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**Docket ID: EPA-HQ-OW-2018-0855**

The undersigned state attorneys general and environmental agencies submit this letter in response to EPA’s request for comments and recommendations as it considers revising its current guidance on state water quality certifications under Clean Water Act § 401<sup>1</sup> in response to the President’s “Executive Order on Energy Infrastructure and Economic Growth,” issued on April 10, 2019.<sup>2</sup> The Executive Order directs EPA to evaluate, among other things, “the appropriate scope of water quality reviews” as well as “the nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time,” in order to clear the way for energy development.<sup>3</sup>

We urge EPA not to weaken its existing guidance and regulations. Section 401 explicitly preserves states’ independent and broad authority to regulate the quality of waters within their borders. Neither the President’s Executive Order nor EPA’s guidance and regulations can contradict or undermine the plain language and congressional intent of section 401.<sup>4</sup>

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<sup>1</sup> 33 U.S.C. § 1341 (section 401).

<sup>2</sup> 84 Fed. Reg. 15,495 (Apr. 15, 2019) (Executive Order).

<sup>3</sup> Executive Order § 3(a)(ii), (v).

<sup>4</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (President cannot use Executive Order to promote policy 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.”).

EPA's expedited and overly broad "consultation" process fails to provide adequate public notice and opportunity for comment. Additionally, revisions to EPA's existing guidance and regulations are wholly unnecessary, as states efficiently and effectively review thousands of water quality certifications each year. Any revisions to EPA's guidance or regulations must be consistent with the Clean Water Act, preserve the states' broad authority to protect water quality, maintain the flexibility contemplated by the Act for states to follow their own administrative processes, and not limit the one-year review period prescribed by Congress. EPA may not upend the well-established, statutorily mandated role of states in implementing the Clean Water Act's water quality protections within their borders.

## **I. EPA'S REVIEW OF ITS SECTION 401 GUIDANCE AND REGULATIONS UNDER THE EXECUTIVE ORDER IS PROCEDURALLY DEFICIENT**

The process EPA is using to solicit input in response to the Executive Order is procedurally deficient and provides no meaningful notice or opportunity for public comment. EPA has broadly requested "pre-proposal recommendations" from states on "provisions that require clarification within section 401 and related federal regulations and guidance."<sup>5</sup> EPA has not issued any actual proposal that states can evaluate and respond to with meaningful comments.

Nor has EPA identified with any specificity the issues on which it seeks comment in preparing to revise its guidance or regulations. EPA suggests that states should use the comment period to "provide feedback" following two multi-state conference calls hosted by EPA.<sup>6</sup> But EPA's efforts to "engage with states" through these "meetings" (as EPA describes them) consisted of little more than two PowerPoint presentations raising more than a dozen broad issues, followed by unstructured discussions.<sup>7</sup> Follow-up documents published by EPA to summarize the comments received during these discussions show 123 separate comments raised by the states on a range of issues, reflecting the confusion and lack of meaningful structure in EPA's process.<sup>8</sup> It is impossible to provide meaningful input on the broad swath of section 401 issues raised by the Executive Order and the multi-state discussions during the two conference calls held by EPA on the short timeline EPA has afforded.

Additionally, the Executive Order requires EPA to issue guidance within only sixty days of the issuance of the Executive Order, *or June 8, 2019*, and to issue draft regulations sixty days

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<sup>5</sup> Memorandum from Lauren Kasparek (April 26, 2019) (Docket ID EPA-HQ-OW-2018-0855-0002).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; *see also* Slideshow on Clean Water Act Section 401 Water Quality Certification: Follow-up State and Tribal Webinar (May 8, 2019) (Docket ID EPA-HQ-OW-2018-0855-0025); Slideshow on Clean Water Act Section 401 Water Quality Certification: Outreach, Feedback, & Next Steps (April 17, 2019) (Docket ID EPA-HQ-OW-2018-0855-0006).

<sup>8</sup> *See* Follow-up State and Tribal Webinar, Written Input from Participants (May 8, 2019) (Docket ID EPA-HQ-OW-2018-0855-0024); State and Tribal Webinar, Written Input from Participants (April 17, 2019) (Docket ID EPA-HQ-OW-2018-0855-0022).

later, *or August 8, 2019*.<sup>9</sup> EPA cannot possibly review—let alone meaningfully consider—the many substantive comments it receives on the plethora of issues at stake in the mere 17 days between the close of public comments and the Executive Order’s deadline for issuing new guidance.

EPA’s flawed public engagement process calls into question the legitimacy of any forthcoming guidance or regulatory revisions. If EPA amends its guidance and regulations (and it should not, for the reasons next discussed), it must provide legitimate and meaningful public notice and opportunity for comment.<sup>10</sup>

## **II. EPA’S REVIEW OF ITS SECTION 401 GUIDANCE AND REGULATIONS UNDER THE EXECUTIVE ORDER IS UNNECESSARY**

There is no reason to revise EPA’s existing guidance because states are managing their section 401 responsibilities effectively and appropriately. The Executive Order relies on a purported need for revisions to the section 401 guidance and regulations because they are “outdated” and “are causing confusion and uncertainty.”<sup>11</sup> Further, statements from EPA Administrator Andrew Wheeler suggest revisions are necessary because states are not implementing section 401 consistently or faithfully.<sup>12</sup> These statements are incorrect.

Rather than exceeding their authority under section 401 or abusing the section 401 process, as the Executive Order and Administrator Wheeler seem to suggest, states efficiently and effectively handle a large volume of section 401 applications annually for a wide range of projects. For example, the New York State Department of Environmental Conservation issued 3,762 water quality certifications in 2018, 5,061 certifications in 2017, and 3,192 certifications in 2016.

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<sup>9</sup> Executive Order § 3(b), (c). *See also* Timeline, Slideshow on Clean Water Act Section 401 Water Quality Certification: Follow-up State and Tribal Webinar, at 10 (Docket ID EPA-HQ-OW-2018-0855-0025).

<sup>10</sup> *See Prometheus Radio Project v. Fed. Comm’n Comm’n*, 652 F.3d 431, 450 (3d Cir. 2011), *cert. denied* 545 U.S. 1123 (2005) (meaningful opportunity for public comment “means enough time with enough information to comment and for the agency to consider and respond to the comments”); *Rural Cellular Ass’n v. Fed. Comm’n’s Comm’n*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (“The opportunity for comment must be a meaningful opportunity, . . . in order to satisfy this requirement, an agency must also remain sufficiently open-minded”); *Levesque v. Block*, 723 F.2d 175, 187 (1<sup>st</sup> Cir 1983) (“Public comment contributes importantly to self-governance and helps ensure that administrative agencies will consider all relevant factors before acting. To serve these purposes, notice and the opportunity for comment must come at a time when they can feasibly influence the final rule.”).

<sup>11</sup> Executive Order § 3.

<sup>12</sup> Press Release on EPA Implementation of Executive Order (April 10, 2019), *available at* <https://www.epa.gov/newsreleases/epa-takes-action-implement-president-trumps-energy-infrastructure-executive-order>.

In the rare circumstances where state certification decisions are challenged, ample administrative and judicial remedies are available. An applicant that objects to the substance of a state's determination under section 401 can seek administrative and court review.<sup>13</sup> An applicant that believes a state has taken too long to review a section 401 application can raise that argument with the appropriate agency or court.<sup>14</sup> Revision of EPA guidelines or regulations is not necessary to protect applicants' interests.

### **III. EPA MAY NOT IMPAIR STATES' WELL-ESTABLISHED AUTHORITY TO INDEPENDENTLY EVALUATE THE WATER QUALITY IMPACTS OF FEDERAL PROJECTS ON STATE WATERS**

Any revision to EPA's guidance or regulations interpreting section 401 must recognize and preserve the state's primary and well-established authority to protect water quality within their borders. State agencies have "broad discretion" when developing the criteria for their section 401 certifications.<sup>15</sup> The cooperative federalism system Congress established in section 401 makes clear that decisions relating to the scope of state agency review are vested in state agencies as long as they are at least as stringent as the Clean Water Act, not EPA or other federal agencies.<sup>16</sup>

The Clean Water Act reflects Congress' policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" of waters within their borders.<sup>17</sup> Consistent with this policy and the Clean Water Act's primary objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"<sup>18</sup> section 401 mandates that

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<sup>13</sup> See, e.g., *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006); *Islander E. Pipeline Co.*, 467 F.3d 295 (2d Cir. 2006) (*Islander East I*); *Constitution Pipeline Co. v. N.Y.S. Dep't of Env'tl. Conservation*, 868 F.3d 87, 90-91 (2d Cir. 2017), *cert. denied* 138 S. Ct. 1697 (2018); *King v. N.C. Env'tl. Mgmt. Comm'n*, 436 S.E.2d 865, 869 (N.C. App Ct. 1993); *Arnold Irrigation Dist. v. Dep't of Env'tl. Qual.*, 717 P.2d 1274, 1276-77 (Or. App. Ct. 1986).

<sup>14</sup> See, e.g., *Millennium Pipeline Co. v. N.Y.S. Dep't of Env'tl. Conservation*, 860 F.3d 696, 701 (D.C. Cir. 2017) (holding that once state agency "has delayed for more than year" an applicant's remedy is to "present evidence of waiver" to relevant federal agency).

<sup>15</sup> *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4<sup>th</sup> Cir. 2019).

<sup>16</sup> See *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, Dep't of Interior*, 20 F.3d 1418, 1427 (6<sup>th</sup> Cir. 1994), *cert. denied* 513 U.S. 927 (1994) (Clean Water Act "sets up a system of 'cooperative federalism' in which states may choose to be primarily responsible for running federally-approved programs").

<sup>17</sup> 33 U.S.C. § 1251(b); see also *id.* § 1370 (preserving states' right to adopt or enforce water quality protections more stringent than federal standards); *Public Util. Dist. No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994) (*PUD No. 1*) ("The Clean Water Act establishes distinct roles for the Federal and State Governments.").

<sup>18</sup> 33 U.S.C. § 1251(a).

[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply [with applicable water quality requirements].<sup>19</sup>

Section 401 further provides that the state’s certification “shall set forth any effluent limitations and other limitations . . . necessary to assure that any applicant for a Federal license or permit will comply” with the CWA, “and with any other appropriate requirement of State law.”<sup>20</sup> The certification “shall become a condition on any Federal license or permit” for which it is issued.<sup>21</sup> “No license or permit shall be granted if the certification has been denied by the State[.]”<sup>22</sup>

The Supreme Court has recognized that “State certifications under § 401 are essential . . . to preserve state authority to address the broad range of pollution” impacting state water resources.<sup>23</sup> Indeed, 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.’”<sup>24</sup> Section 401 thus 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.”<sup>25</sup> Where the state agency determines that a project will not comply with state water quality standards, it can “effectively veto[.]” the project, even if the project “has secured approval from a host of other federal and state agencies.”<sup>26</sup> Thus, Congress “intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.”<sup>27</sup>

A state that denies an application for a section 401 certification is exercising its statutorily mandated authority to protect water quality under the cooperative federalism system established by the Clean Water Act. And because those decisions are subject to judicial review, there is no danger of states abusing their power or arbitrarily denying applications for section 401

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<sup>19</sup> *Id.* § 1341(a)(1).

<sup>20</sup> *Id.* § 1341(d).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *S.D. Warren*, 547 U.S. at 386 (2006); *see also Keating v. Fed. Energy Reg. Comm’n*, 927 F.2d 616, 622 (D.C. Cir. 1991) (Section 401 is “[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them” under the Clean Water Act).

<sup>24</sup> *S.D. Warren*, 547 U.S. at 380 (quoting S. Rep. No. 92-414, p. 69 [1971]).

<sup>25</sup> *Constitution Pipeline Co.*, 868 F.3d at 101.

<sup>26</sup> *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), *cert. denied* 555 U.S. 1046 (2008) (*Islander East II*).

<sup>27</sup> *Keating*, 927 F.2d at 622.

certifications. Any attempt to subsume state authority within the federal regulatory process would violate the plain language and purpose of section 401.

#### **IV. EPA MUST PRESERVE STATE AUTHORITY TO CONDITION CERTIFICATION ON COMPLIANCE WITH ANY “APPROPRIATE REQUIREMENT” OF STATE LAW**

The Executive Order directs EPA to review its guidance and regulations and consider the “types of conditions that may be appropriate to include in a certification.”<sup>28</sup> Section 401 makes clear that when a state issues a section 401 certification, it “shall” include conditions sufficient to ensure that the applicant will comply not only with state water quality standards, but also with “*any other* appropriate requirement of State law.”<sup>29</sup> Thus, “Congress provided the States with power to enforce other appropriate State law by imposing conditions on federal licenses for activities that may result in a discharge.”<sup>30</sup> Accordingly, “federal courts and agencies are without authority to review the underlying validity of requirements imposed under state law or in a state’s certification.”<sup>31</sup>

EPA’s current guidance appropriately recognizes the wide range of state statutes and regulations that states have deemed “appropriate” under this provision, including laws protecting threatened or endangered species or cultural or religious values of waters.<sup>32</sup> EPA cannot curtail the breadth of those state laws. Instead, any revision of the guidance or regulations must preserve the states’ broad authority to enforce appropriate state laws through section 401 conditions.

#### **V. ANY REVISIONS TO EPA’S SECTION 401 GUIDANCE AND REGULATIONS MUST ENSURE THAT STATES CAN COMPLY WITH THEIR OWN ADMINISTRATIVE PROCEDURES WHEN REVIEWING SECTION 401 APPLICATIONS**

The Executive Order directs EPA to evaluate several topics related to the timing and scope of state administrative review of section 401 applications, suggesting that EPA’s revised guidance might create federal restrictions on the timing and scope of state administrative processes.<sup>33</sup> This would be a mistake. EPA’s guidance and regulations must preserve the flexibility the Clean Water Act affords for states to design and comply with their own administrative processes when reviewing section 401 certification applications.

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<sup>28</sup> Executive Order § 3(a)(iii), (v).

<sup>29</sup> 33 U.S.C. § 1341(d) (emphasis added); *see also PUD No. 1*, 511 U.S. at 713-14.

<sup>30</sup> *S.D. Warren*, 547 U.S. at 386 (citation omitted).

<sup>31</sup> *Roosevelt Campobello Inter. Park v. U.S. Envtl. Prot. Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982).

<sup>32</sup> 2010 Interim Guidance, at 21.

<sup>33</sup> Executive Order § 3(a).

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.”<sup>34</sup> A state must not only establish such procedures; it must comply with them.<sup>35</sup> The Clean Water Act allows state agencies to follow state law when complying with section 401’s public notice and hearing requirement,<sup>36</sup> and more broadly when determining whether to issue, condition, or deny a section 401 certification.<sup>37</sup> Recognizing that meaningful state agency and public review cannot be rushed, Congress gave states a reasonable period—up to “one year”—to exercise their broad authority pursuant to state administrative procedures (including public notice and, if appropriate, hearings) when making a section 401 certification determination.<sup>38</sup>

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.<sup>39</sup> 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 has received a deficient or incomplete application may require the applicant to provide additional information.<sup>40</sup> The process of obtaining required information is not entirely within the reviewing agency’s control: applicants can frustrate the timeframe for review by failing to provide requested materials necessary to the state’s review of the application.<sup>41</sup> In some cases, states also must await completion of federal

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<sup>34</sup> 33 U.S.C. § 1341(a)(1).

<sup>35</sup> See *City of Tacoma, Wa. v. Fed. Energy Regulatory Comm’n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006).

<sup>36</sup> *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl Prot.*, 903 F.3d 65, 75 (3d. Cir. 2018), cert. denied \_\_\_ U.S. \_\_\_, 2019 WL 1886047 (Apr. 29, 2019) (Clean Water Act section 401 provides states with discretion as to how they establish public notice and/or hearing procedures).

<sup>37</sup> See *Berkshire Env’tl. Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 112-13, n.1 (1st Cir. 2017) (Clean Water Act section 401 does not affect how agency conducts “internal decision-making before action”); *City of Tacoma, Wa. v. Fed. Energy Regulatory Comm’n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006) (“the decision whether to issue a section 401 certification generally turns on questions of state law”).

<sup>38</sup> 33 U.S.C. § 1341(a)(1).

<sup>39</sup> 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.

<sup>40</sup> 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).

<sup>41</sup> See, e.g., *Constitution Pipeline*, 868 F.3d at 103.

and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications.<sup>42</sup>

Once sufficient information supporting an application has been received for a state to deem an application complete, section 401 requires states to provide public notice and encourages public hearings.<sup>43</sup> Typically, public notice must be accomplished through publication in one or more local newspapers as well as in official agency publications.<sup>44</sup> In almost all cases, states must hold a public comment period ranging from fifteen to forty-five days.<sup>45</sup> To ensure meaningful public review, states appropriately provide extensions of public comment periods for significant projects.<sup>46</sup> The period of public participation may be further extended in situations where states receive requests for a public hearing.<sup>47</sup> After the public comment period and any public hearing

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<sup>42</sup> 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).

<sup>43</sup> 33 U.S.C. § 1341(a)(1).

<sup>44</sup> 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).

<sup>45</sup> 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).

<sup>46</sup> 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](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 Env'tl. 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](https://www.dec.ny.gov/enb/20190213_not2.html).

<sup>47</sup> 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).

are complete, the state agency must review and, in many cases, respond to the public comments received before making a certification determination.<sup>48</sup>

Any revision to EPA's section 401 guidance and regulations must be sufficiently flexible to accommodate the variety of state administrative processes described above and ensure states can comply with state administrative procedural requirements. Any attempt by EPA to limit state review to particular materials or a particular timeframe (except as specifically set forth in section 401) may prevent the states from complying with their own administrative standards, preclude meaningful public notice and comment and thorough state review, and impermissibly intrude on the states' primary authority to protect their water quality.

Placing unnecessary limitations on the time-frame for state review will not result, as the Executive Order suggests, in more expedited approval of section 401 applications. If a state agency's review time is unnecessarily restricted by federal regulation or guidance, the agency may be forced to deny applications without prejudice. The applicants would then need to re-apply for a section 401 certification, triggering a new time-period for review and delaying a final decision on the application. A state agency that rushes to approve section 401 certifications pursuant to an arbitrary federal deadline could leave itself open to legal challenge from opponents of approved projects, leading to more project delays through litigation and the possible vacatur of section 401 certifications by the courts. Either situation will result in unnecessary delays and greater uncertainty in the regulatory process.<sup>49</sup>

## **VI. EPA SHOULD CLARIFY THAT THE TIMEFRAME FOR STATE REVIEW OF A SECTION 401 APPLICATION COMMENCES ONCE A STATE DEEMS AN APPLICATION COMPLETE**

A state agency's time for issuing or denying a section 401 certification commences upon "receipt of such request [for certification]."<sup>50</sup> To be consistent with section 401 and ensure that states can meaningfully exercise their authority to evaluate certification applications and protect state water quality as mandated by the Clean Water Act, EPA should clarify that only receipt of a complete application triggers commencement of the state review period.

The benefits of requiring a complete application before the timeframe for review commences are manifest. Requiring a complete application is necessary to provide public notice and obtain meaningful public comment.<sup>51</sup> After public notice and comment, state agencies generally must review any public comments and determine whether a public hearing is required or

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<sup>48</sup> See, e.g., 310 C.M.R. § 4.10(8)(g) 3.b.; 205 R.I.C.R. §150-05-1.17(D)(4).

<sup>49</sup> If EPA must issue new guidance, it should clarify that states have, by default, a full year to review Section 401 applications—an approach currently taken by the Federal Energy Regulatory Commission. 18 C.F.R. § 4.34(b)(5)(iii).

<sup>50</sup> 33 U.S.C. §1341(a)(1).

<sup>51</sup> 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).

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 forced to act on an application before this public notice and comment process has concluded (or even commenced). A complete application is also necessary to trigger the one-year waiver period and ensure that states can fully exercise their authority under section 401. Otherwise, applicants could frustrate the state’s mandate to make section 401 determinations by submitting an incomplete or deficient application and waiting until a few days before the expiration of the one-year period to complete their application, thereby depriving states of the ability to meaningfully review the complete application and make a determination within the one-year period. Requiring a complete application avoids this potential for gamesmanship.

Any revisions to EPA’s regulations should adopt the U.S. Army Corps of Engineers’ rule requiring that the time period for state review commences when an agency receives a *complete* application. The Army Corps’ regulations provide that “[i]n determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification.”<sup>52</sup> When promulgating this regulation, the Army Corps noted generally that “valid requests for certification must be made in accordance with State laws[.]”<sup>53</sup> The Army Corps regulation requiring that agency to determine whether a state has received a “valid request” for a certification to trigger commencement of the one-year review period has been upheld as “reasonable” and “permissible in light of the statutory text” of section 401.<sup>54</sup> EPA should follow the Army Corps’ lead in this respect.

## **VII. EPA SHOULD CONTINUE TO PROVIDE APPLICANTS WITH THE FLEXIBILITY TO EXTEND ADMINISTRATIVE REVIEW THROUGH THE WITHDRAWAL AND RESUBMISSION OF APPLICATIONS**

Any change to EPA’s section 401 guidance or regulations relating to timing should preserve applicants’ flexibility to functionally extend the timeframe for review by permitting the withdrawal and re-submittal of section 401 certification applications to commence a new review period. States sometimes require more than one year to review section 401 applications, especially for particularly large or complex projects or when an applicant fails to provide relevant information in a timely manner. Historically, applicants have chosen to withdraw and resubmit their section

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<sup>52</sup> 33 C.F.R. § 325.2(b)(1)(ii).

<sup>53</sup> *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986).

<sup>54</sup> *AES Sparrows*, 589 F.3d 721, 729 (4<sup>th</sup> Cir. 2009). In this respect, EPA should decline to follow the approach taken by FERC, which has interpreted the section 401 timeframe as commencing upon receipt of *any* written application, no matter how perfunctory or facially incomplete. *See* 18 C.F.R. § 4.34(b)(5)(iii); *Millennium Pipeline Company, L.L.C.*, 160 FERC ¶ 61,065 (Sept. 15, 2017). Although the Second Circuit upheld FERC’s interpretation of section 401, the Court did not hold that other interpretations of the triggering event would be impermissible. *See N.Y. State Dep’t of Env’tl. Conservation v. Fed. Energy Reg. Comm’n*, 884 F.3d 450, 455-56 (2d Cir. 2018) (*NYSDEC v. FERC*).

401 applications in order to make a new request for a certification, thus creating a new deadline for state action.<sup>55</sup> The withdrawal-and-resubmittal process is well-established and non-controversial in almost all cases.<sup>56</sup> The Second Circuit recently recognized the validity of this process, in noting that, if a state needs more time to review a request for a section 401 certification, it can “request that the applicant withdraw and resubmit the application.”<sup>57</sup> And EPA’s existing guidance, too, recognizes that the withdrawal-and-resubmittal process could be used to “restart[] the certification clock.”<sup>58</sup> Notably, an applicant that desires an expeditious decision remains free to decline to withdraw and resubmit its application, allowing the state to make a decision on the application as it then stands. Applicants therefore retain the power to ensure that the states act on their application within one year if they so choose, which is consistent with Congress’ intent when it adopted section 401 to protect applicants from a state’s “sheer inactivity” on its application.<sup>59</sup>

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<sup>55</sup> See, e.g., *Constitution Pipeline*, 868 F.3d at 94; *Islander E. Pipeline Co., LLC v. Conn. Dep’t of Env’tl. Prot.*, 482 F.3d 79, 87 (2d Cir. 2006) (*Islander East I*).

<sup>56</sup> The D.C. Circuit recently rejected the use of the withdrawal and resubmittal process where states and an applicant entered into a written agreement “to defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests” over more than a decade. *Hoopa Valley Tribe v. Fed. Energy Regulatory Comm’n*, 913 F.3d 1099, 1101 (D.C. Cir. 2019). The Court made clear, however, that its decision was narrow and resolving only the “single issue” of “whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification.” *Id.* at 1109 (emphasis added); *accord id.* at 1100-01. The Court expressly declined to determine whether, in different circumstances, the withdrawal and resubmittal of a section 401 application would “restart[] the one-year clock.” *Id.* at 1104. The period for a party to petition the U.S. Supreme Court for a writ of certiorari in that case has not yet expired.

<sup>57</sup> *NYSDEC v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018).

<sup>58</sup> EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, at 13 (2010).

<sup>59</sup> Conf. Rep. No 91-940, 91st Cong., 2d Sess. (1970), reprinted in U.S. Code Cong. & Ad. News 2712, 2741.

## CONCLUSION

Revisions to EPA's section 401 guidance and regulations are not necessary. Any revisions that EPA decides to undertake must be consistent with the terms and intent of section 401, which preserves broad state authority over water quality issues.

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