playing a detailed oversight role in state and tribal certifications unless invited by the certifying authority. Section 401 is a direct grant of authority to the states (and to tribes with "treatment in a manner as a state" (TAS) status, providing explicit roles for EPA none of which includes overseeing state and tribal process and decision-making under section 401.[40] This concern is discussed further under Question #5 below.

[36] *North Carolina Dept. of Envt'l Quality v. Federal Energy Regulatory Commission* at 21, No. 20-1671 (4th Cir. 2011)(emphasis in original).
[37] *Id.* at 23.
[38] 85 Fed.Reg. 42210, 42269 (July 13, 2020).
[39] *See* 40 C.F.R. 121.9.
[40] EPA's responsibilities under CWA section 401 include (1) acting as a certifying authority if the state or tribe where the potential discharge may originate does not have certification authority, (2) oversee the process under 401(a)(2) which addresses impacts to neighboring jurisdictions, and (3) providing advice and technical assistance when requested through the certification process. *See* CWA §401(a)(1), 401(a)(2) and 401(b).

If the revised 401 certification rule continues to provide federal agencies with an oversight role including judging the quality and completeness of a 401 certification, problems arise regarding opportunities to remedy deficient certifications.

A significant issue is the amount of time the EPA regulation will allow to remedy the deficiency, and whether the time the federal agency takes to determine if there is indeed a deficiency uses part of the certifying authority's "reasonable period" left to respond. This issue highlights a contradiction in the 2020 Rule preamble regarding whether there ever is any "reasonable period" left to remedy perceived certification deficiencies. The preamble provides that a federal licensing or permitting agency may promulgate regulations establishing a procedure for remedying deficient conditions or denials provided such procedures are not used to extend the reasonable period beyond the statutory one year.[41] Yet a few pages earlier in the preamble, EPA states that "the reasonable period of time does not continue to run after a certification decision has been issued regardless of whether there is time remaining in the reasonable period" and that "a certifying authority cannot modify the certification after issuing a decision to the federal agency."[42] A revised certification rule should harmonize this contradiction and clarify if and for what period can a certification deficiency be remedied.

Without clearly defined processes and procedures in EPA's revised 401 certification rule, a federal licensing or permitting agency has discretion to determine what constitutes sufficient time for states and tribes to remedy the certification deficiency or to not allow any remedy at all. Federal agencies could, for example, be delayed in notifying the certifying authority of the deficiency so that the state or tribe has too little time to respond properly within the "reasonable period," after which the federal agency may interpret the certification it believes is deficient as a denial or waiver.

Recommendations:

ASWM recommends the revised certification rule recognize that section 401 is a direct grant of authority to states and tribes with "Treatment in the Manner of a State" (TAS) status and does not provide EPA or other federal agencies with an oversight role of certification conditions or processes. As discussed below under Question # 5 (Certification Actions and Federal Agency Review), Section 401 certification identifies three roles for EPA and none of them are reviewing the content and process for certification conditions.

ASWM recommends that if EPA's revised certification rule continues to provide a federal oversight role regarding quality and completeness of certifications, the revised 401 rule should establish a process for remedying a deficient certification, with timing and other process details that maximize likelihood of timely and effective certifications. Such processes should include an opportunity for the certifying authority not only to remedy defects, but also to discuss with the federal agency whether the perceived problem with the certification is in fact a deficiency**.**

ASWM recommends that the revised rule provide that the reasonable period pauses when a certifying authority submits a certification, so that the time taken by a federal agency to identify deficiencies does not reduce time available to correct the certification. If the clock has not stopped upon submission of a certification to the federal agency, there likely will be very little time left for a certifying authority to correct a deficiency. The overarching goal of the CWA and section 401 is to restore and maintain the quality of the Nation's waters, and federal agencies should not reduce opportunities for the certification to serve that purpose. Legislative history of the CWA indicates the overall purpose of section 401's certification requirement is to ensure that Federal licensing or permitting agencies cannot

[41] 85 Fed.Reg. 42210, 42269 (July 13, 2020).
[42] 85 Fed.Reg. 42210, 42262 (July 13, 2020).

override State water quality requirements, and the purpose of section 401's one-year review period is to prevent states from delaying federal projects by taking no action on certification requests.[43] Stopping the clock upon submission to the federal agency puts timing issues in the hands of the federal agency and thus would not result in states delaying projects through inaction. It also would provide time for certifying authorities to correct their certification. Therefore, stopping the reasonable period when a certifying authority submits its certification, and making any remainder of the period available to remedy a deficiency would be fully consistent with the CWA and Congress' purpose for section 401.

4. Scope of Certification

The 2020 Rule acknowledges that Congress did not provide a single unambiguous definition of the appropriate scope of section 401.[44] However, based on the CWA text, structure, and legislative history the 2020 Rule concludes that the section focuses on addressing water quality impacts from potential or actual discharges from federally licensed or permitted projects.[45] The 2020 Rule uses the term "water quality requirements" to delineate the universe that certifying authorities may consider in its certification, and defines the term as "the applicable provisions of [sections] 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States."[46]

ASWM agrees it is important the certifying authority and interested parties understand what is appropriate for a certification analysis to consider, and thus an appropriate basis for decision and for crafting certification conditions. However, the 2020 Rule inappropriately narrowed the scope of certification considerations to make section 401 less effective at protecting water quality. The 2020 Rule established the concept of a "scope of certification", a term not used in CWA section 401, and imposed two main limits: (1) states may only consider impacts from a "discharge" (narrowly defined), and (2) states may only impose conditions to ensure these discharges will comply with "water quality requirements" (also narrowly defined). As EPA revises the 2020 Rule and clarifies what are appropriate considerations for a 401 certification analysis, it should address a number of issues, including, for example: whether a certification considers water quality implications of the project as a whole or just its potential discharge; if all discharges are considered or just those from point sources; and what is the appropriate interpretation of "water quality requirements." Interpretations of the analytical scope of section 401 have a direct effect on the usefulness of certification as a water quality tool to help achieve CWA goals.
When thinking about the scope of section 401 water quality certification, ASWM has found it helpful to consider a quote from a 10th Circuit Court of Appeals decision: "…in construing the Act, 'the guiding star' is the intent of Congress to improve and preserve the quality of the Nation's waters. All issues must be viewed in the light of that intent."[47]

A. Discharge or Project as a Whole.

The 2020 Rule interprets section 401 as focusing on the discharge from a federally licensed or permitted activity, as opposed to the activity as a whole.[48] In so doing, EPA acknowledges that its interpretation is

[43] *See, e.g.,* S.Rep. 92-414, at 69, reproduced in 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1487 (1973).
[44] 85 Fed.Reg. 42210, 42250.
[45] *Id.*
[46] 40 C.F.R. §121.1(n). §§301, 302, and 306 address appliable effluent limitations for existing and new sources; §303 addresses water quality standards; and §307 addresses toxic pretreatment effluent standards.
[47] *Kennecott Copper Corp. v. Envtl. Prot. Agency*, 612 F.2d 1232, 1236 (10th Cir. 1979) (quoting *Am. Petroleum Institute v. Envtl. Prot. Agency*, 540 F.2d 1023, 1028 (10th Cir. 1976).
[48] 85 Fed.Reg. 42210, 42251 (July 13, 2000).

not consistent with U.S. Supreme Court caselaw. The Agency justifies its interpretation as based on a holistic examination of section 401 and CWA legislative history.[49]

In the 1994 decision in *Jefferson County PUD No. 1*, the U.S. Supreme Court considered the appropriate scope of analysis for section 401, and concluded it encompassed the project as a whole and was not limited to water quality controls specifically tied to a discharge.[50] The Court noted that section 401 "allows [certifying authorities] to impose 'other limitations' on the project in general to assure compliance with various provisions of the Act and with 'any other appropriate requirement of State law.'"[51] As a result, while section 401(a)(1) "identifies the category of activities subject to certification—namely, those with discharges"-- the Court held section 401(d) authorizes additional conditions and limitations "on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[52]

ASWM agrees with the U.S. Supreme Court in *Jefferson County PUD No. 1* and believes EPA's 2020 interpretation to be incorrect. In the preamble to the 2020 Rule, EPA explained that the terms "discharge" as set out in section 401(a) was ambiguous, and thus EPA's interpretation of the term and its relationship to section 401(d) was entitled to *Chevron* deference.[53] [54] Yet, the majority in *Jefferson County PUD* did not identify what portion of the CWA was ambiguous. This is because there was no ambiguity: the plain language of CWA section 401 is clear and as a result Congress's intent must be followed. Justice Stevens concurrence in *Jefferson County PUD* is directly on point:

"While I agree fully with the thorough analysis in the Court's opinion, I add this comment for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards. See, e. g., § 301(b)(1)(C), 33 U. S. C. § 1311(b)(1)(C)."[55]

Recommendations:

ASWM recommends that the revised 401 certification rule adopt the Supreme Court's interpretation of 401 certification in *Jefferson County PUD* and indicate the appropriate scope of certification is the water quality impact of the project as a whole. That interpretation was in effect for twenty-six years prior to the 2020 Rule, and therefore is well-understood and capable of consistent and predictable implementation. Also, considering all potential water quality impacts resulting from issuance of a federal permit or license helps ensure 401 certification remains an effective water quality tool and, as

[49] *Id.*
[50] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology,* 411 U.S. 700 (1994).
[51] *Id*. at 711.
[52] *Id*. at 711-12.
[53] 85 Fed.Reg. 42210 42251-53 (July 13, 2020).
[54] *See Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), for a discussion of a two-step analysis for determining whether an agency interpretation of the statute is entitled to deference. In step one, a court will seek to determine if Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter for courts and agencies must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, that the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
[55] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 411 U.S. 700 (1994),* Stevens, J., concurring.

Congress intended, that Federal licensing or permitting agencies cannot override state or tribal water quality requirements.

B. Water Quality Requirements: Point Sources Discharges or All Discharges, Regulatory or All Water Quality Provisions.

CWA section 401 provides that certifying authorities should consider consistency with enumerated CWA sections and "other appropriate requirements of state law," but does not define that term.[56] The 2020 Certification Rule asserts that the universe of provisions that certifying authorities may consider when evaluating a certification request are "water quality requirements," defined as "applicable provisions of 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States."[57] The 2020 Rule defines "other appropriate requirements of state law" as "including state or tribal regulatory requirements for point source discharges into waters of the United States," which are considered by EPA to be a subset of water quality requirements.[58]

The 2020 Certification Rule places limitation upon limitation on a state or tribe's ability to use 401 certification as an effective water quality tool. As discussed earlier, the 2020 Rule prohibits certifying authorities from imposing conditions on the project "activity as a whole" to protect waters within the state, or tribe, but instead must focus on impacts of the discharge only. The Rule's definition of "appropriate requirements of state law," identified in CWA section 401 as a key consideration in a certification analysis, is similarly defined narrowly as including only state and tribal regulatory provisions that address point sources. As a result, certifying authorities may consider only the enumerated CWA provisions in the context of a specific discharge, and state or tribal regulatory water quality protection provisions that regulate point source discharges. Certifying authorities may not address water quality implications of nonpoint sources, non-regulatory water quality provisions, or discharges into a non-federal water because these issues are not within the scope of certification as defined by the 2020 Rule.[59]

States and tribes have raised concerns to ASWM and others that, under the 2020 Certification Rule, many important water quality impacts are likely beyond the scope of 401 certification analysis. These include, for example, increased water withdrawals, stream flows, aquatic habitat loss, contamination of groundwater supplies, increased erosion and sedimentation, reduced stormwater infiltration, disconnected ecosystems, contaminant loading from spills, and harm to endangered species. … even if such effects are associated with the federally licensed or permitted project as a whole.[60] It is important to note that these considerations that the 2020 Rule considers to be outside the scope of certification all may relate to a state or tribe's designated uses for the water, and therefore are part of a water quality standard under section 303 which the CWA explicitly lists as within the scope of a certification analysis.

To justify limiting the scope of analysis to point source discharges, the 2020 Rule preamble asserts that the enumerated provisions of the CWA all specifically involve discharges from point sources except one, water quality standards. The preamble notes "the only exception is section 303, which addresses water quality standards, but these are primarily used to establish numeric limits in point source discharge permits."[61] ASWM does not agree with the preamble's characterization that water quality standards are primarily used to establish limits in point source discharge permits. Apparently, other offices in EPA

[56] CWA §1341(d); 33 U.S.C. §1341(d).
[57] 40 C.F.R. 121.1(n).
[58] 40 C.F.R. 121.1(n), 85 Fed.Reg. §42210, 42253 (July 13, 2020).
[59] *Id.*
[60] *See, e.g.*, 85 Fed.Reg. 42210, 42252 (July 13, 2020).
[61] 85 Fed.Reg. 42210, 42253 (July 13, 2020).

similarly do not agree with the 2020 Rule's drafters. For example, the EPA Water Quality Standards Handbook observes that water quality standards (WQS) are:

> "the foundation for a wide range of programs under the CWA. They serve multiple purposes including establishing the water quality goals for a specific waterbody, or a portion thereof, and providing the regulatory basis for establishing water quality-based effluent limits (WQBELS) beyond the technology-based levels of treatment required by CWA sections 301(b) and 306. WQS also serve as a target for CWA restoration activities such as total maximum daily loads. … WQS establish the environmental baselines used for measuring the success of CWA programs, so adequate protection of aquatic life and wildlife, recreational uses, and sources of drinking water, for example, depends on developing and adopting well-crafted WQS. CWA programs such as those developed under Section 303(d), Section 305(h) reporting, Section 401 water quality certification, Section 404 permitting for the discharge of dredged and fill material, and WQBELS in discharge permits issued under the National Pollutant Discharge Elimination System (NPDES) under Section 402 depend on such WQS."[62]

This Water Quality Standards Handbook discussion highlights that standards are not limited to point source-related issues but also can be used to manage nonpoint source contamination. For example, the CWA section 303(d) program requires states and tribes to list waters that violate water quality standards even if all discharges meet applicable effluent guidelines, and to develop "Total Maximum Daily Load" (TMDL) watershed plans that typically use a combination of point- and nonpoint source-based tools to bring the water into compliance with standards.[63] A TMDL may be required even if all sources of discharge are from nonpoint sources.[64] The preamble discussion of why it is reasonable to define "water quality requirements" as limited to point sources is analytically unsound, and (as illustrated by its discussion of water quality standards) appears to use selective logic to achieve a policy result that limits the usefulness of section 401 as a state and tribal water quality tool.

When the 2020 Certification Rule defines "water quality requirements" narrowly, it excludes an extensive body of state and tribal law directly applicable to water quality that certifying authorities have relied upon since the CWA was enacted to evaluate and condition federally licensed or permitted projects. The 2020 Rule's narrow definition of water quality requirements is a complete departure from EPA's longstanding position that "[t]he legislative history of [section 401] indicates that the Congress meant for the States to impose whatever conditions on [federally permitted projects] are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns."[65] [66]

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[62] U.S. Environmental Protection Agency, *Water Quality Standards* Handbook, *Section 1.2: Purpose of Water Quality Standards* (EPA-823-B-17-001) (September 2014).

[63] See CWA §303(d), 33 U.S.C. §1313(d).

[64] *Pronsolino v. Nastri,* 291 F.3d 1123 (9th Cir. 2002).

[65] Environmental Protection Agency, "Wetlands and 401 Certification – Opportunities and Guidelines for States and Eligible Indian Tribes," at 23 (1989).

[66] Inconsistency with longstanding EPA policy and guidance regarding 401 water quality certification is among the arguments made by twenty states bringing a facial challenge to the 2020 Rule. Quoting EPA's 1989 Guidance, the state plaintiffs argue the "Rule also departs from EPA's longstanding position that '[t]he legislative history of Section 401(d) indicates that Congress meant for the States to condition certifications on compliance with any State and local law requirements related to water quality preservation' and that 'conditions that relate in any way to water quality maintenance are appropriate'." *California v. Wheeler*, Case No. 3:20-cv-4869, Complaint for Declaratory and Injunctive Relief (N.D. Ca., 2020). The twenty state plaintiffs include California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, Wisconsin, as well as the District of Columbia.

The 2020 Rule's narrow reading of "water quality requirements" also conflicts with the U.S. Supreme Court's broad interpretation of the scope of the CWA. In its unanimous *S.D. Warren* decision the Supreme Court addressed the broad scope of the CWA, noting the Act "does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally, which Congress defined to mean 'the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water."[67] The Court listed the potential effects of the dam project at issue in the case, including drying up of the natural river bed, removing habitat for fish and other aquatic organisms, blocking fish passage, and preventing recreational access to and use of the river. The Court noted that "[c]hanges such as these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns … State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution."[68] "Essential" yet the 2020 Rule's definition of water quality requirements places these types of potential effects outside the scope of section 401. Thus, *S.D. Warren* is the second of two U.S. Supreme Court decisions that the 2020 Rule contravenes.

Congress gave broad authority under the CWA to states and tribes, noting "[i]t 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…"[69] Congress also provided that states and tribes may adopt more stringent water quality provisions than the federal minimums.[70] Nowhere does the CWA suggest that state and tribal laws enacted in response to the responsibility acknowledged in CWA section 101(b) are not "appropriate requirements of state law" and not valid water quality considerations in a 401 certification analysis. Such requirements might deal with buffers, instream flows, land use, groundwater, and other areas committed to state or tribal authority and responsibility. The system, as designed, functions in such a way that if a project proponent disagrees with a state or tribal condition, the project proponent can challenge the condition in court.[71]

In summary, the 2020 Rule preamble's argument that all enumerated CWA provisions address point sources is incorrect when viewed objectively. Limiting "other appropriate requirements of state law" to regulatory provisions addressing point sources removes many important water quality effects from consideration that are relevant to a water quality analysis and is inconsistent with CWA goals and section 401 provisions and contradicts a unanimous U.S. Supreme Court holding interpreting the scope of section 401.

Recommendations:

ASWM recommends that a revised 401 certification rule interpret the scope of certification broadly, consistent with Congressional intent. ASWM further recommends the rule not limit "water quality requirements" to just regulatory provisions and to just discharges from point

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[67] *S.D. Warren Co. v Maine Board of Envtl Protection,* 547 U.S. 370, 385 (2006)

[68] *Id.* at 386.

[69] CWA §101(b), 33 U.S.C. §125(b).

[70] CWA §510, 33 U.S.C. §1370.

[71] The 2020 Rule acknowledges "… the legislative history for the 1972 amendments to the CWA repeatedly shows that Congress intended conflicts regarding the scope of section 401 to be resolved by State courts, not federal agencies. … Courts of competent jurisdiction are better suited to evaluate the underlying State or Tribal law to determine whether a specific certification condition or the basis for denial is within the scope of certification." 85 Fed.Reg. 42210, 42269 (July 13, 2020).

sources. Appropriate considerations should include both regulatory and non-regulatory provisions and address both point and nonpoint discharges.

5. Certification Actions and Federal Agency Review

Under the 2020 Rule, certifying authorities may take any one of four actions in response to a certification request: grant certification, grant certification with conditions, deny certification, or waive certification.[72] Certification authorities must include specific information when granting certifications with conditions or denying certification. For conditioned certifications, the certifying authority must explain why the condition is necessary to assure the proposed project will comply with water quality requirements, and legal citations authorizing the condition.[73] For denied certifications, the certifying authority must identify the specific water quality requirements with which the discharge will not comply and an explanation of why, and if the denial is due to insufficient information, the certifying authority must identify the specific data that would be necessary to assure that the project's discharge will comply with water quality requirements.[74] If the certification or denial does not include the required information, the certification or denial will be considered by the federal licensing or permitting agency as waived.[75] Additionally, if a certifying authority does not follow the procedural requirements of section 401, such as the public notice provisions, or fails to complete its review within the reasonable period of time, the certification will be considered as waived.[76]

The 2020 Rule establishes a number of responsibilities for federal licensing and permitting agencies. The 2020 Rule requires federal agencies to review the actions by certifying authorities to determine they have met procedural requirements, including submission of the above information as part of their certification response.[77] The federal agency must determine whether waiver has occurred, either expressly or implicitly through a failure or refusal to act. If a federal agency determines that a certifying authority did not comply with CWA and 2020 Rule procedural requirements, the certification action will be waived, whether it is a grant, grant with conditions, or denial.[78] If the federal agency concludes that a certification condition meets the procedural requirements of section 401 and includes the information called for in the 2020 Rule, "the condition must be incorporated into the federal license or permit in its entirety, as drafted by the certifying authority."[79] The preamble to the 2020 Rule describes the federal agency role as administrative: federal agencies are not called on to "substantively evaluate or determine whether a certification action was taken within the scope of certification. This federal agency review is entirely procedural in nature."[80]

Section 401 certification identifies three roles for EPA: serving as the certifying authority for jurisdiction that lack 401 certification authority,[81] initiate and oversee the opportunity for neighboring jurisdictions to comment on proposed projects that may affect the quality of their waters,[82] and provide technical assistance upon request.[83] The CWA provides that "[t]he Administrator is authorized to prescribe such

[72] 86 Fed.Reg. 29541, 29543. *See also* CWA §401, 33 U.S.C. §1341; 40 C.F.R. §§121.7, 191.9.
[73] 40 C.F.R. §121.7(d)(1).
[74] *Id.*
[75] 85 Fed.Reg. 42210, 42263 (July 13, 2020).
[76] *Id.*
[77] *Id.*
[78] *Id.* at 42266.
[79] *Id.* at 42265.
[80] *Id*. at 42267.
[81] CWA §401(a)(1), 33 U.S.C. §1341(a)(1).
[82] CWA §401(a)(2), 33 U.S.C. §1341(a)(2).
[83] CWA §401(b), 33 U.S.C. §1341(b).

regulations as are necessary to carry out his functions under this chapter."[84] Section 401 does not contain any express delegation of rulemaking authority, and as a result EPA may prescribe such regulations as are necessary to carry out the Agency's function as a certifying authority, an initiator of neighboring jurisdiction input, and technical assistant provider. EPA arguably has general authority to promulgate regulations outlining the general provisions of section 401, although some states and tribes have disputed that authority.[85] It is considerably less clear whether EPA has any statutory basis to promulgate regulations dictating the procedural and substantive details of how states and tribes should implement the direct grant of authority Congress provides to them in section 401.

The 2020 Rule in effect gives federal agencies veto power over certifying authorities' certification decisions. While the 2020 Rule ostensibly limits federal agencies' authority to review a certification only for "procedural" compliance with the rule, federal agencies can consider a certification waived or a condition invalid if, in the agency's view, the certifying authority did not comply with procedural obligations to explain how their decisions follow the 2020 Rule's substantive limits. For example, if a certifying authority conditions its certification, it must explain why a condition is "necessary."[86] The CWA provides that "no license or permit shall be granted if certification has been denied …" yet under the 2020 Rule a federal agency can interpret procedural requirements in a way that converts a denial to a waiver, and proceeds to license or permit the proposed project over the objections of the certifying authority. Similarly, the 2020 Rule allows federal agencies to ignore certification conditions it does not like, if an agency concludes that procedures have not been correctly followed. The preamble to the 2020 Rule emphasizes the "federal agency review is entirely procedural in nature."[87]

Implementation of what is described as a procedural review can have a significant substantive effect. For example, the Corps of Engineers sought certification of a Nationwide General Permit (NWP) package in September 2020, and many Corps districts reviewed the substance of some of the resulting certification conditions and concluded the conditions were impermissible "reopener clauses." States have told ASWM that some districts viewed the disputed condition as invalid while considering the balance of the certification as valid, other districts believed the disputed condition resulted in a certification denial, and as part of their review at least one district redrafted a certification condition. The NWP certification process was not predictable, not transparent, and not consistent, resulting in substantive changes to certifications not envisioned by the 2020 Rule or the CWA. The 2020 Rule in effect has overridden the CWA requirement that conditions in a certification "shall become a condition on any Federal license or permit."[88] If the validity of a condition is questioned, it is not the business of a federal licensing or

[84] CWA §501(a), 33 U.S.C. §1361. The 1972 CWA does use male pronouns when authorizing EPA action.
[85] *See, e.g., Delaware Riverkeeper Network v. Wheeler,* Case No. 2:20-cv-3412 (E.D. Pa)
[86] 85 Fed. Reg. 42210, 42263-69 (July 13, 2020); 40 C.F.R. §121.7(d)(1).
[87] *Id*. at 42267. The preamble also acknowledges that EPA Office of General Counsel opinions have previously interpreted §401(d) broadly to preclude federal agency review of state certifications, citing *Roosevelt Campobello Inter. Park v USEPA,* 684 F.2d 1041,1056 (1st Cir. 1982). *Id* at 42268.
[88] "Any certification … shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit…" CWA 401(d), 33 U.S.C. 1341(d). Note that caselaw provides that federal licensing and permitting agencies are not authorized to second-guess a water quality certification and every condition should become a term of the federal permit or license should it be issued. *See, e.g., American Rivers v. FERC,* 129 F.3d 99 (1d Cir. 1997)(A federal agency may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, but the federal agency "does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401.").

permitting agency to determine if it is indeed inappropriate; the proper forum to argue the appropriateness of a condition is in state or tribal court.[89]

The 2020 Rule expands the concept of waiver under CWA section 401. The CWA provides:

> "If [the certifying authority] fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence."[90]

Thus, under CWA section 401 a waiver occurs only if a certifying authority fails or refuses to act on a certification request. EPA wished through rulemaking to establish detailed certification process requirements for state and tribal certifying authorities and provide that failure to follow those procedures would result in waiver. As a result, the 2020 Rule expands the statutory concept of certification waiver by providing that not following the 2020 Rule's required process constitutes a "failure or refusal to act" thereby allowing a federal agency to convert a certification condition or denial into a waiver. This 2020 Rule approach to waiver seems somewhat creative and inconsistent with Congressional intent of section 401 to serve as an effective water quality protection tool, and inconsistent with section 401 being a direct grant of authority to states and tribes. In addition, ASWM is aware of certifying authorities whose conditions were not only rejected but subjected to a Corps-established new category of action: "deline" or "deline to rely on" by the federal agency. Such an option is not provided in CWA section 401.

In summary, the "procedural" review of certifications by federal licensing and permitting agencies in practice becomes a substantive review and affects the content of a certification. If a certifying authority does fail to follow process or information requirements of the 2020 Rule, the rule does not require federal agencies to allow the certifying authority to correct the deficiency even where it is minor and the certification could result in water quality protections consistent with section 401 and CWA goals, but instead allows the agency to convert the deficient certification condition or denial to a waiver.

Recommendations:

ASWM recommends a revised certification rule not require specific certification content and processes and should not authorize federal agencies to convert a certification condition or denial into a waiver if content or process requirements are unmet. While the 2020 Rule ostensibly does not authorize federal licensing or permitting agencies to substantively review a certification, in practice federal agencies reviewing compliance with 2020 Rule processes have affected the content of a certification and that is impermissible under the CWA section 401. **A revised rule should reflect that federal licensing and permitting agencies do not have authority to substantively evaluate a 401 certification. Additionally, if the revised rule does provide for a procedural review of the certification by a federal agency, the rule should require the agency to allow a certifying authority to correct any perceived deficiencies. A certification condition or denial perceived by the federal agency as procedurally deficient should not be interpreted as a waiver or subject to the unauthorized category of "decline;"** to do so is inconsistent with the stated goals of the Act and section

[89]The 2020 Rule preamble indicates EPA has concluded "courts of competent jurisdiction are better suited to evaluate the underlying State or Tribal law to determine whether a specific certification condition or the basis for denial is within the scope of certification." 85 Fed.Reg. 42210, 2269 (July 13, 2020).

[90]CWA §401(a)(1), 33 U.S.C. §1341(a)(1).

401. In jurisdictions where certifications or selected conditions were "declined," these decisions by the Corps should be revisited.

6. Enforcement

The 2020 Rule reserves the enforcement role to the federal agency issuing the federal license or permit, providing that "the Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit."[91] The preamble to the 2020 Rule interprets the CWA as not providing an independent regulatory enforcement role for certifying authorities, but allows states and tribes to take enforcement actions where authorized under state or tribal law and not preempted by other federal statutory provisions.[92] Under the 2020 Rule's interpretation of section 401, a certifying authority may inspect a facility that has received certification prior to its operation, in order to determine if the discharge from the certified project will violate the certification, and should notify the project proponent and federal agency if it has identified potential violations. After operations begin, all inspections and enforcement are to be conducted by the federal agencies only.[93] The 2020 Rule does not change a federal agency's enforcement discretion, under which an agency can decide when to enforce and not enforce, "reserving limited enforcement resources for the cases that can make the most difference."[94]

The 2020 Rule's provision that only federal agencies may enforce 401 certification conditions contradicts CWA section 510, which preserves the right of any state to adopt or enforce "any standard or limitation respecting discharges of pollutants" and "any requirement respecting control or abatement of pollution" provided the standards, limitations, and requirements are at least as stringent as CWA requirements.[95] When what became section 401 was first proposed, Senator Muskie explained on the Senate floor why state certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution:

> "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."[96]

The U.S. Supreme Court quoted Senator Muskie's explanation in its unanimous *SD Warren* decision, and noted "[t]hese are the very reasons that Congress provided the States with power to enforce 'any other appropriate requirement of state law,' 33 U.S.C. 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge)."[97] However, the 2020 Rule chooses to reject the unanimous U.S. Supreme Court viewpoint in *S.D. Warren.*

The 2020 Rule's prohibition on state and tribal enforcement of section 401 conditions also is inconsistent with the CWA's citizen suit provision. Under the CWA, any citizen may bring a civil action against any person who is alleged to be in violation of any effluent standard or limitation in the CWA, or against EPA where there is an alleged failure of the Administrator to perform any act or duty under the include, among

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[91] 40 C.F.R. §121.11(c).
[92] *Id*. at 42275-6.
[93] 85 Fed.Reg. 42210, 42277 (July 13, 2020).
[94] *Id.*
[95] CWA §510, 33 U.S.C. §1370.
[96] 116 Cong. Rec. 8984 (1970), quoted in *S.D. Warren Co. v Maine Board of Envtl Protection,* 547 U.S. 370, 385 (2006).
[97] *S.D. Warren Co. v. Maine Board of Envtl Protection,* 547 U.S. 370, 385 (2006).

other things, "a certification under section 1341 [section 401]."[98] In addition to the general citizen suit provision, the CWA explicitly provides that a governor of a state may bring a civil suit where there is alleged an EPA failure to enforce a CWA effluent standard which is occurring in another State and is causing an adverse effect on the public health or welfare in his state, or is causing a violation of any water quality requirement in within the governor's state.[99] When a citizen suit is brought, the federal district courts have jurisdiction to enforce an effluent standard or limitation.[100] The 2020 Rule prevents state and tribes from using citizen suits to enforce 401 certification conditions in a federal license or permit, apparently attempting through regulation and preamble to modify the CWA's statutory citizen suit provisions.

The 2020 Rule declares that it does not preclude states from pursuing enforcement actions where authorized by state law and "not preempted by other federal statutory provisions."[101] Federal preemption is where federal law supersedes conflicting state laws.[102] Many types of federal licenses and permits are preempted, such as licenses for non-federal hydroelectric dams and interstate natural gas pipelines under the Federal Power Act.[103] Federal preemption does not mean the effects at issue are unimportant. For example, hydroelectric dams can adversely affect aquatic habitat, stream flows, and recreation, as the U.S. Supreme Court noted in in *S.D. Warren*.[104] However, if CWA section 401 does not provide authorization for state and tribal certifying authorities to bring an enforcement action, and the federal agency declines to do so, those adverse effects will go unaddressed where the state or tribe is preempted from bringing an action under state or tribal law. During the *SD Warren* litigation, parties noted that but for section 401's certification and conditioning provisions, the issues addressed in the state's certification would have gone unaddressed due to federal preemption under the Federal Power Act.[105] Reserving to federal agencies the authority to enforce 401 certification conditions becomes even more problematic when viewed in the light of enforcement discretion. If an agency decides that noncompliance with a 401 condition is not a "case[] that can make the most difference" the violation may go unaddressed.

Alternatively, or additionally, the federal agency may decide to not enforce provisions if they are not directly related to the agency's mandate. For example, the Army Corps of Engineers indicated when finalizing its 2021 Nationwide General Permit (NWPs) package under CWA section 404 that "it does not have the authority to enforce conditions provided by states, except for those conditions added to the NWPs by water quality certifications by certifying authorities …, that are within the Corps' legal authority to enforce."[106] If the Corps decides to not enforce a 401 condition in its NWPs and the certifying state or tribe is not allowed to enforce the 401 condition, then the CWA's requirement that certification

[98] CWA §506(f), 33 USC §1366(f).
[99] CWA §505(h), 33 USC §1365(f).
[100] CWA §505(a), 33 USC §1365(a).
[101] 85 Fed.Reg. 42210, 42276 (July 13, 2020).
[102] For a general discussion of federal preemption, *see* Congressional Research Service, Federal Preemption: A Legal Primer," (July 23, 2019).
[103] 85 Fed.Reg. 42210, 42276 fn 65 (July 13, 2020).
[104] *S.D. Warren Co. v Maine Board of Envtl Protection,* 547 U.S. 370, 385 (2006).
[105] *See, e.g., S.D. Warren Co. v. Maine Board of Envtl Protection, Amicus Brief in Support of Respondent,* filed by the States of New York, Washington, Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, the Commonwealth of Puerto Rico, the Pennsylvania Department of Environmental Protection and the International Association of Fish and Wildlife Agencies, at 12.
[106] 86 Fed.Reg. 2744, 2750 (January 13, 2021).

conditions "become a condition of any Federal license or permit"[107] has no effect and is rendered meaningless.

ASWM understands federal agency enforcement discretion is an important method of ensuring suitable use of limited enforcement resources. However, when enforcement discretion is coupled with the 2020 Rule section 401 interpretation that state and tribal certifying authorities may not enforce a 401 certification condition, the result violates a basic canon of statutory interpretation. When interpreting a statute, courts and agencies "should not interpret any statutory provision in a way that would render it or other part of the statute inoperative or redundant."[108] The 2020 Rule's prohibition on state and tribal enforcement of certification conditions is, therefore, not supported by the CWA because it renders a statutory provision inoperative.

Recommendations:

ASWM recommends that a revised 401 certification rule provides that state and tribal certification authorities may enforce certification conditions that have become a condition in a federal permit or license. The 2020 Rule's limitations on enforceability are inconsistent with goals for the CWA and the plain language of section 401, conflicts with the enforcement provisions of CWA sections 505 and 510, and contradicts a unanimous U.S. Supreme Court decision.

7. Modifications

The 2020 Certification Rule does not authorize or include any procedure for certifying authorities to modify certifications after issuance.[109] The 2020 Rule also prohibits the use of "reopener" clauses to modify requirements of a certification after it has been issued.[110] The preamble asserts that reopeners allow the certifying authority "to take an action to reconsider or otherwise modify a previously issued certification at some unknown point in the future."[111] The preamble also notes that reopeners are unnecessary because future changes in the project's discharge or associated license or permit "may trigger the requirement for a new certification, depending on the federal agency's procedures."[112]

A prohibition on reopener clauses not only allows but requires the federal licensing or permitting agency to scrutinize the substance of certification conditions to determine if they include reopeners. This is contrary to the Rule's insistence that federal agencies do not have authority to "substantively evaluate or determine whether a certification action was taken within the scope of certification …This federal agency review is entirely procedural …"[113] Generally certifying authorities do not label conditions as a "reopener clause," so the federal agency may feel obligated to make a substantive judgement as to the nature of a condition and sometimes misinterpret appropriate conditions as reopeners prohibited under the 2020 Rule.

For example, in September 2020 the Corps of Engineers required certification of proposed section 404 Nationwide General Permits (NWPs) rather than of final permits. In response, several certifying authorities indicated that their certification applied to the NWPs as proposed and may not apply to final NWPs if the final permits differed substantively from proposal. Such a statement clarified the federal action to which the certification applied. Regardless, some Corps districts interpreted the statement

[107] CWA §401(d), 33 U.S.C. §1341(d).
[108] *See, e.g.,* CRS, "Statutory Interpretation: Theories, Tools, and Trends" at 28 (Updated April 5, 2018).
[109][109] 85 Fed.Reg. 42210, 42278-80 (July 13, 2020)
[110] *Id.* at 42279.
[111] *Id.* at 42280.
[112] *Id.* at 42279.
[113] 85 Fed.Reg. 42210, 42267 (July 13, 2020).

as a prohibited reopener clause and rejected the certification, even though the statement did not involve taking action at "some unknown point in the future."

A number of circumstances exist where modification of an existing 401 certification would be appropriate. Not all of these circumstances would result in a new license or permit with an associated new certification. For example, a court may remand a certification or condition, the project proponent or the certifying authority may want to correct an error, the nature of the licensed or permitted discharge may change, the discharge location may change, or the federal, state, or tribal law upon which the certification is based may change. EPA's regulations governing certification of National Pollutant Discharge Elimination Program (NPDES) permits under CWA section 402 provide procedures for modifying certifications in certain circumstances.[114] The 2020 Rule preamble acknowledges the modification provision in the NPDES certification program[115] yet fails to note presence in the NPDES program of any confusion, regulatory uncertainty, or other problems the preamble attributes to modification provisions.

The 2020 Rule preamble says reopener clauses are unnecessary because if the proposed project changes materially after a certification, "it may be reasonable for the project proponent to submit a new certification request."[116] A federal licensing or permitting agency may conclude that a new permit is necessary if the project and associated discharges have changed from that originally authorized. The preamble seems to envision no role by the certifying authority in determining that material changes to the project require a new or modified certification.

Recommendations:

ASWM recommends that a revised certification rule allow reopener clauses that provide an "if-then" description of future triggering events and associated responsive actions. Reopener clauses such as these would not be what the 2020 Rule preamble is concerned about, namely an invitation to some action by a certifying authority at some unknown point in the future. Instead, these reopener clauses would be focused, and could accommodate changes to the project or its discharge, changes in the laws forming the basis of the certification, or other changes that affect the certification's protection of water quality. Allowing reopener clauses also would remove the need for federal licensing or permitting agencies to make substantive evaluations of certification conditions as part of a hunt for prohibited reopener clauses.

8. Neighboring Jurisdictions

CWA Section 401(a)(2) establishes a process under which neighboring jurisdictions can be notified and have an opportunity to be heard about potential water quality implications of proposed projects undergoing certification. The process begins when a federal licensing or permitting agency notifies EPA that they have received a license or permit application and associated water quality certification.[117] EPA has 30 days to determine whether the discharge "may affect. . . the quality of the waters of any other

[114] 40 C.F.R.§124.55(b). Procedures allow modification if there is a change in the state law or regulation upon which a certification is based, or if a court or appropriate State Board or agency stays, vacates, or remands a certification.
[115] 85 Fed.Reg. 42210, 42279 (July 13, 2020).
[116] *Id.*
[117] CWA §401(a)(2), 33 U.S.C. §1341(a)(2).

State..."[118] The 2020 Certification Rule asserts that determining whether a discharge "may affect" neighboring jurisdictions is discretionary.[119] Under the Rule, if EPA at its discretion determines that the discharge from the certified project may affect water quality in a neighboring jurisdiction, the Administrator shall notify the neighboring jurisdiction, the licensing or permitting agency, and the applicant.[120] "If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such hearing."[121] If a hearing is held, "the Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency."[122]

ASWM is aware of only one court decision addressing whether or not EPA's action to determine if a discharge "may affect" other state or tribal waters is discretionary. In *Fond du Lac v. Thiede*, a Minnesota district court held that the action was mandatory and EPA did not have discretion to not make a determination about whether the discharge authorized by the proposed § 404 permit "may affect" the Band's waters.[123] The court noted the existence of such a clear and limited [30-day] timeframe supported the argument that the statute imposes a duty on EPA to make a "may affect" determination, and interpreted the statutory text of 401(a)(2) in its broader statutory context:

"Given that the purpose of [CWA §401(a)(2)] appears to be to provide a mechanism to work out potential interstate conflicts over water pollution, it seems unlikely that, when a discharge permitted by State A may pollute the waters of State B, Congress intended to leave State B's participation rights entirely up to the unreviewable discretion of EPA. See 33 U.S.C. § 1251(b) ("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…)"[124]

The court's decision highlights a particular concern ASWM has heard often from our state and tribal members: a concern about the potential impact to their waters from upstream waters or wetlands, where upstream states or tribes lack independent authority to regulate discharges into those waters. If a state lacks independent authority to address such discharges, the sole recourse for reviewing federally authorized discharge activities is through CWA § 401 certification. If EPA's duty to determine whether discharges "may affect" the water quality in neighboring jurisdictions is wholly discretionary, section 401(a)(2) may not significantly reduce the likelihood hat activities in upstream waters and wetlands will threaten water quality in downstream waters. EPA has indicated that 401(a)(2) has been rarely used, with regional offices following the statutory process of notification roughly ten times since 1972.

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[118] *Id.* Under the 2020 Certification Rule, a "neighboring jurisdiction" can be a state or a tribe with "Treatment in a Manner as a State" (TAS) under CWA §518(e). Amendments to the CWA enacted after section 401 provided that tribes could seek TAS. As a result, when 401(a)(2) uses the word "state" or "states," EPA has interpreted the words as including states as well as tribes with TAS status for section 401. EPA also refers to tribes with TAS for section 401 also referred to as "authorized tribes."

[119] 85 Fed.Reg. 42210, 42273-42274 (July 13, 2020).

[120] 40 C.F.R. §121.12(c); 85 Fed.Reg. 42210, 422774 (July 13, 2020).

[121] CWA §401(a)(2), 33 U.S.C. §1341(a)(2).

[122] *Id*.

[123] *Fond du Lac Band of Lake Superior Chippewa v. Thiede,* (D.C. Mn, Case No. 19-CV-2489)(Decided February 16, 2021).

[124] *Id.*

ASWM is not unmindful of the potential administrative burden a mandatory duty to make a "may affect" determination could place on EPA's regional offices. It may be helpful to note that EPA regional offices are not determining "will affect" but only whether there is a possibility a proposed project's discharges may have an effect … a determination requiring significantly less technical analysis. EPA could identify factors for a quick "may affect" determination, such as the location of the project and proximity to other jurisdictions, the size of the project and its potential impacts, type of project, if there are documented concerns about the project from a neighboring jurisdiction, and other factors.

The 2020 Certification Rule gives little detail about the 401(a)(2) process beyond that provided by the CWA statutory text. ASWM believes it would be a significant help if a revised certification rule further explained the process and EPA's decision criteria at key stages.

Recommendations:

ASWM recommends the revised certification rule indicate the action of determining if a discharge "may affect" the quality of neighboring jurisdictions' waters is mandatory, not discretionary. The revised rule should include additional detail on how determinations of "may affect" are made, including factors for consideration such as location of the project, proximity to other jurisdictions, project size and type, potential scale of impacts, documented concerns from neighboring jurisdictions. If EPA remains reluctant to determine an action is mandatory, in the alternative the Agency could indicate that regional offices should always choose to use its discretion and make such a finding. Section 401(a)(2) is a primary authority under the CWA to ensure cross-border impacts on water quality are addressed.

ASWM recommends that if a revised rule should decide to interpret the "may affect" determination as discretionary, the revised rule should provide examples of factors guiding EPA's use of that discretion. Such examples could include considerations such as those in a paragraph above and would assist state and tribal co-regulators as well as the interested public in understanding EPA's decision-making process. Similarly, **ASWM recommends the revised certification rule identify what information EPA will provide in its notice to neighboring jurisdictions after making a "may affect" determination.**

9. Data and Other Information

EPA's Notice of Intent solicits data on implementation of the 2020 Certification Rule and effects the Rule has had on certification decisions. **ASWM has encouraged its state and tribal members to submit data and information in response to this Notice of Intent.**

10. Implementation Coordination

EPA's Notice of Intent asks for views regarding how best to implement certification rule changes, particularly regarding how implementation of changes might be coordinated in time among EPA, other federal agencies, and the states and tribes. In addition to EPA's general 401 certification regulations found in Part 121 of 40 C.F.R., several federal licensing and permitting agencies whose authorizations are subject to section 401 certification have promulgated regulations addressing how certification works in their programs. For example, Federal Energy Regulatory Commission regulations specify timeframes and other certification requirements,[125] as do the Corps of Engineers[126] and EPA NPDES program regulations, among others.

[125] 18 C.F.R. §5.23.
[126] 33 C.F.R. §320.4.

Recommendations:

ASWM recommends revisions to EPA's 401 certification rule should be proposed and finalized at the same time as 401 certification regulations of other federal agencies, to help ensure smooth implementation of new requirements. Such coordination could take additional time and therefore potentially delay finalization of the regulatory changes. However, substantial regulatory uncertainty and confusion result when EPA's general certification regulations conflict with the program-specific certification regulations of other agencies, and a longer period to promulgate multiple agencies' certification rules would be worth it when the result is a clearer and more coordinated set of certification requirements.

Thank you for the opportunity to submit information, policy recommendations, and other feedback in support of EPA's efforts to develop a revised CWA Section 401 Certification Rule. ASWM strongly supports EPA's objective of developing a revised certification rule that is fully consistent with CWA section 401 and the goals of the Act. Although these comments have been prepared by ASWM with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes. We encourage your full consideration of the comments of individual states and tribes, and other state and tribal associations.

Sincerely,

Marla J. Stelk
Executive Director

Cc: ASWM Board of Directors
Radhika Fox, Assistant Administrator of Water, EPA
John Goodin, Director, Office of Wetlands, Oceans and Watersheds
Brian Frazer, Director, Oceans, Wetlands, and Communities Division, EPA
Russell Kaiser, Chief, Program Development and Jurisdiction Branch, EPA
Lauren Kasparek, Biologist, Oceans, Wetlands, and Communities Division, EPA