Submitted via regulations.gov in Docket ID No. EPA–HQ– OW–2019–0405

October 21, 2019

Andrew Wheeler
Administrator
Environmental Protection Agency

Re: Comments on EPA Proposed Rule Updating Regulations on Water Quality Certification

Administrator Wheeler:

On behalf of Sierra Club and the undersigned organizations, we write to submit comments on the Environmental Protection Agency's ("EPA") Proposed Rule Updating Regulations on Water Quality Certification ("Proposed Rule"). The proposed changes largely violate the Clean Water Act, will have adverse and wide-ranging consequences beyond the purported impetus for these changes, and will not fix the alleged problems EPA aims to solve. EPA should abandon this proposal; if it does not, the Proposed Rule must be significantly changed.

The Proposed Rule unlawfully usurps state and tribal[1] authority. Although the Clean Water Act provides a federal backstop, the statute explains that ***States*** have "the primary responsibilities and rights … to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). States designate the uses water must accommodate. *Id.* § 1313(c). States set standards for pollution, and have the right to set requirements that exceed federal minimums. *Id.* §§ 1313, 1342(b), 1370.[2] And, through Section 401 of the Clean Water Act, 33 U.S.C. § 1341 ("Section

[1] In 1987, Congress amended the Clean Water Act by adding Section 518(e), 33 U.S.C. § 1377(e), which authorizes Treatment in the Same Manner as a State ("TAS") for federally recognized Indian tribes meeting specific criteria. *See* Section 518(e); 40 C.F.R. 131.8. Tribes granted TAS under the Clean Water Act are authorized to implement certain sections of the Clean Water Act, including Section 401, over tribal lands and waters, in keeping with EPA's longstanding policy encouraging tribal efforts to develop and administer environmental programs. *See e.g.,* "EPA Policy for the Administration of Environmental Programs on Indian Reservations," EPA, November 8, 1984. Accordingly, all references to state authority herein are applicable to tribes who have been granted or are eligible for TAS under Clean Water Act Section 401.

[2] Other notable powers reserved to the states and tribes include the National Pollutant Discharge Elimination System ("NPDES"), which Congress established to require collaboration between states and EPA in the distribution of permits to point source polluters, *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205–08 (1976); the requirement that federal entities "comply with… State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. § 1323; *see EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 209.

401"), States "assure that Federal licensing or permitting agencies cannot override State water quality requirements." *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 647 (4th Cir. 2018) (quoting S. Rep.92-414, at 69 (1971)) (emphasis omitted). Section 401 provides states and tribes with the authority to impose conditions necessary to ensure compliance with these requirements, and, where necessary, the authority to block projects outright. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 380, 385–86 (2006); *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 711–13 (1994).[3] Every circuit court to consider the issue has held that, contrary to what EPA proposes here, federal agencies have no authority to second-guess such state decisions. *See, e.g., Sierra Club*, 909 F.3d at 646.

The proposed rule further misunderstands the protective nature of the Clean Water Act. The purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *S.D. Warren Co.*, 547 U.S. at 385 (quoting 33 U.S.C. § 1251(a)). Here, however, EPA proposed the rule at the direction of Executive Order 13,868, "Promoting Energy Infrastructure and Economic Growth,"[4] which instructs EPA to revise its Section 401 regulations to "encourag[e] and "promot[e]" additional development, opining that state exercise of Section 401 authority is "hindering the development of energy infrastructure."[5] Insofar as such hindrance has occurred, it is by Congressional design: where development conflicts with protection of water quality, water wins. "Through [Section 401], Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval."[6] Unlike some other statutes, no provision of Section 401 allows a project that would violate water quality requirements to nonetheless be approved because of its economic or other benefits.[7] Indeed, for gas pipelines under the jurisdiction of the Federal Energy Regulatory Commission ("FERC")—which constitute three of the four case studies EPA cites in support of the proposed rule—Congress recently and explicitly affirmed the primacy of state and tribal Clean Water Act authority over these projects.[8] EPA has made no showing whatsoever that the Proposed Rule will allow for greater protection of water quality than the existing structure or even that the Proposed Rule will be equally protective.

Moreover, EPA offers no evidence that the current Section 401 regulations have in fact resulted in undue interference with the approval of projects. EPA does not dispute that of the only four cases it identified where states denied Section 401 applications for fossil fuel projects, two were deemed appropriate determinations that the project did not show compliance with

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[3] Section 401 generally resembles its predecessor, section 21(b) of the Water Quality Management Act of 1970, which served a similar federalist purpose, reserving broad authority for states. See Pub. L. No. 91-224; 84 Stat. 91 (1970); *see also S.D. Warren Co*., 547 U.S. at 380 (quoting S.Rep. No. 92–414, p. 69 (1971)) ("Section 401 recast pre-existing law and was meant to 'continu[e] the authority of the State ... to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State'"). Since the passage of the 1972 Clean Water Act amendments, Congress has hardly altered section 401 at all. *See* Debra L. Donahue, The Untapped Power of Clean Water Act Section 401, 23 ECOLOGY L.Q. 201, 235–36 (1996).

[4] Exec. Order No. 13,868, 84 Fed. Reg. 15,495 (Apr. 10, 2019).

[5] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,081–82 (proposed Aug. 22, 2019) (to be codified at 40 C.F.R. pt. 121).

[6] *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

[7] *Compare* Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A) (allowing approval of projects that would violate an applicable coastal management program where "necessary in the interest of national security.").

[8] Energy Policy Act of 2005, Pub.L. No. 109–58, § 311, 119 Stat. 594 , 685 (2005) (adding 15 U.S.C. § 717b(d)).

water quality requirements, the third was remanded to the state for further explanation, and the fourth had no meaningful impact on the project's completion.[9] EPA's proposal to "encourage" fossil fuel infrastructure development by restricting state authority to regulate important sources of water pollution therefore not only is contrary to the text and purpose of the Clean Water Act, but also lacks any rational basis in the record.

Finally, the Proposed Rule's provisions regarding the timing of Section 401 review fail to reflect the realities of such review and will, in practice, stymie authorized agencies attempting to fulfill their responsibilities under Section 401, and lead to unnecessary denials and project delays. The arbitrarily short timeframes EPA seeks to provide authorized agencies will make it impossible for states and tribes to determine that applicants have affirmatively met the burden of showing that proposed projects will comply with water quality requirements or develop appropriate conditions to ensure such compliance. And EPA's suggested changes to the process of decision-making under Section 401 similarly threaten to prevent authorized agencies from obtaining the information necessary for them to carry out their responsibilities under the Act.

The below-signed commentators, therefore, request that EPA abandon its efforts to fundamentally alter Section 401 where it lacks the authority to do so and where no need for such revisions exists. The administration will not be permitted to use the frustrations of a few fossil fuel companies that failed to meet their burden under Section 401 to undermine a statutory scheme that is critical to protecting the quality of waterways across the nation.[10]

I. EPA PROPOSES TO OVERHAUL THE ENTIRE SECTION 401 PROGRAM TO FIX A PROBLEM THAT DOES NOT EXIST WITHOUT SHOWING THAT THE PROPOSED RULE WILL ADEQUATELY PROTECT WATER QUALITY.

EPA's primary motivation in enacting major changes to Section 401 is the perceived inefficiencies in processing applications for fossil fuel infrastructure projects.[11] But EPA has not shown that this problem actually exists for fossil fuel projects, let alone for all the other kinds of projects that are reviewed under Section 401; and certainly has not demonstrated the existence of any problem that would justify the extent of the revisions EPA is proposing. Moreover, EPA's point of departure—fostering fossil fuel projects—is completely at odds with the basic purpose of the Clean Water Act—to protect and improve the quality of the nation's waterways.

A. EPA Has Not Shown that There Is any Reason to Revise the Interpretation of Section 401.

Section 401 is not a program specific to fossil fuel infrastructure. EPA's "Information Collection Request supporting statement" states that from 2013 to 2018, 4,266 individual and

[9] EPA, ECONOMIC ANALYSIS FOR THE PROPOSED CLEAN WATER ACT SECTION 401 RULEMAKING, at 10–12 (2019) (hereinafter Economic Analysis).

[10] To the extent that any of the Proposed Rule takes effect, EPA must make clear that any such changes are to be prospectively applied to new applications only. Any retroactive application would be deeply inappropriate and cause a regulatory nightmare.

[11] 84 Fed. Reg. 44,081–82.

58,766 general federal permits requiring 401 certification were issued per year.[12] This is an underestimate: it accounts only for permits issued by the Corps, Coast Guard, FERC, and Nuclear Regulatory Commission,[13] but as EPA acknowledges, states and tribes issue 401 certifications for other federal permits as well.[14] Many—likely most—of these thousands of annual permit decisions are for projects unrelated to the "coal, oil, and natural gas" infrastructure that is the stated impetus of this rule. EPA entirely fails to acknowledge or evaluate the impact of the proposed regulations on these other types of projects.

As states and tribes review these thousands of annual permit and license applications demonstrate, the existing regulations work well. EPA's supporting Economic Analysis explains that "denials are uncommon" and that decisions on certification requests occur well within the 365-day limit set by Congress.[15] When delays in processing Section 401 applications do occur, it is most commonly because of "incomplete requests."[16]

In the place of any showing of an actual problem across the thousands of Section 401 permits granted every year, EPA focuses on a handful of "high-profile" examples where the Section 401 certification was denied to fossil fuel infrastructure projects: three pipelines in New York State and one coal export terminal in Washington State.[17] And EPA acknowledges—but does not seem to take seriously—that even among these four outliers, two of the denials were upheld after judicial review[18] and one was deemed a "close case" and remanded back to the state with instructions to better explain the decision.[19] EPA, therefore, has failed to demonstrate that there is a problem in processing Section 401 applications for fossil fuel projects, let alone a problem with the Section 401 process across the thousands and thousands of non-fossil fuel projects considered each year. The Proposed Rule, therefore, lacks any kind of rational motivation—it is being driven by a problem that does not exist.[20]

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[12] ENVTL. PROT. AGENCY, EPA ICR NO. 2603.02, ICR SUPPORTING STATEMENT INFORMATION COLLECTION REQUEST FOR UPDATING REGULATIONS ON WATER QUALITY CERTIFICATION PROPOSED RULE 8 (2019).
[13] *Id.*
[14] Economic Analysis at 4.
[15] *Id.* at 6.
[16] *Id.*
[17] *See id.* at 11–12.
[18] *See id.* at 11 (the "court upheld the denial" in the Constitution pipeline case); *id.* at 13 ("all court challenges to the section 401 certification denial have resulted in rulings favorable to the Department of Ecology" in the Millennium coal export terminal).
[19] *See Nat'l Fuel Gas Supply Corp. v. New York State Dep't of Envtl. Conservation*, 761 F. App'x 68, 70–72 (2d Cir. 2019).
[20] Administrator Wheeler's OpEd in the NY Post also demonstrated deep confusion about what, if any, problem the Proposed Rule is aimed at solving. *See* Andrew Wheeler, *Here's How Team Trump will Bust Cuomo's Gas Blockade*, NY POST (Aug. 15, 2019), https://nypost.com/2019/08/15/heres-how-team-trump-will-bust-cuomos-gas-blockade/. Mr. Wheeler seemed to not understand that constraints in gas supply to New York State are primarily tied to issues with gas and *not* electrical power supply. *Id.* The blackout that afflicted New York City in the summer of 2019 that Mr. Wheeler cites as a justification for adopting the Proposed Rule had nothing whatsoever to do with any alleged gas supply constraints in New York State. Susan Scutti, *We now know the cause of New York's massive blackout*, CNN (July 30, 2019), https://www.cnn.com/2019/07/30/us/nyc-blackout-con-ed-explanation-trnd/index.html ("A 'flawed connection' between key pieces of equipment at a New York City electrical substation caused the July 13 power outage that plunged parts of the city that never sleeps into darkness, Con Edison said").

B. The Existing Section 401 Program Provides Important Safeguards that EPA Ignores.

EPA's irrational and highly improper starting point for its proposed revisions to Section 401 is a desire to facilitate the construction of fossil fuel infrastructure—a purpose that is entirely divorced from Congress' intent in passing Section 401 and the Clean Water Act. Fossil fuel infrastructure projects have significant negative impacts on water quality across the country, including disastrous oil spills,[21] degradation of rivers and streams caused during construction of pipelines and other projects,[22] and destruction of aquatic habitat caused by the construction of export terminals[23]. Nevertheless, Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*,[24] directed EPA to change its interpretation of the Clean Water Act to promote the construction of energy infrastructure to transport "supplies of coal, oil, and natural gas" to market.[25] And Administrator Wheeler confirmed that the purpose of the Proposed Rule was to "take action to accelerate and promote the construction of pipelines and other important energy infrastructure."[26] Not surprisingly, therefore, there is nothing in the administrative record to demonstrate that the changes EPA is suggesting will have a net positive effect on the quality of

[21] *Firm fined $3.3M for worst California oil spill in 25 years*, ASSOCIATED PRESS, Apr. 25, 2019, https://www.apnews.com/cb022e4c9bd744ddb9c0e5658ae4f445 ("The spill from a corroded pipeline blackened popular beaches for miles, killed wildlife and hurt tourism and fishing"); Bryce Gray, *Two pipelines, including Keystone, shut after oil leak in St. Charles County*, ST. LOUIS POST-DISPATCH (Feb. 7, 2019), https://www.stltoday.com/business/local/two-pipelines-including-keystone-shut-after-oil-leak-in-st/article_5f664177-7175-5968-83ae-575510863fc5.html; Emily Moon, *After the Latest Leak in South Dakota, How Safe Are America's Pipelines?*, PACIFIC STANDARD (Nov. 24, 2017), https://psmag.com/environment/how-safe-are-americas-pipelines ("Almost nine million gallons of crude oil has spilled from pipelines in the U.S. since 2010"); *see also Pipeline spill affects pastureland in western North Dakota*, ASSOCIATED PRESS, Sep. 3, 2019, https://www.apnews.com/85848a27a6344819aafdb5d539ce0856.

[22] *See, e.g.*, Kennedy Rose, *Pa. fines Sunoco $313K for pipeline construction violations*, PHIL. BUS. J. (Aug. 29, 2019), https://www.bizjournals.com/philadelphia/news/2019/08/29/pa-fines-sunoco-313k-for-pipeline-construction.html (pollution from construction affected a river, two creeks, eight wetlands, and at least four tributaries); Kate Mishkin, *Natural gas pipeline agrees to pay $430,000 penalty for water pollution violations*, CHARLESTON GAZETTE-MAIL (Jun. 12, 2018), https://www.wvgazettemail.com/news/natural-gas-pipeline-agrees-to-pay-penalty-for-water-pollution/article_da3b1828-ae83-5ac3-93bb-06f1a7fc8e37.html (state agency found that pipeline company failed "to control erosion and keeping sediment water from leaving construction sites"); *see also* Michael Burke, *After Sunoco pipeline drilling taints private Chester County wells, critics worry: What's next?*, THE PHILA. INQUIRER (Aug. 5, 2017), https://www.inquirer.com/philly/news/after-sunoco-pipeline-drilling-taints-private-chester-county-wells-critics-worry-public-water-may-be-at-risk-20170805.html.

[23] *See, e.g.*, Josh Harkinson, *Why Big Coal's Export Terminals Could be Even Worse Than the Keystone XL Pipeline*, MOTHER JONES (Oct. 8, 2013), https://www.motherjones.com/environment/2013/10/america-coal-industry-exports-china/; COWLITZ COUNTY, MILLENNIUM BULK TERMINALS—LONGVIEW HEALTH IMPACT ASSESSMENT 45-46 (2018).

[24] 84 Fed. Reg. at 44,081–82.

[25] *See* 84 Fed. Reg. at 15,495.

[26] Wheeler, *supra* 20.

the nation's waterways or would even allow continued protection of the quality of the nation's waterways.[27]

Section 401 moreover is routinely used outside of the narrow fossil fuel examples EPA considers in the Proposed Rule to provide critical protections to water quality. For example, in the regulation of hard rock mining projects, it is particularly important that states retain the flexibility to require ample protections in federal permits. The greatest risk often posed by hard rock mines is not the direct discharge of fill material but the mine's massive disruption of the hydrology of the entire mine site and beyond. Digging below the surface typically requires dewatering with wells intended to lower groundwater levels, thereby not only reducing groundwater but altering the direction of flows and reducing surface water flows. The mining itself exposes and requires processing and storage of metals and sulfides that can contaminate waters forever. A single mine may generate billions of tons of mineralized waste rock and tailings that must be stored forever. These storage sites may seep metals and other toxic materials in ways both foreseen and unforeseen, which may be transported through groundwater or surface water in ways not predicted. Tailings storage often requires huge dams prone to failure, sometimes with catastrophic consequences to the waters below. Many mines require water treatment in perpetuity, which may be planned at the outset or required after the commencement of mining due to unexpected problems.[28] Further, mining projects often result in losses of waters not by discharges of fill material, but by deeming existing waters of the U.S. to be "waste treatment systems" for storage of mine waste under 40 C.F.R. § 230.3(s)(7) (2014).

The tremendous risk and expense of mining often falls to states. Mining companies do not last forever, but the waste and costs of storage and treatment do. If a mine has not posted an adequate bond (which is nearly impossible for costs in perpetuity), a state may be stuck with the bill for managing and treating the waste for all time. For example, acid mine drainage at the Zortman Landusky mine has caused widespread ground and surface water contamination in North Central Montana, with state and federal expenditures already exceeding $50 million for

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[27] EPA's analysis of the impacts of this rule on water quality is utterly lacking. EPA must evaluate the impact of the Proposed Rule on water quality, including in connection with other potential changes being made to the Clean Water Act. For example, EPA is currently seeking to substantially limit the definition of "waters of the United States." Revised Definition of ''Waters of the United States'', 84 Fed. Reg. 4,154 (proposed Feb. 19, 2019) (to be codified at 33 C.F.R. pt. 328). Prior to finalizing any overhaul of Section 401, EPA should assess and make public how the revisions to the definition of waters of the U.S. rule in combination with the Proposed Rule will affect the administration of Section 401.

[28] Examples of studies disclosing the water quality problems inherent to hard rock mining abound. *See*, *e.g.*, BONNIE GESTRING, EARTHWORKS, U.S. COPPER PORPHYRY MINES: THE TRACK RECORD OF WATER QUALITY IMPACTS RESULTING FROM PIPELINE SPILLS, TAILINGS FAILURES AND WATER COLLECTION AND TREATMENT FAILURES (rev. Nov. 2012), https://earthworks.org/cms/assets/uploads/2012/08/Porphyry_Copper_Mines_Track_Record_-_8-2012.pdf; BONNIE GESTRING & JOHN HADDER, EARTHWORKS, U.S. GOLD MINES SPILLS & FAILURES: THE TRACK RECORD OF ENVIRONMENTAL IMPACTS RESULTING FROM PIPELINE SPILLS, ACCIDENTAL RELEASES AND FAILURE TO CAPTURE AND TREAT MINE IMPACTED WATER (2017), https://earthworks.org/cms/assets/uploads/archive/files/publications/USGoldFailureReport2017.pdf; JAMES R. KUIPERS ET AL., EARTHWORKS, COMPARISON OF PREDICTED AND ACTUAL WATER QUALITY AT HARDROCK MINES: THE RELIABILITY OF PREDICTIONS IN ENVIRONMENTAL IMPACT STATEMENTS (2006), https://earthworks.org/cms/assets/uploads/2018/12/49-Kuipers-and-Maest-2006.pdf; LINDSEY NEWLAND BOWKER & DAVID M. CHAMBERS, EARTH WORKS, THE RISK, PUBLIC LIABILITY, AND ECONOMICS OF TAILINGS STORAGE FACILITY FAILURES (2015), https://earthworks.org/cms/assets/uploads/archive/files/pubs-others/BowkerChambers-RiskPublicLiability_EconomicsOfTailingsStorageFacility%20Failures-23Jul15.pdf.

water treatment and clean-up, and the state faces another $2 million a year in perpetuity for ongoing water treatment.[29] Similarly, the Summitville Mine in Colorado has polluted the Alamosa River and harmed agricultural lands, and cost $250 million in state and federal expenditures to date, with the State of Colorado on the hook for $2 million a year in perpetuity for water treatment costs.[30] For these reasons, states have a vital interest in ensuring, through 401 certification, that water quality is fully protected in any Section 404 permit or other federal mining authorization for mining projects. It is essential in these circumstances that the state's authority is not confined to the direct discharge of fill material but encompasses the entire activity associated with the mine.

Hydroelectric dams also are another example of non-fossil fuel projects where states must retain ample authority and flexibility to ensure that federal projects are adequately protective of state water ways. Hydroelectric dams can involve the divergence of major waterways that profoundly alter entire river systems. The Conowingo Dam Project in Maryland, for example, historically trapped 50–67% of the annual sediment load—or 1.5 to 2 million tons—in the Lower Susquehanna River.[31] If not for the Conowingo Dam, this load, along with the nitrogen and phosphorous trapped in the sediment, would have been delivered to the Lower Susquehanna River and Chesapeake Bay at normal rates. Instead, the Dam causes these pollutants to be delivered in surges that have higher impacts on the receiving waterways. The Dam and its reservoir have produced an enormous artificial repository of sediment and associated nutrients that can be scoured by high flow events, re-mobilized, and delivered downstream by large storm-induced flows.[32] These scoured loads add additional pollutant loads at times when the downstream receiving waters are already vulnerable, receiving their heaviest loads of suspended pollution from the Susquehanna River Watershed.[33]

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[29] EARTHWORKS, TRACK RECORD: MONTANA MODERN HARDROCK MINING, WATER QUALITY IMPACTS AND RECLAMATION BONDING (2018), https://earthworks.org/cms/assets/uploads/2018/09/Montana-Predictions-Report.pdf.

[30] Bruce Finley, *One of Colorado's worst Superfund sites has been fixed, but the state's on the hook for $2M a year to keep it clean*, THE DENVER POST (July 10, 2018), https://www.denverpost.com/2018/07/10/colorado-summitville-mine-cleanup/.

[31] *See* URS CORP. & GOMEZ AND SULLIVAN ENGINEERS, FINAL STUDY REPORT: SEDIMENT INTRODUCTION AND TRANSPORT STUDY RSP 3.15 11, 14–15 (2012), http://mde.maryland.gov/programs/Water/WetlandsandWaterways/Documents/ExelonMD/FERC/Conowingo-FRSP-3.15.pdf (hereinafter FSR 3.15); *id*. at 58 tbl.3.2-1 (citing MICHAEL J. LANGLAND, U.S. GEOLOGICAL SURVEY, BATHYMETRY AND SEDIMENT-STORAGE CAPACITY CHANGE IN THREE RESERVOIRS ON THE LOWER SUSQUEHANNA RIVER, 1996-2008 (2009) (hereinafter LANGLAND (2009)) (sediment accumulation rate for 1996-2008 was 1.5 million tons/year; for 1959-2008 average rate was 2 million tons/year)); *see also* FSR 3.15 app. F at 5 (Exelon's bathymetric survey of Conowingo Pond, estimating 1.45-1.69 million tons deposited annually based on 2008–2011 average).

[32] *See* FSR 3.15 at i, 10–11; MICHAEL J. LANGLAND & ROBERT A. HAINLY, U.S. GEOLOGICAL SURVEY, CHANGES IN BOTTOM-SURFACE ELEVATIONS IN THREE RESERVOIRS ON THE LOWER SUSQUEHANNA RIVER, PENNSYLVANIA AND MARYLAND, FOLLOWING THE JANUARY 1996 FLOOD—IMPLICATIONS FOR NUTRIENT AND SEDIMENT LOADS TO CHESAPEAKE BAY (1997); LANGLAND (2009); ROBERT M. HIRSCH, U.S. GEOLOGICAL SURVEY, FLUX OF NITROGEN, PHOSPHORUS, AND SUSPENDED SEDIMENT FROM THE SUSQUEHANNA RIVER BASIN TO THE CHESAPEAKE BAY DURING TROPICAL STORM LEE, SEPTEMBER 2011, AS AN INDICATOR OF THE EFFECTS ON RESERVOIR SEDIMENTATION ON WATER QUALITY (2012).

[33] MD. DEP'T OF NAT. RES., THE LOWER SUSQUEHANNA RIVER WATERSHED ASSESSMENT FINAL REPORT 78 (2016), http://dnr.maryland.gov/waters/bay/Pages/LSRWA/Final-Report.aspx (noting that proportion of scoured sediment loads increases with higher flows); *see also id*. 77 (Table 4-7 illustrating Scour and Load Predictions for Various Flows in Conowingo Reservoir).

Under Section 401, the State of Maryland and other authorizing agencies with hydroelectric dams located in or proposed for their jurisdictions have the critical authority to review the impacts of these dams on their waterways. To be meaningful, that review must include analysis of the dams' impacts to waterway flow, sediment loading, habitats, and aquatic species, among a long list of items. To ensure that proposed dams will comply with the Clean Water Act, as required by Section 401, authorizing agencies also must have the ability to deny certifications that do not meet this threshold or include conditions in the certifications, including ones designed to ensure adequate flow, appropriate temperature, and needed sediment load of waterways.

Here, EPA is proposing to drastically restrict states' and tribes' Section 401 authority in order to facilitate development of fossil fuel infrastructure, but EPA has not shown that current interpretations of Section 401 actually cause unjustifiable roadblocks to fossil fuel infrastructure, EPA has not shown that the proposed revisions would in fact expedite or increase approvals of fossil fuel infrastructure, and EPA appears to have given no consideration as to how the proposed rule's changes will impact non-fossil fuel infrastructure projects, despite the fact that these constitute many if not most of the instances in which Section 401 is used. The proposed rule is an irrational response to an imagined problem, and should be abandoned.

II. THE PROPOSED RULE UNLAWFULLY CURTAILS STATE AND TRIBAL AUTHORITY.

Under the guise of its interpretive authority, EPA seeks to contravene Congress's decision to give states and tribes broad and primary authority in the Clean Water Act by unlawfully and severely restricting how states and tribes exercise their power under Section 401. The Proposed Rule would improperly limit the scope of Section 401 by prohibiting states from considering the overall impact of federally-permitted projects on water quality, including non-point-source impacts, even though EPA does not dispute that these impacts can cause violations of water quality requirements. EPA also would impose a heightened burden of proof on states and tribes seeking to deny certifications and provide federal permitting agencies with novel authority to overrule state decision-making. The Proposed Rule further attempts to limit the water quality requirements and waterways that may be considered as part of the Section 401 review. Each of these changes is contrary to the statutory text, Congressional intent, settled judicial interpretation, and decades of practice.

A. EPA's Proposed Limitation on the "Scope" of 401 Is Unlawful.

The Supreme Court explained the basic structure of Section 401 in *PUD No. 1 of Jefferson County*, 511 U.S. at 707–13. Section 401(a)(1) provides a 'trigger': 401 comes into play when an applicant seeks a "a federal license or permit to conduct any activity 'which *may* result in any *discharge* into the navigable waters.'" *Id.* at 707 (quoting 33 U.S.C. § 1341(a)(1)) (emphases added). Once this trigger is met, Section 401(d) provides the state or tribe with authority to assure that the "*applicant*" will comply with any applicable water quality requirements by imposing "limitations," *id.* at 708 (quoting 33 U.S.C. § 1341(d)) (emphasis added); alternatively, the state may deny certification request outright.

The proposed rule seeks to interpret subsections 401(a)(1) and 401(d) as encompassing the exact same "scope;" specifically, assuring that discharges from point sources into navigable waters caused by federal permitted activity comply with water quality requirements.[34] The statutory text cannot be interpreted in this way. First, EPA steps far outside the scope of its authority by attempting to overrule the Supreme Court's interpretation of Section 401 and prohibit states and tribes from regulating the full extent of applicant conduct that Congress intended. Second, EPA adopts an overly narrow reading of the text of Section 401 by trying to limit the scope of Section 401 to cover only point sources. Neither attempt by EPA to narrow the applicability and scope of Section 401 is compatible with the text or purpose of the Clean Water Act.

1. Section 401(d) Explicitly Permits States to Impose Limitations on the "Applicant," and Not Merely on "Discharges."

In *PUD No. 1*, the Supreme Court explained that under Section 401(d), limitations imposed on the applicant as conditions of certification need not specifically pertain to the discharge that triggered Section 401. 511 U.S. at 711–13. The Court applied this principle to uphold limits requiring that a dam be operated to maintain minimum instream flows, even though a minimum instream flow requirement was not a limit on the specific discharges that triggered section 401(a)(1)'s application in that case (there, discharges of dredge and fill material or discharge of water from the dam tailrace). *Id.* at 711, 723. The Court held that this conclusion was required by the plain language of the statute. *Id.* at 711. EPA does not have authority to adopt a contrary interpretation.

As the Court explained, "the language of [401(d)] contradicts [the] claim that the State may only impose water quality limitations specifically tied to a 'discharge.'" *Id.* "The text refers to the compliance of the applicant, not the discharge." *Id.* Thus, the statutory text provides no reason to narrow state authority to imposing limits on applicants' discharges, rather than applicants' activity as a whole. *Id.* at 712. On the other hand, interpreting 401(d) to only provide states with authority to impose limits on discharges fails to give effect to Congress's decision to use "discharge" in 401(a)(1) but "applicant" in 401(d).

Although *PUD No. 1* did not walk through the *Chevron* two step framework, the case was plainly a *Chevron* step 1 decision, resting on the conclusion that the statutory text was unambiguous. The fact that the Court went on to explain that its interpretation was *also* consistent with EPA's existing regulations, which the Court stated were "a reasonable interpretation … entitled to deference," *id.* at 712, does not diminish the Court's antecedent determination that the language of the statute precluded the interpretation EPA now proposes here. Nor does the Court's statement that its interpretation is the "*most* reasonabl[e]," *id.* (emphasis added), indicate a determination that the language was sufficiently ambiguous as to permit *other* reasonable interpretations; to the contrary, the Court determined that the text specifically foreclosed other interpretations. EPA's contention that *PUD No. 1* "did not analyze section 401 under *Chevron* Step 1 or rely on unambiguous terms in the CWA"[35] is squarely

[34] 84 Fed. Reg. at 44,120.
[35] *Id.* at 44,097.

refuted by the Court's statement that the statutory text "contradicts" the interpretation EPA proposes here.

EPA's assertion of *Chevron* Step 2 interpretive authority is further undermined by EPA's failure to offer a coherent explanation as to which statutory terms EPA believes to be ambiguous, or of how EPA's interpretation of specific statutory terms gives rise to EPA's proposed rule. EPA bizarrely states that its rejection of *PUD No. 1* rests on EPA's proposal "to interpret the use of the term 'applicant' in section 401(d) … as identifying the person or entity responsible for obtaining and complying with the certification."[36] Neither *PUD No. 1* nor any other authority has ever suggested a contrary interpretation of "applicant;" to the contrary, this term is plain and unambiguous. Reaffirming the existing understanding of which *actor* is subject to limits under 401(d) offers no guidance as to which *actions* may be limited. EPA offers no explanation of how its interpretation of "applicant" entails the conclusion that 401(d) only allows imposition of conditions on that applicant's discharges. Nor has EPA explained how its end result—interpreting 401(a)(1) and 401(d) to have coextensive scope—gives effect to Congress's decision to use "discharge" in the former and "applicant" in the later, or how an interpretation that fails to do so is reasonable.

EPA separately solicits comments on the "alternate interpretation" of 401(d) based on EPA's interpretation of "other appropriate requirement of state law."[37] Even if EPA interprets this provision to mean only those "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,"[38] states would still have authority to impose broader, non-discharge-based limits necessary to protect section 303 water quality standards by virtue of 401(d)'s reference to section 301 and section 301(b)(1)(C)'s reference to 303. *PUD No. 1 of Jefferson* Cty., 511 at 713. This authority, independent of the catch-all authority to enforce "other appropriate requirements of state law," permits states to impose conditions on an applicant's non-discharge activities, such as the in-stream flow conditions upheld in *PUD No. 1*. Thus, any EPA authority to interpret "other appropriate requirement of state law" does not support the proposed rule's overall limitation of the scope of section 401(d).

For these reasons, EPA is incorrect in asserting that *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), provides EPA with authority to reject *PUD No. 1*'s interpretation of 401(d). Even if *Brand X* remains good law and can be applied in cases where the Supreme Court, rather than a lower court, has previously interpreted a statute, this case does not meet *Brand X*'s criteria. *PUD No. 1* did not choose among competing reasonable interpretations of an ambiguous provision: *PUD No. 1* was, implicitly but clearly, a *Chevron* step 1 case. And EPA has not explained how its proposed rule is a reasonable interpretation of ambiguous statutory terms.

Independent of any coherent argument about specific statutory text, EPA argues *PUD No. 1*'s conclusion that 401(d) "authorize[s] certification conditions that are unrelated to the discharge … expand[s] section 401 beyond the scope of *federal* regulatory authority integrated

[36] *Id.* at 44,096.
[37] *Id.* at 44,097.
[38] *Id.* at 44,095.

throughout the core regulatory provisions of the modern CWA—the ability to regulate discharges to waters of the United States."[39] Just as *PUD No. 1* observed that it was "peculiar" to argue that statutory language that "gives the States authority to allocate water rights … prevents the State from regulating stream flow," 511 U.S. at 720, it is perverse to allude to principles of federal restraint as a justification for limiting *state* authority under section 401(d).

Finally, EPA's proposed narrow interpretation of 401(d) would have serious environmental consequences, which EPA has not acknowledged or justified. There is no dispute that activities for which a certificate is required under 401 often have serious water quality impacts not directly related to point source discharges, including, but not limited to:

- Impacts arising from reduced stream flows,
- Thermal loading arising from removal of streamside vegetation,
- Increases in sediment loads,
- Destabilized stream banks,
- Altered groundwater regimes,
- Designation of existing waters of the U.S. as "waste treatment systems,"
- Acid mine drainage and metals leaching, and
- Water treatment in perpetuity.

EPA does not dispute that each of these types of impacts can cause violation of water quality requirements. If states are prohibited from imposing conditions that will limit these impacts, then Section 401 risks failing to fulfill its essential purpose of "assur[ing] that Federal licensing or permitting agencies cannot override State water quality requirements." *Sierra Club*, 909 F.3d at 647–48 (citation omitted) (original emphasis omitted).

2. Section 401 Is Not Limited to Point Source Discharges.

The Proposed Rule also seeks to limit the applicability of Section 401 by interpreting the term "discharge" throughout the section to mean only discharges from point sources.[40] The Supreme Court, however, concluded that the plain meaning of "discharge" is a "flowing or issuing out." *S.D. Warren*, 547 U.S. at 377, 384 n. 8. Thus, "discharge" is not ambiguous and is not in need of EPA's interpretation.

Moreover, the Supreme Court in *S.D. Warren* did not limit Section 401 to point sources. And although the Ninth Circuit concluded that Section 401 is not triggered by a discharge from a non-point source, *Oregon Natural Desert Association v. U.S. Forest Service*, 550 F.3d 778 (9th Cir. 2008),[41] at least one other circuit has reaffirmed that the meaning of "discharge" in the provision is simply a "flowing or issuing out" that applied to a non-point source. *See AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 731 (4th Cir. 2009) (finding that a discharge would result from increases in the flow of water from dredging to deepen a channel).

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[39] *Id.* at 44,096 (emphasis added).
[40] *Id.* at 44,104.
[41] Even the Ninth Circuit has held that "a state is free to impose" limitations on a federal license that are unrelated to the regulation of point source discharges once section 401 is triggered. *Oregon Nat. Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998).

The Court's broader definition of "discharge" also is more in keeping with the structure of the Clean Water Act. Elsewhere in the statute, Congress separately defined "discharge" and "discharge of a pollutant," 33 U.S.C. § 1362. The statute defines "discharge" broadly and without reference to point sources. "Discharge of a pollutant" is defined as "an addition of any pollutant to the navigable waters from point source." *See id.* Congress' choice to exclude the term "point source" from the definition of "discharge" was not an accident. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. U.S.*, 464 U.S. 16, 23 (1983)) ("when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'"). Similarly, Section 401 itself contains the term "discharge" eight times. If Congress intended to limit the scope of discharges covered by the provision, it had many opportunities to do so. Instead, the legislature chose to leave the term unqualified throughout and include the modifier "any" in (a)(1). EPA is not at liberty to add in language to Section 401 that Congress opted not to include. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("a legislature says in a statute what it means and means in a statute what it says there"); *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000) (quoting *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995)) ("[w]here Congress knows how to say something but chooses not to, its silence is controlling").

Furthermore, EPA's justification for making its proposed changes falls flat. EPA claims that these changes are warranted by Congress 1972 amendment of the Water Quality Management Act of 1970 into the modern-Clean Water Act.[42] But Congress in fact made few changes to Section 401, *except* to add in cross-references to provisions relating to the management of both point and nonpoint sources. *See* 33 U.S.C. § 1341(a)(1) ("Any applicant... shall provide... a certification from the State in which the discharge... will originate... that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title"); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1140–41 (9th Cir. 2002) ("the [Clean Water Act] is best read to include in the § 303(d)(1) listing and TMDLs requirements waters impaired only by nonpoint sources of pollution").

Congress envisioned that the goals of the Clean Water Act would "be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7). According to the EPA's own website, "States report that nonpoint source pollution is the leading remaining cause of water quality problems... we know that these pollutants have harmful effects on drinking water supplies, recreation, fisheries and wildlife."[43] Section 401 is meant to provide

[42] *See* 84 Fed. Reg. at 44,088.

[43] BASIC INFORMATION ABOUT NONPOINT SOURCE (NPS) POLLUTION, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (last visited Oct. 18, 2019).

state and tribes with broad authority to prevent degradation of their waterways,[44] which is not consistent with limiting that authority to discharges from only point sources.

B. Proposed Section 121.5(e) Sets a Burden of Proof for Denials that Is Contrary to the Statute.

The statute makes state certification contingent on an affirmative showing of compliance with water quality requirements: section 401 requires "certification from the State in which the discharge originates … that any such discharge *will comply* with the applicable provisions … of this title." 33 U.S.C. § 1341(a)(1) (emphasis added). As EPA recognizes in the preamble, this language if anything requires *more* than a "reasonable assurance" that the project will comply with applicable requirements.[45] Proposed section 121.5(b) appropriately reflects the statutory allocation of the burden of proof: a state may certify if it can conclude that the project will comply, but if the state cannot make this affirmative conclusion, the state cannot issue a certification, and instead must deny or waive.[46] *See also Sierra Club*, 898 F.3d 383, at 388 (4th Cir. 2018).

Unfortunately, proposed section 121.5(e) appears to reverse the burden of proof provided in the statute by requiring that a state identify the requirements with which the project "will not comply," and provide a justification for why the state believes compliance is unachievable. The Proposed Rule therefore would prevent a state from denying a certification unless it could definitively conclude that a project *will* violate applicable requirements. Such a requirement would violate the precautionary spirit of the statute and the explicit text of section 401(a)(1), which places the burden on the other side. Accordingly, EPA must revise proposed 121.5(e)(1)-(2) to require a state to identify "the specific water quality requirements that the state cannot confirm the proposed project will comply with" and "a statement explaining why the state cannot confirm that the proposed project will comply with those identified water quality requirements."

One reason why this change is essential is because, in many cases in which a state is unable to certify, the problem is that the applicant has failed to provide complete information about the project or proposed mitigation. The evidence before the state may be insufficient to definitively establish that the project will or will not comply with applicable water quality requirements. For example, information provided by the applicant may demonstrate that discharges, if not mitigated, would violate applicable requirements, but that the applicant is in the process of developing a mitigation plan (potentially in consultation with federal permitting authorities). In this situation, certification would be inappropriate, because the state has no

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[44] According to the agency's somewhat counterintuitive reasoning, a reading of "discharge" that includes nonpoint sources would allow the federal government to impinge upon "land and water resources more appropriately subject to traditional state land use planning authority." Updating Regulations on Water Quality Certification, 84 Fed. Reg. at 44,099. In line with this reasoning, the agency asserts that "section 401 certification conditions… are enforced by federal agencies." *Id*. But precisely the opposite is true. By granting licenses to nonpoint source polluters over the objection of a state agency, the federal government makes the exercise of a state's traditional regulatory authority more difficult. "States…enforce water quality standards through their certification authority under Section 401." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 530 (2d Cir. 2017); Donahue, *supra* note 2 at 204 (describing section 401 as a "fount of state authority").

[45] 84 Fed. Reg. at 44,104.

[46] *See id.* at 44,120.

adequate basis for determining that unspecified mitigation will be effective. Section 401(a)(1) therefore provides the state with authority to deny. Insofar as the proposed rule revokes that authority, because the state also lacks timely information necessary to affirmatively conclude that mitigation will be insufficient or ineffective, the proposed rule is unlawful.

Proposed 121.5(e) also fails to recognize the uncertainty often inherent in the types of large projects which require certification under section 401. Even when complete information is available, many of these projects contain an element of risk. For example, FERC and the Corps have recognized that, for pipelines that are drilled underneath waterways, measures can be taken to reduce the risk of a "frac-out" in which drilling fluid and sediment is released into the waterway, but that this risk cannot be fully eliminated.[47] The same is true for the risk of tailings dam failures and other unintended consequences of mining.[48] Section 401 provides states with authority to determine that the residual risk presented by a particular project precludes certification and therefore warrants denial, even though the state cannot conclusively determine that a frac out or other such incident that would violate water quality standards will occur. It is appropriate to require a state to explain what risks it is concerned with, and how the potential incidents, if they were to occur, would violate water requirements. But states must be permitted to issue a denial when they conclude that the risk of a violation to be unacceptable, and not only when a violation is certain to occur.

Denial must not be limited to circumstances in which "the information provided to the agency demonstrates that the discharge will not comply with the Act."[49] Section 401(a)(1) puts the burden of proof on the applicant, and permits certifying authorities to deny when the information is insufficient to demonstrate compliance, or when a violation is not certain to occur but unacceptably likely. Proposed section 121.5(e) must be revised accordingly.

C. The Clean Water Act Does Not Permit Federal Agencies to Review the Substance of State or Tribal Denials or Conditioned Certifications.

EPA proposes to grant federal permitting agencies an entirely novel authority to "review and make appropriate determinations about the adequacy of certain aspects of a 401 certification."[50] Proposed section 121.6(c)(2) purports to authorize federal permitting agencies to determine that a state denial was based on inappropriate factors or was inadequately supported, and to treat a state's explicit denial as a waiver. Proposed section 121.8(a)(2) asserts a similar authority with respect to conditions imposed under 401(d), authorizing the federal permitting agency to, ultimately, treat a conditional certification as an unconditional one. These proposals are unlawful, and must be abandoned.

Neither of these provisions has *any* support in statutory text. Clean Water Action section 401(a)(1) simply provides that where a state denies a certification request, "no license or permit shall be granted." Similarly, section 401(d) provides that any conditions a state includes in its

[47] FERC, ROVER PIPELINE, PANHANDLE BACKHAUL, AND TRUNKLINE BACKHAUL PROJECTS: FINAL ENVIRONMENTAL IMPACT STATEMENT 4-90, 4-91 (2016), https://www.ferc.gov/industries/gas/enviro/eis/2016/07-29-16-rover-pipeline/impact-statement.pdf.
[48] *See supra* notes 28, 29.
[49] 84 Fed. Reg. at 44,111.
[50] *Id.*

certification decision "shall become a condition on any Federal license or permit subject to the provisions of this section." Both sections give the state the last word; neither provides for any additional review or process. EPA nonetheless asserts that allowing federal permitting agencies to determine whether state denials or conditions are adequately supported "is a reasonable interpretation of the CWA."[51] But EPA does not and cannot identify any specific statutory text that is being interpreted or effectuated by these proposed regulations. Allowing a federal agency to issue a permit where a state has denied certification, or to overrule a condition a state imposed, flatly violates the statute.

Moreover, available evidence indicates that Congress deliberately denied federal permitting agencies such authority. To effectuate its goal of "assur[ing] that federal licensing or permitting agencies cannot override State water quality requirements,"[52] Congress could have directed federal permitting agencies to themselves determine that proposed projects would be consistent with state requirements. Congress's decision to instead assign this responsibility to the state is a deliberate choice, reflecting Congress's determination that the *state* is the entity with the appropriate capabilities and incentivizes to make this determination. And where Congress intended for federal agencies to review state determinations, it explicitly provided for such review, as illustrated by numerous other provisions of the Clean Water Act. *See, e.g.,* 33 U.S.C. §§ 1313(c)(2)(A), (c)(3), (d)(2), 1316(c), 1342(b). Congress did not do so in Section 401.

Unsurprisingly, then, *every* Circuit Court to consider the issue has held that federal permitting agencies lack authority to review the substance of state 401 determinations. *See, e.g., Sierra Club*, 909 F.3d at 646 (collecting cases).[53] EPA's feeble attempt at distinguishing this circuit authority falls flat. In *Sierra Club*, the Fourth Circuit rejected exactly what EPA proposes here: a federal agency's attempt to replace the state's condition with a different one. *See id.* The fact EPA is attempting to wrap the federal agency veto of a state condition in the requirement that the state demonstrate that a "less stringent condition could [not] satisfy applicable water quality requirements,"[54] does not give the federal agency authority where it has none. And the reference to "valid" conditions in *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) does not provide support to EPA's position. There, FERC explicitly disclaimed authority to decide whether conditions imposed by certification were valid or not and took the position that it "could not" prevent those conditions from being imposed. *Id.*

Although several courts have held that federal permitting agencies can evaluate state compliance with section 401's *procedural* requirements, these cases have distinguished this authority from authority to evaluate substance.[55] Even as to procedural requirements, federal agency's ability to evaluate state compliance is limited. In *City of Tacoma, Washington v. FERC*, the DC Circuit held that "FERC has a role to play in verifying compliance with state

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[51] *Id.*
[52] 2 Leg. Hist. 1487 (1973); *accord* S. Rep. 92-414, at 3735 (1971).
[53] *See also Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1218 (9th Cir. 2008); *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056–57 (1st Cir.1982).
[54] 84 Fed. Reg. at 44,120.
[55] *Keating*, 927 F.2d at 622–23; *Lake Erie All. for Prot. of Coastal Corridor v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981) ("state certification under the Clean Water Act is set up as the exclusive prerogative of the state and is not to be reviewed by any agency of the federal government")

public notice procedures at least to the extent of obtaining an assertion of compliance from the relevant state agency." 460 F.3d 53, 68 (D.C. Cir. 2006). EPA, in citing *City of Tacoma*, quotes the court's initial statement that FERC was *not required* to "second guess" such an assertion of compliance,[56] but EPA omits the court's further caution that FERC *should not* do so, because FERC should not "resolve disputes relating to whether the state's public notice procedures have been satisfied, [which] would require FERC to construe state law." 460 F.3d at 68. And *City of Tacoma*, like every other case to have addressed the issue, held that the federal permitting agency had no authority whatsoever to evaluate the substance of state 401 decisions. *Id.* at 67. As the Second Circuit explained in *American Rivers v. FERC*, "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." 129 F.3d 99, 110–11 (2d Cir. 1997).

Courts have also cautioned that while federal permitting agencies have some authority to evaluate compliance with 401's explicit procedural requirements, they have no authority to impose additional requirements. For example, FERC was not permitted to impose the additional legal requirement of claim preclusion on North Carolina and require that the state raise the need to obtain a Section 401 certification during previous permitting proceedings before the Army Corps or be barred from raising it subsequently. *See N.C. v. FERC*, 112 F.3d 1175, 1185 (D.C. Cir. 1997) ("We see no room for [this additional requirement] in such a precisely worded provision").

Finally, EPA provides no policy argument for providing federal permitting agencies with this authority. There already is a remedy for state decisions that inappropriately deny or condition Section 401 certifications: judicial review. Courts can and do review state or tribe Section 401 determinations.[57] EPA offers no argument or evidence demonstrating judicial review is inadequate.[58]

For these reasons, EPA's attempt to provide federal permitting agencies with the

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[56] 84 Fed. Reg. at 44,111 (quoting *City of Tacoma*, 460 F.3d at 68).

[57] *See* S. Rep. No. 92-414 (1971) ("Should [] an affirmative denial [of certification] occur no license or permit could be issued by [] federal agencies . . . unless the State action was overturned in the appropriate courts of jurisdiction."). On such judicial review, courts often uphold state determinations, reflecting both states' generally careful and appropriate exercise of 401 authority and the deferential standard of review. However, courts do not grant states a blank check, and will reverse in cases where state decisions are not "valid," to use EPA's terminology here. *See, e.g.*, *Nat'l Fuel Gas Supply Corp.*, 761 F. App'x 68; *Islander East Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79 (2d Cir. 2006) (remanding denial of Section 401 application back to the state to conduct further review of the project); *see also AES Sparrows Point LNG*, 589 F.3d at 733–34 (Indicating that a state agency denying certification should first examine "the relevant data pertaining to the effect on water quality… and articulate[] a satisfactory explanation for its denial on that basis").

[58] EPA's proposal also suffers in comparison to the current and appropriate process of having judicial review of state conditions, because the Proposed Rule does not contemplate any kind of standard governing federal agency review or any recourse for states that would have their denial or conditions struck down by a federal agency. With judicial review, states have a forum in which to dispute the challenge to the condition or denial and clear standards in place governing that review. If the challenge is successful, states and tribes also have an opportunity to revise their decision on remand. EPA has not provided any such mechanisms, which will create unlawful and arbitrary outcomes, such as having approvals go through without conditions a state might deem critical to the overall approval or forcing through the approval of a project over the state's objection with no conditions imposed whatsoever.

authority to review the substance of state 401 decisions is unlawful and must be abandoned.

D. EPA Cannot Limit the Purpose of Section 401 to Compliance with Only EPA-Approved Water Quality Requirements.

EPA proposes to limit the scope of Section 401 certification "to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements" and to define "water quality requirements" as applicable provisions governing effluent limitations, water quality related effluent limitations, water quality standards, national performance standards, and the toxic and pretreatment effluent standards, as well as "EPA-approved state or tribal Clean Water Act regulatory program provisions."[59] But, as is discussed above, limiting the scope of state authority under Section 401 does not comport with Congress' intent to give the states and tribes broad authority under Section 401. The plain language of the text also does not support EPA's interpretation. If Congress had wanted to list enumerated sections, as it did in Section 1341(a)(1), in the remainder of Section 401, it could have done so. And the single piece of legislative history EPA cites in the Proposed Rule also provides no basis for the change—the agency cites only to a statement about the fact that states can adopt more stringent water quality requirements than the federal floor; the quote says nothing about whether those requirements need be approved by EPA or must be part of some enumerated list.[60]

Moreover, in attempting to limit the nature of the state's review, EPA again seems to be seeking to find a solution to a problem that does not exist. In the preamble, EPA asserts that "certifying authorities have included conditions not related directly to water quality in section 401 certifications, including requiring construction of biking and hiking trails, requiring one-time and recurring payments to state agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and creating public access for fishing along waters of the United States."[61] But it does not provide any identifying details of these examples or provide any context that would explain why these examples—if they exist—are problems, either because of their frequency or lack of connection to a state or tribe's authority under Section 401. With more information any of these examples could have a much more direct connection to water quality than EPA's characterization would suggest. The wholesale overhaul EPA proposed simply is not supported by the agency's opaque explanation.

III. EPA IS IMPERMISSIBLY RESTRICTING THE TIME FOR MAKING DECISIONS UNDER SECTION 401 AND IRRATIONALLY LIMITING THE INFORMATION APPLICANTS MUST SUBMIT.

EPA proposes several changes to its previous interpretation of the deadline for making decisions under Section 401, which have the potential to create impossible timelines for the states or tribes to act. Section 401 plainly provides the state or tribe with "a reasonable period of time (which shall not exceed one year) after receipt of such request" to act on an application under Section 401. 33 U.S.C. § 1341(a)(1). The projects covered by Section 401 can be extremely complicated—they can cover hundreds of miles or thousands of acres, cross or destroy

[59] *See* 84 Fed. Reg. 44,104.
[60] *See id.* (quoting S. Rep. No. 92-414, at 69 (1971)).
[61] *Id.* at 44,094.

high numbers of waterways and wetlands, and involve a wide range of potential impacts to water quality.[62] In addition, project applicants often do not provide all of the information needed to evaluate the potential impact to waterways at the outset, necessitating a back-and-forth, iterative process to ensure the state or tribe has all of the information necessary to evaluate potential impacts to waterways. While some of the suggestions in the Proposed Rule could be beneficial to the overall process, the overarching thrust of EPA's proposals are to subject the states and tribes to arbitrarily abbreviated timelines, in clear contradiction of Congress' intent to give the states and tribes the power to safeguard their waterways from damaging federal projects.[63] The Proposed Rule, therefore, will end up forcing states and tribes to prematurely deny many—if not most—applications under Section 401 in order to avoid waiving their Section 401 rights, an outcome which benefits no one.

A. The Clock Cannot Start Until Receipt of a Valid Request.

The Proposed Rule would have the time for making a decision under Section 401 begin upon the receipt of a "certification request."[64] Although some courts have upheld the interpretation that the Section 401 clock begins upon the receipt of any application, whether complete or not, *see N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018), EPA appears to recognize that Congress did not mean for the time under Section 401 to start running until the state or tribe received an application that met certain minimal standards, *see* 84 Fed. Reg. 44101, *see also AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009) (finding that "only a valid request for § 401(a)(1) water quality certification ...will trigger the one-year waiver period."). EPA, therefore, reasonably proposes that a "certification request" must contain, at a minimum, an enumerated list of documents.[65]

EPA's list of documents, however, falls far short of what should qualify as a "valid" certification request that reasonably and fairly starts the state or tribe's time under Section 401. Critical elements are missing that are needed to begin meaningful review of a project. One glaring example is that EPA's proposal requires only the "location and type of any discharge" and the "location of receiving water," but review of a project's potential impact to water quality cannot be based on location alone.[66] States and tribes need far more information about the waterway and potential impact, including: (1) the designation of the waterway, (2) the volume of the discharge, (3) how and to what extent the discharge might impair the waterway and its existing designation, and (4) whether and to what extent the project might result in more than one discharge in the same waterway that could have cumulative effects.

EPA should amend its proposed rule as follows:

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[62] *See, e.g.*, Jon Hurdle, *New York State denies permit to Constitution Pipeline, halting construction*, NPR (Apr. 22, 2016), https://stateimpact.npr.org/pennsylvania/2016/04/22/new-york-state-denies-permit-to-constitution-pipeline-halting-construction/ (describes pipeline construction over multiple states and about 250 streams).
[63] *City of Fredericksburg, Va. v. FERC*, 876 F.2d 1109, 1112 (4th Cir. 1989) (stating that state control over application requirements "comports with the Clean Water Act's deference to the states in the water quality certification process").
[64] 84 Fed. Reg. 44,101.
[65] *Id.*
[66] *Id.*

1) revise Item 4 to include, at a minimum, the following requirements:

   a) the designation of all waterways whose water quality could be affected by the project, including, but not limited to:

      i) whether the waterway is impaired, and, if so, what water quality standards the waterway does not meet, and
      ii) whether the waterway is of high or exceptional quality;

   b) a more specific description of the "type" of discharge at issue, including, but not limited to:

      i) the chemical composition of the discharge or discharges;
      ii) a description of any thermal or non-chemical discharges;
      iii) the source of the discharge, *e.g.*, a dam, construction equipment, construction activities, mining, etc.; and
      iv) the estimated volume of each discharge;

   c) identification of the number of discharges that will result into each waterway and watershed and an estimated date on which the applicant will provide the state with an analysis of the direct, indirect, and cumulative impacts of the project on the state's waterways; and

   d) identification of any other impacts to water quality that will result from the project.[67]

2) Revise Item 5 to require inclusion of an estimated date on which the applicant will provide the state or tribe with a complete mitigation plan, which includes site-specific information on how the project will be mitigated to comply with the Clean Water Act at each location.

3) Define "certification request" to include payment of any applicable fees to avoid having applicants attempt to start the one-year clock without complying with basic state or tribal application procedures.

4) Include a requirement that project proponents provide any existing documentation or reports showing prior contamination at the proposed project location(s) or a statement by the project proponent that no such contamination has occurred at the proposed project location(s).[68]

5) Include a process by which the state or tribe may inform the relevant federal agency that the applicant's initial submission fails to meet the minimum requirements to qualify as a "certification request" under EPA's revised version of the proposed rule.

6) Include a certification that the project proponent has given the relevant federal agency notice of the certification request on the same day as sending the certification request to the state or

[67] As is discussed in more detail in Section II.A.II, review under Section 401 is not limited to only discharges.
[68] Information about past contamination is critical, whether the application is for an initial license or permit or whether the permit or license is being amended or reissued

tribe, a statement on the method of transmission of the notice to the federal agency, and the name of the person at the relevant federal agency to whom it was sent.[69]

EPA also requested comment on whether it should generate a standard form for all projects.[70] As is clear from the above list, a single form is not sufficient to contain all the data and information a state or tribe needs in an application in order for it to be valid and reasonably viewed as a "certification request." *See also AES Sparrows*, 589 F.3d at 729. Similarly, as this information is the bare minimum that states and tribes need to evaluate projects under Section 401, other federal agencies should not be permitted to require less from the applicant, even if the request to the federal agency is made under a general permit or license.[71] Even in circumstances where a project might qualify for a general permit or license under another provision of federal law, the state's obligations under Section 401 to review the project and issue the certification only if the project complies with the Clean Water Act remain the same. *See* 33 U.S.C. § 1341.

B. Section 401 Provides a Reasonable Time, Not to Exceed a Year, Which Federal Agencies Cannot Arbitrarily Restrict.

Congress' imposition of a "reasonable time (not to exceed one year)" was to prevent "dalliance or unreasonable delay," *see, e.g., Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019), not to make the task of certifying projects impossible. As is discussed above, there is no evidence that states or tribes routinely are causing delay in processing Section 401 applications.[72] On the contrary, it is applicants' failure to provide required application materials that is the most common cause of delay.[73] In short, there is no basis for EPA's proposal to hamstring states and tribes and allow federal agencies to set arbitrarily short deadlines with no input from or recourse for states and tribes.

1. Federal Agencies Cannot Limit State & Tribal Authority by Prematurely Finding Waiver.

Although federal agencies have the authority to determine whether a waiver occurred and adopt regulations setting a "reasonable time" for decisions, *see Millennium Pipeline Co. v. Seggos*, 860 F. 3d 696, 700 (D.C. Cir. 2017), the Clean Water Act does not give the federal agencies unfettered discretion to set deadlines that prevent the state and tribes from exercising their substantive authority under Section 401, *see also City of Tacoma v. FERC*, 460 F. 3d 53, 67 (D.C. Cir. 2006) (noting that, on matters of substance, the federal agency's role is limited to waiting for the state or tribe's decision and deferring to it). Under the guise of its authority to interpret the Clean Water Act, EPA seeks to establish a scheme for increased federal agency—or at least increased EPA—involvement in determining what is a reasonable time to review particular projects or categories of projects.[74] EPA's proposal, however, is completely divorced from the realities states and tribes face when assessing projects under Section 401.

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[69] *See infra* Section III.A.2.
[70] 84 Fed. Reg. at 44,102.
[71] *See id.*
[72] Economic Analysis at 5.
[73] *Id.*
[74] *See* 84 Fed. Reg. 44,108–09.

The projects reviewed by states and tribes under Section 401 can vary widely and include applications under Section 404 for the dredging-and-filling in relatively small areas, massive hydro-dams under the Federal Power Act, interstate gas pipelines constructed under the Natural Gas Act and stretching for hundreds of miles, and mines destroying thousands of acres of wetlands and miles of streams. Because Section 401 projects can be of such different sizes and types and pose such different potential threats to water quality, EPA historically had minimal involvement in setting standard sets of deadlines under Section 401 for programs it did not administer. Rather, deadlines were set with an eye towards the permitting regime at issue and the time the state or tribe might require. Examples include providing a full year from the time the application is filed for hydro dams and interstate gas pipelines,[75] and an initial sixty days from the date of receipt of a complete application, which could then be extended by a regional official.[76] These timelines gave due deference to the state or tribe either to use the full allotted time to acquire and work through a complete application or get a complete application and have enough time to ask the federal agency to extend the deadline.

The Proposed Rule, however, would replace all such existing regulations and require that federal agencies must substitute their own judgment for that of the states and determine what time is reasonable for each project. Without the actual Section 401 application before it—let alone a complete set of materials—the federal agency would be required to assess the project's (1) complexity, (2) potential for discharge, and (3) potential need for additional study or evaluation of water quality effects from the discharge, and unilaterally determine how much time is reasonable.[77] The Proposed Rule makes no mention of consultation with the relevant state or tribe—the expert agency and entity in possession of the 401 application. The federal agency also would be unaware of other critical factors that bear heavily on how much time is reasonable for a particular project, including, but not limited to, the completeness of the application provided; the nature, importance, and sensitivity of the waterways affected by the project; and the mandatory state or tribe's applicable procedures for review.[78] Without a meaningful opportunity for state and tribal input, the potential for abuse in federal determinations of what is "reasonable" is rife. And the Proposed Rule does not contemplate any mechanism for the state or tribe to challenge the federal agency's determination of what is a "reasonable time" before that time period expires.[79]

The categorical approach EPA suggests fares no better and illustrates the agency's failure to understand the true nature of Section 401 projects. The potential impacts of a project to waterways often are entirely divorced from the factors EPA suggests could form the basis of a

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[75] 18 C.F.R. § 4.34(b)(5)(iii) (2015); *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61014 (2018).
[76] 40 C.F.R. § 124.3(c) (2000).
[77] 84 Fed. Reg. at 44,109.
[78] Although it would be a slight improvement if federal agencies considered state and tribal resources and capacity to review in setting how much time is reasonable, the Proposed Rule contains no mechanism for states and tribes to communicate these considerations to the relevant federal authority.
[79] The pre-filing process EPA proposes has the potential to address some of the problems with EPA's proposal, but as is discussed below, changes would need to be made to the pre-filing process described in the Proposed Rule before it would be sufficient. For example, EPA would need to compel applicants to participate in a more robust process than is contemplated in the Proposed Rule and the federal agency deciding the "reasonable time" would need to be required to consider the results of the pre-filing process as part of its consideration of what is "reasonable".

categorical approach, e.g., acreage of a project, the number of states crossed, or the amount of volume being transported in a pipeline project.[80] A dredge-and-fill project with small acreage can have a large impact if it will destroy a critical wetland or waterway,[81] a pipeline located in one or two states can still cross hundreds of sensitive waterways,[82] a small mine may trigger toxic discharges lasting forever,[83] and a project transporting any amount of certain substances can pose massive risks to water quality.[84]

Finally, EPA's suggested alternative that it retain the language that a reasonable time is "generally 6 months,"[85] does not create a sufficiently binding requirement on federal agencies to give states or tribes fair notice of the minimum time they will be provided. States and tribes still are shut out of the determination of what a "reasonable time" might be and EPA's vague guideline provides them with no useful tool to combat being given arbitrarily shorter periods of time than is needed to exercise their authority under Section 401.

2. A "Reasonable" Time to Act Must Be Extended up to a Year as Needed to Allow for Adequate Review.

The Proposed Rule also impermissibly puts a thumb on the scale against having federal agencies modify the initial "reasonable" time provided to states and tribes. EPA states that it "does not expect periods of time to be modified frequently" and that any such modifications would be "unique" circumstances.[86] Again, EPA displays a complete ignorance of the back-and-forth process between the applicant and state or tribe that routinely occurs under Section 401, especially for large and complicated projects. For example, in the first six months alone, the state had to ask the Constitution Pipeline Company three separate times for more information and, as was confirmed by the U.S. Court of Appeals for the Second Circuit, never received a sufficiently complete application to allow the state to certify the project under Section 401. *See Constitution Pipeline Co. v. NYSDEC*, 868 F.3d 87 (2d Cir. 2017). Although Constitution Pipeline may have been more intransigent than a typical applicant, it is standard practice for states and tribes to need more time to evaluate an application as they ask questions and receive more materials to hopefully fill in holes. Neither EPA nor other federal agencies have any

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[80] *See* 84 Fed. Rep. at 44,109.

[81] *See, e.g.*, Ken Ward Jr., *Raese companies agree to $1.8 million EPA fine*, CHARLESTON GAZETTE-MAIL (Jan. 10, 2017), https://www.wvgazettemail.com/news/legal_affairs/raese-companies-agree-to-million-epa-fine/article_82ee40de-0b79-5335-9fd3-12287e660e40.html (Golf course owner responsible for illegal dredge-and-fill operations "agreed to restore about 6,400 linear feet of stream at the golf course"); *see also* Kathryn Eastburn, *Gulf wetlands face population, development woes*, TEXARKANA GAZETTE (Feb. 5, 2019), http://www.texarkanagazette.com/news/texas/story/2019/feb/05/gulf-wetlands-face-population-development-woes/764177/ ("An estimated 98 percent of all commercial fish and shellfish depend upon wetlands in either their life cycle or as part of their food chain").

[82] Letter from John Ferguson, NYSDEC, to Lynda Schubring, Constitution (Apr. 22, 2016); *see also Constitution Pipeline Co. v. NYSDEC*, 868 F.3d 87 (2d Cir. 2017).

[83] *See supra* notes 28–30.

[84] *See, e.g.*, David Hasemyer, *Enbridge's Kalamazoo Spill Saga Ends in $177 Million Settlement*, INSIDE CLIMATE NEWS (Jul. 20, 2016), https://insideclimatenews.org/news/20072016/enbridge-saga-end-department-justice-fine-epa-kalamazoo-river-michigan-dilbit-spill (relatively limited tar sands spill "triggered a massive cleanup effort that… cost the company $1.2 billion and kept the river closed for nearly two years").

[85] 84 Fed. Reg. at 44,109.

[86] *Id.*

basis—statutory or otherwise—to prevent this process from unfolding within the one-year time frame provided under Section 401.

3. Federal Agencies Must Ensure Clear Communication with States and Tribes About Their "Reasonable" Time to Act.

EPA's proposal regarding communications between federal agencies and states or tribes on their "reasonable" time to act suffers from additional flaws.[87] The Proposed Rule places all the onus on the applicant to notify the federal agency and does not make it clear that the applicant must immediately notify the federal agency of its application.[88] As a result, the applicant could wait to notify the federal agency for an indeterminate period of time without the state or tribe ever knowing. And the Proposed Rule does not require that the time the applicant takes to transmit the notice to the federal agency or the 15 days the federal agency takes to set a "reasonable time" will not count towards that "reasonable time."[89] Thus, if a state or tribe is given only 60 days to decide from the date the application is filed, they might not even find out the deadline for deciding until a significant portion of that period has expired. Furthermore, there is no requirement that the federal agency explain itself to the state or tribe, making it even more difficult for the state or tribe to challenge the decision or potentially petition the federal agency for additional time in which to review the application.

4. The One-Year Clock May Be Restarted Under Certain Circumstances.

EPA is incorrect that there are no circumstances where the one-year clock can be reset. Neither Section 401 nor the decision in *Hoopa Valley Tribe* foreclose the possibility of having the applicant submit a new "request" to the state or tribe that would restart the statutory one-year period. The *Hoopa Valley Tribe* decision was limited only to the "single issue" of "whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year." 913 F.3d at 1103. The court concluded that the "[applicant's] water quality certification request ha[d] been complete and ready for review for more than a decade" and that no exception to Section 401's one-year deadline could be found in the face of "a coordinated withdrawal-and-resubmission scheme." *Id.* at 1105. The decision does not support EPA's blanket prohibition on requesting that the applicant "withdraw a certification request or to take any other action for the purpose of modifying or restarting the established reasonable period of time."[90]

Moreover, the *Hoopa Valley Tribe* court explicitly did not address the question of whether the withdrawal of an application followed by submission of a *new* application would restart the one-year clock or "how different a request must be to constitute a 'new request.'" *Id.* at 1104. Under EPA's formulation, the state might not be permitted to ask the applicant to submit a new or revised application, unless it first denies the previous application or version of

[87] *See id.*
[88] *Id.*
[89] *See id.*
[90] *See id.* at 44,108.

the application. Indeed, EPA's proposal would create the absurd result that no matter what changes occurred in the course of a project—even major modifications—a state could never allow an applicant to withdraw and start again. Rather than have an applicant file a new or revised application and have a new reasonable period of time to review it, the states and tribes will be forced to deal with changes to the project or supplemental information about the project by either issuing premature certifications that do not protect water quality or reflexively denying all requests until there is enough information to certify the project. This is not what Congress intended in crafting Section 401 and not what the court in *Hoopa Valley Tribe* decided.

In addition, EPA's proposal fails to create the clarity and certainty the agency seeks under Section 401. The phrase "take any other action for the purpose of modifying or restarting the established reasonable period of time" is vague and will undoubtedly cause additional confusion. For example, are states and tribes now no longer able to ask the applicant for additional information and then request that the federal agency extend the initial period of "reasonable time" the state or tribe was given to review the application? Such a result would drastically hamstring states and tribes' ability to exercise their authority under Section 401 and yet is not foreclosed by EPA's proposal.

5. EPA's Proposed Pre-Filing Process Requires Significant Improvement.

A pre-filing process could give applicants and states and tribes the opportunity to confer prior to the start of the one-year deadline under Section 401 and result in more efficient and expedient processing of applications. Earlier exchanges of information and earlier opportunities for the state or tribe to learn about the project, its potential impacts to water quality, and the information the state or tribe will need to evaluate the project's compliance with the Clean Water Act would allow applicants to know exactly what they need to submit to the state or tribe for quick processing of their certification request.

EPA is correct that initial discussions between the applicant and the agency exercising authority under Section 401 should occur "well before the submittal of a certification request" and that "early engagement and coordination, including participation in a pre-filing meeting or other pre-filing procedures, may also help increase the quality of application materials."[91] But the proposal EPA puts forward for its own pre-filing process requires only a "30-day prefiling meeting process" that is initiated by the applicant and that EPA must "promptly accommodate."[92] Initial meetings can be helpful, but they would be far from productive if project proponents do not provide minimal information about the project at the outset. The pre-filing process also should be required to culminate in development of a full list of materials that will be contained in the application once it is filed and a list of studies and additional analyses that would need to be completed after the application was submitted and their anticipated dates of completion.

A pre-filing process also could not be used to inform the duration of "reasonable" time for review under Section 401, unless it were sufficiently robust and both the applicant and state

[91] *Id.* at 44,113.
[92] *Id.*

or tribe were willing and able to meaningfully participate. Assuming that a meaningful pre-filing process was undertaken, the federal agency determining the "reasonable" time for review of the application should be required to consider the results of the pre-filing process, including the materials to be submitted after the application and their anticipated completion date, as well as whether the applicant failed to provide any materials in the application that it agreed to submit during pre-filing.

And states and tribes need to be given the flexibility to ask for additional information, even if they engage in a prefiling process. EPA's reference to FERC's pre-application process is instructive—even when an applicant engages in the pre-filing process, FERC nevertheless often has many follow-up requests that are informed and shaped by the information it ultimately reviews in the application.

C. Authorized Agencies Must Have Ample Opportunity to Request Additional Information from Applicants.

The Proposed Rule seeks to put limits on the timing and scope of the additional requests that can be made by EPA when it is acting as the certifying authority and also suggests that the same restrictions should be imposed on states and tribes.[93] It is entirely arbitrary for EPA to seek to limit the number, scope, and timing of additional information requests when such requests may be critical to the certifying agency's ability to approve a project. EPA's proposed rule ignores that, even with a robust pre-filing process, certifying agencies may identify gaps and missing information only after they receive initial application materials and as they are able to review information from the applicant. For example, FERC typically employs a pre-filing process for its projects, but nevertheless will issue dozens, if not more, additional information requests to applicants *after* the application is filed and until FERC staff obtains the information they consider necessary to evaluate the project.[94] In particular, it is irrational to assume that additional information requests will not be necessary given the extremely limited information that applicants would provide under EPA's proposed definition of "certification request." EPA's proposal should not be applied either to instances when it is acting as the certifying agency or when the state or tribe is exercising authority under Section 401.

IV. EPA CANNOT REVISE ITS 401 REGULATIONS WITHOUT COMPLETING ADDITIONAL ENVIRONMENTAL REVIEW AND ENVIRONMENTAL JUSTICE REVIEW AND CONSULTATION.

A. EPA Did Not Comply with the Endangered Species Act.

Section 7 of the Endangered Species Act ("ESA"), requires each federal agency to consult with U.S. Fish and Wildlife Service ("USFWS") and with National Marine Fisheries Service ("NMFS") as to any action authorized, funded, or carried out by the agency to ensure that such action is not likely to jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of a listed species critical habitat. 16 U.S.C. § 1536(a)(2). Further, for actions subject to consultation, the agency shall not

[93] 84 Fed. Reg. 44,114–15.
[94] *See, e.g.,* Supplemental Information Request submitted by FERC in Docket CP13-113.

make any irreversible or irretrievable commitment of resources with respect to the proposed agency action which has the effect of foreclosing measures necessary to ensure no jeopardy to listed species or destruction or adverse modification of critical habitat. *Id.* § 1536(d).

Here, EPA has failed to consult with the USFWS and NMFS regarding the Proposed Rule to ensure that the rule will not jeopardize endangered or threatened species nor destroy or adversely modify critical habitat. States and tribes currently impose conditions on Section 401 certifications that protect endangered species and their habitat from a variety of non-point-source impacts, such as preserving instream flows or reducing sediment pollution caused by upland activity. If states are no longer able to impose these conditions, endangered or threatened species and their habitats will likely suffer. More broadly, if the Proposed Rule's restrictive timing provisions lead to states and tribes waiving certifications, the result will be less scrutiny over and less imposition of conditions on even impacts of the point source discharges to navigable waters that EPA concedes are squarely within Section 401's scope.

These are just a handful of examples of the extensive and potentially seriously damaging results on federally listed species and their habitat from the proposed rule necessitating consultation under Section 7 of the ESA. EPA made no attempt to comply with the ESA, yet is committing resources to the finalization and implementation of its substantial revisions to Section 401. EPA is in violation of Section 7 of the ESA.

B. EPA Has Made No Showing of Compliance with Environmental Justice, Executive Orders 12,898 or 13,175.

By its own admission, EPA ignores and fails to apply the requirements of Executive Order 12,898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 11, 1994) ("EJ Executive Order").[95] EPA dismisses its environmental justice obligations based on the bare assertion that "The human health or environmental risks addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority populations, low income populations, and/or indigenous populations."[96] However, a bald assertion with no support does not relieve EPA of its requirement to comply with the EJ Executive Order. And finalizing the Proposed Rule without identifying and addressing its potentially serious environmental justice implications, as EPA proposes to do here, contravenes Executive Order 12,898 and the Agencies' policy, and thus is arbitrary and capricious.

Executive Order 12,898 makes "each Federal agency," including the EPA, responsible for "identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[97] Beyond that, EPA's own environmental justice plan "envision[s] an EPA that integrates environmental justice into everything" it does.[98] To

[95] *See* 84 Fed. Reg. at 44,1219.
[96] *Id.*
[97] 59 Fed. Reg. at 7629, § 1-101 (Feb. 16, 1994).
[98] EPA, *EJ 2020 Action Agenda, The U.S. EPA's Environmental Justice Strategic Plan for 2016-2020* at iii (Oct. 27, 2016).

accomplish this vision, EPA sets forth eight different priority areas, the first of which is "rulemaking."[99] Specifically, EPA aims to "[i]nstitutionalize environmental justice in rulemaking," including performance of "rigorous assessments of environmental justice analyses in rules," in order to "deepen environmental justice practice within EPA programs to improve the health and environment of overburdened communities."[100] Recognizing that "[r]ulemaking is an important function used by the EPA to protect human health and the environment for all communities," EPA devotes the second chapter of the plan to "Rulemaking," and through this chapter, aims to "ensure environmental justice is appropriately analyzed, considered, and addressed in EPA rules with potential environmental justice concerns, to the extent practicable and supported by relevant information and law."[101] Thus, EPA has regularly and purposefully focused on the need for environmental justice assessments of its rulemaking.

EPA has provided guidance to its rule-writers containing direction on how to incorporate environmental justice into the rulemaking process, noting that "it is critical that EPA rule-writers consider environmental justice (EJ) when developing a regulation."[102] The Guidance defines an "environmental justice concern" as including "the actual or potential lack of fair treatment or meaningful involvement of minority populations, low-income populations, tribes, and indigenous peoples in the development ... of environmental ... regulations."[103] This can arise not only when a regulation would "[c]reate new disproportionate impacts," but also when it would "exacerbat[e] existing disproportionate impacts."[104] The assessment can include qualitative or quantitative elements.[105] And the Guidance directs rule-writers to begin the assessment by "first understand[ing] what an action is accomplishing and why it is necessary."[106]

The complete absence of a meaningful environmental justice analysis demonstrates that EPA has fallen far short of the requirements of both the EJ Executive Order and EPA's own EJ Guidance. By dismissing the potential for the Proposed Rule to have any adverse impact on environmental justice communities, EPA failed to alert those communities of the Proposed Rule and missed a significant opportunity to gather additional relevant evidence from the communities that could be affected by the changes in the Proposed Rule. EPA has failed to "address" potential disproportionate effects at all as required by Executive Order 12,898, much less in a meaningful way that prevents unfair treatment of already overburdened communities.

EPA also has an obligation pursuant to Executive Order 13,175 to consult with tribes when formulating policies that have tribal implications, as is the case with this proposed rule.[107] EPA's policy requires meaningful communication and coordination between EPA and tribal

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[99] *Id.*
[100] *Id.*
[101] *Id.* at 13.
[102] EPA, *Guidance on Considering Environmental Justice During the Development of Regulatory Actions* at i (May 2015) (attached as Ex. J-2) ("EPA EJ Guidance").
[103] *Id.* at 9.
[104] *Id.* at 10.
[105] *Id.*
[106] *Id.* at 10.
[107] Executive Order 13,175, Consultation and Coordination With Indian Tribal Governments, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000) (requiring that "[e]ach agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications").

officials prior to EPA taking actions or implementing decisions that may affect tribes.[108] Tribal consultation that occurs after a federal decision effectively has been made or fails to consider tribal input is inadequate. Unfortunately, federal agencies often fail to follow their own consultation policies and either fail to fully consider or completely dismiss tribal concerns.[109] As discussed above, EPA has done no evaluation of whether the Proposed Rule will have disproportionately higher adverse effects on indigenous populations, due, in part, to the lack of enforceable water quality standards on many tribal lands.

Section 401 authority is a critical tool for tribal enforcement of water quality standards. Because state water quality standards generally do not apply to tribal waters, in the absence of tribal water quality standards, gaps in protection of water quality exist on many Indian reservations.[110] Although EPA has considered setting Federal baseline water quality standards for Indian country for decades,[111] those standards were never adopted. Accordingly, many tribal waters currently are without water quality standards. While more than 65 tribes have been granted TAS under Section 401, no tribes currently issue NPDES permits and therefore rely heavily on the ability to issue, deny, or condition 401 certifications to ensure adherence to tribal standards. EPA has done no analysis to determine how the Proposed Rule will impact tribal waters or exacerbate an already problematic issue for Indigenous populations.

Tribal representatives already have submitted comments to the docket in advance of the deadline expressing frustration with EPA's engagement with tribes on the Proposed Rule. For example, the Chief Executive of the Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians wrote to EPA to request "that EPA engage in government-to-government consultation with the Tribe to discuss the proposed changes" and that

> [t]he Tribe is also concerned that EPA has failed to schedule a listening session on the proposed changes in the Pacific Northwest instead only scheduling listening sessions in Chicago and Salt Lake City. Accordingly, the Tribe requests that EPA conduct a third tribal listening session in the Pacific Northwest to provide Tribes a greater opportunity to participate in the development of the new regulations.[112]

Similarly, Tribal Chairman Mark Macarro of the Pechanga Band of Luiseño Indians wrote to EPA to request "formal, meaningful government-to-government consultation," stating that "[t]he Tribal Council has serious concerns regarding both the proposed rule as well as the recent pattern and practice of the US EPA in its consultation practices with Pechanga." In particular, Tribal Chairman Macarro noted that

> Pechanga representatives were provided with basis information regarding the proposed action; however, when Pechanga asked questions and made inquiries regarding the basis and effect of the changes, Pechanga representatives were

[108] *Id.*
[109] *See, e.g.,* U.S. Government Accountability Office (2019, March) Tribal Consultation, Additional Federal Actions Needed for Infrastructure Projects (Publication No. GAO-19-22, https://www.gao.gov/products/GAO-19-22.
[110] 81 Fed. Reg. 66900, 66902 (Sep. 29, 2016).
[111] *Id.*
[112] Letter from Chief Executive Alexis Barry, Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians, to EPA (Sept. 13, 2019).

> instructed by EPA that 'we are not going to engage in a dialogue on [the proposed rule]' and that any information EPA would provide was in the proposed rulemaking documentation. Pechanga representatives were further told that the questions asked could only be answered by 'US EPA leadership.' Pechanga representatives were informed that they could submit their concerns as public comments to the Rule prior to the end of the public comment period. These statements show a significant lack of understanding regarding the intent of Tribal consultation and the obligation and commitment of the federal government to engage in meaningful consultation with Tribal governments to discuss, understand, and address tribal concerns and interests when taking federal actions…[113]

These letters illustrate how EPA has not adequately consulted with tribes. EPA's efforts at tribal consultation on the proposed rule were not meaningful, did not consider disparate impacts to tribal waters, and did not provide adequate opportunities for tribal input and a government-to-government exchange of information and concerns.

V. CONCLUSION

For the foregoing reasons, the below-signed commentators therefore request that EPA rescind the Proposed Rule.

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[113] Letter from Marc Macarro, Tribal Chairman, Pechanga Band of Luiseño Indians, to Andrew Wheeler, Administrator, EPA (Sept. 26, 2019).

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