UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act	**Docket RM20-18-000**

COMMENTS OF THE ATTORNEYS GENERAL OF MARYLAND, CONNECTICUT, ILLINOIS, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND THE DISTRICT OF COLUMBIA, AND THE CALIFORNIA WATER RESOURCES AND CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARDS ON NOTICE OF PROPOSED RULEMAKING

The Attorneys General of Maryland, Connecticut, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and the District of Columbia ("States"), as well as the California State Water Resources Control Board and the nine California Regional Water Quality Control Boards ("California Water Boards"), offer these comments on the Federal Energy Regulatory Commission's ("Commission") notice of proposed rulemaking titled "Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act" 172 FERC ¶ 61,213, dated September 20, 2020, and published in the Federal Register on October 19, 2020. 85 Fed. Reg. 66,287 ("NOPR" or "Proposed Rule"). The Proposed Rule would amend the Commission's regulations to specify that a certifying authority waives its authority to issue a water quality certification pursuant to section 401 of the Clean Water Act, 33 U.S.C. § 1341 ("Section 401"), "if it has not denied or granted certification by one year after the date the certifying agency received a written request for certification" from an applicant for a certificate of public convenience and necessity under section 7 of the Natural Gas Act ("NGA") or an authorization under section 3 of the NGA. 85 Fed. Reg. at 66,288.

The States and California Water Boards write to voice their strong support for providing certifying authorities with the maximum amount of time allowed by statute before their Section 401 certification authority is deemed waived. *See* 33 U.S.C. § 1341(a)(1) ("If the [certifying authority] fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived."). The Clean Water Act was established to "restore and maintain the chemical, physical and biological integrity of the nations' waters," 33 U.S.C. § 1251(a), and Congress recognized that the states would play a distinct and important role in accomplishing those goals, 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…"). The certification requirements established by Section 401 are an important recognition of retained state sovereignty and an inherent check on federal authority that align with the Clean Water Act's system of cooperative federalism.

Section 401 expressly authorizes a certifying authority to approve, deny, or condition certification of a federal permit. 33 U.S.C. § 1341. Without this provision, federal agencies would be free to approve projects with only minimal state input and no guarantee that a state's natural resources will be protected.

As the Commission acknowledges, applications for certificates of public convenience and necessity under section 7 of the NGA and for authorization under section 3 of the NGA tend to involve complex projects. Proposed Rule at 66,288; *see also id.* at n.15 (citing Commission precedent discussing the benefits of extending states a one-year review period). Reviewing the environmental impacts of these projects requires a tremendous investment of resources by our

state agencies and would be difficult to complete within anything less than the maximum available review period. It is therefore essential that the Commission provide states with as much time as possible to complete the certification process.

While the States and California Water Boards appreciate the Commission's setting a default one-year "reasonable period of time" when certifying authorities are considering projects that have applied for approval under sections 3 and 7 of the NGA, the States and California Water Boards also write to note their continuing objections to the Environmental Protection Agency's Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) ("Certification Rule"), which the Commission acknowledges forms the backdrop for this rulemaking. The Certification Rule is an unlawful overextension of federal authority that disrupts Section 401 and upends Congress' carefully calibrated system of cooperative federalism. It does this by, among other things, requiring states to grant or deny certifications within a year rather than to act on an application within that time as required by the Clean Water Act, *compare* 85 Fed. Reg. 42,286 (codified at 40 C.F.R. §121.7(a)) *with* 33 U.S.C. § 1341(a)(1), imposing an arbitrarily rigid trigger for commencing the calculation of a "reasonable period of time," 85 Fed. Reg at 42,285 (codified at 40 C.F.R. § 121.1(m)), and limiting the information required from a project proponent before its application is deemed complete, *id*. at 42,285 (codified at 40 C.F.R. § 121.5). The Certification Rule also imposes several substantive restrictions on the scope of water quality impacts that a certifying authority can consider, *id.* (codified at 40 C.F.R. § 121.1; 121.3), and the nature of mitigation measures which can be included in a permit as conditions to certification, *id.* at 42,232 (codified at 40 C.F.R. § 121.1(n)). In so doing, the Certification Rule may force a state to choose between granting or denying a certification request on incomplete information or waiving the ability to impose the conditions necessary to protect water quality.

The States and California Water Boards commented in opposition of EPA's Certification Rule in its proposed form and many have sued to vacate the final Certification Rule in a pending case in the United States District Court for the Northern District of California. Copies of those comments and the complaint are attached to and hereby incorporated in this letter.

The States and California Water Boards will continue to oppose the rigid timing requirements and substantive restrictions imposed by EPA's Certification Rule. While we support the default extension of a one-year "reasonable period of time" for state certification review of applications for Commission approval under sections 3 and 7 of the NGA, we urge the Commission to provide certifying authorities with as much flexibility as is possible for completing Section 401 review of these complex projects.

Respectfully Submitted,

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Attachment A:

Comments of the Attorneys General of Washington, New York, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the District of Columbia, and the Commonwealths of Massachusetts, Pennsylvania, and Virginia on EPA Proposed Rule Updating Regulations on Water Quality Certifications, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket ID No. EPA-HQ-OW-2019-0405

ATTORNEYS GENERAL OF THE STATES OF WASHINGTON, NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, WISCONSIN, THE DISTRICT OF COLUMIA, AND THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA, AND VIRGINIA

October 21, 2019

By U.S. Mail, E-mail, and Electronically
Attn: Environmental Protection Agency
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John T. Goodin, Director
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RE: Proposed Rule Updating Regulations on Water Quality Certifications, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket ID No. EPA-HQ-OW-2019-0405

Dear Administrator Wheeler and Mr. Goodin:

The undersigned Attorneys General submit these comments on the Environmental Protection Agency's (EPA) proposed rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket ID No. EPA-HQ-OW-2019-0405. We have grave concerns over the proposed rule's attempt to unlawfully curtail state authority under section 401 of the Clean Water Act.

In the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, Congress recognized the critical and primary role that states play in protecting and enhancing the waters within their respective borders. Congress preserved states' broad, pre-existing powers to adopt the conditions and restrictions the states deem necessary to protect state waters, so long as a state does not adopt standards that are less protective than federal standards. *See* 33 U.S.C. § 1370.

An essential component of Congress' preservation of state authority in the Clean Water Act is section 401, 33 U.S.C. § 1341 ("section 401"), authorizing states to conduct an independent review of the water-quality impacts of projects that require a federal permit and ensuring that those projects do not violate state water quality laws. To those ends, Congress specifically prohibited federal agencies from approving projects if a state denied a water quality certification under section 401, *id.* § 1341(a)(1), and authorized states to include conditions necessary to ensure compliance with any "appropriate requirement of State law." *Id*. § 1341(d). Certification conditions are binding conditions on the federal permit. *Id*. Section 401, thus, prevents the federal government from using its licensing and permitting authority to approve projects that could violate state water quality laws.

EPA has long acknowledged and respected the Act's preservation of state authority, especially under section 401. In fact, until revised earlier this year, every EPA guidance document for state section 401 certifications issued by EPA—spanning three decades and four administrations—

recognized states' broad authority to condition or deny federally permitted or licensed projects within their borders pursuant to section 401. Indeed, EPA's 1989 guidance emphasized that "[t]he legislative history of [section 401] indicates that the Congress meant for the States to impose whatever conditions on [federally permitted projects] are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns."[1]

There has been no change in the Clean Water Act since EPA made this statement in its 1989 guidance. And, in the interim, Supreme Court precedent has only confirmed broad state authority under section 401. But now, called to action by an Executive Order designed to promote energy infrastructure rather than protect water quality, EPA proposes an interpretation of section 401 that is inconsistent with the Clean Water Act and would unlawfully usurp state authority to protect the quality of waters within their borders.

Every provision of the proposed rule appears designed to curtail state authority under section 401. First, the proposed rule would unlawfully limit state certification authority to point source discharges from proposed projects into navigable waters, even though the plain language of section 401, as interpreted by the Supreme Court, authorizes states to ensure that the proposed activity *as a whole* does not violate state water quality standards. Second, contrary to the clear language of section 401, which allows states to impose restrictions necessary to ensure compliance with "any other appropriate requirement" of state law, the proposed rule would restrict state conditions to those necessary to ensure compliance with a narrow set of EPA-approved water quality standards. Third, the proposed rule would allow federal agencies to disregard timely-issued denials and state-imposed conditions on certification applications, even though the plain language of section 401, as interpreted by every court to consider the issue, provides that timely state denials and conditions are binding on federal agencies and subject only to judicial review. Fourth, the proposed rule would dictate the timing and scope of state review of certification applications, despite the fact that section 401 only requires that states act within a "reasonable" period of up to one year. And fifth, the proposed rule would improperly intrude into the realm of state administrative procedures by specifying the contents of a section 401 request and state determination, notwithstanding whatever contrary procedural requirements states may have enacted.

EPA must veer from this course. As set out in the comments below, EPA's proposed rule violates the Clean Water Act and applicable case law interpretation of the Act's clear statutory language. If promulgated, the proposed rule will also violate the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. ("APA"). Moreover, the proposed rule represents bad policy that will create far more problems for project proponents than it purports to solve—all to the detriment of water quality and states' rights. We urge EPA to withdraw the proposed rule.

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[1] *See* EPA, Office of Water, *Wetlands and 401 Certification, Opportunities and Guidelines for States and Eligible Tribes*, at 23 (Apr. 1989) (1989 Guidance). The 1989 Guidance is attached to this letter as Attachment C.

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I. EXECUTIVE SUMMARY

The proposed rule is the product of a Presidential Executive Order explicitly aimed not at protecting water quality, but at "promoting energy infrastructure." *See Promoting Energy Infrastructure and Economic Growth*, 84 Fed. Reg. 15,495 (Apr. 10, 2019). The Executive Order identified unspecified "confusion and uncertainty" arising from "[o]utdated Federal guidance and regulations" as the reason for directing EPA to promulgate new section 401 regulations pursuant to a prescribed timeline. *Id.* at 15,496. Following the Executive Order, many of the undersigned states submitted a letter to EPA, urging it not to weaken its existing section 401 regulations and guidance, questioning the need for changes to a certification process that had been followed effectively for decades, and providing details relating to the various and differing administrative procedures that must be followed by states reviewing section 401 certification requests.[2]

Ignoring the states' concerns, EPA proceeded to issue a revised guidance document purporting to significantly narrow state authority under section 401 by restricting the timing and scope of state review of certification applications.[3] Again, many of the undersigned states objected to the restrictions EPA purported to place on their authority, and urged EPA to comply with the plain language and intent of section 401.[4] The states' objections again went unheeded, and EPA proceeded to issue the proposed rule, which goes even further than the 2019 Guidance in curtailing state authority and violating section 401.

The proposed rule conflicts with the plain language and legislative intent of section 401 and the Clean Water Act, relevant judicial precedent, and foundational principles of administrative law. Its flaws are manifest and multiple:

- By proposing to limit the certifying authority of state agencies to point source discharges from projects, 84 Fed. Reg. at 44,120 (proposed 40 C.F.R. §§ 121.3, 121.5), EPA ignores the plain language of section 401 as interpreted by the U.S. Supreme Court. Although the requirement for a project proponent to obtain a section 401 certification is triggered by a potential discharge, once a certification is required the State must ensure that the *applicant* will comply with state water quality standards and requirements, 33 U.S.C. § 1341(a)(1), (d). The Supreme Court interpreted this unambiguous language to mean that states may impose limitations "on the activity as a whole," not just on specific discharges. *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 711 (1994) (*PUD No. 1*). Because the Supreme Court's interpretation—which has been followed by lower courts and EPA for the last 25 years—was based on the plain language of section 401, EPA cannot now adopt a contrary interpretation. *See Nat'l Cable & Telecomm.*

[2] Response by New York Attorney General Letitia James, et al., to EPA's Request for Pre-Proposal Recommendations Regarding Clean Water Act Section 401 Water Quality Certifications, Docket ID EPA-HQ-OW-2018-0855-0059 (May 24, 2019) (Attachment A).
[3] EPA, Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (June 7, 2019) (2019 Guidance).
[4] Letter from Attorneys General of California, et al., to Administrator Wheeler (July 25, 2019) (Attachment B).

Ass'n v. Brand X Internet Serv., 545 U.S. 967, 984 (2005) (*Brand X)* (court interpretation of unambiguous statutory provision "forecloses a contrary agency construction").

- By proposing to require states to consider *only* EPA-approved water quality standards when imposing limitations on section 401 certifications, 84 Fed. Reg. at 44,120 (proposed 40 C.F.R. §§ 121.1(p), 121.3, 121.5), EPA contradicts the plain language of section 401, which authorizes states to ensure compliance with specific provisions of the Act as well as "any other appropriate requirement of state law." 33 U.S.C. § 1341(d). Because the specific provisions of the Act listed in section 401(d) include all EPA-approved water quality standards, EPA's new interpretation would render the clause "any other appropriate requirement of state law" superfluous and meaningless. EPA's new position also departs from decades of agency practice and interpretation without adequate explanation, and conflicts with Congress' intent in the Clean Water Act to preserve broad state authority to enforce state water quality requirements that are more restrictive than federal standards.

- By proposing to authorize federal agencies to ignore a state's timely denial of a certification application, 84 Fed. Reg. at 44,121 (proposed 40 C.F.R. § 121.6(c)), EPA ignores the plain language of section 401, which provides that "[n]o license or permit shall be granted if certification has been denied by the State," 33 U.SC. § 1341(a)(1). The legislative history confirms that Congress intended for a state's denial of certification to act as a "complete prohibition" on issuance of a federal permit.[5] Courts have consistently held that section 401 empowers states to block projects that would adversely impact state water quality, even if those projects would otherwise receive federal approval. *See, e.g., S.D. Warren Co. v. Maine Bd. of Envt'l Protection*, 547 U.S. 370, 380 (2006) (*S.D. Warren*). The remedy available to project applicants when a state denies their section 401 certification request is judicial review of that denial in a court of appropriate jurisdiction.[6] *See, e.g., Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011).

- Similarly, by proposing to authorize federal agencies to ignore state-imposed limitations in a timely-issued certification, 84 Fed. Reg. at 44,121 (proposed 40 C.F.R. § 121.8), EPA ignores the plain language of section 401, which provides that a state certification, including any state-imposed conditions, "shall become a condition on any Federal license or permit." 33 U.S.C. § 1341(d). Courts have universally interpreted the plain language of section 401 as prohibiting federal agencies from reviewing the propriety of state-imposed limitations included in certifications. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 645-56 (4th Cir. 2018); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107-108 (2d Cir. 1997). As with section 401 denials, project proponents remain free to

[5] H. Rep. 92-911, at 122, *reproduced in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 809 (1973) ("Legislative History Vol. 1").
[6] S. Rep. 92-313, at 69 *reproduced in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1487 (1973) ("Legislative History Vol. 2").

seek judicial review of conditions they believe are improper in the appropriate court. *See Am. Rivers, Inc. v. FERC*, 129 F.3d at 112.

- By proposing to restrict the timing and scope of state review under section 401, 84 Fed. Reg. at 44,120-21 (proposed 40 C.F.R. §§ 121.1(h),(n), 121.4, 121.7), EPA exceeds its authority under the Act, which provides that a state waives its section 401 authority *only* if it "fails or refuses" to act within a reasonable period time of up to one year, 33 U.S.C. § 1341(a)(1). The legislative history of this waiver provision makes clear that it was intended only to prevent a state's "sheer inactivity" from delaying federal decision-making.[7] Out of this limited goal, EPA improperly asserts authority to force states to act in an artificially short time period based on minimal information and without any opportunity to obtain more time for review. Nothing in the text and history of section 401, or in the cases EPA selectively cites, supports EPA's restrictive approach.

- EPA also seeks to upend state administrative procedures, in violation of the Clean Water Act, by dictating various requirements of state decision-making under section 401, including the contents of certification requests, 84 Fed. Reg. at 44,119-20 (proposed 40 C.F.R. § 121.1(c)), the scope and timing of state administrative review, *id.* at 44,120 (proposed 40 C.F.R. §§ 121.3, 121.4), and the contents of state determinations on certification requests, *id.* at 44,120-21 (proposed 40 C.F.R. § 121.5(d), (e)). Except for requiring states to provide for public notice and, in appropriate cases, public hearings, section 401 does not dictate state administrative procedures. 33 U.S.C. § 1341(a)(1). This is consistent with the Clean Water Act's goal to "preserve" the states' primary authority over state water quality decisions, 33 U.S.C. § 1251(b), and courts have consistently held that states may follow their own administrative procedures when reviewing section 401 requests. *See, e.g., Berkshire Envt'l Action Team, Inc. v. Tennessee Gas Pipeline Co.*, 851 F.3d 105, 113 (1st Cir. 2017); *Delaware Riverkeeper Network v. Secretary of Penn. Dep't of Envt'l Protection*, 833 F.3d 360, 368 (3d Cir. 2016). Many of the undersigned states have previously provided EPA with information regarding the wide array of administrative procedures and requirements that they apply to section 401 requests. *See* Attachments A & B. Rather than respect those procedures, however, the proposed rule would force states to change them, in some cases through legislative enactments, to comply with EPA-dictated requirements that have no basis in the Clean Water Act.

- The proposed rule violates the Administrative Procedure Act because it is contrary to law, arbitrary and capricious and an abuse of discretion, and without statutory authority. As described above, the proposed rule violates the plain language of section 401 and the Clean Water Act in a host of ways. By seeking to limit how states exercise their authority under section 401, EPA's proposed rule exceeds the agency's statutory authority "to prescribe such regulations as are necessary to carry out [the EPA Administrator's] functions under [the Clean Water Act.]" 33 U.S.C. § 1361(a). EPA's proposed rule goes

[7] H.R. 92-911, at 122, *reproduced in* Legislative History Vol. 1, at 809.

far beyond establishing how EPA will carry out its functions under the Act, instead intruding upon the "responsibilities and rights" Congress expressly reserved to the states. *See* 33 U.S.C. § 1251(b). EPA simply does not have the statutory authority to promulgate regulations that, for example, dictate the scope of state review of section 401 certifications or threaten to nullify state section 401 certification decisions that a federal agency concludes fall outside of EPA's narrowly-defined scope of water quality impacts.

- Moreover, EPA fails to consider any water-quality impacts relevant to the agency's implementation of section 401 and the Clean Water Act in general. EPA also fails to explain why it is changing its position from prior section 401 regulations and guidance that have been applied by the agency for decades to implement the statutory text. Despite the concerns voiced by many of the undersigned states since EPA announced its intent to amend its regulations and guidance, EPA utterly fails to analyze the affects the proposed rule would have on the states and their section 401administrative procedures. The President's desire to promote energy infrastructure is an insufficient reason to upend decades of effective administrative practice. Moreover, because the proposed rule is inconsistent with the authority granted to EPA by Congress in the Clean Water Act, EPA does not have statutory authority to issue it.

For these reasons, the undersigned states strongly object to the proposed rule. Given the numerous flaws of the proposed rule and the lack of evidence that existing section 401 regulations and procedures are inadequate, EPA should abandon its current effort and should withdraw the proposed rule.

II. THE PROPOSED RULE CONFLICTS WITH THE STATES' BROAD AUTHORITY UNDER THE CLEAN WATER ACT TO INDEPENDENTLY EVALUATE THE WATER QUALITY IMPACTS OF FEDERALLY-PERMITTED PROJECTS

EPA's attempt to curtail state authority in numerous key areas with the proposed rule is incompatible with the well-established broad authority that states have under the Clean Water Act to protect the quality of their waters. This section discusses the broad scope of state authority under section 401, as established by the Clean Water Act's plain language and legislative history, and as consistently applied by the courts and EPA for almost 50 years. The specific ways in which the proposed rule conflicts with the statute are discussed in Points III and IV, *infra*.

A. The Plain Language of the Clean Water Act Establishes Broad State Authority.

In the proposed rule, EPA asserts that section 401 is ambiguous or silent on the scope of states' authority to protect the waters within their boundaries. *See, e.g.,* 84 Fed. Reg. at 44.103-106. This assertion is unfounded. The intent of Congress is reflected in the plain language of the Act. From the outset, section 101 declares that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and

enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b).

To accomplish those goals, the Clean Water Act creates a "carefully constructed … legislative scheme" that "impose[s] major responsibility for control of water pollution on the states." *District of Columbia v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) (the 1972 Clean Water Act "recognize[s] that the States should have a significant role in protecting their own natural resources"). The Act "anticipates a partnership between the States and the Federal Government," in which the states are responsible for promulgating water quality standards that "establish the desired condition of a waterway." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Indeed, section 303 of the Act effectively leaves it to the states, subject to baseline federal standards, to determine the level of water quality they will require and the means and mechanisms through which states will achieve and maintain those levels. 33 U.S.C. § 1313. And, section 510 of the Act expressly sets the boundary of state authority in broad terms: "nothing in [the Act] shall … preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) *any requirement respecting control or abatement of pollution*…." 33 U.S.C. § 1370 (emphasis added).

In conjunction with these provisions, section 401 in particular is a critical component of Congress' legislative scheme to preserve state authority. *See S.D. Warren*, 547 U.S. at 386. Section 401(a)(1) provides that "[a]ny applicant for a Federal license or permit to conduct any activity … which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate … that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." 33 U.S.C. § 1341(a)(1). Section 401(d) expands on this language by further stating that:

> "[a]ny certification provided … shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations … and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1341(d).

In other words, while section 401(a)(1) refers to "any discharge" into navigable waters, section 401(d) is more broadly crafted to ensure that "any *applicant*" will comply with "any other appropriate requirement of State law." *PUD No. 1*, at 711; *citing* 33 U.S.C. § 401(a)(1), (d) (emphasis added). Thus, while section 401(a)(1) "identifies the category of activities subject to certification—namely, those with discharges"—section 401(d) "is most reasonably read as authorizing additional conditions and limitations on the activity *as a whole* once the threshold condition, the existence of a discharge, is satisfied." *Id*. at 711-12 (emphasis added). As set out in

Point III *infra*, by drastically curtailing state authority under section 401, EPA's proposed rule conflicts with the plain language of the Act and its broad reservation of states' rights.

B. The Act's Legislative History Confirms That Congress Intended States to Exercise Broad Authority Over Federally Permitted Projects Impacting State Waters.

EPA's attempt to curtail state authority in its proposed rule also contradicts the legislative history of both section 401 and the Act as a whole. To begin with, the proposed rule fails to acknowledge—let alone implement—the broad remedial purpose of the Act. The purpose of the Clean Water Act was as broad as it was ambitious, vastly expanding the tools available to states and the federal government in dealing with entrenched water pollution. In presenting the conference report, Senator Muskie laid out the urgency of the task in no uncertain terms:

> Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.[8]

As to the Act's intention to "restore and maintain the chemical, physical and biological integrity of the nation's waters[,]" Senator Muskie proclaimed these objectives as "not merely the pious declarations that Congress so often makes in passing its laws; on the contrary, this is literally a life or death proposition for the Nation."[9]

Congress adopted section 510 to ensure "that States, political subdivisions, and interstate agencies retain the right to set more restrictive standards and limitations than those imposed" by the Federal government. *People of State of Ill. ex rel. Scott v. City of Milwaukee, Wis.*, 366 F. Supp. 298, 301 n.3 (N.D. Ill. 1973); *Cf. United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). Along with section 510, section 401 is an equally important recognition of state authority that gave more teeth to Congress' intent to preserve states' power to protect water quality. It did so by broadly ensuring that the federal government itself would be powerless to preempt more restrictive state standards, even when it came to federal permitting and licensing decisions.

Congress first adopted section 401 as section 21(b) of the Water Quality Improvement Act of 1970. As noted in the House Report, section 21(b) was created to require state certification of "any activity of any kind or nature which may result in discharges into the navigable waters."[10] The House Report went on to state that federally permitted activities or operations frequently impact water quality and that section 21(b) was intended "to provide reasonable assurance … that no license or permit will be issued by a federal agency for any activity that … could in fact become a source of pollution."[11] In considering the need for the same provision, the Senate Report decried the fact that "[i]n the past, these licenses and permits have been granted without

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[8] Legislative History Vol. 1 at 161.
[9] *Id.* at 164.
[10] H.R. Rep. No. 91-127, at 24 (1969), reprinted in 1970 U.S.C.C.A.N. 2691, 2710.
[11] *Id*. at 7, reprinted in 1970 U.S.C.C.A.N. 2691, 2697.

any assurance that the standards will be met or even considered."[12] Accordingly, in enacting section 401, Congress sought to ensure that all activities authorized by federal permits and impacting water quality would comply with "State law" and that "Federal licensing or permitting agencies [could not] override State water quality requirements."[13]

The legislative history evinces clear Congressional intent to broadly construe the state authority expressly preserved by section 401 to ensure that federal projects satisfy state requirements. In stark contrast to the legislative history, EPA's assertion in the proposed rule that the 1972 Act's permitting requirements for point-source discharges narrowed the focus of state certifications, 84 Fed. Reg. at 44,088, is without support. In fact, "[b]y introducing effluent limitations in the [Clean Water Act] scheme, Congress intended to improve enforcement, not to supplant the old system." *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995), *cert. denied* 518 U.S. 1018 (1996). EPA's narrow interpretation of state authority permeating its proposed rule is patently inconsistent with the legislative history.

C. The Proposed Rule Disregards or Misinterprets Long-Standing Case Law that Has Upheld States' Broad Authority Under Section 401 Pursuant to the Plain Language of the Clean Water Act.

EPA concedes that its proposed rule diverges from Supreme Court precedent in *PUD No. 1*, 511 U.S. at 700. In an attempt to justify the proposed rule's restrictions on state authority, EPA now asserts that the Court's statutory interpretation was based on EPA's prior interpretation rather than the plain, unambiguous text of the statute. *See* 84 Fed. Reg. at 44099. EPA misinterprets *PUD No. 1* and other case law that has consistently upheld broad state authority under section 401.

In *PUD No. 1*, the project proponents challenged the State of Washington's authority to impose a minimum stream flow requirement unrelated to the specific discharges that triggered section 401 certification requirements. Relying on the *plain language* of Sections 401(a) and 401(d), the Court concluded that section 401 permits certification conditions and limitations that apply to the activity as a whole (and not only those tied to the discharge):

> The language of [section 401(d)] contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to "discharge." The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose "other limitations" on the project in general to assure compliance with various provisions of the Clean Water Act and with "any other appropriate requirement of State law."

511 U.S. at 711. While the Court in *PUD No. 1* cited to EPA's regulations and interpretations at the time of the decision as supporting the Court's analysis of the statutory language, the Court's

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[12] S. Rep. No. 91-351, at 3 (1969) (emphasis added).

[13] Legislative History Vol. 2 at 1487. This scope intent was clear throughout the legislative process. For just one example, the conference report broadly stated that, under section 401, "a State may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that State." Legislative History Vol. 1 at 176.

reference to the agency's interpretation was secondary to the Court's reliance on the plain language of the Act. *See* Point III.A.i, *infra.*

Significantly, over a decade after *PUD No. 1*, the Court re-affirmed that "State certifications under § 401 are essential in the scheme to preserve state authority to address the *broad range of pollution* [impacting state waters]." *S.D. Warren Co*, 547 U.S. at 386. When a hydropower dam operator sought to evade section 401 state certification by arguing that its dams did not "discharge" into the river, the Court rejected the operator's arguments. *Id.* at 375-76 ("discharge" under section 401 broader than "discharge of a pollutant"). In doing so, the Court held that section 401 "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.'" *Id.* at 380, quoting S. Rep. No. 92-414, at 69 (1971).

Additionally, and as discussed further below, EPA's proposal regarding what qualifies as "any other appropriate requirement of State law" is too narrow. *See* Point III.A.ii, *infra*. In this regard, though EPA's proposed rule attempts to cast *PUD No. 1* as a "narrow" holding, the Supreme Court in *PUD No. 1* declined to narrowly define the scope of "any other appropriate requirement of State law." *See* 511 U.S. at 713. Rather, the Court held that "States may condition certification upon *any limitations* necessary to ensure compliance with state water quality standards or *any other* 'appropriate requirement of State law.'" *PUD No. 1*, 511 U.S. at 713-14 (emphases added); *see also id.* at 723 (Stevens, J., concurring) ("Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require."). Among other things, the Court held that projects must comply with designated uses. *Id.* at 715 ("[U]nder the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards."). The *PUD No. 1* Court also rejected the project proponent's invitation to otherwise limit the State's regulatory authority to impose conditions in a section 401 certification. *See id.* at 712-13, 722 (rejecting project proponent's argument that 401 certification conditions must be tied to potential discharges and declining to hold that the State's minimum flow requirements conflict with FERC's hydroelectric licensing authority).

Further, as a general matter, the Circuit Courts have long recognized the breadth of State authority under the Clean Water Act and, in particular, section 401. In *Keating v. FERC*, the D.C. Circuit observed:

> One of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act. . . . Through [section 401(a)(1)], Congress intended that the state would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.

927 F.2d 616, 622 (D.C. Cir. 1991). While the crux of the case addresses a state's compliance with section 401(a)(3) to revoke a prior certification, the Court contrasts those statutory constraints with a state's "freedom . . . to impose their own substantive policies in reaching

initial certification decisions. *Id.* at 623; *see also id.* at 624 ("It is true that the state, *alone*, decides whether to certify under section 401(a)(1).") (emphasis added).

And once a certification decision has been made, the federal licensing agency's role is largely limited to ensuring procedural compliance. *See* Point III.B.ii, *infra*. In fact, Circuit Courts have universally held that the use of "shall" in of section 401(d) *requires* any state conditions to become conditions on the Federal license or permit being sought. *See, e.g., Sierra Club v. U.S. Army Corp. of Engineers*, 909 F.3d at 645-46; *Am. Rivers, Inc.*, 129 F.3d at 107; *Cf. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 775 (1984) (rejecting a federal agency's attempt to overcome similar plain statutory language related to mandatory conditions).

EPA's proposed rule is counter to this long line of cases upholding states' broad regulatory authority embodied in the plain language of the Clean Water Act.

D. The Proposed Rule Contrasts Sharply With Nearly 50 Years of EPA's Interpretation of State Authority Under Section 401.

EPA has historically taken the same expansive view of state authority under section 401 that is counseled by a plain reading of the Act, its legislative history, and applicable case law. The proposed rule is a radical departure from EPA's prior, long-held interpretations.

1989 Guidance

Following a push for states to do more to protect wetlands, EPA first adopted section 401 guidance in the George H.W. Bush administration when it issued a handbook for states and tribes on applying section 401 to projects with potential wetlands impacts.[14] In pressing upon states and tribes the importance of 401 certifications as a tool to prevent wetland degradation, EPA addressed the history, purpose, and scope of 401 authority.

EPA's 1989 Guidance began by noting that section 401 "is written very broadly with respect to the activities it covers" and encompasses "any activity, including, but not limited to, the construction or operation of facilities which *may* result in *any discharge* requires water quality certification."[15] EPA explained that the broad purpose of the water quality certification requirement, per Congress, "was to ensure that no license or permit would be issued for an activity that through inadequate planning or otherwise could in fact become a source of pollution."[16]

With regard to the scope of state review, EPA stated that "all of the potential effects of a proposed activity on water quality – direct and indirect, short and long term, upstream and downstream, construction and operation – should be part of a State's [401] certification

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[14] *See* Office of Water, EPA, *Wetlands and 401 Certification—Opportunities and Guidelines for States and Eligible Indian Tribes* at 22 (Apr. 1989) ("1989 Guidance") (Attachment C).
[15] *Id.* at 20 (emphasis original).
[16] *Id.*, quoting 115 Cong. Rec. H9030 (April 15, 1969) (House debate); 115 Cong. Rec. S29858-59 (Oct. 7, 1969) (Senate debate).

review."[17] By way of example, the 1989 Guidance illustrated a number of conditions that states had successfully placed on 401 certifications, including sediment control plans, stormwater controls, protections for threatened species, and noxious weed controls, with "few of these conditions … based directly on traditional water quality standards…."[18] EPA noted that "[s]ome of the conditions are clearly requirements of State or local law related to water quality other than those promulgated pursuant to the [Clean Water Act] sections enumerated in Section 401(a)(1)." All, however, found their source outside of federal law or standards.[19]

Finally, EPA's 1989 Guidance also addressed the timeframes for review and the "completeness" of applications for certification. EPA first noted that the plain language of section 401 gives states "a reasonable period of time (which shall not exceed one year)" to act on a certification request.[20] EPA advised states to adopt regulations to ensure that applicants submit sufficient information to make a decision and encouraged requirements that "link the timing for review to what is considered a receipt of a complete application."[21] As example, EPA favorably cited to a Wisconsin regulation requiring a "complete" application before the agency review time begins.[22] The same regulation stated that the agency would review an application for completeness within 30 days of receipt and allowed the agency to request any additional information needed for the certification.[23]

2010 Guidance

EPA issued additional guidance on section 401 in 2010.[24] Again, EPA viewed state authority under section 401 as expansive.

As it did in 1989, EPA continued to interpret section 401 as a broad mandate for states to consider all water quality impacts from a proposed activity. EPA stated that, "[a]s incorporated into the 1972 [Clean Water Act], § 401 water quality certification was intended to ensure that no federal license or permits would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate [the Act's] provisions."[25] EPA highlighted the Supreme Court's decision in *PUD No. 1* so that states and tribes understood that section 401 review included the ability to "impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the [Act] and any other

[17] *Id*. at 23. Each of these *EPA-suggested* mechanisms would fall outside EPA's newly proposed scope, yet contrary to the APA, EPA neither mentions nor analyzes its departure from any of these suggestions. *See* Point III, *infra*.
[18] *Id*. at 24, 54-55.
[19] *See id*.
[20] *Id*. at 31.
[21] *Id*.
[22] *Id*., *citing* Wisconsin Administrative Code, NR 299.04.
[23] *Id*.
[24] EPA, Office of Wetlands, Oceans, and Watersheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (Apr. 2010) ("2010 Guidance") (Attachment D).
[25] 2010 Guidance at 16.

appropriate requirements of state or tribal law."[26] On the scope of other state law to be considered, EPA stated that "[i]t is important to note that, while EPA-approved state and tribal water quality standards may be a major consideration driving §401 decision[s], they are not the only consideration."[27] EPA's 2010 Guidance also maintained EPA's view that states should adopt regulations to require a complete application from applicants.[28] To illustrate, EPA used regulations from Oregon establishing a detailed list of information for applicants to provide.[29]

Existing section 401 regulations

EPA's existing regulations regarding state water quality certifications also embrace broad state authority. *See generally* 40 C.F.R. part 121. The regulations provide that states must certify that a permitted "activity"—not discharge—will comply with water quality standards. 40 C.F.R. § 121.2(a)(3). "Water quality standards" is defined broadly to include standards established pursuant to the Clean Water Act, as well as any "State-adopted water quality standards." *Id.* § 121.1(g).

Consistent with the language and intent of the Clean Water Act, the existing certification regulations also do not interject federal oversight into the state administrative process. The regulations do not provide for federal agencies to reject state denials or conditional certifications on a case-by-case basis. With respect to the timing of state review, the regulations provide that a state waives its authority only if the state provides express written notification of waiver or "fail[s]" to act on a certification request within a reasonable period of time. 40 C.F.R. § 121.16(b).

The existing regulations also respect the variety of administrative procedures that states may employ in reviewing section 401 certification applications. The regulations impose no specific requirements on the contents of a section 401 denial, and provide only a few broad categories of information that should be included when a state grants a certification, including "[a] statement of any conditions which the certifying agency deems necessary or desirable" and "[s]uch other information as the certifying agency may determine to be appropriate." 40 C.F.R. § 121.2(a). Even these broad requirements may be modified if the state, federal permitting agency, and EPA regional administrator agree on such a modification. *Id.* § 121.2(b). By respecting and not interfering with state administrative procedures, the existing regulations preserve the system of cooperative federalism established by the Clean Water Act.

EPA suggests that its existing regulations are out of date because they were first enacted pursuant to section 21(b) of the Water Quality Improvement Act of 1970, the precursor to section 401. *See, e.g.,* 84 Fed. Reg. at 44,081, 44,088-089 & n.16. But section 401 essentially carried forward section 21(b) with only "minor" changes.[30] Indeed, the then-EPA administrator described section 401 as "essentially the same" as section 21(b).[31] EPA fails to explain how

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[26] *Id*. at 18, *citing PUD No. 1*, 511 U.S. at 712.
[27] *Id*. at 16.
[28] *Id*. at 15-16.
[29] *Id*. at 16.
[30] Senate Debate on S. 2770 (Nov. 2, 1971), *reproduced in* Legislative History Vol. 2 at 1394.
[31] Comments of EPA Administrator Ruckelshaus on H.R. 11895 and H.R. 11896 (Dec. 13, 1971), *reproduced in* Legislative History Vol 1, at 852.

these minor changes in the Clean Water Act justify the wholesale restructuring of the section 401 process envisioned in the proposed rule.

2019 Guidance and proposed rule

Against the backdrop of 50 years of EPA's consistent position on section 401 and in response to an Executive Order designed to "promot[e] energy infrastructure," 84 Fed. Reg. at 15,495, EPA in 2019 suddenly reversed course in its interpretation of section 401. First, EPA—over the objections of many states—withdrew replaced its 2010 Guidance with a terse new guidance document that purported to impose substantially shorter time limitations on state review, while at the same time narrowing the permissible scope of state review.[32] Second, EPA—again despite objections—proceeded to issue the proposed rule, which goes even further than the 2019 Guidance in unraveling state authority under the Clean Water Act. It does so by further limiting the timing and scope of state review, while also authorizing federal agencies to simply ignore section 401 certificate conditions or denials if the federal agency determines that the state exceeded EPA's narrowly defined scope of section 401.

EPA's interpretation of section 401 as providing for broad state authority has been in place for almost 50 years—both in agency guidance and the existing regulations. During that time, states have processed a huge number of section 401 certification applications in a timely and non-controversial manner. Proof of the overall effectiveness of EPA's existing regulations is found in the fact that EPA can only point to a small handful of cases as examples of the alleged "confusion" caused by the existing regulations.[33] In fact, it is EPA's proposed rule and 2019 Guidance that will create confusion and uncertainty. EPA should withdraw the proposed rule.

III. EPA'S PROPOSED RULE CONFLICTS WITH THE CLEAN WATER ACT AND WOULD SEVERELY ERODE STATE AUTHORITY TO PROTECT STATE WATERS UNDER SECTION 401

EPA's proposed rule conflicts with the Clean Water Act in at least four specific ways. First, EPA's attempt to limit state authority to ensuring that point-source discharges to navigable waters comply with EPA-approved water quality standards violates the Clean Water Act's plain language, legislative intent, and binding case law. Second, EPA's attempt to authorize federal agencies to disregard state-imposed conditions in, or denials of, section 401 certifications violates the Clean Water Act's plain language, legislative intent, and binding case law. Third, EPA's attempt to narrow the timing and scope of a state's review of section 401 requests violates the plain language of the Clean Water Act, and relies on an inappropriately selective reading of

[32] EPA, *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes* (2019) (2019 Guidance).

[33] *See* 84 Fed. Reg. at 44,081 (noting that "litigation over the section 401 certifications for several high-profile infrastructure projects have highlighted the need for the EPA to update its regulations"); EPA, *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking*, at 11-12 (Aug. 2019) (referring to four specific cases where proposed rule might have resulted in more expeditious review of section 401 applications).

applicable case law. Fourth, EPA's proposed rule would interfere with states' ability to follow their own administrative procedures, contrary to the language and intent of the Clean Water Act.

A. EPA's Unlawful Proposal to Limit State Authority under Section 401 to Ensuring that Point Source Discharges Comply with EPA-Approved Water Quality Standards Contravenes the Clean Water Act, Congressional Intent, and Case Law.

EPA's proposed rule would limit state authority under section 401 to ensuring that point source discharges to navigable waterways comply with EPA-approved water quality standards. 84 Fed. Reg. at 44,120 (proposed 40 C.F.R §§ 121.1(g), (p), 121.3). EPA's cramped interpretation of state authority under section 401 violates the letter and spirit of the Clean Water Act, as interpreted by the Supreme Court.

i. Section 401 does not limit the scope of State review to discharges from point sources.

EPA proposes to limit the scope of section 401 certifications solely to impacts from specific discharges associated with a federally permitted activity, thus preventing states from basing certifications on the water quality effects of the activity as a whole. This is in direct contravention of the Clean Water Act, established Supreme Court precedent, and other case law.

As discussed above, the Supreme Court has interpreted the plain language of section 401 to permit states to assure that an "activity as a whole" complies with state water quality laws, not just any particular point-source discharge from that activity. *PUD No. 1*, 511 U.S. at 711-12. As the Court noted, there are clear and key differences in language between Sections 401(a) and 401(d) that are deliberate and must be given their full import to realize the intent of Congress. The Supreme Court also has held that the term "discharge" under section 401 must be interpreted according to its plain meaning ("'flowing or issuing out'") and is not as narrow as "discharge of a pollutant" (which has other elements). *See S.D. Warren,* 547 U.S. at 375-84 (citing Webster's New International Dictionary 742 (2d ed.1954)).

Despite these Supreme Court opinions, EPA proposes to limit the scope of section 401 certifications solely to point-source discharges to waters of the United States—a stance that cannot be reconciled with the Clean Water Act or applicable case law. EPA acknowledges that its proposed rule is contrary to *PUD No. 1*, but asserts that *Brand X*, 545 U.S. at 967, allows EPA to sidestep the Supreme Court's interpretation. EPA is wrong.

Brand X involved the Federal Communications Commission's (FCC) interpretation of terms used in the Communications Act of 1934. *Brand X*, 545 U.S. at 973-74. On appeal, the Ninth Circuit found itself bound by a prior decision that had construed those same terms in a manner contrary to that urged by the FCC.[34] *Id*. at 979-80; *citing Brand X*, 345 F.3d at 1128-1132. The Supreme Court reversed, finding that the Ninth Circuit was not bound by the prior decision because that decision never determined the terms were unambiguous in the first instance. *Brand X*, 545 U.S. at 982-83. As a result, the Court held that the FCC was entitled to propose its own interpretation and that the Ninth Circuit should have subjected that interpretation to the two-step

[34] At the time of the prior decision, *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000), the FCC was not a party to the action, nor had it made any effort (through rulemaking or otherwise) to interpret the terms. *Id*. at 876.

analysis for agency deference embodied in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Brand X*, 545 U.S. at 982-83.

EPA's reliance on *Brand X* to contradict *PUD No. 1* is misplaced. First, *Brand X* does not apply to the situation presented here—where a court has already construed the plain language of an *unambiguous* statute. As the *Brand X* Court made clear, "a precedent holding a statute to be unambiguous forecloses a contrary agency construction." *Brand X*, 545 U.S. at 984, *citing Neal v. United States*, 516 U.S. 284 (1996). Here, both *PUD No. 1* and *S.D. Warren* directly relied on the text of the statute. *See PUD No. 1,* 511 U.S. at 711 (finding the "text refers to the compliance of the applicant, not the discharge"); *see also id.* ("The language of this subsection contradicts [the] claim that [a] State may only impose water quality limitations specifically tied to a 'discharge.'"); *S.D. Warren*, 547 U.S. at 375-78 (applying ordinary meaning of "discharge" under section 401). While the *PUD No. 1* Court later noted—almost in passing—that EPA's 401 regulations were "consistent" with the Court's construction of section 401, that consistency was not central to the decision, and the Court's holding was premised on the plain text of the Act and is devoid of any reference to textual ambiguity. *See PUD No. 1*, 511 U.S. at 711-12; *see also S.D. Warren*, 547 U.S. at 377 (similar). EPA cannot create ambiguity where there is none; and it is only where a statute is ambiguous that an agency can fill in the gaps, whether contrary to a previous court decision or otherwise. *See Brand X,* 545 U.S. at 984.

Second, "it is far from settled that *Brand X* applies to prior decisions of the Supreme Court." *MikLin Enterprises, Inc. v. Nat'l Labor Relations Board*, 861 F.3d 812, 823 (8th Cir. 2017). The holding in *Brand X* only explains "why a court of appeals' interpretation of an ambiguous provision in a regulatory statute does not foreclose a contrary reading by an agency." *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring). That explanation is not, however, applicable to a decision by the Supreme Court because such a decision "would presumably remove any pre-existing ambiguity." *Id*. In other words, while agencies may resolve ambiguous statutory provisions previously construed by lower courts, that opportunity is foreclosed once the Supreme Court has interpreted a statute—as is the case here—because there is no longer any other reasonable interpretation. *See id*.; *see also United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488-89 (2012) (rejecting the government's argument that a prior Supreme Court decision finding statutory text to be ambiguous could be subjected to a *Chevron* analysis under *Brand X*).

Third, even if EPA's proposed rule was subject to a *Chevron* analysis, the rule fails to satisfy step two of *Chevron* because it does not represent a reasonable construction of the Act. EPA bases its departure from *PUD No. 1* (not to mention its own 50-year history of broadly construing state authority under section 401) exclusively on the fact that Congress removed the word "activity" from section 21(b)(1) of the 1970 Water Quality Improvement Act when Congress migrated that provision into the new section 401(a)(1). 84 Fed. Reg. at 44,088. EPA then asserts that this change somehow evinces a congressional intent to gut section 21(b)'s scope as it was incorporated into section 401.[35] *Id*.

[35] EPA's claim is baseless, especially when viewed in the context of the 1972 Act that—without question—sought to strengthen and vastly expand the then-existing universe of tools to be brought to bear on water pollution. *See, e.g.* Statement of Senator Muskie, *reproduced in* Legislative History Vol. 1 at 161.

This is incorrect. Section 21(b) and the nearly identical provisions of section 401 embody Congress' consistent intent that states exercise broad authority over all water quality impacts that would—or could—result from federally licensed or permitted activities. There is nothing in the legislative history to indicate that Congress intended the scope of state authority under section 401 to be less than the authority granted in section 21(b). Indeed, the evidence shows that Congress intended to *expand* upon that authority. Most critically, while section 401(a) modified section 21(b) to require any "discharge" to comply with certain provisions of the newly-reformulated Act, Congress added section 401(d) to broadly require that any "applicant" comply with the Act and "any other appropriate requirement of State law."[36] 33 U.S.C. § 1341(d). Accordingly, there is no support in the Act's legislative history for EPA's assertion in the proposed rule that the 1972 Act's permitting requirements for point-source discharges narrowed the focus of state certifications as migrated into the 1972 Act.

Furthermore, congressional focus on ensuring the compliance of an "activity" was unwavering from the enactment of section 21(b) to its incorporation into section 401. From its inception, section 401 was described as requiring any "*activities* that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State for an evaluation."[37] Consistent with this intent, EPA itself has long acknowledged that section 401 requires consideration of all water quality impacts from a proposed activity rather than only discharges from a "point source." In section 401 guidance issued over 30 years ago, EPA stated that it is "imperative for a State review to consider all potential water quality impacts of the project, *both direct and indirect*, over the life of the project."[38] This is especially important because a state's certification of a construction permit or license also operates as a certification for any federal permits or licenses needed for that project's operation.[39] EPA reaffirmed this stance as recently as 2010.[40] EPA's current departure from this long-standing interpretation is

[36] Notably, if a discharge from a point source must exist before a state can issue a section 401 certification, Congress's intent for section 401 to apply to all federally permitted activities that may become a source of pollution would be effectively thwarted, because the activity involved would *already* be subject to the Act's permitting provisions. *See* 33 U.S.C. § 1342. Congress, in contrast, intended section 401's scope to be broader than just federally-issued Clean Water Act permits. H Rep No. 91-127, *reprinted in* 1970 USCCAN 2691, 2697; *see also* H.R. Conf. Rep. No. 95-830, at 96, *reprinted in* Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act, Vol. 3, at 280 (1977) ("[A] federally licensed or permitted activity, *including discharge permits under Section 402*, must be certified to comply with state water quality standards.") (emphasis added).
[37] Senate Debate on S. 2770 (Nov. 2, 1971), *reproduced in* Legislative History Vol. 2 at 1388 (emphasis added).
[38] 1989 Guidance, at 22 (emphasis added).
[39] *Id*.; 33 U.S.C. § 1341(a)(3).
[40] 2010 Guidance at 16-17.

without a rational basis, and EPA's claim that it took 50 years to notice differences between the 1970 and 1972 Acts strains credulity.[41]

Further, in determining what type of discharge triggers section 401, *S.D. Warren* rejected the idea that "discharge" under section 401 is as limited as the Act's primary prohibition—"discharge of a pollutant." 547 U.S. at 380. In particular, the Court reasoned that "discharge" in section 401 is "without any qualifiers." *See id*. In contrast, "discharge of a pollutant" is qualified by the elements in its definition, including an "addition" from a "point source." *See id.* at 380-81. Thus, an "addition" was not required under section 401: "[T]he understanding that something must be added in order to implicate § 402 does not explain what suffices for a discharge under § 401." *Id.* at 381. As with the "addition" element, the "point source" element is not required to trigger section 401 review and requirements.

In short, EPA's proposal to limit state review to discharges from point sources is inconsistent with the plain language of section 401 as interpreted by the Supreme Court in *PUD No. 1* and *S.D. Warren*. As a result, EPA should withdraw this rulemaking.

ii. Section 401's reference to "any other appropriate requirements of state law" is not limited to EPA-approved standards.

The proposed rule also seeks to further limit state authority under section 401 by interpreting the phrase "any other appropriate requirement of state law" to mean only EPA-approved state regulatory programs under the Clean Water Act. 8484 Fed. Reg. at 44080, 44093, 44095, 44103-4, 44107, 44120. This interpretation contravenes the Act.

First, EPA's proposed limitation is nonsensical when viewed in conjunction with the plain language of section 401 and the Act as a whole. Section 401(d) provides that state 401 certifications are to assure compliance with:

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

33 U.S.C. § 1341(d). Section 401 review also assures compliance with the water quality standards and implementation plans states are required to adopt under Section 303. *See, e.g., PUD No. 1*, 511 U.S. at 712-13, citing H.R. Conf. Rep. No. 95–830, at 96 (1977), *reproduced in* 1977 U.S.C.C.A.N 4326, 4471 (noting that "Section 303 is always included by reference where section 301 is listed"). The legislative history of the 1972 amendments confirms that this additional language was intended to expand water quality compliance conditions that may be added to certifications beyond federally-approved water quality standards and implementation plans: the Conference Report noted that the conference version of section 401 was largely the same as the version passed by the House, except that "Subsection (d), which requires a

[41] Equally unconvincing is EPA's sudden desire to "holistically" review the statute and regulations for the first time in 50 years, particularly when such review conflicts with the statutory text and intent and established judicial precedent.

certification to set forth effluent limitations, other limitations, and monitoring requirements necessary to insure compliance with sections 301, 302, 306, and 307, of this Act, *has been expanded to also require compliance* with any other appropriate requirement of State law which is set forth in the certification."[42]

EPA's proposed rule would render section 401's requirement that state certifications assure compliance with "any appropriate requirement of state law" superfluous. *See* 33 U.S.C. § 1341(d). Such an interpretation is irrational and contradicts the statutory text. Because EPA-approved standards are included within the specific provisions identified in Sections 401(a) and (d), "any other appropriate requirement of State law" must refer to additional state standards, not just those approved by EPA under the Act. As EPA previously has explained, "[w]ater quality certifications under section 401 reflect not only that the licensed or permitted activity and discharge will be consistent with the specific CWA provisions identified in Sections 401(a) and (d), but also with 'any other appropriate requirements of State [and Tribal] law.'"[43]

Notably, this distinction was explicitly recognized in EPA's 1989 Guidance, in which EPA recognized that section 401(d) gives states the authority to review projects for compliance with three separate categories of requirements: "with [federal standards]; with any State law provisions or regulations more stringent than [federal standards]; *and* with 'any other appropriate requirement of State law.'"[44] EPA's proposed rule renders Congress' clear inclusion of "any other appropriate requirement of State law" either an extraneous duplication or a nullity, neither of which is proper. *See, e.g., Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883) (noting that courts must give effect to every clause and word of a statute, wherever possible).

Moreover, the scope of "other appropriate requirements of state law" is broad. As EPA explained in its 2010 Guidance, such requirements include items such as state erosion and sedimentation standards, construction and post-construction stormwater management, coastal protections, or state laws protecting threatened and endangered species.[45] Though the provisions appear disparate, they are, in fact, directly related to water quality. For instance, construction stormwater management is necessary to ensure that a wide variety of contaminants unearthed during the construction process and then carried in stormwater during a storm event do not enter the receiving water body, causing the water body's quality to degrade. Sedimentation standards

[42] S. Conf. Rep. 92-1236, at 138, *reproduced in* Legislative History Vol. 1 at 321 (emphasis added).
[43] 2010 Guidance at 21.
[44] 1989 Guidance at 23 (emphasis added).
[45] 2010 Guidance at 21.

address similar concerns. EPA's proposed rule significantly undermines states' abilities to effectuate protections such as these that are critical to the health of state waters.

Second, in limiting state review to only federally-approved standards, EPA's proposed rule clashes with Congress' explicit, long-standing desire for the Clean Water Act not to preempt state law:

> "[N]othing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that . . . such State . . . may not adopt or enforce any [limitation] which is less stringent than the [limitation] under this chapter . . . ."

33 U.S.C. § 1370. This savings clause is broad—applying not only to discharges of pollutants, but also any pollution control or abatement requirement—and nothing in the clause excludes conditions imposed under section 401. As numerous courts have held, Sections 401 and 510 evince Congress' clear intent not to preempt but to "supplement and amplify" state authority. *See, e.g., People of State of Ill. Ex rel. Scott v. City of Milwaukee, Wis.*, 366 F. Supp. 298, 301-302 (N.D. Ill. 1973), *citing United States v. Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt. 1973). Moreover, a federal statute is presumed to supplement rather than displace state law, especially where federal law invades core state functions or otherwise disrupts an area of traditional state regulation. *See, e.g.*, *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 544 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purpose must be "clear and manifest.").

EPA's proposed interpretation is also internally inconsistent. For example, EPA claims that it does not contest the Supreme Court's holding in *PUD No. 1* that a state may condition section 401 certification on compliance with the state's "designated uses" of the waterway. 84 Fed. Reg. at 44,097 n.30; *see PUD No. 1*, 511 U.S. at 715 ("a project that does not comply with a designated use of the water does not comply with the applicable water quality standards"). But EPA also complains that state agencies have included "non-water quality related" conditions such as "requiring construction of biking and hiking trails" or "creating public access for fishing" in their section 401 certifications. 84 Fed. Reg. at 44,094. However, many states have established "recreation" or "fishing" as the "designated use" for particular waterways. *See, e.g.,* 6 New York Code of Rules and Regulations (N.Y.C.R.R.) §§ 701.2-701.7 (designating "recreation" and "fishing" as best uses for various classes of state freshwaters). Ensuring that the public has access to a waterway – whether through surface trails or by fishing access point – is critical to maintaining these designated uses. But EPA would apparently consider such conditions to be outside the permissible scope of section 401, and thus allow federal agencies to simply ignore them.

EPA should abandon its proposal to limit "any other appropriate requirement of State law" to EPA-approved standards.

B. The Proposed Rule's Attempt to Impose Federal Agency Control over State Section 401 Determinations Upends the Cooperative Federalism Approach Enshrined in the Clean Water Act.

Contrary to the plain language and legislative intent of the Clean Water Act, as well as established case law, the proposed rule unlawfully seeks to impose federal control over the scope of state water quality certifications. If promulgated, the proposed rule would authorize federal agencies to ignore state conditions on certifications and disregard state denials of certification requests if federal agencies deem such a denial to be beyond the narrow scope of certification proposed by EPA. This approach squarely conflicts with the Clean Water Act's cooperative federalism framework and has no basis.

The plain language, legislative history, and judicial interpretation of section 401(a)(1) preclude EPA's proposal to empower federal agencies to treat a state's denial of a section 401 certificate "in a similar manner as waiver" if the federal agency determines that the denial is outside the "scope of certification" as defined by EPA or fails to include certain information required by EPA. 84 Fed. Reg. at 44,121.

i. Section 401 prohibits federal agencies from issuing federal permits if a state has denied a water quality certification.

First, the plain language of section 401 provides that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived." 33 U.S.C. § 1341(a)(1). Even if this direct command could be subject to more than one interpretation, the following sentence leaves no doubt: "No license or permit shall be granted if certification has been denied by the State[.]" *Id.* Thus, the plain and unambiguous language of the statute gives states the final decision on certification requests, precluding review of state certification denials by federal agencies.

Second, although this plain language is dispositive, the legislative history of section 401 further demonstrates that Congress intended a state's denial of certification to be final and unreviewable by federal agencies. The House Report on section 401 states that "[d]enial of certification by a State . . . results in a *complete prohibition* against the issuance of the Federal license or permit."[46] Moreover, "[i]f a State refused to give a certification, the courts of that State are the forum in which the applicant must challenge the refusal."[47] Similarly, the Senate Report on its proposed version of section 401 provides that "[s]hould … an affirmative denial occur" by a State "no license or permit could be issued" by the relevant federal agency "unless the State action was overturned in the appropriate courts of jurisdiction."[48]

Moreover, both the House and Senate versions of section 401 largely carried forward existing language from section 21(b) of the version of the Federal Water Pollution Control Act enacted in

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[46] H. Rep. 92-911, at 122, *reproduced in* Legislative History Vol. 1 at 809 (emphasis added).
[47] *Id.*
[48] S. Rep. 92-414, at 69 *reproduced in* Legislative History Vol. 2 at 1487.

1970. *See* Federal Water Pollution Act, § 21(b) (1970), *enacted by* 84 Stat. 91, at 108, Public Law 91-224. In enacting section 21(b), Congress noted that "[d]enial of certification by a State … results in a complete prohibition against the issuance of the Federal license or permit."[49] Again, Congress made clear that "[i]f a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge that refusal."[50]

Indeed, during the 1969 House debate on its version of the certification requirement, which at the time did not include a waiver provision, a Representative asked "is it not possible that a State, for reasons other than water pollution, may refuse to grant such certification or simply fail to act upon it? If so, what could the applicant do?"[51] A member of the Public Works committee responded that although "there was a possibility that this could happen" it was "assumed . . . that all of the people involved in connection with this pollution control would be acting in good faith."[52] But the committee member further noted that "if the applicant has reason to feel that [its] rights have been interfered with the judicial procedures available now in the State courts to require action by the State would be available to the applicant."[53] After the waiver provision was added to the House bill, a congressperson noted that although the waiver provision would *not* "protect an applicant against arbitrary action by a State agency," the "normal appeals procedures to the courts will protect a license applicant" in the "rare case" of arbitrary state action.[54]

This legislative history recognizes, in no uncertain terms, that a state's denial of a section 401 certification would operate as a "complete prohibition" on a federal agency issuing the relevant permit or license, reviewable only by a court of competent jurisdiction. Federal agencies simply do not have the authority to overrule or ignore state denials.

Courts have consistently recognized that the plain language of section 401(a)(1) "mean[s] exactly what it says: that *no* license or permit . . . shall be granted if the state has denied certification." *United States v. Marathon Development Corp.*, 867 F.2d 96, 101 (1st Cir. 1989). The Supreme Court has noted that section 401 "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.'" *S.D. Warren*, 547 U.S. at 380 (quoting S. Rep. No. 92-414, p. 69 [1971]). Section 401 entitles a state agency to "conduct its own review" of a project's "likely effects on [state] waterbodies" and to determine "whether those effects would comply with the State's water quality standards." *Constitution Pipeline Co., LLCNew York State Dep't of Envtl. Conservation*, 868 F.3d 87, 101 (2d Cir. 2017), *cert. denied* 138 S. Ct. 1697 (2018). Where the state agency determines that a project will not comply with state water quality

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[49] Conf. Rep. on H.R. 4148, *reproduced in* Congressional Record—House, H.2315, at H.2330 (March 24, 1970).
[50] *Id*.
[51] House Debate on H.R.4148, *reproduced in* Congressional Record—House, at H.2608 (April 15, 1969).
[52] *Id.* at H.2609.
[53] *Id*.
[54] House Debate on H.R.4148, *reproduced in* Congressional Record—House, at H.2691 (April 16, 1969).

standards, it can "effectively veto[]" the project, even if the project "has secured approval from a host of other federal and state agencies." *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), *cert. denied* 555 U.S. 1046 (2008). In short, Congress "intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating*, 927 F.2d at 622.

Courts have also recognized and enforced Congress' intent to require that applicants seek review of section 401 denials in a court of appropriate jurisdiction. State decisions to grant or deny a request for a water quality certification "turn[] on questions of substantive environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence." *Keating*, 927 F.2d at 622-23. The federal agencies' "role [in the section 401 state review process] is limited to awaiting and then deferring to, the final decision of the state." *City of Tacoma*, *Wash. v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006). In short, a state's denial of a section 401 certification is reviewable in the court of appropriate jurisdiction, not before any federal agency. *See Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) ("a State's decision on a request for section 401 certification is generally reviewable only in State court"); *Marathon Development Corp.*, 867 F.2d at 102 ("Any defect in a state's section 401 water quality certification can be redressed. The proper forum for such a claim is state court, rather than federal court, because a state law determination is involved.").

By treating a state denial of a section 401 certification as a waiver of state review, the proposed rule seeks to undo the core purpose of section 401—to prevent federal agencies from railroading states into accepting projects that adversely impact water quality. A state that has denied a section 401 certification request within the waiver period has not waived its authority, although its decision remains subject to judicial review.[55] The heavy-handed approach presented in the proposed rule is counter to the statute and should be withdrawn.

ii. EPA's Proposal to Institute Control and Oversight of State Conditions Imposed in Water Quality Certifications Runs Afoul of the Clean Water Act and Controlling Judicial Precedent.

Similarly, the plain language, legislative history, and judicial interpretation of section 401(d) preclude EPA's proposal to empower federal agencies to determine, on a case-by-case basis, whether state-imposed conditions on a certification are within the "scope" of section 401, as defined by EPA.

The plain language of section 401(d) provides that any condition imposed in a state certification "shall become a condition on any Federal license or permit" for which it is issued. The use of the word "shall" unambiguously connotes a "command" that "imposes a mandatory duty" on federal agencies. *Kingdomware Technologies, Inc. v. United States*, ___ U.S. ___, 136 S. Ct. 1969, 1977 (2016). Section 401 provides no exception to this plain command for situations in which a federal agency believes a state has exceeded its authority under section 401, and EPA's contrary interpretation violates the plain language of the statute. *See, e.g., Escondido Mut. Water Co.*, 466

[55] *See* Legislative History Vol. 1, at 809; Legislative History Vol. 2, at 1487.

U.S. at 779 (requiring the federal agency to incorporate mandatory conditions, stating "nothing in the legislative history or statutory scheme is inconsistent with the plain command of the statute that licenses issued within a reservation by the Commission pursuant to [Federal Power Act] § 4(e) 'shall be subject to and contain such conditions as the Secretary' . . . shall deem necessary").

The legislative history of section 401 confirms that appropriate state courts—not federal agencies—are the forum for challenging state conditions on certifications that an applicant believes are unlawful. The Senate report on section 401 noted that "the provision makes clear that any water quality requirements established under State law . . . shall through certification become conditions on any Federal license or permit."[56] The committee noted that "[t]he purpose of the certification mechanisms provided in this law is to assure that Federal licensing or permitting agencies *cannot override* State water quality requirements."[57] And yet EPA, in the proposed rule, attempts to do exactly that: allow federal agencies to override state determinations made pursuant to state law.

Confirming the plain language and legislative history, courts interpreting section 401 have *universally* held that federal agencies lack the authority to second-guess conditions imposed by states in water quality certifications.

In *PUD No. 1*, all nine justices of the Supreme Court agreed that federal agencies are bound by state section 401 decisions. The majority noted that "[t]he limitations included in the certification become a condition on any federal license." *PUD No. 1*, 511 U.S. at 708. The dissenting justices went further, noting that "[b]ecause of § 401(d)'s mandatory language, federal courts have uniformly held that [federal agencies have] no power to alter or review § 401 conditions, and that the proper forum for review of those conditions is state court." *Id.* at 734 (Thomas, J., dissenting). In other words, "Section 401(d) conditions imposed by State" are "binding" on federal agencies. *Id.*

Courts of Appeals interpreting section 401(d) have reached similar conclusions. As of the date of these comments, the First, Second, Third, Fourth, Ninth and District of Columbia Circuits have all recognized that state-imposed conditions are not subject to federal agency review. No Circuit has reached the contrary conclusion. In fact, as early as 1982, the First Circuit recognized that "courts have consistently agreed" that "the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification." *Roosevelt Campobello Intern. Park Comm'n v. U.S. Envt'l Protection Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982). This conclusion, the First Circuit held, was "supported by the statutory scheme of the Clean Water Act" that sought to preserve state authority to impose requirements and conditions more stringent than those required by the federal government. *Id.* Courts of Appeals to consider the issue over the next decade agreed that federal agencies lacked authority to second-guess or review conditions imposed by state water quality certification, which must be reviewed in state court. *See U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992)

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[56] Senate Rep. 92-414, at 69, *reproduced in* Legislative History Vol. 2, at 1487.
[57] *Id.* (emphasis added).

("FERC may not alter or reject conditions imposed by states through section 401 certificates."); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3d Cir. 1988) ("only the state may review the limits which it sets through the [section 401] certification process.").

In *American Rivers v. FERC*, the Second Circuit rejected FERC's refusal to incorporate several conditions imposed by the State of Vermont on hydropower plants' section 401 certificates. 129 F.3d at 102-103. FERC argued that the conditions—which included reserving to the state the right to reopen the certification when appropriate, to review and approve any significant changes to the project, and to approve final erosion-control plans before construction commenced—were "beyond the scope" of the State's section 401 authority. *Id*. The Second Circuit rejected this approach, concluding that "the statutory language is clear" and "unequivocal, leaving little room for FERC to argue that it has authority to reject state conditions it finds to be *ultra vires*." *Id.* at 107. The Second Circuit also rejected FERC's various attempts to avoid the "mandatory language" of section 401(d), concluding that nothing in section 401 delegated to FERC "the authority to decide which conditions are within the confines of § 401(d) and which are not." *Id.*; *see also id.* at 110-111 (FERC "does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401."). The Court observed that "applicants for state certification may challenge in courts of appropriate jurisdiction any state-imposed condition that exceeds a state's authority under § 401." *Id.* at 112.

Most recently, the Fourth Circuit rejected the Army Corps' attempt to impose its own water quality condition of a specific project "in lieu of" a condition imposed by the State of West Virginia on the applicable nationwide permit. *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d at 645-46. The Fourth Circuit rejected the Army Corps' attempt to invoke agency deference, holding that the "plain language" of section 401(d) "leaves no room for interpretation." *Id*. at 644-45. Observing that "[e]very Circuit to address this provisions has concluded that 'a federal licensing agency lacks authority to reject [state section 401 certification] conditions,'" the Fourth Circuit concluded that "[t]he plain language of the statute does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, *even if* the Corps determines that the alternative condition is more protective of water quality." *Id*. at 646, quoting *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1218 (9th Cir. 2008) (emphasis added).

In a similar context with virtually identical statutory text, the U.S. Supreme Court admonished a federal permitting agency for ignoring such clear statutory language to include mandatory conditions from the Department of the Interior in its federal license. *See Escondido Mut. Water Co.*, 466 U.S. at 779. The Court found no room in this language to argue otherwise, finding no "clear expressions of legislative intent to the contrary." *See id*. at 772. As discussed in Point II of this letter, there is no support in the Act's legislative history for EPA's proposal to disregard or overrule state conditions or denials of section 401 certifications. In fact, the Clean Water Act legislative history demonstrates that the clear statutory terms mean what they say. Accordingly, any reviewing court will likely find, as the Supreme Court did in *Escondido*, that this statutory arrangement makes sense given state certifying agencies' familiarity with its water-quality standards and reservation of right to determine what conditions are necessary for adequate protection of its waters. *Cf. Escondido Mut. Water Co.*, 466 U.S. at 778–79 ("The fact that in reality it is the Secretary's, and not the Commission's, judgment to which the court is giving

deference is not surprising since the statute directs the Secretary, and not the Commission, to decide what conditions are necessary for the adequate protection of the reservation. There is nothing in the statute or the review scheme to indicate that Congress wanted the Commission to second-guess the Secretary on this matter.").

EPA attempts to disregard the clear case law by asserting that its counter-textual and unsupported interpretation of Section 401 is entitled to *Chevron* deference and couching the proposed rule as the agency's first "holistic" analysis of section 401. 84 Fed. Reg. at 44,103-104. EPA's invocation of *Chevron* deference is misplaced because the judicial precedent is based on the plain language of the Clean Water Act. For example, although *American Rivers* and *Sierra Club* specifically dealt with the authority of FERC and the Army Corps, respectively, the decisions were based on the plain language of section 401. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Nor is *Snoqualmie Indian Tribe v. FERC* to the contrary. 545 F.3d 1207 (9th Cir. 2008). There, the Ninth Circuit held that FERC could impose *additional* conditions on a federal permit, if those conditions "do not conflict with or weaken the protections provided by" the state's water quality certification. *Id.* at 1218-19 (emphasis added). The Ninth Circuit recognized that "a federal licensing agency lacks authority to reject" state-imposed water quality certification "conditions in a federal permit," but concluded that "FERC did not reject" the state-imposed standards in that case, but "incorporated them in its [federal] License and strengthened them." *Id.* at 1218. No amount of "holistic" analysis can contradict the plain language of the statute. *See U.S. Ent'l Protection Agency*, 573 U.S. 302, 328 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

EPA's attempts to manufacture ambiguity in the statute by suggesting that Congress intended to allow EPA to define the term "condition" under section 401. *See* 84 Fed. at 44,105-106. This argument fails because it misconstrues the structure of section 401(d). Section 401(d) provides that a states' certification may set forth "any effluent limitations and other limitations," along with "monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply" with appropriate state standards and requirements. 33 U.S.C. § 1341(d). The *certification*, in turn, "shall become *a condition* on any Federal license or permit." *Id*. (emphasis added). In other words, states impose "limitations" and "monitoring requirements" in a certification, and the certification itself then becomes "a condition" on the federal permit. There is no ambiguity in this arrangement, which requires that the certification is incorporated whole cloth into the federal license or permit. *See Am. Rivers*, 129 F.3d at 107.

EPA is similarly wrong in claiming that courts have recognized federal authority to review the substance of state denials of or conditions on section 401 certifications. *See* 84 Fed. at 44,106. The authority of federal agencies to review state section 401 certifications is narrow and limited to ensuring that the state complies with the specific procedural requirements set forth in section 401. *See Alcoa Power Generating Inc.*, 643 F.3d at 971 ("A water quality certification is reviewable in federal court, however, at least to the extent section 401 itself imposes requirements that a state must satisfy"). Thus, in *City of Tacoma*, the D.C. Circuit held that FERC had "an obligation to confirm, at least facially, that the state has complied with section 401(a)(1)'s public notice requirements." 460 F.3d at 67-68. The Court, however, also recognized the "rule" that "the decision whether to issue a section 401 certification generally turns on

questions of state law" and "FERC's role is limited to awaiting, and then deferring to, the final decision of the state." *Id.* at 67. "Otherwise," the Court cautioned, "the state's power to block the project would be meaningless." *Id. City of Tacoma* thus stands for the proposition that federal agencies must take basic steps to ensure that states comply with the procedural public notice requirement that is explicitly set forth in section 401.

In *Keating*, the State had already issued a section 401 certification to the applicant, but then attempted to revoke that certification. *Keating*, 927 F.2d at 622-23, 625. The D.C. Circuit held that, in a case where the federal permit requiring a section 401 certification had already been issued, FERC had an obligation to confirm that the state complied with the procedures set forth in section 401(a)(3) for withdrawing the certification. *Id.* at 623-24. The Court recognized the "freedom the states may have to impose their own substantive policies in reaching initial certification decisions," but concluded that "the picture changes dramatically once that decision has been made and a federal agency has acted upon it." *Id.* at 623. *Keating* therefore has no application to cases where a state has not yet acted a certification request.

EPA's suggestion that federal agencies have struggled to enforce state certifications conditions, 84 Fed. Reg. at 44,116, misses the point. The remedy for federal agencies unhappy with the system of cooperative federalism created by the Clean Water Act must be legislative, not administrative. In any case, enforcement of certification conditions may also be initiated by the appropriate states through state law administrative remedies or through citizen lawsuits. *See* 33 U.S.C. § 1365(a). After all, "the Water Quality Certification is by default a state permit," and states may enforce their own permits. *Delaware Riverkeeper Network v. Secretary of Penn. Dep't of Envt'l Protection*, 833 F.3d 360, 368 (3d Cir. 2016).

None of the cases cited by EPA in the proposed rule suggested that federal agencies have authority to review the *substance* of state-imposed section 401 conditions to determine whether they comply with EPA's view of the appropriate scope of the statute. In short, the proposed rule utterly conflicts with case law limiting federal agency review of state certification decisions.

C. EPA's Attempt to Restrict the Timing and Scope of State Review of Section 401 Requests Conflicts with the Plain Language and Legislative Intent of the Clean Water Act.

Section 401 provides that a state waives its authority to issue, condition, or deny a section 401 certification *only* if the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1) (the "waiver provision"). The statute imposes no further restrictions on the timeframe or scope of the State's review of a section 401 application. Out of this modest restriction, EPA attempts to craft a procedural and substantive gauntlet that states must navigate if they wish to avoid inadvertently waiving their section 401 authority.

EPA attempts to justify its counter-contextual approach by suggesting that the language "fails or refuses to act" should be read to mean *both* "a fail[ure] or refus[al] to act" *and* "a fail[ure] or refus[al] to act [within the statute's permissible scope]." 84 Fed. at 44,110. As an initial matter, EPA's proposed interpretation would impermissibly add words to the statute. Moreover, EPA's

proposed interpretation violates the Congressional intent behind the waiver provision, which was intended only to prevent "sheer inactivity" by the state, not to authorize federal agencies to interject themselves into every aspect of state administrative review. Indeed, when the waiver provision was first added it was acknowledged that *any* state action within the required time period—even an arbitrary and capricious one—would not constitute a waiver.[58]

The waiver provision first appeared in 1970, when section 21(b) was added to the Federal Water Pollution Control Act. *See* Public Law No. 91-224, 84 Stat. 91, at 108 (April 3, 1970). Section 21(b) combined state certification requirements from a house bill (H.R.4148) and senate bill (S.7) that took different approaches to the timing requirement. The original version of the House bill (H.R.4148) reported from the Public Works Committee to the House did not include any limitation to the timeframe of state review.[59] In response to concerns that a state could block federally approved projects by simply not acting on an application for a water quality certification, the bill was amended to provide that "[i]f an affected State . . . fails to act to certify or refuses to certify within a reasonable period of time as determined by the licensing or permitting agency . . . the certification requirements of this subsection shall be waived."[60] The amendment was intended to "guard[] against a situation where the [certifying state] simply sits on its hands and does nothing."[61]

In considering the new waiver provision, members of Congress acknowledged its limited effect. The state would "not have any particular pressure to compel certification but it is put in the position … to do away with dalliance or unreasonable delay and to require a 'yes' or 'no.'"[62] Nor would the waiver provision "protect an applicant against arbitrary action by a State agency" – rather, the "normal appeals procedures to the courts will protect a license applicant."[63] In other words, the state would be required to act on an application, but, once the state acted, any challenge to that action would have to go through regular judicial review procedures.[64] The Senate version of the state certification requirement (S.7) took a different approach to the timing issue, imposing a flat one-year limit on state action.[65] The Senate bill provided no further restrictions on the timing or substance of state certification decisions.

The final version of section 21(b) combined the two approaches by requiring the state to act "within a reasonable period of time (which shall not exceed one year)."[66] Notably, the final version of the bill did not adopt the House's proposed language empowering federal agencies to

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[58] House Debate on H.R.4148, *reproduced in* Congressional Record—House, at H.2691 (April 16, 1969).
[59] *See* House Rep. 91-127, at 42-43.
[60] House Debate, Congressional Record—House, at H.2689 (April 16, 1969).
[61] *Id.* at H.2690.
[62] *Id.*
[63] *Id.* at H.2691.
[64] *See id*.
[65] *See* S. Rep. 91-351, at 113.
[66] Public Law 91-224, at 18 (April 3, 1970).

establish the reasonable period of time.[67] The Conference Report noted that the waiver provision was included "[i]n order to insure that sheer inactivity by the State . . . will not frustrate the Federal application."[68] The Conference Report also noted that "[i]f a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge that refusal."[69]

As noted above, when the Clean Water Act was reorganized and amended in 1972, the waiver provision was carried forward essentially unaltered in what is now section 401.[70] The House Report restated, verbatim, the original justification for the waiver provision: "to insure that sheer inactivity by the State . . . will not frustrate the Federal application."[71]

Section 401 does not permit a federal agency to determine that a state has failed to "act" on the application simply because the federal agency believes the denial or conditions are outside of the EPA-dictated scope of section 401, as the proposed rule would allow. 84 Fed. Reg. at 44,120. A state that issues with conditions or denies a section 401 certification within the waiver period has not "fail[ed]" or "refus[ed]" to act on the request, and therefore has not waived its authority. 33 U.S.C. § 1341(a)(1). A state that timely denies certification or issues a certification with conditions has not engaged in the "sheer inactivity" sought to be prevented by the waiver provision. Indeed, the legislative history of section 401 is clear that Congress did not intend the waiver provision to allow federal second-guessing of the substance of state decision-making, which would remain subject to judicial review.[72]

The waiver provision of section 401 also does not authorize EPA to arbitrarily limit the information that a state agency can request from an applicant. Under the proposed rule, a state's time to act on a section 401 certification would begin to run upon receipt of seven basic items of information, and could not be paused or extended. *See* 84 Fed. Reg. at 44,099. Amongst those seven enumerated items are the applicant's name and contact information, the relevant federal license of permit, and a statement affirming that the applicant is requesting a 401 certification, all of which are essentially administrative, not substantive, pieces of information. *Id.* This means states could not obtain more time for review even if, for example: (1) the state requires additional information to make an informed decision or comply with state administrative procedures; (2) the scope of the project substantially changes after the request is submitted; or (3) the initial request fails to correctly identify the number, location, or nature of potential discharges. Nothing in section 401 contemplates that the waiver provision was intended to artificially limit the

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[67] *Id.*
[68] H.R. Conf. Rep. 91-940, *reproduced in* Congressional Record—House, at H.2330 (March 24, 1970).
[69] *Id.*
[70] 86 Stat. 816, at 877-78, Public L. No. 92-500 (Oct. 18, 1972).
[71] H.R. 92-911, *reproduced in* Legislative History Vol. 1 at 809.
[72] *See, e.g.,* H.R. Conf. Rep. 91-940, *reproduced in* Congressional Record—House, at H.2330 (March 24, 1970); *see also* Point III.B.ii, *supra* (plain language of section 401 prohibits federal oversight of state denials and certifications).

information a state could require from an applicant so that the state can make an informed decision. Preventing a state from "sit[ting] on its hands," is quite different from *forcing* a state to make decisions in an artificially short time period based on insufficient, outdated, or incorrect information.[73]

EPA also attempts to use the waiver provision and a selective reading of applicable case law to prohibit states from asking applicants to withdraw and resubmit applications in order to extend the time period for state review. 84 Fed. Reg. at 44,120. EPA's sole authority for prohibiting the withdrawal and resubmittal process is *Hoopa Valley Tribe v. FERC*, in which the D.C. Circuit held that waiver had occurred where an applicant and states had, pursuant to a written agreement, repeatedly extended the timeframe for the states' review of a water quality request for more than a decade by having the applicant purport to withdraw and resubmit the request via the same one-page letter. 913 F.3d 1099,1103-1105 (D.C. Cir. 2019), *petition for certiorari pending* Docket No. 19-257. But the D.C. Circuit was very clear that *Hoopa Valley* was limited to the "coordinated withdrawal-and-resubmission scheme" at issue in that case, and was not intended to prohibit withdrawal-and-resubmission generally, especially in circumstances where an applicant withdraws and resubmits a new "request." *Id.* at 1103-04. EPA contorts this narrow holding to establish an unworkable rule that state agencies may *never* ask an applicant to withdraw and resubmit an application, regardless of the complexity of the project, any project changes over the course of state review, or the circumstances of that case.

Moreover, in flatly prohibiting the use of withdrawal and resubmission to extend the deadline for state action, EPA ignores authority from other circuits. In *N.Y.S. Dep't of Envt'l Conservation v. FERC*, the Second Circuit held that if a state believes an applicant has submitted insufficient information, it could "request that the applicant withdraw and resubmit the application." 884 F.3d 450, 456 (2d Cir. 2018) (*NYSDEC v. FERC*), citing *Constitution Pipeline*, 868 F.3d at 94 (in which "an applicant for a section 401 certification had withdrawn its application and resubmitted at the Department's request—thereby restarting the one-year review period"). EPA's statement that the Second Circuit did not "opine on the legality of such an arrangement" is simply wrong. 84 Fed. Reg. at 44,091 n. 19. To the contrary, the Second Circuit held out the withdrawal and resubmittal process as a way to ensure that a state can work with the applicant to refile in accordance with its requirements in cases where the applicant submits insufficient information, even in cases where the waiver period starts before a complete application has been received. 884 F.3d at 456. EPA now seeks to shut off the path of review held open by the Second Circuit by prohibiting states from obtaining more time for review by asking applicants to withdraw and resubmit their applications.

As a practical matter, EPA says nothing about what a State is to do if an applicant *voluntarily* withdraws an application and submits a new request. By failing to address issues related to voluntary withdrawal, the proposed rule creates more ambiguity and uncertainty. Must the state agency deny the now-withdrawn application within the original reasonable period? May the State treat a withdrawn and resubmitted application as a new request triggering a new waiver period if the applicant takes that step of its own volition, but not if the state suggested that more time is

[73] House Debate, Congressional Record—House, at H.2689 (April 16, 1969).

necessary for review? Must the State ensure that the request is sufficiently different to be considered a "new" request? If so, what should the State consider? EPA does not say.

Finally, nothing in the text or legislative history of section 401 gives EPA or other federal agencies the authority to establish federal oversight of deadlines for state action, as contemplated in section 121.4 of the proposed rule. 84 Fed. Reg. at 44,120. The plain language and legislative history of section 401 provide that states have "a reasonable period of time" of "up to one year" to act on certification requests. The language from the House version of the waiver provision that would have provided for federal authority to set deadlines was not included in the final version of the bill, which instead adopted the Senate's maximum review period of one year. The "reasonable period" contemplated by section 401 must necessarily depend on a variety of factors, including the nature of the project and the requirements of state administrative law. Applicants or other parties dissatisfied with the length of time required for state review can—and have—made case-by-case arguments to the applicable federal agency that the state has waived its review. *See, e.g., Hoopa Valley Tribe*, 913 F.3d at 1102; *NYSDEC v. FERC*, 884 F.3d at 454. No further federal oversight of the timing of state section 401 review is permissible and proper.

In sum, the proposed rule leaves states with an untenable set of choices, each of which threatens the integrity of state waters: (1) grant a section 401 certification based on incomplete or inaccurate information (risking legal challenge from parties opposed to the proposed project); (2) grant the certification with conditions without knowing whether the federal agency will fully incorporate those conditions in the permit or license; (3) deny the certification and risk having the federal agency nevertheless conclude the state has waived, or being sued by the project proponent; or (4) explicitly waive and thus allow the project to be constructed without any assurance that it will comply with state water quality standards and requirements.

Moreover, EPA's counter-textual approach is not necessary to ensure that state section 401 certifications do not delay federal licensing decisions. The vast majority of certifications are issued in a timely manner. In complex cases where the certification decision takes more time, the federal agencies involved regularly require more than a year to make a decision on the federal application. Rather than speed project implementation, the proposed rule will, in fact, lead to unnecessary denials of certification applications and an overall increase in litigation and uncertainty over projects for which section 401 certification is required.

D. EPA's Proposal Would Violate the Clean Water Act by Dictating the Scope and Substance of State Administrative Procedures.

EPA's proposed rule impermissibly intrudes on state authority to create and follow state administrative procedures when reviewing section 401 applications. Although EPA's proposed rule only "recommends" that states "update" their procedural and substantive regulations, by attempting to dictate the contents of section 401 requests, the scope and timeframe of state review, and the contents of state decisions, EPA seeks to override every aspect of the state administrative process for section 401 certifications.

Except for requiring states to provide for public notice and, in appropriate cases, public hearings on certification requests, section 401 does not require states to follow a particular procedure in

reviewing requests for certification. *See* 33 U.S.C. § 1341(a)(1); *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007), quoting 33 U.S.C. § 1251(b) ("In the [Clean Water Act], Congress expressed its respect for states' role through a scheme of cooperative federalism that enables states to 'implement ... permit programs'"). Accordingly, courts have long recognized that a state reviewing a section 401 request may apply the appropriate state administrative procedures. *See, e.g., Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019) ("State Agencies have broad discretion when developing the criteria for their section 401 Certification."); *Berkshire Envt'l Action Team,* 851 F.3d at 113 (finding "no indication" in section 401 that Congress "intended to dictate how" a state agency "conducts its internal decision-making before finally acting"); *Delaware Riverkeeper Network*, 833 F.3d at 368 ("the Water Quality Certification is by default a state permit, and the issuance and review of a Water Quality Certification is typically left to the states"); *City of Tacoma*, 460 F.3d at 67-68 (noting that federal agency's role in state decision to issue section 401 certification is "limited" and that federal agency is not in a position to second-guess the state's application of state procedural standards to the applicant).

States have established a wide range of efficient and fair administrative procedures, which share certain features designed to enable the thorough review contemplated by section 401.[74] Initially, a state reviews a section 401 application to ensure that it includes sufficient information for meaningful review by the state agency and the public. A state that receives a deficient or incomplete application may require the applicant to provide additional information.[75] The process of obtaining required information is not entirely within the reviewing agency's control, and applicants can frustrate the timeframe for review by failing to provide requested materials necessary to the state's review of the application. *See, e.g., Constitution Pipeline*, 868 F.3d at 103. In some cases, states also must await completion of federal and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications.[76] Many states provide public notice, and where a state deems appropriate, public hearings once sufficient information supporting an application has been received for a state to deem an application complete. In many states, public notice must be accomplished through publication in one or more local newspapers as well as in official agency

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[74] *See, e.g.*, 314 Code of Massachusetts Regulations (C.M.R.) § 9.05(3); 6 New York Code of Rules and Regulations (N.Y.C.R.R.) § 621.7(a)(2), (g); 15A North Carolina Administrative Code (N.C.A.C.) § 02H.0503; 250 Rhode Island Code of Regulations (R.I.C.R.) § 150-05-1.17; Vermont Admin. Code (Vt. A.C.) § 16-3-301:13.11; Conn. Gen. Stat. 22a-6h; 23 Cal. Code of Regulations (Ca.C.R.) §§ 3855-3861.

[75] *See, e.g.*, N.Y. Environmental Conservation Law § 70-0109(2)(a); *see also* 310 C.M.R. § 4.10(8)(g)3.a.-b.; 314 C.M.R. § 9.05(1); 6 N.Y.C.R.R. §621.7(a), (f); 250 R.I.C.R. § 150-05-1.17(B), (D); Vt. A.C. § 16-3-301:13.3(c)(3); Or. Admin. R. 340-048-0032(2).

[76] *See, e.g.*, 23 Ca.C.R. §§ 3836(c), 3837(b)(2) (projects subject to section 401 water quality certification must be reviewed under the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., as appropriate, before approval by the State Water Resources Control Board or the Regional Water Quality Control Boards); 6 N.Y.C.R.R. § 621.3(a)(7) (an application is not considered complete until a negative declaration or draft environmental impact statement have been prepared pursuant to state environmental quality review act, ECL article 8).

publications.[77] In almost all cases, states must hold a public comment period ranging from fifteen to forty-five days.[78] To ensure meaningful public review, states appropriately provide extensions of public comment periods for significant projects.[79] The period of public participation may be further extended in situations where states receive requests for a public hearing.[80] After the public comment period and any public hearings are complete, the state agency must review and, in many cases, respond to the public comments received before making a certification determination.[81]

Many of the undersigned states previously provided information regarding their administrative procedures to EPA.[82] But rather than respect states' authority to carry out states administrative procedures, the proposed rule seeks to impose EPA oversight and control over virtually every aspect of the state administrative process for section 401 certifications.

First, EPA's proposed new definition of "certification request" conflicts with the text of the Clean Water Act, Congressional intent, and case law. Under the Clean Water Act, a state agency's timeframe for issuing or denying a section 401 certification commences upon "receipt of such request [for certification]." 33 U.S.C. § 1341(a)(1). Yet the proposed rule—and specifically its reliance on receipt of a barebones "certification request" to trigger a state's certification review period—contradicts clear congressional intent and turns on its head EPA's

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[77] *See, e.g.*, 6 N.Y.C.R.R. § 621.7(a)(2), (c); 15A N.C.A.C. § 02H.0503(a); 250 R.I.C.R. § 150-05-1.17 (D)(1)(a); 9 Va. Admin. Code (Va.A.C.) § 25-210-140(A).

[78] *See, e.g*., 5 Col. Code of Regulations § 1002-82.5(B)(1) (30 days); Conn. Gen. Statutes Ann. § 22a-6h(a) (30 days); 314 C.M.R. § 9.05(3)(e) (21 days); 6 N.Y.C.R.R. § 621.7(b)(6) (15 to 45 days); 250 R.I.C.R. § 150-05-1.17(D)(2) (30 days); Va. Code § 62.1-33.15:20(C) (45 days for state agencies to provide comment); 9 Va.A.C. § 25-210-140(B) (30 days for public comment); Vt. A.C. §§ 16-3-301:13.3(c), 13.11(c) (30 days); 23 Ca.C.R. § 3858(a) (at least 21 days).

[79] *See, e.g*., Ca. State Water Resources Control Bd., Draft Water Quality Certification Comment Deadline Extended for Application of Southern California Edison Co. (Sept. 27, 2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/big_creek/docs/final_bc_ceqa_draft_cert_notice_extended.pdf; N.Y. Dep't of Envtl .Conservation, Notice of Supplemental Public Comment Hearing and Extension of Public Comments on Application of Transcontinental Gas Pipe Line Company, LLC (Feb. 13, 2019), https://www.dec.ny.gov/enb/20190213_not2.html.

[80] *See, e.g*., Conn. Gen. Stat. 22a-6h(d) (applicant may request public hearing within 30 days of publication of a tentative determination); 250 R.I.C.R. § 150-05-1.17(D)(3) (providing for a mandatory public hearing if enough requests are received, notice of which must be provided fourteen days prior to date of hearing); 15A N.C.A.C. §§ 02H.0503(d), 0504 (notice of public hearing must be given thirty days prior to date of hearing, and record of public hearing must be held open for thirty days after the date of hearing); Vt. A.C. § 16-3-301:13.3(g), (h) (public hearing may be requested during public comment period, and notice of public hearing must be given thirty days before date of hearing).

[81] *See, e.g*., 310 C.M.R. § 4.10(8)(g) 3.b.; 205 R.I.C.R. §150-05-1.17(D)(4); Or. Admin. R. 340-048-0042(5).

[82] *See* Attachments A and B.

own longstanding practice of requiring a complete application prior to the commencement of a state's certification review period.[83]

Specifically, EPA proposes to define a "certification request" to include:

> A written, signed and dated communication from a project proponent to the appropriate certifying authority that: (1) Identifies the project proponent(s) and a point of contact; (2) Identifies the proposed project; (3) Identifies the applicable federal license or permit; (4) Identifies the location and type of any discharge that may result from the proposed project and the location of receiving waters; (5) Includes a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat or control the discharge; (6) Includes a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received; and (7) Contains the following statement: "The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time."

84 Fed Reg. 44189-44120. But, EPA's interpretation of the trigger for section 401 certification review as requiring a written "certification request" accompanied by this limited set of information does not comport with section 401 or the Clean Water Act. Many states have specific—and much more robust—requirements for what must be included in an application for a state permit or certification before it can be considered administratively complete. *See, e.g.,* 6 N.Y.C.R.R. §§ 621.3, 621.4. An administratively complete application, in turn, is required in many states before public notice and comment on an application can begin. *See, e.g.,* N.Y. Environmental Conservation Law § 70-0109(2)(a); 6 N.Y.C.R.R. § 621.7(a)(2), (g). The minimal information required by the proposed rule for a certification request to trigger the review period is insufficient to allow states to fully evaluate the impacts of the proposed activity and associated discharges and take appropriate action to address these impacts.

Moreover, the benefits of requiring a complete application before the timeframe for section 401 review commences are numerous. For a "certification request" to be meaningful, the states need sufficient information to determine whether the project will comply with water quality standards and requirements. Requiring a complete application is necessary to provide public notice and obtain meaningful public comment.[84] After public notice and comment, state agencies review any public comments and determine whether a public hearing is required or appropriate, respond to the comments, and decide whether the application should be granted, granted with conditions, or denied. A state agency required to act within one year of receiving an incomplete application may not be able to conclude that a project would comply with state standards and could be

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[83] *See* 2010 Guidance, at 15-16.

[84] *See, e.g., Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D. W. Va. 2010) (noting that "[c]ompletion and public notice are inextricably linked" and rejecting public notice and comment process undertaken on incomplete application).

forced to act on an application before this public notice and comment process has concluded (or even commenced). Accordingly, only a complete application can trigger the one-year waiver period and ensure that states can fully exercise their authority under section 401.

Under the proposed rule, applicants could frustrate a state's section 401 review by submitting an incomplete or deficient application and waiting until a few days before the expiration of the one-year period to "complete" an application with information required by the state. This approach deprives states of meaningful consideration and review within the one-year period. Requiring a complete application avoids this potential for gamesmanship.

Second, the proposed rule limits states' authority to seek additional information relevant to their certification decisions, contrary to section 401. Section 401(a)(1) requires that a state "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1). A state must not only establish such procedures; it must comply with them. *See City of Tacoma, Wa.*, 460 F.3d at 67-68. The Clean Water Act allows state agencies to follow state law when complying with section 401's public notice and hearing requirement, *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envt'l Prot.*, 903 F.3d. 65, 75 (3d. Cir. 2018), *cert. denied* 139 S. Ct. 1648 (2019) (Clean Water Act section 401 provides states with discretion as to how they establish public notice and/or hearing procedures), and more broadly when determining whether to issue, condition, or deny a section 401 certification. *See Berkshire Envtl. Action Team, Inc.*, 851 F.3d at 112-13, n.1 (Clean Water Act section 401 does not affect how agency conducts "internal decision-making before action"); *City of Tacoma*, 460 F.3d at 67-68) ("the decision whether to issue a section 401 certification generally turns on questions of state law"). Recognizing that meaningful state agency and public review cannot be rushed, Congress gave states a reasonable period—up to "one year"— to exercise this broad authority pursuant to state administrative procedures (including public notice and, if appropriate, hearings) when making a section 401 certification determination. 33 U.S.C. § 1341(a)(1). EPA's regulations must preserve the flexibility the Clean Water Act affords to states to design and comply with their own administrative processes when reviewing section 401 certification applications

Third, because the proposed rule restricts states' authority to extend the timeframe for agency review, it threatens to prevent states from complying with their obligation to ensure that applications are administratively complete and comply with public notice and comment requirements. Arbitrary federal oversight of the timing of state administrative actions subverts states' ability to ensure that administrative procedures are followed.

Fourth, proposed sections 121.5 and 121.6 of the proposed rule would also establish a list of elements that all state denials or conditional approvals must include, 84 Fed. Reg. at 44,120, notwithstanding any contrary state law requirements for the contents of administrative decisions. For example, conditional approvals would be required to state "whether and to what extent a less stringent condition would satisfy applicable water quality requirements." *Id.* Likewise, denials would be required to identify the "water quality data or information, if any, that would be needed to assure that the discharge from the proposed project complies with water quality requirements." 84 Fed. Reg. at 44,120. Fundamentally, it is the applicant's burden to show that a proposed project will comply with water quality requirements, not the state's burden to show how such

compliance might be achieved. *See* 33 U.S.C. § 1341(a)(1). Moreover, the purpose of section 401 is to protect state water quality, not to provide applicants with the "le[ast] stringent" method of satisfying water quality requirements. Many states have robust anti-degradation policies enacted pursuant to the Clean Water Act that *require* stringent protection of water quality standards, not just the bare minimum that a project applicant or the federal government might want to see. *See generally* 33 U.S.C. § 1313.

EPA's proposed rule, if promulgated, would also force at least some states to enact legislation to amend their administrative procedures. For example, in New York the general administrative procedures to be followed by the New York State Department of Environmental Conservation (NYSDEC) when reviewing a section 401 application are set forth by statute. *See* N.Y. ECL § 70-0107(3)(d). That statute provides that a "complete application" is required before NYSDEC commences its review, and that the complete application must include an environmental review of the project. *See* N.Y. ECL § 70-0105(2). Under the proposed rule, NYSDEC would not be permitted to wait until it receives a complete application or an environmental review before its time period to act on a section 401 certification commences. Unless the Legislature amends the statute, NYSDEC would be forced to choose between violating state law by acting on a permit application that does not include an environmental review (and subjecting itself to lawsuit in state court), or denying the application and risking the relevant federal agency finding waiver.

EPA should abandon its proposal to define "certification request" narrowly and require that the time period for state review of certification applications begins once a state confirms that the application is complete. A complete "certification request" is one that includes all of the information a state agency requires to support the application and related determination. EPA should not attempt to dictate the contents of state administrative decisions on section 401 applications.

IV. IF ADOPTED, EPA'S PROPOSED RULE WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT

Agency rulemaking that is arbitrary and capricious, an abuse of discretion, without statutory authority, not in accordance with law, or not supported by substantial evidence is unlawful and must be vacated and set aside. *See* 5 U.S.C. § 706(2). EPA's proposed rule fails to satisfy these standards.

As noted above, the proposed rule is unlawful. EPA's attempts to limit the scope of state authority under section 401 goes against the plain language and legislative history of the statute and—by EPA's own admission—is contrary to Supreme Court precedent. Further, EPA is well outside the bounds if its authority in its attempt to create federal oversight and veto authority over state section 401 certifications. In addition to these deficiencies, the proposed rule will also violate the APA by failing to: (1) consider and analyze relevant issues, including the Clean Water Act's overarching objective to restore and maintain water quality; and (2) provide a reasoned explanation or rational basis for EPA's decision to repeal the existing section 401 regulations without consideration of the states' significant reliance on the existing regulations.

A. The Proposed Rule Is Not in Accordance with Law.

The proposed rule seeks to overhaul the long-established section 401 regulations and to limit state authority, which is in direct conflict with the text and intent of the CWA and applicable case law. As discussed in Points III and IV above, the proposed rule, if adopted, will: (1) restrict the information and the type of impacts that states can consider in evaluating section 401 applications; (2) curtail the states' ability to impose conditions on projects that ensure compliance with state law; (3) expand federal agencies' ability to find waiver of section 401 certification, depriving the states the ability to conduct section 401 review; and (4) institute federal review of state conditions on certifications and denials of certification requests. These restrictions, directly contradict both the CWA and established judicial precedent interpreting section 401. For that reason, the proposed rule is not in accordance with law and, if promulgated, will violate the APA. 5 U.S.C. § 706(2)(A).

The proposed rule also violates the Clean Water Act by limiting state enforcement of section 401 conditions. In addition to preserving the rights of individual states to *create* water quality standards, the Clean Water Act also provides states with the means to *enforce* those standards to achieve the objectives of that Act. *Cf.* 33 U.S.C. § 1251(a) ("The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). Contrary to EPA's suggestion, Congress did not intend in the Act for states to go through an empty exercise of imposing conditions in a water quality certification without authority to enforce those conditions. In effect, EPA is arguing that state certification serves as nothing more than statements of idle aspiration. That view is contrary to the structure of the Act, which preserves a central role for states—giving them the responsibility and right to protect and *maintain* water quality under federal law. *See S.D. Warren*, 547 U.S. at 386 ("Congress provided the States with power to enforce 'any other appropriate requirement of State law,' by imposing conditions on federal licenses for activities that may result in a discharge") (citing 33 U.S.C. § 1341(d)); *PUD No. 1*, 511 U.S. at 707 (explaining that states "are responsible for enforcing water quality standards on intrastate waters"; describing those responsibilities as "primary enforcement responsibilities"). For such obligations to be meaningful, they must be enforceable by the state that imposed them, rather than exclusively by the relevant federal licensing agency that incorporates those conditions into the license obtained for the activity at issue. *See United States v. S. California Edison Co.*, 300 F. Supp. 2d 964, 980–81 (E.D. Cal. 2004) ("FERC must accept and include such conditions in its licenses even where it disagrees with them. . . . This mandatory requirement cannot logically be reconciled with a finding that only FERC can enforce such conditions, administratively and non-judicially.").

Moreover, this interpretation does not align with the express terms in the citizen suit provision set forth in section 505 of the Act, which also provides states the means of enforcing certification conditions in civil actions taken in federal courts. 33 U.S.C. §1365(a); *see also Deschutes River Alliance v. Portland Gen. Elec. Co*., 249 F. Supp. 3d 1182, 1194 (D. Or. 2017) (holding any person may bring a suit for compliance with section 401 conditions as consistent with CWA text and legislative history). *Cf.* 33 USC § 1251(e). In short, EPA's proposed rule limiting

enforcement to the applicable federal permitting agency fails in every respect and should be withdrawn.

B. EPA Lacks Statutory Authority to Promulgate the Proposed Rule.

An agency rule adopted in excess of or without statutory authority is unlawful and must be vacated and set aside. 5 U.S.C. § 706(2)(C). "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988). In issuing the proposed rule, EPA relies on sections 401 and 501 of the Clean Water Act. 84 Fed. Reg. at 44,081. But section 401 does not give EPA any rulemaking authority, and under section 501(a) of the Clean Water Act, EPA is limited to prescribing "such regulations as are necessary to carry out [the Administrator's] functions under [the] Act." 33 U.S.C § 1361. Indeed, federal courts have long held that under the plain language of the Clean Water Act, EPA has no authority over state decisions on section 401 certifications. *See e.g., Am. Rivers Inc. v. FERC*, 129 F.3d 99, 111-12 (2d Cir. 1997) (FERC has no authority to reject state conditions on Section 401 certifications); *U.S. Dept. of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates."); *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 647 (4th Cir. 2018) (Congress "carefully prescribed the allocation of authority between federal and state agencies in the Clean Water Act" leaving the Army Corps with no statutory authority to change or reject conditions imposed by a state on a Section 401 certification).

The Proposed Rule goes well beyond the Congressional authorization to EPA to adopt regulations necessary to carry out the agency's duties and responsibilities under the Clean Water Act and instead intrudes on the "responsibilities and rights" left by Congress to the states. 33 U.S.C. §§ 1251(b), 1341, 1361. As discussed in detail above, the Proposed Rule seeks to interpose federal oversight over every aspect of state review of Section 401 certification applications, from proscribing a postcard-length list of items to be included in a Section 401 request and severely curtailing state authority to obtain additional information, to ignoring state denials and conditions that do not comport with EPA's narrowly defined "scope" of Section 401 review or include EPA-mandated information.

EPA's attempt to regulate and usurp state administrative decisionmaking directly contradicts the Clean Water Act and section 401, which specifically contemplates that the *states* will establish administrative procedures governing their review of section 401 applications. *See* 33 U.S.C. 1341(a)(1) (requiring the appropriate "State or interstate agency" to "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications."). Accordingly, EPA is not authorized to promulgate the proposed rule under sections 401 or 501 of the Act. *See Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (citation omitted) ("EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area."). Accordingly, the Proposed Rule is *ultra vires* and must be withdrawn. *Iowa League of Cities v.*

EPA, 711 F.3d 844, 877-78 (8th Cir. 2013) (EPA legislative rules promulgated without valid statutory authority are *ultra vires* and violate the APA).

C. The Proposed Rule Is Arbitrary and Capricious and an Abuse of Discretion.

A regulation is arbitrary and capricious "if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). That standard is met here.

i. EPA failed to consider the relevant factors related to implementing section 401 and did not provide a rational basis for the proposed rule.

To pass muster under the APA's arbitrary and capricious standard, agency rulemaking must be "based on a consideration of the relevant factors." *State Farm*, 463 U.S. at 43. An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id*. Particularly relevant here, when EPA adopts Clean Water Act regulations, it cannot "ignore the directive given to it by Congress … which is to protect water quality." *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009).

EPA's proposed rule falls well short of this requirement because it lacks analysis of water quality impacts and fails to consider whether the proposed rule, if adopted, will ensure the CWA's overarching goal to protect water quality is met. *See id.* at 939-940 (a rule interpreting the Act to exclude prohibitions against discharges of certain pesticides was invalid because, among other reasons, EPA ignored the rule's water quality impacts). The water quality impacts of the proposed rule could be severe if state agencies lose their broad authority to protect the quality of state waters. For example, by limiting states' power to review and impose conditions under section 401 only to point-source discharges into navigable waters, EPA is stripping states of their authority to address impacts from non-point sources associated with an activity reviewable under section 401. Similarly, the proposed rule would preclude states from mitigating impacts to non-navigable state waters. When combined with EPA's recent proposal to significantly narrow the definition of "navigable waters," the effect of the proposed rule could be to leave a huge number of streams impacted by federal projects beyond state authority under section 401.[85] This could create massive regulatory gaps by removing water quality impacts from federal or state oversight, especially in cases where federal law pre-empts state water quality regulations,. EPA's failure to consider these potential impacts at all renders its action arbitrary and capricious.

EPA also wholly failed to evaluate the impact of the proposed rule on existing state regulations related to section 401 implementation. This is especially problematic in light of section 401's clear directive that states must adopt regulations governing public notice and may promulgate

[85] *See* EPA and Army Corps, *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules* (signed Sept. 12, 2019).

rules on public hearings related to certification applications. 33 U.S.C. § 1341(a)(1). Indeed, as the states informed EPA in its comments during the agency's pre-proposal consultations, any revisions to the certification regulations will impact state regulations developed under section 401.[86] Rather than consider and analyze the impact of the proposed rule on existing state regulations adopted pursuant to section 401, EPA simply "recommends that states and authorized tribes update, as necessary, their own CWA section 401 regulations." 84 Fed. Reg. at 44,080, 44,083. By its refusal to evaluate the proposed rule's impact on state section 401 regulations, EPA "failed to consider an important part of the problem" and acted arbitrarily and capriciously. *See State Farm*, 463 U.S. at 43.

EPA repeatedly asserts that the key reason for the proposed rule is to increase predictability and timeliness in the section 401 certification process. 84 Fed. Reg. at 44,080, 44,081. But the agency does not provide any analysis demonstrating that existing section 401 regulations do not and cannot ensure predictability and timeliness in section 401 review. Nor does the agency explain how the proposed rule will, in fact, provide increased predictability in comparison. The agency's reference to several section 401 denials that resulted in litigation over the last several years as evidence of the need to increase regulatory certainty and predictability justifying the proposed rule falls short of a reasoned explanation. *See id.* at 44,081. Given the sweeping changes the proposed rule seeks to implement, and the numerous gaps left in it by the agency, it is just as likely that the proposed rule will cause more confusion, unpredictability and delay in section 401 review than the well-established existing section 401 regulations. Indeed, the EPA acknowledges that the proposed rule, if adopted, is likely to engender protracted litigation impacting states, tribes, federal agencies. *Id.* at 44,083-84. The deliberate trading of one set of lawsuits for another provides no basis for promulgation of an agency rule. *See Organized Village of Kake v. United States Department of Agriculture*, 795 F.3d 956, 970 (9th Cir. 2005). For these reasons, EPA has failed to provide rational basis and reasonable explanation for the proposed rule.

ii. <u>EPA failed to provide a reasoned explanation for the change in its position on a section 401 implementation</u>.

Additional requirements apply to agency rulemaking when an agency changes its position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) ("*Fox Television*"). While an agency is free to change its regulations, it "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC. v. Navarro*, __ U.S. __, 136 S.Ct. 2117, 2125-2126 (2016) (citing *Fox Television*). Moreover, '[i]n explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Id*. "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations, Inc.*, 556 U.S. at 515-516.

While the proposed rule asserts on several occasions that it is EPA's first effort to adopt comprehensive regulations implementing section 401, EPA acknowledges that the rules, if

[86] *See* Attachments A and B.

adopted, will replace EPA's long-standing certification regulations. 84 Fed. Reg. 44,081; *see* 40 C.F.R. Part 121. Those regulations were promulgated pursuant to section 21(b) of the Federal Water Pollution Control Act, which was "substantially" carried forward with only "minor changes" in section 401.[87] EPA fails to explain why the "minor" differences between section 21(b) and section 401 justify EPA's complete about-face on a host of relevant issues, including the permissible scope of section 401 certifications, the timeframe for state review, the need for a complete application before review commences, and the authority of federal agencies to review state section 401 decisions. Nothing in the modest changes Congress made between section 21(b) in 1970 and section 401 in 1972 supports EPA's sudden and drastic change in position. *See Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Additionally, EPA fails to provide any analysis regarding the states' significant reliance on the agency's existing regulations or evaluate the impact of the proposed regulatory change on state interests. EPA's existing certification regulations and guidance have provided a stable section 401 framework for decades. In reliance on that framework, and as set forth in the states' previous comments to EPA regarding the agency's plans to overhaul its section 401 regulatory program,[88] the states have based their own implementation of section 401 on the existing certification regulations and guidance and will be significantly impacted by EPA's abrupt policy reversals.[89] EPA's refusal to acknowledge and analyze the states' reliance interests affected by the proposed rule demonstrates that the agency has failed to provide a reasoned explanation for its changed position. An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X,* 545 U.S. at 981.

Nor does EPA provide a reasoned explanation for the need for wholesale regulatory changes to its section 401 regulations. The proposed rule is the result of an Executive Order intended to promote the development of energy infrastructure. *See* 84 Fed. Reg. at 44,081-82, citing 84 Fed. Reg. 15,495. That Executive Order points to unspecified "confusion and uncertainty" in the existing section 401 process that is "hindering the development of energy infrastructure." 84 Fed. Reg. at 15,496. Notably, the Executive Order says nothing about the prevention of water pollution. Although the current Administration may favor a policy of promoting energy infrastructure, that policy goal is not sufficient to authorize EPA to contradict or undermine the plain language and congressional intent of the Clean Water Act—particularly section 401—to preserve state authority over state water quality issues. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (President cannot use Executive Order to promote policy

[87] Legislative History Vol. 2, at 1394, 1487.
[88] *See* Attachments A & B.
[89] This issue is particularly acute in that subset of states lacking primacy over Section 402 National Pollutant Discharge Elimination System (NPDES) permitting because such states (and tribes) rely wholly on section 401 to address the water quality impacts from federally-permitted facilities. Creating those authorized programs now will require years for such states to authorize, fund, and staff.

goals in absence of statutory or constitutional authority); *id.* at 637-38 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb"); *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013) ("[T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections.").

iii. The proposed rule does not consider and analyze alternatives.

An agency must also consider alternatives to its proposed action, particularly when it proposes to reverse its policy. *State Farm*, 463 U.S. at 46-48 (rescission of automobile passive restraint requirements found arbitrary and capricious for agency failure to consider alternatives); *Ctr. For Science in the Pub. Interest v. Dep't of Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986) (agency analysis reversing position "should include an explanation for the reversal which is supported by the record and a discussion of what alternatives were considered and why they were rejected").

The proposed rule is a significant departure from the prior EPA position on section 401 implementation as set forth in the existing certification regulations and the previous section 401 Guidance. As discussed in detail in Points II and III above, the proposed rule seeks to dramatically curtail state authority to review projects subject to federal permits under section 401 and, if adopted, will limit states' ability to ensure protection of state water resources. Yet, EPA has entirely failed to mention, let alone consider, a single alternative to its proposed rule. This failure demonstrates that the agency is acting in a manner that is arbitrary and capricious and in violation of the APA.

V. CONCLUSION

For the foregoing reasons, EPA should abandon and withdraw this rulemaking.

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Attachment B:

Comments of the California State Water Resources Control Board on EPA Proposed Rule Updating Regulations on Water Quality Certifications, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket ID No. EPA-HQ-OW-2019-0405

CALIFORNIA
Water Boards

GAVIN NEWSOM
GOVERNOR

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SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

October 21, 2019

Andrew Wheeler
Administrator
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1200 Pennsylvania Ave., NW
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SECTION 401 CERTIFICATION PROPOSED RULE
DOCKET ID NO. EPA-HQ-OW-2019-0405

Dear Mr. Wheeler:

The California State Water Resources Control Board (State Water Board) and the nine California Regional Water Quality Control Boards (collectively, "Water Boards") are certifying agencies pursuant to section 401 of the Clean Water Act. The Water Boards oppose the proposed changes by the U.S. Environmental Protection Agency (EPA) to the section 401 certification regulations (Proposed Rule). (84 Fed. Reg. 44080-44122 (August 22, 2019).) The Proposed Rule is a clear overreach that ignores the state's authority to regulate its own water resources and disregards the principles of cooperative federalism established by the Clean Water Act and repeatedly affirmed by the United States Supreme Court.

By requiring only negligible information for a valid certification request, the Proposed Rule invites applicants to try to exploit unreasonably rigid timelines to circumvent a state's meaningful review of a project's effects on water quality. A state's only recourse to stave off procedural gamesmanship is denial. A sharp increase in certification denials does not serve EPA's stated goal of promoting efficiency. Indeed, none of the EPA's proffered rationale justify reversing fifty years of agency practice in favor of an untested system that contravenes established law. EPA should withdraw Proposed Rule or revise it to comply with applicable law in a manner that affirms respect for state law and state institutions.

This comment letter addresses the Water Boards' concerns that are applicable to the entirety of the Proposed Rule first, and then sets forth detailed comments on the specific proposed language in Attachment A.

The Proposed Rule is inconsistent with principles of cooperative federalism.

A fundamental defect in the Proposed Rule is that it disregards state interests, thereby undermining cooperative federalism, which is a foundational component of the Clean Water Act. As set forth in Clean Water Act section 101(b), "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." Section 510 further specifies that except as expressly provided, nothing in the Clean Water Act shall preclude or deny the right of any State to adopt or enforce any standard or limitation respecting discharges of pollutants or any requirement respecting control or abatement of pollution.

The section 401 certification program is an embodiment of these cooperative federalism principles. The Supreme Court has explained that "[s]tate certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution . . . ." (*S.D. Warren Co. v. Maine Board of Environmental Protection* (2006) 547 U.S. 370, 385 (*S.D. Warren*).) A state certification is the mechanism of ensuring that a federal license or permit is not used as an excuse to violate a state's water quality standards. (*Id.*) Section 401 is an acknowledgement that states are in the best position to understand their own law and that additional conditions may be necessary to ensure compliance with state law and applicable requirements. As the federal permitting or licensing agency is often not an agency primarily tasked with managing environmental issues, the federal agency may in fact be reliant on the certification authority's expertise regarding water quality. There would not have been a reason to include section 401 certification if the certification was meant to be little more than a rubber stamp. Any attempt to overhaul the section 401 certification program must preserve an expansive view of the federalism principles embodied in section 401 and repeatedly affirmed by the Supreme Court.

Despite the clear and express language of the Clean Water Act, the Proposed Rule attempts to dismantle the existing program that has been built on decades of cooperative federalism. The overall effect of the Proposed Rule would be to strip the states of their Clean Water Act authority to provide a substantive review a project's effect on water quality before a federal permit or license is issued. Three specific aspects of the Proposed Rule highlight how it would undercut cooperative federalism.

First, the Proposed Rule disregards a state's right to impose more stringent water quality requirements. Section 401(d) of the Clean Water Act authorizes a state to condition certification based on, among other things, "any other appropriate requirement of state law." Through its definition of "water quality requirements," the Proposed Rule attempts to rewrite this statutory language. The Proposed Rule purports to restrict certifying authorities from considering anything other than specifically enumerated sections of the Clean Water Act or "EPA-approved state or tribal Clean Water Act regulatory program provisions." "Any other appropriate requirement of state law" cannot be reasonably interpreted to be so limited. This constricted and unprecedented

interpretation of "water quality requirements" is an unwarranted intrusion into a state's authority to impose stricter conditions to protect the quality of waters within its borders. As is accounted for and endorsed by the Clean Water Act, many states, including California, have state-based programs and attendant requirements that exist outside the ambit of EPA-approved regulatory programs. A state's authority to establish and enforce more stringent state requirements is not contingent on EPA approval of those more stringent requirements.

Second, sections 121.6 and 121.8 of the Proposed Rule would require federal agencies to review the validity of any denials and any conditions set forth in a certification before incorporation. This federal agency oversight would supplant state court review of certifications, which is the established process for challenging a certification. Review of state certification is properly in state court because state courts are well-versed in state law. Review by federal agencies erodes the cooperative federalism scheme by unnecessarily entangling federal agencies in review and second-guessing interpretations of state law. Further, the Proposed Rule's chosen remedy for any allegedly invalid conditions or an invalid denial is that the federal agency may remand only if there is still remaining time in the review period. Given the already untenable list of actions that must occur during the reasonable period of time, it is extremely unlikely that there would ever be any time remaining, and even if there were, remand is permissive, not mandatory. The ultimate result is that the certifying authority would never have the opportunity to fix any perceived deficiencies, and a federal agency can unilaterally convert a denial into a waiver or only incorporate certification conditions that it deems acceptable.

Third, the Proposed Rule is susceptible to being construed as deeming enforcement of certification conditions the exclusive province of the federal agency. Although the express language in section 121.9 only references federal enforcement authority, the preamble seemingly affirms federal enforcement authority to the exclusion of state enforcement. (84 Fed. Reg. at 44116 ("Once the certifying authority acts on a certification request, section 401 does not provide an additional or ongoing role for certifying authorities to enforce certification conditions under federal law; rather, that role is reserved to the federal agency issuing the federal license or permit.").) EPA should clarify that the Proposed Rule was not intended to strip enforcement authority from the states because nothing in section 401 even impliedly precludes state enforcement. EPA has previously acknowledged different state practices with respect to section 401 enforcement in its interim handbook, entitled "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes." In this handbook, which represented EPA's guidance for ten years, EPA described various levels of state involvement in section 401 enforcement, including state-only enforcement, state inspections and investigations with referral to federal agencies for prosecution, bifurcated enforcement, and state-led, but federally assisted enforcement actions. The handbook noted that the California Water Code specifically sets forth potential civil liability and criminal penalties for violations of section 401 certifications. (Water Code §§ 13385, 13387.) These Water Code sections confirm that the California Legislature intended the Water Boards to have enforcement authority of section 401

certifications. Moreover, while section 401 is silent on enforcement, enforcement is authorized under the Clean Water Act citizen suit provisions. (*Oregon Natural Desert Association v. Dombeck* (9th Cir. 1998) 172 F.3d 1092, cert. denied (1999) 528 U.S. 964). It is established that states are among the persons authorized to bring citizen suits. (*U.S. Dept. of Energy v. Ohio* (1992) 503 U.S. 607, 615–616.) Enforcement of certification requirements is unquestionably within the scope of protection from preemption set forth in Clean Water Act section 510.

The Proposed Rule invites procedural gamesmanship.

By requiring only cursory information in a certification request and imposing unreasonably inflexible time constraints on review decisions, the Proposed Rule invites applications that are crafted to frustrate meaningful state review of projects. An applicant may successfully stymy substantive review by refusing to disclose complete information during the appointed period of time for review. If the certifying agency is forced to take action before it is fully informed, there would be an increased risk that the federal agency would deem the certification or denial invalid, thereby resulting in a de facto waiver. In any such cases of unintentional waiver, the Water Boards would use their authority under state law to protect water quality to the extent feasible, but they would be preempted in some instances from relying on state law. In such cases, unintentional waiver would weaken protections afforded to California's waters.

By EPA's own description, incomplete initial certification requests are the most common cause of section 401 review delay. The solution to that delay is to ensure and to incentivize applicants for federal licenses to provide the states a complete initial request for state certification, not to pare down the information required. EPA concedes that the data gaps between the scant information required by the Proposed Rule and a complete application may be significant and may result in more denials. More denials will not achieve EPA's stated goal of creating a more efficient regulatory process. Instead, an influx of denials and reapplications could lengthen decision timelines and prioritize resources on procedural, rather than substantive, review. As the federal agencies would have a new obligation to review every denial, this unnecessary process also wastes federal resources.

EPA fails to offer a supportable justification for the abrupt changes that run contrary to the Clean Water Act and Supreme Court precedent.

Pursuant to the express language of the Clean Water Act, and as affirmed by the Supreme Court, certifying authorities have the authority to impose conditions on the activity as a whole to ensure compliance with certain provisions of the Clean Water Act and appropriate requirements of state law. As the Supreme Court noted, section 401(d) expressly refers to "'any effluent limitations and other limitations . . . necessary to assure that *any applicant*' will comply with various provisions of the Act and appropriate state law requirements." (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 711 (*PUD No. 1*) (emphasis in original).) Based on the

unambiguous language of the statute itself, the Supreme Court held that once it is determined that the activity may result in a discharge, the certifying agency's authority extends to the entire activity, not just the discharge. (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700 (*PUD No. 1*).) And in *S.D. Warren*, the state's conditions of certification were not limited to the triggering discharge.

The Supreme Court's holding in *PUD No. 1* did not solely rely on EPA's regulations, as the preamble asserts. Rather the decision was founded in the interpretation of the express language of the Clean Water Act itself. "And § 401(a)(1) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition the existence of a discharge, is satisfied." (*PUD No. 1* at 712.) This conclusion was consistent with, but not dependent on, the language used in EPA's regulations. In affirming the conditions set forth in the certification, *PUD No. 1* ratified the system of cooperative federal federalism envisioned by the Clean Water Act whereby a state may set forth more stringent requirements in a certification to protect the quality of its waters.

The preamble emphasizes that the regulations have not been amended since they were promulgated in the early 1970s. This point underscores that the existing interpretation of the scope of the Clean Water Act has been in place for half a century. The preamble provides no compelling rationale or justification for upending fifty years of agency practice. When an agency is changing an existing position, an agency should be aware that longstanding policies may have engendered serious reliance issues. (*Encino Motorcars, LLC v. Novarro* (2016) 136 S.Ct. 2117, 2125 (holding that an agency's change in practice without explaining a prior inconsistent finding is arbitrary and capricious).) In such cases, a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. (*Id.*) The Proposed Rule involves a complete overhaul of existing practices, yet it fails to offer a reasoned explanation for the change. To attempt to explain its reasoning, EPA expresses its agreement "with the logic of Justice Thomas's dissent in *PUD No. 1*," 84 Fed. Reg. at 44095, and conveys its belief that *PUD No. 1* was wrongly decided, 84 Fed. Reg. at 44089 fn. 16 (highlighting an argument that the Supreme Court "failed to identify or understand"). But EPA cannot unilaterally impose its preference for a dissenting opinion via this Proposed Rule because the majority opinion in *PUD No. 1* was based on the unambiguous text of the Clean Water Act. (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) (*Chevron*) 467 U.S. 837; *United States v. Home Concrete & Supply, LLC* (2012) 566 U.S. 478, 488-89.) Even if the Clean Water Act was ambiguous as to whether certification could only consider impacts resulting from the discharge, which it is not, EPA is not entitled to *Chevron* deference for an interpretation that contravenes the Clean Water Act's legislative history, statutory objective, and its own prior interpretation and practices.

EPA must withdraw or revise the Proposed Rule in accordance with applicable law.

Although the Water Boards would rely on their state authority to continue to preserve robust protection of water quality whenever possible, state authority would not be an available remedy where the state is preempted. To avoid deleterious effects on California's waters, EPA should withdraw this disruptive dismantling of the certification process or revise the Proposed Rule to comply with applicable law in a manner that affirms respect for state law and state institutions. In addition to the objections explained above, detailed comments regarding the specific sections of the Proposed Rule and the proposed language therein are attached.

Sincerely,

Eileen Sobeck
Executive Director
State Water Resources Control Board

ATTACHMENT A

§ 121.1 Definitions

"Certification request" (§ 121.1(c))

A certifying agency cannot be expected to determine whether water quality standards will be met based on the limited information provided. Even the minimal amount of required information is insufficiently detailed or specific. With respect to the proposed discharge, the certification request need only include "the location and type of any discharge that may result from the proposed project and the location of receiving waters." (§ 121.1(c)(4).) The request does not have to indicate the volume, timing, chemical composition, or other specific information about the discharge, only the "type" of discharge. Further, "location" alone is insufficient detail. Applicants should be required to a provide a map of the project that includes identification of waters within the boundaries of the project area, not only "receiving waters."

Other information is also necessary to assess the effect of the proposed discharges on water quality. For dredge or fill projects not involving an appropriation of water or FERC license, the Water Boards have developed a comprehensive list of items that should be required for all applications and items that may be required in a case-by-case basis. (The State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State is available on the Water Boards' website at: https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html.) Many of these items are missing from the definition of certification request. For example, where applicable, draft compensatory mitigation and temporary impact restoration plans should be submitted with the application as it frequently takes a significant amount of time to finalize those plans. Applicants should also be required to submit any applicable fees, especially if the application request is the event that triggers the agency's obligation to act and applicable timelines.

To make matters worse, the Proposed Rule makes no provision for the certifying agency to require submission of additional information beyond that provided in the applicant's request for certification. The preamble recognizes that certifying agencies may develop their own procedures for requesting additional information (84 Fed. Reg. at 44115), but that authority is illusory given the rigid application of deadlines that are not extended for any reason, including an applicant's failure to adhere to the certifying authority's requests for additional information, in the Proposed Rule. As is discussed below, section 121.13 allows EPA to make requests for additional information when EPA is the certifying agency. But because the request is not a requirement and there is no penalty for the applicant's failure to provide the requested information, this authorization is meaningless. Certification authorities need the ability to request additional information when such information is necessary to determine whether the project will comply with water quality standards.

The definition of certification request is also not a good fit for general permits, such as U.S. Army Corps of Engineers (Corps) Regional General Permits, where the Corps, not the project proponent, is making the request and details about individual projects are not known. The suggested list of information for general permits on page 44102 is more helpful, particularly because it includes the proposed general permit itself. However, this is still insufficient information to issue a certification for a general permit when the proposed permitted activities would not be exempt from the California Environmental Quality Act (CEQA, Cal. Pub. Resources Code, § 21000 et seq.). For example, the Water Boards typically certify only general nationwide permits that include activities that are CEQA exempt because there is insufficient time in the review period to develop a CEQA document.

Under the Proposed Rule, the clock starts on the period for certification as soon as a "request" for certification is submitted, but a request need not include anything but a bare bones summary of the project. If EPA is going to define the elements that must be included in a "certification request" and thereby trigger the one-year statutory deadline, the proposal should be revised to provide more fulsome and detailed information. Without such a revision, the effect of the Proposed Rule would be to deprive the certifying agency of any meaningful opportunity to determine the water quality effects of the proposed activity.

"Fail or refuse to act" (§ 121.1(h))

"Constructively" is not defined, but the preamble indicates a certifying authority fails or refuses to act "in a way Congress intended" or "acts outside the scope of certification," this constitutes a constructive failure or refusal to grant or deny certification. (84 Fed. Reg. at 44110.) Such a broad interpretation of fail or refuse to act is inconsistent with the language of the Clean Water Act. A certifying authority that issues or denies certification on time has not failed or refused to act. This definition invites abuse, as it would allow federal agencies to impose a waiver, despite timely action by the certifying authority, simply because the certifying authority and the federal agency disagree about the scope of the certifying authority's authority under section 401 of the Clean Water Act.

"Water quality requirements" (§ 121.1(p))

Section 401(d) of the Clean Water Act authorizes a state to condition certification based on "appropriate requirements of state law." The regulation effectively rewrites this statutory language to exclude all water quality requirements of state law other than those of "EPA-approved state or tribal Clean Water Act regulatory program provisions." The Proposed Rule would exclude both requirements of state law not submitted to EPA and requirements of state law submitted to EPA under voluntary programs such as those under section 208 and 319 of the Clean Water Act. Nor would it include programs addressing water quality issues outside of federal jurisdiction, such as impacts to isolated wetland or groundwater. Further, it would arbitrarily exclude water quality

requirements where EPA declines to approve state water requirements in reliance on Clean Water Act section 101(g). In effect, EPA proposes to define "appropriate" to mean EPA-approved. Nothing in the Clean Water Act, which seeks to preserve state law, remotely supports such a narrow interpretation.

§ 121.3 Scope of certification

Section 121.3, which seeks to limit state authority to the discharge that triggers the need for certification, in disregard of other water quality effects of the project or activity, is inconsistent with *PUD No. 1* and *S.D. Warren*. Without authority to set conditions addressing the entire activity, the certifying agency would be powerless to use the certification to address impacts to groundwater, impacts to isolated surface waters, or impacts from non-point sources, even though these are water quality impacts that would not occur without issuance of the federal permit or license.

Attempting to limit the certifying authority's authority to the discharge also creates ambiguities as to what is considered within the scope of certification under the regulation. For example,

- If the discharge triggering certification requirements is a discharge of fill material that blocks fish passage or current circulation, are the impacts of the "discharge" limited to the impacts that occur at the time the fill material is deposited in waters of the United States, or do they include the impacts that continue to occur for as long as the fill material is in place?

- If the discharge triggering certification requirements is a release of water from a dam or hydropower tailrace, do the impacts of the discharge include characteristics of the discharge that are the result of the impoundment of water by the facility from which water is released, such as elevated temperatures or toxins from harmful algal blooms? Do they include impacts resulting changes in the timing or amount of water discharged from what would result in the absence of the dam or hydropower facility?

§ 121.4 Establishing a reasonable period of time

As set forth in proposed section 121.1(o), "receipt" means the date that the request is documented as received by the certifying authority. Per section 121.4(c)(2), the federal agency shall provide the date of receipt to the certification agency. The federal agency will not necessarily know the date that the request is documented as received by the certifying authority. Instead, this requirement is worded as if date of receipt is assumed to be the date the request was sent.

Subsection (f) would prohibit the state from requesting withdrawal or other action to restart the clock. The effect of this subsection, in conjunction with the skeletal

information required for a certification request, may be to force the states to issue denials because the request for certification and any supplemental information provided by the applicant does not provide sufficient information find compliance with water quality standards. This may pose a problem for FERC applicants, as FERC will dismiss an application for an original license if certification is denied twice. (*City of Harrisburg*, 45 F.E.R.C. ¶ 61053 (1988); *Rugraw, Inc.* (1999) 89 FERC ¶ 61287.)

§ 121.5 Action on a certification request

The requirement that a certification must include a "statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements" is inconsistent with the express language of the Clean Water Act. Certifications impose conditions that provide reasonable assurance of compliance. (*See* 33 U.S.C. § 401(a).) The Clean Water Act does not limit conditions to those that "could" satisfy applicable requirements. There are several problems with this requirement, including:

- Given the often very short time allowed for certification (either because the federal licensing agency sets a short certification period, or because the federal agency requires the filing of the request before completion of studies being prepared for licensing), a requirement for additional findings may be hard to meet on a timely basis.

- Given the Proposed Rule's unduly narrow definition of "water quality requirements," such a finding is inappropriate for many conditions. For example, monitoring requirements may serve to provide baseline data, identify the need for updating water quality standards, or to help evaluate the effectiveness of treatment technology and best management practices in order to develop or refine water quality requirements, not just to determine whether the project is complying with existing water quality standards and effluent limitations.

- Determinations of possible "less stringent" requirements would be subjective. For example, for all conditions related to timing, it would be less stringent to give the discharger more time to comply, and generally speaking, regulations do not specify a timeframe for compliance.

Subsection (e), which addresses denial requirements, is impermissible to the extent that it puts the burden of proof on the certifying authority. Nothing in section 401 suggests that it is the certifying agency's burden to remediate deficiencies in an applicant's request.

In addition, where the certifying authority lacks information to determine compliance, it is unreasonable to expect the certifying agency to specify what water quality requirements will be violated. For example, when the request for certification does not include the volume and chemical composition of the proposed discharge, the agency would not

know what is in the discharge, and it cannot be expected to specify which standards would be violated. Likewise, if the certifying agency has properly determined that the project will not comply, it should not be required to go further and specify what would be necessary to bring the project into compliance. It should not be the Water Boards' obligation to fix deficiencies in the application.

Subsection (f) should be deleted because it is unnecessary. Under the Clean Water Act, water quality standards are required for all waters of the United States. Where there are water quality standards, there should always be applicable water quality requirements, otherwise water quality standards would be purely aspirational. Hence, the circumstances described in subsection (f)—no water quality requirements are applicable to the waters receiving the discharge—would not occur unless the state is in violation of section 303 and EPA, also in violation of section 303, has failed to take action.

§ 121.6 Effect of denial of certification

The Water Boards support revisions to the regulations that would override FERC's policy that it will dismiss an application for an original license after a second denial of certification, even if the denial is without prejudice. However, there are some situations where a denial of certification should preclude a new certification request. For FERC license renewals, where the certifying authority has definitively determined that certification cannot be issued and the license should be allowed to expire, FERC should not administratively extend the license indefinitely so long as the licensee files another request for certification each time the previous one is denied.

Subsections (b) and (c) are inappropriate because the propriety of state certification decisions should be reviewed in state court, not by the federal agency. In the preamble, EPA ignores the many cases, including *American Rivers v. Federal Energy Regulatory Commission* (2d Cir. 1997) 129 F.3d 99 and *Roosevelt Campobello Roosevelt Campobello Internat. Park Com. v. U.S. Environmental Protection Agency* (1st Cir. 1982) 684 F.2d 1041, that say federal agencies have no authority to review certifications, relying instead on cases like *City of Tacoma, Washington v. Federal Energy Regulatory Commission* (D.C. Cir. 2006) 460 F.3d 53 and *Hoopa Valley Tribe v. Federal Energy Regulatory Commission* (D.C. Cir. 2019) 913 F.3d 1099, petn. for cert. pending. But the cases relied upon do not authorize substantive review of whether the conditions are authorized or supported by the evidence. Rather, they address procedural issues, including whether the state acted on time to avoid waiver and whether the state allowed for public participation.

In addition to ignoring established precedent, these subsections disregard basic principles of administrative law. If a reviewing court finds error in an administrative agency's decision, a reviewing court's action is to set aside the agency decision and to remand to the agency for further action. If an agency denies an application, but fails to make adequate findings, the court will set aside the denial and remand to the agency to

determine if, after making appropriate findings, it would still deny approval, approve with conditions, or approve unconditionally. Instead, the Proposed Rule would have a federal agency that determines the certifying agency failed to make adequate findings treat the lack of adequate findings as a waiver, which amounts to an unconditional approval. The Proposed Rule allows for remand in the unlikely event that there is time remaining in the reasonable period for review, but given all the actions that must happen during this short period, this would be virtually impossible. Moreover, remand would be discretionary. This result is particularly outrageous given the requirements under section 121.5(e) that go beyond what a reviewing court would need to know if the denial is consistent with applicable law and supported by the evidence.

State courts are in the best position to review certification decisions, not federal agencies. State courts will have a greater understanding and respect for state law and state institutions. In contrast, the Proposed Rule illustrates a lack of understanding or regard for state law.

§ 121.8 Incorporation of conditions into the license or permit

Section 121.8 would have the federal agency determine the validity of conditions of certification, and if it determine the conditions to be inappropriate, the Proposed Rule would prohibit incorporation of the condition into the permit. As with denials, the treatment of invalid conditions is inconsistent with applicable precedent providing that review should be in state court, and inconsistent with applicable principles for review of administrative action. Ordinarily, if an agency approves with conditions that are inappropriate, or not supported by adequate findings, a court will remand to the agency for it to determine which of several options it wants to follow. On remand, the agency may revise the condition or make additional findings as appropriate and consistent with the court's opinion; it may remove the condition with no other changes; it may remove the condition, but add others that the agency finds necessary in the absence of the removed condition; or it may deny approval. Under the Proposed Rule, only one of these options would apply—removal of the condition—regardless of the circumstances. This would include circumstances where the record clearly indicates that the project will violate water quality standards in the absence of the condition, but the federal agency concludes that the certifying agency did not adequately explain whether a less stringent condition could meet water quality standards. The Proposed Rule allows the federal agency discretion to remand, but only in the highly unlikely event that there is still remaining time in the original period of review.

§ 121.9 Enforcement and compliance of certification conditions

Section 121.9(a) should be deleted. The certifying agency should decide whether and when to inspect. As a condition of certification, the certifying agency may set appropriate conditions for monitoring and inspections. Section 121.9(a) is also confusing for projects where "operation" is not a distinct phase of the project. The preamble attempts to clarify that "operation may include implementation of a certified

project," 84 Fed. Reg. at 441116 fn. 47, but that provides little help. For example, does "implementation" mean when any activity on the project commences or only when the discharges to waters begin? For dredging associated with the maintenance of a flood control project, is "implementation" or "operation" of the project the dredging or use of the flood control project? At least the regulations should be revised to clarify that a pre-operation inspection is the minimum, and not the certification authority's only opportunity to inspect. The certification authority will not always be able to determine compliance with all conditions of the certification prior to "operation." For example, restoration of temporary impacts and procedures for in-water work may need to be assessed for compliance after "operation" has begun.

Section 121.9(b) seeks to impose a duty on a certifying authority to provide notification and recommend remedial measures if the certifying agency determines there will be a violation. Especially because neither the applicant nor the federal agency is required to do anything in response, there is no justification for imposing this duty on certifying agency.

Although the language of section 121.9(c) only specifies that the federal agency is "responsible" for enforcement, the preamble seemingly implies that the regulation is intended to deprive states of enforcement authority by stating that "section 401 does not provide an independent regulatory enforcement role for certifying authorities." (84 Fed. Reg. at 44116.) States do not derive their enforcement authority under section 401 or any other section of the Clean Water Act. They enforce water quality requirements, including NPDES requirements, under state law. Indeed, states seeking approval authority under the NDPES program are required to show they have adequate enforcement authority under state law. Also, while section 401 of the Clean Water Act is silent on certification agency enforcement, it is also silent on federal agency enforcement. Nothing in section 401 states or implies that federal agencies' independent enforcement authority is to the exclusion of certification authorities' independent enforcement authority. Some states may not have enacted legislation authorizing certifying agencies to take enforcement action, but nothing in section 401 operates to override enforcement authority in those states that have provided for it.

Moreover, while section 401 is silent on enforcement, enforcement is authorized under the Clean Water Act citizen suit provisions. (*Oregon Natural Desert Association v. Dombeck* (9th Cir. 1998) 172 F.3d 1092, cert. denied (1999) 528 U.S. 964). It is established that states are among the persons authorized to bring citizen suits. (*U.S. Dept. of Energy v. Ohio* (1992) 503 U.S. 607, 615–616.)

Aside from being inconsistent with the language of the Clean Water Act and all applicable precedent, depriving certifying agencies of enforcement authority is inconsistent with the principles of cooperative federalism embodied in the Clean Water Act. Section 101(b) recognizes "the primary responsibilities and rights of States to prevent, reduce and eliminate pollution." Limiting state enforcement authority is

inconsistent with this principle and EPA should clarify that the Proposed Rule would not affect the states' enforcement authority.

Moreover, section 510 of the Clean Water Act specifies that: "Except as expressly provided" in the Clean Water Act, nothing in the Act shall "preclude or deny the right of any State . . . or interstate agency to adopt and enforce" any "requirement respecting control or abatement of pollution." Enforcement of certification requirements is unquestionably within the scope of this protection from preemption, and nothing in Section 401 even impliedly precludes state enforcement.

Subpart D – Certification by the Administrator (§§ 121.12-121.14)

The proposed revisions to the regulations governing certification by the Administrator highlight the absurdity of the process that certifying authorities would face. For example, pursuant to revised section 121.12, applicants would be required to adhere to pre-request procedures because, as the preamble explains, the EPA has a "relatively short time" to act or waive. (84 Fed. Reg. at 44113.) That the Proposed Rule would render pre-application procedures necessary when EPA is the certifying agency illustrates that the timelines set forth in the Proposed Rule for states are not reasonable.

Similarly, revisions to section 121.13 acknowledge that additional information would sometimes be necessary to certify the project, highlighting the woeful deficiency of the meager information required in the initial certification request. It is unclear why the ability to request additional information is only included when EPA is the certifying authority. But even if this ability to request additional information was expressly available to all certifying authorities, because the failure to provide additional information does not modify the established "reasonable" period of time, the failure to comply carries no real penalty. Accordingly, a request for additional information with an unenforceable response deadline is an empty directive that does not cure the fatal flaws of the definition of a certification request.

Attachment C:

Complaint, *State of California, et al. v. Wheeler*, No. 3:20-cv-04869 (N.D. Cal. July 21, 2020).

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA AND THE STATE WATER RESOURCES CONTROL BOARD, STATE OF WASHINGTON, STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF RHODE ISLAND,

Case No.: 3:20-cv-4869

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*)

STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WISCONSIN, AND THE DISTRICT OF COLUMBIA,

Plaintiffs,

v.

ANDREW R. WHEELER, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Plaintiffs, the States of California, Washington, New York, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the Commonwealths of Massachusetts and Virginia, the District of Columbia, and the California State Water Resources Control Board, by and through their respective Attorneys General, allege as follows against defendants Andrew R. Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency (EPA), and EPA (collectively, Defendants):

INTRODUCTION

1.1 This lawsuit challenges a final rule issued by the Defendants, entitled "Updating Regulations on Water Quality Certification," 85 Fed. Reg. 42,210 (July 13, 2020) (Rule). The Rule upends fifty years of cooperative federalism by arbitrarily re-writing EPA's existing water quality certification regulations to unlawfully curtail state authority under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. (CWA or the Act).

1.2 The CWA's primary objective is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In achieving that goal, Congress recognized the critical and important role states play in protecting and enhancing waters within their respective borders. *Id.* § 1251(b). And, Congress sought to preserve the States' preexisting and broad authority to protect their waters. To those ends, the Act specifically provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the

development and use (including restoration, preservation, and enhancement) of land and water resources …." *Id*.

1.3 This preservation of state authority is present throughout the Act. Congress preserved for each State the authority to adopt or enforce the conditions and restrictions the state deems necessary to protect its state waters, so long as the state does not adopt standards that are less protective of waters than federal standards. *Id*. § 1370. State standards, including those of the Plaintiff States, may be and frequently are more protective. And, critical to the current action, Congress in section 401 of the Act, 33 U.S.C. § 1341 (section 401), expressly authorized States to independently review the water quality impacts of projects that may result in a discharge and that require a federal license or permit to ensure that such projects do not violate state water quality laws.

1.4 Where a State denies a water quality certification under section 401, Congress specifically prohibited federal agencies from permitting or licensing such projects. *Id.* § 1341(a)(1).

1.5 Congress also broadly authorized States to include conditions in state certifications necessary to ensure an applicant's compliance with any "appropriate requirement of State law." *Id.* § 1341(a), (d). The conditions in state certifications must be incorporated as conditions in federal permits. *Id*. § 1341(d). In this way, section 401 prevents the federal government from using its licensing and permitting authority to authorize projects that could violate state water quality laws. *See generally, id.* § 1341.

1.6 EPA has long acknowledged and respected the powers preserved for the States in section 401. In fact, until 2019, EPA's regulations and every guidance document issued by EPA for section 401 certifications—spanning three decades and four administrations—expressly recognized states' broad authority under section 401 to condition or deny certification of federally permitted or licensed projects within their borders. The Supreme Court and Circuit Courts of Appeals have affirmed that broad state authority under section 401.

1.7 In April 2019, however, President Trump signed Executive Order 13868, directing EPA to issue regulations that reduce the purported burdens current section 401 certification

requirements place on energy infrastructure project approval and development, thus effectively prioritizing such projects over water quality protection. Executive Order on Promoting Energy Infrastructure and Economic Growth, 84 Fed. Reg. 15,495 (Apr. 15, 2019) (Executive Order 13868). EPA issued the Rule pursuant to Executive Order 13868.

1.8 The Rule violates the Act and unlawfully usurps state authority to protect the quality of waters within their borders.

1.9 Contrary to the language of section 401, Supreme Court precedent, and EPA's long-standing interpretation, the Rule prohibits States, including Plaintiff States, from considering how a federally approved project, as a whole, will impact state water quality, instead unlawfully limiting the scope of state review and decision-making to point source discharges into narrowly defined waters of the United States. *Cf. PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology* (*PUD No. 1*), 511 U.S. 700, 711 (1994) ("The language of [Section 401(d)] contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge'" because the text "allows the State to impose 'other limitations' on the project in general.").

1.10 Similarly, the Rule would unlawfully limit states' review and decision-making authority under section 401 by allowing only consideration of whether a federally licensed project will comply with state water quality standards and requirements regulating point source discharges. But section 401 contains no such limitation, instead broadly authorizing States to impose any condition necessary to ensure an applicant complies with "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Both EPA and the Courts have long recognized the broad scope of the phrase "appropriate requirement of State law." *See PUD No. 1*, 511 U.S. at 712-13 (Section 401(d) "author[izes] additional conditions and limitations on the activity as a whole"; these conditions and limitations include "state water quality standards … [which] are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process").

1.11 The Rule would also interfere with the States' ability to apply their own administrative procedures to their review of applications for water quality certification, instead

imposing onerous federal control over virtually every step of the administrative process. The Rule requires States to take action within a time limit imposed by the federal permitting agency based on a minimal list of required information. State agencies appear to be discouraged from obtaining additional information if that information cannot be developed and provided within that time limit, even for major infrastructure projects that pose significant risk to a wide variety of state water resources for decades. Even when a State is able to make a certification decision before the expiration of the time limit imposed by the federal agency, the federal agency could *still* determine that the State waived its authority if it concludes that the State failed to provide certain information to the federal agency required by the Rule. This Federal dictate of state administrative procedures is fundamentally inconsistent with the cooperative federalism scheme established by the CWA in general, and with the preservation of broad state authority affirmed by section 401 in particular.

1.12 EPA's departure from 50 years of consistent administrative and judicial precedent by narrowing state authority under section 401 is contrary to Congress's 1972 enactment of the CWA, which by its terms expressly preserved state authority by incorporating the language of section 401 essentially unchanged from its predecessor statute, the Water Quality Improvement Act of 1970. EPA claims that this drastic change is justified based on its "first holistic analysis of the statutory text, legislative history, and relevant case law." 85 Fed. Reg. at 42,215. However, nothing in the text, purpose, or legislative history of section 401, no matter how "holistically" considered, supports the Rule's substantial infringement on state authority. The Rule unlawfully interprets a statute that is "essential in the scheme to preserve state authority to address the broad range of pollution" affecting state waters, *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (*S.D. Warren*), to instead restrict state authority to do so.

1.13 By attempting to limit the scope of state section 401 water quality certifications and by imposing new, unjustified, and unreasonable substantive limits, time constraints, and procedural restrictions on States' review of and decisions on section 401 certification applications, the Rule is a radical departure from past EPA policy and practice, is unlawful, and

abandons the decades-long successful cooperative federalism approach Congress intended in the CWA.

1.14 As set forth below, the Rule is arbitrary, capricious, an abuse of discretion, contrary to the CWA and binding precedent, and in excess of EPA's authority under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C). Accordingly, Plaintiff States seek a declaration that the Rule violates the Clean Water Act and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA), and request that the Court set aside and vacate the Rule.

JURISDICTION AND VENUE

2.1 This action raises federal questions and arises under the CWA and the APA. This Court has jurisdiction over the States' claims pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States) and 5 U.S.C. §§ 701-706. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory, injunctive, and other relief pursuant to 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 701-706.

2.2 The United States has waived sovereign immunity for claims arising under the APA. 5 U.S.C. § 702.

2.3 The States are "persons" within the meaning of 5 U.S.C. § 551(2), authorized to bring suit under the APA to challenge unlawful final agency action. 5 U.S.C. §§ 701(2), 702.

2.4 Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C) because plaintiff State of California resides within the district and this action seeks relief against federal agencies and officials acting in their official capacities.

INTRADISTRICT ASSIGNMENT

3.1 Pursuant to Civil Local Rules 3-5(b) and 3-2(c), there is no basis for assignment of this action to any particular location or division of this Court.

PARTIES

4.1 The Plaintiff States are sovereign states of the United States of America. The States bring this action in their sovereign and proprietary capacities. As set out below, the Rule directly harms the States' interests, including, but not limited to, environmental harms, financial harms that flow from implementing EPA's radical shift in policy, and limits on powers

specifically reserved to the States by Congress in the Act. The States also bring this action as *parens patriae* on behalf of their citizens and residents to protect public health, safety, and welfare, their waters, natural resources, and environment, and their economies.

4.2 Defendant EPA is the federal agency with primary regulatory authority under the Act and bears responsibility, in whole or in part, for the acts complained of in this Complaint.

4.3 Defendant Andrew R. Wheeler is sued in his official capacity as Administrator of the EPA and bears responsibility, in whole or in part, for the acts complained of in this Complaint.

STATUTORY AND REGULATORY BACKGROUND

The Administrative Procedure Act

5.1 Federal agencies are required to comply with the APA's rulemaking requirements in amending or repealing a rule.

5.2 Under the APA, a federal agency must publish notice of a proposed rulemaking in the Federal Register and "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c).

5.3 "[R]ule making" means "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5).

5.4 An agency that promulgates a rule that modifies its long-standing policy or practice must articulate a reasoned explanation and rational basis for the modification and must consider and evaluate the reliance interests engendered by the agency's prior position. *See, e.g., Dep't of Homeland Security v. Regents of the University of Ca.*, ___ S. Ct. ___, Slip Op. at 23-26 (June 18, 2020); *Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also* 5 U.S.C. § 706(2)(C).

5.5 The APA authorizes this Court to "hold unlawful and set aside agency action, findings and conclusions" it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law" or taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

The Clean Water Act

5.6 The Act's objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

5.7 In furtherance of that primary objective, Congress both preserved and enhanced the States' authority to protect the quality of state waters. The Act provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources …." *Id.* § 1251(b). As such, "Congress expressed its respect for states' role[s] through a scheme of cooperative federalism …." *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007).

5.8 Congress's preservation of pre-existing state authority is evident throughout the Act. For example, section 303 of the Act authorizes states, subject to baseline federal standards, to determine the level of water quality they will require and the means and mechanisms through which they will achieve and maintain those levels. 33 U.S.C. § 1313.

5.9 Section 510 of the Act states that "nothing in [the Act] shall … preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution" as long as such requirements are at least as stringent as the Act. *Id.* § 1370.

5.10 Section 401 of the Act provides that "[a]ny applicant for a Federal license or permit to conduct any activity … which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate … that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." *Id.* § 1341(a)(1). Section 401(d) broadly states that "[a]ny certification provided … shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a

Federal license or permit will comply with any applicable effluent limitations and other limitations … and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section." *Id*. § 1341(d).

5.11 The authority reserved to States in section 401 is meaningful and significant. In enacting section 401, Congress sought to ensure that all activities authorized by the federal government that may result in a discharge would comply with "State law" and that "Federal licensing or permitting agencies [could not] override State water quality requirements." S. Rep. 92-313, at 69, *reproduced in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972 ("Legislative History Vol. 2"), at 1487 (1973).

5.12 States' authority under section 401 to impose conditions on a federally permitted or licensed project is not limited to water quality controls specifically tied to a "discharge." Rather, section 401 "allows [states] to impose 'other limitations' on the project in general to assure compliance with various provisions of the Act and with 'any other appropriate requirement of State law.'" *PUD No. 1*, 511 U.S. at 711. Thus, while section 401(a)(1) "identifies the category of activities subject to certification—namely, those with discharges"—section 401(d) authorizes additional conditions and limitations "*on the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied." *Id*. at 711-12 (emphasis added). Section 401's "terms have a broad reach, requiring state approval any time a federally licensed activity 'may' result in a discharge…, and its object comprehends maintaining state water quality standards." *S.D. Warren*, 547 U.S. at 380. Furthermore, "Congress intended that [through section 401, States] would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

5.13 The Act imposes only one restriction on the timeframe of state certification review and decision-making: if a State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived." 33 U.S.C. § 1341.

5.14 In the quarter of a century since the Supreme Court's decision in *PUD No. 1*, Congress has not limited or otherwise amended the language of section 401.

EPA's Longstanding Section 401 Regulations and Guidance

5.15 In 1971, EPA promulgated regulations regarding state water quality certifications pursuant to section 21(b) of the Water Quality Improvement Act of 1970—the CWA's predecessor (1971 Regulations). *See* 36 Fed. Reg. 22,369, 22,487 (Nov. 25, 1971). Congress carried over the provisions of section 21(b) in section 401 of the CWA of 1972 with only "minor" changes. Senate Debate on S. 2770 (Nov. 2, 1971), *reproduced in* Legislative History Vol. 2 at 1394.

5.16 In the Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act, Congress directed EPA to "promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section [401] of this [Act] or permit application pursuant to section 402 of this [Act]." 33 U.S.C. § 1314(h). This is the only instruction that Congress gave EPA with regards to implementing section 401. EPA did so, as codified in 40 C.F.R. Part 136 (defining the scientific methods for analyzing a wide array of pollutants).

5.17 Following the 1972 amendments and the enactment of section 401, Congress directed EPA to modify other existing regulations but did not direct EPA to revise its existing 1971 Regulations.

5.18 Accordingly, EPA continued to apply the 1971 Regulations to implement section 401 following the CWA's enactment in 1972.

5.19 Not only does the Rule conflict with the Act's express protection of state interests under section 401, the Rule is a significant departure from, and contrary to, EPA's 1971 Regulations.

5.20 Pursuant to EPA's 1971 Regulations, when issuing a section 401 certification, states are required to include a statement certifying that a permitted "activity," not just a point source discharge, will comply with water quality standards. *See* former 40 C.F.R. § 121.2(a)(3) (June 7, 1979). Furthermore, "water quality standards" was broadly defined to include standards

established pursuant to the CWA, as well as any "State-adopted water quality standards." *Id.* § 121.1(g).

5.21 The 1971 Regulations did not permit federal agencies to determine whether state denials or conditional certifications met specified requirements and were therefore effective or not. Moreover, a State could only waive its authority under section 401 if it provided express written notification of such waiver or failed to act on a certification request within a reasonable period of time. *Id.* § 121.16(b) (June 7, 1979).

5.22 In April 1989, EPA's Office of Water issued a section 401 certification guidance document entitled "Wetlands and 401 Certification—Opportunities and Guidelines for States and Eligible Indian Tribes" (1989 Guidance).

5.23 EPA's 1989 Guidance acknowledged that section 401 "is written very broadly with respect to the activities it covers." 1989 Guidance at 20. The 1989 Guidance further stated that "'[a]ny activity, including, but not limited to, the construction or operation of facilities which *may* result in *any discharge*' requires water quality certification." *Id.* (emphasis in original). The 1989 Guidance explained that the purpose of the water quality certification requirement in section 401, "was to ensure that no license or permit would be issued for an activity that through inadequate planning or otherwise could in fact become a source of pollution." *Id.* at 20.

5.24 The 1989 Guidance contemplated broad state review of federally permitted or licensed projects and stating the "imperative" principle that "all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation—should be part of a State's [401] certification review." *Id.* at 22, 23. The 1989 Guidance also provided examples of conditions that States had successfully placed on section 401 certifications. These included watershed management plans, fish stocking, and noxious weed controls. *Id.* at 24, 54-55. EPA noted that "[w]hile few of these conditions [were] based on traditional water quality standards, all [were] valid" under section 401. *Id.* at 24. EPA further noted that "[s]ome of the conditions [were] clearly requirements of State or local law related to water quality other than those promulgated pursuant to the [CWA] sections enumerated in Section 401(a)(1)." *Id.*

5.25 Consistent with the text of section 401 and EPA's 1971 Regulations, the 1989 Guidance narrowly construed the circumstances under which a State would waive its authority to review certification requests under section 401: a waiver would be deemed to have occurred only if a state failed to act within "a reasonable period of time (which shall not exceed one year) after receipt" of a certification request. *Id*. at 31.

5.26 The 1989 Guidance also advised States to adopt regulations requiring that applicants submit information to ensure informed decision-making. *Id*. Further, the 1989 Guidance encouraged States to "link the timing for review to what is considered a receipt of a complete application." *Id*. As an example, EPA cited a Wisconsin regulation requiring a "complete" application before the agency review time began. *Id*., *citing* Wisconsin Administrative Code, NR 299.04. The 1989 Guidance noted that pursuant to the same Wisconsin regulation, the state agency would review an application for completeness within 30 days of receipt and could request any additional information needed to make a certification decision. *Id*. (currently, these requirements are codified in Wisconsin Administrative Code, NR 299.03).

5.27 EPA issued additional section 401 guidance in April 2010 entitled "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes" (2010 Guidance). The 2010 Guidance was consistent with and affirmed EPA's longstanding recognition of States' broad authority preserved under the CWA and enhanced by section 401.

5.28 In the 2010 Guidance, EPA stated that, "[a]s incorporated into the 1972 [CWA], § 401 water quality certification was intended to ensure that no federal license or permit would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate [the Act's] provisions." 2010 Guidance at 16. Relying on the Supreme Court's controlling decision in *PUD No. 1*, the 2010 Guidance confirmed that "once § 401 is triggered, the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law." *Id*. at 18. For example, EPA explained that "water quality implications of fertilizer and herbicide use on a subdivision and golf course might be

considered as part of a § 401 certification analysis of a CWA § 404 permit that would authorize discharge of dredged or fill material to construct the subdivision and golf course." *Id*.

5.29 In line with EPA's long-standing position, the 2010 Guidance maintained an expansive view of the scope of other state laws appropriately considered under section 401 certification reviews: "It is important to note that, while EPA-approved state and tribal water quality standards may be a major consideration driving § 401 decision[s], they are not the only consideration." *Id*. at 16.

5.30 The 2010 Guidance acknowledged that States establish requirements for what constitutes a complete application and highlighted the fact that the timeframe for state review of a section 401 certification request "begins once a request for certification has been made to the certifying agency, *accompanied by a complete application*." *Id*. at 15-16 (emphasis added).

5.31 In the years following EPA's issuance of its 1989 and 2010 guidance documents, Congress has neither limited nor otherwise amended the language of section 401.

Executive Order 13868 and Section 401 Certifications

5.32 On April 10, 2019, President Trump issued Executive Order 13868, upending EPA's longstanding broad interpretation of state authority to protect water quality under section 401.

5.33 Intended to promote and speed infrastructure development, particularly in the coal, oil, and natural gas sectors, Executive Order 13868 directed EPA to evaluate ways in which section 401 certifications have "hindered the development of energy infrastructure." 84 Fed. Reg. at 15,496. Executive Order 13868 failed to acknowledge the critical role of section 401 certifications to the Act's primary purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters, and to preserving States' authority to do so.

5.34 Executive Order 13868 directed the EPA Administrator to undertake a number of actions related to section 401 certifications. First, Executive Order 13868 required the Administrator, within 60 days, to (1) examine the 2010 Guidance and issue superseding guidance to States and authorized tribes; and (2) issue guidance to agencies to reduce the burdens on energy infrastructure projects caused by section 401's certification requirements. Second,

Executive Order 13868 required the Administrator, within 120 days, to review EPA's section 401 regulations for consistency with Executive Order 13868's energy infrastructure and economic growth goals and publish revised regulations consistent with those goals. Third, Executive Order 13868 required the Administrator to finalize the revised regulations no later than 13 months from April 10, 2019.

5.35 Executive Order 13868 also required all federal agencies that issue licenses or permits requiring section 401 certification to, within 90 days of the final EPA Rule, "initiate a rulemaking to ensure their respective agencies' regulations are consistent with" the EPA Rule. Exec. Order No. 13868, Sec. 3(d).

5.36 In response to Executive Order 13868, on June 7, 2019, EPA issued a document entitled "Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes" with a stated purpose of facilitating implementation of Executive Order 13868 (2019 Guidance). The 2019 Guidance attempted to impose substantially shorter timeframes for, and narrow the permissible scope of, state review. Although the 2019 Guidance was issued without notice and opportunity for comment, all of the Plaintiff States submitted a letter to EPA objecting to the guidance. Concurrently, the EPA Administrator informed the States he was withdrawing and rescinding the 2010 Guidance.

5.37 On August 22, 2019, EPA published the proposed Rule in the Federal Register with only a 60-day public comment period that closed on October 21, 2019. 84 Fed. Reg. 44,080.

5.38 Along with the proposed Rule, EPA published its "Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking" (Economic Analysis). In keeping with Executive Order 13868, the 23-page Economic Analysis focused largely on the economic effects of states' section 401 certification conditions and denials for the energy industry projects.

5.39 The Economic Analysis failed to consider the potential economic impacts from decreased water quality caused by the Rule's limitations on the scope of States' section 401 authority.

5.40 EPA held public hearings on the proposed Rule on September 5, 2019, and September 6, 2019, in Salt Lake City, Utah. Several Plaintiff States gave oral testimony at the

public hearings, including Washington and New York. Plaintiff States also submitted written comments on the proposed Rule on October 17 and 21, 2019.

The Final Section 401 Rule

5.41 On June 1, 2020, EPA released a pre-publication version of the final Rule, entitled "Clean Water Act Section 401 Certification Rule." In announcing the final Rule, the Administrator stated that EPA was "following through on President Trump's Executive Order to curb abuses of the Clean Water Act that have held our nation's energy infrastructure projects hostage, and to put in place clear guidelines that finally give these projects a path forward."[1]

5.42 On July 13, 2020, EPA published the final Rule in the Federal Register. 85 Fed. Reg. 42,210. By its terms, the Rule becomes effective 60 days following the publication date.

5.43 The final Rule is a radical departure from prior EPA policy and practice regarding section 401, drastically curtailing state authority under section 401 in a way that is contrary to: (1) the plain language, structure, purpose, and legislative history of the CWA; (2) binding Supreme Court precedent interpreting section 401; and (3) EPA's own guidance on section 401, which spans decades and multiple administrations, resulting in significant reliance by the States. Moreover, the Rule unlawfully limits States' section 401 authority.

5.44 The Rule asserts, without rational basis, that it will reduce regulatory uncertainty and increase predictability for States, tribes and project proponents. 85 Fed. Reg. at 42,236, 42,242. The Rule conflicts with the CWA's text, structure, purpose, and intent, as well as longstanding agency guidance and controlling precedent, and forces the States to amend their own section 401 laws. As a result, the Rule will in fact cause increased confusion and uncertainty that will ensue while the States attempt to revise their statutes and regulations related to section 401 and the States, federal agencies, and project proponents litigate and attempt to implement and comply with the Rule's requirements.

[1] https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0

Limits on Scope of Section 401 Certification Review

5.45 The Rule unlawfully limits the applicability and scope of section 401 certifications to impacts from specific, point source discharges to waters of the United States, thus prohibiting States from conditioning water quality certifications to assure the effects of the project as a whole do not violate water quality standards. 85 Fed. Reg. 42,285 (to be codified at 40 C.F.R. §§ 121.1; 121.3).

5.46 Confining the scope of section 401 certification to point source discharges is contrary to the Act's plain language and the Supreme Court's decision in *PUD No. 1*. In *PUD No. 1*, the Supreme Court held that, while section 401(a)(1) "identifies the category of activities subject to certification—namely, those with discharges"—section 401(d) "is most reasonably read as authorizing additional conditions and limitations on *the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied." *Id*. at 711-12 (emphasis added).

5.47 EPA acknowledges that the Rule departs from the controlling precedent in *PUD No. 1*, *see, e.g.,* 85 Fed. Reg. at 42,231, but asserts that *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005) (*Brand X*) allows EPA to effectively overrule the Supreme Court's *PUD No. 1* decision. *Brand X*, however, does not permit EPA to overrule binding Supreme Court precedent or adopt an interpretation that is not in accordance with the law.

5.48 In limiting the scope of section 401 certifications to impacts from specific, point source discharges, the Rule abandons without a rational explanation EPA's previous position articulated in the 1989 Guidance that "it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project." 1989 Guidance at 22. Similarly, the Rule abandons without a rational explanation EPA's position set forth in the 2010 Guidance that "the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law." 2010 Guidance at 18.

Limits on Appropriate Requirements of State Law

5.49 In direct conflict with the Act's language and Congressional intent, the Rule also unlawfully limits the term "other appropriate requirements of State law" in Section 401(d) to "water quality requirements," newly defined as the "applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States." *See* 85 Fed. Reg. at 42232 (to be codified as 40 C.F.R. § 121.1(n))

5.50 By restricting the definition of "water quality requirements," the Rule potentially excludes a broad range of state and tribal law directly applicable to water quality that has been used for decades to evaluate and condition federally licensed or permitted projects.

5.51 In limiting "water quality requirements" only to specified provisions of the Act and those state and tribal laws related to "point source discharges," the Rule not only abandons but runs contrary to EPA's longstanding position that "[t]he legislative history of [section 401] indicates that the Congress meant for the States to impose whatever conditions on [federally permitted projects] are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns." 1989 Guidance at 23.

5.52 The Rule also departs from EPA's longstanding position that "[t]he legislative history of Section 401(d) indicates that Congress meant for the States to condition certifications on compliance with any State and local law requirements related to water quality preservation" and that "conditions that relate in any way to water quality maintenance are appropriate." *Id*. at 25-26.

5.53 EPA fails to provide a rational explanation for its complete departure from its longstanding interpretation of section 401. With its sudden departure from an established regulatory approach, EPA also failed to consider the reliance interests of states that have developed section 401 certification procedures and water quality control programs in reliance on EPA's prior, longstanding interpretation of section 401.

Restrictions on Certification Request Process

5.54 The Rule also sets out new procedures for the submission and evaluation of section 401 certification requests. These procedures plainly conflict with the CWA's text and purpose.

5.55 Prior to the Rule, the States or other certifying authorities and EPA together determined the types of information an applicant was required to submit in a section 401 certification request. In contrast, the Rule enumerates an insufficient and minimal list of information project proponents are directed to provide in a section 401 certification application. *Compare* 40 C.F.R. § 121.3 (June 7, 1979), *with* 85 Fed. Reg. at 42,285 (to be codified as 40 C.F.R. § 121.5). Contrary to *PUD No. 1*, the Rule does not require project applicants to provide information related to the water quality impacts caused by the proposed activity as a whole. Rather, the Rule merely requires each applicant to identify the "location and nature" of potential discharges and the "methods and means" by which the discharge(s) will be monitored and managed, along with other, limited information. 85 Fed. Reg. at 42,285 (to be codified as 40 C.F.R. § 121.5f(b)-(c)).

5.56 Although the Rule allows States and other certifying authorities to request additional information from project applicants, EPA attempts to limit this in the Preamble by suggesting that—regardless of whether such information is sufficient to fully evaluate water quality impacts—the requested information is to be limited to whatever can be "produced and evaluated within the reasonable time." 85 Fed. Reg. at 42,246.

5.57 The Rule also sets out a procedure whereby federal agencies must establish a "reasonable period of time" by which certifying authorities must act on requests for section 401 certifications, either categorically or on a case-by-case basis. 85 Fed. Reg. at 42,285-286 (to be codified as 40 C.F.R. § 121.6). Pursuant to the Rule, this time period cannot exceed one year under any circumstances. *Id.* (to be codified as 40 C.F.R. § 121.6(a)). Moreover, this reasonable time period is to be measured from the certifying authority's "receipt" of the certification request, rather than the certifying authority's receipt of the complete certification application. *Id*. at 42,285 (to be codified as 40 C.F.R. § 121.1(m)).

5.58 The Rule further prohibits a certifying authority from requesting that a project applicant withdraw a certification request and resubmit it with additional information to extend the timeframe for review, even where the request lacks information necessary for the certifying authority to conduct a proper review. *Id*. at 42,285-286 (to be codified as 40 C.F.R. § 121.6(e)). This interpretation is in conflict with section 401's purpose of preserving state authority.

5.59 The Rule prescribes a broad range of circumstances under which a state's section 401 review authority is deemed waived because of a state's purported failure to follow certain newly-included procedural requirements. *Id.* (to be codified as 40 C.F.R. § 121.9). Where a certifying authority fails to grant, grants with conditions, or denies a certification application within the reasonable time period, as determined by the federal agency, it waives its ability to do so. *Id*. (to be codified as 40 C.F.R. § 121.9(a)(2)). Additionally, where a certifying authority does not meet the Rule's procedural requirements in certifying or denying a section 401 application, the certification or denial will be deemed waived. *Id*. And where a condition imposed by a certifying authority is not supported by the required information, the condition is deemed waived. *Id*. In addition, where a certifying authority certifies an application without following the procedural requirements set forth in the Rule, the certification will be deemed waived. *Id*. (to be codified as 40 C.F.R. § 121.9(b)).

5.60 Taken together, these procedural requirements of the Rule impermissibly expand the waiver provision of section 401 in conflict with the Act's language and Congressional intent.

5.61 Further, these procedural requirements of the Rule significantly impair the ability of States and other certifying authorities to fully and efficiently review project proposals for water quality impacts and will likely result in an increase of certification denials for lack of sufficient information.

5.62 These unprecedented restrictions also conflict with existing state practices, procedures, and regulations on initiating section 401 certification review, many of which were developed in reliance on EPA's long-standing position on these requirements.

HARMS TO PLAINTIFF STATES

6.1 The Rule harms the sovereign, environmental, economic, and proprietary interests of Plaintiff States.

6.2 The States' respective jurisdictions encompass a substantial portion of the United States. Along with countless other waterbodies and wetlands, the water resources found within Plaintiff States include the entirety of the Pacific Coast from Mexico to Canada, large portions of the Atlantic Coast, the Great Lakes and Lake Champlain, Chesapeake Bay and its tributaries, and the majority of the Columbia River. Plaintiff States contain headwaters formed in the Sierra Nevada, Cascades, Rocky, and Appalachia mountains. Many of the nation's largest rivers originate in and/or flow through the Plaintiff States, including the Mississippi, the Columbia, the Colorado, and the Hudson. The States have a fundamental obligation to protect these waters and wetlands, both for their own economic interests and on behalf of the millions of residents and thousands of wildlife species that rely on them for survival. Many States also legally hold both the surface and groundwaters within their borders in trust for their residents.

6.3 The Rule significantly impairs Plaintiff States' abilities to protect the quality of these waters. In the Act, Congress preserved the States' broad, existing powers to adopt the conditions and restrictions necessary to protect state waters, so long as those efforts were not less protective than federal standards. To those ends, the States have long exercised section 401 authority to protect against adverse impacts to water quality from federally licensed or permitted activities within state borders.

6.4 As described in detail above, the Rule unlawfully curtails both the scope of water quality-related impacts that the States can address, and the sources of state law on which States can base certification review and decisions for federally licensed or permitted projects. For example, the Rule narrowly defines the scope of 401 certification as "limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." 85 Fed. Reg. 42,250. The definition of "water quality requirements" in the Rule, in turn, further narrows the scope to only specified provisions of the Act and state and tribal

regulatory requirements "for point source discharges into waters of the United States." 85 Fed. Reg. 42,285 (to be codified at 40 C.F.R. § 121.1(n)).

6.5 Consistent with longstanding relevant Supreme Court and lower court decisions, section 401 certification practice, and EPA guidance, when evaluating requests for section 401 certification the States have used section 401 to review all potential water quality impacts from a proposed project, both upstream and downstream and over the life of the proposed project. The States also have reviewed impacts as they relate to both "waters of the United States" and state waters, including groundwater, as defined under their respective state laws. In doing so, the States have assessed project impacts pursuant to a broad range of appropriate water-related state law requirements, including requirements applicable to both point and non-point sources of water pollution.

6.6 For example, the States have used section 401 authority to address water quality impacts that, depending on the circumstances, may not be non-point: turbidity associated with dam reservoir wave action and pool level fluctuations, aquatic habitat loss, contamination of groundwater supplies, contaminant loading from spills and discharges associated with over-water industrial activities, impacts on stream flows, and wetland fill. States have also used section 401 authority in the context of large water supply projects to require mitigation to address long-term impacts from operation, such as hydrologic modifications and water quality degradation associated with enhanced stratification in new and expanded reservoirs. Impacts such as stormwater runoff, whether or not related to any particular point source discharge contemplated by the Rule, may have significant detrimental effects on water quality in and around project sites. In the case of western water diversion projects, stormwater runoff may adversely impact different river basins. Section 401 certifications have been one of the primary mechanisms the States have used to mitigate these impacts when associated with federally licensed and permitted projects. The Rule's limitation to point source impacts will prevent States from addressing and preventing these harms under their section 401 authority, to the detriment of the States' proprietary interests in the quality of those waters, their related ecosystems, and the general health and well-being of their residents.

6.7 In addition to impacts to state waters themselves, the Rule also directly harms other state economic and proprietary interests.

6.8 For example, many States own or hold in trust the fish and other wildlife populations within their borders, and have certain statutory obligations to protect these resources. Because the Rule prevents the States from fully protecting the aquatic habitat and resources those species rely upon for survival, the Rule will result in direct harms to wildlife and wildlife populations.

6.9 Increased pollution, degradation and loss of waters, as well as other impacts to water quality as a result of the Rule also will impair the States' water recreation industries by making waters less desirable for fishing, boating, and swimming, and curtailing commercial and tax revenues associated with such activities.

6.10 The States have relied on the 1971 Regulations and EPA's longstanding practice and guidance interpreting section 401 broadly to authorize protection of water quality from federally licensed or permitted projects within their borders. Over the decades since the promulgation of the 1971 Regulations, the States have expended significant resources to develop and implement their own regulatory programs based on that broad interpretation of section 401. The Rule upends the States' section 401 programs and will force the States to significantly revise these programs to conform to the Rule's requirements.

6.11 The Rule will cause the States to incur direct financial harms. For example, the Rule will force States to hire additional personnel to process requests for section 401 certifications on the truncated timelines and with the additional procedures established by the Rule. Washington alone allocated over $600,000 to hire the additional staff it anticipates will be required in order to conduct section 401 certification reviews under the Rule. This expenditure is for the 2020 fiscal year alone, and is an expense that is expected to continue year-over-year well into the future. Connecticut anticipates needing to hire at least two additional professional staff, and Wisconsin estimates expending an additional $170,000 annually for additional staff to comply with the Rule. While state budgets are nearly always constrained, the effective date of the

Rule comes during that time when states are facing a projected $555 billion shortfall over the next two fiscal years due to the impact of the COVID-19 pandemic.

6.12 Most, if not all, of the States will incur costs related to the expensive and time-consuming process of revising their laws and regulations in order to conform to the Rule.

6.13 New Jersey, New York, and California, among other states, have robust application review and public comment processes outlined in both state law and regulation that will need to be overhauled in light of the Rule and EPA's dramatic shift in section 401 policy. These changes to state laws and regulations require investment of the same regulatory resources required to review and process section 401 certifications, none of which were considered in EPA's economic review of the proposed rule and potential harms.

6.14 Finally, the States have relied on EPA's longstanding and consistent interpretation of section 401 as conferring broad authority on the States to protect water quality within their respective jurisdictions, whether those impacts occur from a specific discharge or by operation of a project as a whole, consistent with the statutory text and Supreme Court precedent.

6.15 By abandoning this long-standing position and policy, the Rule substantially degrades the primary mechanism by which States have ameliorated or avoided impacts to state waters from federally licensed and/or permitted activities, contrary to Congress's intent. As a result, the Rule forces the States either to incur the financial and administrative burdens associated with instituting or expanding their water protection programs or to bear the burdens of degraded waters.

6.16 Expanding water protection programs will require difficult and time-consuming processes involving state program creation and expansion, state legislative and regulatory changes, and state appropriation and expenditures. And, the Rule compromises the States' long reliance on section 401 to ensure the full scope of state water quality protections apply to activities that are otherwise preempted from state regulation.

6.17 Applicants for section 401 certification have also relied on EPA's longstanding position that section 401 allows an applicant to work with a state certifying authority to define a mutually acceptable scope and timeframe for agency review. By forcing state certifying agencies

to unnecessarily limit the scope and timeframe of their review, the Rule increases the chances that section 401 requests will be needlessly denied, leading to administrative inefficiencies and unnecessary litigation, and the loss or delayed benefits of projects that would have been certified had the States been operating under the previous regime. In its haste to promote energy infrastructure pursuant to President Trump's Executive Order—a consideration that is not entertained in any capacity by the text or purpose of the Act—EPA utterly failed to assess the unintended impacts the Rule will have on the States and the regulated parties seeking certification under section 401.

6.18 The relief sought herein will redress these and other injuries caused by the Rule.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Arbitrary and Capricious and Not in Accordance with Law
Unlawful Implementation of Section 401 of the Clean Water Act
in Violation of the Administrative Procedure Act
(5 U.S.C. § 706)

7.1 Plaintiff States re-allege the facts set out in Paragraphs 1.1 through 6.18 as though fully set out herein.

7.2 The APA provides that this Court "shall" "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A).

7.3 Agency action is not in accordance with the law if the agency fails to interpret and implement the statutory language consistent with the statute's text, structure, and purpose and with controlling Supreme Court precedent.

7.4 The Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7, 121.8, and 121.9, is an unlawful and impermissible implementation of section 401 of the Clean Water Act, 33 U.S.C. § 1341, as interpreted by the United States Supreme Court, because it unlawfully limits the States' authority granted to them by Congress through enactment of the Act.

7.5 As a result, the Rule must be set aside as arbitrary, capricious, and not in accordance with law.

SECOND CAUSE OF ACTION
Arbitrary and Capricious and Not in Accordance with Law
Disregard of Prior Agency Policy and Practice
in Violation of the Administrative Procedure Act
(5 U.S.C. § 706)

7.6 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

7.7 When an agency promulgates a rule that modifies its long-standing policy or practice, it must articulate a reasoned explanation and provide a rational basis for doing so.

7.8 An agency modifying or abandoning its long-standing policy or position must consider and take into account the reliance interests that are impacted by the change.

7.9 In adopting the Rule, Defendants failed to provide a reasoned explanation for defying the Supreme Court's long-standing interpretation of section 401 and abandoning their own long-standing policy and practice of interpreting section 401 as a broad reservation of states' rights.

7.10 The Rule lacks a rational basis because—despite EPA's assertions to the contrary—the Rule will increase uncertainty and decrease predictability in the section 401 certification process.

7.11 Defendants also failed to consider and take into account the serious reliance interests engendered by the Agency's prior long-standing policy and position regarding state authority under section 401.

7.12 For these reasons, the Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7, 121.8, and 121.9, is arbitrary, capricious, and not in accordance with law, and must be set aside.

THIRD CAUSE OF ACTION
Arbitrary and Capricious and Not in Accordance with Law
Failure to Consider Statutory Objective and Impacts on Water Quality
in Violation of the Administrative Procedure Act
(5 U.S.C. § 706)

7.13 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

7.14 Agency action is not in accordance with law if the agency fails to consider the applicable statutory requirements.

7.15 Agency action is arbitrary and capricious if the agency fails to consider important issues, considers issues that Congress did not intend for it to consider, or fails to articulate a reasoned explanation for the action.

7.16 When Defendants promulgated the Rule, they were required to consider whether it met the Act's objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters as set forth in 33 U.S.C. § 1251(a).

7.17 The protection of water quality is the paramount interest that must be considered by Defendants when promulgating regulations for the administration of the Clean Water Act, including those defining the contours of state authority to condition or deny section 401 certification requests.

7.18 Defendants promulgated the Rule without weighing its adverse impacts to the Nation's waters. Directed by an Executive Order aimed at increasing domestic energy production without any consideration of water quality, Defendants relied on factors that Congress did not intend for it to consider. Defendants also failed to consider how those impacts undermine, rather than further, the Act's objective of restoring and maintaining the integrity of the Nation's waters.

7.19 The Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7, 121.8, and 121.9, conflicts with the Clean Water Act's objective to protect water quality. As a result, the Rule is arbitrary and capricious and not in accordance with law.

FOURTH CAUSE OF ACTION
Agency Action in Excess of Jurisdiction
(5 U.S.C. § 706)

7.20 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

7.21 Under the APA, the Court "shall . . . set aside agency action" that is taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

7.22 In issuing the Rule, EPA relies on sections 401 and 501 of the Act. However, section 401 does not grant EPA any rulemaking authority for procedures and responsibilities expressly reserved for states, and section 501(a) limits EPA to prescribing "such regulations as are necessary to carry out [the Administrator's] functions under [the] Act." 33 U.S.C. § 1361.

7.23 The Rule exceeds EPA's authority to adopt regulations necessary to carry out the agency's functions under the Act, and instead intrudes on the "responsibilities and rights" Congress explicitly left to the states. *Id.* §§ 1251(b), 1341, 1361.

7.24 EPA also relies on section 304 of the Act, in which Congress directed EPA to, "promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 401 of this Act or permit application pursuant to section 402 of this Act." 33 U.S.C. § 1314(h). But nothing in section 304 authorizes EPA to promulgate regulations that infringe upon state authority or dictate state law or administrative procedures in reviewing requests for and granting or denying certifications pursuant to section 401.

7.25 Because the Rule exceeds EPA's rulemaking authority under the Act, it must be set aside.

RELIEF REQUESTED

WHEREFORE, the States respectfully request that this Court issue a judgment and order:

1. Declaring that in developing and adopting the Rule, EPA acted arbitrarily and capriciously and not in accordance with law, abused its discretion, and exceeded its statutory jurisdiction and authority;
2. Declaring the Rule unlawful, setting it aside, and vacating it;
3. Awarding the Plaintiff States their reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and

4. Awarding the Plaintiff States such additional and further relief as the Court may deem just, proper, and necessary.

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** Application for admission pro hac vice pending or forthcoming*

SIGNATURE ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the other signatories.

DATED: July 21, 2020

/s/ Tatiana K. Gaur
Tatiana K. Gaur

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