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The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
Office of the Administrator
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ms. Lauren Kasparek
Oceans, Wetlands, and Communities Division (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments on Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule, No. EPA–HQ–OW–2022–0128

Dear Administrator Regan and Ms. Kasparek:

American Whitewater submits these comments on the Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule, No. EPA–HQ–OW–2022–0128 (June 9, 2022) ("Proposed Rule") in support of strengthening the role of states and tribes as the primary guardians of water quality under the Clean Water Act. With the proposed rule, the Environmental Protection Agency ("EPA") has the opportunity to empower local communities to play a meaningful role in protecting their right to clean, healthy, and productive waters. American Whitewater strongly supports EPA's reconsideration and revision of the recently promulgated Section 401 regulations, 85 Fed. Reg. 42,284 (July 13, 2020) ("2020 Rule"). EPA must expressly rescind those portions of the 2020 Rule that impinge on principles of cooperative federalism. EPA must go further, however, to ensure its regulations restore the ability of states to assure hydropower and other federally licensed projects meet state requirements and are otherwise consistent with the Clean Water Act and Supreme Court precedent. In doing so, the EPA can take tangible steps toward meeting the Clean Water Act's goals of achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation," eliminating the discharge of pollutants into the navigable waters, and controlling nonpoint source discharges.

General Comments

American Whitewater is a national 501(c)(3) non-profit organization with a mission to protect and restore America's whitewater rivers and to enhance opportunities to enjoy them safely. Our members are primarily conservation-oriented kayakers, canoeists, and rafters who enjoy exploring whitewater rivers. As outdoor enthusiasts who spend time on and in the water, our members have a direct interest in the health and water quality of our nation's waterways.

American Whitewater works throughout the country to protect healthy, free-flowing rivers and restore rivers that have been dammed, degraded, and dewatered through hydropower development.

For paddlers, water quality directly influences our health, our enjoyment of public streams, our tourism contributions to rural economies, and in many cases, our livelihoods. The Clean Water Act has improved both water quality and water quantity allowing river-based recreation to flourish. And Section 401 has played an essential role in this success by providing states and tribes with the authority to condition federal hydropower licenses with instream flow requirements that protect, mitigate, and enhance opportunities for river-based recreation.

The U.S. Bureau of Economic Analysis confirms that the economic benefits of water-based recreation are significant in the United States.[1] The Bureau calculated that in 2019 boating and fishing contributed $23.6 billion of current-dollar value to the U.S. economy. Weakening the regulations that ensure federally permitted projects meet states' and tribes' goals for safe, healthy, and functioning waterbodies directly threaten the recreation and tourism economies of countless communities across the United States. American Whitewater partners with many commercial outfitters, equipment manufacturers, and rural municipalities that would be directly financially impacted if federally-permitted projects failed to meet state goals. The EPA can best protect rural, recreational, and tourism economies by maintaining or strengthening water quality regulations.

For these reasons, American Whitewater fully supports EPA's efforts to develop regulations that reject the unlawful limitations placed on state and tribal authority under the 2020 Rule and instead work to empower certifying authorities as they seek to protect their waters, wildlife, and communities. In doing so, EPA will restore the principles of cooperative federalism embodied in Section 401. However, as described below, we are concerned that EPA's proposed regulations, while a clear improvement on the 2020 Rule, fall short of this mark and in places are inconsistent with the statutory framework. EPA must revise the proposed rules to both avoid interfering with the states' and tribes' primary authority and to ensure that all certifying authorities, and the communities that rely on clean, healthy, functioning waterbodies, are able to rely on Section 401 to protect their interests.

Legal Background

Under the Clean Water Act, the States are "the 'prime bulwark in the effort to abate water pollution,' and Congress expressly empowered them to impose and enforce water quality standards that are more stringent than those required by federal law." *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (quoting *U.S. v. Com. of Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983)). To ensure the States were able to fulfill this primary responsibility of protecting water quality, Congress enacted Section 401 to fill a potential gap in the overall regulatory structure of the Clean Water Act—namely, federally licensed activities that may otherwise escape compliance with the requirements of state law to protect water quality. *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) ("Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that

[1] *See* https://www.bea.gov/sites/default/files/2020-11/orsa1120_1.pdf (last visited Aug. 7, 2022).

respects the States' concerns."). Thus, through Section 401, the states and tribes have the right to review the potential impacts of proposed federally licensed projects that "may result in any discharge into the navigable waters" and the obligation to "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 [water quality requirements under the Clean Water Act] and with any other appropriate requirement of State law." 33 U.S.C. §§ 1341(a)(1) & (d). And with respect to how the States use this authority, the Clean Water Act defers to states and tribes to establish "the water quality certification process." *City of Fredericksburg, Va. v. FERC* 876 F.2d 1109, 1112 (4th Cir. 1989); *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").

Under Section 401, an applicant for a federal license to conduct an activity resulting in a discharge into navigable waters must first obtain a certification from the certifying authority where the project is located. The certifying authority must act on request for a certification within a reasonable period of time, which cannot exceed a year. 33 U.S.C. § 1341(a)(1). If the certifying authority fails to act within that period, it waives the right to review the project. *Id*. The applicant must ensure that it will comply with state water quality requirements and any other appropriate requirement of state law. 33 U.S.C. § 1341(d). Section 401 certifications contain conditions that must be included as articles in a FERC license lasting 30–50 years. *See id*. (the terms and conditions of the certification "shall become a condition on any Federal license or permit subject to the provisions of this section."). For hydroelectric projects these terms and conditions typically include requirements for minimum instream flows along with other measures relating to the certifying authorities water quality standards and other legal requirements. Importantly for American Whitewater and its members, such conditions included typically recognize instream flow needs for river-based recreation that provide for the use and enjoyment of public waterways.

In 1971, EPA promulgated regulations that guided the implementation of Section 401 for nearly fifty years. Under these regulations, certifying authorities across the country reviewed thousands of certification requests every year. From small dredge and fill projects to hydroelectric dams, with few exceptions, these reviews proceeded in a timely fashion and worked as Congress intended, allowing states and tribes to protect their water and communities from potentially harmful projects.

Notwithstanding this track record of successful implementation, over the past several years, there have been ongoing efforts to undermine the Clean Water Act. The energy industry and its allies in Congress are continuing in their attempts to pass harmful legislation such as the Hydropower Clean Energy Future Act, which would limit the ability of states to determine whether a project complies with water quality standards. While opposition to these efforts to weaken the Clean Water Act prevented the passage of harmful legislation in the past, the energy industry succeeded in its efforts to persuade the prior administration to conclude that "[o]utdated Federal guidance and regulations regarding §401 of the Clean Water Act . . . are causing confusion and uncertainty and are hindering the development of energy infrastructure." Executive Order 13868. As a result, EPA issued interim guidance followed by the 2020 Rule, that represented an industry wish list of ways to eliminate any meaningful role for the states in

protecting water quality in Federally-issued licenses. The new regulations exacerbated rather than reduced confusion and uncertainty through FERC's inconsistent waiver determinations that have led to litigation, certification denials, and bewilderment among 401 certifying agencies charged with implementing new regulations.

American Whitewater filed comments in response to EPA's 2020 Rule.[2] The final 2020 Rule failed to adequately address comments filed by thousands of individuals, environmental conservation organizations, and state resource agencies critical of the new proposed rules as an infringement on states' authority to require federally-licensed projects to meet state requirements, standards, and goals. Notwithstanding these comments, the EPA promulgated a final rule that effectively renders Section 401 meaningless by limiting the time, information, scope of review, mandatory conditioning authority, and enforcement of conditions protecting the communities that rely on safe and healthy waterbodies from the harm that could be caused by improperly regulated federally-licensed projects. Specifically, the 2020 Rule fundamentally weakens the ability of states and tribes to assure that federally-licensed energy projects meet state and tribal water quality requirements and other appropriate requirements of state and tribal law. This substantial weakening of state and tribal authority will result in an increase in harm to our rivers and negatively impact water-based outdoor recreation.

Specifically, the 2020 Rule fundamentally undermines a vital section of the Clean Water Act and weakens the role of the states and tribes as the primary guardians of their waters and communities. Ensuring that the construction and operation of the energy projects, in particular, balance power generation with protecting environmental quality, and in addition, ensuring that these projects meet state water quality standards, is based on principles of cooperative federalism, a framework that is undermined by the current rules. For example, section 4(e) of the Federal Power Act states that the Federal Energy Regulatory Commission ("FERC") is required "in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e). However, this "equal consideration" mandate established under the Electric Consumer Protection Act of 1986 does not necessarily result in equal treatment of power and non-power values. Congress noted that FERC must "give these nondevelopmental values the same level of reflection as it does power," but this reflection does not "necessarily result in their equal treatment." H.R. Conf. Rep. No. 934, 99th Cong., 2d. Sess. at 22. Thus, undermining the vital role of the states in protecting waters embodied in Section 401 of the Clean Water Act leaves FERC with the discretion to prioritize generation over the protection of environmental quality and water-dependent recreational opportunities, resulting in a weakening of water quality protections. This may have significant consequences for the health and safety of the waters that our members use and enjoy.

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[2] *See* https://www.americanwhitewater.org/content/Document/view/id/1999/ (last visited Aug. 7, 2022).

DISCUSSION

A. When Section 401 Certification Is Required

Section 401 requires a certification for any federally licensed or permitted activity that "may result in any discharge into the navigable waters." The Clean Water Act defines the term "discharge," when used without qualification, to "include[] a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16). "[D]ischarge of a pollutant," in turn, means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).[3] This distinction is meaningful. Yet, with the proposed rule EPA ignores the plain language of the statute, and clear Congressional intent, by limiting the states' and tribes' authority to review and condition projects that may impact their waters and communities.

In 2006, a unanimous Supreme Court in *S.D. Warren* rejected the notion that "discharge" should be limited to only to "discharge of pollutants." 547 U.S. at 376. According to the Court, the term "'discharge' presumably is broader, else superfluous, and since it is neither defined in the statute nor a term of art, we are left to construe it 'in accordance with its ordinary or natural meaning.'" *Id*. (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). "When it applies to water," therefore, "'discharge' commonly means a 'flowing or issuing out.'" *Id.* (citing Webster's New International Dictionary 742 (2d ed. 1949)). The Court also rejected the dam operator's argument that "discharge" should equate simply to a "discharge of a pollutant"— and thus, require an addition of a pollutant from a point source to trigger the Section 401 certification requirement. 547 U.S. at 378–80. The dam operator had argued that "discharge" should be limited to the narrower definition of "discharge of a pollutant" based on the interpretive canon, noscitur a sociis. *Id.* The Court rejected this argument because it attempted to "extrapolate a common feature from what amounts to a single item." *Id.* at 379–80. The Supreme Court's reasoning in *S.D. Warren* thus confirms that the statutory language of the Clean Water Act means pollution caused by nonpoint sources is subject to Section 401.

In reaching this banal conclusion, *S.D. Warren* announces three principles that must now guide any approach to interpreting Section 401. First, the term "discharge" must be given its plain meaning, defined by the Supreme Court as a "flowing or issuing out" of water pollution. Second, the legislative history of the 1970 law that added "discharge" to the federal water pollution control law is essential to understanding the proper scope of Section 401. Finally, the term "discharge" must be read and interpreted in light of the Clean Water Act's purposes of preventing water pollution and retaining state authority to address pollution from federally permitted activities.

Failing to adhere to these principles, EPA proposes limiting the review threshold under Section 401 to "any license or permit that authorizes an activity which may result in a discharge

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[3] A "point source" is "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14). The Act does not define the term "nonpoint source," but the Ninth Circuit has stated that "[n]onpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source." *Pronsolino v. Nastri,* 291 F.3d 1123, 1126 (9th Cir. 2002).

from a *point source* into a water of the United States." 87 Fed. Reg. at 35,773 (proposed 40 C.F.R. § 121.2 (emphasis added)). To support this diversion from the clear statutory language and binding Supreme Court precedent, EPA relies on two Ninth Circuit decisions that found Section 401 was limited to discharges from point sources. *Or. Nat. Desert Ass'n v. Dombeck,* 172 F.3d 1092 (9th Cir. 1998) ("*ONDA I*") and *Or. Nat. Desert Ass'n v. USFS,* 550 F.3d 778 (9th Cir. 2008) ("*ONDA II*").

In *ONDA I* and *ONDA II*, the Ninth Circuit addressed whether water pollution from livestock grazing, a nonpoint source of pollution, is a "discharge" within the meaning of Section 401. In *ONDA I*, the Ninth Circuit held that water pollution from livestock grazing was not a "discharge" triggering the certification requirement. *ONDA I* equated the term "discharge" with the term "discharge of a pollutant." 172 F.3d at 1097. Because the latter is defined as an addition of a pollutant from a point source, *ONDA I* reasoned that the otherwise undefined term "discharge" in Section 401 "is limited to discharges from point sources." *Id.* Therefore, according to *ONDA I*, discharges from nonpoint sources, including grazing, did not fall within the scope of the Section 401 certification requirement. The Ninth Circuit restated this understanding Section 401 in *ONDA II*, notwithstanding the conflict with the reasoning and holding in *S.D. Warren*. EPA's reliance on these decisions is misplaced.

First, because *S.D. Warren* thoroughly undermines the reasoning in *ONDA I*, and *ONDA II* relies primarily on *ONDA I*, EPA cannot use these decisions to avoid the plain meaning of the term "discharge" in Section 401 encompasses pollution from federally-permitted nonpoint sources of pollution. To begin with, as the statute plainly states, the term "discharge" necessarily is broader than the term "discharge of a pollutant." Accordingly, it cannot be limited only to an addition of a pollutant from a point source. *ONDA I* relied on the same type of rationale rejected by the Supreme Court, basing its holding on a narrow reading of the term "discharge." 172 F.3d at 1097 (inferring that "[t]he term 'discharge' in § 1341 is limited to discharges from point sources"). This does not comport with (1) the Court's expansive reading of the term "discharge" as "broader, else superfluous" and (2) the Court's conclusion that discharge must therefore be given its "common and ordinary meaning." *S.D. Warren*, 547 U.S. at 387. *S.D. Warren* makes clear that the use of the word "includes" in the definition of "discharge" indicates Congress did not intend to limit the general definition of "discharge" to "discharge of a pollutant." 547 U.S. at 378–80; *see also id.* at 382–83 (discussing this in the context of the legislative history). The statute's plain language indicates that "discharge" includes, but is not limited to, water pollution from point sources. *See Burgess v. United States*, 128 S.Ct. 1572, 1578 n.3 (2008) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation.") (alteration in original, citation omitted). Under the plain language of Section 401, then, "any activity" that may result in "any" discharge—i.e., releases "flowing or issuing out" from any source of water pollution—requires Section 401 certification if conducted under a federal permit.

Second, EPA mischaracterizes the issue in *S.D. Warren* as narrowly addressing the question of whether a discharge from a point source could occur absent the addition of any pollutant to the water emitted from the dam turbines. Yet, the Supreme Court carefully articulated the issue presented as being "whether operating a dam to produce hydroelectricity 'may result in any discharge into the navigable waters' of the United States." *S.D. Warren*, 547 U.S. at 373. Nothing in the Supreme Court's discussion of the term "discharge" turns on the

source of the pollution. *S.D. Warren* mentions the term "point source" only once, in reciting the definition of the term "discharge of a pollutant." 547 U.S. at 375 (citing 33 U.S.C. §§ 1362(16), (12)). The Court makes clear that the term "discharge," read according to its "ordinary or natural meaning," is a "flowing or issuing out." *Id*. at 376. While the facts presented in *S.D. Warren* may have dealt with an activity that may have resulted in point source pollution, the Court's detailed discussion of the legal meaning of "discharge" in Section 401 is not confined to any particular type of pollution or polluting activity. *Id*. at 375–81.

Third, the Clean Water Act's legislative history demonstrates Congress's intent to allow states and tribes to review all federally licensed and permitted discharges, both point and nonpoint discharges. First, the legislative history of the Clean Water Act shows that Congress intended Section 401 to apply to all pollution-generating activities on federal lands. Section 401 originated as § 21(b) of the Water Quality Improvement Act of 1970. Pub. L. No. 91-224, § 21(b); 84 Stat. 91 (1970). The language of § 21(b) was identical in all relevant respects—including the use of the unqualified term "discharge"—to the current language of Section 401. The 1970 Act did not distinguish between point and nonpoint sources of water pollution, however. Instead, it focused exclusively on water quality standards and regulated all polluting activities threatening those standards. Thus, Congress could not have intended to limit § 21(b) to point sources because Congress did not introduce the distinction between point and nonpoint sources until 1972. Section 21(b) became Section 401 in 1972.

The only change in the operative first sentence was a substitution of the words "will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title" for the words "not violate applicable water quality standards" in § 21(b). *Compare* Pub. L. No. 91-224, § 21(b), 84 Stat. 91 (1970) *with* 33 U.S.C. § 1341(a). When Congress did introduce the new distinction in 1972, it did not add the term "point source" to Section 401 nor to the definition of "discharge" in § 502(16). In 1970, the House Report recognized the broad reach of § 21(b), noting its purpose to ensure that "no license or permit will be issued by a Federal agency for an activity that . . . *could in fact become a source of pollution*." H.R. Rep. No. 91-127, at 6, 7 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2697 (emphasis added).[4] According to the Supreme Court, "Section 401 recast preexisting law" and was meant to continue the states' authority to deny certification "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 (internal quotes omitted).

Finally, EPA's narrow reading of Section 401 is inconsistent with the purpose and intent of the Clean Water Act. As the Supreme Court concluded in *S.D. Warren* that "[r]eading § 401 to give 'discharge' its common and ordinary meaning preserves the state authority apparently intended" under the Act's cooperative, and complex, state-federal system. 547 U.S. at 387. The Court observed that prohibiting any polluter from hiding "'behind a Federal license or permit as an excuse for a violation of water quality standard[s]'" is among "the very reasons that Congress provided the States with power to enforce 'any other appropriate requirement of State law,' 33 U.S.C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a

[4] Despite the addition of the term "discharge of pollutants" in the 1972 Clean Water Act amendments, and direct federal regulation of discharges of pollutants through §§ 301–302, 306–307, and 402, Congress left the unqualified term "discharge" in Section 401 unaltered and subject to the state certification requirement. Compare Pub. L. No. 91-224, § 21(b), 84 Stat. 91 (1970) with Pub. L. No. 92-500, § 401(a), 86 Stat. 816 (1972)

discharge." *Id*. at 386 (quoting 116 Cong. Rec. 8984 (1970), statement of Senator Muskie) (alteration in original). Requiring federally permitted activities to comply with state water quality requirements via the Section 401 certification process is consistent with other parts of the Act. Section 313, for example—which Congress originally enacted as part of the same statutory provision setting forth the certification requirement in Section 21(a) of the Water Quality Improvement Act of 1970—requires that every federal agency "shall be subject to, and comply with" the full range of state regulatory authority, including water quality standards. 33 U.S.C. § 1323(a); *see also Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1167 (9th Cir. 2004) (federally-operated dams must comply with state water quality standards); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1153 (9th Cir. 1998) (holding state antidegradation policy applies to the federal sale of timber and confirming that section 313 applies to any federally authorized activity that may cause water pollution). In short, the Section 401 certification process exists to ensure that states may exercise their authority and fulfill their responsibility to review federally permitted activities before the federal government issues a permit that may result in water pollution. According to the Court, state certification under Section 401 is "essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren*, 547 U.S. at 386. *S.D. Warren* bases its plain meaning interpretation of "discharge" on clear congressional intent that states have the opportunity to review and certify that an activity meets water quality standards—not on the source of the pollution. 547 U.S. at 386–87.

EPA must heed this overarching purpose and interpret Section 401 in a manner consistent with this approach. To do so, EPA must revise the proposed regulation to ensure that all federally licensed and permitted "discharges" are subject to review under Section 401. This will specifically include nonpoint source discharges. Such discharges, as EPA notes, are "the leading remaining cause of water quality problems."[5] By preventing states and tribes from reviewing, conditioning, or even halting projects that may result in nonpoint source discharges, the proposed rule runs counter to the Clean Water Act's primary goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—which Congress envisioned would "be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a). Thus, by blocking the states and tribes from reviewing projects that may allow the discharge of toxics such as pesticides, herbicides, and insecticides from agricultural lands or residential areas, oil, grease, and toxic chemicals from energy production, sediments from forest lands, pollutants from abandoned mines, bacteria and nutrients from livestock operations, and pollutants entering waterways from facilities through air deposition, to name just a few, EPA is preventing the Act from working as intended.

B. Pre-Filing Meeting Request

The state's and tribe's ability to control the process under Section 401 from beginning to end is of paramount importance. As a result, we support the change EPA has proposed to the pre-application meeting requirements. 87 Fed. Red. at 35,378 (proposed 40 C.F.R. § 121.4). The prior regulations improperly limited the time for agency information requests as well as their ability to require studies that cannot be completed during the shortened certification period. Although many of those restrictions will be removed under this rule, the pre-filing meeting still

[5] *See* https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (last visited Aug. 7, 2022).

provides state certifying agencies and applicants with an opportunity to identify the information needs, and the specific requirements of the certifying authority's application rules, prior to application submission. This early identification should include studies that may not be required by the federal licensing agency but may be necessary to assure that projects comply with state water quality standards and other requirements of state law. If used correctly, this early identification of information needs at the pre-filing meeting will avoid delay, disputes, and denials where due to the submission of incomplete certification applications.

C. Request for Certification

EPA is proposing to establish the minimum information needed to initiate the certification process. While the proposed rule is a vast improvement over the existing rule, and takes an important step towards ensuring the certification review occurs at the appropriate phase of the federal licensing or permitting process, EPA has missed an opportunity to ensure the states, tribes, EPA, and the public have the information necessary to ensure the certification process runs as Congress intended. First, we strongly support the requirement that the request for certification include "a copy of the draft license or permit." 87 Fed. Red. at 35,378 (proposed 40 C.F.R. § 121.5(a)). As EPA notes, this requirement will ensure that the certifying authority is provided with a key piece of information necessary to determine whether the project will comply with the applicable water quality requirements and other appropriate legal requirements—namely, the terms and conditions the federal agency has proposed. Working from there, the certifying authority will be in a position to know which provisions will need to ensure are part of the final permit and what more many need to be required to meet the applicable standard. We believe this will save the certifying authority both time and resources because it will not need to guess what the federal agency may require.

But this change will come with some challenges. For example, as EPA notes, currently FERC's regulations require a hydropower license applicant to provide a copy of a water quality certification or request for certification "no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis." 18 C.F.R. § 5.23. Moreover, some agencies, such as FERC, do not routinely release draft licenses or permits. While EPA suggests it is not "aware of any regulatory based reason why Federal licensing or permitting agencies could not manage their internal procedures so that a certifying authority's 'reasonable period of time' did not begin to run until after it had received a copy of the draft license or permit," it does not explain how it will ensure that federal agencies like FERC, the Corps, and others modify their internal processes to align with EPA's preferred approach.

In addition, moving the certification review back in the licensing or permitting process to after the point that a draft license or permit is developed will likely mean that the certifying authority will have access to additional information that have been developed through the permitting process. As a result, we also strongly support EPA's proposed regulation requiring the requestor provide "any existing and readily available data or information related to potential water quality impacts from the proposed project." *Id*. This change will put the onus where it belongs: on the project proponent to ensure it has provided all of the existing information that may aid in the review of the project.

But EPA needs to go further, both for when it is the certifying authority and for when the certifying authority does not have its own rules or regulations requiring sufficient information to allow it, and the public, to understand the true impact of a proposed project. Thus, although moving the certification review to later in the process may mean that more information on the potential impacts of the project is available, it is not certain that federal process will result in the development of all the *necessary* information. As a result, EPA should not limit the type of information it can, and should, require in a request to just the existing data or information. The rules must allow, and establish specific parameters, for the certifying authority to request additional information as part of the certification request process. This may include the requirement that the requestor conduct additional studies that the certifying authority identifies as necessary to complete its review of the project.

This is of course well within the states', tribes', and even EPA's authority to identify and request such information when necessary to conduct a meaningful review of a proposed project. To the extent that EPA has concerns about necessary delay in the certification process that could result if a certifying authority refused to "receive" a request, thereby indefinitely delaying the beginning of the review process until all of the required studies are identified and complete, reasonable regulations guiding the process for the initial review, identification of the likely required information as early as possible, and the clear definition of what constitutes a request, will alleviate such concerns. But the regulations should make clear that states and tribes have the authority to specify the requirements for certification applications, including information needs. While EPA appears to acknowledge this authority, the inference that EPA's proposed list of information is sufficient to constitute a "request" for certification is misplaced and inconsistent with the structure and intent of Section 401. *See* 87 Fed. Red. at 35,378 (proposed 40 C.F.R. § 121.5(b)). Rather than making this authority clear and allowing the states and tribes to set their own processes, as anticipated under the statute, EPA's proposed rules set a presumptive standard for what is required for the initiation of a certification process that if left as the default will leave states and tribes unable to complete their reviews under Section 401.

EPA's proposed definition of a "receipt," 87 Fed. Red. at 35,377 (proposed 40 C.F.R. § 121.1(k)), in combination with the proposal to remove the 2020 Rule's definition of "certification request," 40 C.F.R. § 121.1(c), is a step in the right direction to clarify when the reasonable period time begins. However, EPA can and should go further to ensure that the review clock does not begin ticking until the reviewing authority has all the information it will need to conduct a meaningful review.

D. Reasonable Period of Time

Congress provided that a state or tribe waives its certification authority under Section 401 if it "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). As such, the definition of what constitutes a reasonable period of time in a given situation carries substantial importance. As discussed above, the plain language, intent, and history of Section 401 lead to the singular conclusion that determining the reasonable period of time is wholly within the purview of the states and tribes as the certifying authorities. To suggest otherwise would improperly impair the ability of the certifying authority to make these important decisions.

Unfortunately, EPA's proposed rules do precisely this. In fact, the rules allow the federal licensing agency to dictate the deadline for states to complete their environmental review. In addition, EPA's proposal to set a default deadline of 60 sixty days is patently unworkable in most instances and will likely have the unintended consequence of causing significant delays in the review of many projects. Both elements of EPA's proposed rule are untenable.

First, EPA's proposed rule fails to make clear that the states and tribes have the authority to establish the "reasonable period of time" for the review under Section 401. With Section 401 Congress unambiguously reserved to the states and tribes the power to manage the process of reviewing requests for certification. A principal and necessary component of this authority is the ability to take the time necessary to conduct its review. Thus, while Congress established the requirement that such review must occur within a reasonable time was to prevent "dalliance or unreasonable delay," *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019), nothing in the statute suggest that anyone other than certifying authority is in a position to determine what is "reasonable." Indeed, the states and tribes best positioned to determine how much time, within the statutory maximum of a year, they will need to review a request. Just as Congress intended, the certifying authorities are experts in the controlling substantive and procedural state or tribal law, and therefore they alone will know how long a review may take. Contrary to EPA's suggestions, the timing of the federal process is largely irrelevant and must yield to the needs of the states and tribes—as Congress clearly anticipated because Section 401 does not allow a federal agency to proceed with a final decision until the certifying authority makes its decision on certification. 33 U.S.C. § 1341(a)(1). Therefore, notwithstanding the past practice of federal agencies' involvement in setting the "reasonable time," there is no reasonable basis for giving them a role nowhere contemplated in the statute. EPA must revise the Proposed Rule to recognize that the most rational reading of Section 401's grant of primary authority to states and tribes includes granting certifying authorities the ability to establish the "reasonable time."

Second, EPA's proposed default deadline of sixty days is unworkable and misguided. In short, this proposed rule prevents the states, tribes, and EPA from having enough time to complete a meaningful review of a project's environmental impacts. Compounding the errors noted elsewhere, the proposed rules start the time clock for state certification when an applicant submits a bare-bones request to the state certification agency, rather than when the applicant provides the certifying agency with the information necessary to allow it to begin its environmental review. Then, from there, the deadline makes it nearly impossible for the certifying agency to review that information, hold a meaningful public process to obtain additional information, feedback, and input from impacted communities, complete an adequate analysis of the impacts, and craft the necessary terms and conditions to ensure the project will comply with requirements of state law. In short, EPA's proposed deadline sets the certifying authorities up to fail, at the expense of the environment and the communities Section 401 is meant to protect.

Section 401 provides the certifying authority one year to act on a Section 401 request before its certification authority is deemed waived. EPA's regulations should not contravene the statute by mandating action, or allowing the federal agency to mandate action, in less than one year. Accordingly, EPA should revise the rule to provide that a federal agency may *request* the

certifying authority act in less time than one year, but the certifying authority must consent to any such request and in no event shall its refusal or failure to act in *less than* one-year be the basis for a waiver determination.

E. Scope of Certification

With Section 401, Congress provided the states and tribes broad authority to impose the terms and conditions on federally licensed or permitted activities, including the authority to halt those projects outright, to protect their waters and communities. Unfortunately, EPA's proposed rules circumscribe this authority in a way that is inconsistent with the plain language and intent of the statute. EPA must write these regulations to preserve the authority Congress intentionally left with the states and tribes.

Under EPA's proposed rules, "[w]hen a certifying authority reviews a request for certification, it shall evaluate whether the activity as a whole will comply with all applicable water quality requirements." 87 Fed. Red. at 35,378 (proposed 40 C.F.R. § 121.3). The proposed regulations define the phrase "activity as a whole" to mean "any aspect of the project activity with the potential to affect water quality." *Id*. at 35,377 (proposed 40 C.F.R. § 121.1(a)). And, in turn, the proposed rules define "water quality requirements" to mean "any limitation, standard, or other requirement under sections 301, 302, 303, 306 and 307 of the Clean Water Act, any Federal and state or tribal laws or regulations implementing those sections, and any other water quality related requirement of state or tribal law." *Id*. (proposed 40 C.F.R. § 121.1(m)). Together these sections define the scope of a state or tribes review of a proposed project under Section 401.

To begin with, what EPA gets right. EPA's proposed regulations make the necessary correction to restore the scope of the certifying agency's Section 401 authority to review, and impose terms and conditions on, the "activity as a whole." *See id*. at 35,378 (proposed 40 C.F.R. § 121.3). This is necessary change that, as EPA detail at length, *id*. at 35,343–45, is mandated by the language, intent, and history of the act, as confirmed by the Supreme Court in *PUD No. 1 of Jefferson County and City of Tacoma v. Wash. Dept. of Ecology*, 511 U.S. 700 (1994) ("*PUD No. 1*"). We strongly support this important correction.

However, EPA immediately undermines this important step towards restoring state and tribal authority by subsequently limiting the scope of review by providing unnecessarily narrow definitions of the "activity as a whole" and "water quality requirements." These definitions, working in tandem, work to severely restrict the states' and tribes' ability to exercise their authorities under Section 401.

First, by limiting the scope of review to only those "aspects of the project activity with the potential to affect water quality," EPA is significantly limiting the scope of review. Section 401(d) of the Clean Water Act requires the certifying authority to impose the conditions necessary "to assure that *any applicant* for a Federal license or permit will comply" with applicable provisions of the Clean Water Act and appropriate requirements of state or tribal law. 33 U.S.C. § 1341(d) (emphasis added). The Supreme Court has read Section 401(a) and Section 401(d) together as extending the permissible considerations and conditions under Section 401

beyond the immediate impacts of discharge, to the activity as a whole. *PUD No. 1*, 511 U.S. at 712 ("any applicant" refers "to the compliance of the applicant, not the discharge"). In that case, the project proponent argued that the discharge of water at the end of the tailrace after it had been used to generate electricity was beyond the state's authority to consider, because it was unrelated to the project's point source discharges that triggered Section 401 in the first place. *Id.* at 711. The Supreme Court disagreed, holding that 401(d) authorizes "additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *PUD No. 1*, 511 U.S. at 712.

EPA now proposes to only allow the certifying authority to review, and thus condition, those aspects of the activity that have the "potential to affect water quality." *See* 87 Fed. Red. at 35,378 (proposed 40 C.F.R. § 121.3). After acknowledging that Congress did not include any such limitation in the Act itself, EPA offers no meaningful analysis of why it would choose to impose such a limit on the states and tribes. Instead, EPA relies on dicta from a single Circuit Court decision, an out-of-context quote from *PUD No. 1*, the Trump Administration rule that was designed to limit state and tribal authority, and a rescinded guidance document. 87 Fed. Reg. at 35,343. These collectively amount to a particularly thin reed upon which EPA stands to contend that it would be "inconsistent with the purpose of Clean Water Act section 401 to deny or condition a section 401 certification based solely on potential air quality, traffic, noise, or economic impacts that have no connection to water quality." *Id*. But that is not EPA's conclusion to make. Congress left that determination to the states and tribes when it authorized them to issue terms and conditions necessary to "assure that any applicant for a Federal license or permit will comply . . . with any other appropriate requirement of State law[.]" 33 U.S.C. § 1341(d). As the Supreme Court noted in *PUD No. 1*, that allows the certifying agency to impose "additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." 511 U.S. at 700.

Second, EPA's proposed regulations divest the certifying authority of the ability to impose terms and conditions on project to ensure compliance with "appropriate requirement[s] of state law" other than water quality standards, as preserved by Congress. 33 U.S.C. § 1341(d). EPA's proposed regulations read a limit on the certifying authority's power to ensure the federally licensed project will comply with any other appropriate state law that does not exist in the statute. Because Congress is assumed to say what it means and to mean what it says, *United States v. Lopez*, 998 F.3d 431, 441 (9th Cir. 2021), EPA cannot adopt such a regulation. In short, what is "appropriate" is up to the states up to the states and tribes to decide. Congress trusted them to act reasonably, in furtherance of protecting their waters and communities. EPA should do the same. To do otherwise is to add unnecessary ambiguity into the process that could be exploited to prevent states and tribes from protecting their waters, wildlife, and communities.

F. Certification Decisions

Section 401 provides that the State waives its certification requirements only if it "fails or refuses to act" on the request within that period. 33 U.S.C. § 1341(a)(1). Section 401 does not define what it means for a State to "act." EPA's narrow interpretation of "act" in the proposed rule is inconsistent with the letter and intent of the Clean Water Act, and unnecessarily limits the states' and tribes' authority to manage their review under Section 401. EPA has proposed that a

"certifying authority may act on a request for certification in one of four ways: grant certification, grant certification with conditions, deny certification, or expressly waive certification." 87 Fed. Red. at 35,378 (proposed 40 C.F.R. § 121.7(a)). In doing so, EPA has replaced the verb "act" in the waiver provision with specific language that Congress did not use, and specifically rejected when developing Section 401.

The ordinary meaning of the word "act" means "to take action." Merriam-Webster Dictionary (2021). And "action" means broadly "a thing done." *Id*. The ordinary meaning of "act" does not have the specific, narrow meaning EPA gives in the proposed rule. Limiting how a state or tribe may "act" to avoid waiver runs counter to Congress' intent to allow the states and tribes to manage their own certification processes. The Clean Water Act does not define what the State must do to "act" within one year, and EPA should similarly leave that decision to the states and tribes. If Congress wanted to specify the only ways States can "act" on a request to avoid waiver, as EPA suggests here, it would have been more specific. Indeed, within Section 401, Congress specified other "acts" a State shall take in other circumstances, such as requiring if a State has no effluent limitation or standard that applies to the federal activity, "the State shall so *certify*[.]" 33 U.S.C. § 1341(a)(1) (emphasis added).

Section 401's history shows that Congress intentionally used "act" instead of a more specific command such as "grant or deny." As introduced, Section 401 did not contain any time limit for States to act on a request. *See* H.R. 4141, 91st Cong. § 14(b) (Jan. 23, 1969). Representative Edmondson introduced language to prevent a State from blocking a federal permit indefinitely, explaining that the amendment was intended to

> do away with dalliance or unreasonable delay and to require a 'yes' or 'no' and certification by States that are considered to be adversely affected. The failure by the State to act in one way or the other within the prescribed time would constitute a waiver of the certification required as to that State.

115 Cong. Rec. 9264 (Apr. 16, 1969). However, Representative Edmondson's proposed amendment stated:

> If an affected State . . . fails to act *to certify* or refuse *to certify* within a reasonable period of time . . . after notification of such application, the certification requirements of this subsection shall be waived with respect to such State . . . with respect to such application.

115 Cong. Rec. 9264 (emphasis added). The House adopted this amendment. 115 Cong. Rec. 9269. The Senate also considered limiting the time for State action on a request. That language, too, sought to require a final decision within the specified time, stating: "Such State . . . shall, within one year of receipt of any application for such certification, *notify the applicant of such certification or of intent not to certify*." Section 14(b) in Senate Bill 7. S. Rep. 91-1 (emphasis added).

Neither provision made it into the final statute, however. Instead, Congress chose the "fails or refuses to act" language. The Conference Report explaining this language omitted the earlier statements about requiring a final decision, and instead noted Congress' intent "to insure

that *sheer inactivity* by the State . . . will not frustrate the Federal application." H.R. Conf. Rep. 91-940 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2741 (emphasis added).

Congress's choice of different language is meaningful. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Nachman Corp. v. Pension Benefit Guaranty Corporation,* 446 U.S. 359, 392–93 (1980) (Stewart, J., dissenting). Thus, "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006); *see also Doe v. Chao*, 540 U.S. 614, 622 (2004) (rejecting a statutory interpretation where the "drafting history show[s] that Congress cut the very language in the bill that would have authorized" the claimed relief). A reviewing court should not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," and even more so "when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 341 (2005).[6] Nor may EPA.

Thus, Congress' decision to craft Section 401 to ensure that a State acts, without specifying how, was intentional. *Cf. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]e begin with the understanding that Congress says in a statute what it means and means in a statute what it says there[.]") (internal quotations omitted). As a result, EPA's interpretation of Section 401 violates several tenets of statutory construction. To begin, it runs afoul of the "fundamental principle of statutory construction that 'absent provisions cannot be supplied by the courts,'" *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (cleaned up; quoting Scalia & Garner, Reading Law; The Interpretation of Legal Texts 94 (2012)), and the corollary presumption against interpreting a statute to contain language that Congress could have easily included but did not. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014); *see also Bates v. United States*, 522 U.S. 23, 29 (1997). Put differently, if Congress "*intended* for 'act' to mean grant, deny, or waive, as EPA suggests, why didn't it simply use those words instead? After all, Congress knows how to be specific, and its use of different terms in the same statute is meaningful, not surplusage. The simplest answer is: that is not what Congress intended. *United States v. Lopez*, 998 F.3d 431, 441 (9th Cir. 2021) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

Indeed, courts have noted that a state may "act" on a certification request in several ways. For example, the Second Circuit has twice held that if a state believes an applicant has submitted insufficient information, the state could properly "act" by "request[ing] that the applicant withdraw and resubmit the application." *Constitution Pipeline Co., LLC v. New York State Dept. of Envt'l Conservation*, 868 F.3d 87, 94 (2d Cir. 2017), *cert. denied* 138 S. Ct. 1697 (2018); *New York State Dept. of Envt'l Conservation v. FERC*, 884 F.3d 450, 456 (2nd Cir. 2018); *North Carolina DEQ*, 2021 WL 2763265, at *9 (describing the types of actions an agency may take on a request). Thus, a state or tribe may "act" on a request for certification in a number of ways.

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[6] Elsewhere in the Clean Water Act, Congress used specific terms to denote the precise action to be taken in particular situations, rather than simply requiring an agency to "act." *See, e.g.*, 33 U.S.C. § 1313(d)(2) (requiring that "[t]he Administrator shall either *approve or disapprove* [a State's list of impaired waters and cleanup plans for those waters] not later than thirty days after the date of submission.") (emphasis added).

Such “timely action to review and process a certification request,” when taken in “good faith,” should be sufficient for a State to avoid waiving its 401 authority. *North Carolina DEQ*, 2021 WL 2763265, at *9.

This interpretation is consistent with the general objectives of the Clean Water Act and the specific objectives of Section 401 to preserve state authority over federal projects that may impact their waters, and State autonomy for how to address those concerns, consistent with minimums established in the Act. 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. . . .”). Thus, by not defining what it means to “act” under Section 401, Congress left it to each state to determine how it would act on a request for certification.

In short, Congress trusted the states and tribes to take the appropriate actions within a reasonable period of time in response to a request for certification. EPA should too. As such, EPA should not prescribe the types of actions that a state or tribe must take to avoid waiver.

Similarly, EPA should not impose its requirements for issuing final determinations on the states and tribes. Each state and tribe will have its own regulatory process and requirements that it must follow when responding to and making a final determination regarding a request for certification. EPA should respect these varied processes and avoid imposing additional procedural or technical requirements. Those additional steps and elements may prove problematic if inconsistent with a state’s or tribe’s existing processes, may impose additional administrative burdens on already shorthanded agencies, and could be used to challenge or block the issuance of certifications that carry important terms and conditions.

To this end, EPA’s proposed requirements for granting a certification with conditions, 87 Fed. Red. at 35,378 (proposed 40 C.F.R. § 121.7(d)), are unnecessarily specific and prescriptive. The requirement that a state or tribe develop “[a] statement explaining why each of the included conditions is necessary to assure that the activity as a whole will comply with water quality requirements,” *id*. (proposed 40 C.F.R. § 121.7(d)(3)), does not forward the goal of Section 401, adds a potentially burdensome requirement to the state’s or tribe’s process that may not be required under state law, and is outside of EPA’s authority to impose on the states and tribes. Similarly, it is beyond EPA’s authority and improper to impose the requirement that the certifying authority develop a written “statement explaining why the certifying authority cannot certify that the activity as a whole will comply with water quality requirements,” before denying a certification request. *Id*. (proposed 40 C.F.R. § 121.7(e)(2)). The nature, scope, and process of a denial are best left to the states and tribes to identify and implement.

Again, if EPA believes this is a necessary component of its decision-making process when it is the certifying authority, it can self-impose that requirement. With respect to the states and tribes, however, the regulations should clarify that the 401 certification decisions should be consistent with the applicable state or tribal rules and procedures. EPA should undoubtedly work with the various certifying authorities to provide guidance and recommendations towards ensuring 401 certifications decisions are transparent and equitable, but it is not EPA’s place to dictate the specifics of those processes.

G. Federal Agency Review

The federal permitting agencies may not issue a license for an activity resulting in a discharge into navigable waters where the certifying agency denies a water quality certificate. In addition, federal agencies must include as license conditions all requirements contained in Section 401 water quality certifications. The proposal rule, 87 Fed. Red. at 35,381 (proposed 40 C.F.R. § 124.55), appears to restore this statutorily-mandated framework. This is a necessary correction to the previous regulations that allowed federal agencies to veto state-mandated conditions in project licenses, and limit the ability of states to deny certification to projects that fail to comply with state water quality standards. We applaud EPA for making this critical correction.

H. Modifications

EPA intrudes unnecessarily on the states' and tribes' rights to protect their communities by proposing to prohibit so-called "unilateral" modifications of certifications. Specifically, EPA has proposed that the certifying may only "modify the agreed upon portions of the certification" after receiving written agreement from the Federal licensing or permitting agency. 87 Fed. Red. at 35,377 (proposed 40 C.F.R. § 121.10(b)). This limitation on state and tribal authority is not found in the statute and runs counter to the regulatory scheme Congress established in Section 401. EPA has overstepped its regulatory authority in proposing this severe limitation of state and tribal authority. 33 U.S.C. § 1361(a).

The ability to modify the terms and conditions imposed on a project under Section 401, when necessary to protect the state's or tribe's interests in clean water and a healthy environment, is central to its reserved authority in Section 401. The potential need for updating, changing, or adding conditions to protect local communities only makes sense given the potential harms Section 401 is meant to prevent. For example, FERC licenses hydropower dams for 30–50 years, 40 years being the default license term. While the licensing process permits state certifying agencies to mandate conditions based on past, ongoing, and projected impacts from project operations, conditions will inevitably change during the license term, and future impacts are projections based on currently available data. Modifications, or "reopeners," may be warranted based on changed circumstances or the availability of new information that was not available at the time of certification. These changed circumstances may include but are not limited to climate change, extreme hydrologic events, cumulative impacts from other projects, flow diversions, the listing of species under the Endangered Species Act, changes in existing uses including recreation, and project impacts on aquatic or terrestrial impact over time.

Requiring the certifying authority to obtain the agreement of the permitting authority to reopen or amend a certification places these agencies in a position of needing to wait perhaps decades to address unforeseen conditions at the time of licensing. To do so is antithetical to the point of Section 401. As Senator Muskie pointed out when arguing for retaining the states' and tribes' authority under Section 401, the permitting agencies are poorly equipped to know how to protect the environment. Accordingly, in Senator Muskie's experience, "mission-oriented agencies whose mission is something other than concern for the environment simply do not adequately protect environmental values. That is not their mission. They would do a disservice to

their mission if they would try to act as environmental protectors." 117 Cong. Rec. 38,855 (Nov. 2, 1971). As such, Congress left the states and tribes in that role. EPA's proposed regulation would reverse this design.

Failure to allow states and tribes to modify certifications as they see fit may lead to two unintended consequences. First, when faced with the prospect of being forced to allow a project to operate for decades, with no opportunity to adapt to changing circumstances, some certifying authorities may be more inclined to deny certifications outright. Second, to mitigate against an inability to amend or modify certification, a prudent certifying authority may be compelled to add additional measures to protect against future harm.

If EPA wishes to obtain the concurrence of the permitting authority before reopening or modifying a certification in its capacity as a certifying authority, it is free to do so and to write regulations to that effect. With respect to the states and tribes, however, the regulations should make clear that states can reopen certification based on a showing that changed circumstances and ongoing effects of project operations fail to meet water quality standards.

J. Enforcement

To avoid further confusion EPAs' rules should clarify that the Clean Water Act makes clear that the states, tribal, and public can enforce the terms and conditions imposed on a licensee by a certification. EPA has proposed to take the first step in this direction but should do more.

The existing regulations appears to make federal agencies exclusively "responsible for enforcing certification conditions that are incorporated into a federal license or permit." 40 C.F.R. § 121.11(c). EPA properly proposes to eliminate this language. 87 Fed. Reg. at 35,364. This is necessary, as the existing regulation is inconsistent with the letter and intent of the Clean Water Act. However, EPA can avoid future uncertainty and confusion by clarifying state and tribal authority to enforce certification conditions in the Proposed Rule. As EPA notes, the courts have uniformly confirmed state and tribal enforcement authority. S*ee id.* Indeed, the CWA could not be interpreted to "put all enforcement authority exclusively in the hands of the federal permitting agency" in light of the "overwhelming textual support for state authority to create and enforce their own water quality standards." *Deschutes River Alliance v. Portland Gas and Electric Co.* (*Deschutes River Alliance*) 249 F. Supp. 3d 1182, 1192 (D. Or. 2017).

Similarly, EPA should reaffirm the clear language of the Clean Water Act which provides for citizen enforcement in the absence of enforcement action by the state or federal government. *See* 33 U.S.C. § 1365(a)(1), (f)(6). While certainly not necessary given the clear language of the statute and caselaw, EPA can help avoid any further confusion over the public's right to protect their waters and interests by confirming the reach of the citizen suit provision in this regulation.

K. Treatment in a Similar Manner as a State Under Section 401

American Whitewater supports EPA's efforts to clarify and streamline the application process for tribes to seek "treatment as states" for the purposes of Section 401. Ensuring the tribes can avail themselves to the rights and powers as certifying authorities and neighboring jurisdictions is an important step toward protecting their reserved treaty rights. To this end, the

codification of the TAS application process should allow tribes to better engage in this process. However, it is not clear from the preamble to the proposed rule, or the other publicly available information what steps EPA has taken to consult with tribes before establishing these rules. While the proposed application process appears to be consistent with similar processes used by tribes seeking TAS under other sections of the Clean Water Act and other federal environmental laws, EPA must go further. Ensuring that the process is open and accessible to the tribes that may wish to seek TAS status is important to meeting not only the goals of the CWA but also the federal government's obligations to the tribes. As such, EPA must, in consultation with the tribes, ensure that the TAS process does not impose unnecessary or burdensome obligations that may hamper or even prevent tribes from seeking TAS status.

For example, EPA notes that in some cases it may request additional information when reviewing a tribe's application. EPA must at the outset, with these rules, establish clear guidelines for what a tribe must submit with its application. Such information must be narrowly tailored to meet specific needs and objectives related to the tribe's ability to manage their own programs. And the standards against which a tribe's program will be judged, must be clear and equitable, and must be developed in consultation with the tribes themselves. In short, the goal of the process should be to allow a tribe that's interested in exercising this right is allowed to do so, with the support and assistance of EPA. Finally, EPA should establish rules to ensure its review is efficient and prompt, to prevent unnecessary delay in approving qualified tribal programs.

American Whitewater specifically supports EPA's proposal to authorize tribes to obtain TAS solely for Section 401(a)(2), whereby a tribe will be able to participate as a neighboring jurisdiction if an activity may affect their waters. However, when tribal waters are involved, EPA must ensure that the process is consistent with the federal government's obligations towards tribes and tribal law. For example, EPA's regulation must ensure that the public hearing process conducted under Section 401(a)(2) satisfies the tribe's consultation requirements. Similarly, EPA must ensure that the 401(a)(2) process accounts for tribal rules and requirements for all of the tribe's waters, and related interests. Again, EPA must consult with the tribes themselves as it develops the specifics of how these regulations should meet these two important requirements

Conclusion

Congress' goal in enacting the Clean Water Act was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 401 has long played an important role in meeting these goals. EPA is at a crossroads and its next steps will determine if Section 401 will continue to allow states and tribes to protect rural, recreational, and tourism economies. The Proposed Rule unquestionably includes several positive provisions that are consistent with the goal of securing the primary responsibility of states and tribes under Section 401 to prevent federal-permitted projects from harming their waters and communities. American Whitewater applauds EPA for taking the steps necessary to undo the potential harm caused by the 2020 Rule. However, EPA has unfortunately committed some of the same mistakes of the 2020 Rule, and has proposed to limit state and tribal authority in a manner inconsistent with both the letter and intent of the statute. As a result, EPA must

revise the Proposed Rule to implement the statute as written and ensure the realization of the purpose of Section 401 to protect our waters and communities.

We appreciate the opportunity to comment on the Proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule and request that the EPA consider these comments and revise the proposed rules to address the concerns raised here.

Respectfully submitted,

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