October 21, 2019

Lauren Kasparek
Oceans, Wetlands, and Communities Division
Office of Water (4504–T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

*Via regulations.gov*

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

Dear Ms. Kasparek:

Enclosed please find a comment letter concerning the above-captioned proposed rulemaking, filed on behalf of the Natural Resources Defense Council.

If you have any questions about this submission, please contact me at jdevine@nrdc.org or 202-289-2361.

Sincerely,

Jon Devine
Senior Attorney & Director of Federal Water Policy
Nature Program
Natural Resources Defense Council

The Environmental Protection Agency has proposed to severely curtail states' and tribes' authority to review and take actions to limit the impact of federally-permitted projects impacting their water resources.[1] EPA makes a mockery of its claimed respect for tribal rights and cooperative federalism, proposes a rule that violates the Clean Water Act in several respects, ignores important aspects of the issue, utterly fails to identify a problem that the proposal is designed to address, and promotes an unworkable and illogical scheme that leaves waters more vulnerable to pollution and other harms. The proposal lacks support from states and tribes and from the people who benefit from states' and tribes' efforts to protect the public health, community protection, recreation, and other services that water bodies provide.

If EPA actually cared about clean water, it would withdraw the proposal immediately. Unfortunately, the Trump EPA, led by Administrator Wheeler, has weaponized the Clean Water Act against entities, even including those governments with which it is supposed to partner under the law, that EPA appears to perceive as political enemies or as impediments to its pro-polluter agenda.[2]

## I. Summary of the Proposal

EPA proposes to change the regulations implementing section 401 of the Clean Water Act. Section 401 requires "[a]ny applicant for a Federal license or permit to conduct any activity

[1] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019).

[2] *See, e.g.*, Andrew Wheeler, "Here's how Team Trump will bust Cuomo's gas blockade," New York Post (Aug. 15, 2019) (describing this proposal and stating, "[b]y reining in states, the updated regulations in our proposal will streamline the approval for and construction of energy infrastructure projects"), available at https://nypost.com/2019/08/15/heres-how-team-trump-will-bust-cuomos-gas-blockade/; The Hill, "San Francisco pushes back as Trump claims city waterways have 'tremendous pollution'" (Oct. 2, 2019) (describing EPA notice of violation to San Francisco and letter to California claiming deficiencies in Clean Water Act implementation), available at https://thehill.com/policy/energy-environment/464104-san-francisco-pushes-back-as-trumps-claims-city-waterways-have. *See also* Letter from Donald S. Welsh, Executive Director, Environmental Council of the States, to EPA Administrator Andrew R. Wheeler (Sept. 26, 2019) ("ECOS is seriously concerned about a number of unilateral actions by U.S. EPA that run counter to the spirit of cooperative federalism and to the appropriate relationship between the federal government and the states who are delegated the authority to implement federal environmental statutes."), available at https://www.ecos.org/wp-content/uploads/2019/09/ECOS-Sept-26-2019-Letter-to-Adminstrator-Wheeler.pdf.

… which may result in any discharge into the navigable waters" to obtain, "a certification from the State in which the discharge originates … that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of [the] Act."[3] Section 401 further provides that this requirement is waived if the certifying agency "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…."[4] The federal permitting agency may not issue the permit or license unless certification has been granted or waived, and "[n]o license or permit shall be granted if certification has been denied…."[5] Certification for the construction of a facility generally also serves as certification of that facility's operation.[6]

Section 401 also provides states and tribes with broad authority to issue conditional certifications – that is, to certify a project and allow it to be permitted so long as the applicant for the federal permit abides by specific conditions. In particular, certifying authorities should:

> 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, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law….[7]

The Act requires that any such requirement specified by the certifying authority "shall become a condition on any Federal license or permit subject to the provisions of this section."[8]

EPA's proposal would impose new limitations on several of the Act's statutory provisions. First, EPA would only allow for certification decisions to be based on the impacts of the "discharge" associated with a federally-permitted activity, not the activity as a whole, and

[3] 33 U.S.C. §1341(a)(1).
[4] 33 U.S.C. §1341(a)(1).
[5] 33 U.S.C. §1341(a)(1).
[6] 33 U.S.C. §1341(a)(3).
[7] 33 U.S.C. §1341(d).
[8] 33 U.S.C. §1341(d).

would define discharge to include only point source discharges.[9] Second, EPA would restrict states' and tribes' authority by prohibiting them from basing certification decisions on anything other than "applicable provisions" – a term the agency fails to define – of five sections of the Clean Water Act and "EPA-approved state or tribal Clean Water Act regulatory program provisions."[10] Third, EPA proposes to make the federal permitting agency the final arbiter of whether a state or tribal certification decision was proper, such that the permitting agency could issue a permit despite a state/tribal denial of certification or ignore conditions that a state or tribe imposed on its certification. Fourth, EPA proposes to radically curtail states' and tribes' time to make certification decisions before they are deemed waived. The proposal accomplishes this final change by: (1) giving the federal permitting agency free rein to impose as short a period for action as the federal agency deems "reasonable";[11] (2) mandating that the time for states and tribes to act begins when the project proponent submits a barebones request for certification without any requirement that complete information about the project be included;[12] (3) declaring the one year period in section 401 (or whatever shorter period the federal agency imposes) not to be subject to any pause even if the project proponent fails to provide needed information;[13] and (4) denying certifying authorities the ability to work with project proponents to restart the clock when necessary for states or tribes to fully consider a certification request.[14]

[9] 84 Fed. Reg. at 44,095-99.
[10] 84 Fed. Reg. at 44,094-95; *id.* at 44,120 (proposed §121.1(p)).
[11] 84 Fed. Reg. at 44,120 (proposed §121.4(a)).
[12] 84 Fed. Reg. at 44,120 (proposed §§121.1(c), 121.4(e)).
[13] 84 Fed. Reg. at 44,099 ("The CWA does not contain provisions for pausing or delaying the timeline for any reason, including to request or receive additional information from a project proponent. If the certifying authority has not acted on a request for certification within the reasonable time period, the certification requirement will be waived by the federal licensing and permitting agencies.").
[14] 84 Fed. Reg. at 44,120 (proposed §121.4(f)).

## II. The Proposal is Inconsistent With the Clean Water Act's Plain Language.

The proposed rule violates the Clean Water Act's plain language in several respects. EPA lacks the authority to promulgate final regulations that contain any of these elements.

### A. Certification is not Limited to the Effects of a "Discharge."

The proposal limits certification to assessing the impact of the "discharge," narrowly understood to mean the specific outflow from a point source. However, the Clean Water Act plainly envisions certification decisions being made considering the impacts of the entire activity under consideration.

First, the Act provides that, except if changed circumstances necessitate, certification for "the construction of any facility shall fulfill the requirements … with respect to certification in connection with any other Federal license or permit required for the operation of such facility…."[15] Because a project may involve a discharge only at the construction stage but cause important impacts to waterways after its construction (which may often be the case with respect to projects requiring Army Corps permits, for instance), the necessary meaning of this provision is that certification should consider the impacts that result from the broader effects of the project. EPA itself previously recognized the obvious import of this statutory provision, saying that because "certification of a construction permit or license generally also operates as certification for an operating permit or license … it is important for the §401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project."[16]

---

[15] 33 U.S.C. §1341(a)(3).

[16] U.S. EPA, Office of Wetlands, Oceans, and Watersheds, "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes," at 17 (Apr. 2010) (hereinafter "Interim 401 Guidance"), available at https://www.aswm.org/pdf_lib/cwa_section_401_water_quality_certification_handbook_2010.pdf.

Second, the Act's trigger for certification is not an actual discharge, but instead "any activity" that "*may result* in any discharge" to waterways.[17] This requirement reveals that a certification authority's responsibility is broader than the discharge itself. Because the Act envisions a state or tribe being called upon to certify a project that does not definitely result in a discharge, the scope of that review and action must, by definition, include more than just what happens as a consequence of the discharge itself.

Finally, as EPA admits, subsection 401(d) of the Act provides that states and tribes may specify conditions to be complied with by the "applicant," a term which is far broader than the term "discharge." The plain language of the statute, then, empowers states and tribes to direct the applicant to construct or operate the certified activity in a way consistent with their own requirements. Nevertheless, EPA now attempts to argue that "applicant" in subsection (d) effectively means "discharge," and does not authorize a state or tribe to condition certification on restrictions on a project's impact that is not related to a discharge. This argument is foreclosed by the statute. For one, subsection 401(d) of the Act does not use the term "discharge" in describing what states and tribes may restrict via certification conditions, so the agency's attempt to limit the authority in that subsection to discharges cannot be squared with the plain language of the provision.[18] And subsection (a), which EPA argues supports its new interpretation because it links the certification obligation to an activity that may result in a "discharge," actually undermines the agency's argument; that subsection uses both "discharge" and "applicant" and does so in a way that in no way suggests that the terms are co-extensive.

[17] 33 U.S.C. §1341(a)(1) (emphasis added).
[18] EPA claims that the use of the term "applicant" in subsection (d) "creates ambiguity," 84 Fed. Reg. at 44,095, but utterly fails to explain how that might be. Indeed, EPA's proposal reflects an understanding of what "applicant" clearly means – "the person or entity that applied for the federal license or permit that requires a certification." *Id.* at 44,096.

The Supreme Court, in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*,[19] understood the statute to confer on a certification authority broad latitude so long as the project involved a potential discharge, thus directly contradicting EPA's position in this rulemaking. In that case, a city and local utility district challenged the state's imposition of minimum flow requirements on the construction of a hydroelectric dam to protect the river as a fishery, arguing that the minimum flow condition was unrelated to the "discharge" from the permitted activity. The Court disagreed, noting that subsection 401(d) "expands the State's authority" beyond "discharges" and instead authorizes conditions to be placed on "any applicant" subject to the certification requirement.[20] In particular, the Court ruled that "§401(d) is most reasonably read as authorizing additional conditions and limitations *on the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied."[21]

### B. Certification Properly Includes More Than "Water Quality Requirements" as the Proposal Defines That Term and Includes Appropriate Requirements of State Law.

The proposal unlawfully prohibits states and tribes from conditioning or denying certification based on any requirement that is purely a creature of state law, whereas the Act expressly authorizes reliance on such non-federal provisions. EPA proposes to eliminate certifying authorities' ability to condition or deny certification based on anything other than "water quality requirements" as newly defined.[22] The proposal then defines "water quality requirements" as "applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions."[23]

---

[19] 511 U.S. 700 (1994).
[20] 511 U.S. at 711.
[21] 511 U.S. at 712 (emphasis added).
[22] 84 Fed. Reg. at 44,120 (proposed §121.3, which limits scope of certification to "assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements").
[23] 84 Fed. Reg. at 44,120 (proposed §121.1(p)).

The Clean Water Act clearly contemplates that states and tribes can make certification decisions in reliance on requirements that are not federally approved or focused on water quality. First, section 401 underscores the authority of states and tribes to rely on a broad suite of requirements by specifying that certification may be conditioned on compliance with "any other appropriate requirement of State law set forth in such certification."[24] In this rulemaking, however, "EPA proposes to interpret 'appropriate requirements' for section 401 certification review to include those provisions of state or tribal law that are EPA-approved CWA regulatory programs that control discharges, including provisions that are more stringent than federal law."[25] EPA does not provide examples of such requirements, nor explain how such requirements would not already be encompassed within the list of enumerated sections of the Act on which conditions may be based; accordingly, it appears as though the agency would treat the phrase "any other appropriate requirement of State law" as surplusage, which a basic canon of statutory interpretation says is to be avoided.[26]

Additionally, section 401(a) and (d) both authorize certification decisions premised on requirements of section 301 of the Act. In turn, section 301(a)(1)(C) incorporates more stringent state law programs without being limited to specified water quality provisions or federally-approved requirements, by requiring the achievement of "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established *pursuant to any State law or regulations*, (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act."[27] That provision's use of the term "any,"

[24] 33 U.S.C. §1341(d).
[25] 84 Fed. Reg. at 44,095.
[26] *E.g., Direct Marketing Ass'n v. Brohl*, 135 S.Ct. 1124, 1132 (2015).
[27] 33 U.S.C. §1311(a)(1)(C) (emphasis added).

its use of the phrase "including those necessary to meet water quality standards, treatment standards, or schedule of compliance," and its cross-reference to section 510 of the Act reinforces states' and tribes' broad authority; section 510 preserves state authority to "adopt or enforce ... any standard or limitation respecting discharges of pollutants, or ... any requirement respecting control or abatement of pollution ... or ... *any right or jurisdiction of the States with respect to the waters* (including boundary waters) of such States."[28]

EPA itself has previously recognized that the statute envisions a broader scope of authority for certifying agencies than the proposal would permit. In 2010, the agency pointed to the text of the statute and said: "It is important to note that, while EPA-approved state and tribal water quality standards may be a major consideration driving §401 decision[s], they are not the only consideration."[29] Noting that the Act specifies that certification of a construction project also typically functions as a certification for its operation, EPA continued, "it is important for the §401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project."[30]

As Justice Stevens, concurring in *PUD No. 1*, observed, "[n]ot a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards."[31] That point is particularly relevant to the question of whether EPA can all but eliminate states' and tribes' authority to make certification decisions premised on their own laws related to waterways within their

[28] 33 U.S.C. §1370 (emphasis added).
[29] Interim 401 Guidance at 16.
[30] Interim 401 Guidance at 17.
[31] 511 U.S. at 723 (Stevens, J., concurring).

jurisdiction. Similarly, the Court, in *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*,[32] stressed that "[s]tate certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution…."[33]

### C. Federal Agencies May Not Reject Certification Denials and Conditions.

EPA proposes to give federal permitting and licensing agencies the power to determine whether a state or tribe's denial of certification or certification condition is within the "scope of certification" as the proposal would define that term.[34] The plain language of the Clean Water Act prohibits EPA from giving the federal agencies that authority.

If a state or tribe determines that certification should be denied, the Act is clear – the federal agency may not issue a permit or license. Specifically, section 401(a)(1) says: "No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be."[35] That language permits no discretion; *if* certification is denied, *then* the permit/license cannot issue. The Act does not say, as EPA apparently would wish it did, that "[w]here a Federal agency determines that a certifying authority's denial

---

[32] 547 U.S. 370 (2006).

[33] 547 U.S. at 386. EPA tries to diminish this Supreme Court statement and says that it does not mean that Congress's use of the term "appropriate requirement of State law" in section 401 was intended to include more than the EPA-approved "water quality requirements" that EPA proposes to allow states and tribes to consider. 84 Fed. Reg. at 44,090-91. Specifically, the agency argues that because the Court followed its statement about "address[ing] the broad range of pollution" with a quotation from Senator Muskie that uses the phrase "water quality standards," certifying authorities are not free to use certification broadly to address the wider range of impacts from permitted activities. EPA's argument is deliberately obtuse. Before the Court used the "broad range" language, it discussed the goals of the Act at length, including how it is meant to address the overall integrity of water, and it explained how dams can impact water's condition quite apart from any specific discharge. Immediately after that discussion, the Court said, "Changes in the river *like these* fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns." 547 U.S. at 385-86 (emphasis added). It then points to several sections of the Act that empower states and, in that context, says: "State *certifications under § 401 are essential in the scheme* to preserve state authority to address the broad range of pollution," clearly referring to the "system that respects the States' concerns" that it just mentioned. *Id.* at 386. Unless one is reading this to try to obscure the Court's intent, the entire discussion clearly is meant to explain that section 401 is a broad authority to allow states and tribes to address the impacts of projects as a whole on waterways.

[34] 84 Fed. Reg. at 44,121 (proposed §§121.6(b) & (c) & 121.8(a), which provide that the "Federal agency determines" whether denial or condition comply with Clean Water Act or regulations).

[35] 33 U.S.C. §1341(a)(1).

satisfies the requirements of Clean Water Act section 401 and §§ 121.3 and 121.5(e), the Federal agency must provide written notice of such determination to the certifying authority and project proponent, and the license or permit shall not be granted."[36]

Similarly, if a state or tribe concludes that conditions should be imposed on an applicant for a federal permit or license, the Act is clear – those conditions must be incorporated into the permit or license. Section 401(d) provides that "[a]ny certification" an authority provides "shall become a condition on any Federal license or permit subject to the provisions of this section," including "any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply" with various requirements.[37] Again, this language is unambiguous – a certification, along with any elements the certifying authority determines to be necessary, must become a permit condition. However, EPA proposes to overrule Congress's clear direction and only include those conditions that "the Federal agency determines" are consistent with the Act and the new regulations.[38]

Although section 401 is clear on its face, Congress's intent that federal agencies lack the ability to second-guess state certification decisions is reinforced by section 511 of the Act. That section provides that "[n]othing in the National Environmental Policy Act … shall be deemed to … authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review … the adequacy of any certification under section 401 of this Act…."[39]

Federal courts have recognized and given effect to the plain language of the statute and routinely held that federal agencies lack any power to reject a state or tribe's certification denial

[36] 84 Fed. Reg. at 44,121 (proposed §§121.6(b)).
[37] 33 U.S.C. §1341(d).
[38] 84 Fed. Reg. at 44,121 (proposed §§121.8(a)).
[39] 33 U.S.C. §1371(c)(2)(A).

or conditions.[40] But enforcing the Act's limit on federal agencies' authority does not mean that there is no check on invalid conditions or denials. If a project proponent believes that a denial or condition goes beyond a state or tribe's authority under the Act, it may challenge that certification decision in the appropriate court.[41]

EPA itself has previously acknowledged that it lacks the authority to overrule a condition in a state certification. For instance, the agency refused to change or reject various state-imposed conditions on the EPA-issued permit for "the discharge of pollutants incidental to the normal operation of vessels," arguing that it had no power to do so under the Act.[42] Similarly, the agency's earlier guidance implementing section 401 understood the statute's plain language to prohibit federal agencies from second-guessing states and tribes; it said that "[c]onditions placed in §401 water quality certifications must become conditions of the resulting federal permit or

---

[40] *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 645 (4th Cir. 2018) ("The plain language of Section 1341(d) of the Clean Water Act provides that any state certification "*shall* become a condition on any Federal license or permit." 33 U.S.C. § 1341(d) (emphasis added). This language leaves no room for interpretation."); *Am. Rivers, Inc. v. Fed. Energy Regulatory Comm'n*, 129 F.3d 99, 107 (2d Cir. 1997) (the "language [of section 401(d)] is unequivocal, leaving little room for FERC to argue that it has authority to reject state conditions it finds to be *ultra vires*"); *id.* at 110-11 ("While the Commission may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, the Commission does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401."); *Ackels v. U.S. EPA*, 7 F.3d 862, 867 (9th Cir. 1993) ("once the state added the additional conditions, EPA was required to incorporate those conditions into the final permit and lacked authority to reject them"); *Roosevelt Campobello Int'l Park Comm'n v. EPA,* 684 F.2d 1041, 1056 (1st Cir.1982) ("'Limitations contained in a State certification must be included in a NPDES permit. EPA has no authority to ignore State certification or to determine whether limitations certified by the State are more stringent than required to meet the requirements of State law.'" (quoting EPA Decision of the General Counsel No 58 (Mar. 29, 1977)).

[41] *Lake Carriers Ass'n v. EPA*, 652 F.3d 1, 10 (D.C. Cir. 2011) ("we note that EPA's resolution of this matter does not leave the petitioners without recourse. If they believe that the certification conditions imposed by any particular state pose an inordinate burden on their operations, they may challenge those conditions in that state's courts."); *Am. Rivers*, 129 F.3d at 102 (agreeing with state and environmental petitioners "that the Commission is bound by the language of § 401 to incorporate all state-imposed certification conditions into hydropower licenses and that the legality of such conditions can only be challenged by the licensee in a court of appropriate jurisdiction"); *Ackels*, 7 F.3d at 867 ("Petitioners' only recourse is to challenge the state certification in state judicial proceedings.").

[42] *Lake Carriers*, 652 F.3d at 10 ("given the case law and the arguments that EPA had before it, the agency correctly concluded that it did 'not have the ability to amend or reject conditions in a [state's] CWA 401 certification'"); *see also Roosevelt Campobello Int'l Park Comm'n*, 684 F.2d at 1056 ("The courts have consistently agreed with [EPA's] interpretation, ruling that the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification.").

license. The federal agency may not select among conditions when deciding which to include and which to reject."[43] The same document explained that "[t]he denial of certification by a state or tribe *prohibits* the federal the federal agency from issuing the permit or license in question."[44]

## III. Numerous Elements of the Proposal Are Arbitrary and Capricious.

An agency rule is arbitrary and capricious if, among other things, "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[45] Because the proposed rule is so poorly considered and because EPA's record is so devoid of evidence in support of the policy choices the agency proposes to make, it is arbitrary and capricious.

### A. The Basis for the Proposal Runs Counter to the Evidence EPA Has.

According to EPA, the proposal "is intended to make the Agency's regulations consistent with the current text of CWA section 401, increase efficiencies, and clarify aspects of CWA section 401 that have been unclear or subject to differing legal interpretations in the past."[46] This justification is "incongruent with what the record reveals about the agency's priorities and decisionmaking process," and thus improper under the Administrative Procedure Act,[47] because the true purpose of the proposal is to greenlight fossil fuel energy projects such as pipelines.[48] But even taking EPA's stated purpose at face value, the proposal does not make sense.

---

[43] Interim 401 Guidance at 10 (footnote omitted) (citing section 401(d)); *see also id.* at 22 ("The federal permitting agency does not have authority to review and amend the conditions on a §401 certification. All conditions must be included in the permit or license or the permit or license may not be issued." (citing section 401(d)).
[44] Interim 401 Guidance at 11 (emphasis added) (citing section 401(a)(1)).
[45] *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983).
[46] 84 Fed. Reg. at 44,099.
[47] *Department of Commerce v. New York*, 139 S.Ct. 2551, 2575-76 (2019).
[48] This rulemaking was mandated by Executive Order 13,868, titled "Promoting Energy Infrastructure and Economic Growth," 84. Fed. Reg. 15,495 (Apr. 15, 2019). *See also* Wheeler, "Here's how Team Trump will bust

Neither the agency's record in support of this rulemaking nor its stated purpose in proposing the rule justifies the draconian limits it would place on the scope of state and tribal certification decisions. First, with respect to the record, EPA does not cite any instance of a project being stopped or limited by conditions based on factors apart from the impact to water bodies. The lone example EPA identifies of a certification decision that allegedly was based on non-water factors was a New York denial of certification that considered the greenhouse gas pollution impacts of the Valley Lateral Pipeline in 2017,[49] but that denial was subsequently undone by a ruling that New York had waived certification.[50] Accordingly, there appears to be no record support for the notion that states and tribes must be reined in to ensure that they are not acting outside the scope of the Clean Water Act. Second, the proposal will not increase efficiency or promote greater clarity about the scope of certification. Thanks to guidance from the Supreme Court, other federal courts, and EPA, it was abundantly clear – until this proposal sought to upend matters – to certifying authorities, federal permitting agencies, and project proponents that states and tribes have the authority to make certification decisions related to how projects (viewed as a whole, not considering only the discharge associated with the project) affect the condition of states' water bodies. They also understood that federal permitting agencies lacked any ability to reject certification decisions. If this proposal is finalized, however, stakeholders will be uncertain whether decisions are sufficiently connected to a project "discharge" or to "water quality requirements" in order to be within EPA's newly-defined scope

Cuomo's gas blockade," *supra* ("But too many critically important pipelines are still being delayed for years or killed altogether. For President Trump, these delays and blockades are unacceptable.").

[49] 84 Fed. Reg. at 44,110 n.44; *see also* U.S. EPA, Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking, at 21-22 (Aug. 2019) (hereinafter "Economic Analysis") (reviewing how proposal would affect four "case studies" and concluding only Valley Lateral Pipeline example would be outside the scope of certification).

[50] *New York State Department of Envtl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018).

of certification, and this uncertainty will inevitably spawn contentious and inefficient debates and, predictably, litigation between certifying authorities and federal permitting agencies.[51]

Neither the agency's record in support of this rulemaking nor its stated purpose in proposing the rule justifies how EPA has proposed to short-change states and tribes on the time they need to adequately review certification requests. First, the agency presents zero evidence or example of certifying authorities that have delayed making certification decisions despite having sufficient information to fully understand the impacts of a proposed project. To the contrary, the record contains significant input from certifying authorities that "[t]he most common reason for certification delays cited by states was incomplete requests" by applicants.[52] Second, the proposal's timing and certification request provisions entirely fail to promote efficiency and certainty. By allowing project proponents to start the waiver clock by submitting a barebones request for certification, the proposal will create massive inefficiency; it will override numerous states' efforts to identify the necessary information for a meaningful certification review,[53] and it will encourage applicants to request certification as early as possible and provide as little information as possible to maximize the likelihood of waiver and to give certifying authorities less of a basis to question projects. This dynamic will lead to more certification denials; as the

[51] *See* Economic Analysis at 15 (identifying, as a "potential con" of the proposal's limitation on the scope of certification, "[a]dditional legal challenges from certifying authorities and environmental organizations").
[52] Association of Clean Water Administrators, 401 Certification Survey Summary, at 1 (May 2019) (cited in Economic Analysis at 23) (hereinafter "ACWA 2019 Summary"), available at https://www.acwa-us.org/wp-content/uploads/2019/05/ACWA-State-401-Cert-Survey-Summary.pdf. *See also* Testimony of the Western States Water Council, U.S. Senate Committee on Environment & Public Works, Hearing to Examine Implementation of Clean Water Act Section 401 and S. 3303, the Water Quality Certification Improvement Act of 2018, 115th Cong., 2d Sess., at 5 (Aug. 16, 2018) ("Delays are typically due to submission of an incomplete application, completion of necessary study requirements, and constraints on state resources, including staff limitations and turnover. Certifications may also be held up by the applicant not responding to States' requests for additional information or failing to comment on proposed project conditions. Often substantive details of the proposed action change requiring further review."), available at https://www.epw.senate.gov/public/index.cfm/hearings?Id=A30DD7AB-5D05-4562-8ECF-BF9EB0FC8DE2&Statement_id=55EBA17E-58C3-4FCD-B163-937BE7BC8D39.
[53] ACWA 2019 Summary at 1 ("Twenty-one… states either have regulations that explain completeness, accept the federal Army Corps of Engineers application, or clearly list requirements on the application.").

Executive Director of the Western States Water Council testified to a Senate Committee considering a bill that closely resembles EPA's proposal:

> Such a limitation [a 90-day timeline for certification decisions] could very well force a state to deny a certification request, likely without prejudice, allowing an applicant to reapply once the required information is provided. An applicant may also elect to withdraw and later resubmit an application with the required information. It should be noted that the denial of Section 401 certification can also halt federal permitting procedures and lead to delays. Short inflexible deadlines for large, complex projects that may affect hundreds of streams and wetlands can be problematic for both applicants and States.[54]

Similarly, EPA's proposal to constrain the time that certifying authorities have to act and the proposal's prohibition on certifying authorities taking steps to work with project proponents to avoid waiver will not promote certainty, as the process of establishing each project's "reasonable period" will become a much more high-stakes affair and thus likely engender numerous disputes about the necessary length.

### B. The Proposal Ignores Critical Aspects of the Certification Issue.

#### 1. The Proposal Ignores the Impacts it Will Have on Water Bodies' Condition.

The proposal and the accompanying material in the docket utterly fail to assess the impact of the proposed rule on the condition of the nation's waters, which is not only an important issue in any Clean Water Act rulemaking – it ought to be the overriding issue. Neither the proposal preamble nor the accompanying economic analysis contains any effort to estimate how many of the thousands of certification decisions made each year would be affected by the new rules if EPA were to finalize them.

[54] Questions for the Record for Mr. Willardson, U.S. Senate Committee on Environment & Public Works, Hearing to Examine Implementation of Clean Water Act Section 401 and S. 3303, the Water Quality Certification Improvement Act of 2018, 115th Cong., 2d Sess., at 4 (Aug. 16, 2018), available at http://www.westernstateswater.org/wp-content/uploads/2018/09/08162018-Willardson-Final-QFR-Responses-09202018.pdf.

EPA has not apparently considered what kinds of certification decisions are particularly susceptible to being deemed outside the scope of certification (and therefore invalid) by federal permitting authorities or how frequently states and tribes are likely to be deemed to have waived certification. EPA acknowledges that such effects are predictable but does not attempt to ascertain their extent.[55] Consequently, EPA has no idea what the real-world impacts on the nation's waters will be of finalizing and implementing its new proposal. The agency likely does not want to reckon with those impacts; as discussed below, states and tribes use section 401 to limit the harm that federally-permitted projects can inflict on waterways in a host of different ways, many of which would be endangered by this proposal. Failure to consider the effects of these changes is, by itself, a fatal flaw in the proposal, as any rulemaking under the Clean Water Act ought to consider how and to what extent it promotes the law's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[56]

**2. The Proposal Ignores the Disturbance it Will Cause to State and Tribal Programs.**

The limitation of certification decisions to the impact of a "discharge" on "water quality requirements" also ignores an important aspect of the problem. EPA does not consider the enormous upheaval that such a change would cause, as it will deprive states and tribes of a key tool they have long used to control certain kinds of projects that can threaten the integrity of their waters.

Previously, EPA affirmed that, so long as a discharge may occur, "the scope of analysis and potential conditions can be quite broad," citing as an example that "water quality

[55] *See* Economic Analysis at 15 (new timeline provisions mean "[p]otentially less time to collect and generate information to inform decision; may lead to more denials or waivers"); *id.* (new scope provisions mean "[p]otential exclusion of conditions if conditions extend beyond the proposed scope of certification; potential waiver if reasons for denial extend beyond the proposed scope"); *see also* Willardson Questions for the Record, *supra* (giving federal agencies the ability to veto state certification decisions "would likely lead to instances where States' concerns are discounted in favor of the federal agencies' missions").

[56] 33 U.S.C. §1251(a).

implications of fertilizer and herbicide use on a subdivision and golf course might be considered as part of a §401 certification analysis of a CWA §404 permit that would authorize discharge of dredged or fill material to construct the subdivision and golf course."[57] A certification based on such considerations would likely be threatened by the proposal, as would several other examples described below.

For decades, states and tribes have understood that the Clean Water Act authorizes them to condition certification of hydroelectric dam operating permits on providing sufficient flows for aquatic life in the rivers in which dams are located. However, if this proposal were to be finalized, that critical authority would be jeopardized, as *PUD No. 1* makes clear. In that case, the dissenting justices (on which EPA would now rely) argued that "a minimum stream flow requirement is a limitation on intake – the opposite of discharge,"[58] thus rendering it outside of those justices' view of states' and tribes' authority only to base certifications on the "discharge" itself. Because EPA now proposes to prohibit certifying authorities from making decisions based on any impacts besides those directly from a "discharge," and to limit certification to a narrowly-defined set of "water quality requirements," minimum stream flow conditions could well be deemed off-limits and discarded by the Federal Energy Regulatory Commission.[59]

States and tribes rely on the certification process to safeguard their waters' integrity and the consistency of federally-permitted projects with numerous other state and tribal requirements that may not necessarily be directly related to a water quality standard or be federally-approved. EPA described several examples in 2010:

[57] Interim 401 Guidance at 18.
[58] 511 U.S. at 725 (Thomas, J., dissenting).
[59] In view of this concern, to say nothing of numerous other requirements on which states and tribes may base certification decisions, this regulation is likely to adversely affect salmon and other endangered species. Accordingly, section 7 of the Endangered Species Act requires that EPA consult with the National Marine Fisheries Service and the Fish and Wildlife Service about this proposed regulation.

> Water quality certifications under §401 reflect not only that the licensed or permitted activity and discharge will be consistent with the specific CWA provisions identified in sections 401(a) and (d), but also with "any other appropriate requirements of State [and Tribal] law." Some State regulations explicitly identify considerations relevant for §401 certification, while others do not. For example, Ohio's regulations state that certification may be denied if the activity will "result in adverse long or short term impact on water quality." Similarly, river designation under the Wild and Scenic Rivers Act might be a relevant consideration independent of a state or tribe's water quality standards. For example, Georgia considers a suite of other state regulations under its review including compliance with the state Erosion and Sedimentation Act for buffer integrity, construction and post-construction stormwater management, and the adequacy of mitigation. In addition, the Georgia water quality certification authority also coordinates with the Coastal Resources Division to insure project compliance with coastal protection regulations. Another relevant consideration when determining if granting 401 certification would be appropriate is the existence of state or tribal laws protecting threatened and endangered species, particularly where the species plays a role in maintaining water quality or if their presence is an aspect of a designated use. Also relevant may be other state and tribal wildlife laws addressing habitat characteristics necessary for species identified in a waterbody's designated use.
>
> Similar to the discussion in section *III.C.2. 401 Certification Consideration: Consistency with Water Quality Standards*, protection of the cultural or religious value of waters expressed in state or tribal law can also be relevant to a certification decision, even when not included as part of a water quality standard.

In the same vein, EPA reports that states commonly use section 401 to ensure that the impacts of projects do not degrade the integrity of their waters. For instance, many states rely on certification to require harm associated with projects permitted by the Army Corps pursuant to section 404 are mitigated and to include conditions to ensure mitigation success. Virginia similarly uses certification to implement the state's "no net loss" goal for wetland area and function,[60] while South Carolina has adopted regulations that lay out the kinds of impacts that will cause a certification denial, several of which may not pass muster under EPA's new construct:

> 5. Certification will be denied if:
> (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired;
> (b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses;

[60] Interim Guidance at 23-24.

(c) the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species;
(d) the proposed activity adversely impacts special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers[61]

Likewise, perfectly reasonable conditions that Alaska previously imposed via certification on an EPA-issued National Pollutant Discharge Elimination System stormwater permit could be in jeopardy; one wonders whether EPA could have deemed unnecessary, and thus invalid, the state condition that "the storm water pollution prevention plan shall be approved and sealed by a Professional Engineer registered in the State of Alaska," and that the discharger pay a fee to cover the state's review of the plan.[62]

Additionally, EPA's new approach – which focuses only on the specific discharge from the activity for which certification is sought – would appear to preclude states' use of section 401 authority to guard against cumulative impacts from numerous activities. As 14 state attorneys general and the Pennsylvania Department of Environmental Protection told EPA in comments on EPA's revised guidance on section 401, "the water quality of a single waterbody or watershed may be impacted by multiple water development projects diverting surface waters for beneficial uses," and "one watershed may have projects subject only to state regulation as well as projects requiring federal approval, such as FERC licenses," and in such circumstances "the states' Section 401 review can help to ensure coordinated management of water quality impacts of

[61] South Carolina Dept. of Health & Envtl. Control, Regulation 61-101, Water Quality Certification, §(F)(5), available at https://www.scdhec.gov/sites/default/files/media/document/R.61-101.pdf.
[62] 66 Fed. Reg. 19,483, 19,484 (Apr. 16, 2001). We acknowledge that EPA has requested comment on whether or not to include "any applicable fees" in the definition of "certification request," 84 Fed. Reg. at 44,101-02, but doing so only begs the question of whether – using EPA's new proposed scope of certification – states and tribes could condition certification upon the payment of a fee that enables a certifying authority to conduct either its certification review or a required post-certification review of a particular plan or submission.

FERC projects and other projects affecting the same water body or watershed."[63] As an example, these state officials pointed to the Sacramento-San Joaquin Delta Estuary, "where flows are affected by hundreds of projects in the upstream watersheds, including some very large dams with FERC licenses, as well as dams and other projects without FERC licenses."[64] They continued: "The waters of the Estuary are impacted by changes in flow and temperature, salinity intrusion and harmful algal blooms that are the cumulative effect of so many diversions within the same watershed. Section 401 helps ensure coordinated management of this water body."[65]

Finally, and absurdly, EPA's new requirement that certification has to be based on specified provisions of the Clean Water Act or a federally-approved state requirement would appear even to prevent a state from making certification decisions based on tightened water quality standards that a state or tribe has recently adopted but EPA has not yet approved, contrary to prior practice.[66]

The foregoing examples represent only a small sample of the kinds of certification decisions that states and tribes make regularly under section 401 today. If states and tribes wish to continue to safeguard their waters in this fashion, they may have to amend state law (and secure EPA's approval) to incorporate these requirements into their water quality standards. In some cases, that may not even be an option under EPA's proposal, for instance if state and tribal protections are aimed at protecting waters from harm inflicted by certain kinds of projects but not directly caused by those projects' discharge. Moreover, these examples only discuss the

[63] Letter from California Attorney General Becerra et. al, to EPA Administrator Wheeler, at 3 (July 25, 2019), available at https://oag.ca.gov/system/files/attachments/press-docs/State%20AG%20Comments%20on%20Section%20401%20Guidance-FINAL%2019-0725.pdf.
[64] *Id.* at 3 n. 14.
[65] *Id.*
[66] *Contra* Interim Guidance at 19 ("Note that water quality standards adopted by a state or tribe but not yet approved by EPA may still be relevant during the §401 certification process as 'other appropriate requirement' of state or tribal law.").

upheaval likely to happen due to EPA's new limitations on the scope of certification, but the agency's new procedural requirements could be equally challenging to manage. After discussing the proposed new, very spare, certification request requirements, the agency blithely says "EPA recommends that, following establishment of final EPA regulations defining 'certification request' and 'receipt,' certifying authorities update their existing section 401 certification regulations to ensure consistency with the EPA's regulations."[67] The agency does nothing to meaningfully assess how much of a burden this is likely to be to states and tribes. By failing to consider the major disruption the proposal would likely cause at the state and tribal level, the proposal is arbitrary and capricious.[68]

**3. The Proposal Ignores Important Considerations Concerning "Reasonable" Time.**

EPA would empower federal permitting agencies to establish a deadline for certification decisions, after which states' and tribes' rights would be waived, and only identifies three considerations to inform the establishment of this deadline. Specifically, the proposal would require the "reasonable period" to be set based on: "[t]he complexity of the proposed project"; "[t]he potential for any discharge"; and "[t]he potential need for additional study or evaluation of water quality effects from the discharge."[69] Reliance on just these factors significantly ignores the practicalities of certification decisions.

First, the proposal would not take account of certifying authorities' capacity or workload. But the number of certification decisions varies greatly from place to place. As the Association of Clean Water Administrators reported to EPA, on an annual basis, "Michigan has

[67] 84 Fed. Reg. at 44,102.
[68] Indeed, "major disruption" could well be an understatement; the proposal is likely to create conflicts that could require certifying authorities to violate their own substantive or procedural requirements in order to comply with federal law, potentially leaving their actions vulnerable to legal challenges based on those pre-existing state or tribal requirements.
[69] 84 Fed. Reg. at 44,120 (proposed §121.4(d)).

approximately 5000 requests and New York approximately 4000 annual requests," as compared to states like New Hampshire and South Dakota, which have about 10 and 15 requests per year, respectively.[70]

Second, the proposal fails to account for existing state requirements for requests, both substantive and procedural. For instance, several states require the submission of the application to the federal permitting agency as part of a request for certification, but the proposal would allow a project proponent to submit a request for certification without yet having applied to the federal agency and the federal agency. Similarly, some states require information that is season-dependent, like a wetland delineation performed during the growing season or an assessment of aquatic life keyed to certain life stages. And certification authorities have a range of public notice and participation requirements that the proposal would have federal permitting authorities ignore.

## IV. Legislative History Supports a Broad Understanding of State and Tribal Authority Under Section 401.

Although the Act's plain text suffices to render many aspects of the proposal unlawful, the legislative history of section 401 further confirms that EPA has proposed a rule contrary to Congressional intent in several respects.

The legislative history of the Act reveals that Congress intended to exclude federal permitting agencies from the certification decision. In considering an amendment offered during Senate debate, which would have excluded Army Corps of Engineers' dredging projects from EPA review, Senator Muskie warned of "mission-oriented" agencies making decisions without scrutiny by environmental agencies, and highlighted section 401 as an example of how the Act would prevent that.[71] Senator Muskie said: "we have found – and the hearings of our committee

[70] ACWA 2019 Summary at 1.
[71] Comm. on Pub. Works, Committee Print 93d Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 1388-89 (1973) (hereinafter "1972 Legislative History").

are replete with the evidence – that mission-oriented agencies whose mission is something other than concern for the environment simply do not adequately protect environmental values."[72]

The development of section 401(d) suggests that EPA is mistaken to attempt to limit the scope of states' and tribes' certification authority as it has proposed. In the Senate, subsection (d) authorized conditions to be imposed based on enumerated sections of the Act, along with "any more stringent water quality requirement of state law as provided in section 510 of this Act…."[73] That the final law uses the phrase "appropriate requirement of State law" instead indicates that Congress did not intend this provision to be limited to "water quality requirements," as EPA has proposed. At a minimum, the fact that this provision included at least state laws preserved under section 510 of the Act demonstrates that Congress did not intend for this authority to be limited to EPA-approved state law. The conference report on the bill reinforces that subsection (d) confers a broad authority, as it states that the conference substitute language "has been expanded to also require compliance with any other appropriate requirement of State law which is set forth in the certification."[74]

Congress's development of section 401 reveals that it would not have approved of the proposal's provision granting EPA a wide-ranging ability to declare whether certifying authorities are acting within the newly-created scope of certification. The proposal provides:

> (a) The Administrator may, and upon request shall, provide federal agencies, certifying authorities, and project proponents with assistance regarding determinations, definitions and interpretations with respect to the meaning and content of water quality requirements, as well as assistance with respect to the application of water quality requirements in particular cases and in specific circumstances concerning a discharge from a proposed project or a certified project.

[72] *Id.* at 1389.
[73] 1972 Legislative History at 1685.
[74] 1972 Legislative History at 321.

> (b) A certifying authority, Federal agency, or project proponent may request assistance from the Administrator to evaluate whether a condition is intended to address water quality effects from the discharge.[75]

This provision is directly contradicted by a discussion in the House report on the bill. In discussing subsection 401(b), which provides a role for EPA in providing technical advice, the Committee on Public Works wrote:

> The Committee notes that a similar provision in the 1970 Act has been interpreted to provide authority to the Administrator to independently review all State certifications. This was not the Committee's intent. The Administrator may perform services of a technical nature, such as furnishing information or commenting on methods to comply with limitations, standards, regulations, requirements, or criteria, but only upon request of a State, interstate agency or Federal agency.[76]

This kind of function is a far cry from the role that EPA would now assign itself – passing judgment the meaning of state and tribal requirements and on whether certifying authorities have properly constrained their review to "water quality effects from the discharge," as defined by the proposal.

Finally, the legislative history confirms what section 401 already says plainly: federal permitting agencies lack any authority to second-guess or veto state or tribal certification decisions. The House report on the bill says:

> No Federal license or permit shall be granted unless this certification has first been obtained or there has been a waiver of the requirement as provided by this subsection. Denial of certification by a State, interstate agency, or the Administrator, as the case may be, *results in a complete prohibition against the issuance of the Federal license* or permit.[77]

Similarly, during Senate consideration of the conference report on the bill, Senator Muskie provided a detailed summary of many of the bill's provisions, and said that, under section 401,

[75] 84 Fed. Reg. at 44,122 (proposed §121.15).
[76] 1972 Legislative History at 811.
[77] 1972 Legislative History at 809 (emphasis added).

federal permitting agencies "shall accept as *dispositive* the determinations of EPA and the States…."[78]

## V. The Proposal Includes Numerous Vague Provisions that Could Weaken State and Tribal Authority Further.

The proposed rule is bad enough when one considers the changes that EPA explicitly acknowledges. However, the proposal also is unclear in several key places, which raises a host of questions about how the new requirements would actually work in practice.

First, the proposal does not address whether state or tribal antidegradation policies can serve as a valid basis for certification. Many states currently rely on their antidegradation policies in making certification decisions.[79] This practice makes perfect sense, and even should be permissible under the proposed rule's radical restriction on the legal requirements on which states and tribes may rely, because antidegradation is an essential element of states' water quality standards.[80] However, antidegradation analysis, as outlined in EPA regulations, sometimes requires the consideration of factors that are not water quality-related or may not be considered as such under this proposal. For instance, Tier 2 antidegradation analysis considers whether "lower water quality is necessary to accommodate important *economic or social development* in the area in which the waters are located."[81] Similarly, Tier 3 antidegradation analysis considers whether waters are an outstanding National resource because, among other things, they are of "exceptional recreational … significance."[82] This fact leaves one to wonder whether EPA's new restrictions on certification decisions will preempt antidegradation review. And the proposal

[78] 1972 Legislative History at 183 (emphasis added).
[79] Interim 401 Guidance at 19.
[80] *PUD No. 1*, 511 U.S. at 705 ("A 1987 amendment to the Clean Water Act makes clear that § 303 also contains an 'antidegradation policy'—that is, a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation."); *id.* ("At a minimum, state water quality standards must satisfy these conditions.").
[81] 40 C.F.R. §131.12(a)(2) (emphasis added).
[82] 40 C.F.R. §131.12(a)(3).

injects further uncertainty into this question by stating that the proposal would not change the longstanding authority of states and tribes to rely upon designated uses – another essential element of water quality standards – when making certification decisions,[83] but including no similar affirmation with respect to antidegradation requirements.

The proposal also fails to clarify how the new requirements it imposes might interact with other Clean Water Act rollbacks EPA has pursued. For instance, earlier this year, EPA announced: "the best, if not the only, reading of the statute is that all releases to groundwater are excluded from the scope of the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater."[84] Given the agency's newfound belief that pollutant discharges that pass through groundwater are immune from the Act's regulatory view, one must question whether the agency thinks the same is true of the discharges that it now claims are the focus of a state or tribe's certification review. Similarly, in February, EPA published a proposed rule to radically slash the extent of water bodies nationwide subject to the Clean Water Act,[85] and it is entirely unclear whether states and tribes might try to protect features excluded from the Act's coverage, at least to some extent, using section 401. For instance, if a state chose to maintain its EPA-approved water quality standards for ephemeral streams that EPA intends to exclude from being considered "waters of the United States," could a state or tribe base a certification decision on concerns that a discharge from a federally-permitted action would cause a violation of those water quality standards downstream?

If it were not illegal and irresponsible enough for EPA to authorize federal permitting agencies to veto states' and tribes' certification conditions that federal agencies deem to be

[83] 84 Fed. Reg. at 44,097 n. 30.
[84] 84 Fed. Reg. 16,810, 16,814 (Apr. 23, 2019).
[85] 84 Fed. Reg. 4154 (Feb. 14, 2019).

outside the scope of certification, the proposal suggests that this already problematic authority might be broader still. EPA proposes to require states and tribes to explain why any condition is "necessary to assure that the discharge from the proposed project will comply with water quality requirements," cite the particular provision of law that "authorizes the condition," and provide a statement about "whether and to what extent a less stringent condition could satisfy applicable water quality requirements."[86] These requirements beg the question of whether federal permitting authorities can reject conditions if they deem a state or tribe's explanation inadequate or if they believe a less stringent condition would suffice.

Additionally, the proposal is unclear about whether a state or tribe may deny certification based only on a lack of information. The proposed rule's section on denials indicates that a denial "shall include" three things, only one of which is information "needed to assure that the discharge from the proposed project complies with water quality requirements,"[87] and the provision is phrased in the conjunctive – the three subsections are joined by an "and." This suggests that states and tribes could not rely exclusively on insufficient information as a basis for a certification denial. However, EPA's economic document accompanying the proposal suggests that denials based on a lack of information would be possible under the proposed rule; after acknowledging that the proposal "could lead to certifying authorities having less information available to make a section 401 certification decision if initial certification requests are incomplete," EPA says that, [i]f the data gaps are significant, certifying authorities may respond by issuing more denials."[88] Denying certification based on a lack of information is essentially the only tool that EPA's proposal would leave states and tribes faced with a recalcitrant project

[86] 84 Fed. Reg. at 44,120 (proposed §121.5(d)).
[87] 84 Fed. Reg. at 44,120 (proposed §§121.5(e)).
[88] Economic Analysis at 17.

proponent; if this option is not available, then EPA's proposal – which already significantly eviscerates section 401 – would render section 401 a dead letter.

## VI. Conclusion

EPA must withdraw this proposal. It violates the Clean Water Act and the Administrative Procedure Act. It is terrible public policy. It will significantly worsen relationships between federal agencies and states and tribes.