October 21, 2019

**VIA REGULATIONS.GOV**

The Honorable Andrew Wheeler
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

**RE: Docket ID No. EPA-HQ-OW-2019-0405**
**Updating Regulations on Water Quality Certification, Proposed Rule, 84 Fed. Reg. 44,080 (Aug. 22, 2019)**

Dear Administrator Wheeler:

The National Association of Manufacturers, U.S. Chamber of Commerce, and Energy Equipment and Infrastructure Alliance (together, "the Associations") appreciate the opportunity to comment on EPA's proposal to update its regulations governing water quality certification under Clean Water Act ("CWA") section 401.[1] EPA's proposed updates and clarifications would go a long way toward providing clarity, regulatory certainty, and predictability to the section 401 certification process. The Associations appreciate that the majority of section 401 certifications are issued in a timely manner and are appropriately focused on compliance with water quality requirements. That said, we are aware of some troubling instances where the certification timeline has been dragged out or the scope of the analysis expanded well beyond what Congress envisioned when it enacted section 401. The proposed revisions to EPA's outdated regulations are properly tailored to respect the balance that Congress struck between federal and state authorities and between protecting water resources and reducing delays in federal licensing or permitting proceedings.

## I. Interests of the Associations

The **National Association of Manufacturers** ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

[1] *See* 84 Fed. Reg. 44,080 (Aug. 22, 2019).

The **U.S. Chamber of Commerce** is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system.

The **Energy Equipment and Infrastructure Alliance** ("EEIA") is the association of suppliers of construction, engineering, equipment, materials and services for development, maintenance and operation of infrastructure for energy production, transmission and consumption. EEIA is the only organization representing the full spectrum of the energy infrastructure supply chain—over one hundred thousand companies and millions of workers in sixty industries from all 50 states—supporting upstream production facilities, midstream infrastructure including transmission pipelines, and downstream infrastructure for power generation, storage, processing and export.

Many of the Associations' members build, own or operate facilities and conduct a broad range of activities throughout the country that require federal licenses or permits from not only EPA, but other federal agencies such as the U.S. Army Corps of Engineers ("Corps") and the Federal Energy Regulatory Commission ("FERC"). As such, Association members often must obtain water quality certifications under CWA section 401. Others are subject to uncertain project construction schedules or in-service availability of a project's delivered energy resources. In recent years, some Association members have encountered considerable delays and uncertainty in trying to navigate the section 401 certification process and have sometimes had to deal with inconsistent state requirements. The Associations have a significant interest in ensuring that the substantive and procedural requirements for section 401 certification are consistent with the scope of review and timeline that Congress envisioned.

## II. Comments on Substantive Requirements for 401 Certifications

### A. The Scope of Section 401 Review Must Be Limited to Water Quality-Related Requirements.

EPA proposes to codify a new provision clarifying that the scope of a 401 certification "is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements."[2] The Associations support this clarification, which is consistent with Congress's intent to focus section 401 certification reviews on water quality. Nothing in the CWA or its legislative history indicates that Congress intended to authorize states to deny water quality certifications on the basis of non-water quality concerns.

Congress gave states and authorized tribes an important tool to protect water quality by enacting CWA section 401. Under that provision, certifying authorities must determine that "any discharge into the navigable waters . . . will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317."[3] Each of those provisions, in turn, deals with effluent

[2] *See* 84 Fed. Reg. at 44,120 (proposed § 121.3).

[3] 33 U.S.C. § 1341(a)(1).

limitations, water quality standards, and pretreatment standards. To be sure, Congress used a seemingly open-ended phrase—"any other appropriate requirement of State law"—in section 401(d) of the statute when discussing the sorts of requirements that become conditions on Federal licenses and permits that are subject to CWA section 401.[4] But that phrase is preceded by specific references to enumerated sections of the statute focused on water quality-related requirements and thus, should not be interpreted so broadly as to refer to state law requirements that are unrelated to the protection of water quality.

As EPA explains in the preamble, under the *ejusdem generis* canon of interpretation, "where general words follow an enumeration of two or more things, they apply only to things of the same general kind or class specifically mentioned."[5] The Supreme Court typically employs this canon "to ensure that a general word will not render specific words meaningless."[6] With that instruction in mind, it follows that "other appropriate requirement" must be construed in a way that ensures that the preceding specific references to statutory provisions governing effluent limitations and standards, standards of performance, pretreatment standards, are not rendered meaningless.[7] Had Congress intended "other appropriate requirement" to be interpreted so broadly as to encompass non-water quality requirements, it would have had no reason to refer specifically to the specific provisions of the CWA that are cross-referenced in section 401(d). And as EPA notes in the proposal, Congress knows how to craft statutory language requiring consideration of impacts beyond water quality.[8] Indeed, Congress did so elsewhere in the CWA. For instance, when directing EPA to promulgate effluent limitations guidelines, Congress explicitly declared that EPA shall take into account various factors including "non-water quality environmental impact."[9] Had Congress intended for section 401 reviews to encompass more than just water quality requirements, Congress surely would have chosen a more direct way to achieve that result.

The legislative history supports EPA's proposed clarification of the scope of section 401 certifications. When introducing the 1970 version of what is now CWA section 401, Senator Edmund Muskie emphasized that the provision focused on compliance with water quality standards:

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[4] *See id.* § 1341(d).

[5] 84 Fed. Reg. at 44,095 (citing *Wash. State Dep't of Social & Health Servs. v. Keffeler*, 537 U.S. 371, 383-85 (2003)).

[6] *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 295 (2011).

[7] *Cf. Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 628-29 (2018) (concluding that the phrase "other limitation" in CWA section 509(b)(1)(E) must mean "some type of restriction on the discharge of pollutants" given the numerous references in that provision to cross-referenced sections [] that [] impose restrictions on the discharge of certain pollutants").

[8] *See* 84 Fed. Reg. at 44,094.

[9] *See* 33 U.S.C. §§ 1314(b)(1)(B), (b)(2)(B) & (b)(4)(B).

> 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*.[10]

Likewise, the Senate Report for the 1972 Act explained that what is now section 401 "makes clear that any *water quality requirements established under State law*, more stringent than those requirements under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override *State water quality requirements*."[11] Nothing in the legislative history remotely suggests that Congress contemplated that section 401 certification reviews would encompass non-water quality considerations.

EPA's proposed clarification of the scope of section 401 certifications is important in light of some recent examples where states have denied water quality certifications based in part on non-water quality considerations. For instance, the New York Department of Environmental Conservation denied a water quality certification request after determining that "FERC's environmental assessment had failed to evaluate the downstream greenhouse gas emissions from the Project."[12] To use another recent example, in September 2017, the Washington Department of Ecology denied the Millennium Bulk Terminals-Longview request for a water quality certification *with prejudice*, referring to a litany of "significant unavoidable adverse impacts" to support the denial, such as potential impacts on air quality, vehicle traffic, noise and vibration, social and community resources, rail transportation and safety, vessel transportation, cultural and tribal resources, and water quality.[13] While these broader potential impacts are important to consider, Section 401 of the CWA is not the proper lens.

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[10] 116 Cong. Reg. 8,984 (Mar. 24, 1970) (discussing section 21(b) of the Water Quality Improvement Act of 1970) (emphasis added).

[11] S. Rep. No. 92-414, at 69 (1971) (emphasis added).

[12] *See* Letter from Thomas Berkman, N.Y. State Dep't of Envtl. Conservation, to Georgia Carter, Millennium Pipeline Co. LLC (Aug. 30, 2017); *see also N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 454 (2d Cir. 2018).

[13] *See* WA Dep't of Ecology, Section 401 Water Quality Certification Denial (Order No. 15417) (Sept. 27, 2017), *available at* https://ecology.wa.gov/DOE/files/83/8349469b-a94f-492b-acca-d8277e1ad237.pdf.

### B. The Proposed Rule Properly Limits the Scope of 401 Certification to Discharges Not Activities.

Based on a holistic analysis of the text, structure, and history of the CWA, EPA proposes to clarify that a certifying authority's review and action under section 401 is limited to water quality impacts from the potential *discharge* into navigable waters associated with a proposed federally licensed or permitting project, rather than the broader *activity* that may result in any such discharge.[14] This clarification is appropriately reflected in various revisions to the regulatory text.[15] For instance, proposed section 121.3 states that the scope of a 401 certification is "limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." Similarly, proposed section 121.5 repeatedly refers to whether a "discharge from a proposed project will comply with water quality requirements."[16] The Associations support these changes and agree with EPA's detailed justification in the preamble.

As EPA ably explains in the preamble, the Supreme Court's holding in *PUD No. 1. of Jefferson County v. Washington Department of Ecology* ("*PUD No. 1*")[17] presents no barrier to the interpretation set forth in the proposal. *PUD No. 1* did not hold that the statute unambiguously forecloses the proposed interpretation in this rule—that a certifying authority's actions under sections 401(a) and 401(d) are limited to water quality impacts from potential discharges, not a proposed activity as a whole.[18] And EPA is free to revise its part 121 regulations to reflect a different interpretation of the statute.

As the Supreme Court (in *PUD No. 1*) recognized, section 401(a) refers to what provisions of law a "discharge" must comply with, whereas section 401(d) refers to what an "applicant" must comply with. To reconcile these terms, the majority held that the latter section is "most reasonably read as authorizing additional conditions and limitations *on the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied."[19] But the majority failed to connect the dots between the term "applicant" in section 401(d) and the term "activity," which appears nowhere in section 401(d). More significantly, the majority emphasized that its view of the statute is consistent with EPA's implementing regulations, which require the certifying authority to find "there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards."[20] The majority then deferred to EPA's regulation under *Chevron*.

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[14] *See* 84 Fed. Reg. at 44,095-97.

[15] *Id.* at 44,120.

[16] *Id.*

[17] 511 U.S. 700 (1994).

[18] *See* 84 Fed. Reg. at 44,095-97.

[19] *PUD No. 1*, 511 U.S. at 711.

[20] *Id.* at 712 (quoting 40 C.F.R. § 121.2(a)(3)).

Moreover, the majority in *PUD No. 1* failed to confront the fact that EPA's regulations were based on superseded statutory text and had not yet been updated to reflect the changes that Congress made in 1972. In fact, to date, the EPA regulation that the Court relied upon (40 C.F.R. § 121.2(a)(3)) still cites to "Sec. 21(b) and (c), 84 Stat. 91 (33 U.S.C. 1171(b) (1970)); Reorganization Plan No. 3 of 1970" as the authorizing legislation. That legislation, the Water Quality Improvement Act of 1970, required applicants for a federal license or permit to conduct any activity that may result in a discharge into navigable waters of the United States to obtain a certification "that there is reasonable assurance, as determined by the State or interstate agency that such *activity* will be conducted in a manner which will not violate applicable water quality standards."[21] That provision was carried forward in large part to become what is now CWA section 401, but Congress made an important change in 1972: applicants must now provide a certification that "any such *discharge* will comply with" applicable provisions of the CWA.[22] The Senate Report explains that Congress made changes to section 401 "to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants."[23]

Despite this important change to the statutory text, EPA has not revised section 121.2 since it originally promulgated that regulation in 1971, apart from non-substantive re-designations in 1972 and 1979.[24] Consequently, the regulations that the *PUD No. 1* court deferred to are not consistent with the revised statutory text. Viewed in this light, the clarifications that EPA is now proposing are long overdue and would finally bring EPA's regulations in line with statutory changes that occurred nearly five decades ago. Nothing in *PUD No. 1* stands in the way of making these regulatory changes via this rulemaking because the majority opinion did not unambiguously foreclose EPA from adopting a different interpretation that attempts to harmonize sections 401(a) and 401(d) and actually accounts for how the statutory text evolved.

### C. Section 401 Only Applies to Discharges into *Navigable Waters*.

The Associations agree with EPA's proposal to conclude that "section 401 is a regulatory provision that creates federally enforceable requirements and its application must therefore be limited to point source discharges to waters of the United States."[25] This conclusion is appropriately codified through the proposed new definitions and proposed new section 121.3, which expressly limits the scope of section 401 certification to "assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements."[26] EPA is

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[21] 84 Stat. 91, § 21(b).

[22] 33 U.S.C. § 1341(a)(1).

[23] *See* S. Rep. No. 92-414, at 69.

[24] *See* 36 Fed. Reg. 22,487 (Nov. 25, 1971); *see also* 37 Fed. Reg. 21,441 (Oct. 11, 1972); 44 Fed. Reg. 32,899 (June 7, 1979).

[25] *See* 84 Fed. Reg. at 44,099.

[26] *See* 84 Fed. Reg. at 44,120 (proposed § 121.3).

proposing to define "discharge" as being "into navigable waters" and to define "condition" to encompass only those requirements that are "within the scope of certification."[27] EPA further proposes regulatory text specifying that conditions that do not satisfy the definition in proposed section 121.1(f) will not be incorporated into the license or permit.[28] Read together, these provisions would properly ensure that section 401 certification review does not improperly sweep in non-waters of the United States into federally enforceable requirements.

This clarification on the scope of section 401 is especially important given EPA's prior, overreaching assertion in the now-withdrawn 2010 Interim Handbook that once section 401 is triggered by a discharge into navigable waters, the certifying authority's analysis can expand to non-navigable waters.[29] The Associations strongly agree with EPA's current position that the term "applicant" in CWA section 401(d) cannot be interpreted as allowing the federal government to implement and enforce conditions included in licenses and permits that are aimed solely at addressing *non-navigable* waters.[30] Such an interpretation would improperly expand the scope of the CWA's regulatory programs beyond navigable waters.

On this point, it is worth mentioning that multiple stakeholders, in their comments to EPA's and the Corps' proposed revisions to the definitions of "waters of the United States," appeared to agree that the scope of section 401 certification is limited to only "navigable waters." As detailed below, these stakeholders expressed concern that if waters are no longer considered "navigable waters" under a revised definition of "waters of the United States," they would be beyond the scope of section 401 certification reviews:

- Attorneys General of New York, California, Connecticut, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia: "[W]hen roadway networks were built, many Massachusetts streams were relocated into highway ditches. The Proposed Rule may eliminate these upland ditches from jurisdiction, excluding them from regulation under the Massachusetts 401 Water Quality Certification regulations."[31]

- Association of Clean Water Administrators: "Should applicability of section 401 be reduced commensurately with the reduction of jurisdictional waters under this proposed rule, projects which discharge into, dredge out, or fill formerly jurisdictional waters including both streams and wetlands could go unregulated since there would be no opportunity, through 401 certification, for state evaluation of the project. Furthermore,

[27] *See id.* (proposed §§ 121.1(f) and 121.1(g)).

[28] *See id.* at 44,121 (proposed § 121.8).

[29] *See* 84 Fed. Reg. at 44,098.

[30] *See id.*

[31] Comments of the Attorneys General of NY, CA, CT, ME, MD, MA, MI, NJ, NM, OR, RI, VT, VA, WA, and DC, Docket ID No. EPA-HQ-OW-2018-0149-5467, at Attachment A p. 10 (Apr. 15, 2019), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5467.

some states with more expansive waters of the state definitions bar unpermitted discharges to state waters and depend on federal processes such as 401, 402, and 404 to evaluate water quality impacts to waters of the state. In these states, *if federal jurisdiction is scaled back, states relying on 401 would have to create a separate state permitting structure to ensure that discharges to non-jurisdictional state waters and wetlands are not unregulated or in violation of state law.*"[32]

- State of Washington: "Substantial additional costs would be incurred by Washington State if the section 401 water quality certification mechanism was no longer available as a tool for us to regulate most 'waters of the States.' . . . If the rule change proposal is adopted, Washington State, at its own expense, would need to develop a separate permitting program to prevent degraded water quality."[33]

- Arkansas Game and Fish Commission: "By omitting ephemeral streams the agencies are actually eliminating an opportunity for the state of Arkansas to make decisions about the discharge of pollutants into their waters through the Clean Water Act Section 401 water quality certification process."[34]

- Oklahoma Department of Environmental Quality : "Although the proposed definition does provide certainty as to what is jurisdictional and what is not, it potentially limits a state's ability to require conditions through the 401 certification process by exclusion of ephemeral and intermittent streams and certain wetlands."[35]

- New York State Departments of Environmental Conservation, Agriculture & Markets, and State: "Under the Proposed Rule, some projects that currently require a section 404 permit will no longer require the permit, leading to New York being further removed

[32] Comments of Ass'n of Clean Water Administrators, Docket ID No. EPA-HQ-OW-2018-0149-4588, at 8 (Apr. 15, 2019), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4588 (emphasis added).

[33] Comments of State of Washington, Docket ID No. EPA-HQ-OW-2018-0149-4733, at 2 (Apr. 12, 2019), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4733.

[34] Comments of Arkansas Game & Fish Comm'n, Docket ID No. EPA-HQ-OW-2018-0149-4837, at 1 (Apr. 15, 2019), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4837.

[35] Comments of Oklahoma Dep't of Envtl. Quality, Docket ID No. EPA-HQ-OW-2018-5084, at 1 (Apr. 15, 2019), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5084.

from the review for impacts to the state by obviating the New York's 401 Water Quality Certification."[36]

- California State Water Resources Control Board: "[T]he Water Boards also rely on the authority provided by CWA section 401 to regulate discharges to waters of the United States, especially for discharges associated with projects licensed by the Federal Energy Regulatory Commission. A narrow definition of 'waters of the United States' would mean that state authority over more of these types of projects would be preempted by the Federal Power Act."[37]

- State of Oregon: "Under the proposal to exclude all ephemeral streams and wetlands that do not have a direct surface connection to jurisdictional waters, Oregon will no longer have the opportunity to review and condition permits under its 401 program for projects and activities to these waters, and important environmental protections will be lost."[38]

These recent comments provide additional support for EPA's conclusion that the scope of section 401 is inextricably tied to what constitutes navigable waters (*i.e.*, the definition of "waters of the United States"), and EPA should consider them as part of this rulemaking. Put simply, if a water feature is not a "navigable water" (*i.e.*, a "water of the United States"), it is not within the scope of section 401. It is immaterial whether the project or activity that requires a Federal permit or license involves discharges into both navigable and non-navigable waters. Only the discharges into navigable waters are properly considered under section 401.

### D. The Term "Discharge" in Section 401 Reflects that Congress Intended to Limit the Scope of Review to Pollution *from Point Sources*.

Under EPA's proposal, section 401 is only triggered by discharges from point sources.[39] Together, proposed sections 121.1(g) (definition of "discharge") and 121.3 (scope of certification) make it clear that section 401 requirements do not apply to nonpoint source pollution, but do apply to discharges from point sources.

The statutory text and structure support EPA's proposed clarification. On its face, section 401 is triggered whenever there is an "activity . . . which may result in any discharge into the

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[36] Comments of New York State Dept's of Envtl. Conservation, Agriculture & Markets, and State, Docket ID No. EPA-HQ-OW-2018-0149-5164, at 5 (Apr. 15, 2019), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5164.

[37] Comments of California State Water Resources Control Board, Docket ID No. EPA-HQ-OW-2018-0149-5126, at 7 (Apr. 15, 2019), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5126.

[38] Comments of State of Oregon, Docket ID No. EPA-HQ-OW-2018-0149-5412, at 4 (Apr. 11, 2019), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5412.

[39] *See* 84 Fed. Reg. at 44,100.

navigable waters."[40] Importantly, the term "discharge" in section 401 was inserted into the statutory text during the 1972 Amendments. Before that, the predecessor to CWA section 401 more broadly required that a licensed activity would "not violate water quality standards."[41] The Senate Report explains why the statutory text evolved in this manner: Congress wanted "to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants."[42] Effluent limitations and discharge of pollutants are terms that refer to point sources, not nonpoint source runoff.

Tellingly, the cross-referenced provisions in section 401 "relate to the regulation of point sources."[43] Equally important, Congress never used the term "nonpoint source discharge" or "discharge from a nonpoint source" anywhere in the CWA.[44] Rather, Congress consistently used the term "discharge" to refer to the release of effluent from a point source, and it used the term "runoff" to refer to pollution from nonpoint sources.[45] For these reasons, the term "discharge" in section 401 refers to discharges from point sources, not nonpoint source pollution.

Nothing in the Supreme Court's decision in *S.D. Warren* alters this conclusion. As the Ninth Circuit explained when reinforcing that section 401 does not apply to nonpoint source pollution, *S.D. Warren* was "limited to the conclusion that a discharge need not involve pollutants, hence the expulsion of water from a dam turbine is a discharge."[46] Nothing in that case stands for the proposition that the term "discharge" in section 401 somehow encompasses nonpoint source pollution.

### E. Additional Comments on Substantive Requirements for Section 401 Certifications.

In addition the foregoing, the Associations offer the following comments related to other substantive requirements for section 401 certifications.

*First*, EPA should revise proposed section 121.3 to state that "the scope of Clean Water Act section 401 certification is limited to providing reasonable assurance ~~assuring~~ that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." EPA should make conforming changes in proposed sections 121.5, 121.9, 121.10, and 121.11 of the proposed rule. The Agency states in the preamble to the proposed rule that the "reasonable assurance" language in the current regulations "is an artifact from the pre-1972

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[40] *See* 33 U.S.C. § 1341(a)(1).

[41] Pub. L. 91-224, § 21(b)(1), 84 Stat. 91 (1970).

[42] S. Rep. No. 92-414, at 69 (1971).

[43] *See Ore. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998).

[44] *See id.* at 1098.

[45] *Id.*

[46] *See Ore. Natural Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 784 (9th Cir. 2008).

version of the statute,"[47] but that is not entirely true. Although the 1972 Act did remove the "reasonable assurance" language from section 401(a)(1), other sections in the current version of the statute continue to refer to the "reasonable assurance" standard, such as sections 401(a)(3) and 401(a)(4).[48] As such, EPA should not impose a "more stringent" requirement to certify that a discharge "will comply" with water quality requirements.[49] As one state court explained, although the statute uses the phrase "will comply" in section 401(a)(1), that provision "do[es] not necessarily require DEC to provide absolute certainty that permittees will never violate state standards, assuming this sort of guarantee is even possible."[50] Because the "reasonable assurance" standard remains consistent with the statutory text and because it is questionable whether certifying authorities can ever guarantee strict compliance with water quality requirements, EPA should retain the "reasonable assurance" standard in revising the part 121 regulations.

*Second*, the Associations support the requirements in proposed section 121.5(d) that any conditions in certifications must be supported by a citation to a specific federal, state, or tribal law, as well as statements explaining why the conditions are necessary and whether less stringent conditions could satisfy water quality requirements.[51] These requirements will help provide the public and applicants with a better understanding of the certifying authorities' rationale and a check on any certifying authorities' attempts to impose unnecessary requirements on applicants for federal licenses or permittees. Moreover, this proposed regulatory text would align the part 121 regulations with 40 C.F.R. § 124.53(e), which requires that certifying authorities "shall cite the CWA or State law references upon which [any conditions more stringent than those in the draft permit are] based" and that they shall explain "the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards."[52] Importantly, 40 C.F.R. § 124.53(e) provides that a certifying authority's failure to provide such citations or supporting statements *waives* both the right to certify with respect to the condition in question and the right to object to any less stringent condition that may be established during the EPA permit issuance process.[53]

*Third*, although the Associations support EPA's ability to assist federal agencies, certifying authorities, and project proponents with "determinations, definitions and interpretations with respect to the meaning and content of water quality requirements" (proposed

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[47] *See* 84 Fed. Reg. at 44,104.

[48] *See* 33 U.S.C. §§ 1341(a)(3), (a)(4).

[49] *See* 84 Fed. Reg. at 44,104.

[50] *Miners Advocacy Council v. Alaska Dep't of Envtl. Conservation*, 778 P.2d 1126, 1138 (Alaska 1989) (rejecting arguments from environmental groups that the state must "assure 'strict compliance' with state standards in all cases and at all discharge points" rather than finding that there was "reasonable assurance" of compliance).

[51] *See* 84 Fed. Reg. at 44,120 (proposed § 121.5(d)).

[52] 40 C.F.R. § 124.53(e).

[53] *See id.*

section 121.15), EPA should clarify in the preamble that this does not allow EPA to override state interpretations of their own water quality standards in the event of a disagreement between a state and EPA as to how to interpret applicable standards. Under the CWA's cooperative federalism framework, "water quality standards . . . are primarily the states' handiwork."[54] Thus, when a "state reasonably certifies a particular limitation as consistent with its water quality standards, EPA may not mandate *more* stringent limitations."[55] The Associations believe this clarification is important to ensure that states remain in the lead role when it comes to interpreting and implementing their own water quality standards.[56]

## III. Comments on Procedural Requirements for 401 Certifications

The Associations support EPA's proposed revisions that are designed to ensure that certification decisions are made in timely fashion and that no actions can be taken to toll or otherwise reset the statutory timeline for certification decisions. The text, legislative history, and case law support the proposed clarifications.

On its face, the statute provides that the certifying authority must act "within a reasonable period of time (which shall not exceed one year) after receipt of such request."[57] Congress set a statutory deadline because it wanted to "insure that sheer inactivity by the [certifying authority] will not frustrate the Federal application"[58] and to curb "a *state's* 'dalliance or unreasonable delay.'"[59] Moreover, recent decisions from courts of appeals have instructed that "while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year"[60] and that the statute does not "specify that this time limit applies only for 'complete' applications."[61] On the latter point, if the statute required complete applications, "states could

[54] *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993).

[55] *Id.* at 352 (citing *In re Ina Road Water Pollution Control Facility*, NPDES Appeal No. 84-12, 2 E.A.D. 99 (1985)).

[56] Less than a decade ago, concerns about potential federal overreach led the House of Representatives to pass the Clean Water Cooperative Federalism Act of 2011, which would have amended CWA section 401 to explicitly state that if a state certifies that a discharge will comply with the applicable provisions of the CWA, "the Administrator may not take any action to supersede the determination."H.R. 2018, § 2(b), 112th Cong., 1st Sess. (July 13, 2011). That bill was never passed by the Senate.

[57] 33 U.S.C. § 1341(a)(1).

[58] H.R. Rep. No. 92-911, at 122 (1972).

[59] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (quoting 115 Cong. Rec. 9,264 (1969)) (emphasis in original).

[60] *Id.*

[61] *N.Y. State Dep't of Envtl. Conserv. v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018).

blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need."[62]

Based on the foregoing, EPA proposes a number of revisions to 40 C.F.R. part 121 that are consistent with Congress's intent that certifying authorities act on requests for certification within the statutory timeframe. Many of these revisions build upon existing regulations while providing additional clarity to help ensure timely certification decisions. The Associations support EPA's efforts to provide additional clarity, as explained in more detail below. We also offer some suggestions for improvement.

### A. New Definitions in the Proposed Rule Will Help Clarify When the Timeline for Making a Certification Decision Starts and Ends.

EPA has proposed to codify new definitions of "certification request," "fail or refuse to act," and "reasonable period of time." Together with the operative provisions in part 121, these new definitions provide assurance that the federal licensing or permitting authority, the certifying authority, and the project proponent share a common and clear understanding of when the decision-making time frame commences and the date by which the certifying authority must render a decision.[63] Of particular importance, by spelling out exactly what constitutes a "certification request" that triggers the obligation for a certifying authority to act within a "reasonable period of time," the proposed regulation seeks to address the concern raised by the Second Circuit (in *N.Y. State Department of Environmental Conservation v. FERC*) that states could circumvent the bright-line one-year limit in the statutory text by repeatedly insisting that a request is not complete.[64]

### B. The Proposed Rule Properly Continues to Allow Federal Licensing or Permitting Agencies to Make Waiver Determinations.

Proposed section 121.4 reaffirms that the federal licensing or permitting agency has authority to determine both: (i) what constitutes a "reasonable period of time" during which a certifying authority must act on a certification request; and (ii) whether a certifying agency has waived the certification requirement due to a failure or refusal to act.[65] In this respect, the proposed rule is consistent with longstanding regulations promulgated by EPA and other federal agencies that provide that federal licensing and permitting agencies have authority to make these determinations.[66] Notably, courts of appeals have recognized that these sorts of determinations are properly made by federal licensing or permitting agencies.[67]

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[62] *Id.* at 456.

[63] *See* 84 Fed. Reg. at 44,119-20 (proposed §§ 121.1(c), (h) & (n)).

[64] *See* 884 F.3d at 455-56.

[65] *See* 84 Fed. Reg. at 44,120-21 (proposed §§ 121.4, 121.7).

[66] *E.g.*, 40 C.F.R. § 121.16 (certification requirement "shall be waived" if the federal licensing or permitting agencies notifies EPA in writing of the certification authority's failure to act on a request for certification "within a reasonable period of time after receipt of such request, as (Continued...)

The Associations support EPA's decision to continue allowing each federal licensing or permitting agency to define what is "reasonable" given their familiarity with their own permitting processes and resources/workloads. Due to the vast differences between the sorts of projects that require 401 certifications, a one-size-fits-all definition of "reasonable period of time" is neither necessary nor desirable.

### C. The Associations Support Placing Limits on a Certifying Agency's Ability to Modify or Restart the Decision-making Timeline.

Proposed section 121.4(f) expressly prohibits certifying authorities from requesting applicants to withdraw or taking any other action to modify or restart the established "reasonable period of time" for the certifying authority to act on a certification request.[68] As EPA explains in the preamble, this proposed revision is consistent with the clear statutory text.[69] One year is the maximum time that Congress allowed for a certification, and there is no statutory exception for a "coordinated withdrawal-and resubmission scheme."[70]

That said, the Associations share EPA's understanding that there may be cases "where the certifying authority and project proponent are working collaboratively and in good faith" and in those instances, "it may be desirable to allow the certification process to extend beyond the reasonable period of time and beyond the one-year statutory deadline."[71] This is a concern that is also expressed in a recent *amicus* brief filed on behalf of a broad coalition of states supporting *certiorari* in the *Hoopa Valley* case:

> Applicants 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

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determined by the licensing or permitting agency (which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year); 18 C.F.R. § 5.23(b)(2) (FERC regulations deeming certification requirements to be waived "if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for clarification"); 33 C.F.R. § 325.2(b)(1)(ii) (Corps regulations deeming certification requirements to be waived if the certifying agency fails to or refuses to act on a certification request "within 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").

[67] *E.g.*, *Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696, 700-01 (D.C. Cir. 2017) (explaining that the project proponent can petition FERC to find that a state has waived its certification authority); *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018) (affirming FERC's waiver determination).

[68] 84 Fed. Reg. at 44,120 (proposed § 121.4(f)).

[69] *See id.* at 44,107-08 (quoting from *Hoopa Valley*, 913 F.3d at 1103-04).

[70] *See Hoopa Valley*, 913 F.3d at 1105.

[71] *See* 84 Fed. Reg. at 44,108.

> 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. Withdrawal allows the applicant to continue working with the state certification agency toward a certification with mutually agreeable conditions*.[72]

Recognizing the practical reality that one year may not be a sufficient amount of time for a certifying authority to grant or deny certification requests in connection with particularly large or complex projects and the potentially chilling effect of a denial decision on project financing, the Associations agree that there should be some flexibility regarding the timeline for certification analysis and decision. As drafted, the proposed rule seems to provide such flexibility in the following ways:

- The *applicant* can control when the timeline for certification begins to run under the new definition of "certification request."[73] Under that definition, a request does not start the timeline for analysis and decision unless it includes the specific written statement: "The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time."[74] If the applicant lacks sufficient confidence that a decision can be made within one year, it can delay submitting a compliant "certification request" until it is ready. Until that time comes, nothing in the rule prevents the proponent from working collaboratively with the certifying authority to provide the information that the certifying authority needs to make a final decision within the "reasonable period of time" determined by the federal licensing or permitting agency.

- Nothing in the proposed regulatory text prohibits the *applicant* from withdrawing its request and submitting a new request at a later date. As drafted, the regulation appears to limit only a *certification authority's* ability to modify or restart the clock via a withdrawal-and-resubmit scheme. To be sure, a withdrawal and resubmission that is solely undertaken by the applicant could conceivably be viewed as unlawful following the D.C. Circuit's *Hoopa Valley* decision. But that Court pointedly declined to opine on the legality of withdrawing a request and submitting a "wholly new one in its place" or

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[72] Brief for the States of Oregon, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Rhode Island, South Dakota, Utah, Washington, and Wisconsin as *Amici Curiae* in Support of Petitioners, *California Trout v. Hoopa Valley Tribe*, S. Ct. No. 19-257, at 10-11 (filed Sept. 27, 2019) (emphasis added).

[73] 84 Fed. Reg. at 44,119-20 (proposed § 121.1(c)(7)).

[74] *Id.* EPA explains in the preamble that this statement "is intended to remove any potential ambiguity on the part of the certifying authority about whether the written request before it is, in fact, a 'request for certification' that triggers the statutory timeline." 84 Fed. Reg. at 44,102.

"how different a request must be to constitute a 'new request' such that it restarts the one-year clock."[75] Thus, even under *Hoopa Valley*, an applicant may be able to lawfully restart the clock for making a certification decision by withdrawing its request and resubmitting something other than an identical request accompanied by a one-page letter requesting action, unlike what happened in that case.[76]

### D. The Proposed Rule Properly Restricts a Certifying Authority's Ability to Deny a Request with Prejudice.

Under proposed section 121.6(a), a project proponent can submit a new certification request after a denial. Effectively then, certifying authorities may not deny requests with prejudice. The Associations support this proposal. As EPA explains in the preamble, nothing in the statute prevents an applicant from reapplying for a section 401 certification if the original request is denied.[77] A project proponent should be afforded the opportunity to make whatever changes to the project are necessary to try to demonstrate that potential discharges will comply with applicable water quality requirements.

### E. EPA Should Make the Proposed Pre-request Procedures Optional for All Certification Requests.

Proposed section 121.12 sets forth new pre-request procedures that would apply in those limited instances where EPA, not a state or tribe, is the certifying authority. These procedures are comparable to pre-filing requirements that other agencies (*e.g.*, FERC and the Corps) have adopted by regulation. Under such procedures, EPA would meet with project proponents before the submission of a "certification request" (and hence, before the "reasonable period of time" begins to run) to learn more about the project at issue.[78]

The Associations agree with EPA that pre-meeting procedures likely are not necessary for routine, less complex projects, but could be very useful for complex projects.[79] We also believe pre-request coordination could be useful not just when EPA is the certifying authority, but in many instances where states or tribes are the certifying authorities. For these reasons, the Associations recommend that EPA make the pre-request procedures more broadly applicable, while also making those procedures discretionary, not mandatory. The Associations believe EPA has the legal authority to promulgate such discretionary procedures. Nothing in the statute forbids pre-request consultation or coordination, and that statutory silence should not be

[75] *See* 913 F.3d at 1104.

[76] *See id.*

[77] *See* 84 Fed. Reg. at 44,111.

[78] *See* 84 Fed. Reg. at 44,113.

[79] *See id.*

interpreted as prohibiting EPA from promulgating a regulation that facilitates pre-request planning.[80]

### F. EPA Should Place Limits on the Ability to Modify Previously-Issued Certifications.

EPA solicits comment on "whether and to what extent states or tribes should be able to modify previously issued certifications, either before or after the time limit expires, before or after the license or permit is issued, or to correct an aspect of a certification or its conditions remanded or found unlawful by a federal or state court or administrative body."[81] The Associations believe that section 401 certifications should not be perpetual moving targets and thus, some limits need to be placed on a certifying authority's ability to modify previously issued certifications. Outside of the statutory one-year review period, states should not be allowed to modify and unilaterally impose new conditions. At least one court has held that a federal licensing or permitting agency is not obligated to incorporate conditions that a certifying authority issues beyond the statutory certification period.[82] If states try to impose new conditions outside of the review period, those should not automatically become conditions of the existing license or permit.

CWA section 401 balances the need to protect water quality with the need for timely certification decisions and regulatory certainty by including detailed provisions governing how states are to notify federal licensing or permitting agencies in the event they believe there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, or 1317 of the Act.[83] Those statutory provisions, however, are limited in time and scope. Nothing in those provisions, or any other provision in section 401, contemplates that certifying authorities can unilaterally impose new or modified conditions in perpetuity.

## IV. Conclusion

The Associations commend EPA for proposing much-needed clarifications and updates to its outdated regulations governing water quality certifications. While the Associations believe that most certifications stay within the scope of what Congress outlined in the CWA and are concluded in a timely manner, the proposed revisions should help rectify and prevent those

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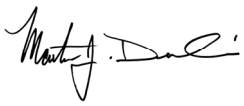
[80] *Cf. Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 248-49 (D.C. Cir. 2014) (rejecting argument that procedures for "enhanced coordination" among EPA and the Corps on CWA section 404 permits were contrary to statute and holding that "no statutory provision forbids EPA from consulting with or coordinating with the Corps, or vice versa").

[81] *See* 84 Fed. Reg. at 44, 117.

[82] *See Airport Communities Coal. v. Graves*, 280 F. Supp. 2d 1207, 1217 (W.D. Wash. 2003).

[83] *See* 33 U.S.C. §§ 1341(a)(3), (4); *see also Keating v. FERC*, 927 F.2d 616, 624 (D.C. Cir. 1991) (explaining that the Act "permit state revocation of prior certification only if" requirements related to timing and changed circumstances are satisfied).

unusual cases where certifying authorities stray far from what we believe Congress envisioned would be the procedural and substantive requirements for water quality certifications. We thank EPA for the opportunity to comment on this important proposal.



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