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MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO,
NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, WISCONSIN, THE
DISTRICT OF COLUMBIA, AND THE COMMONWEALTHS OF MASSACHUSETTS,
PENNSYLVANIA, AND VIRGINIA**

October 21, 2019

By U.S. Mail, E-mail, and Electronically

Attn: Environmental Protection Agency

Office of Wetlands, Oceans and Watersheds, Office of Water

John T. Goodin, Director

1200 Pennsylvania Avenue, N.W.

Washington, D.C. 20460

RE: Proposed Rule Updating Regulations on Water Quality Certifications, 84 Fed. Reg. 44080 (Aug. 22, 2019), Docket ID No. EPA-HQ-OW-2019-0405

Dear Administrator Wheeler and Mr. Goodin:

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

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

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

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

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

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

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

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

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

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I. EXECUTIVE SUMMARY

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

Ignoring the states’ concerns, EPA proceeded to issue a revised guidance document purporting to significantly narrow state authority under section 401 by restricting the timing and scope of state review of certification applications.³ Again, many of the undersigned states objected to the restrictions EPA purported to place on their authority, and urged EPA to comply with the plain language and intent of section 401.⁴ The states’ objections again went unheeded, and EPA proceeded to issue the proposed rule, which goes even further than the 2019 Guidance in curtailing state authority and violating section 401.

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

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

² Response by New York Attorney General Letitia James, et al., to EPA’s Request for Pre-Proposal Recommendations Regarding Clean Water Act Section 401 Water Quality Certifications, Docket ID EPA-HQ-OW-2018-0855-0059 (May 24, 2019) (Attachment A).

³ EPA, Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (June 7, 2019) (2019 Guidance).

⁴ Letter from Attorneys General of California, et al., to Administrator Wheeler (July 25, 2019) (Attachment B).

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

- By proposing to require states to consider *only* EPA-approved water quality standards when imposing limitations on section 401 certifications, 84 Fed. Reg. at 44,120 (proposed 40 C.F.R. §§ 121.1(p), 121.3, 121.5), EPA contradicts the plain language of section 401, which authorizes states to ensure compliance with specific provisions of the Act as well as “any other appropriate requirement of state law.” 33 U.S.C. § 1341(d). Because the specific provisions of the Act listed in section 401(d) include all EPA-approved water quality standards, EPA’s new interpretation would render the clause “any other appropriate requirement of state law” superfluous and meaningless. EPA’s new position also departs from decades of agency practice and interpretation without adequate explanation, and conflicts with Congress’ intent in the Clean Water Act to preserve broad state authority to enforce state water quality requirements that are more restrictive than federal standards.
- By proposing to authorize federal agencies to ignore a state’s timely denial of a certification application, 84 Fed. Reg. at 44,121 (proposed 40 C.F.R. § 121.6(c)), EPA ignores the plain language of section 401, which provides that “[n]o license or permit shall be granted if certification has been denied by the State,” 33 U.S.C. § 1341(a)(1). The legislative history confirms that Congress intended for a state’s denial of certification to act as a “complete prohibition” on issuance of a federal permit.⁵ Courts have consistently held that section 401 empowers states to block projects that would adversely impact state water quality, even if those projects would otherwise receive federal approval. *See, e.g., S.D. Warren Co. v. Maine Bd. of Env’tl Protection*, 547 U.S. 370, 380 (2006) (*S.D. Warren*). The remedy available to project applicants when a state denies their section 401 certification request is judicial review of that denial in a court of appropriate jurisdiction.⁶ *See, e.g., Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011).
- Similarly, by proposing to authorize federal agencies to ignore state-imposed limitations in a timely-issued certification, 84 Fed. Reg. at 44,121 (proposed 40 C.F.R. § 121.8), EPA ignores the plain language of section 401, which provides that a state certification, including any state-imposed conditions, “shall become a condition on any Federal license or permit.” 33 U.S.C. § 1341(d). Courts have universally interpreted the plain language of section 401 as prohibiting federal agencies from reviewing the propriety of state-imposed limitations included in certifications. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 645-56 (4th Cir. 2018); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107-108 (2d Cir. 1997). As with section 401 denials, project proponents remain free to

⁵ H. Rep. 92-911, at 122, *reproduced in* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 809 (1973) (“Legislative History Vol. 1”).

⁶ S. Rep. 92-313, at 69 *reproduced in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1487 (1973) (“Legislative History Vol. 2”).

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

- By proposing to restrict the timing and scope of state review under section 401, 84 Fed. Reg. at 44,120-21 (proposed 40 C.F.R. §§ 121.1(h),(n), 121.4, 121.7), EPA exceeds its authority under the Act, which provides that a state waives its section 401 authority *only* if it “fails or refuses” to act within a reasonable period time of up to one year, 33 U.S.C. § 1341(a)(1). The legislative history of this waiver provision makes clear that it was intended only to prevent a state’s “sheer inactivity” from delaying federal decision-making.⁷ Out of this limited goal, EPA improperly asserts authority to force states to act in an artificially short time period based on minimal information and without any opportunity to obtain more time for review. Nothing in the text and history of section 401, or in the cases EPA selectively cites, supports EPA’s restrictive approach.
- EPA also seeks to upend state administrative procedures, in violation of the Clean Water Act, by dictating various requirements of state decision-making under section 401, including the contents of certification requests, 84 Fed. Reg. at 44,119-20 (proposed 40 C.F.R. § 121.1(c)), the scope and timing of state administrative review, *id.* at 44,120 (proposed 40 C.F.R. §§ 121.3, 121.4), and the contents of state determinations on certification requests, *id.* at 44,120-21 (proposed 40 C.F.R. § 121.5(d), (e)). Except for requiring states to provide for public notice and, in appropriate cases, public hearings, section 401 does not dictate state administrative procedures. 33 U.S.C. § 1341(a)(1). This is consistent with the Clean Water Act’s goal to “preserve” the states’ primary authority over state water quality decisions, 33 U.S.C. § 1251(b), and courts have consistently held that states may follow their own administrative procedures when reviewing section 401 requests. *See, e.g., Berkshire Env’tl Action Team, Inc. v. Tennessee Gas Pipeline Co.*, 851 F.3d 105, 113 (1st Cir. 2017); *Delaware Riverkeeper Network v. Secretary of Penn. Dep’t of Env’tl Protection*, 833 F.3d 360, 368 (3d Cir. 2016). Many of the undersigned states have previously provided EPA with information regarding the wide array of administrative procedures and requirements that they apply to section 401 requests. *See* Attachments A & B. Rather than respect those procedures, however, the proposed rule would force states to change them, in some cases through legislative enactments, to comply with EPA-dictated requirements that have no basis in the Clean Water Act.
- The proposed rule violates the Administrative Procedure Act because it is contrary to law, arbitrary and capricious and an abuse of discretion, and without statutory authority. As described above, the proposed rule violates the plain language of section 401 and the Clean Water Act in a host of ways. By seeking to limit how states exercise their authority under section 401, EPA’s proposed rule exceeds the agency’s statutory authority “to prescribe such regulations as are necessary to carry out [the EPA Administrator’s] functions under [the Clean Water Act.]” 33 U.S.C. § 1361(a). EPA’s proposed rule goes

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

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

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

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

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

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

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

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

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

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

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

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

33 U.S.C. § 1341(d).

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

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

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

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

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

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

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

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

⁸ Legislative History Vol. 1 at 161.

⁹ *Id.* at 164.

¹⁰ H.R. Rep. No. 91-127, at 24 (1969), reprinted in 1970 U.S.C.C.A.N. 2691, 2710.

¹¹ *Id.* at 7, reprinted in 1970 U.S.C.C.A.N. 2691, 2697.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1989 Guidance

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

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

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

¹⁴ *See* Office of Water, EPA, *Wetlands and 401 Certification—Opportunities and Guidelines for States and Eligible Indian Tribes* at 22 (Apr. 1989) (“1989 Guidance”) (Attachment C).

¹⁵ *Id.* at 20 (emphasis original).

¹⁶ *Id.*, quoting 115 Cong. Rec. H9030 (April 15, 1969) (House debate); 115 Cong. Rec. S29858-59 (Oct. 7, 1969) (Senate debate).

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

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

2010 Guidance

EPA issued additional guidance on section 401 in 2010.²⁴ Again, EPA viewed state authority under section 401 as expansive.

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

¹⁷ *Id.* at 23. Each of these *EPA-suggested* mechanisms would fall outside EPA’s newly proposed scope, yet contrary to the APA, EPA neither mentions nor analyzes its departure from any of these suggestions. *See* Point III, *infra*.

¹⁸ *Id.* at 24, 54-55.

¹⁹ *See id.*

²⁰ *Id.* at 31.

²¹ *Id.*

²² *Id.*, *citing* Wisconsin Administrative Code, NR 299.04.

²³ *Id.*

²⁴ EPA, Office of Wetlands, Oceans, and Watersheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (Apr. 2010) (“2010 Guidance”) (Attachment D).

²⁵ 2010 Guidance at 16.

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

Existing section 401 regulations

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

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

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

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

²⁶ *Id.* at 18, *citing PUD No. 1*, 511 U.S. at 712.

²⁷ *Id.* at 16.

²⁸ *Id.* at 15-16.

²⁹ *Id.* at 16.

³⁰ Senate Debate on S. 2770 (Nov. 2, 1971), *reproduced in* Legislative History Vol. 2 at 1394.

³¹ Comments of EPA Administrator Ruckelshaus on H.R. 11895 and H.R. 11896 (Dec. 13, 1971), *reproduced in* Legislative History Vol 1, at 852.

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

2019 Guidance and proposed rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Third, even if EPA's proposed rule was subject to a *Chevron* analysis, the rule fails to satisfy step two of *Chevron* because it does not represent a reasonable construction of the Act. EPA bases its departure from *PUD No. 1* (not to mention its own 50-year history of broadly construing state authority under section 401) exclusively on the fact that Congress removed the word “activity” from section 21(b)(1) of the 1970 Water Quality Improvement Act when Congress migrated that provision into the new section 401(a)(1). 84 Fed. Reg. at 44,088. EPA then asserts that this change somehow evinces a congressional intent to gut section 21(b)'s scope as it was incorporated into section 401.³⁵ *Id.*

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

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

Furthermore, congressional focus on ensuring the compliance of an “activity” was unwavering from the enactment of section 21(b) to its incorporation into section 401. From its inception, section 401 was described as requiring any “*activities* that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State for an evaluation.”³⁷ Consistent with this intent, EPA itself has long acknowledged that section 401 requires consideration of all water quality impacts from a proposed activity rather than only discharges from a “point source.” In section 401 guidance issued over 30 years ago, EPA stated that it is “imperative for a State review to consider all potential water quality impacts of the project, *both direct and indirect*, over the life of the project.”³⁸ This is especially important because a state's certification of a construction permit or license also operates as a certification for any federal permits or licenses needed for that project's operation.³⁹ EPA reaffirmed this stance as recently as 2010.⁴⁰ EPA's current departure from this long-standing interpretation is

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

³⁷ Senate Debate on S. 2770 (Nov. 2, 1971), *reproduced in* Legislative History Vol. 2 at 1388 (emphasis added).

³⁸ 1989 Guidance, at 22 (emphasis added).

³⁹ *Id.*; 33 U.S.C. § 1341(a)(3).

⁴⁰ 2010 Guidance at 16-17.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴² S. Conf. Rep. 92-1236, at 138, *reproduced in* Legislative History Vol. 1 at 321 (emphasis added).

⁴³ 2010 Guidance at 21.

⁴⁴ 1989 Guidance at 23 (emphasis added).

⁴⁵ 2010 Guidance at 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁶ H. Rep. 92-911, at 122, *reproduced in* Legislative History Vol. 1 at 809 (emphasis added).

⁴⁷ *Id.*

⁴⁸ S. Rep. 92-414, at 69 *reproduced in* Legislative History Vol. 2 at 1487.

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

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

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

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

⁴⁹ Conf. Rep. on H.R. 4148, *reproduced in* Congressional Record—House, H.2315, at H.2330 (March 24, 1970).

⁵⁰ *Id.*

⁵¹ House Debate on H.R.4148, *reproduced in* Congressional Record—House, at H.2608 (April 15, 1969).

⁵² *Id.* at H.2609.

⁵³ *Id.*

⁵⁴ House Debate on H.R.4148, *reproduced in* Congressional Record—House, at H.2691 (April 16, 1969).

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

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

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

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

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

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

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

U.S. at 779 (requiring the federal agency to incorporate mandatory conditions, stating “nothing

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

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

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

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

⁵⁶ Senate Rep. 92-414, at 69, reproduced in Legislative History Vol. 2, at 1487.

⁵⁷ *Id.* (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵⁸ House Debate on H.R.4148, *reproduced in* Congressional Record—House, at H.2691 (April 16, 1969).

⁵⁹ *See* House Rep. 91-127, at 42-43.

⁶⁰ House Debate, Congressional Record—House, at H.2689 (April 16, 1969).

⁶¹ *Id.* at H.2690.

⁶² *Id.*

⁶³ *Id.* at H.2691.

⁶⁴ *See id.*

⁶⁵ *See* S. Rep. 91-351, at 113.

⁶⁶ Public Law 91-224, at 18 (April 3, 1970).

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

As noted above, when the Clean Water Act was reorganized and amended in 1972, the waiver provision was carried forward essentially unaltered in what is now section 401.⁷⁰ The House Report restated, verbatim, the original justification for the waiver provision: “to insure that sheer inactivity by the State . . . will not frustrate the Federal application.”⁷¹

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

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

⁶⁷ *Id.*

⁶⁸ H.R. Conf. Rep. 91-940, *reproduced in* Congressional Record—House, at H.2330 (March 24, 1970).

⁶⁹ *Id.*

⁷⁰ 86 Stat. 816, at 877-78, Public L. No. 92-500 (Oct. 18, 1972).

⁷¹ H.R. 92-911, *reproduced in* Legislative History Vol. 1 at 809.

⁷² *See, e.g.,* H.R. Conf. Rep. 91-940, *reproduced in* Congressional Record—House, at H.2330 (March 24, 1970); *see also* Point III.B.ii, *supra* (plain language of section 401 prohibits federal oversight of state denials and certifications).

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

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

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

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

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

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

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

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

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

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

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

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

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

States have established a wide range of efficient and fair administrative procedures, which share certain features designed to enable the thorough review contemplated by section 401.⁷⁴ Initially, a state reviews a section 401 application to ensure that it includes sufficient information for meaningful review by the state agency and the public. A state that receives a deficient or incomplete application may require the applicant to provide additional information.⁷⁵ The process of obtaining required information is not entirely within the reviewing agency’s control, and applicants can frustrate the timeframe for review by failing to provide requested materials necessary to the state’s review of the application. *See, e.g., Constitution Pipeline*, 868 F.3d at 103. In some cases, states also must await completion of federal and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications.⁷⁶ Many states provide public notice, and where a state deems appropriate, public hearings once sufficient information supporting an application has been received for a state to deem an application complete. In many states, public notice must be accomplished through publication in one or more local newspapers as well as in official agency

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

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

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

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

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

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

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

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

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

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

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

⁸² See Attachments A and B.

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

Specifically, EPA proposes to define a “certification request” to include:

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

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

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

⁸³ *See* 2010 Guidance, at 15-16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EPA’s proposed rule falls well short of this requirement because it lacks analysis of water quality impacts and fails to consider whether the proposed rule, if adopted, will ensure the CWA’s overarching goal to protect water quality is met. *See id.* at 939-940 (a rule interpreting the Act to exclude prohibitions against discharges of certain pesticides was invalid because, among other reasons, EPA ignored the rule’s water quality impacts). The water quality impacts of the proposed rule could be severe if state agencies lose their broad authority to protect the quality of state waters. For example, by limiting states’ power to review and impose conditions under section 401 only to point-source discharges into navigable waters, EPA is stripping states of their authority to address impacts from non-point sources associated with an activity reviewable under section 401. Similarly, the proposed rule would preclude states from mitigating impacts to non-navigable state waters. When combined with EPA’s recent proposal to significantly narrow the definition of “navigable waters,” the effect of the proposed rule could be to leave a huge number of streams impacted by federal projects beyond state authority under section 401.⁸⁵ This could create massive regulatory gaps by removing water quality impacts from federal or state oversight, especially in cases where federal law pre-empts state water quality regulations. EPA’s failure to consider these potential impacts at all renders its action arbitrary and capricious.

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

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

rules on public hearings related to certification applications. 33 U.S.C. § 1341(a)(1). Indeed, as the states informed EPA in its comments during the agency's pre-proposal consultations, any revisions to the certification regulations will impact state regulations developed under section 401.⁸⁶ Rather than consider and analyze the impact of the proposed rule on existing state regulations adopted pursuant to section 401, EPA simply "recommends that states and authorized tribes update, as necessary, their own CWA section 401 regulations." 84 Fed. Reg. at 44,080, 44,083. By its refusal to evaluate the proposed rule's impact on state section 401 regulations, EPA "failed to consider an important part of the problem" and acted arbitrarily and capriciously. *See State Farm*, 463 U.S. at 43.

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

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

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

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

⁸⁶ *See* Attachments A and B.

adopted, will replace EPA's long-standing certification regulations. 84 Fed. Reg. 44,081; *see* 40 C.F.R. Part 121. Those regulations were promulgated pursuant to section 21(b) of the Federal Water Pollution Control Act, which was "substantially" carried forward with only "minor changes" in section 401.⁸⁷ EPA fails to explain why the "minor" differences between section 21(b) and section 401 justify EPA's complete about-face on a host of relevant issues, including the permissible scope of section 401 certifications, the timeframe for state review, the need for a complete application before review commences, and the authority of federal agencies to review state section 401 decisions. Nothing in the modest changes Congress made between section 21(b) in 1970 and section 401 in 1972 supports EPA's sudden and drastic change in position. *See Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

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

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

⁸⁷ Legislative History Vol. 2, at 1394, 1487.

⁸⁸ *See* Attachments A & B.

⁸⁹ This issue is particularly acute in that subset of states lacking primacy over Section 402 National Pollutant Discharge Elimination System (NPDES) permitting because such states (and tribes) rely wholly on section 401 to address the water quality impacts from federally-permitted facilities. Creating those authorized programs now will require years for such states to authorize, fund, and staff.

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

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

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

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

V. CONCLUSION

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

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ATTACHMENT A

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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 § 401¹ in response to the President’s “Executive Order on Energy Infrastructure and Economic Growth,” issued on April 10, 2019.² 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.³

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 401.⁴

¹ 33 U.S.C. § 1341 (section 401).

² 84 Fed. Reg. 15,495 (Apr. 15, 2019) (Executive Order).

³ Executive Order § 3(a)(ii), (v).

⁴ 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."⁵ 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.⁶ 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.⁷ 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.⁸ 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

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

⁶ *Id.*

⁷ *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).

⁸ *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*.⁹ 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.¹⁰

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.”¹¹ Further, statements from EPA Administrator Andrew Wheeler suggest revisions are necessary because states are not implementing section 401 consistently or faithfully.¹² 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.

⁹ 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).

¹⁰ *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 (1st 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.”).

¹¹ Executive Order § 3.

¹² 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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷ 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,"¹⁸ section 401 mandates that

¹³ 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).

¹⁴ 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).

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

¹⁶ See *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, Dep't of Interior*, 20 F.3d 1418, 1427 (6th 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").

¹⁷ 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.").

¹⁸ 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].¹⁹

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.”²⁰ The certification “shall become a condition on any Federal license or permit” for which it is issued.²¹ “No license or permit shall be granted if the certification has been denied by the State[.]”²²

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.²³ 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.’”²⁴ 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.”²⁵ 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.”²⁶ Thus, Congress “intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.”²⁷

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

¹⁹ *Id.* § 1341(a)(1).

²⁰ *Id.* § 1341(d).

²¹ *Id.*

²² *Id.*

²³ *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).

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

²⁵ *Constitution Pipeline Co.*, 868 F.3d at 101.

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

²⁷ *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.”²⁸ 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.”²⁹ 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.”³⁰ 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.”³¹

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.³² 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.³³ 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.

²⁸ Executive Order § 3(a)(iii), (v).

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

³⁰ *S.D. Warren*, 547 U.S. at 386 (citation omitted).

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

³² 2010 Interim Guidance, at 21.

³³ 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.”³⁴ A state must not only establish such procedures; it must comply with them.³⁵ The Clean Water Act allows state agencies to follow state law when complying with section 401’s public notice and hearing requirement,³⁶ and more broadly when determining whether to issue, condition, or deny a section 401 certification.³⁷ 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.³⁸

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 401.³⁹ 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.⁴⁰ 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.⁴¹ In some cases, states also must await completion of federal

³⁴ 33 U.S.C. § 1341(a)(1).

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

³⁶ *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).

³⁷ 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”).

³⁸ 33 U.S.C. § 1341(a)(1).

³⁹ 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.

⁴⁰ 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).

⁴¹ 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.⁴²

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.⁴³ Typically, public notice must be accomplished through publication in one or more local newspapers as well as in official agency publications.⁴⁴ In almost all cases, states must hold a public comment period ranging from fifteen to forty-five days.⁴⁵ To ensure meaningful public review, states appropriately provide extensions of public comment periods for significant projects.⁴⁶ The period of public participation may be further extended in situations where states receive requests for a public hearing.⁴⁷ After the public comment period and any public hearing

⁴² 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).

⁴³ 33 U.S.C. § 1341(a)(1).

⁴⁴ 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).

⁴⁵ 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).

⁴⁶ See, e.g., Ca. State Water Resources Control Bd., Draft Water Quality Certification Comment Deadline Extended for Application of Southern California Edison Co. (Sept. 27, 2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/big_creek/docs/final_bc_ceqa_draft_cert_notice_extended.pdf; N.Y. Dep't of 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.

⁴⁷ 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.⁴⁸

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.⁴⁹

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]."⁵⁰ 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.⁵¹ After public notice and comment, state agencies generally must review any public comments and determine whether a public hearing is required or

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

⁴⁹ 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).

⁵⁰ 33 U.S.C. §1341(a)(1).

⁵¹ 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.”⁵² When promulgating this regulation, the Army Corps noted generally that “valid requests for certification must be made in accordance with State laws[.]”⁵³ 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 401.⁵⁴ 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

⁵² 33 C.F.R. § 325.2(b)(1)(ii).

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

⁵⁴ *AES Sparrows*, 589 F.3d 721, 729 (4th 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.⁵⁵ The withdrawal-and-resubmittal process is well-established and non-controversial in almost all cases.⁵⁶ 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.”⁵⁷ And EPA’s existing guidance, too, recognizes that the withdrawal-and-resubmittal process could be used to “restart[] the certification clock.”⁵⁸ 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.⁵⁹

⁵⁵ 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*).

⁵⁶ 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.

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

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

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

CONCLUSION

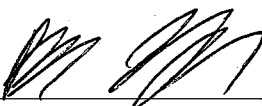
Revisions to EPA's section 401 guidance and regulations are not necessary. Any revisions that EPA decides to undertake must be consistent with the terms and intent of section 401, which preserves broad state authority over water quality issues.

Dated: May 24, 2019
Albany, New York

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ATTACHMENT B

**Attorneys General of California, Connecticut, Maryland, Maine, Massachusetts,
Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island,
Vermont, Washington, and Pennsylvania Department of Environmental Protection**

July 25, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, N.W.
Washington, D.C. 20460

**RE: Clean Water Act Section 401 Guidance for Federal Agencies, States and
Authorized Tribes**

Dear Administrator Wheeler,

The undersigned state attorneys general and environmental agency submit this letter to object to the “Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes” (“Guidance”) issued by the United States Environmental Protection Agency (“EPA”) on June 7, 2019.¹ EPA’s stated purpose for issuing the Guidance is to “facilitate implementation of Executive Order 13868 . . . by providing clarification on [the Clean Water Act] Section 401 requirements and procedures and the EPA’s existing regulations at 40 C.F.R. Part 121.”² EPA is responsible for implementing the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, through guidance and regulations that are consistent with the Act’s goals and framework.³ Disregarding this mandate, EPA issued the Guidance, which directly contravenes the language of the Clean Water Act and undermines Congressional intent. The Guidance improperly attempts to restrict the timing for state review of water quality certification applications under Section 401, to limit the information states can require to evaluate such applications, and to impose federal oversight of state decisions on certification applications. Although EPA initiated a stakeholder consultation process for anticipated revisions to Section 401 guidance and regulations, the Guidance was issued only two weeks after the close of the consultation process, which is not sufficient time to meaningfully consider stakeholder input. In fact, EPA did not address or incorporate the comments submitted by the undersigned.

The Guidance undermines the cooperative federalism framework of the Clean Water Act and directly contradicts both the language and intent of the statute as well as applicable case law;

¹ The Guidance is available at https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf.

² Guidance at 1-2.

³ See *Friends of the Earth, Inc. v. U.S. Env'tl. Protection Agency*, 446 F.3d 140, 144 (D.C. Cir. 2006); *Nat. Resources Def. Council, Inc. v. U.S. Env'tl. Protection Agency*, 822 F.2d 104, 122-123 (D.C. Cir. 1987).

and is without legal effect. To avoid confusion and unnecessary litigation, we respectfully request that EPA withdraw the Guidance and formally reinstate EPA's prior Section 401 guidance that was rescinded on June 7, 2019. In the alternative, we request that EPA revise the Guidance to rectify the deficiencies described below. In the meantime, the undersigned will endeavor to adhere to existing, binding statutory, regulatory and case law regarding Section 401, rather than the Guidance.

I. THE GUIDANCE ATTEMPTS TO UNLAWFULLY UNDERMINE THE STATES' BROAD AND INDEPENDENT AUTHORITY UNDER SECTION 401 TO EVALUATE FEDERAL PROJECT IMPACTS AND PROTECT STATE WATERS.

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.⁴ 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,"⁵ Section 401 mandates that:

[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].⁶

A state's Section 401 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 Clean Water Act, "and with any other appropriate requirement of State law."⁷ The certification "shall become a condition on any Federal license or permit" for which it is issued.⁸ "No license or permit shall be granted if the certification has been denied by the State . . ."⁹ Section 401(a)(1) also requires states to "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications."¹⁰ A state must not only establish such procedures for review of Section 401 applications; it must comply with them.¹¹

⁴ 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); *Pub. Util. District No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) ("[T]he Clean Water Act establishes distinct roles for the Federal and State Governments.")

⁵ 33 U.S.C. § 1251(a).

⁶ 33 U.S.C. § 1341(a)(1).

⁷ 33 U.S.C. § 1341(d).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See City of Tacoma, Wash. v. Fed. Energy Reg. Comm'n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006).

As the Supreme Court has recognized, “State certifications under § 401 are essential . . . to preserve state authority to address the broad range of pollution” impacting state water resources.¹² Yet, the Guidance improperly attempts to diminish this broad independent state authority. This is especially problematic for federally licensed hydroelectric and interstate natural gas projects, which are regulated by the Federal Energy Regulatory Commission (“FERC”) under licenses with decades-long terms that are largely exempt from state law regulation.¹³ As a result, Section 401 review is generally the only mechanism available to states to ensure that these projects, which can have significant impacts on water quality during construction and operation pursuant to their FERC licenses, are subjected to rigorous review and, where necessary, conditions to protect state water quality.

In addition, the water quality of a single waterbody or watershed may be impacted by multiple water development projects diverting surface waters for beneficial uses, including irrigation, municipal use, and hydropower. In some instances, one watershed may have projects subject only to state regulation as well as projects requiring federal approval, such as FERC licenses.¹⁴ Therefore, the states’ Section 401 review can help to ensure coordinated management of water quality impacts of FERC projects and other projects affecting the same water body or watershed.

EPA’s authority to implement the Clean Water Act must be exercised in a manner that “directly promotes the goals of the Act” and “is fully consistent with [its] framework.”¹⁵ By issuing the Guidance, EPA has failed to comply with this mandate. The Guidance conflicts with the Clean Water Act and undermines the Act’s principles of cooperative federalism by attempting to limit state review of applications for Section 401 certifications and to give federal agencies oversight of states’ certifications. In particular, the Guidance improperly instructs federal and state agencies to: (1) limit the statutorily-established period for states to act on Section 401 applications; (2) restrict the scope of information that states may require to fully evaluate applications; (3) make Section 401 certification decisions without incorporating review of project impacts under the National Environmental Policy Act (“NEPA”) into the Section 401 certification process; and (4) disregard states’ decisions on applications for Section 401 certifications under certain circumstances. As discussed below, these aspects of the Guidance

¹² *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 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).

¹³ *California v. Fed. Energy Reg. Comm’n*, 495 U.S. 490, 506-507 (1990).

¹⁴ One such example is the Sacramento-San Joaquin Delta Estuary in California, where flows are affected by hundreds of projects in the upstream watersheds, including some very large dams with FERC licenses as well as dams and other projects without FERC licenses. The waters of the Estuary are impacted by changes in flow and temperature, salinity intrusion and harmful algal blooms that are the cumulative effect of so many diversions within the same watershed. Section 401 helps ensure coordinated management of this water body.

¹⁵ See *Nat. Resources Def. Council, Inc. v. U.S. Envtl. Protection Agency*, *supra* note 3, 822 F.2d at 122-123.

have no legal basis and are directly contrary to the cooperative federalism embodied in the Clean Water Act. EPA should therefore withdraw or revise the Guidance.

A. By Reversing EPA's Prior Position That State Review and Decisions under Section 401 Should Be Based on Complete Applications, the Guidance Undermines the Clean Water Act

In an attempt to limit state review of federal projects that require Section 401 certifications, EPA reversed its prior guidance regarding the timing for states' review of applications. Congress gave states "a reasonable period of time (which shall not exceed one year)" to exercise their broad authority to make a Section 401 certification determination.¹⁶ The time period for a state to issue or deny a Section 401 certification begins upon "receipt of such request [for certification]."¹⁷ In 2010, EPA issued guidance on Section 401 certifications ("2010 Guidance"), which recognized that the timeline for a state's review is triggered "once a request for certification has been made to the certifying agency, accompanied by a complete application."¹⁸ The 2010 Guidance appropriately established an objective approach to judging the completeness of Section 401 applications consistent with the language and intent of the Clean Water Act. In particular, the 2010 Guidance recognized "[t]he advantage of a clear description of components of a complete § 401 certification application is that . . . applicant and agencies alike understand when the review timeframe has begun."¹⁹ The requirement that an applicant must submit an application consistent with state law requirements in order to commence the Section 401 review process is also adopted by the United State Army Corps of Engineers ("U.S. Army Corps").²⁰ Requiring that a request for certification meet the prerequisites a state has set for a complete application "comports with the Clean Water Act's deference to the states in the water quality certification process."²¹

EPA's new Guidance unlawfully abandons the 2010 Guidance's "complete application" position. In the Guidance, EPA concludes that the use of the term "complete application" was "inappropriate" because that exact language is not itself in the text of the Clean Water Act.²² This reversal in position contorts the Act's clear intent to provide states with a reasonable period of time (up to one year) in which to evaluate a federal project's impacts and protect state water

¹⁶ 33 U.S.C. § 1341(a)(1).

¹⁷ *Id.*

¹⁸ U.S. Environmental Protection Agency, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (2010), at 15-16. A copy of the 2010 Guidance is attached as Exhibit 1 to this letter. EPA rescinded the 2010 Guidance on June 7, 2019. (EPA letter dated June 7, 2019), https://www.epa.gov/sites/production/files/2019-06/documents/letter_on_updated_cwa_401_guidance.pdf.)

¹⁹ *Id.* at 16.

²⁰ See 33 C.F.R. § 325.2(b)(1)(ii) (the one-year review period commences when "the certifying agency has received a valid request for certification"); *Final Rule for Regulatory Programs of the Army Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986) ("valid requests for certification must be made in accordance with State laws").

²¹ *City of Fredericksburg, Va. v. Fed. Energy Reg. Comm'n*, 876 F.2d 1109, 1112 (4th Cir. 1989).

²² Guidance at 3.

quality. EPA's changed position leads to the illogical outcome that states are now expected to make decisions under Section 401 based on deficient information.

There are many reasons why states need a complete application for Section 401 certification before the timeframe for review commences. A complete application is necessary to provide public notice and obtain meaningful public comment.²³ A complete application is also necessary to obtain all of the input a state needs for its decision, because without complete information states may be unable to determine whether water quality standards will be met. Otherwise, an applicant could frustrate a 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 submit a complete application, thereby depriving the state of the ability to meaningfully review the complete application and make a determination within the one-year period allowed by Section 401. Requiring a complete application avoids this potential for gamesmanship. Further, in the absence of a requirement that the applicant submit a complete application for Section 401 certification, states will be forced to deny incomplete applications in order to avoid waiver of Section 401 authority and ensure state water resources are protected. Therefore, EPA should revise the Guidance to omit the provision stating that any written request for certification triggers the Section 401 review period.

In addition, while the Guidance does not propose a specific timeframe for states to act on a certification application, it would reduce the amount of time states have to make their determinations. As noted above, establishing shorter timelines for review contradicts the Clean Water Act's intent²⁴ and also is unworkable given the wide variety of projects that may need a Section 401 certification. This is particularly true given the required public notice and potential public hearing components under state law, which can take a substantial amount of time depending on the proposed project's complexity.²⁵ States review thousands of Water Quality Certification applications each year. Once the public comment and any public hearing is complete, state agencies must review and, in many cases, respond to the public comments received before making a certification determination.²⁶ Some states also have procedures providing for administrative review of an agency determination on a Section 401 certification application, including a hearing, before that determination is deemed final.²⁷ Any review/waiver timelines proposed by EPA in future regulations must provide a reasonable interpretation of what constitutes a flexible timeframe, up to the one-year period authorized by the Clean Water Act, to allow states sufficient

²³ See, e.g., *Ohio Valley Envtl. Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D. W. Va. 2009) (noting, "[c]ompletion and public notice are inextricably linked" and rejecting public notice and comment process undertaken on incomplete application).

²⁴ 33 U.S.C. § 1341(a)(1). Cf. *New York State Dep't of Envtl. Conservation v. Fed. Energy Reg. Comm'n*, 884 F.3d 450, 456 (2d. Cir. 2018).

²⁵ See note 8, *supra*.

²⁶ See, e.g., 310 Code of Massachusetts Regulations (C.M.R.) § 4.10(8)(g) 3.b.; 205 Rhode Island Code of Regulations (R.I.C.R.) §150-05-1.17(D)(4).

²⁷ See, e.g., Col. Rev. Statutes (C.R.S.) § 25-8-302(1)(f); 5 Colo. Code of Regulations (C.C.R.) § 1002-21.4(A)(2)(d); 314 C.M.R. § 9.10(1); 23 C.C.R. §§ 3867-3869; see also *Berkshire Envtl. Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 111-12 (1st Cir. 2017) (holding that a certification undergoing administrative appeal under Massachusetts law is not a final agency action).

time to review and act on applications.²⁸ Affording states the full one year period under the Clean Water Act, or at a minimum providing flexibility to easily extend the timeframe for review up to the one-year period, will ensure that, consistent with the goal and intent of Section 401, states have a meaningful opportunity to fully evaluate the potential impacts of federal projects and ensure state water quality is protected.

B. The Guidance Attempts to Unlawfully Limit the Scope of Information that States May Require to Fully Evaluate Section 401 Applications.

The Guidance states, “[t]o evaluate a certification request, a state or tribe should only need the application materials submitted for the federal permit or license.”²⁹ This statement contradicts Section 401, which authorizes states to determine, based on an application for a Section 401 certification, whether the project will impact state water quality and will comply with appropriate state law requirements.³⁰ In fact, the Guidance recognizes that “there is no statutory provision that prohibits a state or tribe from requesting specific information, or additional information, to help inform its decision on whether to issue, issue with conditions or deny certification . . .”³¹ As the Supreme Court has explained, the scope of states’ certification authority under Section 401 is not limited to ensuring compliance with the Clean Water Act, but also includes authority to impose conditions consistent with any applicable state law requirements.³² To accomplish this, it is necessary for states to require that applicants provide sufficient information to enable them to determine whether appropriate state law requirements are, or can be, met. Without such information, states would be unable to conduct proper review under Section 401. Accordingly, EPA’s instruction to the contrary undermines cooperative federalism and conflicts with the Clean Water Act.

C. The Guidance Incorrectly Suggests that State Section 401 Certification Review Need Not Be Coordinated with the NEPA Process.

In addition, the Guidance incorrectly recommends that states should issue certifications without first reviewing environmental documentation prepared for the project under NEPA.³³ EPA’s stated rationale for this recommendation is that the environmental documentation will include information on all environmental impacts, not just water quality impacts. This rationale makes no sense. Although NEPA review is not limited to water quality impacts, it nonetheless must include thorough consideration of water quality impacts and alternatives and mitigation measures to avoid those impacts.³⁴ This information is critical to informing a state’s decision on Section 401 applications and in establishing conditions of certification. Moreover, information on impacts on other natural resources may be relevant to setting conditions of certification. Where there are alternative ways of achieving water quality standards, a state may consider other environmental impacts in deciding between those alternatives.

²⁸ *Id.*

²⁹ Guidance at 4.

³⁰ 33 U.S.C. § 1341(d).

³¹ Guidance at 4.

³² *Pub. Util. District No. 1 of Jefferson Cty.*, *supra* note 4, 511 U.S. at 711-713.

³³ Guidance at 5.

³⁴ *See* 40 C.F.R. §§ 1502.14, 1502.16(h).

There are also circumstances where a state's assessment of a Section 401 application allows consideration of other factors in addition to water quality impacts. For example, in certain circumstances, EPA's antidegradation regulations authorize states to take into account overriding social and economic concerns when evaluating Section 401 applications.³⁵ Thus, states may consider a broader set of environmental impacts to determine whether social and economic concerns justify the reduction in water quality from a particular project. For this reason, states benefit from the full NEPA review before making a determination on a Section 401 application.

EPA's recommendation that a state act without the benefit of NEPA review is especially problematic where the state's procedural requirements include compliance with state environmental review laws, sometimes referred to as "state NEPAs," that require completion of environmental documentation before issuance of discretionary approvals.³⁶ To avoid unnecessary duplication, these state laws encourage preparation of joint state and federal environmental review documents.³⁷ This allows for collaboration between state and federal technical experts and a streamlining of the processes for applicants' compliance with state and federal environmental laws. If a state is required to issue Section 401 certification before NEPA environmental documentation is complete and made available, however, the state will have no choice but to initiate state environmental review before NEPA documents are available, an unnecessarily burdensome approach for both the state and the applicant. Therefore, EPA should omit from the Guidance the recommendation that states need not wait until completion of NEPA review to evaluate an application for Section 401 certification.

D. EPA's Attempt to Institute Federal Oversight of State Section 401 Decisions Undermines Cooperative Federalism and Conflicts with the Clean Water Act.

The Guidance unlawfully instructs federal agencies to evaluate whether "a state or tribe [has issued] a Section 401 certification with conditions beyond the scope of Section 401, i.e., conditions not related to water quality requirements, or has denied a water quality certification for reasons beyond the scope of Section 401" and "determine whether a permit or license should be issued with those conditions or if waiver has occurred."³⁸ This instruction clearly conflicts with the Clean Water Act and implementing regulations.

Federal agencies have no authority to review the scope or grounds for states' decisions on Section 401 certifications.³⁹ Indeed, Section 401 "was meant to 'continu[e] the authority of the

³⁵ See 40 C.F.R. §§ 131.6(d), 131.12(a)(2).

³⁶ See, e.g., Cal. Pub. Res. Code § 21000 *et seq.*; Wash. Rev. Code § 43.21C.150.

³⁷ See, e.g., Cal. Code Regs. tit. 14, §§ 15006 (j), 15220 *et seq.*

³⁸ Guidance at 4.

³⁹ See *Am. Rivers, Inc. v. Fed. Energy Regulatory Comm'n*, 129 F.3d 99, 107-08 (2d Cir. 1997) (rejecting argument that FERC "has the authority to review the legality of state-imposed § 401 conditions in the first instance"); *Roosevelt Campobello Int'l Park Comm'n v. U.S. Env'tl. Prot. Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982) ("federal courts and agencies are without authority to review the validity of the requirements imposed under state law or in a state's certification" under Section 401) (citations omitted).

State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.”⁴⁰ Section 401 entitles a state agency to “conduct its own review” of a project’s “likely effects on [state] waterbodies” and to determine “whether those effects would comply with the State’s water quality standards.”⁴¹ Congress “intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.”⁴² Federal agencies’ “role [in the Section 401 state review process] is limited to awaiting and then deferring to, the final decision of the state.”⁴³

As discussed above, Section 401 specifically allows states to impose conditions in certifications to ensure a project will comply with the Clean Water Act and “with any other appropriate requirement of State law.”⁴⁴ Any condition of the Section 401 certification “shall become a condition on any Federal license or permit.”⁴⁵ In fact, EPA General Counsel decisions previously “interpreted this provision broadly to preclude federal agency review of state certification.”⁴⁶ EPA’s Section 401 regulations provide that any “[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State.”⁴⁷ Moreover, the First Circuit noted that “courts have consistently agreed with this interpretation, ruling that the proper forum to review the appropriateness of a state’s certification is the state court.”⁴⁸ The Guidance acknowledges that “[s]ome courts in limited jurisdictions have concluded that the CWA does not authorize federal permitting agencies to reject conditions of a Section 401 certification . . .”⁴⁹ In fact, “[e]very Circuit to address the provision has concluded that ‘a federal licensing agency lacks authority to reject [state Section 401 certification] conditions in a federal permit.’”⁵⁰ In addition, federal agency

⁴⁰ *S.D. Warren*, *supra* note 12, 547 U.S. at 380 (quoting S. Rep. No. 92-414, p. 69 [1971]).

⁴¹ *Constitution Pipeline Co., LLC v. New York State Dep’t of Envtl. Conservation*, 868 F.3d 87, 101 (2d Cir. 2017).

⁴² *Keating*, *supra* note 12, 927 F.2d at 622; *see also Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), *cert. denied* 555 U.S. 1046 (2008).

⁴³ *City of Tacoma*, *supra* note 11, 460 F.3d at 67.

⁴⁴ 33 U.S.C. § 1341(d).

⁴⁵ *Id.*

⁴⁶ *See Roosevelt Campobello Int’l Park Comm’n*, *supra* note 39, 684 F.2d at 1056 (citing decisions of EPA General Counsel on the issue).

⁴⁷ 40 C.F.R. § 124.55(e).

⁴⁸ *Roosevelt Campobello Int’l Park Comm’n*, *supra* note 39, 684 F.2d at 1056.

⁴⁹ Guidance at 4.

⁵⁰ *Sierra Club v. U.S. Army Corps. of Engineers*, 909 F.3d 635, 645-46 (4th Cir. 2018), quoting *Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm’n*, 545 F.3d 1207, 1218 (9th Cir. 2008); *see also Am. Rivers, Inc.*, 129 F.3d at 107-08 (language of section 401(d) is “unequivocal” in divesting federal agencies of “authority to reject ‘unlawful’ state conditions”); *U.S. Dep’t of Interior v. Fed. Energy Reg. Comm’n*, 952 F.2d 538, 548 (D.C. Cir. 1992) (federal agency “may not alter or reject conditions imposed by the states through section 401 certificates”); *Keating*, *supra* note 12, 927 F.2d at 622 (federal agency properly refused to review the validity of a state’s decision to grant or deny a request for certification).

review of certifications undermines state self-governance by circumventing the institutional arrangements established under state law for judicial review of administrative action.⁵¹

As a model of cooperative federalism, the Clean Water Act explicitly grants *states* the right to make Section 401 decisions. Congress deliberately did not give the EPA or other federal agencies any authority to oversee or second-guess a state's decisions under Section 401. By instructing federal agencies to review the scope and grounds for state decisions on Section 401 certifications, the Guidance violates the Clean Water Act.

II. THE GUIDANCE IS NOT CONTROLLING.

The Guidance states “[i]n the event of a conflict between the discussion in this guidance and any statute or regulation, the guidance would not be controlling.”⁵² As set forth above, the Guidance conflicts with the Clean Water Act and for that reason, under its own terms, the Guidance is not controlling on EPA, other federal agencies, or the states. Thus, the Guidance can only serve to inject additional confusion and litigation into the existing Section 401 process. Indeed, application of the Guidance to the Section 401 certification process will leave the EPA and other agencies open to legal challenges based on the numerous inconsistencies and conflicts between the Guidance and the Clean Water Act.⁵³ In an attempt to avoid such legal challenges to the maximum extent possible, the undersigned will endeavor to adhere to existing, binding statutory, regulatory, and case law regarding Section 401, rather than the Guidance.

For the foregoing reasons, the undersigned state attorneys general and environmental agency respectfully ask that EPA withdraw the Guidance and reinstate EPA's 2010 Guidance. In the alternative, we request that EPA revise the Guidance to correct the objectionable provisions identified in this letter. Furthermore, we ask that EPA refrain from incorporating the improper positions in the Guidance in EPA's future revisions to Section 401 implementing regulations.

⁵¹ See generally *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (Congressional interference with a State's control over its institutions and governance “would upset the usual constitutional balance of federal and state powers.”)

⁵² Guidance at 2.

⁵³ Agency guidelines are entitled to limited deference by courts but only to the extent they have “power to persuade” based on the agency's “thoroughness evident in its consideration” of the issue, “the validity of its reasoning,” and “its consistency with earlier and later pronouncements” on the issue. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As discussed in this letter, the Guidance not only directly contradicts EPA's prior pronouncements related to Section 401 certifications but also is in direct conflict with the Clean Water Act, implementing regulations and applicable case law. The Guidance is therefore not entitled to deference.

Respectfully submitted,

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ATTACHMENT C

2010



Clean Water Act Section 401 **Water Quality Certification:** A Water Quality Protection Tool For States and Tribes



U.S. Environmental Protection Agency
Office of Wetlands, Oceans, and Watersheds

Background and Purpose

Based on two decades of case law and state and tribal program experience, the Environmental Protection Agency has substantially updated its handbook on Clean Water Act (CWA) §401 water quality certification and how states can use §401 certification to protect wetlands and other aquatic resources.

This new handbook, “Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes”, describes CWA §401 certification authorities, the way different state and tribal programs use certification, and how state and tribal certification programs leverage available resources to operate their certification programs.

While this new handbook is not a rule and does not create any legal requirements or set policy, it provides a wide-ranging description of §401 certification provisions and practices which may be helpful to states and tribes interested in using §401 as an effective water resource protection tool. This document does not substitute for CWA section 401 itself, or the relevant EPA (and other federal or state/tribal) implementing regulations. States, tribes, and federal licensing/permitting agencies may consider other approaches consistent with the CWA and those regulations. EPA retains the discretion to revise this handbook in the future.

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I. Introduction

Clean Water Act (CWA) §401 water quality certification provides states and authorized tribes¹ with an effective tool to help protect water quality, by providing them an opportunity to address the aquatic resource impacts of federally issued permits and licenses. This handbook explains the applicability and scope of §401, and provides practical examples drawn from state and tribal experiences about how §401 certification has been used to achieve their water quality goals.

Under §401, a federal agency cannot issue a permit or license for an activity that may result in a discharge to waters of the U.S. until the state or tribe where the discharge would originate has granted or waived §401 certification. The central feature of CWA §401 is the state or tribe's ability to grant, grant with conditions, deny or waive certification. Granting certification, with or without conditions, allows the federal permit or license to be issued consistent with any conditions of the certification.² Denying certification prohibits the federal permit or license from being issued.³ Waiver allows the permit or license to be issued without state or tribal comment. States and Tribes make their decisions to deny, certify, or condition permits or licenses based in part on the proposed project's compliance with EPA-approved water quality standards. In addition, states and tribes consider whether the activity leading to the discharge will comply with any applicable effluent limitations guidelines, new source performance standards, toxic pollutant restrictions, and other appropriate requirements of state or tribal law.⁴

U.S. Supreme Court in *S. D. Warren Co. v. Maine Board of Environmental Protection*

“State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed:

‘No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.’ 116 Cong. Rec. 8984 (1970).

These are 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 discharge.”⁵

Examples of federal licenses and permits subject to §401 certification include CWA §402 NPDES permits in states where EPA administers the permitting program, CWA §404 permits for discharge of dredged or fill material issued by the Army Corps of Engineers (Corps), Federal

¹ Tribes may receive §401 certification authority when they receive Treatment As a State (TAS) status which is often at the same time as EPA approval of their water quality standards, as further discussed in *II.B.I. States and Authorized Tribe* below.

² CWA §401(a)(1); 33 USC1341(a)(1).

³ CWA §401(a)(1); .33 USC § 1341(a)(1).

⁴ CWA §401(d);.33 USC 1341(d).

⁵ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006). [Quote from the unanimous U.S. Supreme Court decision affirming the State of Maine's certification authority over a Federal Energy Regulatory Commission dam relicensing.]

Energy Regulatory Commission (FERC) hydropower licenses, and Rivers and Harbors Act §9 and §10 permits for activities that have a potential discharge in navigable waters issued by the Corps. Many states and tribes rely on §401 certification to ensure that discharges of dredge or fill material into a water of the U.S. do not cause unacceptable environmental impacts and, more generally, as their primary regulatory tool for protecting wetlands and other aquatic resources.⁶ In addition, §401 certification is often a state or tribe's only opportunity to review and appropriately condition or object to the federal permitting or licensing of a hydroelectric project.

Although §401 certification can be an effective tool for protecting water quality, it is limited in scope and application to situations involving federally-permitted or licensed activities that may result in a discharge to a water of the U.S. If a federal permit or license is not required, or would authorize impacts only to waters that are not waters of the U.S., the activity is not subject to CWA §401. Although §401 certification by itself is not a comprehensive water quality program for states and tribes, it can nevertheless be an effective water quality protection tool.

⁶ *State Wetland Program Evaluation: Phase I*, Environmental Law Institute, 2005; *State Wetland Program Evaluation: Phase II*, Environmental Law Institute, 2006.

II. Threshold Issues Regarding Clean Water Act §401 Certification

This chapter discusses a number of threshold issues regarding §401 certification. Section 401 certification does not apply to all permits or licenses associated with any aquatic resource, and this chapter clarifies the circumstances when §401 certification applies. The chapter also discusses which government agency may exercise §401 certification authority, and the ways in which concerns of downstream jurisdictions are taken into account during the §401 certification process.

A. When CWA §401 Certification Applies

The language of §401(a)(1) is written very broadly with respect to the activities it covers. It states:

Any 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 in which the discharge originates.⁷ [emphasis added]

As the statutory language indicates and courts have held, the permit or license must: (a) be issued by a federal agency, (b) for an activity that has the potential to discharge, (c) into a water of the United States, (d) from a point source⁸. This section will discuss each of these terms.

1. “Federal” Permit or License

In order for a §401 water quality certification to be required, the activity causing the discharge must be authorized by a permit or license issued by a federal agency.⁹ Federal licenses and permits most frequently subject to §401 water quality certification include CWA §402 (NPDES) permits issued by EPA¹⁰, §404 (dredge and fill) permits issued by the Corps, Federal Energy Regulatory Commission (FERC) hydropower licenses, and Rivers and Harbors Act (RHA) §9 and §10 permits issued by the Corps.

Temporary or “annual licenses” in effect while an application for permit renewal is under review might not require §401 certification where issuance of such temporary licenses is a “ministerial and nondiscretionary act.”¹¹ The most common example of such a license is the annual license renewals issued by FERC while existing hydroelectric dam license renewals are under review.¹² Where interim or other types of permits and licenses are involved, interested

⁷ CWA §401(a)(1); 33 USC 1341(a)(1).

⁸The Ninth Circuit Court of Appeals has interpreted §401 in light of its broader CWA context and has concluded the discharge must be from a point source to trigger §401. See Section II.A.4 below for more information.

⁹General EPA regulations define a license or permit for the purposes of §401 as, “any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into ...waters of the United States.” 40 CFR § 121.1(a).

¹⁰ As of March 2010, states in which EPA administers the §402 NPDES permit program include New Hampshire, Massachusetts, Idaho, and New Mexico.

¹¹ *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1134, 1136 (9th Cir. 2002), cert denied, 1245 S.Ct. 85 (2003).

¹² Handbook for Hydroelectric Project Licensing and 5 MW Exemptions from Licensing. Federal Energy Regulatory Commission. Appendix A: Federal Power Act, Part 1. Washington, DC. April 2004. pg A-20; Compliance Handbook. Division of Hydropower and Administrative Compliance. Federal Energy Regulatory Commission. March 2004. pg 89.

parties should consult with EPA, the state or tribal agency, and the federal permitting or licensing agency to determine whether §401 certification applies.

State or tribal implementation of a state permit program in lieu of the federal program does not “federalize” the resulting permits or licenses for purposes for §401. For example, when a state or tribe is approved to administer the §402 or §404 program, permitting authority resides with the state or tribe, not a federal agency, and 401 certification does not apply to those authorizations issued by the state or tribe. The CWA anticipates that states and tribes issuing those permits will ensure consistency with CWA provisions and other appropriate requirements of state and tribal law as part of their permit application evaluation.¹³ In addition, Corps regulations indicate that the Corps will seek 401 certification for Corps’ dredging projects involving a discharge into waters of the U.S. even though the Corps is not issuing itself a permit.¹⁴

2. Discharge

Another element required for §401 certification to apply is the potential for a discharge. It is important to note that §401 certification is triggered by the *potential* for a discharge; an actual discharge is not required. There does not have to be an actual discharge or a “discharge of a pollutant.” The statute states that, “[a]ny ... federal license or permit to conduct any activity ... which may result in a discharge.”¹⁵ Consequently, the discharge need not be a certainty, only that it “may” occur should the permit or license be granted. However, if no discharge may occur, no water quality certification is required. For example, when a RHA §10 permit is required for the hanging of power lines across a navigable river (RHA §10 water) without a potential discharge to the water, the Corps typically has not sought water quality certification.

In addition, the potential discharge does not need to involve an addition of pollutants. Section 401 certification can be triggered not only where there is discharge of a pollutant (such as would be authorized by §402 or §404 permits), but also where there is a discharge not involving addition of a pollutant, such as water released from the tailrace of a dam.¹⁶ As the U.S. Supreme Court has stated, “[w]hen it applies to water, ‘discharge’ commonly means a ‘flowing or issuing out’”¹⁷ and an addition of a pollutant is not “fundamental to any discharge.”¹⁸ A lower court has ruled that allowing more water to flow through a dam’s turbines is a discharge for §401 purposes.¹⁹ Two courts have found that a withdrawal of water or reduction in flow does not constitute a discharge.²⁰

¹³ In addition, similar requirements to address the effect of pollutants on downstream jurisdictions exist under CWA §402 and §404 programs when assumed by a State or Tribe. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046 (1992).

¹⁴ Under 33 CFR 336.1(a)(1), Corps practice is to seek 401 certification for their dredging projects.

¹⁵ CWA §401(a)(1); 33 USC 1341 (a)(1).

¹⁶ *See, e.g., Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 6-7 (9th Cir.(Or.) 1998 *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

¹⁷ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

¹⁸ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

¹⁹ *Alabama Rivers Alliance v. Federal Energy Regulatory Commission*, 325 F.3d 290, 295-6 (DC Cir 2003) in the case installing larger turbines in a hydroelectric dam was found to potentially result in a discharge of larger volumes of water through the dam, triggering water quality certification review.

²⁰ *Great Basin Mine Watch v. Helen Hankins BLM*, 456 F.3d 955, 963 (9th Cir 2006) in the context of the removal of all flow from a stream in Nevada for use in a gold mine; *State of North Carolina v. Federal Energy Regulatory Commission*, 112 F.3d 1175, 1187 (DC Cir 1997) in the context of withdrawing water from a lake for a municipal

3. Waters of the U.S. and Waters of the State or Tribe

The third element required for §401 certification to apply is that the potential discharge must be into a water of the U.S. The term “waters of the U.S.” is defined in EPA and Corps regulations, and applies to all CWA programs. The scope of waters of the U.S. protected under the CWA includes traditionally navigable waters and also extends to include interstate waters, territorial seas, tributaries to navigable waters, adjacent wetlands, and other waters.²² Since §401 certification only applies where there may be a discharge into waters of the U.S., how states or tribes designate their own waters does not determine whether §401 certification is required. Note, however, that once §401 has been triggered due to a potential discharge into a water of the U.S., additional waters may become a consideration in the certification decision if it is an aquatic resource addressed by “other appropriate provisions of state[tribal] law.”²³

4. Point Sources

In addition to the requirements for a federal permit or license and a discharge into a water of the U.S., some courts have indicated that the discharge

The Regulatory Definition of Waters of the U.S.

“(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.”²¹

water supply; the opinion in *Great Basin Mine Watch v. Helen Hankins BLM* also said that states may, but are not required to, regulate water withdrawals or set minimum stream flow standards in water quality certifications, at 963.

²¹ 40 CFR § 230.3(s); 33 CFR § 328.3(a).

²² *Id.* For discussion of evolution of the regulatory definition of “waters of the United States,” see Downing et al. Clean Water Act Jurisdiction: A Legal Review. Wetlands. Vol. 23. No. 3. 2003. p 477.

²³ See CWA §401(d), 33 USC 1341(d). Note that the Corps may consider a 401 certification as administratively denied where the certification contains conditions that require the Corps to take an action outside its statutory authority or are otherwise unacceptable. See, e.g., RGL 92-04, “Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits.”

²⁴ 40 CFR § 230.3(s); 33 CFR § 328.3(a).

must be from a point source.²⁵ The Ninth Circuit Court of Appeals in *ONDA v. Dombeck* held that, “[t]he term “discharge” in §1341 is limited to discharges from point sources.”²⁶ The CWA defines “point source” as “any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel...rolling stock ... or vessel...from which pollutants are or may be discharged.”²⁷ Bulldozers and similar equipment are considered point sources²⁸, as are the tailraces of dams.²⁹ While other Circuit Courts of Appeal have not addressed this question, the U.S. in briefs filed before the U.S. Supreme Court suggests that §401 requires the discharge to be from a point source.³⁰

B. When Jurisdictions Have §401 Certification Authority

Not all jurisdictions whose water may be affected by a federal permit or license have §401(a)(1) certification authority. Only the state or authorized tribe *where the discharge originates* has the authority to directly condition or prevent issuance of a federal permit or license.³¹ States and tribes downstream of the jurisdiction where a discharge originates do not have §401 authority. However, CWA §401(a)(2) provides neighboring states or tribes with an opportunity to object to, and make recommendations for, federal licenses and permits.³²

1. States and Authorized Tribes

The CWA directly grants all states §401 certification authority, and currently all states have retained their authority. In addition, U.S. territories are considered “states” under the CWA.³³

Tribes do not automatically have §401 authority, but may request it when granted “Treatment in the same manner As a State” (TAS) authority by EPA.³⁴ This often occurs when a tribe is authorized to administer the water quality standards program and has designated the tribal agency that will administer §401. No separate application is required. If granted, tribes possess the same certification authority and responsibilities as states. As of January 2010, 36 tribes had developed water quality standards approved by EPA and have been granted §401 certification

²⁵ “We hold that certification under § 1341 is not required for grazing permits or other federal licenses that may cause pollution solely from nonpoint sources.” *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 7 (9th Cir.(Or.) 1998).

²⁶ *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 5 (9th Cir.(Or.) 1998).

²⁷ 33 USC 1362(14); CWA §502(14); Case law has indicated that point sources also include bulldozers and similar equipment: *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922 (1983).

²⁸ *See, e.g., Avoyelles Sportsman's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).

²⁹ *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 6 (9th Cir.(Or.) 1998). Also supported by, *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006). *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 711 (1994).

³⁰ *See, e.g., Amicus brief of the United States in S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006), found at 2006 WL 53960 (January 9, 2006).

³¹ CWA §401(a)(1); 33 USC 1341(a)(1).

³² In some cases, such as when the backwater pool area for a reservoir extends into another state or tribe, neighboring states or tribes may comment without being downstream.

³³ CWA §502(3); 33 USC 1362(3): “The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.”

³⁴ CWA §401(a)(1); 33 USC 1341(a)(1).

authority.³⁵ Courts have held that tribal water quality standards and §401 certification authority extend to non-Indian fee land within a reservation.³⁶

Where the discharge originates within a jurisdiction without §401 authority, EPA is the certifying agency. Section 401(a)(1) states, “In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator [EPA].”³⁷ As a result, EPA typically acts as the certifying authority on tribal lands when the tribe lacks certification authority.

2. States or Tribes Where a Discharge Originates

The courts have interpreted §401 to mean that the state or tribe in which a discharge originates has §401 certification authority.³⁸ When a facility is located within one state but the end of its discharge pipe is located in the waters of another state, the jurisdiction where the discharge enters the waters of the U.S. has certification authority. The state with jurisdiction over the receiving waters has a direct interest in the quality of its resulting water quality, while the state in which the facility is located may have a variety of other concerns not directly related to the waters affected by the discharge. Similarly, the state where the discharge enters a “water of the U.S.” is likely better positioned to monitor and inspect for compliance with any 401 certification conditions on the discharger’s permit or license.

³⁵ Region 2: Saint Regis Mohawk Tribe. Region 4: Seminole of Florida; Miccosukee Tribe of Indians of Florida; Region 5: Mole Lake Band of the Lake Superior Tribe of the Chippewa Indians, Sokaogon Chippewa Community; The Fond du Lac Band of the Minnesota Chippewa Tribe; Grand Portage Band of the Minnesota Chippewa Tribe. Region 6: Ohkay Owingeh (Pueblo of San Juan); Pueblo of Acoma; Pueblo of Isleta; Pueblo of Nambe; Pueblo of Picuris; Pueblo of Pojoaque; Pueblo of Sandia; Pueblo of Santa Clara; Pueblo of Taos; Pueblo of Tesuque. Region 8: Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation; Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation;. Region 9: Big Pine Paiute Tribe of the Owens Valley; Bishop Paiute Tribe; Hoopa Valley Tribe; Hopi Tribe; Hualapai Tribe; Pyramid Lake Paiute Tribe; White Mountain Apache. Regions 6, 8 and 9: Navajo Nation. Region 10: Confederated Tribes of the Chehalis Reservation; Confederated Tribes of the Colville Reservation; Confederated Tribes of the Umatilla Indian Reservation of Oregon; Confederated Tribes of the Warm Springs Indian Reservation of Oregon; Kalispel Indian Community of the Kalispel Reservation; Lummi Nation; Makah Tribe; Port Gamble S’Klallam Tribe; Puyallup Tribe of Indians; and the Spokane Tribe of Indians.

³⁶ See, e.g., *State of Montana v. United States Environmental Protection Agency*, 137 F.3d 1135, 1141 (9th Cir 1998).

³⁷ 33 USC 1341(a)(1); CWA §401(a)(1).

³⁸ “[A] certification from the State in which the discharge originates or will originate” 33 USC 1341(a)(1); CWA §401(a)(1); “[O]nly required to obtain a certification from the state where the discharge originates.” *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-1484 (DC Cir 1990).

<u>Players in the Water Quality Certification Process</u>	
Origin of the Discharge	Certifying entity *
Within the borders of a state with a designated certification authority	→ State certifying agency
On tribal land that has been granted TAS and 401 certification authority	→ Tribal certifying agency
Within the borders of a state or tribal holdings where no certification authority exists	→ EPA
*Other states and tribes may be involved in the certification process through the downstream effects consultation process found in §401(a)(2).	

Figure 1. Certification Agency by Discharge Location

3. Other Affected States and Tribes

Although §401 certification authority rests with the jurisdiction where the discharge originates, neighboring states and tribes downstream³⁹ or otherwise potentially affected by the discharge have an opportunity to raise objections to, and comment on, the federal permit or license.⁴⁰ The EPA Administrator determines if a discharge subject to §401 certification “may affect” the water quality of other states or tribes, and EPA is required to notify those other jurisdictions whose water quality may be affected.⁴¹ The other jurisdictions are then provided an opportunity to submit their views and objections about the proposed license or permit and associated §401 certification. They may also request that the federal permitting or licensing agency hold a hearing at which, “the [EPA] Administrator shall ... submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency.”⁴² The federal licensing or permitting agency “shall condition such license or permit in such manner as may be necessary to ensure compliance with applicable water quality requirements.”⁴³ Recommendations from neighboring jurisdictions do not have the same force as conditions from a §401 certifying state. While the Federal agency must develop measures to address the downstream jurisdictions’ concerns, the agency may develop its own measures and does not need to adopt the downstream state or tribe’s specific recommendations without modification, as it would were they from the §401 certifying agency. If the Federal agency “cannot ensure compliance” with the other state or tribe’s water quality requirements, it “shall not issue such license or permit.”⁴⁴

³⁹ In some cases, such as when the backwater pool area for a reservoir extends into another state or tribe, neighboring states or tribes may comment without being physically downstream.

⁴⁰ CWA §401(a)(2), 33 USC 1341. Note that the CWA establishes processes to address the effect of pollutants on downstream stakeholders exist under CWA §§ 402 and 404 programs when assumed by a state or tribe. For example: *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046 (1992).

⁴¹ CWA §401(a)(2); 33 USC 1341(a)(2).

⁴² CWA §401(a)(2); 33 USC 1341(a)(2)

⁴³ CWA §401(a)(2); 33 USC 1341(a)(2).

⁴⁴ CWA §401(a)(2); 33 USC 1341(a)(2).

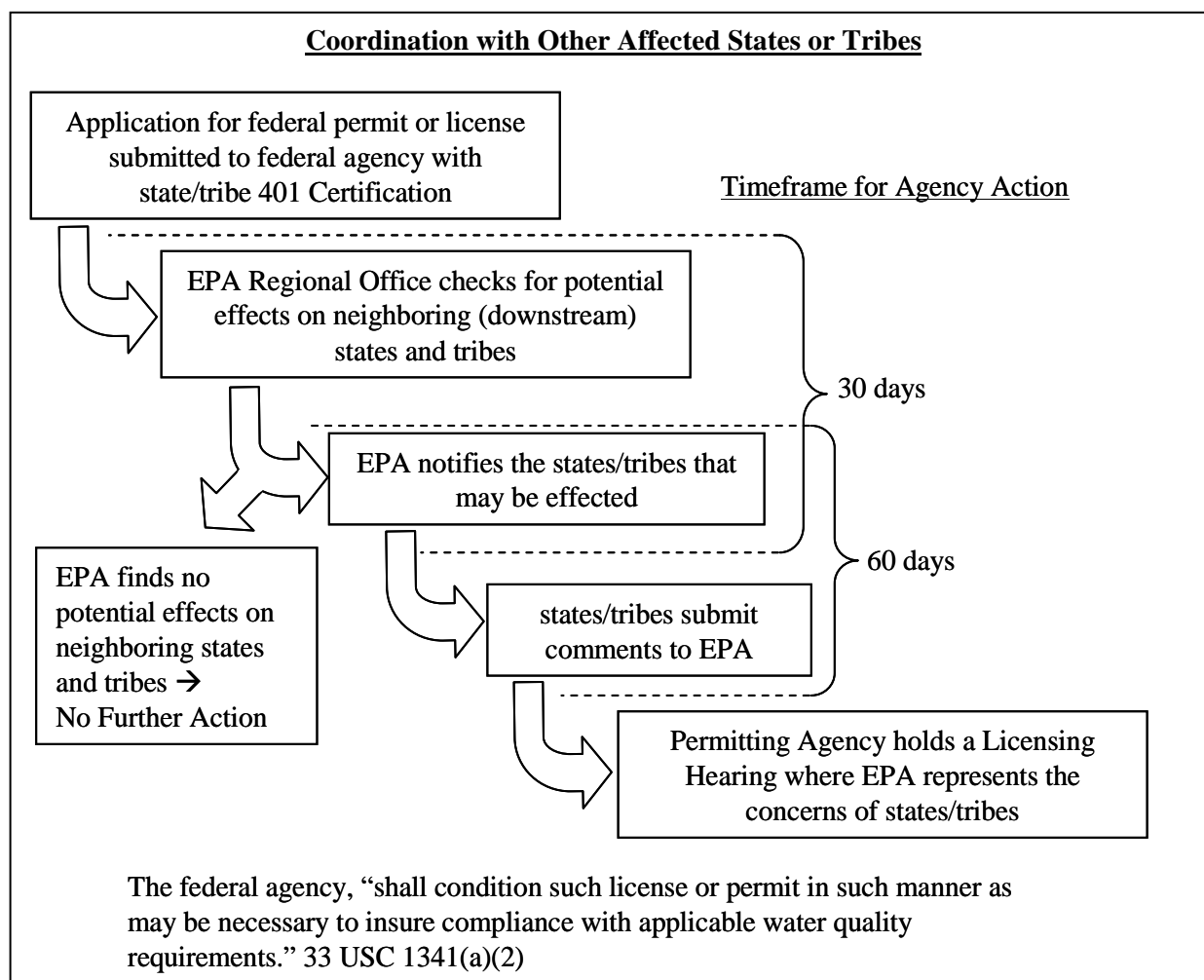


Figure 2. Downstream Agency Coordination

C. CWA Section 401 Certification Options

The central component of §401 certification is the state or tribe’s decision to grant, condition, deny or waive certification. In essence, the state or authorized tribal⁴⁵ agency decides whether the licensed or permitted activity and discharge will be consistent with a number of specifically identified CWA provisions: effluent limitations for conventional and non-conventional pollutants (§301 and §302), water quality standards (§303), new source performance standards (§306), and requirements for toxic pollutants (§307).⁴⁶ Section 401(d) requires inclusion of license or permit conditions to ensure compliance with these listed CWA provisions, as well as appropriate requirements of state or tribal law.⁴⁷ A state or tribe

⁴⁵ Tribes authorized to use §401 certification authority have developed water quality standards and designated an agency to administer the certification authority, as further discussed in *II.B.I. States and Authorized Tribes* above.

⁴⁶ 33 CWA §401(a)(1); USC 1341(a)(1).

⁴⁷ CWA §401(d); 33 USC 1341(d); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006); *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994).

certification is intended to ensure that all these provisions and requirements will be met. The following four subsections discuss each certification option.

1. Grant

The granting of §401 water quality certification to an applicant for a federal license or permit signifies that the state or tribe has determined that the proposed activity and discharge will comply with water quality standards as well as the other identified provisions of the CWA and appropriate requirements of state or tribal law. Granted certifications receive significant weight in the federal permitting or licensing agency's review of the project's potential impacts on water quality.⁴⁸ However, certification review and issuance does not fulfill environmental impact review requirements under the National Environmental Policy Act (NEPA), nor does it substitute for a dredged or fill permit from the Corps of Engineers or any other required CWA permit.⁴⁹

2. Grant with Conditions

States and tribes may include limitations or conditions in their certifications as necessary to ensure compliance with water quality standards and other provisions of the CWA and appropriate requirements of state or tribal law.⁵⁰ Conditions to protect water quality need not focus solely on the potential discharge. Once a potential discharge triggers the requirement for §401, the certifying agency may develop "additional conditions and limitations on the activity as a whole."⁵¹ Conditions placed in §401 water quality certifications must become conditions of the resulting federal permit or license.⁵² The federal agency may not select among conditions when deciding which to include and which to reject.⁵³ If the federal agency chooses not to accept all conditions placed on the certification, then the permit or license may not be issued.⁵⁴ Some federal agencies may decide to view the certification as denied, and administratively deny the permit without prejudice, if the conditions are viewed as beyond the agency's authority.⁵⁵

3. Deny

⁴⁸ Water Quality Standards Handbook. Second Edition. US EPA. August 1994. Chapter 7.6.3.

⁴⁹ Section 401 certification does not fulfill any requirements under NEPA, *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1125 (DC Cir. 1971); Section 401 certification does not substitute for other CWA permit requirements, *Monongahela Power Company v. John O. Marsh*, 809 F.2d 41, 53 (DC Cir 1987).

⁵⁰ 33 USC 1341(d); CWA §401(d); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006). *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994).

⁵¹ *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

⁵² CWA 401(d), 33 USC 1341(d).

⁵³ *American Rivers v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-111 (2d Cir, 1997).

⁵⁴ 33 USC 1341(a)(1); CWA §401(a)(1); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-111 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 868 (9th Cir 1993); *Puerto Rico Sun Oil Company v. United States Environmental Protection Agency*, 8 F.3d 73, 74-75 (1st Cir 1993); *Roosevelt Campobello International Park Commission v. United States Environmental Protection Agency*, 684 F.2d 1041, 1056 (1st Cir 1982); *US v. Marathon Development Corporation*, 867 F.2d 96, 99 (1st Cir. 1989).

⁵⁵ Note that the Corps may consider a 401 certification as administratively denied where the certification contains conditions that require the Corps to take an action outside its statutory authority or are otherwise unacceptable. See, e.g., RGL 92-04, "Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits."

States and tribes deny certification if the activity and discharge will not comply with the applicable sections of the CWA and appropriate requirements of state and tribal law.⁵⁶ The denial of §401 certification by a state or tribe prohibits the federal agency from issuing the permit or license in question.⁵⁷

4. Waive

States and tribes are authorized to waive §401 certification, either explicitly, through notification to the applicant, or by the certification agency not taking action. If action is not taken on a certification request, “within a reasonable time (which shall not exceed one year),” the state or authorized tribe has waived the requirement for certification. The amount of time allowed for action on a certification application is determined by the Federal agency issuing the license or permit, while the certifying agency determines what constitutes a “complete application” that starts the timeframe clock.⁵⁸ To avoid waiving inadvertently, a state or tribal agency receiving a request for certification should consult with the federal licensing or permitting agency to verify the time available for their certification decision. However, the onus for applying for water quality certification lies with the permit or license applicant, and waiver can not occur without a request for certification.⁵⁹

Under the CWA, waiver does not indicate a state or tribe’s substantive opinion regarding the water quality implications of a proposed activity or discharge. A state or tribe may waive certification for a variety of reasons, including a lack of resources to evaluate the application. Waiver merely means the federal permitting or licensing agency may continue with its own application evaluation process and issue the license or permit in the absence of an affirmative state or tribal certification.

S. D. Warren Co. v. Maine Board of Environmental Protection et al

“Section 401 recast pre-existing law and was meant to ‘continu[e] the authority of the State ... to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.’ S.Rep. No. 92-414, p. 69 (1971). Its terms have a broad reach, requiring state approval any time a federally licensed activity ‘may’ result in a discharge (‘discharge’ of course being without any qualifiers here), 33 U.S.C. § 1341(a)(1), and its object comprehends maintaining state water quality standards.”⁶⁰

⁵⁶ 33 USC 1341(a)(1); CWA §401(a)(1).

⁵⁷ CWA 401(a)(1); 33 USC 1341(a)(1).

⁵⁸ The Fourth Circuit observed that certification agencies prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989); 33 USC 1341(a)(1); CWA §401(a)(1); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

⁵⁹ *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989).

⁶⁰ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843, 1851 (2006).

III. The CWA 401 Certification Process

The previous chapter discussed threshold issues affecting when CWA §401 certification applies and what certification options states and tribes have (grant, grant with conditions, deny, or waive). This section discusses some of the details of the §401 certification process, including receipt of an application, review by the state or authorized tribe⁶¹, and enforcement and dispute resolution issues. Where possible, the chapter illustrates its points with examples taken from state and tribal experiences.

A. Timeframes and Opportunities for Review

The federal permitting or licensing agency may set the certification response time limit to any “reasonable period of time (which shall not exceed one year).”⁶² If the certifying agency does not respond within the time limit, §401 certification is waived.⁶³ As discussed below, federal agencies have established varying timeframes up to one year. An initial step, therefore, is for the certifying agency to verify the amount of time it has for its §401 analysis.

Federal agencies may define what is a “reasonable time” for purposes of §401 certification of their permits or licenses, provided the period is less than one year in duration. For example, some Corps Districts provide a response period of 60 days for a §401 certification associated with a CWA §404 permit. FERC normally allows a full year for states and tribes to develop a §401 certification response. EPA regulations governing the certification of federally-issued CWA §402 NPDES permits allow states and tribes 60 days to issue certification.⁶⁴ EPA regulations applicable in other contexts suggest a time limit of six months.⁶⁵

Not all Corps Districts use a 90-day time frame for certification of 404 permits.⁶⁶ For example, while the Savannah Army Corps of Engineers (Corps) District has a self-imposed 120 day timeline for making permit decisions, it has placed no limit on receipt of state certification other than the statutory one year. Should Georgia not issue a §401 certification by the 120-day deadline for §404 permit issuance, the District may issue a provisional permit that is not valid unless the conditions listed on the cover page, such as obtaining §401 certification, are met.⁶⁷ Shorter certification timeframes apply in other places such as Florida, where the certification time limit is 90 days for individual Corps permits and 30 days for Corps Nationwide General Permits that did not receive categorical certifications.⁶⁸ For their part, state and tribal

⁶¹ Tribes authorized to use §401 certification authority have received “Treatment as a State” (TAS) status, and have designated an agency to administer the certification authority. As further discussed in *II.B.1. States and Authorized Tribes* above, typically authorized tribes also have developed EPA-approved water quality standards.

⁶² CWA §401(a)(1); 33 USC 1341(a)(1).

⁶³ CWA §401(a)(1); 33 USC 1341(a)(1); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

⁶⁴ 40 CFR §124.53(c)(3).

⁶⁵ 40 CFR §121.16(b). (“which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year.”)

⁶⁶ Corps Districts may establish agreements with states or tribes to have longer or shorter timeframes for water quality certification decisions than the 60 days provided in regulations. See, e.g., RGL 87-03.

⁶⁷ Savannah Corps District. Provisional permit cover sheet.

⁶⁸ CWA Section 404 Nationwide General Permits are certified as a category every five years at reissuance. If categorical certification is denied for any Nationwide permit, each individual project wishing to be authorized under the Nationwide permit would require 401 certification.

certification agencies may adopt procedural requirements regarding certification, for example specifying that the receipt of agency certification requests starts the certification review time period.⁶⁹ While such requirements may help ensure that states and tribes have adequate time for their 401 review, it is important that they note the time frame at the time the certification application is received and consult with the Federal licensing or permitting agency early about any concerns.

1. When More Time is Needed

In cases where the certifying agency believes it needs more information or time to review the license or permit before issuing a certification, and it has not been able to work out an appropriate time frame with the licensing or permitting Federal agency, states have tended to take two approaches. Some states on occasion have suggested the applicant withdraw and resubmit its application for certification (restarting the certification clock), as an alternative to denying certification based on gaps in analyses or information. This withdraw-resubmission process potentially gives the applicant and the §401 certifying agency time to produce requested reports, and is intended to give the certifying agency additional time to review the relevant information and issue a certification. Note that the withdraw-resubmission process can result in the federal agency being unable to act in a timely manner on permit or license applications. As an alternative approach, some states have denied §401 certification “without prejudice” when they lack data necessary for their analysis, and then encouraged the applicant to resubmit the application with the application fee waived as long as they continue to abide by the standard public notice requirements.⁷⁰

2. Certification Timeframe for Permits to Construct and Operate Facilities

Another issue related to timeframes occurs when one federal permit or license is required for the construction of a facility and a separate federal permit or license is required for its operation. Generally, §401 requires certification of the construction permit or license and then only notice of application for a permit or license to operate the new facility, unless construction and operation would be certified by a different state certification authority.⁷¹ Upon receiving notice of application for a permit or license to operate the new facility, the certifying agency has 60 days to determine if;

[T]here is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of this [CWA] title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which

⁶⁹ The Fourth Circuit observed that certification agencies prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

⁷⁰ This handbook does not endorse either of the two approaches, but emphasizes the need for coordination regarding necessary information early in the certification process in order to avoid denial or withdrawal due to data gaps. FERC believes that both of these approaches can often result in delays and impair FERC’s ability to act on hydropower license, relicense, and amendment applications in a timely manner.

⁷¹ CWA §401(a)(3); 33 USC 1341(a)(3); *Keating v. Federal Energy Regulatory Commission*, 927 F.2d 616, 623 (DC Cir 1991)(The statute allows a state to revoke a prior certification only within a specified time limit and only pursuant to certain defined circumstances.); *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997) (Section 401(a)(3) does not, however, require a state with certification rights pertaining only to the operation of a project to assert those rights at the time a construction permit is issued for the project).

such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements.⁷²

If the certifying agency does not respond within sixty days to the notice, the certification of construction of the facility also serves as certification of operation of the facility.⁷³ CWA §401 certification of any federal permit or license required for construction of a facility will satisfy §401 certification requirements for federal permits or licenses required for operation of the facility as well, if the certification agency finds the project has not changed in any of the ways laid out in §401(a)(3) discussed above.⁷⁴ Note that certification of construction cannot serve as certification of operation if the applicant has failed to provide notice to the certifying agency of: (1) the application for a permit or license to operate the facility, or (2) any proposed changes in the construction or operation of the facility that may result in a violation of effluent limitations (CWA §301), water quality related effluent limitations (CWA §302), water quality standards and implementation plans (CWA §303), national standards of performance (CWA §306), toxic and pretreatment effluent standards (CWA §307) or other appropriate requirements of state or tribal law.⁷⁵

In the case where construction requires a federal permit or license and §401 certification, but operation of the facility does not require a federal permit or license, the facility must provide an opportunity for the §401 certification authority:

[T]o review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated.⁷⁶

If the certifying agency finds that the operation of the facility will violate water quality requirements but will not trigger the review procedure under §401(a)(3) (change in construction, operation, or water quality requirements), the certifying agency notifies the federal agency that issued the permit or license authorizing construction of the facility. Then the “Federal agency may, after public hearing, suspend such license or permit.”⁷⁷ If suspension is issued, it shall remain in effect until the certifying agency provides notice to the federal agency that the facility will not violate the applicable water quality requirements.⁷⁸ To ensure that adequate consideration is given to water quality impacts of facility operation, as well as to minimize the need for such after-the-fact suspensions (which are solely at the discretion of the Federal agency), states should review all such impacts at the time of initial certification, and include conditions in their certifications to address them as appropriate.

⁷² CWA §401(a)(3); 33 USC 1341(a)(3).

⁷³ CWA §401(a)(3); 33 USC 1341(a)(3); *Keating v. FERC*, 927 F.2d 616, 623 (DC Cir 1991).

⁷⁴ *Keating v. FERC*, 927 F.2d 616, 624 (DC Cir 1991).

⁷⁵ *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989); CWA §401(a)(3); 33 USC 1341(a)(3); CWA §401(d); 33 USC 1341(d).

⁷⁶ CWA §401(a)(4); 33 USC 1341(a)(4).

⁷⁷ CWA §401(a)(4); 33 USC 1341(a)(4).

⁷⁸ CWA §401(a)(4); 33 USC 1341(a)(4).

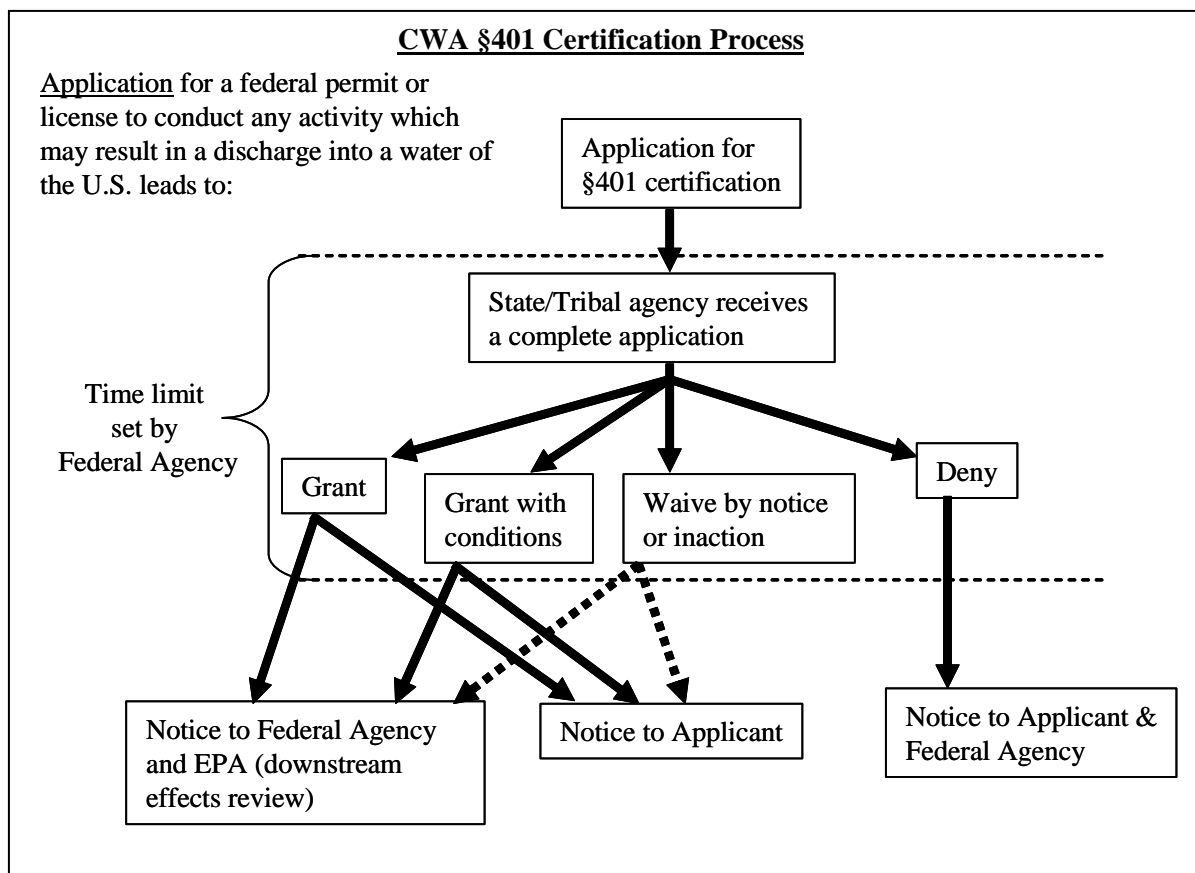


Figure 3. The Water Quality Certification Process

B. Start of the 401 Certification Process

Section 401 indicates that an application for a federal permit or license that may result in a discharge to waters of the U.S. cannot be considered complete unless accompanied by a grant or waiver of §401 certification.⁷⁹ “No license or permit shall be granted until the certification ... has been obtained or has been waived.”^{80, 81} As a result, the applicant is responsible for requesting the necessary §401 certification from the state or tribe.⁸²

States and tribes often establish their own specific requirements for a complete application for water quality certification.⁸³ Generally, the state or tribe’s §401 certification review timeframe begins once a request for certification has been made to the certifying agency,

⁷⁹ 33 USC 1341(a)(1); CWA §401(a)(1); *Puerto Rico Sun Oil Company v. EPA*, 8 F.3d 73, 74 (1st Cir 1993); *US v. Marathon Development Corporation*, 867 F.2d 96 (1st Cir. 1989).

⁸⁰ CWA §401(a)(1); 33 USC 1341(a)(1).

⁸¹ Note that the process in practice is not always linear. For example, FERC’s licensing regulations indicate that once the Commission determines that the application is complete, it issues a “Ready for Environmental Analysis” notice instructing the license applicant to request water quality certification from the state certifying agency within 60 days of notice issuance.

⁸² *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989).

⁸³ *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

accompanied by a complete application. A complete application for §401 certification typically includes the completed application for a federal license or permit, including detailed descriptions of the proposed project and anticipated aquatic resource impacts.⁸⁴ At times, the list of components of a complete application can be lengthy. For example, Oregon has identified a complete §401 certification application for a §404 permit as including: the legal name and address of activity owner or operator; legal name and address of the authorized representative; name and addresses of contiguous property owners; complete written description of activity, including maps, diagrams, and other information; names of affected waters, including wetlands and tributary streams; land use compatibility statement; identified steps that will be undertaken to prevent violation of water quality standards; copies of environmental information submitted to the federal licensing or permitting agency; confirm status of waters impacted by the project, including if they are on 303(d) lists or subject to a Total Maximum Daily Load (TMDL) calculation; evaluation of potential water quality standard violations or contribution to violation; and identification of mitigation measures.⁸⁵ Oregon also identifies additional information that may be required for projects in wetlands and streams and for hydropower projects.

The advantage of a clear description of components of a complete §401 certification application is that applicants know what they must be prepared to provide, and applicant and agencies alike understand when the review timeframe has begun.

C. Scope of Analysis For §401 Certification Decisions

U.S. Supreme Court in *PUD v Washington Department of Ecology*:

“Section 401(d) thus allows the State to impose ‘other limitations’ on the project in general to assure compliance with various provisions of the Clean Water Act and with ‘any other appropriate requirement of State law’ ... Section 401(a)(1) identifies the category of activities subject to certification--namely, those with discharges. And §401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”⁸⁸

When Congress enacted the water quality certification provisions in 1970, it wanted to ensure that no federal license or permit would be issued “for an activity that through inadequate planning or otherwise could in fact become a source of pollution.”⁸⁶ As incorporated into the 1972 CWA, §401 water quality certification was intended to ensure that no federal license or permits would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate CWA provisions. Specifically, the statute calls for states or tribes to base their certification on a consideration of whether the permit or license would be consistent with a list of CWA authorities including water quality standards and effluent limitations, as well as “any other appropriate

requirement of State [or tribal] law set forth in such certification.”⁸⁷ It is important to note that, while EPA-approved state and tribal water quality standards may be a major consideration driving §401 decision, they are not the only consideration.

⁸⁴ CWA §401(a)(1,3); 33 USC 1341(a)(1, 3); *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989).

⁸⁵ OAR 340-048-0020; see also <http://www.deq.state.or.us/wq/sec401Cert/process.htm#min>.

⁸⁶ 115 Cong. Rec. H9030 (April 15, 1969)(House debate); 115 Cong. Rec. S28958-59 (Oct. 7, 1969) (Senate debate).

⁸⁷ CWA §401(d); 33 USC 1341(d).

As noted in the previous section, the CWA indicates that §401 certification of a permit or license for the construction of any facility may fulfill the requirements for certification in connection with any other federal license or permit required for the operation of such facility.⁸⁹ In other words, certification of a construction permit or license generally also operates as certification for an operating permit or license. Thus, it is important for the §401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.⁹⁰ For example, certification of a new hydroelectric dam subject to licensing by FERC would consider water resource implications of both the dam’s construction and operation, for the life of the permit.

Three exceptions to this general rule of “one certification” exist. First, if the §401 certification of permits for project construction is from a different jurisdiction than where a potential discharge would originate during facility operation, then the federal operating permit would require an additional certification from the state or tribe in which the operational discharge would originate.⁹¹ The second exception exists where there have been unanticipated changes to the facility, receiving water quality, water quality standards, or other CWA requirements (see the box below).⁹² Third, the general rule does not apply if the applicant failed to provide notice to the certifying agency, “of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted.”⁹³ In short, certification of a permit or license for the construction of a facility will fulfill the requirements for certification of any other construction or operation permits or licenses for the facility as long as the potential impacts from construction and operation are within the same jurisdiction and there is no change in the facility, the receiving water, water quality standards or other CWA requirements.

Certification of Construction And Certification of Operation: CWA §401(a)(3)

“The certification obtained...with respect to the construction of any facility shall fulfill the...certification...for the operation of such facility unless, after notice to the certifying... agency...[the certifying] agency...notifies such [federal] agency within sixty days...that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying...agency... with notice of any proposed changes in the construction or operation of the facility...which changes may result in violation of section 301, 302, 303, 306, or 307 of this title.”

⁸⁸ *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

⁸⁹ 33 USC 1341(a)(3); CWA §401(a)(3); “The statute allows a state to revoke a prior certification only within a specified time limit and only pursuant to certain defined circumstances” *Keating v. Federal Energy Regulatory Commission*, 927 F.2d 616, 623 (DC Cir 1991); “Section 401(a)(3) does not, however, require a state with certification rights pertaining only to the operation of a project to assert those rights at the time a construction permit is issued for the project.” *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997).

⁹⁰ In *PUD I* the court found that, “activities—not merely discharges—must comply with state water quality standards.” *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

⁹¹ *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-1484 (DC Cir 1990).

⁹² 33 USC 1341(a)(3); CWA §401(a)(3); See also *Keating v. FERC*, 927 F.2d 616, 622 (DC Cir 1991).

⁹³ 33 USC 1341(a)(3); CWA §401(a)(3).

Section 401 applies to any federal permit or license for an activity that may discharge into a water of the U.S. The Ninth Circuit Court of Appeals has ruled that the discharge must be from a point source, and agencies in other jurisdictions have generally adopted the requirement.⁹⁴ Once these thresholds are met, the scope of analysis and potential conditions can be quite broad. As the U.S. Supreme Court has held, once §401 is triggered, the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law.⁹⁵

For example, water quality implications of fertilizer and herbicide use on a subdivision and golf course might be considered as part of a §401 certification analysis of a CWA §404 permit that would authorize discharge of dredged or fill material to construct the subdivision and golf course. Note that the Corps may decide to consider a certification with conditions it views as beyond its statutory authority as a denial, and not issue the section 404 or section 10 permit.⁹⁶

1. Basis for Certification Decisions – Generally

In order to obtain certification of any proposed activity that may result in a discharge to waters of the U.S., an applicant must demonstrate that the proposed activity and discharge will not violate or interfere with the attainment of any limitations or standards identified in §401(a) and (d). Specifically, the statute provides that an applicant for a federal license or permit obtain a certification that the discharge and activity is consistent with state or tribal effluent limitations (CWA §301), water quality related effluent limitations (CWA §302), water quality standards and implementation plans (CWA §303), national standards of performance (CWA §306), toxic and pretreatment effluent standards (CWA §307) and “any other appropriate requirement of State [or Tribal] law set forth in such certification.”⁹⁷

Water Quality Standards:
A benchmark for water quality protection

Standards provide the foundation for a broad range of water quality management activities including, but not limited to, monitoring under §§ 305(b) and listing /TMDL development under section 303(d), permitting under §§ 402 and 404, water quality certification under §401, and the control of non-point source pollution under §319. Standards also provide a benchmark for the assessment of wetland impacts. Such standards, however, are not the only consideration during a §401 certification analysis.

Figure 4. The Water Quality Standards Benchmark

Certifying agencies often develop procedures and a list of considerations that they deem necessary as part of their certification analysis to ensure compliance with the appropriate CWA provisions and requirements of state or tribal law related to the maintenance, preservation, or enhancement of water quality. For example, North Carolina has developed a list of assessment formulas and general certification conditions relating to project impacts, buffers, violation sites,

⁹⁴ *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 5 (9th Cir.(Or.) 1998); *ONDA v. U.S. Forest Service*, 550 F.3d 778 (9th Cir. 2008). Discussions with more than a dozen certification agencies in 2005 did not reveal one case of certification being given or required for federal permits or licenses for non-point source discharges into waters of the U.S.

⁹⁵ *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711-712 (1994); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

⁹⁶ See, e.g., RGL 92-04, “Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits.”

⁹⁷ CWA §401(d); 33 USC 1341(d).

stormwater, surface water classifications, dams and ponds, wetlands and others that are reviewed for applicability to each project, so that all projects are held to the same standards and undergo the appropriate level of scrutiny. In Georgia, coordination between the certifying agency and the state fish and wildlife agencies has led to certification conditions designed to protect state species of concern that are tied to water quality goals in state law. Texas and Virginia certifications both rely on “No Net Loss” goals laid out in statute or regulation when requiring adherence to the avoidance, minimization and mitigation standards found in the CWA §404(b)(1) guidelines.

Whatever the basis of the certifying agency’s decision, thorough and clear documentation of the information and rationale used to reach the decision will help to educate the applicant and the public of the importance of water quality protection. Equally important, thorough and clear documentation can help to ensure that the certification is defensible should it be challenged in court or during public comment.

2. 401 Certification Consideration: Consistency With Water Quality Standards

As noted above, water quality standards are often the starting point for determining an appropriate response to a §401 certification request. States and tribes adopt EPA-approved water quality standards pursuant to CWA §303, and base those standards on the waters’ use and value for “. . . public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.”⁹⁸ These water quality standards and the state’s and tribe’s §401 implementing regulations and guidelines are, perhaps, the most important tools for the implementation of §401. Note that water quality standards adopted by a state or tribe but not yet approved by EPA may still be relevant during the §401 certification process as “other appropriate requirement” of state or tribal law.⁹⁹

Water quality standards consist of designated uses, criteria (narrative and numeric), and an antidegradation policy, which together provide environmental benchmarks for each class of water body. In practice, narrative and numeric criteria are often the clearest benchmarks for assessment of potential project impacts.

Across the country water quality standards have been developed for different open water bodies such as lakes, rivers and estuaries. In most areas of the country, however, water quality standards have not been developed specifically for wetlands. Wetland types vary over a wide gradient of physical, chemical and biological conditions that do not always reflect the characteristics of adjacent open water bodies. Therefore, the application of open water standards to wetlands can present challenges. One way to help ensure comprehensive consideration of wetlands in the §401 certification process is by creating wetland-specific water quality standards. Several states rely on their antidegradation policies for developing certification conditions. South Carolina has developed an implementation manual for applying its antidegradation policy to wetlands which has helped them more comprehensively assess wetlands impacts.¹⁰⁰

⁹⁸ CWA §303(c)(2)(A); 33 USC 1313 (c)(2)(A).

⁹⁹ They fall under the, “other appropriate requirement of State law set forth in such certification” requirement of 33 USC 1341(d); CWA §401(d).

¹⁰⁰ Antidegradation Implementation for Water Quality Protection in South Carolina. Department of Health and Environmental Control, Bureau of Water. July 1998. <http://www.scdhec.net/environment/water/docs/antideg.pdf>

For more information on water quality standards see the *National Guidance on Water Quality Standards for Wetlands*¹⁰¹, the *Water Quality Standards Handbook*¹⁰², or Section II of the April 1998 Advance Notice of Proposed Rule Making seeking comments from interested parties on possible revisions to the Water Quality Standards Regulation at 40 CFR Part 131.¹⁰³

3. 401 Certification Considerations: Effluent Guidelines, New Source Performance Standards and Toxics

In addition to water quality standards, §401 certification decisions must reflect consistency with effluent guidelines, New Source Performance Standards (NSPS), the CWA's toxics provisions, and other considerations.¹⁰⁴

Effluent guidelines are national technology-based effluent limitations for the discharge of pollutants directly to surface waters and to publicly owned treatment works (POTWs).¹⁰⁵ Effluent guidelines are developed for a wide range of specific industrial sectors and discharges -- from manufacturing to agricultural and service industries. As of 2010, effluent guidelines have been issued for 55 industry sectors and subsectors.¹⁰⁶ National effluent guideline regulations typically specify maximum daily allowable concentration and a 30-day average for a pollutant that may be discharged by facilities within the targeted industry, often per unit of production.¹⁰⁷ Regardless of the quality of the receiving water, all permits must include effluent limitations at least as stringent as those called for under the effluent guidelines.¹⁰⁸ While effluent guidelines serve as a national minimum of pollution control, the CWA requires permitting authorities to develop more stringent water quality-based standards if the effluent guideline requirements are insufficient to meet water quality standards on a particular water body.¹⁰⁹

NSPS are technology-based discharge limits placed on new facilities. They are developed similarly to effluent guidelines, tailored to specific industrial sectors, and applicable nationwide regardless of the quality of the receiving water.¹¹⁰ As a general rule, NSPS are more stringent than effluent limitations guidelines placed on existing sources in the same industrial sector.

4. 401 Certification Considerations: Consistency With Other Appropriate Requirements of State and Tribal Law

¹⁰¹ National Guidance: Water Quality Standards for Wetlands. US EPA. July 1990. pvii. as Appendix B to Chapter 2 - General Program Guidance of the Water Quality Standards Handbook, December, 1983.

¹⁰² Water Quality Standards Handbook, Second Edition. US EPA. September 1993.

¹⁰³ Found on EPA's website at <http://www.epa.gov/waterscience/standards/laws.htm>; Federal Register: July 7, 1998 (Volume 63, Number 129), Page 36741-36806, From the Federal Register Online via GPO Access, wais.access.gpo.gov, DOCID:fr07jy98-27.

¹⁰⁴ CWA §404(a)(1); 33 USC 1341(a)(1).

¹⁰⁵ CWA §304(b); 33 USC 1314(b).

¹⁰⁶ See CWA section 307(b) and (c); and CWA section 402(a) (1); EPA's Industrial Limitations Guidelines <http://www.epa.gov/waterscience/guide/industry.html>.

¹⁰⁷ CWA section 307(b) and (c); and CWA section 402(a) (1); 40 CFR §425.01-§620 (effluent guidelines).

¹⁰⁸ Exceptions to this statement include where a facility is eligible for a variance from the effluent guideline limitation, such as under the Fundamentally Different Factors (FDF) variance, CWA §301(n), 33 USC 1311(n). Similar variances from effluent guidelines can be found at CWA § 301, 33 USC §1311. For a general discussion see: Water Quality Standards Handbook. Second Edition. US EPA. August 1994. Chapter 7.6.3.

¹⁰⁹ CWA §301(b)(1)(C), §303(e)(3)(A); 33 USC 131(b)(1)(C), 1313(e)(3)(A); 40 CFR 122.44(d). Effluent guidelines may be insufficient to meet water quality standards in a number of circumstances, such as where a particular waterbody receives discharges from numerous facilities, or flows are low during some times of the year.

¹¹⁰ CWA §306(b)(1)(B); 33 USC 1316(b)(1)(B).

Water quality certifications under §401 reflect not only that the licensed or permitted activity and discharge will be consistent with the specific CWA provisions identified in sections 401(a) and (d), but also with “any other appropriate requirements of State [and Tribal] law.”¹¹¹ Some State regulations explicitly identify considerations relevant for §401 certification, while others do not. For example, Ohio’s regulations state that certification may be denied if the activity will “result in adverse long or short term impact on water quality.”¹¹² Similarly, river designation under the Wild and Scenic Rivers Act might be a relevant consideration independent of a state or tribe’s water quality standards.¹¹³ For example, Georgia considers a suite of other state regulations under its review including compliance with the state Erosion and Sedimentation Act for buffer integrity, construction and post-construction stormwater management, and the adequacy of mitigation. In addition, the Georgia water quality certification authority also coordinates with the Coastal Resources Division to insure project compliance with coastal protection regulations. Another relevant consideration when determining if granting 401 certification would be appropriate is the existence of state or tribal laws protecting threatened and endangered species, particularly where the species plays a role in maintaining water quality or if their presence is an aspect of a designated use. Also relevant may be other state and tribal wildlife laws addressing habitat characteristics necessary for species identified in a waterbody’s designated use.

Similar to the discussion in section *III.C.2. 401 Certification Consideration: Consistency with Water Quality Standards*, protection of the cultural or religious value of waters expressed in state or tribal law can also be relevant to a certification decision, even when not included as part of a water quality standard.¹¹⁴

D. Conditioning Federal Licenses and Permits Through §401 Certification

States and tribes frequently place conditions on their water quality certifications when such conditions are deemed necessary to ensure compliance with the identified CWA provisions and any other appropriate requirements of state or tribal laws.¹¹⁵ These §401 certification conditions must be included in the resulting federal permit or license.¹¹⁶

Many state and tribal governments use §401 certification as one of their primary regulatory tools for protecting water quality.¹¹⁷ Some states frequently grant §401 certification unconditionally, while other states have a set of basic conditions involving Best Management Practices (BMPs) that are attached to most permits or licenses.¹¹⁸

¹¹¹ CWA §404(d); 33 USC §1341(d).

¹¹² OH ADC 3745-32-05 (B).

¹¹³ 16 USC §1271.

¹¹⁴ Ceremonial use standards were upheld by the 10th Circuit Court of Appeals in *Albuquerque v. Browner*, 97 F.3d 415, 423 (1996).

¹¹⁵ CWA §401(d); 33 USC 1341(d).

¹¹⁶ CWA §401(d); 33 USC 1341(d). *See also, e.g., American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 107 (2nd Cir 1997); *Department of Interior v. FERC*, 129 P.U.R.4th 632, 952 F.2d 548 (DC Cir 1992).

¹¹⁷ *State Wetland Program Evaluation: Phase I*, Environmental Law Institute, 2005; *State Wetland Program Evaluation: Phase II*, Environmental Law Institute, 2006.

¹¹⁸ *State Wetland Program Evaluation: Phase I*, Environmental Law Institute, 2005; *State Wetland Program Evaluation: Phase II*, Environmental Law Institute, 2006.

In addition to CWA-derived requirements, §401 certification conditions may be based on “any other appropriate requirement of State [or Tribal] law set forth in such certification.”¹¹⁹ The ability to condition §401 certifications has been used by states and tribes to ensure that water quality has been comprehensively addressed in the design and implementation of projects and that unavoidable impacts will be mitigated. For example, North Carolina regulators believe that the mitigation demanded in their §401 certification conditions, specifically the requirement for at least 1:1 restoration or creation for wetland loss, allows the goal of No Net Loss of wetlands to be met at the state level.

As stated earlier, all conditions in a §401 certification must be included in any resulting federal permit or license, and the federal agency must incorporate the conditions without amendment.¹²⁰ The U.S. Supreme Court stated in 2006, “[i]t is still the case that, when a State has issued a certification covering a discharge that adds no pollutant, no federal agency will be deemed to have authority under NEPA to ‘review’ any limitations or the adequacy of the §401 certification.”¹²¹ The federal permitting agency does not have authority to review and amend the conditions on a §401 certification. All conditions must be included in the permit or license or the permit or license may not be issued.¹²²

As discussed in the dispute resolution section below, federal courts have established that the state or tribal court system is the proper forum to review the substance of certification decisions¹²³, including the consistency of the conditions with CWA §401 and state or tribal water quality goals.¹²⁴ It is advisable that conditions placed on a §401 certification include a reference to the law or regulation that was the impetus for that condition.¹²⁵

1. Appropriate Conditions

Section 401 provides that:

Any certification provided under this section [401] shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [enumerated provisions of the CWA]... and with any other appropriate requirement of State law set forth in such certification.¹²⁶

¹¹⁹ CWA §401(d); 33 USC 1341(d).

¹²⁰ *American Rivers, Inc. v. FERC.*, 129 F.3d 99, 107 (2nd Cir 1997).

¹²¹ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006); Also supported by, *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1125 (DC Cir. 1971).

¹²² CWA §401(d); 33 USC 1341(d). *American Rivers* at 110-111.

¹²³ The Supreme Court has at least implied that a remedy may be had in federal court, at least with respect to certifications involving FERC hydro licenses. In *Jefferson County PUD*, 511 U.S. 700 (1994), the Court stated that “[i]f FERC issues a license containing a stream flow condition with which petitioners disagree, they may pursue judicial remedies at that time.” Since appeals of FERC licensing orders may be had only in the federal courts of appeals, this statement implies – perhaps confusingly – that the federal courts may examine the merits of conditions contained in a water quality certification in the context of reviewing a FERC order.

¹²⁴ *US v. Marathon Development Corporation*, 867 F.2d 96, 102 (1st Cir. 1989); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir 1982); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

¹²⁵ See e.g., 40 CFR 124.53(e)(2).

¹²⁶ 33 USC 1341(d); CWA §401(d).

Accordingly, a state or tribal certification should incorporate those conditions necessary to ensure a resulting federal license or permit will include effluent limitations at least as stringent as the applicable national technology-based guidelines established under the CWA, and as stringent as needed to attain and maintain water quality standards, including their designated uses and criteria. Under CWA §401(d) the water quality concerns to consider, and the range of potential conditions available to address those concerns, extend to any provision of state or tribal law relating to the aquatic resource.

Considerations can be quite broad so long as they relate to water quality. The U.S. Supreme Court has stated that, once the threshold of a discharge is reached (necessary for §401 certification to be applicable), the conditions and limitations included in the certification may address the permitted activity as a whole.¹²⁷

Certification may address concerns related to the integrity of the aquatic resource and need not be specifically tied to a discharge.

As the Supreme Court pointed out, “§401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”¹²⁸ For example, the Supreme Court upheld the imposition of minimum stream flows to support spawning salmon in the certification of a proposed hydroelectric dam in Washington State.¹²⁹

2. Role of Monitoring and Mitigation

Conditions accompanying §401 certifications may include monitoring requirements and compensatory mitigation if a state or tribe believes them necessary to comply with the CWA or appropriate requirements of state or tribal laws.¹³¹ Several states have included monitoring and reporting requirements as §401 conditions.¹³² Such requirements help the state determine whether water quality is being degraded. In addition, monitoring and reporting requirements allow agencies to assess the effect of operational practices and conditions on water quality in order to shape the development of certification decisions and conditions in the future. As an

The U.S. Supreme Court ruled in *PUD v. Washington Department of Ecology*. that:

“Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth “any effluent limitations and other limitations ... necessary to assure that *any applicant*” will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a “discharge.” The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose “other limitations” on the project in general to assure compliance with various provisions of the Clean Water Act and with “any other appropriate requirement of State law.” Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post*, at 1916, we see no such anomaly. Section 401(a)(1) identifies the category of activities subject to certification--namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”¹³⁰

¹²⁷ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).

¹²⁸ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).

¹²⁹ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).

¹³⁰ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 711-12 (1994).

¹³¹ CWA §401(d), 33 USC 1341(d).

¹³² Missouri, Confederated Tribes of the Warm Springs Reservation, and North Carolina, among others.

added benefit, monitoring and reporting helps applicants see and understand the impact, or averted impact, on water quality of their permitted actions. Monitoring and reporting helps to educate the regulated community about their impact on water quality and is essential for institutional learning to guide future certification decisions.

Mitigation requirements are often included in certification conditions to set the location, type, and extent of mitigation already required for a §404 dredge and fill permit or other permits. Although state and tribal certification regulations and conditions can require mitigation for any federal permit or license, mitigation is most commonly associated with CWA §404, under which EPA and the Corps follows the mitigation framework set out in the §404(b)(1) guidelines to evaluate applications for §404 dredge and fill permits. Missouri developed mitigation guidelines which regulators have implemented through CWA 401 certifications to increase the mitigation obtained from Corps permits. Some states have also elected to require mitigation in certifications for federal permits and licenses other than under §404, such as for FERC licenses. When mitigation is required for any permit or license, the state or tribe considers whether sufficient assurances should be incorporated into the certification to ensure the long-term functional success of the project. In North Carolina, for example, mitigation projects must be permanently protected by conservation easements or other similar protections.¹³³

3. State and Tribal Laws and Certification Conditions

State and tribal laws pertaining to water quality are used to guide decision making in the §401 certification process. As discussed above, conditions are developed to ensure compliance with the CWA or other appropriate requirements of state or tribal laws. State or tribal water quality standards, developed under the CWA and approved by EPA, are often the initial standard considered by states and tribes when drafting conditions. Also relevant is any state or tribal law establishing a more stringent standard or goal for water quality. Applicable state and tribal laws may establish quantitative standards, or narrative criteria that set qualitative goals. For example, Virginia has established a “No Net Loss” of wetland acreage and function goal in statute¹³⁴ and the state often relies on it when certifying wetlands projects to require avoidance, minimization, and - when necessary - mitigation measures.

Some states have laws that limit their agencies’ abilities to impose environmental requirements more stringent than those imposed by federal law, commonly referred to as “No More Stringent” laws. Section 401 certification programs in states with any type of restriction may wish to develop a process that ensures compatibility between their §401 certification and the limitation on stringency. Texas law prevents the state from permitting the discharge of dredged or fill material into waters of the state, but does not limit the state’s role in the 401 water quality certification process.¹³⁵ However, budget constraints led to a reduction in the resources available for the state’s 401 certification review activities. In response, the state developed a two-tiered system of review under a Memorandum of Agreement with the Corps. For projects under the impact thresholds identified as Tier 1, water quality certification is essentially waived by the state if the applicant self-selects one Best Management Practice (BMP) from each of three

¹³³ N.C. Division of Water Quality, Wetlands/401 Unit, Project Specific Condition List, July 2004 (Version 2). 18 pages; For more information on federal regulation, guidance and research on the use and performance of mitigation under the CWA and the Rivers and Harbors Act visit the <http://www.epa.gov/wetlandsmitigation/>.

¹³⁴ Code of Virginia § 62.1-44.15:21; Explained in regulation as “no net loss of wetland acreage and functions or stream functions and water quality benefits” 9VAC25-210-80.B.1(k)(5).

¹³⁵ Texas Water Code Title 2. Subtitle D. Chapter 26. Section 26.027(d).

classes to become conditions on their Corps permit.¹³⁶ While Texas does not individually review Tier 1 projects, it does develop the BMP options and requirements applicants must follow. Tier 2 projects receive individual state §401 water quality certification review.

E. Certification Process

CWA section 401 indicates that an applicant for a federal permit or license must include as part of the application for the federal permit a 401 certification or waiver¹³⁷, implying that federal agencies would not evaluate an application for a permit or license until the §401 certification decision is made. In practice, states and tribes frequently review certification requests while the federal permitting or licensing agency is reviewing the project application.¹³⁸

1. Regulations Describing §401 Certification

Although regulations or guidelines on implementation of §401 are not required under the CWA, establishing a procedure by which certification decisions are made, and clarifying what information will be used to make those decisions, helps educate and inform applicants and the public about the CWA 401 process and the importance of water quality protection. State and Federal Section 401 certification regulations and guidelines vary in their detail. Some define the specific quantitative and qualitative limitations or standards used to assess aquatic resource impacts, while others merely note where applications for §401 certification should be sent.

States that have developed implementation guidelines for making §401 certification decisions have found them very useful in helping to ensure the project applicant, agency staff, and the general public understand the §401 process and requirements. Some state and tribal laws and regulations define specific elements of the §401 certification process. For example, a particularly important component of the 401 process is a state or tribal definition of what constitutes a complete application. Because the timeframe for 401 certification review starts upon receipt of a complete application¹³⁹, inadvertent waiver due to passage of time is less likely where the standard for a complete application is well-defined.

California has defined a complete application as, “an application that includes all information and items and the fee deposit required.” California’s regulations identify a detailed list of required application information including: full contact information of applicant; technical description of full activity through the final stage; identification of all federal permits or licenses being sought and all supporting information and correspondence produced for those permits or license(s) both draft and final; the correct certification fee; and a complete project description.¹⁴⁰ The California regulation goes on to clarify that a complete project description identifies receiving waterbody(ies) and impacts, location, mitigation, all avoidance and minimization

¹³⁶ Memorandum of Agreement Between the U.S. Army Corps of Engineers and the Texas Natural Resource Conservation Commission on Section 401 Certification Procedures, August 17, 2000.

¹³⁷ CWA §401(a)(1); .33 USC §1341(a)(1).

¹³⁸ An example of how the process in practice is not always as linear as the CWA suggests is FERC’s licensing regulations. Under those regulations, once the Commission determines that the application is complete, it issues a “Ready for Environmental Analysis” notice instructing the license applicant to request water quality certification from the state certifying agency within 60 days of notice issuance.

¹³⁹ The Fourth Circuit observed that certification agencies prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

¹⁴⁰ CACR Title 23. Division 3. Chapter 28. Article 4. § 3856. Contents of a Complete Application.

efforts, and a brief list with the estimated adverse impacts of all projects implemented by the applicant within the last five years (or planned for implementation within the next five years) that are in any way related to the proposed activity or receiving water body(ies).¹⁴¹

The state of North Carolina's administrative code identifies the information required in an application for §401 certification, including maps and a description of the receiving waters, the discharge, the activity, and the applicant. In addition, North Carolina regulations reserve the right to request additional information and conduct on site investigations as deemed necessary by North Carolina Department of Environmental Health and Natural Resources.¹⁴²

State implementation guidelines may be codified in statute or regulations, or described in guidance. A description of the §401 certification implementation process typically addresses standard operating procedures (SOPs) and the scope of review in terms of applicable state provisions, effects over the lifetime of the project, and certifying the operation of the facility in the construction certification. In addition, maintaining a list of all of the laws, regulations, and guidance documents referenced during §401 review can help ensure consistent application of standing policies.

2. Certification Practices Viewed as Effective by States or Tribes

Certification practices vary across States and Tribes. Some states have explicit procedures calling for comprehensive documentation of the rationale used to make certification decisions, while others adopt a less formal approach. In general, several states have found that providing comprehensive and detailed information in certifications and guidance on the certification review process and standards of review allows 401 certification to serve as an effective water quality protection tool while minimizing administrative costs and maximizing public transparency.

a. Substance of Certifications

Although not all federal licenses and permits reviewed under §401 will warrant conditioning, §401 certification is an important (and, sometimes, the only) regulatory opportunity to address water quality in draft federal permits and licenses. Therefore, when necessary, states and tribes should seek to include conditions that protect against the full range of reasonably possible impacts.

Conditions placed on §401 certifications should be as specific as necessary to ensure that water quality will be protected. Conditions that enumerate "how" to address "what" potential adverse effect from "where" help all parties understand what is being called for. As a result, conditions that are specific are more likely to be consistent with water quality standards and protect aquatic resources in accordance with the water quality goals of the state or tribe. For example, where protection of sensitive fisheries is a concern, some states and tribes have found it helpful to specify minimum flow volumes or regimes and stocking practices including species, size class, number, frequency and location.

In some circumstances, the provisions states or tribes would wish to see reflected in the permit or license can be achieved through early discussions with the applicants, rather than through formally conditioning the 401 certification. Some states such as North Carolina and

¹⁴¹ CACR Title 23. Division 3. Chapter 28. Article 4. § 3856. Contents of a Complete Application.

¹⁴² 15A NC ADC 2H.0502.

Oregon use the comment period when project proponents are developing their applications for Corps and state permits to give applicants the chance to include in the project description the changes that are likely to be required anyway. The use of Best Management Practices (BMPs) and practices needed for Total Maximum Daily Load (TMDL) implementation are often added to projects during this stage. BMPs can include such actions as using constructed wetlands or bioretention areas rather than retention ponds for catching nutrients and sediments. A related action often recommended in Kansas is the creation of a lake protection plan for developments around old watershed dams that were previously used for flood control and agriculture.¹⁴³ The lake protection plans emphasize BMPs around the lake and informs the residents that discharges from the water body that cause water quality exceedences downstream may result in violations and enforcement actions. In addition, Kansas has developed a coordination group of most of the state and federal natural resource agencies that meets quarterly and shares information on BMPs, TMDLs, water quality standards, federal and state regulations including mitigation regulations, relevant literature references and similar resources useful to §401 and other programs. The group also works to coordinate technical assistance for permittees (of various programs) needing help understanding and implementing their permit requirements or state expectations.

In addition to carefully crafted and detailed conditions placed on the original permit, re-opener provisions and deed notifications have been used where the state or tribal certifying agency anticipates changes in water quality standards or other considerations. Section 401 certification conditions that call for interaction with the state or tribe when a specified action or condition occurs are often called ‘adaptive management’ conditions and may help to ensure that water quality goals are met under changing conditions. In the context of hydropower licensing adaptive management is a process in which the licensee and stakeholders collaborate on “fine tuning” required environmental measures within a Commission prescribed range. For example, in response to a 401 certification adaptive management condition, FERC may require in a license a minimum flow between 100 and 500 cubic feet per second to protect a particular resource and within that range of flow the licensee and certifying agency make flow decisions on a reoccurring basis depending on the conditions occurring at the time. Some states have included an adaptive management condition in their 401 certification for FERC hydroelectric licenses that require facility operators to get review and approval of a dredging management plan prior to dredging operations associated with the dam. Adaptive management in general helps to anticipate and address potential future changes in the circumstances used as the basis for the 401 certification decisions. For example, Oregon regularly includes re-opener clauses when certifying Corps permits and under state law may modify the certification, with public comment, if water quality standards change.¹⁴⁴

Another approach to extend the effect of 401 certification conditions is to require deed notifications to be placed on the land title for all remaining jurisdictional waters (and buffers where applicable). This helps to alert future land owners to permit requirements. As noted in section *III.C.1. Basis for Certification Decisions – Generally* above, North Carolina maintains a list of issues, evaluation tools and standard conditions including re-opener and deed notification provisions that are reviewed during every §401 certification evaluation.¹⁴⁵ In fact, North Carolina

¹⁴³ In Kansas this is common for old impoundments.

¹⁴⁴ Oregon Administrative Rules 340-048-0050.

¹⁴⁵ N.C. Division of Water Quality, Wetlands/401 Unit, Project Specific Condition List, July 2004 (Version 2). 18 pages.

includes a re-opener clause on almost all certifications issued. North Carolina §401 staff have also noted several applicants who indicated they saw the deed notification and realized they needed a certification.

b. Procedures used to Minimize the Administrative Burden of Certification

Many states and tribes have adopted procedures that minimize administrative burden by merging their 401 certification application and public notice process with those of the federal licensing or permitting agency. For example, many states and tribes have established joint applications and public notice arrangements with Corps Districts for CWA §404 permits and RHA §9 and §10 permits. Joint procedures help to ensure that all available project information is provided to all parties while simplifying the administrative requirements for applicants. Such procedures ensure that public comments on a project are collected at one time and provided to all relevant agencies. A number of states and tribes use the notice date as the start of the countdown to automatic waiver of certification, provided that they have received a complete application, which can be defined by the state or tribe.¹⁴⁶ A particular benefit of joint application and public notice requirements is that they help improve communication and coordination between the state and tribal agencies and the federal agencies while establishing a standard information requirement for both applications.

Close coordination with the federal permitting or licensing authority can provide certification agencies with valuable access to the applicant prior to the official request for certification. Several states, including Oregon, Georgia, Montana and Kansas, rely heavily on the pre-application consultation process to provide an opportunity to discuss potential water quality concerns and obtain changes to the proposed project prior to official application for a permit or license and certification. Kansas uses pre-application meetings for a variety of purposes. Along with the standard information gathering and dissemination function, Kansas also attempts to use pre-application meetings to discuss low-impact and smart growth design features with the applicant and other agencies involved. In addition, Kansas focuses on communication within affected watersheds to ensure that proposed projects will not disrupt other permitted activities in the watershed such as Public Water Supplies, Waste Water Treatment Plants and other permittees. Kansas has found that assessing a project in regard to the existing impacts and uses of the watershed is especially important when considering changes to channel morphology and other baseline conditions upon which other permittees or users rely. Montana uses pre-application meetings to discuss and distribute copies of their water quality standards, a stormwater / erosion control handbook, and information pertinent to other permits the applicant might need relative to other permitting authorities. Georgia works to have projects 'modified to address concerns' during the application process, so that the main water quality issues are addressed prior to final certification. Oregon provides information to the applicant on BMPs and fact sheets about water quality, including *Stormwater Management Plan Submission Guidelines for Removal/Fill Permit Applications Which Involve Impervious Surfaces*.¹⁴⁷

¹⁴⁶ See e.g., *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1111-1112 (4th Cir 1989). When invalidating a FERC license issued without a 401 certification, the Fourth Circuit referenced FERC's regulations (18 C.F.R. § 4.38(c)(2)) requiring water quality certification requests be made in compliance with state law. In this instance Virginia's application requirements for 401 certification defined a complete application.

¹⁴⁷ Oregon Department of Environmental Quality, *Stormwater Management Plan Submission Guidelines for Removal/Fill Permit Applications Which Involve Impervious Surfaces*. (2005).

Certification review can also take many forms within a state or tribal government. Some jurisdictions conduct certification review through one office for all projects (e.g. North Carolina, Nebraska, Georgia, Confederated Salish and Kootenai Tribes of the Flathead Reservation, and Pueblo of Sandia). Alternatively, other jurisdictions separate certification review into project type such as FERC license or Corps permit (e.g. Oregon or Montana). In addition, certification review may be a state or tribe's only regulatory look at a project affecting water quality or it may run parallel to review for other state or tribal permits.

U.S. v. Marathon Development Corporation:

“Neither the language nor the history of section 404(e) of the Clean Water Act (‘General permits [for dredged or fill material] on State, regional, or nationwide basis’), 33 U.S.C. § 1344(e), suggests that states have any less authority in respect to general permits than they have in respect to individual permits.”¹⁴⁸

As discussed more fully in the *Resolution of §401 Certification Related Disputes* section below, conditions on a federal permit or license are reviewable in state or tribal courts for consistency with water quality standards and other relevant laws. Certification practices discussed above, such as implementation procedures and evaluation criteria, will help to ensure the documentation of the §401 certification decision is thorough, making internal agency and even external legal review of a 401 certification decision easier.

F. Issues Raised by General Permits, After-the-Fact Permits, and Provisional Permits

The Clean Water Act authorizes general permits for activities that do not have significant environmental impacts either individually or cumulatively.¹⁴⁹ General Permits allow projects of a specifically defined type of impact or activity to proceed with limited or no individualized review. Some general permits require only notification to the Federal agency issuing the permit about a proposed project; others do not even require notification. General permits may be developed at and apply to a national or a smaller regional geographic scale. General permits are widely used in the Section 402 NPDES and section 404 permit programs.

A general permit may result in a discharge from a point source into a water of the United States, and as such is subject to the same §401 water quality certification requirements as individual permits, but at the point it is being initially issued and not as it is applied to particular projects. When a state or tribal agency is considering whether to provide §401 certification for a proposed general permit, the agency has the same options as it would for an individual permit or license —grant, deny, condition or waive.¹⁵⁰ Nationwide and Regional General Permits issued by the Army Corps of Engineers under CWA §404 are certified at the issuance and re-issuance of the general permit.

When certification is denied for a Nationwide or Regional General Permit, the District offices of the Army Corps of Engineers have responded primarily in two ways. In some instances Districts allow projects to be covered by a general permit provided the project proponent first

¹⁴⁸ *US v. Marathon Development Corporation*, 867 F.2d 96, 100 (1st Cir. 1989).

¹⁴⁹ *See, e.g.*, CWA §404(e); 33 USC 1344(e); 33 CFR § 330.1(b), 40 CFR §122.28(b)(2).

¹⁵⁰ Demonstrated in general practice nationwide and supported in the 1st Circuit Court of Appeals; *US v. Marathon Development Corporation*, 867 F.2d 96, 100 (1st Cir. 1989).

obtains §401 certification from the state or tribe, for a specific project to be covered by the general permit. The Corps often will issue a provisional authorization that only becomes effective when accompanied by a §401 water quality certification. In other cases, the certifying agency has worked with District to develop a more acceptable General Permit for which the state can provide a certification, that would not need additional certification review when specific projects are covered. When a state or tribe imposes conditions on a Nationwide or Regional General Permit, often the Corps District offices have responded by incorporating the conditions into a state- or tribe-specific version of the Nationwide Permit, or by requiring an individual §401 certification in order to qualify for the General Permit.

EPA-issued CWA §402 general permits are also reviewed by states and tribes under CWA §401. When a state or tribe denies certification the general permit is issued by the Regional Administrator with the notation that the following permit is not valid for that state or tribe's jurisdiction. In addition, if the state or tribe grants certification but imposes conditions on an EPA issued general permit, the conditions are attached to the general permit for application in that area.

If certification has been waived or granted for a general permit, any applicant approved to make use of that general permit faces no further certification review.¹⁵¹

Under limited circumstances, agencies have issued permits authorizing a discharge after a discharge has commenced. For example, after-the-fact permits are sometimes issued under CWA §404 for discharge of dredged or fill material into waters of the U.S. A state or tribe's §401 certification considerations for these after-the-fact permits should be conducted in the same manner as for normal pre-discharge permit applications. The burden of proof remains on the applicant to show that the requirements of the CWA have not been and will not be violated as a result of the activity.

Even in the case of after-the-fact permits, the state or tribe has the option of granting, denying, conditioning or waiving certification. If the applicant fails to adequately demonstrate that the fill activity did not and will not violate the CWA sections enumerated in §401 or any appropriate requirement of state or tribal law, certification should be denied. If certification is denied on an after-the-fact permit, the Corps may not issue a permit

¹⁵¹ Further certification review may be applicable as outlined in the certification conditions (if present) or under §401(a)(3) or (a)(4) .

American Rivers v. FERC:

“First, applicants for state certification may challenge in courts of appropriate jurisdiction any state-imposed condition that exceeds a state's authority under §401. In so doing, licensees will surely protect themselves against state-imposed *ultra vires* conditions. Second, even assuming that certification applicants will not always challenge *ultra vires* state conditions, the Commission may protect its mandate by refusing to issue a license which, as conditioned, conflicts with the F[ederal]P[ower]A[ct]. In so doing, the Commission will not only protect its mandate but also signal to states and licensees the limits of its tolerance.”¹⁵²

In some cases the permitting or licensing authority will issue a provisional authorization that only becomes effective when accompanied by a water quality certification. If certification is waived through the passage of time the applicant may then return to the permitting or licensing authority for a final authorization. If a certification is denied, the provisional authorization never becomes valid, and if certification is granted with conditions the provisional authorization is restricted by those conditions (with or without further modification by the permitting or licensing authority). Provisional authorizations are common in the context of Nationwide or Regional General Permits under CWA §404.

G. Resolution of §401 Certification-Related Disputes

Applicants or others who disagree with the 401 certification, including its conditions, may seek to have the decision reviewed and overturned. Complaints to the federal permitting or licensing agency are unlikely to be effective, since the agencies do not have authority to modify or overturn the state 401 certification. The initial forum for appealing a decision to grant, condition, or deny certification is often a state or tribe's courts or administrative appeals process for which the details are likely to vary among states and tribes. Some jurisdictions have an administrative appeals process that needs to be exhausted prior to proceeding to state or tribal court, while other jurisdictions do not.

Legal Review for §401 Certification

State or Tribal Courts

- Certification decision consistent with water quality standards; other enumerated CWA provisions; and appropriate provisions of state or tribal law

Federal Courts

- Timeframe for automatic waiver of certification
- Re-certification needed due to changes in circumstances outlined in §401(a)(3)
- Whether threshold conditions required for 401 certification to apply are met (i.e., federal permit or license, discharge, water of the U.S.)

Figure 5. Courts of Review for §401 Certifications

If a permit applicant wishes to challenge conditions included in a certification, the “only recourse is to challenge the state certification in state judicial proceedings.”¹⁵³ State or tribal

¹⁵² *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997).

¹⁵³ *US v. Marathon Development Corporation*, 867 F.2d 96, 102 (1st Cir. 1989); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir 1982); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

courts review §401 certification conditions for consistency with state or tribal water quality standards and other provisions of the state judicial proceedings.”¹⁵⁴ Review is typically limited to the question of whether the certifying agency’s decision is supported by the record and is consistent with applicable law (states and tribes often have a standard for administrative behavior similar to the arbitrary or capricious standard established for federal administrative actions).¹⁵⁵

Some issues regarding the §401 certification may be heard in federal administrative proceedings and courts.¹⁵⁶ For example, the federal permitting or licensing authority may review the procedural requirements of §401 certification, including whether the proper state or tribe has certified, whether the state or tribe complied with applicable public notice requirements, and whether the certification decision was timely.¹⁵⁷ In instances where federal permits were issued without the required §401 certification or certification conditions have not been enforced, the courts have found challenges under the citizen suit provisions of the CWA permissible on procedural grounds.¹⁵⁸

H. Enforcement of §401 Certifications

Enforcement practices for §401 certification vary across the country. Many states and tribes assert they may enforce 401 certification conditions using their water quality standards authority. While authority may be available, states and tribes may face challenges due to programmatic funding and support to carry out enforcement actions. Federal agencies also have the authority to enforce 401 certification conditions once incorporated as conditions in their permit or license.

401 certification conditions may be enforced by a variety of parties. The federal issuing agency may enforce the §401 certification conditions placed on permits or licenses as a mandatory requirement of the permit or license.¹⁵⁹ As discussed above, states and tribes assert they may enforce §401 certification conditions directly. In addition, the general public potentially may enforce 401 certification conditions as well; the 9th Circuit Court of Appeals notes that “nothing in the language of the Clean Water Act, the legislative history, or the implementing regulations restricts citizens from enforcing the same conditions of a certificate or permit that a State may enforce.”¹⁶⁰

A challenge with enforcement of 401 certification conditions arises from the fact that, as authors, the state or tribal certifying agency likely best understands what the condition requires

¹⁵⁴ *US v. Marathon Development Corporation*, 867 F.2d 96, 102 (1st Cir. 1989); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir 1982); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

¹⁵⁵ *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997).

¹⁵⁶ *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 107, 111-112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 867 (9th Cir 1993)

¹⁵⁷ *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-111 (2nd Cir 1997); *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006).

¹⁵⁸ *Oregon Natural Desert Association v. Michael P. Dombek*, 151 F.3d 945, 2 (9th Cir.(Or.) 1998); *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 988 (9th Cir 1995).

¹⁵⁹ See e.g., *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 108 (2nd Cir 1997) (“...§ 401(a)(5) of the CWA, 33 U.S.C. § 1341(a)(5), [FN20] which provides the licensing agency (in this case FERC) with authority to enforce the terms of a license--which pursuant to § 401(d) include a state's § 401 certification conditions--once such a federal license has issued.”)

¹⁶⁰ *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 988 (9th Cir 1995).

even though the condition is reflected in a permit or license issued by a federal agency. As a result, some federal agencies are reluctant to enforce 401 certification-derived conditions in their permits. State approaches to 401 certification violations vary. In New Mexico the State will find violations and report them to the Corps for enforcement action. North Carolina enforces violations to their own water quality standards and certification conditions. In Kansas the Corps enforces based on any conditions of the permit that they have jurisdiction over and then hands over the information to state and local authorities for compliance with any independent requirements, and if it is a water quality issue specific to a water quality compliance then enforcement is left to the state. If a Montana Water Quality Act violation occurs related to noncompliance with a 401 Certification condition, Montana's certification program writes the first letter identifying the violation and what needs to be done to reach compliance. If no action is taken the matter is directed to the Department of Environmental Quality Enforcement Division for further action. The Confederated Salish and Kootenai Tribes conduct the initial investigations and the Water Quality Program reports to the Corps, who then works alongside the Tribe on compliance assistance and enforcement when needed.

States and tribes may establish enforcement regulations and programs specifically for §401 certification, or instead simply expand the jurisdiction of existing enforcement programs. The California Water Code establishes civil liability for any person who violates §401 and criminal penalties for any person who knowingly or negligently violates §401, with a penalty chart for each.¹⁶¹

I. Suspension of §401 Certifications

Once a federal permit or license is issued with the required §401 certification, the certification can only be changed under limited circumstances.¹⁶² Certification “may be suspended or revoked by the federal agency...upon the entering of a judgment...that such facility or activity has been operated in violation of the applicable [CWA] provisions.”¹⁶³ This statutory provision suggests that a certifying agency can not revoke or suspend a certification without the action of the federal permitting or licensing authority. In contrast, if a certified permit or license is modified by the applicant or the federal agency, the certification agency has an opportunity to change conditions, but only those affected by the permit or license modification.¹⁶⁴

The federal permitting or licensing agency possesses very limited authority to review state or tribal water quality certifications to change final permit or license conditions after certification has been granted, even at the request of the certifying agency. If certification has already been granted for the construction of a facility and the certifying agency wants to either revise the certification of the construction or issue a new certification for the operation of the facility, the federal agency must assess whether the request for revision complies with §401(a)(3). The request for revision of a certification decision must be timely and in response to

¹⁶¹ Porter-Cologne Water Quality Control Act. CAWC. Division 7. Chapter 5.5. § 13385 Civil Liability. And § 13387 Criminal Penalties.

¹⁶² *Caribbean Petroleum Corporation v. EPA*, 28 F.3d 232, 235 (1st Cir 1994).

¹⁶³ CWA §401(a)(5), 33 USC 1341(a)(5); These provisions include of section 301, 302, 303, 306, and 307.

¹⁶⁴ Under these circumstances the certification agency receives the entire permit for review, even though only the conditions subject to the modification are reopened. *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 867 (9th Cir 1993).

changed circumstances since the issuance of the original certification.¹⁶⁵ The authority to review a final certification decision or the substance of conditions has been reserved to the state or tribal court system (as discussed above in the *Resolution of §401 Certification-Related Disputes* section). If the requirements of §401 (a)(3) have not been met, the federal agency may still use the information and recommendations from the certification agency in formulation of the federal permit or license, but they are not bound to follow the advice of the certifying agency.¹⁶⁶

¹⁶⁵ 33 USC 1341(a)(3); CWA §401(a)(3); *Keating v. FERC*, 927 F.2d 616, 621-622 (DC Cir 1991).

¹⁶⁶ 33 USC 1341(a)(3); CWA §401(a)(3); *Puerto Rico Sun Oil Company v. EPA*, 8 F.3d 73, 79 (1st Cir 1993); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

IV. Leveraging Available Resources

A §401 certification program still needs funding and adequate resources to be implemented fully, even with a solid foundation in federal and state or tribal law and an exemplary staff. This section discusses some of the approaches that states and tribes have taken to leverage available funding, staffing, and data sources.

A. Funding and Permit Fees

States and authorized Tribes¹⁶⁷ vary greatly in their implementation of the program and also in their funding sources which include such diverse sources as general government funds, certification fees, federal grants, and State Departments of Transportation (DOT). Many, but not all, states and tribes augment program budgets with application fees for §401 certification.¹⁶⁸

California Water Code §13160.1:
Federal Certificate Fee

“The state board may establish a reasonable fee schedule to cover the costs incurred...but is not limited to including, the costs incurred in reviewing applications...prescribing terms...and monitoring requirements, enforcing and evaluating compliance...and monitoring requirements, conducting monitoring and modeling, analyzing laboratory samples, reviewing documents..., and administrative costs...The fee schedule may provide for payment of a single fee...or for periodic or annual fees...”¹⁶⁹

States and Tribes establish the fee requirements, schedules and final allocation of the funds collected; practices vary across the country.

Fees vary amongst states and tribes in at least two respects: revenues return either directly to the 401 certification program or to a general fund, and fees are either based on project size or a flat fee. The state of California’s Regional Water Quality Control Boards requires filing fees for §401 certification and related state permits which includes a flat fee based on the activity and a

rate per the volume or area of impact.¹⁷⁰ The fee structure allows for part of the cost of the §401 certification program to be recovered through appropriately set fees that are directed to the California Water Rights Fund.¹⁷¹

In contrast to California, some other states are authorized to charge 401 certification fees that are remitted back to the program. For example, fees for water quality certification in Ohio go back to the agency’s surface water protection budget in accordance with Ohio Revised Code 3745-114 (C). There is a base fee of \$200 plus a review fee which is determined by the

¹⁶⁷ Tribes authorized to use §401 certification authority have Treatment as State (TAS) authority, and typically have developed water quality standards and designated an agency to administer the certification authority, as further discussed in *I.B.I. States and Authorized Tribes* on page 9.

¹⁶⁸ The CWA is silent on administrative fees for 401 certification, neither encouraging nor discouraging their use. Potential use of fees is more dependent on state and tribal law and custom.

¹⁶⁹ Porter-Cologne Water Quality Control Act. CAWC. Division 7. Chapter 3. Article 4. § 13160.1. Federal certificate fee.

¹⁷⁰ Title 23, Division 3, Chapter 9, Article 1, Sections 2200, 2200.4, 2200.5 And 2200.6 of the California Code of Regulations, for fee calculator see http://www.waterboards.ca.gov/water_issues/programs/cwa401/.

¹⁷¹ Porter-Cologne Water Quality Control Act. CAWC. Division 7. Chapter 3. Article 4. § 13160.1. Federal certificate fee.

magnitude of the impact and the funds go back into the agency budget.¹⁷² Ohio's administrative code also establishes that the state can "require that the applicant perform various environmental quality tests," at any point, "prior to the issuance of the §401 water quality certification or prior to, during, or after the discharge of dredged or fill material."¹⁷³

Missouri charges a flat fee of \$75 for any certification request. In contrast, for certification of Corps permits Oregon fees have been based on the amount of removal or fill above set thresholds, unless activities are exempt from fees. Oregon bases application fees for hydroelectric projects on the theoretical horsepower of the proposed project and uses them for the certification program's base funding. In addition, each applicant for hydropower 401 certification must pay for DEQ's costs to review the application and make a decision; these costs are invoiced and are separate from the annual fee.¹⁷⁴

North Carolina's permit fee for §401 certification is \$240 for an impact less than 150 feet of stream or 1 acre of wetlands and \$570 for larger impacts; any changes to or renewals of a certification require a new permit fee before processing will begin.¹⁷⁵ North Carolina also offers express permits, stormwater management plan review, and stream origin and perennial or intermittent determinations that are given priority and turned around twice as fast and cost roughly five times as much; permits and plan reviews starting at \$1000 and stream determinations starting at \$200 for 2 calls per property.¹⁷⁶ In Montana, certification fees are established in regulations as a minimum of \$400.00, or 1% of the gross value of the proposed project, not to exceed \$20,000.00.¹⁷⁷ Authority for certification fees in Montana is based in statutory authority granting ability to charge a fee sufficient to cover the direct and indirect costs of reviewing an application, conducting compliance inspections, monitoring water quality and preparing water quality rules or guidance documents, however in reality most projects eligible for certification in Montana are reviewed under state §318 authorities and assessed a \$250 fee.¹⁷⁸ Many tribal certification programs do not charge any fee for water quality certification.

B. Staffing Sources

States and tribes vary in staff sizes. States with independent permitting authorities for the aquatic resources covered under §401 and additional waters of the state can have very large staffs and budgets. North Carolina has upwards of 40 people working on §401 certification and their permitting program for aquatic resources not covered under the CWA. In contrast, Nebraska has a staff of one-half a Full Time Equivalent (FTE) to address both 401 water quality

¹⁷² Ohio Revised Code 3745-114: \$500 per acre of wetland; \$5 per linear foot or \$200, whichever is greater, for ephemeral streams; \$10 per linear foot or \$200, whichever is greater, for intermittent streams; \$15 per linear foot or \$200, whichever is greater, for perennial streams; \$3 per cubic yard of dredged or fill material for lakes.

¹⁷³ Ohio Revised Code 6111.

¹⁷⁴ Oregon Revised Statute §468.065, (2003).

¹⁷⁵ North Carolina Department of the Environment and Natural Resources, Wetlands/401 Certification Unit, 401 Water Quality Certification Fee Memorandum, <http://h2o.enr.state.nc.us/ncwetlands/fees.html> (accessed 5/4/06).

¹⁷⁶ NC Division of Water Quality, Wetland Buffer Program Express Review Fees (2004), found at http://h2o.enr.state.nc.us/ncwetlands/express_review.htm.

¹⁷⁷ Administrative Rule of Montana 17.30.201(6).

¹⁷⁸ Administrative Rule of Montana 17.30.201(6).

certification for discharges into waters of the US and letters of opinion for impacts to waters that are only state waters.¹⁷⁹

Some agencies that frequently request 401 certification have found it helpful to fund a position in the certification agency dedicated to their project requests. This seems particularly common with State DOTs.¹⁸⁰ Since DOTs are frequent applicants for certification and often involve large complex projects with fragmented impacts that demand significant time and resources to evaluate, they are often very interested in helping speed up the certification review. North Carolina and Oregon have arranged for §401 certification program staff to be funded by their DOT under the conditions that the staff almost exclusively work on DOT projects (ensuring immediate attention and therefore a quicker review turnaround) but answer and report exclusively to the certification program management. In Oregon, the 401 staff for certification of non-hydroelectric projects consists of two to three positions, one of which is periodically DOT funded. In North Carolina the certification program staff is roughly 40 people of which 11 are funded by the DOT. North Carolina also gets funding from other state programs and EPA grants. However resource constraints are handled at the state and tribal agency, the following information may help program staff obtain data and technical resources more easily and perhaps expand the recuperative effect of permit fees.

C. Data Sources

Certification decisions are based on the potential impacts to water quality goals as specified in water quality standards, other CWA provisions identified in Section III.C. *Scope of Review For §401 Certification Decisions* above, and other appropriate water quality based state or tribal laws and regulations.¹⁸¹ However, to support a 401 certification decision, the certifying agency may need additional information on the site, associated aquatic resources, or the effect of the potential impacts, than what may have been included in the application materials. The most relevant source of information to the §401 program is the water quality standards and the information used to develop them. Also helpful may be information used to develop or contained in a Total Maximum Daily Load (TMDL). In addition, other state and tribal departments and agencies such as those implementing the CWA §402 National Pollutant Discharge Elimination System program house information that could be applicable to the potential impacts associated with project proposals. Old certifications should also provide insight into not only the type and extent of information used in the past to assess similar projects but also potential sources of information on the resource, the potential impacts or the possible conditions that would mitigate the effects on water quality. Useful and important data may also be found outside the application and state government sources. For example, the professional community

¹⁷⁹ The letters of opinion identify that the project as proposed or with the listed changes / additions, likely will not violate title 117 Water Quality Standards, however these letters are not legally binding or directly enforceable.

¹⁸⁰ State DOTs and Port authorities also fund positions at in the US Army Corps of Engineers and other permitting agencies. However, no examples have been identified where private entities have funded state or tribal 401 certification positions.

¹⁸¹ 33 USC 1341(d); CWA §401(d); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006); *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994).

including the federal informational tools, professional societies, academic publications and trade journals contain copious amounts of information. But their usefulness is dependent on the extent to which the user can find the most salient information quickly.

1. The Applicant

Information provided by the applicant is the logical first resource to consult when evaluating a proposed project. Since time is often at a premium, the materials received from the applicant can not always be recreated by the certifying agency to ensure accuracy; therefore they must be trusted when verified against the best professional judgment of the staff and outside experts as needed. Several states and Corps Districts have developed lists of consultants and applicants who have established records of accurate submissions, which helps certifying agencies focus their verification efforts on less established or familiar applications and applicants. In some states such as Kansas, applicants must research other permitted impacts and uses in the watershed and alert them to the proposed project, helping to identify and address cumulative and cross project impacts in the watershed.

2. Other State, Tribal or Local Agencies

Other state, tribal and local agencies may also house relevant and valuable information for the certification process. Departments of Transportation conduct large studies of cumulative and secondary impacts to aquatic resources which can be a rich source of information on ways to analyze and address large projects with fragmented impacts. State natural resource inventories are often developed by the cooperative extension service and can provide detailed information on the natural resource base and conservation issues facing the region. Local governments may have developed watershed plans that could provide useful site specific data, many local watershed groups and monitoring efforts are registered through EPA's Adopt Your Watershed program and can be found by searching the website.¹⁸² Similarly, looking at the activities and experiences of neighboring state and tribal water quality certification programs, and their analysis could provide valuable information.

State Natural heritage programs are a good place to find detailed information on aquatic resources, plants, animals, communities, land cover and land ownership. The Natural Heritage Programs focus on providing information on the status and distribution of native animals and plants, emphasizing species of concern and high quality habitats such as wetlands. Heritage specialists collect, verify, and disseminate information to a broad community of users for many applications including the listing and delisting of threatened and endangered species and the development of environmental assessments. In addition, NatureServe works with the network of state (and international) natural heritage programs to provide information about rare and endangered species and threatened ecosystems.¹⁸³ NatureServe collects and manages detailed local information on plants, animals, and ecosystems, and develops information products, data management tools, and conservation services. NatureServe's publications include an analysis of the biodiversity value of geographically isolated wetlands in all 50 states which may be a useful starting point for assessing the habitat value of potentially impacted wetland resources.¹⁸⁴

3. Federal Information Tools

¹⁸² <http://cfpub.epa.gov/surf/locate/index.cfm>

¹⁸³ <http://www.natureserve.org/>.

¹⁸⁴ <http://www.natureserve.org/publications/isolatedwetlands.jsp>.

Many federal programs and agencies develop, collect, disseminate and produce informational tools that could provide valuable information to a certification decision. When using databases that may be more historical than current, it is always important to verify that the data remains valid. The United States Geological Survey (USGS) studies and provides information on a variety of topics including biology, geography, hydrology, geology, regional studies, natural hazards, the environment, and wildlife and human health.¹⁸⁵ The National Wetlands Inventory (NWI) produces and provides information on the characteristics, extent, and status of the nation's wetlands and deepwater habitats and other wildlife habitats.¹⁸⁶ The national wetland plant list, status and trends reports, and other reports focusing on national, geographic or resource specific areas are also available from the NWI.

EPA's Watershed Assessment, Tracking and Environmental Results (WATERS) tool unites water quality information from several independent and unconnected databases and displays the information in maps and reports.¹⁸⁷ The EPA programs covered in WATERS are: water quality standards, water quality inventory (§305(b) report), total maximum daily load (TMDL – §303(d) list), water quality monitoring, NPDES permits, safe drinking water, fish consumption advisories, nonpoint source pollution, nutrient criteria, beach program and vessel sewage discharge. One of the tools in WATERS is the EPA's EnviroMapper which provides access to environmental information in a geographic format.

EnviroMapper can display various types of environmental information, including air releases, drinking water, toxic releases, hazardous wastes, water discharge permits, and Superfund sites. EnviroMapper includes: federal, state, and local information about environmental conditions and features, facility and chemical-based information from the Envirofacts Warehouse, information about surface water features and their environmental condition, the Superfund program's National Priorities List sites, results from environmental sampling and monitoring in the New York City area in the aftermath of the events of September 11, 2001, information on demographic characteristics, and areas served by Brownfields Grantees and select brownfield's properties. It combines interactive maps and aerial photography to locate, display and query brownfield grant types and properties addressed by cities, counties, states, and tribes.

The Natural Resource Conservation Service (NRCS) provides technical expertise in such areas as animal husbandry and clean water, ecological sciences, engineering, resource economics, and social sciences. In particular, the NRCS' expertise focuses on soil science and natural resource conditions and trends in the United States, represented in soil surveys and the National Resources Inventory.¹⁸⁸ Technical guides are the primary scientific references for NRCS. They contain technical information about the conservation of soil, water, air, and related plant and animal resources. The technical guides used in each field office are localized so that they apply specifically to the geographic area for which they are prepared and are referred to as Field Office Technical Guides (FOTGs). The electronic FOTGs (eFOTGs) include automated data bases, computer programs, and other electronic-based materials and are broken into five sections of information: general information, soil and site information, conservation management

¹⁸⁵ <http://www.usgs.gov/science.html>.

¹⁸⁶ <http://www.nwi.fws.gov/>.

¹⁸⁷ <http://www.epa.gov/waters/about/index.html>.

¹⁸⁸ <http://www.nrcs.usda.gov/about/>.

systems, practice standards, and specifications and conservation effects.¹⁸⁹ The NRCS also provides soil survey information through their online mapping tool the Web Soil Survey.¹⁹⁰ Because 401 certification decisions may require consideration of soil characteristics which can affect the aquatic resource impacts of a proposed project, such as stormwater runoff.

Surf Your Watershed is an EPA web based service that helps to locate, use, and share environmental information about states and watersheds.¹⁹¹ Information is provided by 8 digit HUC (Hydrologic Unit Code) but can be accessed using stream name, state, city, zip code, tribe or county. Links to United States Census Bureau information and USGS data on stream flow, science, water use and selected abstracts are provided as well as information on the counties, American Heritage Rivers, National Estuary Programs, states, and watersheds upstream and downstream. Surf Your Watershed contains the following databases: Adopt Your Watershed, Wetlands Restoration Projects, American Heritage Rivers Service and SURF-Environmental Websites Database. Adopt Your Watershed is a database of watershed groups throughout the nation. You can search for a group in your area either by state, zip code, group name, keywords or even stream name. Wetlands Restoration Projects includes self reported information about ongoing wetlands projects organized by state and watershed. American Heritage Rivers Services is a multi-agency initiative to help communities find support for their rivers. The database offers a "yellow pages" directory of services to help communities revitalize their rivers environmentally, economically and culturally. SURF-Environmental Websites Database is a directory of websites dedicated to environmental issues and information. It is searchable by keywords, geography, organization, or even by the information medium.

The USGS' National Hydrography Dataset (NHD) is the underlying data maps for surf your watershed and many other geo-referenced programs however it can also be viewed independently of these other applications.¹⁹² The NHD is a comprehensive set of digital spatial data that contains information about surface water features such as lakes, ponds, streams, rivers, springs and wells. Within the NHD, surface water features are combined to form "reaches," which provide the framework for linking water-related data to the NHD surface water drainage network. These linkages enable the analysis and display of water-related data in upstream and downstream order. The NHD Viewer provides direct access to the NHD through an interactive web viewer.¹⁹³ In addition to the NHD, the USGS also collects surface water data nationally at thousands of sites. The information varies from historical only to daily values or even real time measurements. The USGS also houses a repository of water quality measurements and assessments taken at surface water monitoring stations and independent locations. Both the surface water and water quality information is available through the USGS's National Water Information System (NWIS) website.¹⁹⁴

EPA also hosts two data warehouses for water quality information, the Legacy Data Center (LDC), and STORET. The LDC is a static, archived database and STORET is an operational system actively being populated with water quality data. Both systems contain raw

¹⁸⁹ <http://www.nrcs.usda.gov/technical/efotg/>.

¹⁹⁰ <http://websoilsurvey.nrcs.usda.gov/app/>

¹⁹¹ <http://www.epa.gov/surf/>.

¹⁹² <http://nhd.usgs.gov/>.

¹⁹³ <http://nhd.usgs.gov/data.html>; or directly to the viewer at <http://nhdgeo.usgs.gov/viewer.htm>.

¹⁹⁴ Surface water monitoring: <http://waterdata.usgs.gov/nwis/sw>; Water quality monitoring: <http://waterdata.usgs.gov/nwis/qw>.

biological, chemical, and physical data on surface and ground water collected by federal, state and local agencies, Indian Tribes, volunteer groups, academics, and others. All 50 States, territories, and jurisdictions of the U.S. are represented in these systems. Both the LDC and STORET are web-enabled and available to the public.¹⁹⁵

The Federal Emergency Management Agency (FEMA) publishes flood hazard zone maps which may also be useful in 401 certification assessments. The FEMA Flood Insurance Rate Maps (FIRMs) available online are identified as FIRMette and are free on the Map Service Center website.¹⁹⁶

Note, the above geographic tools are not complete or definitive sources for location specific information. They have been developed using information reported by local, state and regional governments and non-governmental organizations. The presence or absence of information should be treated as informative but not a definitive indication of conditions on the ground.

4. Professional Societies and Private Sector Tools

In addition to state, tribal and federal programs and tools, private industry and professional organizations and their associated journals can provide very detailed information on individual aquatic resource types and impacts. The Society of Wetland Scientists (SWS)¹⁹⁷, American Water Resources Association (AWRA)¹⁹⁸, American Society of Limnology and Oceanography (ASLO)¹⁹⁹, American Fisheries Society (AFS)²⁰⁰, American Society of Ichthyologists and Herpetologists²⁰¹, North American Benthological Society²⁰², and the American Ornithologists' Union²⁰³ are a few such professional organizations that may provide access to valuable information for certification decisions and condition development. Non-profit organizations dedicated to watershed protection also produce many reports, technical guides, and often review and compare assessment methods focusing on everything from site design to watershed modeling and planning – one such organization is the Center for Watershed Protection²⁰⁴ and specifically its Stormwater Manager's Resource Center.²⁰⁵

The number of internet mapping tools available to the public has grown dramatically in recent years and offers users various types of information and levels of detail. Google Earth and Microsoft's Bing are the most popular examples of desktop mapping tools that are novice user friendly, allow for some integration of information from independent sources, and provide satellite imagery.²⁰⁶ For more advanced users Geographic Information System (GIS) platforms

¹⁹⁵ <http://www.epa.gov/storet/index.html>

¹⁹⁶ <http://msc.fema.gov/webapp/wcs/stores/servlet/FemaWelcomeView?storeId=10001&catalogId=10001&langId=-1>

¹⁹⁷ <http://www.sws.org/>

¹⁹⁸ <http://www.awra.org/index.html>

¹⁹⁹ <http://aslo.org/index.html>

²⁰⁰ <http://www.fisheries.org/html/index.shtml>

²⁰¹ <http://www.asih.org/>

²⁰² <http://www.benthos.org/index.cfm>

²⁰³ <http://www.aou.org/>

²⁰⁴ <http://www.cwp.org/index.html>

²⁰⁵ <http://www.stormwatercenter.net/>

²⁰⁶ Microsoft Bing Maps <http://www.microsoft.com/maps/>; Google Earth <http://earth.google.com/>.

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allow users to import existing geo-referenced maps and datasets and create new, or manipulate existing, data layers to produce customized maps and geographic analysis.

Note, the use of any private software for official government business may require licensing fees and agreements.

Appendix A: Clean Water Act Section 401

33 USC 1341; CWA §401

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any 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 in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302 of this title, and there is not an applicable standard under sections 306 and 307 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 511(c) of this title. Such State or interstate agency shall 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. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or

permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 301, 302, 303, 306, or 307 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 301, 302, 303, 306, or 307 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 301, 302, 303, 306, or 307 of this title.

(6) Except with respect to a permit issued under section 402 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

ATTACHMENT D



Wetlands And 401 Certification

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Opportunities And Guidelines For States And Eligible Indian Tribes



BEMIDJI AREA OFFICE



DEPARTMENT OF HEALTH & HUMAN SERVICES
PUBLIC HEALTH SERVICE
INDIAN HEALTH SERVICE

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I. INTRODUCTION

This handbook has been developed by EPA's Office of Wetlands Protection (OWP) to highlight the potential of the State water quality certification process for protecting wetlands, and to provide information and guidance to the States.¹ Throughout this document, the term "State" includes those Indian Tribes which qualify for treatment as States under the federal Clean Water Act (CWA) Section 518(e).² We encourage Tribes who are interested in expanding their protection of wetlands and other waters under this new provision of the CWA to examine water quality certification as a readily available tool to begin their programs.

One of OWP's key mandates is to broaden EPA's wetlands protection efforts in areas which complement our authority under the Clean Water Act Section 404 regulatory program. Thus, we are exploring and working with other laws, regulations, and nonregulatory approaches to enhance their implementation to protect wetlands. In addition, the National Wetlands Policy Forum has recommended in its report issued in November 1988, that States "make more aggressive use of their certification authorities under Section 401 of the CWA, to protect their wetlands from chemical and other types of alterations."³

In light of these directives, we have examined the role of the Section 401 State water quality certification process and are working with States to improve its application to wetlands. This process offers the opportunity to fulfill many goals for wetland protection because:

- * **It is a cooperative federal/State program and it increases the role of States in decisions regarding the protection of natural resources;**
- * **It gives States extremely broad authority to review proposed activities in and/or affecting State waters (including wetlands) and, in effect, to deny or place conditions on federal permits or licenses that authorize such activities;**
- * **It is an existing program which can be vastly improved to protect wetlands without major legislative initiatives;**
- * **Its proper implementation for wetlands should integrate many State programs related to wetlands, water quality, and aquatic resource preservation and enhancement, to ensure consistency of activities with these State requirements. Examples of such programs include coastal zone management, floodplain management, and nonpoint source programs.**

The issues discussed in this handbook were identified through discussions with State 401 certification program personnel and through a workshop held in December 1987 with many of the States who actively apply 401 certification to wetlands. The handbook includes examples of how some States have successfully approached the issues discussed. Because the water quality certification process is continually evolving, we do not attempt to address all the issues here. This handbook is a first step towards clarifying how 401 certification applies to wetlands, and helping States use this tool more effectively.

EPA would like to work with the States to ensure that their authority under Section 401 is exercised in a manner that achieves the goals of the Clean Water Act and reflects the State role at the forefront in administering water quality programs. Clearly, the integrity of waters of the U.S. cannot be protected by an exclusive focus on wastewater effluents in open waters. While the federal Section 404 program addresses many discharges into wetlands, and other federal agencies have environmental review programs which benefit wetlands, these do not substitute for a State's responsibilities under Section 401. A State's authority under Section 401 includes consideration of a broad range of chemical, physical, and biological impacts. The State's responsibility includes acting upon the recognition that wetlands are critical components of healthy, functioning aquatic systems.

To help States implement the guidance provided in this handbook and to foster communication on 401 issues, you will find a list of State 401 certification contacts and federal EPA contacts in Appendix A. In order to keep this and other wetland contact lists current, EPA has asked the Council of State Governments to establish a computerized database of State wetland programs and contacts (See Appendix A for details.) EPA is also refining a list of Tribal contacts to foster communication with interested Tribes.

SUMMARY OF ACTIONS NEEDED

The following is a summary of the activities needed to make 401 certification a more effective tool to protect wetlands. States can undertake many of these activities right away, while also taking other actions which lay the groundwork for improving future 401 certification decisions. Tribes, who primarily are just beginning to develop wetlands programs, should consider these actions (along with developing water quality standards) as first steps to becoming more involved in wetlands regulatory efforts. The actions below are discussed throughout the handbook.

- * All states should begin by including wetlands in their definitions of state waters.
- * States should develop or modify their existing 401 certification and water quality standard regulations and guidelines to accommodate special wetland considerations.
- * States should make more effective use of their existing narrative water quality standards (including the antidegradation policy) to protect the integrity of wetlands.
- * States should initiate or improve upon existing inventories of their wetland resources.
- * States should designate uses for these wetlands based on wetland functions associated with each wetland type. Such estimated uses could be verified when needed for individual applications with an assessment tool such as the Wetlands Evaluation Technique, or Habitat Evaluation Procedure, or region-specific evaluation methods.
- * States should tap into the potential of the outstanding resource waters designation of the antidegradation policy for their wetlands.
- * States should incorporate 401 certification for wetlands into their water quality management planning process. This process can integrate wetland resource information with different water management programs affecting wetlands (including coastal zone management, nonpoint source and wastewater programs).

II. WHAT IS WATER QUALITY CERTIFICATION AND HOW DOES IT WORK?

States may grant or deny "certification" for a federally permitted or licensed activity that may result in a discharge to the waters of the United States, if it is the State where the discharge will originate. The decision to grant or deny certification is based on a State's determination from data submitted by an applicant (and any other information available to the State) whether the proposed activity will comply with the requirements of certain sections of the Clean Water Act enumerated in Section 401(a)(1). These requirements address effluent limitations for conventional and nonconventional pollutants, water quality standards, new source performance standards, and toxic pollutants (Sections 301, 302, 303, 306 and 307). Also included are requirements of State law or regulation more stringent than those sections or their federal implementing regulations.

States adopt surface water quality standards pursuant to Section 303 of the Clean Water Act and have broad authority to base those standards on the waters' use and value for "public water supplies, propagation of fish and wildlife, recreational purposes, and . . . other purposes."⁴ All permits must include effluent limitations at least as stringent as needed to maintain established beneficial uses and to attain the quality of water designated by States for their waters.⁵ Thus, the States' water quality standards are a critical concern of the 401 certification process.

If a State grants water quality certification to an applicant for a federal license or permit, it is in effect saying that the proposed activity will comply with State water quality standards (and the other CWA and State law provisions enumerated above). The State may thus deny certification because the applicant has not demonstrated that the project will comply with those requirements. Or it may place whatever limitations or conditions on the certification it determines are necessary to assure compliance with those provisions, and with any other "appropriate" requirements of State law.

If a State denies certification, the federal permitting or licensing agency is prohibited from issuing a permit or license. While the procedure varies from State to State, a State's decision to grant or deny certification is ordinarily subject to an administrative appeal, with review in the State courts designated for appeals of agency decisions. Court review is typically limited to the question of whether the State agency's decision is supported by the record and is not arbitrary or capricious. The courts generally presume regularity in agency procedures and defer to agency expertise in their review.⁶

States may also waive water quality certification, either affirmatively or involuntarily. Under Section 401(a)(1), if the State fails to act on a certification request

"within a reasonable time (which shall not exceed one year)" after the receipt of an application, it forfeits its authority to grant conditionally or to deny certification.

The most important regulatory tools for the implementation of 401 certification are the States' water quality standards regulations and their 401 certification implementing regulations and guidelines. While all of the States have some form of water quality standards, not all States have standards which can be easily applied to wetlands. Most Tribes do not yet have water quality standards, and developing them would be a first step prior to having the authority to conduct water quality certification. Also, many States have not adopted regulations implementing their authority to grant, deny and condition water quality certification. The remainder of this handbook discusses specific approaches, and elements of water quality standards and 401 certification regulations that OWP views as effective to implement the States' water quality certification authority, both generally, and specifically with regard to wetlands.

III. 401 CERTIFICATION CAN BE A POWERFUL TOOL TO PROTECT WETLANDS

In States without a wetlands regulatory program, the water quality certification process may be the only way in which a State can exert any direct control over projects in or affecting wetlands. It is thus critical for these States to develop a program that fully includes wetlands in their water quality certification process.

But even in States which have their own wetlands regulatory programs, the water quality certification process can be an extremely valuable tool to protect wetlands. First, most State wetland regulatory laws are more limited in the wetlands that are subject to regulation than is the Clean Water Act. The Clean Water Act covers all interstate wetlands; wetlands adjacent to other regulated waters; and all other wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce.⁷ This definition is extremely broad and one would be hard pressed to find a wetland for which it could be shown that its use or destruction clearly would not affect interstate commerce. Federal jurisdiction extends beyond that of States which regulate only coastal and/or shoreline wetlands, for instance. And in States that regulate inland wetlands, often size limitations prevent States from regulating wetlands that are subject to federal jurisdiction.⁸

Even if State jurisdiction is as encompassing or more so than federal jurisdiction, however, water quality certification may still be a valuable and essential wetlands protection device. In the State of Massachusetts, for instance, a 401 certification is not simply "rubber stamped" on the permitting decisions made pursuant to the Massachusetts Wetlands Protection Act. The State has denied certification to proposed projects requiring a federal permit even though the State wetlands permitting authority

(in Massachusetts, permits are granted by local "conservation commissions") has granted authorization for a project.

There may be a number of reasons that a proposed activity may receive authorization under a State wetland regulatory program, but fail to pass muster under a 401 certification review. The most commonly cited reason, however, is that water quality personnel have a specialized understanding of the requirements and implementation of the State's water quality standards and the ways in which certain activities may interfere with their attainment.

It is important, however, to keep in mind the limitations of 401 certification when considering a comprehensive approach to protecting your wetland resources. The primary limitation is that if 401 certification is the only tool a State has to protect wetlands, it cannot place limits on activities which do not require a federal license or permit. Some activities such as drainage or groundwater pumping, can have severe impacts on the viability of wetlands, but may not require a permit or license. Ideally, 401 certification should be combined with other programs in the State offering wetlands protection opportunities (such as coastal management and floodplain management). For example, Alaska has integrated its 401 certification and coastal management consistency review processes so that the provisions of each program augment the other to provide more comprehensive protection. This approach not only strengthens protection, it reduces duplication of State efforts and coordinates permit review for applicants.⁹

IV. THE ROLE OF WATER QUALITY STANDARDS IN THE CERTIFICATION PROCESS

A. Wetlands Should be Specifically Designated as Surface Waters of the States

In order to bring wetlands fully into the State water quality certification process, a first step is to include the term "wetlands" in the State water quality standards' definition of surface waters. EPA will be working with all States through the triennial review process of State standards to ensure that their definitions are at least as comprehensive as the federal definitions for waters (see Appendix B for federal definitions of "Waters of the U.S." and the term "wetlands").

It may seem minor, but from every standpoint, it is important to have wetlands specifically designated as surface waters in State water quality standards. First, it precludes any arguments that somehow wetlands are not covered by water quality standards. Second, it predisposes decision makers (from 401 certification program managers, to the head of the agency or a water quality board, all the way to the judges

on the courts that may review these decisions) to consider the importance of wetlands as part of the aquatic ecosystem. Third, it makes it clear that wetlands are to be treated as waters in and of themselves for purposes of compliance with water quality standards and not just as they relate to other surface waters.

The third point is critical and bears further explanation. When States include wetlands in the definition of surface waters covered by their water quality standards, they clarify that activities in or affecting wetlands are subject to the same analysis in the certification decision as are projects affecting lakes, rivers, or streams. This is not to say that a wetland project's effects on adjacent or downstream waters are not also part of the water quality certification analysis. Rather, it is to say that wetlands, either adjacent to or isolated from other waters, are waterbodies in and of themselves and an applicant for water quality certification must show that a proposed project will not violate water quality standards in those wetlands, as well as in other waters.

The States currently have a variety of definitions of "waters of the State" in the legislation that enables water quality standards (e.g., multi-media environmental protection acts, water quality acts, and the like). Only three States currently have the term "wetlands" explicitly listed as one of the types of waters in this enabling legislation (Nebraska, Rhode Island, West Virginia). These States need only to repeat that definition in their water quality standards and their 401 certification implementing regulations.

While most States do not have the term "wetlands" in their enabling legislation, many use the term "marshes" in a list of different types of waters to illustrate "waters of the State" in their enabling legislation. Kentucky, for example, defines waters of the State as:

. . . any and all rivers, streams, creeks, lakes, ponds, impounding reservoirs, springs, wells, marshes, and all other bodies of surface or underground water, natural or artificial, situated wholly or partly within or bordering upon the Commonwealth or within its jurisdiction.¹⁰

When used in this way, the term "marshes" is typically understood to be generic in nature rather than being descriptive of a type of wetland, and can therefore be considered as the equivalent of the term "wetlands". In these States, however, in order to ensure that the term "marshes" is interpreted as the equivalent of wetlands, the best approach is to include the term "wetlands" in the definition of surface waters used in the State's water quality standards and in the 401 certification implementing regulations.

There is another group of States that has neither the term "wetlands" or "marshes" in the enabling legislation's definition of waters of the State. These definitions typically contain language that describes in some generic manner, however,

all waters that exist in the State. They may not specifically designate any particular type of water body, as, for instance, Tennessee's Water Quality Control Act:

*. . . any and all water, public or private, on or beneath the surface of the ground, which [is] contained within, flow[s] through, or border[s] upon Tennessee or any portion thereof*¹¹

Or they may specify some types of surface waters and then generically include all others with a clause such as "and all other water bodies" or "without limitation", as does Massachusetts:

*All waters within the jurisdiction of the Commonwealth, including, without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, and coastal waters and groundwaters.*¹²

In these States, as in the States with "marshes" in the enabling legislation's definition of waters, regulators should clarify that wetlands are part of the surface waters of the State subject to the States' water quality standards by including that term, and any others they deem appropriate, in a definition of surface waters in their water quality standards and in their 401 certification implementing regulations.

Both Kentucky and Ohio, for instance, which have the term "marshes," but not the term "wetlands" in their enabling legislation, have included the term "wetlands" in their surface water quality standards' definition of waters.¹³ Massachusetts, which does not have the term "wetlands" or "marshes" in its enabling legislation, has put the term "wetlands" into its water quality standards also.¹⁴ Additionally, Ohio's 401 certification implementing regulations include the term "wetlands" in the definition of waters covered by those regulations and specifically address activities affecting the integrity of wetlands.¹⁵

B. General Requirements of EPA's Water Quality Standards Regulations.¹⁶

When the States review their water quality standards for applicability to projects affecting wetlands, it is important to have in mind the basic concepts and requirements of water quality standards generally. Congress has given the States broad authority to adopt water quality standards, directing only that the States designate water uses that protect the public health and welfare and that take into account use of State waters for drinking water, the propagation of fish and wildlife, recreation, and agricultural, industrial and other purposes.

EPA's water quality standards regulations require States to adopt water quality standards which have three basic components: use designations, criteria to protect those uses, and an antidegradation policy.

EPA directs that, where attainable, designated uses must include, at a minimum, uses necessary to protect the goals of the CWA for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the waters. This baseline is commonly referred to as the "fishable/swimmable" designation. If the State does not designate these minimum uses, or wishes to remove such a designated use, it must justify it through a use attainability analysis based on at least one of six factors.¹⁷ In no event, however, may a beneficial existing use (any use which is actually attained in the water body on or after November 28, 1975) be removed from a water body or segment.

Criteria, either pollutant-specific numerical criteria or narrative criteria, must protect the designated and existing uses. Many of the existing numeric criteria are not specifically adapted to the characteristics of wetlands (see last section of handbook for steps in this direction). However, almost all States have some form of the narrative standards (commonly known as the "free froms") which say that all waters shall be free from substances that: settle to form objectionable deposits; float as debris, scum, oil or other matter to form nuisances; produce objectionable color, odor, taste, or turbidity; injure, or are toxic, or produce adverse physiological responses in humans, animals, or plants; or produce undesirable or nuisance aquatic life. States have also used other narrative criteria to protect wetland quality. The use of criteria to protect wetlands is discussed in the following section.

In addition, EPA also requires that all States adopt an antidegradation policy. Several States have used their antidegradation policy effectively to protect the quality of their wetland resources. At a minimum, a State's antidegradation policy must be consistent with the following provisions:

- (1) Existing uses and the level of water quality necessary to protect existing uses in all segments of a water body must be maintained;**
- (2) if the quality of the water is higher than that necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water, that quality shall be maintained and protected, unless the State finds that lowering the water quality is justified by overriding economic or social needs determined after full public involvement. In no event, however, may water quality fall below that necessary to protect the existing beneficial uses;**
- (3) if the waters have been designated as outstanding resource waters (ORWs) no degradation (except temporary) of water quality is allowed.**

In the case of wetland fills, however, EPA allows a slightly different interpretation of the antidegradation policy.¹⁸ Because on the federal level, the Congress has anticipated the issuance of at least some permits by virtue of Section 404, it is EPA's policy that, except in the case of ORWs, the "existing use" requirements of the antidegradation policy are met if the wetland fill does not cause or contribute to "significant degradation" of the aquatic environment as defined by Section 230.10(c) of the Section 404(b)(1) Guidelines.¹⁹

These Guidelines lay a substantial foundation for protecting wetlands and other special aquatic sites from degradation or destruction. The purpose section of the Guidelines states that:

". . . from a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principal should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources."²⁰

The Guidelines also state that the following effects contribute to significant degradation, either individually or collectively:

". . . significant adverse effects on (1) human health or welfare, including effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites (e.g., wetlands); (2) on the life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration or spread of pollutants or their byproducts beyond the site through biological, physical, or chemical process; (3) on ecosystem diversity, productivity and stability, including loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water or reduce wave energy; or (4) on recreational, aesthetic, and economic values."²¹

The Guidelines may be used by the States to determine "significant degradation" for wetland fills. Of course, the States are free to adopt stricter requirements for wetland fills in their own antidegradation policies, just as they may adopt more stringent requirements than federal law requires for their water quality standards in general.

C. Applying Water Quality Standards Regulations to Wetlands - What States are Doing Now

Some States have taken the lead in using 401 certification as a wetlands protection tool to protect them for their water quality and other irreplaceable functions, such as storage places for flood waters, erosion control, foodchain support and habitat

for a wide variety of plants and animals. These States have taken several different approaches to wetlands protection in their water quality certification process.

1. Using Narrative Criteria

States have applied a variety of narrative criteria to projects in or affecting wetlands in the 401 certification determination. For example, Maryland's water quality standards contain a narrative directive, which the agency relied upon to deny certification for a non-tidal wetland fill. The standard provides that "[a]ll waters of this State shall be protected for the basic uses of water contact recreation, fish, other aquatic life, wildlife, and water supply."²² In its denial, Maryland stated:

Storm waters are relieved of much of their sediment loads via overbanking into the adjacent wetland and a resultant decrease in nutrient and sediment loading to downstream receiving waters is occurring. To permit the fill of this area would eliminate these benefits and in the future, would leave the waterway susceptible to adverse increased volumes of storm waters and their associated pollutants. It is our determination that [a specified waterway] . . . requires protection of these wetland areas to assure that the waters of this State are protected for the basic uses of fish, other aquatic life, wildlife and water supply.

Because wetlands vary tremendously in background levels of certain parameters measured by the traditional numerical/chemical criteria applied to surface waters, some States have relied on "natural water quality" criteria to protect wetlands in the 401 certification process. Minnesota, for instance, has taken this approach in denying certification for a flood control project because of the State's "primary concern . . . that the project would likely change Little Diann Lake from an acid bog to a fresh-circumneutral water chemistry type of wetland." The agency was concerned that "introduction of lake water into the closed acid system of Little Diann Lake would completely destroy the character of this natural resource." It relied on a provision of its water quality standards allowing the State to limit the addition of pollutants according to background levels instead of to the levels specified by criteria for that class of waters generally. The denial letter pointed out that this rule "States that the natural background level may be used instead of the specified water quality standards, where reasonable justification exists for preserving the quality found in the State of nature." According to the denial letter, because of the clear potential for impacts to the bog, the State was invoking that particular provision.²³

Tennessee has relied on broad prohibitory language in its water quality standards to deny water quality certification for wetland fill projects and has been upheld in court. Hollis v. Tennessee Water Quality Control Board²⁴ was brought by a 401 certification

applicant who proposed to place fill along the southeastern shoreline of a natural swamp lake. The court upheld the denial of 401 certification, explaining:

Reelfoot Lake is classified for fish and aquatic life, recreation, and livestock watering and wildlife uses. The [Water Quality] Board has established various standards for the waters in each classification. Among other things, these standards pertain to dissolved oxygen, pH, temperature, toxic substances, and other pollutants. The Permit Hearing Panel found the petitioner's activity will violate the "other pollutants" standard in each classification. Collectively, these ["other pollutants"] standards provide that other pollutants shall not be added to the water that will be detrimental to fish or aquatic life, to recreation, and to livestock watering and wildlife.

The court found that while there was no evidence that the project in and of itself would "kill" Reelfoot Lake, there was evidence that the shoreline was important to recreation because tourists visit Reelfoot to view its natural beauty and the lacustrine wetlands function as a spawning ground for fish and produce food for both fish and wildlife. It found that although the evidence in the record did not quantify the damage to fish and aquatic life, recreation, and wildlife that would result from the proposed fill, the opinion of the State's expert that the activity would be detrimental to these uses was sufficient to uphold the denial of certification.

Kentucky has also relied on narrative criteria. It denied an application to place spoil from underground mine construction in a wetland area because wetlands are protected from pollution as "Waters of the Commonwealth" and because placing spoil or any fill material (pollutants under KRS 224.005(28)) in a wetland specifically violated at least two water quality criteria. One of Kentucky's criteria, applicable to all surface waters, provides that the waters "*shall not be aesthetically or otherwise degraded by substances that . . . [i]njure, [are] toxic to or produce adverse physiological or behavioral responses in humans, animals, fish and other aquatic life.*"

The other criterion, applicable to warm water aquatic habitat, provides that "*[f]low shall not be altered to a degree which will adversely affect the aquatic community.*"²⁵ This second criterion which addresses hydrological changes is a particularly important but often overlooked component to include in water quality standards to help maintain wetland quality. Changes in flow can severely alter the plant and animal species composition of a wetland, and destroy the entire wetland system if the change is great enough.

Ohio has adopted 401 certification regulations applicable to wetlands (and other waters) that, together with internal review guidelines, result in an approach to the 401 certification decision similar to that of the 404(b)(1) Guidelines. Its 401 certification regulations first direct that no certification may be issued unless the applicant has

demonstrated that activities permitted by Section 404 or by Section 10 of the Rivers and Harbors Act (RHA) will not:

(1) prevent or interfere with the attainment or maintenance of applicable water quality standards;

(2) result in a violation of Sections 301, 302, 303, 306 or 307 of the CWA; additionally, the agency may deny a request notwithstanding the applicant's demonstration of the above if it concludes that the activity "will result in adverse long or short term impacts on water quality."²⁶

Ohio has placed all of its wetlands as a class in the category of "State resource waters." For these waters, Ohio has proposed amendments to its standards to say that "[p]resent ambient water quality and uses shall be maintained and protected without exception."²⁷ The proposed standards also require that point source discharges to State resource waters be regulated according to Ohio's biological criteria for aquatic life.

However, Ohio has not yet developed biological indices specifically for wetlands. Thus, for projects affecting wetlands, it bases its certification decisions on internal review guidelines that are similar to the federal Section 404(b)(1) Guidelines. Ohio's guidelines are structured by type of activity. For instance, for fills, their requirements are as follows:

(a) if the project is not water dependent, certification is denied;

(b) if the project is water dependent, certification is denied if there is a viable alternative (e.g., available upland nearby is viable alternative);

(c) if no viable alternatives exist and impacts to wetland cannot be made acceptable through conditions on certification (e.g., fish movement criteria, creation of floodways to bypass oxbows, flow through criteria), certification is denied.

Ohio's internal review guidelines also call for (1) an historical overview and ecological evaluation of the site (including biota inventory and existing bioaccumulation studies); (2) a sediment physical characterization (to predict contaminant levels) and (3) a sediment analysis.²⁸

Using these guidelines, Ohio frequently conditions or denies certification for projects that eliminate wetland uses. For instance, Ohio has issued a proposed denial of an application to fill a three acre wetland area adjacent to Lake Erie for a

recreational and picnic area for a lakefront marina based on its classification of wetlands as "State resource waters:"

Wetlands serve a vital ecological function including food chain production, provision of spawning, nursery and resting habitats for various aquatic species, natural filtration of surface water runoff, ground water recharge, and erosion and flood abatement. The O.A.C. Section 3745-1-05(C) includes wetlands [in the] State Resource Waters category and allows no further water quality degradation which would interfere with or become injurious to the existing uses. The addition of fill material to the wetland would cause severe adverse effects to the wetland. This fill would eliminate valuable wetland habitat, thereby degrading the existing use.

The justification for this denial, according to Ohio program managers, was not only that the project would interfere with existing uses, but in addition, the project was not water dependent as called for in Ohio's internal guidelines. Ohio 401 certification program personnel note that these review guidelines present the general approach to certification, but with regard to projects that are determined to be of public necessity, this approach may give way to other public interest concerns. For example, a highway is not water dependent per se; if, however, safety and financial considerations point to a certain route that necessitates filling wetlands, the agency may allow it. In that event, however, mitigation by wetland creation and/or restoration would be sought by the agency as a condition of certification.

2. Highest Tier of Protection: Wetlands as Outstanding Resource Waters

One extremely promising approach taken by some of the States has been to designate wetlands as outstanding resource waters (ORW), in which water quality must be maintained and protected according to EPA's regulations on antidegradation (i.e., no degradation for any purposes is allowed, except for short term changes which have no long term consequences).²⁹ This approach provides wetlands with significant protection if the States' antidegradation policies are at least as protective as that of EPA. EPA designed this classification not only for the highest quality waters, but also for water bodies which are "important, unique, or sensitive ecologically, but whose water quality as measured by the traditional parameters (dissolved oxygen, pH, etc.) may not be particularly high or whose character cannot be adequately described by these parameters."³⁰ This description is particularly apt for many wetland systems.

The designation of wetlands as outstanding resource waters has occurred in different ways in different States. Minnesota, for instance, has designated some of its rare, calcareous fens as ORWs and intends to deny fills in these fens.

Ohio has issued for comment, proposed revised water quality standards that include a newly created "outstanding State resource waters" category. Ohio intends to prohibit all point source discharges to these waters. Of fourteen specific water bodies proposed to be included in this category by the Ohio EPA at this time, ten are wetlands: four fens; three bogs; and three marshes.

Because the designation of wetlands as ORWs is such an appropriate classification for many wetland systems, it would behoove the States to adopt regulations which maximize the ability of State agencies and citizens to have wetlands and other waters placed in this category. The State of Kentucky has set out procedures for the designation of these waters in its water quality standards. Certain categories of waters automatically included as ORWs are: waters designated under the Kentucky Wild Rivers Act or the Federal Wild and Scenic Rivers Act; waters within a formally dedicated nature preserve or published in the registry of natural areas and concurred upon by the cabinet; and waters that support federally recognized endangered or threatened species. In addition, Kentucky's water quality standards include a provision allowing anyone to propose waters for the ORW classification.³¹

Minnesota has a section in its water quality standards that could be called an "emergency" provision for the designation of outstanding resource waters. Normally it is necessary under Minnesota's water quality standards for the agency to provide an opportunity for a hearing before identifying and establishing outstanding resource waters and before prohibiting or restricting any discharges to those waters. The "emergency" provision allows the agency to prohibit new or expanded discharges for unlisted waters *"to the extent . . . necessary to preserve the existing high quality, or to preserve the wilderness, scientific, recreational, or other special characteristics that make the water an outstanding resource value water."*³² This provision allows the agency to protect the waterbody while completing the listing process which could take several years.

Moreover, some States have improved on the formulation of the ORW classification by spelling out the protection provided by that designation more specifically than do EPA's regulations. For instance, Massachusetts' water quality standards state that for "National Resource Waters:"

*Waters so designated may not be degraded and are not subject to a variance procedure. New discharges of pollutants to such waters are prohibited. Existing discharges shall be eliminated unless the discharger is able to demonstrate that: (a) Alternative means of disposal are not reasonably available or feasible; and (b) The discharge will not affect the quality of the water as a national resource.*³³

This provision explicitly outlines how the State intends to maintain and protect the water quality of ORWs. Another provision which Minnesota uses to control discharges to waters that flow into ORWs for their effect on ORWs is that:

The agency shall require new or expanded discharges that flow into outstanding resource value waters [to] be controlled so as to assure no deterioration in the quality of the downstream outstanding resource value water.³⁴

V. USING 401 CERTIFICATION

A. The Permits/Licenses Covered and the Scope of Review

The language of Section 401(a)(1) is written very broadly with respect to the activities it covers. "[A]ny activity, including, but not limited to, the construction or operation of facilities, which may result in any discharge" requires water quality certification.

When the Congress first enacted the water quality certification provision in 1970, it spoke of the "wide variety of licenses and permits . . . issued by various Federal agencies," which "involve activities or operations potentially affecting water quality."³⁵ The purpose of the water quality certification requirement, the Congress said, was to ensure that no license or permit would be issued "for an activity that through inadequate planning or otherwise could in fact become a source of pollution."³⁶

1. Federal Permits/Licenses Subject to Certification

The first consideration is which federal permits or licenses are subject to 401 certification. OWP has identified five federal permits and/or licenses which authorize activities which may result in a discharge to the waters. **These are: permits for point source discharges under Section 402 and discharges of dredged and fill material under Section 404 of the Clean Water Act; permits for activities in navigable waters which may affect navigation under Sections 9 and 10 of the Rivers and Harbors Act (RHA); and licenses required for hydroelectric projects issued under the Federal Power Act.**

There are likely other federal permits and licenses, such as permits for activities on public lands, and Nuclear Regulatory Commission licenses, which may result in a discharge and thus require 401 certification. Each State should work with EPA and the federal agencies active in its State to determine whether 401 certification is in fact applicable.

Indeed, it is not always clear when 401 certification should apply. For instance, there remains some confusion under Sections 9 and 10 of RHA concerning which projects may involve or result in a discharge, and thus require State certification. In many cases there is an overlap between Section 404 CWA and Sections 9 and 10 RHA. Where these permits overlap, 401 certification always applies. Under the Section 404 regulations, the question of whether dredging involves a discharge and is therefore subject to Section 404, depends on whether there is more than "de minimis, incidental soil movement occurring during normal dredging operations".³⁷

Where only a Section 9 or 10 permit is required, 401 certification would apply if the activity may lead to a discharge. For example, in the case of pilings, which the Corps sometimes considers subject to Section 10 only, a 401 certification would be required for the Section 10 permit if structures on top of the pilings may result in a discharge.

States should notify the regional office of federal permitting or licensing agencies of their authority to review these permits and licenses (e.g., the Corps of Engineers for Section 404 in nonauthorized States, and Sections 9 and 10 of the RHA; EPA for Section 402 permits in nonauthorized States; and the Federal Energy Regulatory Commission (FERC) for hydropower licenses). In their 401 certification implementing regulations, States should also give notice to applicants for these particular federal permits and licenses, and for all other permits and licenses that may result in a discharge to waters of the State, of their obligation to obtain 401 certification from the State.

West Virginia's 401 certification implementing regulations, for instance, state that:

*1.1. Scope. . . . Section 401 of the Clean Water Act requires that any applicant for a federal license or permit to conduct an activity which will or may discharge into waters of the United States (as defined in the Clean Water Act) must present the federal authority with a certification from the appropriate State agency. Federal permits and licenses issued by the federal government requiring certification include permits issued by the United States Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. 1344 and licenses issued by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C. 1791 et seq.*³⁸

Because West Virginia has been authorized to administer the NPDES permitting program under Section 402 of the Clean Water Act, applicants for NPDES permits do not have to apply for water quality certification separately. In addition, West Virginia has not specifically designated Rivers and Harbors Act permits in the above regulation. However, because the regulation States that such permits or licenses include Section

404 and FERC licenses, those and all other permits not specifically designated but which may result in a discharge to the waters would be covered by the regulation's language. The better approach would be to enumerate all such licenses and permits that are known to the State and include a phrase for all others generically.

2. Scope of Review Under Section 401

An additional issue is the scope of the States' review under Section 401. Congress intended for the States to use the water quality certification process to ensure that no federal license or permits would be issued that would violate State standards or become a source of pollution in the future. Also, because the States' certification of a construction permit or license also operates as certification for an operating permit (except for in certain instances specified in Section 401(a)(3)), it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.

A second component of the scope of the review is when an activity requiring 401 certification in one State (i.e. the State in which the discharge originates) will have an impact on the water quality of another State.³⁹ The statute provides that after receiving notice of application from a federal permitting or licensing agency, EPA will notify any States whose water quality may be affected. Such States have the right to submit their objections and request a hearing. EPA may also submit its evaluation and recommendations. If the use of conditions cannot insure compliance with the affected State's water quality requirements, the federal permitting or licensing agency shall not issue such permit or license.

The following example of 401 certification denial by the Pennsylvania Department of Environmental Resources (DER) for a proposed FERC hydroelectric project illustrates the breadth of the scope of review under Section 401 (see Appendix C for full description of project and impacts addressed). The City of Harrisburg, Pennsylvania proposed to construct a hydroelectric power project on the Susquehanna River. The Pennsylvania DER considered a full range of potential impacts on the aquatic system in its review. The impacts included those on State waters located at the dam site, as well as those downstream and upstream from the site. The impacts considered were not just from the discharge initiating the certification review, but water quality impacts from the entire project. Thus, potential impacts such as flooding, changes in dissolved oxygen, loss of wetlands, and changes in groundwater, both from construction and future operation of the project, were all considered in the State's decision.

The concerns expressed by the Pennsylvania Department of Environmental Resources are not necessarily all those that a State should consider in a dam

certification review; each project will have its own specific impacts and potential water quality problems. The point of the illustration is to show that **all of the potential effects of a proposed activity on water quality -- direct and indirect, short and long term, upstream and downstream, construction and operation -- should be part of a State's certification review.**

B. Conditioning 401 Certifications for Wetland Protection

In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, standards of performance or pretreatment standards; with any State law provisions or regulations more stringent than those sections; and with "any other appropriate requirement of State law."

The legislative history of the subsection indicates that the Congress meant for the States to impose whatever conditions on the certification are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns.

1. What are Appropriate Conditions?

There are any number of possible conditions that could be placed on a certification that have as their purpose preventing water quality deterioration.

By way of example, the State of Maryland issued a certification with conditions for placement of fill to construct a 35-foot earthen dam located 200 feet downstream of an existing dam. Maryland used some general conditions applicable to many of the proposed projects it considers, along with specific conditions tailored to the proposed project. Examples of the conditions placed on this particular certification include:

The applicant shall obtain and certify compliance with a grading and sediment control plan which has been approved by the [county] Soil Conservation District. The approved plan shall be available at the project site during all phases of construction.

Stormwater runoff from impervious surfaces shall be controlled to prevent the washing of debris into the waterway. The natural vegetation shall be maintained and restored when disturbed or eroded. Stormwater drainage facilities shall be designed, implemented, operated, and maintained in accordance with the requirements of the applicable approving authority.

The applicant is required to provide a mixing tower release structure to achieve in-stream compliance with Class III trout temperature (20[degrees] C) and dissolved oxygen (5.0 mg/liter) standards prior to the Piney Run/Church Creek confluence. The design of this structure shall be approved by the Maryland Department of the Environment (MDE).

The applicant is required to provide a watershed management plan to minimize pollutant loadings into the reservoir. This plan shall be reviewed and approved by MDE prior to operation of the new dam facility. In conjunction with this plan's development any sources of pollutant loading identified during field surveys shall be eliminated or minimized to the extent possible given available technology.

The applicant is required to provide to MDE an operating and maintenance plan for the dam assuring minimum downstream flows in accordance with the requirements of the DNR and assuring removal of accumulated sediments with subsequent approved disposal of the materials removed.

The applicant is to provide mitigation for the wetlands lost as a result of the construction of this project and its subsequent operation. Wetland recreation should be located in the newly created headwaters areas to: a) assure adequate filtration of runoff prior to its entry into the reservoir and b) replace the aquatic resource being lost on an acre for acre basis.

See Appendix D for the full list of conditions placed on this certification. While few of these conditions are based directly on traditional water quality standards, all are valid and relate to the maintenance of water quality or the designated use of the waters in some way. Some of the conditions are clearly requirements of State or local law related to water quality other than those promulgated pursuant to the CWA sections enumerated in Section 401(a)(1). Other conditions were designed to minimize the project's adverse effects on water quality over the life of the project.

In addition, Appendix D contains a list of conditions which West Virginia and Alaska placed on the certification of some Section 404 nationwide permits. Many of the West Virginia conditions are typical of ones it uses on individual proposals as well. For any particular project, West Virginia will include more specific conditions designed to address the potential adverse effects of the project in addition to those enumerated in Appendix D. The conditions from Alaska are used on a nationwide permit (#26) regarding isolated waters and waters above headwaters. These conditions are discussed in Section V. C(1).

2. The Role of Mitigation in Conditioning Certification

Many States are trying to determine the role that mitigation should play in 401 certification decisions. We cannot answer this question definitively for each State, but offer as a guide EPA's general framework for mitigation under the Section 404(b)(1) Guidelines used to evaluate applications for Section 404 permits. In assuring compliance of a project with the Guidelines, **EPA's approach is to first, consider avoidance of adverse impacts, next, determine ways to minimize the impacts, and finally, require appropriate and practicable compensation for unavoidable impacts.**

The Guidelines provide for avoiding adverse impacts by selecting the least environmentally damaging practicable alternative. In addition, wetlands are "special aquatic sites." For such sites, if the proposed activity is not "water dependent," practicable alternatives with less adverse environmental impacts are presumed to be available unless the applicant clearly demonstrates otherwise.⁴⁰

The Guidelines also require an applicant to take "appropriate and practicable" steps to minimize the impacts of the least environmentally damaging alternative selected.⁴¹ Examples in the Guidelines for minimizing impacts through project modifications and best management practices are provided in Appendix E.

After these two steps are complete, appropriate compensation is required for the remaining unavoidable adverse impacts. Compensation would consist of restoration of previously altered wetlands or creation of wetlands from upland sites. In most cases, compensation on or adjacent to the project site is preferred over off-site locations. The restoration or creation should be functionally equivalent to the values which are lost. Finally, compensating with the same type of wetland lost is preferred to using another wetland type.

The States may choose to adopt mitigation policies which require additional replacement to help account for the uncertainty in the science of wetland creation and restoration. What is important from EPA's perspective is that mitigation not be used as a trade-off for avoidable losses of wetlands, and that mitigation compensate, to the fullest extent possible, for the functional values provided to the local ecosystem by the wetlands unavoidably lost by the project.

3. The Role of Other State Laws

Another question that has been asked is what State law or other requirements are appropriately used to condition a 401 certification. The legislative history of Section 401(d) indicates that Congress meant for the States to condition certifications on compliance with any State and local law requirements related to water quality

preservation. The courts that have touched on the issue have also indicated that conditions that relate in any way to water quality maintenance are appropriate. Each State will have to make these determinations for itself, of course; there are any number of State and local programs that have components related to water quality preservation and enhancement.

One issue that has arisen in two court cases is whether a State may use State law requirements, other than those that are more stringent than the provisions of Sections 301, 302, 303, 306 and 307 of the CWA(401(a)(1)), to deny water quality certification. An Oregon State court has ruled that a State may, and indeed must, include conditions on certifications reflecting State law requirements "to the extent that they have any relationship to water quality." "Only to the extent that [a State law requirement] has absolutely no relationship to water quality," the court said, "would it not be an 'other appropriate requirement of State law.'"⁴² State agencies must act in accord with State law, of course, and thus the decision to grant certification carries with it the obligation to condition certification to ensure compliance with such State requirements.

This State court decision struck down a State agency's denial of certification because it was based on the applicant's failure to certify compliance with a county's comprehensive plan and land use ordinances. The court held that such "other appropriate requirement[s] of State law" could not be the basis for denying certification. However, the court held that the agency should determine which of the provisions of the land use ordinances had any relation to the maintenance and preservation of water quality. Any such provisions, the court said, could and should be the basis for conditions placed on a certification.

Another State court, however, this one in West Virginia, has upheld the State's denial of certification on the basis of State law requirements unrelated to the implementation of the CWA provisions enumerated in Section 401(a)(1).⁴³ The court simply issued an order upholding the State's denial, however, and did not write an opinion on the subject. The questions raised by these two opinions are thorny. If States may not deny certification based on State law requirements other than those implementing the CWA, yet want to address related requirements of State law, they must walk a thin line between their State requirements and the limitations of their certification authority under federal law.

One way to avoid these difficulties and to ensure that 401 certification may properly be used to deny certification where the State has determined that the activity cannot be conditioned in such a way as to ensure compliance with State water quality related requirements, is to adopt water quality standards that include all State provisions related to water quality preservation. Congress has given the States great latitude to adopt water quality standards that take into consideration the waters' use for

such things as "the propagation of fish and wildlife, recreational purposes, and . . . other purposes."⁴⁴ Because of the broad authority granted by the Congress to the States to adopt water quality standards pursuant to Section 303 of the CWA, and because compliance with Section 303 is clearly one of the bases on which a State can deny certification, the States can avoid the difficulty of the deny/condition dilemma by adopting water standards that include all the water quality related considerations it wishes to include in the 401 certification review.

For example, the State of Washington has included State water right permit flow requirements in its conditions for certification of a dam project. This is one means of helping to ensure that hydrological changes do not adversely affect the quality of a waterbody. However, a more direct approach is to include a narrative criterion in the State's water quality standards that requires maintenance of base flow necessary to protect the wetland's (or other waterbody's) living resources. The State of Kentucky has such a criterion in its water quality standards (see previous section IV. D(1) on "Using Narrative Criteria"). Placing the provision directly in the State standards might better serve the State if a certification is challenged because the requirement would be an explicit consideration of 401 certification.

C. Special Considerations for Review of Section 404 Permits: Nationwide and After-the-Fact Permits

1. Nationwide Permits.

Pursuant to Section 404(e) of the CWA, the Corps may issue general permits, after providing notice and an opportunity for a hearing, on a State, regional or nationwide basis for any category of activities involving discharges of dredged or fill material, where such activities are similar in nature and will cause only minimal adverse environmental effects both individually and cumulatively. These permits may remain in effect for 5 years, after which they must be reissued with notice and an opportunity for a hearing. If the activities authorized by general permits may result in a discharge, the permits are subject to the State water quality certification requirement when they are first proposed and when proposed for reissuance. States may either grant certification with appropriate conditions or deny certification of these permits.

Under the Corps' regulations, if a State has denied certification of any particular general permit, any person proposing to do work pursuant to such a permit must first obtain State water quality certification. If a State has conditioned the grant of certification upon some requirement of State review prior to the activity's commencing, such condition[s] must be satisfied before work can begin.

Some States have reported that for general permits for which they have denied water quality certification or on which they have imposed some condition of review, they are having difficulties ensuring that parties performing activities pursuant to these permits are applying to the State for water quality certification or otherwise fulfilling the conditions placed on the certification prior to the commencement of work under these permits.

At least one State is grappling with the problem through its 401 certification implementing regulations. The State of West Virginia denied certification for some nationwide permits issued by the Corps and conditioned the granting of certification for others. One of the conditions that West Virginia has imposed on those certifications that it granted (which thus apply to all nationwide permits in the State) is compliance with its 401 certification implementing regulations. The regulations in turn require that any person authorized to conduct an activity under a nationwide permit must, prior to conducting any activity authorized by a Corps general permit, publish a Class I legal advertisement in a qualified newspaper in the county where the activity is proposed to take place. The notice must describe the activity, advise the public of the scope of the conditionally granted certification, the public's right to comment on the proposed activity and its right to request a hearing. The applicant must forward a certificate of publication of this notice to the State agency prior to conducting any such activity.⁴⁵

The regulation further provides that any person whose property, interest in property or "other constitutionally protected interest under [the West Virginia Constitution] [is] directly affected by the Department's certification" may request a hearing within 15 days of the publication of the notice given by the applicant. The agency will then decide whether to "uphold, modify or withdraw certification for the individual activity."

West Virginia program officers have described the reasons for this procedure:

Because of a long-standing concern . . . that untracked dredge and fill activities could prove disastrous on both individual and cumulative bases, the regulations require an authorized permittee [under federal law] to forward proof of publication and a copy of the newspaper advertisement. The information on the notice is logged into a computer system and a site specific inspection sheet is generated. Inspectors then may visit the site to determine compliance with permit conditions and to evaluate cumulative impacts.⁴⁶

Without such notice and a tracking system of activities performed under these permits, such as that adopted by West Virginia, it will be difficult for a State to evaluate whether or not to grant or deny water quality certification for these permits when they come up for reissuance by the Corps or to condition them in such a way as to avoid adverse impacts peculiar to each of these general permits. It is advisable for

the States, regardless of whether they have granted or denied certification, to adopt as part of their 401 certification implementing regulations, provisions addressing these concerns for general permits.

Another way in which some States are attempting to minimize the potential environmental impact of nationwide permits is by stringently conditioning their certification. Alaska, for instance, placed conditions on nationwide permit 26 regarding isolated waters and waters above the headwaters. One of the conditions Alaska used excludes isolated or headwater wetlands of known or suspected high value. When there is uncertainty about a particular wetland, the Corps is required to send pre-discharge notification to designated State officials for a determination. (See Appendix D for a full description of conditions on nationwide permit 26).

2. Section 404 After-the-Fact Permits

The Corps of Engineers' regulations implementing Section 404 provide for the acceptance of after-the-fact permit applications for unauthorized discharges except under certain circumstances. Several States have expressed concern with after-the-fact permits, including the belief that once the discharges have taken place, the water quality certification process is moot. Because of that belief, many States report that they waive certification for after-the-fact permits. Such an approach frustrates law enforcement efforts generally and the water quality certification process in particular because it encourages illegal activity.

The evaluation of after-the-fact permit applications should be no different than for normal applications. Because the burden should be on the applicant to show compliance with water quality standards and other CWA requirements, rather than waiving certification, States could deny certification if the applicant cannot show from baseline data prior to its activity that the activity did not violate water quality standards. If data exist to determine compliance with water quality standards, the States' analysis should be no different merely because the work has already been partially performed or completed. Arkansas denied after-the-fact water quality certification of a wetland fill as follows:

[a certain slough] is currently classified as a warmwater fishery Draining and clearing of [its associated] wetlands will significantly alter the existing use by drastically reducing or eliminating the fishery habitat and spawning areas. This physical alteration of the lake will prevent it from being "water which is suitable for the propagation of indigenous warmwater species of fish" which is the definition of a warmwater fishery. Thus, the . . . project [violates] Section 3 (A) of the Arkansas Water Quality Standards, "Existing instream water uses and the level of water quality necessary to protect the

existing uses shall be maintained and protected." The Department recommends the area be restored to as near original contours as possible.

With after-the-fact permits, just as with any other permit application, if the State denies certification, the Corps is prohibited from granting a permit. If the applicant refuses to restore the area and does not have a permit, the applicant is subject to a potential enforcement action for restoration and substantial penalties for the unpermitted discharge of pollutants by the EPA, the Corps, a citizen under the citizen suit provision of the CWA, or by the State, if the activity violates a prohibition of State law.

If the State determines that it will get a better environmental result by conditioning certification, it may choose to take that approach. The condition might require mitigation for the filled area (where restoration may cause more environmental harm than benefit, for instance) with restoration or creation of a potentially more valuable wetland area.

In any event, a State should not waive certification of an after-the-fact permit application simply because it is after-the-fact.

VI. DEVELOPING 401 CERTIFICATION IMPLEMENTING REGULATIONS: ADDITIONAL CONSIDERATIONS

A comprehensive set of 401 certification implementing regulations would have both procedural and substantive provisions which maximize the State agency's control over the process and which make its decisions defensible in court. The very fact of having 401 certification regulations goes a long way in providing the State agency that implements 401 certification with credibility in the courts. Currently, no State has "ideal" 401 certification implementing regulations, and many do not have them at all. When 401 certification regulations are carefully considered, they can be very effective not only in conserving the quality of the State's waters, but in providing the regulated sectors with some predictability of State actions, and in minimizing the State's financial and human resource requirements as well.

Everything in this handbook relates in some way to the development of sound water quality standards and 401 certification implementing regulations that will enhance wetland protection. This section addresses some very basic procedural considerations of 401 certification implementing regulations which have not been treated elsewhere. These include provisions concerning the contents of an application for certification; the agency's timeframe for review; and the requirements placed on the applicant in the certification process.

A. Review Timeframe and "Complete" Applications

Under Section 401(a)(1) a State will be deemed to have waived certification if it fails to act within "a reasonable period of time (which shall not exceed one year) after receipt of such request." Program managers should keep in mind that the federal permitting or license agency may have regulations of its own which provide a time limit for the State's certification decision. For instance, Corps regulations say that a waiver "will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt . . . unless the district engineer determines a shorter or longer period is reasonable . . ."⁴⁷ FERC rules state that a certifying agency "is deemed to have waived the certification requirements if . . . [it] has not denied or granted certification by one year after the date the certifying agency received the request".⁴⁸ EPA regulations for Section 402 in non-authorized States set a limit of 60 days unless the Regional Administrator finds that unusual circumstances require a longer time.⁴⁹

States should coordinate closely with the appropriate federal agency on timing issues. For example, Alaska negotiated joint EPA/State procedures for coastal NPDES permit review. The agreement takes into account and coordinates EPA, Coastal Zone Management, and 401 certification time frames.

It is also advisable for the States to adopt rules which reasonably protect against an unintended waiver due, for example, to insufficient information to make a certification decision or because project plans have changed enough to warrant a reevaluation of the impacts on water quality. Thus, after taking the federal agencies' regulations into account, the State's 401 certification regulations should link the timing for review to what is considered receipt of a complete application.

Wisconsin, for instance, requires the applicant to submit a complete application for certification before the official agency review time begins. The State's regulations define the major components of a complete application, including the existing physical environment at the site, the size of the area affected, all environmental impact assessment information provided to the licensing or permitting agency, and the like. The rules State that the agency will review the application for completeness within 30 days of its receipt and notify the applicant of any additional materials reasonably necessary for review. Although the application will be deemed "complete" for purposes of review time if the agency does not request additional materials within 40 days of receipt of the application, the agency reserves the right to request additional information during the review process.⁵⁰

In the case of FERC projects, West Virginia has taken additional precautions with regard to time for review:

If the project application is altered or modified during the FERC licensing process prior to FERC's final decision, the applicant shall inform the Department of such changes. The Department may review such alterations or modifications and, if the changes are deemed significant by the Director, the Department may require a new application for certification. The Department will have ninety (90) days to review such changes or until the end of the year review period . . . , whichever is longer, to determine whether to require a new application or to alter its original certification decision. If the department requires a new application because of a significant application modification, then the Department will have six (6) months to issue its certification decision from the date of submission of the application.⁵¹

B. Requirements for the Applicant

It is very important, in particular for conserving the agency's resources and ensuring that there is sufficient information to determine that water quality standards and other provisions of the CWA will not be violated by the activity, to clarify that it is the applicant who is responsible for providing or proving particular facts or requirements.

For instance, Section 401(a)(1) requires that a State "establish procedures for public notice in the case of all applications for certification." West Virginia requires applicants for FERC licenses to be responsible for this notice. In the case of Section 404 permits, West Virginia has a joint notice process with the Corps to issue public notices for 404 applications which also notify the public of the State certification process. Thus, there is no need for West Virginia to require the applicant to do so for these permits.⁵²

A second consideration is that States should require the applicant to demonstrate the project's compliance with applicable federal and State law and regulation. EPA's 401 certification regulations name the sources of information a State should use as that contained in the application and other information "furnished by the applicant" sufficient to allow the agency to make a statement that water quality standards will not be violated.⁵³ Of course in addition, the regulations also refer to other information the agency may choose to examine which is not furnished by the applicant.

Ohio, for instance, has written a requirement for the applicant to demonstrate compliance into its 401 certification implementing regulations:

(A) The director shall not issue a Section 401 water quality certification unless he determines that the applicant has demonstrated that the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the state will:⁵⁴ (1) Not prevent or interfere with the attainment or maintenance of applicable water quality standards; (2) Not result in a violation of any applicable provision of the following sections of the Federal Water Pollution Control Act [301, 302, 303, 306 and 307].

(B) Notwithstanding an applicant's demonstration of the criteria in paragraph (A) . . . the director may deny an application for a Section 401 water quality certification if the director concludes that the discharge of dredged or fill material or obstructions or alterations in waters of the state will result in adverse long or short term impact on water quality.⁵⁵

C. Permit Fees

A very significant concern for all States who plan to initiate or expand their 401 certification program is the availability of funding. Application fee requirements are a potential funding source to supplement State program budgets. The State of California's Regional Water Quality Control Boards require filing fees for 401 certification applications unless a Board determines that certification is not required. The fee structure is spelled out in the California Water Code. The money collected from the fees goes into the State agency's general fund. The Regional Boards may recover some portion of the fees through the budget request process. The State of Ohio also has a fee structure for 401 certification applicants. In Ohio, however, fees go into the State's general fund, rather than back into the State agency. Neither State collects fees sufficient to support the 401 certification program fully. Despite these potential barriers, application fees could provide a much needed funding source which States should explore.

D. Basis for Certification Decisions

The regulations should also set out the grounds on which the decision to grant or deny certification will be based, the scope of the State's review, and the bases for conditioning a certification. If a State has denied water quality certification for a general permit or has conditioned such a permit on some requirement of State review, the State's 401 certification implementing regulations might also outline the obligations

of a person proposing to accomplish work under such a permit. The following is a hypothetical example of regulatory language a State might use to define the grounds for the State's decision to grant, condition, or deny certification:

In order to obtain certification of any proposed activity that may result in a discharge to waters of the United States, an applicant must demonstrate that the entire activity over its lifetime will not violate or interfere with the attainment of any limitations or standards contained in Section 301, 302, 303, 306, and 307, the federal regulations promulgated pursuant thereto, and any provisions of state law or regulation adopted pursuant to, or which are more stringent than, those provisions of the Clean Water Act.

The agency may condition certification on any requirements consistent with ensuring the applicant's compliance with the provisions listed above, or with any other requirements of state law related to the maintenance, preservation, or enhancement of water quality.

This sample regulatory language provides the grounds for the certification decision, sets the scope of review (lifetime effects of the entire activity) and clearly States that the applicant must demonstrate compliance. For purposes of conditioning the certification in the event it is granted, the same standards can be applied, with the addition of any other requirements of State law that are related to water quality.

Regulations are not project specific. They must be generally applicable to all projects subject to 401 certification review, while at the same time providing reasonable notice to an applicant regarding the general standards employed by the agency in the certification process. (A State may choose to adopt license/permit-specific regulations for 401 certification, but such regulations will still have to be applicable to all activities that may occur pursuant to that license or permit).

There are other considerations that should be addressed in 401 certification implementing regulations, some of which have been mentioned in other parts of this handbook. These include provisions which require applicants for federal licenses and permits which may result in a discharge to apply for water quality certification; provisions which define waters of the State to include wetlands and which define other pertinent terms; and provisions addressing general permits.

VII. EXISTING AND EMERGING SOURCES OF DATA TO AID 401 CERTIFICATION AND STANDARDS DECISION MAKERS

According to a number of State program managers, more data on wetland functions, or "uses," would greatly assist the certification process. Wetland ecosystems not only perform a wide variety of functions but do so in varying degrees. Public agencies and private applicants currently employ a number of assessment methods such as the Wetlands Evaluation Technique and the Habitat Evaluation Procedure to determine what functions or uses exist in a particular wetland system.⁵⁶ In many States, however, water quality certification reviewers lack the resources to perform even a simple assessment of a wetland's boundaries, values and functions. Information about the location and types of wetland systems, and of the functions they may perform (such as flood storage, habitat, pollution attenuation, nutrient uptake, and sediment fixing) would aid standard writers in developing appropriate uses and criteria for wetlands, and allow 401 certification officials to conduct a more thorough review.

Several States already have extensive knowledge of their wetland resources, and data gathering efforts are also being undertaken by EPA, the U.S. Fish and Wildlife Service and other agencies.⁵⁷ Although these efforts to inventory and classify wetlands have not been closely tied to the 401 certification process in the past, these existing data can be valuable sources of information for 401 certification reviewers. It is important to remember, however, that wetland boundaries for regulatory purposes may differ from those identified by National Wetland Inventory maps for general inventory purposes. The EPA, Corps of Engineers, Fish and Wildlife Service, and Soil Conservation Service have adopted a joint manual for identifying and delineating wetlands in the United States. The manual will be available in June, 1989.⁵⁸

There are several programs that offer technical support for 401 certification decisions. For example, approximately forty States have worked with the Nature Conservancy to establish "natural heritage programs," which identify the most critical species, habitats, plant communities, and other natural features within a State's territorial boundaries. Most States now have a State natural heritage office to coordinate this identification program. Inventory efforts such as the natural heritage program could give 401 certification managers some of the information they need to limit or prohibit adverse water quality impacts in important wetland areas. Specifically, the inventory process can identify existing wetland uses in order to maintain them. The information may also be used in identifying wetlands for Outstanding Resource Waters designation.⁵⁹

The Fish and Wildlife Service maintains a Wetlands Values Data Base which may be very useful in identifying wetland functions and in designating wetland uses for water quality standards. The data base is on computer and contains an annotated bibliography of scientific literature on wetland functions and values.⁶⁰ Several States

have established critical area programs to identify and protect unique and highly sensitive land and water resources. These programs can provide data to the State water quality certification office and thereby strengthen the scientific basis for 401 certification decision making.⁶¹

Another potential source of information which might identify wetlands appropriate for designation as Outstanding Resource Waters are the wetland plans which each State is required to develop to comply with the 1986 Emergency Wetlands Resources Act. Beginning in fiscal year 1988, Statewide Comprehensive Outdoor Recreation Plans (SCORP) must now contain a Wetlands Priority Conservation Plan approved by the Department of Interior. Although these plans are primarily focused on wetlands for acquisition, they are a potential source of data on wetland locations and functions. The wetlands identified may also be suitable for special protection under the Outstanding Resource Waters provisions of the antidegradation policy.

The Advance Identification program (ADID), conducted by EPA and the permitting authority, may also furnish a considerable amount of useful information. EPA's 404(b)(1) Guidelines contain a procedure for identifying in advance areas that are generally suitable or unsuitable for the deposit of dredged or fill material.⁶² In recent years, EPA has made greater use of this authority. ADID is often used in wetland areas that are experiencing significant development or other conversion pressures. Many ADID efforts generate substantial data on the location and functions of wetlands within the study area such as wetland maps, and habitat, water quality, or hydrological studies.

Special Area Management Plans (SAMPs) are another planning process which may yield useful information. SAMPs refer to a process authorized by the 1980 amendments to the Coastal Zone Management Improvement Act, which provides grants to States to develop comprehensive plans for natural resource protection and "reasonable coastal-dependent economic growth."⁶³ The SAMP process implicitly recognizes the State water quality certification process, directing all relevant local, State, and federal authorities to coordinate permit programs in carrying out the completed SAMP. The Corps of Engineers has supported and initiated several of these processes. In addition, other SAMPs have been completed by several States.

Much of these data can be collected, combined, and used in decision making with the aid of geographic-based computer systems that can store, analyze, and present data related to wetlands in graphic and written forms.⁶⁴ A reviewing official can quickly access and overlay a range of different existing information bases such as flora and fauna inventories, soil surveys, remote sensing data, watershed and wetland maps, existing uses and criteria, and project proposal information.

Finally, data is presently emerging on the use of wetlands as treatment areas for wastewater, stormwater, and non-point discharges.⁶⁵ Florida, for instance, has adopted a rule on wastewater releases into wetlands.⁶⁶ Florida prohibits wastewater discharges into the following kinds of wetlands: those designated as outstanding waters of the State; wetlands within potable water supplies; shellfish propagation or harvesting waters; wetlands in areas of critical State concern; wetlands where herbaceous ground cover constitutes more than thirty percent of the uppermost stratum (unless seventy-five percent is cattail); and others. Wastewater discharges are permitted in certain wetlands dominated by woody vegetation, certain hydrologically altered wetlands, and artificially created wetlands; however, the State applies special effluent limitations to take account of a wetland's ability to assimilate nitrogen and phosphorus. It also applies qualitative⁶⁷ and quantitative⁶⁸ design criteria.

The rule establishes four "wetland biological quality" standards. First, the flora and fauna of the wetland cannot be changed so as to impair the wetland's ability to function in the propagation and maintenance of fish and wildlife populations or substantially reduce its effectiveness in wastewater treatment. Second, the Shannon-Weaver diversity index of benthic macroinvertebrates cannot be reduced below fifty percent of background levels. Third, fish populations must be monitored and maintained, and an annual survey of each species must be conducted. Fourth, the "importance value" of any dominant plant species in the canopy and subcanopy at any monitoring station cannot be reduced by more than fifty percent, and the average "importance value" of any dominant plant species cannot be reduced by more than twenty-five percent.⁶⁹

These types of efforts, constantly being adjusted to take account of new information in a field where knowledge is rapidly expanding, are fertile sources of information for wetland standard writers and 401 certification decision makers.

VIII. SUMMARY OF ACTIONS NEEDED

This handbook has only scratched the surface of issues surrounding effective use of 401 certification to protect wetlands. The preceding discussion and examples from active States have highlighted possible approaches for all States to incorporate into their 401 certification programs. The handbook shows that there are many things that a State can act on right away to improve the effectiveness of 401 certification to protect the integrity of its wetlands. At the same time, there are improvements to water quality standards for wetlands which will have to take place within a longer timeframe.

A. Steps States Can Take Right Away

- * All states should begin by explicitly incorporating wetlands into their definitions of state waters in both state water quality standards regulations, and in state 401 certifications regulations.**
- * States should develop or modify their regulations and guidelines for 401 certification and water quality standards to clarify their programs, codify their decision process, and to incorporate special wetlands considerations into the more traditional water quality approaches.**
- * States should make more effective use of their existing narrative water quality standards (including the antidegradation policy) to protect wetlands.**
- * States should initiate or improve upon existing inventories of their wetland resources.**
- * States should designate uses for their wetlands based on estimates of wetland functions typically associated with given wetland types. Such potential uses could be verified for individual applications with an assessment tool such as the Wetlands Evaluation Technique or Habitat Evaluation Procedure.**
- * States should tap into the potential of the outstanding resource waters tier of the antidegradation policy for wetlands. It may not be an appropriate designation for all of a state's wetlands, but it can provide excellent protection to particularly valuable or ecologically sensitive wetlands from both physical and chemical degradation.**
- * States should incorporate wetlands and 401 certification into their other water quality management processes. Integrating this tool with other mechanisms such as coastal zone management programs, point and nonpoint source programs, and water quality management plans will help fill the gaps of each individual tool and allow better protection of wetlands systems from the whole host of physical, chemical, and biological impacts.**

Time and the courts may be needed to resolve some of the more complicated and contentious issues surrounding 401 certification such as which federal permits and licenses require 401 certification. EPA intends to support States in resolving such issues.

OWP, in cooperation with the Office of Water Regulations and Standards (OWRS), will build on this 401 certification handbook by developing guidance in FY 89-90 on water quality standards for wetlands. The guidance will provide the framework for States to incorporate wetlands into their water quality standards. The guidance will: require States to include wetlands as "waters of the State;" provide methods to designate wetland uses that recognize differences in wetland types and functions; address some chemical-specific and narrative biological criteria for wetlands; and discuss implementation of State antidegradation policies.

B: Laying the Groundwork for Future Decisions

Many States are successfully applying their existing narrative and, to a lesser extent, numeric water quality criteria to their wetland resources. Nevertheless, more work is needed to test the overall adequacy and applicability of these standards for wetlands, and to develop additional criteria where needed.

For example, existing criteria related to pH do not account for the extreme natural acidity of many peat bogs nor the extreme alkalinity of certain fens. Also, many existing criteria focus too extensively on the chemical quality of the water column without adequately protecting the other physical and biological components which are an integral part of wetland aquatic systems. Some numeric criteria for chemicals may not be protective enough of species (particularly bird species) which feed, breed, and/or spend a portion of their life cycle in wetlands. Hydrological changes can have severe impacts on wetland quality, but these changes are rarely addressed in traditional water quality standards.

Research of interest to State programs is being sponsored by the Wetlands Research Program of EPA's Office of Research and Development (ORD). Research covers three areas: Cumulative Effects, Water Quality, and Mitigation. Although these efforts will be developed over several years, interim products will be distributed to the States. States may find these products of use when developing criteria and standards, when identifying and designating wetlands as outstanding resource waters, and when making 401 certification decisions.

Cumulative Effects:

EPA's research on cumulative effects of wetlands takes a regional perspective. Through a series of regional pilot studies involving landscape analyses, ORD is correlating water quality conditions at the outlets of major watersheds with the percentage of wetlands in these watersheds. The types of wetlands, their position, and

non-wetland factors are also being analyzed. The results will allow water quality managers in these regions to specify the optimal percentage and combination of various types of wetlands needed to maintain water quality of lakes and rivers. Such watershed criteria could be used to guide efforts to create or restore wetlands for the purpose of intercepting and improving the quality of nonpoint runoff.

The pilot studies will also determine which wetland features can be used to predict wetland functions. Once differences among wetlands can be identified based on their functions, it will be possible to classify particular wetlands with regard to specific designated uses.

The cumulative effects program is using the results of the pilot studies as technical support for developing a "Synoptic Assessment Method". This method has already been used to rank watersheds within certain regions, according to the likely cumulative benefits of their wetlands. Also, sources of information useful for designating uses of individual wetlands were described by ORD in EPA's draft guidance for Advance Identification Appendix D.⁷⁰ Information on regionally rare or declining wetland wildlife, which could be used as one basis for establishing "special aquatic areas" in selected wetlands, is also available from the ORD Wetlands Research Team at the Corvallis EPA Lab.

Water Quality:

Another ORD study, being implemented through the Duluth Lab, is examining impacts to the water quality and biota of 30 wetlands, before and after regional development. This study will be useful, as part of 401 certification, for developing performance standards for activities which may affect wetland water quality.

Several research projects being proposed by the Wetland Research Program could produce information very useful to water quality managers. These are described in ORD's publication, "Wetlands and Water Quality: A Research and Monitoring Implementation Plan for the Years 1989-1994". Many of these proposals are planned, but will hinge upon funding decisions in future budget years. Those which drew the most support from a 1988 EPA workshop of scientists and State program administrators were as follows:

- o **Water Quality Criteria to Protect Wetland Function.** Existing quality criteria for surface waters would be reviewed for applicability to wetlands. Methods for biological and chemical monitoring of wetlands would be refined, and a field manual produced.

- o **Ecological Status and Trends of the Wetland Resource.** A nationwide network would be established to monitor the wetland resource. Field surveys would define the expected range of numerical values within each region for particular chemicals and especially, for biological community metrics, across a gradient of sites ranging from nearly-pristine to severely disturbed.
- o **Waste Assimilative Limits of Wetlands.** Observable features which determine the long-term ability of wetlands to retain contaminants and nutrients would be tested. "Safe" loading limits for various substances would be proposed for specific wetland types or regions. Similar kinds of information would also become available from a research effort focused specifically on artificial wetlands and coordinated by EPA-Cincinnati, in cooperation with the Corvallis and Duluth Labs. That study would recommend engineering design factors essential in wetlands constructed by municipalities for tertiary wastewater treatment.

Mitigation:

Information useful to 401 certification will also originate from ORD'S mitigation research. This research aims to determine if created and restored wetlands replace functions lost by wetland destruction permitted under Section 404. The research is organized to (1) synthesize current knowledge on wetland creation and restoration, (2) compile 404 permit information on created and restored wetlands, and (3) compare created and naturally occurring wetlands. Research results will be incorporated into a "Mitigation Handbook" useful for designing and evaluating mitigation projects. A literature synthesis being developed as a Provisional Guidance Document will be available in 1989. A provisional version of the handbook will be produced in 1990. This will assist States in identifying areas at greatest risk due to 404 permit activities and thus help target 401 certification and water quality standards activities.

APPENDIX A

Provided below are State 401 certification contacts and EPA wetlands contacts who can provide assistance in applying 401 to wetlands.

EPA has asked the Council of State Governments (CSG) to maintain a database of State wetland contacts and programs. In order to help keep the database up to date, please contact CSG when you have changes in your program or staff contacts, or if you come across inaccuracies in other State programs. You can access this database using virtually any computer with a modem. In order to obtain your free username and password contact:

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**APPENDIX B
FEDERAL DEFINITIONS**

The federal definition of "waters of the United States" is (40 CFR Section 232.2(q)):

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which would or could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish could be taken and sold in interstate or foreign commerce;
 - (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;*
- (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (5) Tributaries of waters identified in paragraphs 1-4.
- (6) The territorial sea;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in 1-6; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet criteria in this definition) are not waters of the United States.

(* Note: EPA has clarified that waters of the U.S. under the commerce connection in (3) above also include, for example, waters:

- Which are or would be used as habitat by birds protected by Migratory Bird Treaties or migratory birds which cross State lines;
- Which are or would be used as habitat for endangered species;
- Used to irrigate crops sold in interstate commerce.)

The federal definition of "wetlands" (40 CFR § 232.2(r)). Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

APPENDIX C

SCOPE OF PROJECT REVIEW: PENNSYLVANIA DAM PROPOSAL EXAMPLE

The dam proposed by the City of Harrisburg was to be 3,000 feet long and 17 feet high. The dam was to consist of 32 bottom hinged flap gates. The dam would have created an impoundment with a surface area of 3,800 acres, a total storage capacity of 35,000 acre feet, and a pool elevation of 306.5 feet. The backwater would have extended approximately eight miles upstream on the Susquehanna River and approximately three miles upstream on the Conodoguinet Creek.

The project was to be a run-of-the-river facility, using the head difference created by the dam to create electricity. Maximum turbine flow would have been 10,000 cfs (at a nethead of 12.5) and minimum flow would have been 2,000 cfs. Under normal conditions, all flows up to 40,000 cfs would have passed through the turbines.

The public notice denying 401 certification for this project stated as follows:

1. The construction and operation of the project will result in the significant loss of wetlands and related aquatic habitat and acreage. More specifically:
 - a. The destruction of the wetlands will have an adverse impact on the local river ecosystem because of the integral role wetlands play in maintaining that ecosystem.
 - b. The destruction of the wetlands will cause the loss of beds of emergent aquatic vegetation that serve as habitat for juvenile fish. Loss of this habitat will adversely affect the relative abundance of juvenile and adult fish (especially smallmouth bass).
 - c. The wetlands which will be lost are critical habitat for, among other species, the yellow crowned night heron, black crowned night heron, marsh wren and great egret. In addition, the yellow crowned night heron is a proposed State threatened species, and the marsh wren and great egret are candidate species of special concern.
 - d. All affected wetlands areas are important and, to the extent that the loss of these wetlands can be mitigated, the applicant has failed to demonstrate that the mitigation proposed is adequate. To the extent that adequate mitigation is possible, mitigation must include replacement in the river system.

- e. Proposed riprapping of the shoreline could further reduce wetland acreage. The applicant has failed to demonstrate that there will not be an adverse water quality and related habitat impact resulting from riprapping.
 - f. Based upon information received by the Department, the applicant has underestimated the total wetland acreage affected.
2. The applicant has failed to demonstrate that there will be no adverse water quality impacts from increased groundwater levels resulting from the project. The ground water model used by the applicant is not acceptable due to erroneous assumptions and the lack of a sensitivity analysis. The applicant has not provided sufficient information concerning the impact of increased groundwater levels on existing sites of subsurface contamination, adequacy of subsurface sewage system replacement areas and the impact of potential increased surface flooding. Additionally, information was not provided to adequately assess the effect of raised groundwater on sewer system laterals, effectiveness of sewer rehabilitation measures and potential for increased flows at the Harrisburg wastewater plant.
 3. The applicant has failed to demonstrate that there will not be a dissolved oxygen problem as a result of the impoundment. Present information indicates the existing river system in the area is sensitive to diurnal, dissolved oxygen fluctuation. Sufficient information was not provided to allow the Department to conclude that dissolved oxygen standards will be met in the pool area. Additionally, the applicant failed to adequately address the issue of anticipated dissolved oxygen levels below the dam.
 4. The proposed impoundment will create a backwater on the lower three miles of the Conodoguinet Creek. Water quality in the Creek is currently adversely affected by nutrient problems. The applicant has failed to demonstrate that there will not be water quality degradation as a result of the impoundment.
 5. The applicant has failed to demonstrate that there will not be an adverse water quality impact resulting from combined sewer overflows.
 6. The applicant has failed to demonstrate that there will not be an adverse water quality impact to the 150 acre area downstream of the proposed dam and upstream from the existing Dock Street dam.
 7. The applicant has failed to demonstrate that the construction and operation of the proposed dam will not have an adverse impact on the aquatic resources upstream from the proposed impoundment. For example, the suitability of the impoundment for smallmouth bass spawning relative to the frequency of turbid

conditions during spawning was not adequately addressed and construction of the dam and impoundment will result in a decrease in the diversity and density of the macroinvertebrate community in the impoundment area.

8. Construction of the dam will have an adverse impact on upstream and downstream migration of migratory fish (especially shad). Even with the construction of fish passageways for upstream and downstream migration, significant declines in the numbers of fish successfully negotiating the obstruction are anticipated.
9. The applicant has failed to demonstrate that there will not be an adverse water quality impact related to sedimentation within the pool area.

APPENDIX D

EXAMPLES OF CERTIFICATION CONDITIONS

****MARYLAND****

Maryland certified with conditions the fill/alteration of 6.66 acres of non-tidal wetlands as part of the construction of an 18 hole golf course and a residential subdivision. Approximately three-fourths of the entire site of 200 acres had been cleared for cattle grazing and agricultural activities in the past. As a result, a stream on the east side of the property with no buffer had been severely degraded. An unbuffered tractor crossing had also degraded the stream. A palustrine forested wetland area on the southeast side of the property received stormwater runoff from a highway bordering the property and served as a flood storage and ground water recharge area. Filling this area for construction of a fairway would eliminate some 4.5 acres of wetlands. Additionally, other smaller wetland areas on the property, principally around an old farm pond that was to be fashioned into four separate ponds for water traps, were proposed to be altered or lost as a result of the development.

The Corps did not exercise its discretionary authority to require an individual permit and thus the project was permitted under a nationwide permit (26). The State decided to grant certification, conditioned on a number of things that it believed would improve the water quality of the stream in the long run.

The filled wetland areas had to be replaced on an acre-for-acre basis on the property and in particular, the 4.5 acre forested palustrine wetland had to be replaced onsite with a wetland area serving the same functions regarding stormwater runoff from the highway.

Some of the other conditions placed on the certification were as follows:

1. The applicant must obtain and certify compliance with a grading and sediment control plan approved by the [name of county] Soil Conservation District;
2. Stormwater runoff from impervious surfaces shall be controlled to prevent the washing of debris into the waterway. Stormwater drainage facilities shall be designed, implemented, operated and maintained in accordance with the requirements of the [applicable county authority];

3. The applicant shall ensure that fish species are stocked in the ponds upon completion of the construction phase in accordance with the requirements of the [fisheries division of the natural resources department of the State];
4. The applicant shall ensure that all mitigation areas are inspected annually by a wetlands scientist to ensure that all wetlands are functioning properly;
5. A vegetated buffer shall be established around the existing stream and proposed ponds;
6. Biological control methods for weed, insects and other undesirable species are to be employed whenever possible on the greens, tees, and fairways located within or in close proximity to the wetland or waterways;
7. Fertilizers are to be used on greens, tees, and fairways only. From the second year of operation, all applications of fertilizers at the golf course shall be in the lower range dosage rates [specified]. The use of slow release compounds such as sulfur-coated urea is required. There shall be no application of fertilizers within two weeks of verticutting, coring or spiking operations.

**** WEST VIRGINIA ****

THE FOLLOWING GENERAL CONDITIONS APPLY TO ALL NATIONWIDE PERMITS IN WEST VIRGINIA:

1. Permittee will investigate for water supply intakes or other activities immediately downstream which may be affected by suspended solids and turbidity increases caused by work in the watercourse. He will give notice to operators of any such water supply intakes before beginning work in the watercourse in sufficient time to allow preparation for any change in water quality.
2. When no feasible alternative is available, excavation, dredging or filling in the watercourse will be done to the minimum extent practicable.
3. Spoil materials from the watercourse or onshore operations, including sludge deposits, will not be dumped into the water course or deposited in wetlands.
4. Permittee will employ measures to prevent or control spills from fuels, lubricants, or any other materials used in construction from entering the watercourse.
5. Upon completion of earthwork operations, all fills in the watercourse or onshore and other areas disturbed during construction, will be seeded, riprapped, or given some other type of protection from subsequent soil erosion. If riprap is utilized, it is to be of such weight and size that bank stress or slump conditions will not be created due to its placement. Fill is to be clean and of such composition that it will not adversely effect the biological, chemical or physical properties of the receiving waters.
6. Runoff from any storage areas or spills will not be allowed to enter storm sewers without acceptable removal of solids, oils and toxic compounds. All spills will promptly be reported to the appropriate Department of Natural Resources office.
7. Best Management Practices for sediment and erosion control as described in the 208 Construction Water Quality Management Plan are to be implemented.
8. Green concrete will not be permitted to enter the watercourse unless contained by tightly sealed forms or cells. Concrete handling equipment will not discharge waste washwater into the watercourse or wetlands without adequate wastewater treatment.

9. No instream work is permissible during the fish spawning season April through June.
10. Removal of mature riparian vegetation not directly associated with project construction is prohibited.
11. Instream equipment operation is to be minimized and should be accomplished during low flow periods.
12. Nationwide permits are not applicable for activities on Wild and Scenic Rivers or study streams, streams on the Natural Streams Preservation List or the New River Gorge National River. These streams include New River (confluence with Gauley to mouth of Greenbrier); Greenbrier River (mouth to Knapps Creek), Birch River (mouth to Cora Brown Barge in Nicholas County), Anthony Creek, Cranberry Run, Bluestone River, Gauley River, and Meadow River.
13. Each permittee shall follow the notice requirements contained in Section 9 of the Department of Natural Resources Regulations for State Certification of Activities Requiring Federal Licenses and Permits, Chapter 20-1, Series XIX (1984).
14. Each permittee shall, if he does not understand or is not aware of applicable Nationwide Permit conditions, contact the Corps of Engineers prior to conducting any activity authorized by a nationwide permit in order to be advised of applicable conditions.

**** ALASKA ****

**EXAMPLES OF CERTIFICATION CONDITIONS REQUIRED FOR
NATIONWIDE PERMIT 26 FROM ALASKA**

(26) Discharges of dredged or fill material into the waters listed in subparagraph (i) and (ii) of this paragraph which do not cause the loss or substantial adverse modification of 10 acres or more of waters of the United States, including wetlands. For discharges which cause the loss or substantial adverse modification of 1 to 10 acres of such waters, including wetlands, notification of the District Engineer is required in accordance with 330.7 of this part (see Section 2 of this Public Notice).

(i) Non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.

(ii) Other non-tidal waters of the United States, including adjacent wetlands, that are not part of the surface tributary system to interstate waters or navigable waters of the United States (i.e., isolated waters).

REGIONAL CONDITION H: Work in a designated anadromous fish stream is subject to authorization from the Alaska Department of Fish and Game. (No change from REGIONAL CONDITION H previously published in SPN 84-7.)

REGIONAL CONDITION J:

a. If, during review of the pre-discharge notification, the Corps of Engineers or the designated State of Alaska reviewing officials determine that the proposed activity would occur in any of the following areas, the applicant will be advised that an individual 404 permit will be required. Where uncertainty exists, the Corps will send pre-discharge notification to the designated State officials for a determination.

1. National Wildlife Refuges
2. National Parks and Preserves
3. National Conservation Areas
4. National Wild and Scenic Rivers
5. National Experimental Areas
6. State Critical Habitat AREas
7. State Sanctuaries
8. State Ranges and Refuges
9. State Eagle Preserves
10. State Ecological Reserves and Experimental Areas
11. State Recreation Areas

12. Wetlands contiguous with designated anadromous fish streams
13. Headwaters and isolated wetlands in designated public water supply watersheds of Craig, Hoonah, Hydaburg, Anchorage, Cordova, Seldovia and Kodiak
14. Sitka Area: Wetlands in the Swan Lake Area Meriting Special Attention (AMSA) in the district Coastal Management Plan
15. Anchorage area: Designated Preservation and Conservation Wetlands in the Wetlands Management Plan
16. Bethel area: Designated Significant Wetlands in the district Coastal Management Plan not covered under General Permit 83-4
17. Hydaburg area: The six AMSA's of the district Coastal Management Plan
18. Bering Strait area: All designated conservation AMSA's of the district Coastal Management Plan
19. Juneau area: Designated Sensitive Wetlands of the district Coastal Management Plan
20. NANA: Designated Special Use Areas and Restricted/Sensitive areas in the district Coastal Management Plan
21. Tanana Basin Area Plan: type A-1 wetlands in the Alaska Rivers Cooperative State/Federal Study
22. Susitna Area Plan: type A-1 wetlands in the Alaska Rivers Cooperative State/Federal Study
23. High value headwaters and isolated wetlands identified once the ongoing Wetlands Management Plans or Guides listed in b-5 (below) are completed
24. Alaska Natural Gas Pipeline Corridor designated type A and B wetlands
25. Headwaters and isolated waters which include identified bald eagle, peregrine falcon, and trumpeter swan nesting areas
26. ADF&G identified waterfowl use areas of statewide significance
27. Designated caribou calving areas.

Any individual permit issued in locations covered by district coastal management plans, State or Federal regional wetlands plans or local wetlands plans (numbers 14 through 23 above) will be consistent with the plan provisions for the specific wetland type and may require adding stipulations.

Oil and gas activities in the North Slope Borough which involve the discharge of dredged or fill material into waters including wetlands are not covered by the previous nationwide permit under 33 CFR 330.4(a) and (b) and are not covered under the nationwide permit 26. These activities require individual 404 permits or other general permits. These activities were previously excluded by the Corps of Engineers Special Public Notice 84-3 dated March 9, 1984.

b. Pre-discharge notification received by the Corps of Engineers for the discharge of dredged or fill material in the following areas will be provided to designated State agencies which include (1) the appropriate ADEC Regional Environmental Supervisor, (2) the appropriate ADF&G Regional Habitat Supervisor, (3) the appropriate DGC regional contact point, and (4) the appropriate DNR regional contact (should DNR indicate interest in receiving notices).

1. Headwater tributaries of designated anadromous fish streams and their adjacent contiguous wetlands
2. Open water areas of isolated wetlands greater than 10 acres and lakes greater than 10 acres above the headwaters
3. North Slope Borough wet and moist tundra areas not already covered by APP process
4. Wet and moist tundra areas outside the North Slope Borough
5. High value headwaters and isolated wetlands identified in the following ongoing State or Federal wetland management guides or plans: Mat-Su, Kenai Borough, Valdez, North Star Borough Yukon Delta and Copper River Basin
6. Headwater or isolated wetlands within local CZM district boundaries or the identified coastal zone boundary, whichever is geographically smaller (not withstanding the requirements under "a." 14.20 (above))
7. Anchorage Area: designated Special Study areas in the Wetlands Management Plan
8. Tanana Basin Area Plan: areas designated A-2, B-1, B-2 in the Alaska River Cooperative State/Federal Study
9. Susitna Area Plan: areas designated A-2, A-3, A-4 in the Alaska River Cooperative State/Federal Study

The designated officials of the State of Alaska, and the Corps will evaluate the notifications received for the areas listed "b." above under the provisions set forth in 33 CFR 330.7 (see Section 2 of this Public Notice) which includes an evaluation of the

environmental effects using the guidelines set forth in Section 404(b)(1) of the Clean Water Act. Notices shall be screened against the nationwide conditions under 330.5(b) (See Section 4 of the Public Notice) using available resource information. Conditions 330.5(b)(1), (2), (3), (4), (6), and (7) and (9) will be focused on during the State review.

The State's review of these areas under "b." above will encompass the following:

1. After receiving pre-discharge notification from the Corps, the State of Alaska shall comment verbally, and/or if time permits, in writing to the Corps District Engineer through a single State agency concerning the need for an individual permit review.

2. Existing fish and wildlife atlases and field knowledge shall be used to evaluate notices. If significant resource values are not identified for the area in question or if insufficient resource information exists, State agencies will not request an individual permit unless:

- (a) An on-site field evaluation will be conducted, weather permitting, during the extended review provided under the individual permit, or;

- (b) Federal resource agencies plan a similar field evaluation that could provide identical information to State resource agencies.

Should either the State review or the Corps review determine that the nationwide permit is not applicable, an individual 404 permit will be required.

New categories may be added at a later date should either the Corps or the State of Alaska recognize a need. These changes will be made available for public review through a public notice and comment period at the appropriate time.

This REGIONAL CONDITION shall be effective for the period of time that nationwide permit 26 is in effect unless the REGIONAL CONDITION is sooner revoked by the Department of the Army with prior coordination with the State of Alaska.

APPENDIX E

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Subpart H—Actions To Minimize Adverse Effects

Note.—There are many actions which can be undertaken in response to § 203.10(d) to minimize the adverse effects of discharges of dredged or fill material. Some of these, grouped by type of activity, are listed in this subpart.

§ 230.70 Actions concerning the location of the discharge.

The effects of the discharge can be minimized by the choice of the disposal site. Some of the ways to accomplish this are by:

- (a) Locating and confining the discharge to minimize smothering of organisms;
- (b) Designing the discharge to avoid a disruption of periodic water inundation patterns;
- (c) Selecting a disposal site that has been used previously for dredged material discharge;
- (d) Selecting a disposal site at which the substrate is composed of material similar to that being discharged, such as discharging sand on sand or mud on mud;

(e) Selecting the disposal site, the discharge point, and the method of discharge to minimize the extent of any plume;

(f) Designing the discharge of dredged or fill material to minimize or prevent the creation of standing bodies of water in areas of normally fluctuating water levels, and minimize or prevent the drainage of areas subject to such fluctuations.

§ 230.71 Actions concerning the material to be discharged.

The effects of a discharge can be minimized by treatment of, or limitations on the material itself, such as:

(a) Disposal of dredged material in such a manner that physiochemical conditions are maintained and the potency and availability of pollutants are reduced.

(b) Limiting the solid, liquid, and gaseous components of material to be discharged at a particular site;

(c) Adding treatment substances to the discharge material;

(d) Utilizing chemical flocculants to enhance the deposition of suspended particulates in diked disposal areas.

§ 230.72 Actions controlling the material after discharge.

The effects of the dredged or fill material after discharge may be controlled by:

(a) Selecting discharge methods and disposal sites where the potential for erosion, slumping or leaching of materials into the surrounding aquatic ecosystem will be reduced. These sites or methods include, but are not limited to:

(1) Using containment levees, sediment basins, and cover crops to reduce erosion;

(2) Using lined containment areas to reduce leaching where leaching of chemical constituents from the discharged material is expected to be a problem;

(b) Capping in-place contaminated material with clean material or selectively discharging the most contaminated material first to be capped with the remaining material;

(c) Maintaining and containing discharged material properly to prevent point and nonpoint sources of pollution;

(d) Timing the discharge to minimize impact, for instance during periods of unusual high water flows, wind, wave, and tidal actions.

§ 230.73 Actions affecting the method of dispersion.

The effects of a discharge can be minimized by the manner in which it is dispersed, such as:

(a) Where environmentally desirable, distributing the dredged material widely in a thin layer at the disposal site to maintain natural substrate contours and elevation;

(b) Orienting a dredged or fill material mound to minimize undesirable obstruction to the water current or circulation pattern, and utilizing natural bottom contours to minimize the size of the mound;

(c) Using silt screens or other appropriate methods to confine suspended particulate/turbidity to a small area where settling or removal can occur;

(d) Making use of currents and circulation patterns to mix, disperse and dilute the discharge;

(e) Minimizing water column turbidity by using a submerged diffuser system. A similar effect can be accomplished by submerging pipeline discharges or otherwise releasing materials near the bottom;

(f) Selecting sites or managing discharges to confine and minimize the release of suspended particulates to give decreased turbidity levels and to maintain light penetration for organisms;

(g) Setting limitations on the amount of material to be discharged per unit of time or volume of receiving water.

§ 230.74 Actions related to technology.

Discharge technology should be adapted to the needs of each site. In determining whether the discharge operation sufficiently minimizes adverse environmental impacts, the applicant should consider:

(a) Using appropriate equipment or machinery, including protective devices, and the use of such equipment or machinery in activities related to the discharge of dredged or fill material;

(b) Employing appropriate maintenance and operation on equipment or machinery, including adequate training, staffing, and working procedures;

(c) Using machinery and techniques that are especially designed to reduce damage to wetlands. This may include machines equipped with devices that scatter rather than mound excavated materials, machines with specially designed wheels or tracks, and the use of mats under heavy machines to reduce wetland surface compaction and rutting;

(d) Designing access roads and channel spanning structures using culverts, open channels, and diversions that will pass both low and high water flows, accommodate fluctuating water levels, and maintain circulation and faunal movement;

(e) Employing appropriate machinery and methods of transport of the material for discharge.

§ 230.75 Actions affecting plant and animal populations.

Minimization of adverse effects on populations of plants and animals can be achieved by:

(a) Avoiding changes in water current and circulation patterns which would interfere with the movement of animals;

(b) Selecting sites or managing discharges to prevent or avoid creating habitat conducive to the development of undesirable predators or species which have a competitive edge ecologically over indigenous plants or animals;

(c) Avoiding sites having unique habitat or other value, including habitat of threatened or endangered species;

(d) Using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all of the existing environmental characteristics. Habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat. Use techniques that have been demonstrated to be effective in circumstances similar to those under consideration wherever possible. Where proposed development and restoration techniques have not yet advanced to the pilot demonstration stage, initiate their use on a small scale to allow corrective action if unanticipated adverse impacts occur.

(e) Timing discharge to avoid spawning or migration seasons and other biologically critical time periods;

(f) Avoiding the destruction of remnant natural sites within areas already affected by development.

§ 230.76 Actions affecting human use.

Minimization of adverse effects on human use potential may be achieved by:

(a) Selecting discharge sites and following discharge procedures to prevent or minimize any potential damage to the aesthetically pleasing features of the aquatic site (e.g. viewscapes), particularly with respect to water quality;

(b) Selecting disposal sites which are not valuable as natural aquatic areas;

(c) Timing the discharge to avoid the seasons or periods when human recreational activity associated with the aquatic site is most important;

(d) Following discharge procedures which avoid or minimize the disturbance of aesthetic features of an aquatic site or ecosystem.

(e) Selecting sites that will not be detrimental or increase incompatible human activity, or require the need for frequent dredge or fill maintenance activity in remote fish and wildlife areas:

(f) Locating the disposal site outside of the vicinity of a public water supply intake.

§ 230.77 Other actions.

(a) In the case of fills, controlling runoff and other discharges from activities to be conducted on the fill:

(b) In the case of dams, designing water releases to accommodate the needs of fish and wildlife.

(c) In dredging projects funded by Federal agencies other than the Corps of Engineers, maintain desired water quality of the return discharge through agreement with the Federal funding authority on scientifically defensible pollutant concentration levels in addition to any applicable water quality standards.

(d) When a significant ecological change in the aquatic environment is proposed by the discharge of dredged or fill material, the permitting authority should consider the ecosystem that will be lost as well as the environmental benefits of the new system.

ENDNOTES

1. The state water quality certification process is authorized by Section 401 of the Clean Water Act, 33 U.S.C. §1341.

2. A Tribe is eligible for treatment as a State if it meets the following criteria: 1) it is federally recognized; 2) it carries out substantial government duties and powers over a Federal Indian Reservation; 3) it has appropriate regulatory authority over surface waters of the reservation; and 4) it is reasonably expected to be capable of administering the relevant Clean Water Act program. EPA is currently developing regulations to implement Section 518(e) for programs including Section 401 certification which will provide further explanation of the process tribes must go through to achieve state status. In addition, the term "state" also includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

3. The National Wetlands Policy Forum, chaired by Governor Kean of New Jersey, represents a very diverse group of perspectives concerned with policy issues to protect and manage the nation's wetland resources. The goal of the Forum was to develop sound, broadly supported recommendations to improve federal, state, and local wetlands policy. The Forum released its recommendations in a report, "Protecting America's Wetlands: An Action Agenda" which can be obtained from The Conservation Foundation, 1250 24th Street, NW, Washington, D.C. 20037.

4. 33 U.S.C. §4.1313 (c)(2)(A).

5. Section 301(b)(1)(c) of the Clean Water Act.

6. If the applicant is a federal agency, however, at least one federal court has ruled that the state's certification decision may be reviewed by the federal courts.

7. 33 C.F.R. §328.3 (Corps regulations); 40 C.F.R. §232.2(q) (EPA regulations).

8. For instance, except for wetlands designated as having unusual local importance, New York's freshwater wetlands law regulates only those wetlands over 12.4 acres in size.

9. Alaska Administrative Code, Title 6, Chapter 50.

10. Kentucky Environmental Protection Act, KRS 224.005(28).
11. Tennessee Water Quality Control Act, §69-3-103(29).
12. Massachusetts Clean Waters Act, Chapter 21, §26.
13. K.R.S. 224.005(28) (Kentucky enabling legislation defining waters of the state); 401 K.A.R. 5:029(1)(bb) (Kentucky water quality standards defining surface waters); Ohio Water Pollution Control Act, §6111.01(H) (enabling legislation defining waters of the state); Ohio Administrative Code, §3745-1-02(DDD) (water quality standards defining surface waters of the state).
14. Massachusetts Clean Waters Act, Chapter 21, §26 (enabling legislation defining waters of the state); 314 Code of Mass. Regs. 4.01(5) (water quality standards defining surface waters).
15. Ohio Administrative Code, 3745-32-01(N).
16. 40 C.F.R. §131.
17. A use attainability analysis (40 C.F.R. §131.10(g)) must show at least one of six factors in order to justify not meeting the minimum "fishable/swimmable" designated uses or to remove such a designated use. The analysis must show that attaining a use is not feasible because of: naturally occurring pollutant concentrations; natural flow conditions or water levels that cannot be made up by effluent discharges without violating state water conservation requirements; human caused pollution that cannot be remedied or that would cause more environmental damage if corrected; hydrologic modifications, if it is not feasible to restore the water to its original conditions or operate the modification to attain the use; natural non-water quality physical conditions precluding attainment of aquatic life protection uses; or controls more stringent than those required by §301(b) and §306 would result in substantial and widespread economic and social impact.
18. Questions and Answers on Antidegradation (EPA, 1985). this document is designated as Appendix A of Chapter 2 of EPA's Water Quality Standards Handbook.
19. The regulations implementing Section 404(b)(1) of the Clean Water Act are known as the "(b)(1) Guidelines" and are located at 40 C.F.R. §230.
20. 40 C.F.R. §230.1(d)
21. 40 C.F.R. §230.10(c).
22. Code of Maryland Regulations Title 10, §10.50.01.02(B)(2)(a).

23. Minnesota Rules, §7050.0170. The rule states in full:

The waters of the state may, in a state of nature, have some characteristics or properties approaching or exceeding the limits specified in the water quality standards. The standards shall be construed as limiting the addition of pollutants of human activity to those of natural origin, where such be present, so that in total the specified limiting concentrations will not be exceeded in the waters by reason of such controllable additions. Where the background level of the natural origin is reasonably definable and normality is higher than the specified standards the natural level may be used as the standard for controlling the addition of pollutants of human activity which are comparable in nature and significance with those of natural origin. The natural background level may be used instead of the specified water quality standard as a maximum limit of the addition of pollutants, in those instances where the natural level is lower than the specified standard and reasonable justification exists for preserving the quality to that found in a state of nature.

24. No. 83-1352-I (Chancery Court, 7th Division, Davidson County, 1984)(unpublished opinion).

25. These criteria are at 401 K.A.R. 5:031, §2(4) and §4(1)(c), respectively.

26. Ohio Admin. Code, §3745-32-05.

27. Ohio Admin. Code, §3745-1-05(C).

28. Copies of Ohio's review guidelines are available from Ohio EPA, 401 Coordinator, Division of Water Quality Monitoring and Assessment, P.O. Box 1049, Columbus, Ohio 43266-0149.

29. 40 CFR §131.12.

30. 48 Fed. Reg. 51,400, 51,403 (1983)(preamble).

31. Kentucky Water Quality Standards, Title 401 K.A.R. 5:031, §7.

32. Minnesota Rules, §7050.0180, Subpart 7.

33. 314 Code of Massachusetts Regulation, §4.04(4).

34. Minnesota Rules, §7050.0180, Subpart 9.

35. H.R. Rep. No. 91-127, 91st Cong., 1st Sess. 6 (1969).

36. 115 Cong. Rec. H9030 (April 15, 1969) (House debate); 115 Cong. Rec. S28958-59 (Oct. 7, 1969) (Senate debate).

37. C.F.R. §323.2(d). However, in *Reid v. Marsh*, a case predating these regulations, the U.S. District Court for the Northern Corps District of Ohio ruled that "even minimal discharges of dredged material are not exempt from Section 404 review". In this district, the Corps treats all dredging projects under Section 404.

38. West Virginia Code, §47-5A-1 (emphasis added).

39. Clean Water Act, §401(a)(2).

40. 40 C.F.R. §230.10(a).

41. 40 C.F.R. §230.10(d).

42. *Arnold Irrigation District v. Department of Environmental Quality*, 717 Pac.Rptr.2d 1274 (Or.App. 1986).

43. *Marmac Corporation v. Department of Natural Resources of the State of West Virginia*, C.A. No. CA-81-1792 (Cir. Ct., Kanawha County 1982).

44. 33 U.S.C. §1313(c)(2)(A).

45. West Va. Admin. Code, §47-5A-9.3 (a).

46. Unpublished paper by Dr. Paul Hill of West Virginia's Department of Natural Resources. Prepared for EPA-sponsored December 1987 workshop on "The Role of Section 401 Certification in Wetlands Protection".

47. 33 C.F.R. §325.2(b)(ii).

48. 18 C.F.R. §4.38(e)(2).

49. 40 C.F.R. §124.53(c)(3).

50. Wisconsin Administrative Code, NR 299.04.

51. West Va. Admin. Code, §47-5A-4.3.

52. Id.

53. 40 C.F.R. §121.2. EPA's regulations implementing Section 401 were issued under the 1970 Water Pollution Control Act, (not the later Clean Water Act) and thus, may have some anomalies as a result.

54. This is a reference to Section 10 of the Rivers and Harbors Act.

55. Ohio Admin. Code, §3745-32-05.

56. See, e.g., P. Adamus, Wetland Evaluation Technique (WET), Volume II: Methodology Y-87 (U.S. Army Corps of Engineers Waterways Experiment Station, Vicksburg, MS, 1987); L. Cowardin, Classification of Wetlands and Deepwater Habitats of the United States (U.S. Fish and Wildlife Service 1979). See also Lonard and Clairain, Identification of Wetland Functions and Values, in Proceedings: National Wetlands Assessment Symposium (Chester, VT: Association of State Wetland Managers, 1986) (list of twenty five methodologies).

57. See, e.g., R. Tiner, Wetlands of the United States: Current Status and Recent Trends (U.S. Govt. Printing Office 1984) (National Wetlands Inventory). The National Wetlands Inventory has mapped approximately 45 percent of the lower forty eight states and 12 percent of Alaska. A number of regional and state reports may be obtained from the National Wetlands Inventory of the U.S. Fish and Wildlife Service in Newton Corner, MA. Region 5 maps can also be ordered from the U.S. Geological Survey's National Cartographic Information Center in Reston, VA.

58. The new joint Federal Manual for Identifying and Delineating Jurisdictional Wetlands, can be obtained from the U.S. Government Printing Office 1989).

59. See, e.g., Chesapeake Bay Critical Areas Commission, Guidance Paper No. 3, Guidelines for Protecting Non-Tidal Wetlands in the Critical Area (Maryland Department of Natural Resources, April 1987).

60. For information on the Wetlands Values Data Base contact: Data Base Administrator, U.S. Fish and Wildlife Service, National Energy Center, 2627 Redwing Road, Creekside One, Fort Collins, Colorado, 80526. Phone: (303) 226-9411.

61. For example, Florida's Section 380 process designates "Areas of Critical State Concern" which often include wetlands. Florida Statutes §380.05.

62. 40 C.F.R. §230.80 (1987).

63. 16 U.S.C. §1452(3) (1980). See also, U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 10 (1986).

64. See D. Burke, Technical and Programmatic Support for 401 Certification in Maryland, (Maryland Department of Natural Resources, Water Resources Administration, December 1987) (unpublished); A. Lam, Geographic Information Systems for River Corridor and Wetland Management in River Corridor Handbook (N.Y. Department of Environmental Conservation) (J. Kusler and E. Meyers eds., 1988).

The system described by Burke is called MIPS (Map and Image Processing System) and is capable of translating a myriad of information to the scale specified by the user.

65. See, e.g., [multiple authors], "Ecological Considerations in Wetlands Treatment of Municipal Wastewaters," (Van Nostrand Reinhold Co., New York, 1985); E. Stockdale, "The Use of Wetlands for Stormwater Management and Nonpoint Pollution Control: A Review of the Literature," (Dept. of Ecology, State of Washington 1986); "Viability of Freshwater Wetlands for Urban Surface Water Management and Nonpoint Pollution: An Annotated Bibliography," prepared by The Resource Planning Section of King County, Washington Department of Planning and Community Development (July, 1986).

66. The Warren S. Henderson Wetlands Protection Act of 1984, Fla. Stat. §403.91 - 403.938, required the Florida Department of Environmental Regulation to establish specific criteria for wetlands that receive and treat domestic wastewater treated to secondary standards. The rule is at Fla. Admin. Code, §17-6.

67. Maximization of sheet flow.

68. Hydrologic loading and retention rates.

69. Id.; See also L. Schwartz, Criteria for Wastewater Discharge to Florida Wetlands, (Florida Department of Environmental Regulation) (Dec. 1987) (unpublished report).

70. Copies of the draft, "Use of Advance Identification Authorities under Section 404 of the Clean Water Act: Guidance for Regional Offices", can be obtained from the Regulatory Activities Division of the Office of Wetlands Protection (A-104F), EPA, 401 M Street, SW, Washington, D.C. 20460.

2010



Clean Water Act Section 401 **Water Quality Certification:** A Water Quality Protection Tool For States and Tribes



U.S. Environmental Protection Agency
Office of Wetlands, Oceans, and Watersheds

Background and Purpose

Based on two decades of case law and state and tribal program experience, the Environmental Protection Agency has substantially updated its handbook on Clean Water Act (CWA) §401 water quality certification and how states can use §401 certification to protect wetlands and other aquatic resources.

This new handbook, “Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes”, describes CWA §401 certification authorities, the way different state and tribal programs use certification, and how state and tribal certification programs leverage available resources to operate their certification programs.

While this new handbook is not a rule and does not create any legal requirements or set policy, it provides a wide-ranging description of §401 certification provisions and practices which may be helpful to states and tribes interested in using §401 as an effective water resource protection tool. This document does not substitute for CWA section 401 itself, or the relevant EPA (and other federal or state/tribal) implementing regulations. States, tribes, and federal licensing/permitting agencies may consider other approaches consistent with the CWA and those regulations. EPA retains the discretion to revise this handbook in the future.

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I. Introduction

Clean Water Act (CWA) §401 water quality certification provides states and authorized tribes¹ with an effective tool to help protect water quality, by providing them an opportunity to address the aquatic resource impacts of federally issued permits and licenses. This handbook explains the applicability and scope of §401, and provides practical examples drawn from state and tribal experiences about how §401 certification has been used to achieve their water quality goals.

Under §401, a federal agency cannot issue a permit or license for an activity that may result in a discharge to waters of the U.S. until the state or tribe where the discharge would originate has granted or waived §401 certification. The central feature of CWA §401 is the state or tribe's ability to grant, grant with conditions, deny or waive certification. Granting certification, with or without conditions, allows the federal permit or license to be issued consistent with any conditions of the certification.² Denying certification prohibits the federal permit or license from being issued.³ Waiver allows the permit or license to be issued without state or tribal comment. States and Tribes make their decisions to deny, certify, or condition permits or licenses based in part on the proposed project's compliance with EPA-approved water quality standards. In addition, states and tribes consider whether the activity leading to the discharge will comply with any applicable effluent limitations guidelines, new source performance standards, toxic pollutant restrictions, and other appropriate requirements of state or tribal law.⁴

U.S. Supreme Court in *S. D. Warren Co. v. Maine Board of Environmental Protection*

“State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed:

‘No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.’ 116 Cong. Rec. 8984 (1970).

These are 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 discharge.”⁵

Examples of federal licenses and permits subject to §401 certification include CWA §402 NPDES permits in states where EPA administers the permitting program, CWA §404 permits for discharge of dredged or fill material issued by the Army Corps of Engineers (Corps), Federal

¹ Tribes may receive §401 certification authority when they receive Treatment As a State (TAS) status which is often at the same time as EPA approval of their water quality standards, as further discussed in *II.B.I. States and Authorized Tribe* below.

² CWA §401(a)(1); 33 USC1341(a)(1).

³ CWA §401(a)(1); .33 USC § 1341(a)(1).

⁴ CWA §401(d);.33 USC 1341(d).

⁵ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006). [Quote from the unanimous U.S. Supreme Court decision affirming the State of Maine's certification authority over a Federal Energy Regulatory Commission dam relicensing.]

Energy Regulatory Commission (FERC) hydropower licenses, and Rivers and Harbors Act §9 and §10 permits for activities that have a potential discharge in navigable waters issued by the Corps. Many states and tribes rely on §401 certification to ensure that discharges of dredge or fill material into a water of the U.S. do not cause unacceptable environmental impacts and, more generally, as their primary regulatory tool for protecting wetlands and other aquatic resources.⁶ In addition, §401 certification is often a state or tribe's only opportunity to review and appropriately condition or object to the federal permitting or licensing of a hydroelectric project.

Although §401 certification can be an effective tool for protecting water quality, it is limited in scope and application to situations involving federally-permitted or licensed activities that may result in a discharge to a water of the U.S. If a federal permit or license is not required, or would authorize impacts only to waters that are not waters of the U.S., the activity is not subject to CWA §401. Although §401 certification by itself is not a comprehensive water quality program for states and tribes, it can nevertheless be an effective water quality protection tool.

⁶ *State Wetland Program Evaluation: Phase I*, Environmental Law Institute, 2005; *State Wetland Program Evaluation: Phase II*, Environmental Law Institute, 2006.

II. Threshold Issues Regarding Clean Water Act §401 Certification

This chapter discusses a number of threshold issues regarding §401 certification. Section 401 certification does not apply to all permits or licenses associated with any aquatic resource, and this chapter clarifies the circumstances when §401 certification applies. The chapter also discusses which government agency may exercise §401 certification authority, and the ways in which concerns of downstream jurisdictions are taken into account during the §401 certification process.

A. When CWA §401 Certification Applies

The language of §401(a)(1) is written very broadly with respect to the activities it covers. It states:

Any 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 in which the discharge originates.⁷ [emphasis added]

As the statutory language indicates and courts have held, the permit or license must: (a) be issued by a federal agency, (b) for an activity that has the potential to discharge, (c) into a water of the United States, (d) from a point source⁸. This section will discuss each of these terms.

1. “Federal” Permit or License

In order for a §401 water quality certification to be required, the activity causing the discharge must be authorized by a permit or license issued by a federal agency.⁹ Federal licenses and permits most frequently subject to §401 water quality certification include CWA §402 (NPDES) permits issued by EPA¹⁰, §404 (dredge and fill) permits issued by the Corps, Federal Energy Regulatory Commission (FERC) hydropower licenses, and Rivers and Harbors Act (RHA) §9 and §10 permits issued by the Corps.

Temporary or “annual licenses” in effect while an application for permit renewal is under review might not require §401 certification where issuance of such temporary licenses is a “ministerial and nondiscretionary act.”¹¹ The most common example of such a license is the annual license renewals issued by FERC while existing hydroelectric dam license renewals are under review.¹² Where interim or other types of permits and licenses are involved, interested

⁷ CWA §401(a)(1); 33 USC 1341(a)(1).

⁸The Ninth Circuit Court of Appeals has interpreted §401 in light of its broader CWA context and has concluded the discharge must be from a point source to trigger §401. See Section II.A.4 below for more information.

⁹General EPA regulations define a license or permit for the purposes of §401 as, “any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into ...waters of the United States.” 40 CFR § 121.1(a).

¹⁰ As of March 2010, states in which EPA administers the §402 NPDES permit program include New Hampshire, Massachusetts, Idaho, and New Mexico.

¹¹ *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1134, 1136 (9th Cir. 2002), cert denied, 1245 S.Ct. 85 (2003).

¹² Handbook for Hydroelectric Project Licensing and 5 MW Exemptions from Licensing. Federal Energy Regulatory Commission. Appendix A: Federal Power Act, Part 1. Washington, DC. April 2004. pg A-20; Compliance Handbook. Division of Hydropower and Administrative Compliance. Federal Energy Regulatory Commission. March 2004. pg 89.

parties should consult with EPA, the state or tribal agency, and the federal permitting or licensing agency to determine whether §401 certification applies.

State or tribal implementation of a state permit program in lieu of the federal program does not “federalize” the resulting permits or licenses for purposes for §401. For example, when a state or tribe is approved to administer the §402 or §404 program, permitting authority resides with the state or tribe, not a federal agency, and 401 certification does not apply to those authorizations issued by the state or tribe. The CWA anticipates that states and tribes issuing those permits will ensure consistency with CWA provisions and other appropriate requirements of state and tribal law as part of their permit application evaluation.¹³ In addition, Corps regulations indicate that the Corps will seek 401 certification for Corps’ dredging projects involving a discharge into waters of the U.S. even though the Corps is not issuing itself a permit.¹⁴

2. Discharge

Another element required for §401 certification to apply is the potential for a discharge. It is important to note that §401 certification is triggered by the *potential* for a discharge; an actual discharge is not required. There does not have to be an actual discharge or a “discharge of a pollutant.” The statute states that, “[a]ny ... federal license or permit to conduct any activity ... which may result in a discharge.”¹⁵ Consequently, the discharge need not be a certainty, only that it “may” occur should the permit or license be granted. However, if no discharge may occur, no water quality certification is required. For example, when a RHA §10 permit is required for the hanging of power lines across a navigable river (RHA §10 water) without a potential discharge to the water, the Corps typically has not sought water quality certification.

In addition, the potential discharge does not need to involve an addition of pollutants. Section 401 certification can be triggered not only where there is discharge of a pollutant (such as would be authorized by §402 or §404 permits), but also where there is a discharge not involving addition of a pollutant, such as water released from the tailrace of a dam.¹⁶ As the U.S. Supreme Court has stated, “[w]hen it applies to water, ‘discharge’ commonly means a ‘flowing or issuing out’”¹⁷ and an addition of a pollutant is not “fundamental to any discharge.”¹⁸ A lower court has ruled that allowing more water to flow through a dam’s turbines is a discharge for §401 purposes.¹⁹ Two courts have found that a withdrawal of water or reduction in flow does not constitute a discharge.²⁰

¹³ In addition, similar requirements to address the effect of pollutants on downstream jurisdictions exist under CWA §402 and §404 programs when assumed by a State or Tribe. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046 (1992).

¹⁴ Under 33 CFR 336.1(a)(1), Corps practice is to seek 401 certification for their dredging projects.

¹⁵ CWA §401(a)(1); 33 USC 1341 (a)(1).

¹⁶ *See, e.g., Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 6-7 (9th Cir.(Or.) 1998 *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

¹⁷ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

¹⁸ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

¹⁹ *Alabama Rivers Alliance v. Federal Energy Regulatory Commission*, 325 F.3d 290, 295-6 (DC Cir 2003) in the case installing larger turbines in a hydroelectric dam was found to potentially result in a discharge of larger volumes of water through the dam, triggering water quality certification review.

²⁰ *Great Basin Mine Watch v. Helen Hankins BLM*, 456 F.3d 955, 963 (9th Cir 2006) in the context of the removal of all flow from a stream in Nevada for use in a gold mine; *State of North Carolina v. Federal Energy Regulatory Commission*, 112 F.3d 1175, 1187 (DC Cir 1997) in the context of withdrawing water from a lake for a municipal

3. Waters of the U.S. and Waters of the State or Tribe

The third element required for §401 certification to apply is that the potential discharge must be into a water of the U.S. The term “waters of the U.S.” is defined in EPA and Corps regulations, and applies to all CWA programs. The scope of waters of the U.S. protected under the CWA includes traditionally navigable waters and also extends to include interstate waters, territorial seas, tributaries to navigable waters, adjacent wetlands, and other waters.²² Since §401 certification only applies where there may be a discharge into waters of the U.S., how states or tribes designate their own waters does not determine whether §401 certification is required. Note, however, that once §401 has been triggered due to a potential discharge into a water of the U.S., additional waters may become a consideration in the certification decision if it is an aquatic resource addressed by “other appropriate provisions of state[tribal] law.”²³

4. Point Sources

In addition to the requirements for a federal permit or license and a discharge into a water of the U.S., some courts have indicated that the discharge

The Regulatory Definition of Waters of the U.S.

“(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.”²¹

water supply; the opinion in *Great Basin Mine Watch v. Helen Hankins BLM* also said that states may, but are not required to, regulate water withdrawals or set minimum stream flow standards in water quality certifications, at 963.

²¹ 40 CFR § 230.3(s); 33 CFR § 328.3(a).

²² *Id.* For discussion of evolution of the regulatory definition of “waters of the United States,” see Downing et al. Clean Water Act Jurisdiction: A Legal Review. Wetlands. Vol. 23. No. 3. 2003. p 477.

²³ See CWA §401(d), 33 USC 1341(d). Note that the Corps may consider a 401 certification as administratively denied where the certification contains conditions that require the Corps to take an action outside its statutory authority or are otherwise unacceptable. See, e.g., RGL 92-04, “Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits.”

²⁴ 40 CFR § 230.3(s); 33 CFR § 328.3(a).

must be from a point source.²⁵ The Ninth Circuit Court of Appeals in *ONDA v. Dombeck* held that, “[t]he term “discharge” in §1341 is limited to discharges from point sources.”²⁶ The CWA defines “point source” as “any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel...rolling stock ... or vessel...from which pollutants are or may be discharged.”²⁷ Bulldozers and similar equipment are considered point sources²⁸, as are the tailraces of dams.²⁹ While other Circuit Courts of Appeal have not addressed this question, the U.S. in briefs filed before the U.S. Supreme Court suggests that §401 requires the discharge to be from a point source.³⁰

B. When Jurisdictions Have §401 Certification Authority

Not all jurisdictions whose water may be affected by a federal permit or license have §401(a)(1) certification authority. Only the state or authorized tribe *where the discharge originates* has the authority to directly condition or prevent issuance of a federal permit or license.³¹ States and tribes downstream of the jurisdiction where a discharge originates do not have §401 authority. However, CWA §401(a)(2) provides neighboring states or tribes with an opportunity to object to, and make recommendations for, federal licenses and permits.³²

1. States and Authorized Tribes

The CWA directly grants all states §401 certification authority, and currently all states have retained their authority. In addition, U.S. territories are considered “states” under the CWA.³³

Tribes do not automatically have §401 authority, but may request it when granted “Treatment in the same manner As a State” (TAS) authority by EPA.³⁴ This often occurs when a tribe is authorized to administer the water quality standards program and has designated the tribal agency that will administer §401. No separate application is required. If granted, tribes possess the same certification authority and responsibilities as states. As of January 2010, 36 tribes had developed water quality standards approved by EPA and have been granted §401 certification

²⁵ “We hold that certification under § 1341 is not required for grazing permits or other federal licenses that may cause pollution solely from nonpoint sources.” *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 7 (9th Cir.(Or.) 1998).

²⁶ *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 5 (9th Cir.(Or.) 1998).

²⁷ 33 USC 1362(14); CWA §502(14); Case law has indicated that point sources also include bulldozers and similar equipment: *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922 (1983).

²⁸ *See, e.g., Avoyelles Sportsman's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).

²⁹ *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 6 (9th Cir.(Or.) 1998). Also supported by, *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006). *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 711 (1994).

³⁰ *See, e.g., Amicus brief of the United States in S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006), found at 2006 WL 53960 (January 9, 2006).

³¹ CWA §401(a)(1); 33 USC 1341(a)(1).

³² In some cases, such as when the backwater pool area for a reservoir extends into another state or tribe, neighboring states or tribes may comment without being downstream.

³³ CWA §502(3); 33 USC 1362(3): “The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.”

³⁴ CWA §401(a)(1); 33 USC 1341(a)(1).

authority.³⁵ Courts have held that tribal water quality standards and §401 certification authority extend to non-Indian fee land within a reservation.³⁶

Where the discharge originates within a jurisdiction without §401 authority, EPA is the certifying agency. Section 401(a)(1) states, “In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator [EPA].”³⁷ As a result, EPA typically acts as the certifying authority on tribal lands when the tribe lacks certification authority.

2. States or Tribes Where a Discharge Originates

The courts have interpreted §401 to mean that the state or tribe in which a discharge originates has §401 certification authority.³⁸ When a facility is located within one state but the end of its discharge pipe is located in the waters of another state, the jurisdiction where the discharge enters the waters of the U.S. has certification authority. The state with jurisdiction over the receiving waters has a direct interest in the quality of its resulting water quality, while the state in which the facility is located may have a variety of other concerns not directly related to the waters affected by the discharge. Similarly, the state where the discharge enters a “water of the U.S.” is likely better positioned to monitor and inspect for compliance with any 401 certification conditions on the discharger’s permit or license.

³⁵ Region 2: Saint Regis Mohawk Tribe. Region 4: Seminole of Florida; Miccosukee Tribe of Indians of Florida; Region 5: Mole Lake Band of the Lake Superior Tribe of the Chippewa Indians, Sokaogon Chippewa Community; The Fond du Lac Band of the Minnesota Chippewa Tribe; Grand Portage Band of the Minnesota Chippewa Tribe. Region 6: Ohkay Owingeh (Pueblo of San Juan); Pueblo of Acoma; Pueblo of Isleta; Pueblo of Nambe; Pueblo of Picuris; Pueblo of Pojoaque; Pueblo of Sandia; Pueblo of Santa Clara; Pueblo of Taos; Pueblo of Tesuque. Region 8: Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation; Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation;. Region 9: Big Pine Paiute Tribe of the Owens Valley; Bishop Paiute Tribe; Hoopa Valley Tribe; Hopi Tribe; Hualapai Tribe; Pyramid Lake Paiute Tribe; White Mountain Apache. Regions 6, 8 and 9: Navajo Nation. Region 10: Confederated Tribes of the Chehalis Reservation; Confederated Tribes of the Colville Reservation; Confederated Tribes of the Umatilla Indian Reservation of Oregon; Confederated Tribes of the Warm Springs Indian Reservation of Oregon; Kalispel Indian Community of the Kalispel Reservation; Lummi Nation; Makah Tribe; Port Gamble S’Klallam Tribe; Puyallup Tribe of Indians; and the Spokane Tribe of Indians.

³⁶ See, e.g., *State of Montana v. United States Environmental Protection Agency*, 137 F.3d 1135, 1141 (9th Cir 1998).

³⁷ 33 USC 1341(a)(1); CWA §401(a)(1).

³⁸ “[A] certification from the State in which the discharge originates or will originate” 33 USC 1341(a)(1); CWA §401(a)(1); “[O]nly required to obtain a certification from the state where the discharge originates.” *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-1484 (DC Cir 1990).

<u>Players in the Water Quality Certification Process</u>	
Origin of the Discharge	Certifying entity *
Within the borders of a state with a designated certification authority	→ State certifying agency
On tribal land that has been granted TAS and 401 certification authority	→ Tribal certifying agency
Within the borders of a state or tribal holdings where no certification authority exists	→ EPA
*Other states and tribes may be involved in the certification process through the downstream effects consultation process found in §401(a)(2).	

Figure 1. Certification Agency by Discharge Location

3. Other Affected States and Tribes

Although §401 certification authority rests with the jurisdiction where the discharge originates, neighboring states and tribes downstream³⁹ or otherwise potentially affected by the discharge have an opportunity to raise objections to, and comment on, the federal permit or license.⁴⁰ The EPA Administrator determines if a discharge subject to §401 certification “may affect” the water quality of other states or tribes, and EPA is required to notify those other jurisdictions whose water quality may be affected.⁴¹ The other jurisdictions are then provided an opportunity to submit their views and objections about the proposed license or permit and associated §401 certification. They may also request that the federal permitting or licensing agency hold a hearing at which, “the [EPA] Administrator shall ... submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency.”⁴² The federal licensing or permitting agency “shall condition such license or permit in such manner as may be necessary to ensure compliance with applicable water quality requirements.”⁴³ Recommendations from neighboring jurisdictions do not have the same force as conditions from a §401 certifying state. While the Federal agency must develop measures to address the downstream jurisdictions’ concerns, the agency may develop its own measures and does not need to adopt the downstream state or tribe’s specific recommendations without modification, as it would were they from the §401 certifying agency. If the Federal agency “cannot ensure compliance” with the other state or tribe’s water quality requirements, it “shall not issue such license or permit.”⁴⁴

³⁹ In some cases, such as when the backwater pool area for a reservoir extends into another state or tribe, neighboring states or tribes may comment without being physically downstream.

⁴⁰ CWA §401(a)(2), 33 USC 1341. Note that the CWA establishes processes to address the effect of pollutants on downstream stakeholders exist under CWA §§ 402 and 404 programs when assumed by a state or tribe. For example: *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046 (1992).

⁴¹ CWA §401(a)(2); 33 USC 1341(a)(2).

⁴² CWA §401(a)(2); 33 USC 1341(a)(2)

⁴³ CWA §401(a)(2); 33 USC 1341(a)(2).

⁴⁴ CWA §401(a)(2); 33 USC 1341(a)(2).

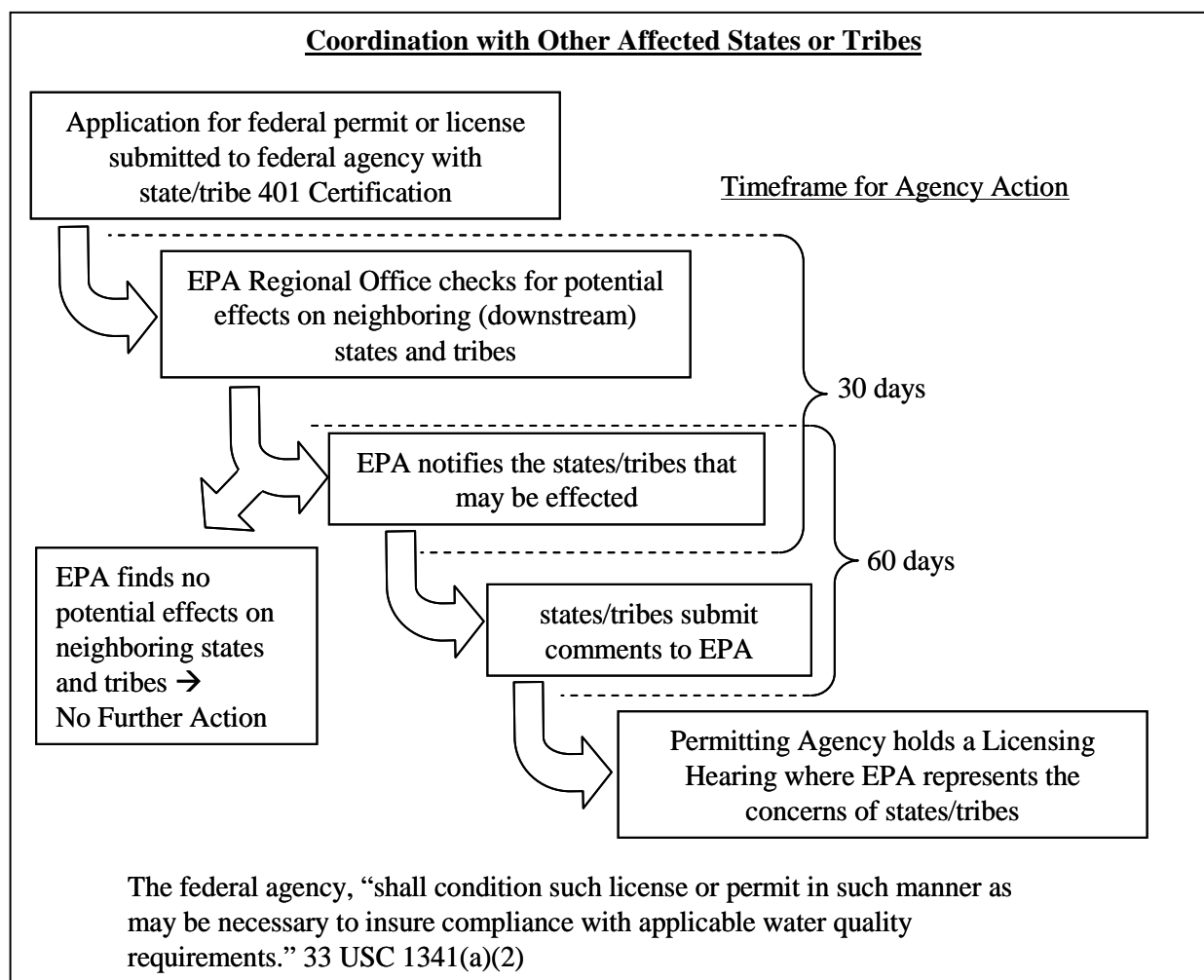


Figure 2. Downstream Agency Coordination

C. CWA Section 401 Certification Options

The central component of §401 certification is the state or tribe’s decision to grant, condition, deny or waive certification. In essence, the state or authorized tribal⁴⁵ agency decides whether the licensed or permitted activity and discharge will be consistent with a number of specifically identified CWA provisions: effluent limitations for conventional and non-conventional pollutants (§301 and §302), water quality standards (§303), new source performance standards (§306), and requirements for toxic pollutants (§307).⁴⁶ Section 401(d) requires inclusion of license or permit conditions to ensure compliance with these listed CWA provisions, as well as appropriate requirements of state or tribal law.⁴⁷ A state or tribe

⁴⁵ Tribes authorized to use §401 certification authority have developed water quality standards and designated an agency to administer the certification authority, as further discussed in *II.B.I. States and Authorized Tribes* above.

⁴⁶ 33 CWA §401(a)(1); USC 1341(a)(1).

⁴⁷ CWA §401(d); 33 USC 1341(d); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006); *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994).

certification is intended to ensure that all these provisions and requirements will be met. The following four subsections discuss each certification option.

1. Grant

The granting of §401 water quality certification to an applicant for a federal license or permit signifies that the state or tribe has determined that the proposed activity and discharge will comply with water quality standards as well as the other identified provisions of the CWA and appropriate requirements of state or tribal law. Granted certifications receive significant weight in the federal permitting or licensing agency's review of the project's potential impacts on water quality.⁴⁸ However, certification review and issuance does not fulfill environmental impact review requirements under the National Environmental Policy Act (NEPA), nor does it substitute for a dredged or fill permit from the Corps of Engineers or any other required CWA permit.⁴⁹

2. Grant with Conditions

States and tribes may include limitations or conditions in their certifications as necessary to ensure compliance with water quality standards and other provisions of the CWA and appropriate requirements of state or tribal law.⁵⁰ Conditions to protect water quality need not focus solely on the potential discharge. Once a potential discharge triggers the requirement for §401, the certifying agency may develop "additional conditions and limitations on the activity as a whole."⁵¹ Conditions placed in §401 water quality certifications must become conditions of the resulting federal permit or license.⁵² The federal agency may not select among conditions when deciding which to include and which to reject.⁵³ If the federal agency chooses not to accept all conditions placed on the certification, then the permit or license may not be issued.⁵⁴ Some federal agencies may decide to view the certification as denied, and administratively deny the permit without prejudice, if the conditions are viewed as beyond the agency's authority.⁵⁵

3. Deny

⁴⁸ Water Quality Standards Handbook. Second Edition. US EPA. August 1994. Chapter 7.6.3.

⁴⁹ Section 401 certification does not fulfill any requirements under NEPA, *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1125 (DC Cir. 1971); Section 401 certification does not substitute for other CWA permit requirements, *Monongahela Power Company v. John O. Marsh*, 809 F.2d 41, 53 (DC Cir 1987).

⁵⁰ 33 USC 1341(d); CWA §401(d); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006). *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994).

⁵¹ *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

⁵² CWA 401(d), 33 USC 1341(d).

⁵³ *American Rivers v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-111 (2d Cir, 1997).

⁵⁴ 33 USC 1341(a)(1); CWA §401(a)(1); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-111 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 868 (9th Cir 1993); *Puerto Rico Sun Oil Company v. United States Environmental Protection Agency*, 8 F.3d 73, 74-75 (1st Cir 1993); *Roosevelt Campobello International Park Commission v. United States Environmental Protection Agency*, 684 F.2d 1041, 1056 (1st Cir 1982); *US v. Marathon Development Corporation*, 867 F.2d 96, 99 (1st Cir. 1989).

⁵⁵ Note that the Corps may consider a 401 certification as administratively denied where the certification contains conditions that require the Corps to take an action outside its statutory authority or are otherwise unacceptable. See, e.g., RGL 92-04, "Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits."

States and tribes deny certification if the activity and discharge will not comply with the applicable sections of the CWA and appropriate requirements of state and tribal law.⁵⁶ The denial of §401 certification by a state or tribe prohibits the federal agency from issuing the permit or license in question.⁵⁷

4. Waive

States and tribes are authorized to waive §401 certification, either explicitly, through notification to the applicant, or by the certification agency not taking action. If action is not taken on a certification request, “within a reasonable time (which shall not exceed one year),” the state or authorized tribe has waived the requirement for certification. The amount of time allowed for action on a certification application is determined by the Federal agency issuing the license or permit, while the certifying agency determines what constitutes a “complete application” that starts the timeframe clock.⁵⁸ To avoid waiving inadvertently, a state or tribal agency receiving a request for certification should consult with the federal licensing or permitting agency to verify the time available for their certification decision. However, the onus for applying for water quality certification lies with the permit or license applicant, and waiver can not occur without a request for certification.⁵⁹

Under the CWA, waiver does not indicate a state or tribe’s substantive opinion regarding the water quality implications of a proposed activity or discharge. A state or tribe may waive certification for a variety of reasons, including a lack of resources to evaluate the application. Waiver merely means the federal permitting or licensing agency may continue with its own application evaluation process and issue the license or permit in the absence of an affirmative state or tribal certification.

S. D. Warren Co. v. Maine Board of Environmental Protection et al

“Section 401 recast pre-existing law and was meant to ‘continu[e] the authority of the State ... to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.’ S.Rep. No. 92-414, p. 69 (1971). Its terms have a broad reach, requiring state approval any time a federally licensed activity ‘may’ result in a discharge (‘discharge’ of course being without any qualifiers here), 33 U.S.C. § 1341(a)(1), and its object comprehends maintaining state water quality standards.”⁶⁰

⁵⁶ 33 USC 1341(a)(1); CWA §401(a)(1).

⁵⁷ CWA 401(a)(1); 33 USC 1341(a)(1).

⁵⁸ The Fourth Circuit observed that certification agencies prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989); 33 USC 1341(a)(1); CWA §401(a)(1); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

⁵⁹ *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989).

⁶⁰ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843, 1851 (2006).

III. The CWA 401 Certification Process

The previous chapter discussed threshold issues affecting when CWA §401 certification applies and what certification options states and tribes have (grant, grant with conditions, deny, or waive). This section discusses some of the details of the §401 certification process, including receipt of an application, review by the state or authorized tribe⁶¹, and enforcement and dispute resolution issues. Where possible, the chapter illustrates its points with examples taken from state and tribal experiences.

A. Timeframes and Opportunities for Review

The federal permitting or licensing agency may set the certification response time limit to any “reasonable period of time (which shall not exceed one year).”⁶² If the certifying agency does not respond within the time limit, §401 certification is waived.⁶³ As discussed below, federal agencies have established varying timeframes up to one year. An initial step, therefore, is for the certifying agency to verify the amount of time it has for its §401 analysis.

Federal agencies may define what is a “reasonable time” for purposes of §401 certification of their permits or licenses, provided the period is less than one year in duration. For example, some Corps Districts provide a response period of 60 days for a §401 certification associated with a CWA §404 permit. FERC normally allows a full year for states and tribes to develop a §401 certification response. EPA regulations governing the certification of federally-issued CWA §402 NPDES permits allow states and tribes 60 days to issue certification.⁶⁴ EPA regulations applicable in other contexts suggest a time limit of six months.⁶⁵

Not all Corps Districts use a 90-day time frame for certification of 404 permits.⁶⁶ For example, while the Savannah Army Corps of Engineers (Corps) District has a self-imposed 120 day timeline for making permit decisions, it has placed no limit on receipt of state certification other than the statutory one year. Should Georgia not issue a §401 certification by the 120-day deadline for §404 permit issuance, the District may issue a provisional permit that is not valid unless the conditions listed on the cover page, such as obtaining §401 certification, are met.⁶⁷ Shorter certification timeframes apply in other places such as Florida, where the certification time limit is 90 days for individual Corps permits and 30 days for Corps Nationwide General Permits that did not receive categorical certifications.⁶⁸ For their part, state and tribal

⁶¹ Tribes authorized to use §401 certification authority have received “Treatment as a State” (TAS) status, and have designated an agency to administer the certification authority. As further discussed in *II.B.1. States and Authorized Tribes* above, typically authorized tribes also have developed EPA-approved water quality standards.

⁶² CWA §401(a)(1); 33 USC 1341(a)(1).

⁶³ CWA §401(a)(1); 33 USC 1341(a)(1); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

⁶⁴ 40 CFR §124.53(c)(3).

⁶⁵ 40 CFR §121.16(b). (“which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year.”)

⁶⁶ Corps Districts may establish agreements with states or tribes to have longer or shorter timeframes for water quality certification decisions than the 60 days provided in regulations. See, e.g., RGL 87-03.

⁶⁷ Savannah Corps District. Provisional permit cover sheet.

⁶⁸ CWA Section 404 Nationwide General Permits are certified as a category every five years at reissuance. If categorical certification is denied for any Nationwide permit, each individual project wishing to be authorized under the Nationwide permit would require 401 certification.

certification agencies may adopt procedural requirements regarding certification, for example specifying that the receipt of agency certification requests starts the certification review time period.⁶⁹ While such requirements may help ensure that states and tribes have adequate time for their 401 review, it is important that they note the time frame at the time the certification application is received and consult with the Federal licensing or permitting agency early about any concerns.

1. When More Time is Needed

In cases where the certifying agency believes it needs more information or time to review the license or permit before issuing a certification, and it has not been able to work out an appropriate time frame with the licensing or permitting Federal agency, states have tended to take two approaches. Some states on occasion have suggested the applicant withdraw and resubmit its application for certification (restarting the certification clock), as an alternative to denying certification based on gaps in analyses or information. This withdraw-resubmission process potentially gives the applicant and the §401 certifying agency time to produce requested reports, and is intended to give the certifying agency additional time to review the relevant information and issue a certification. Note that the withdraw-resubmission process can result in the federal agency being unable to act in a timely manner on permit or license applications. As an alternative approach, some states have denied §401 certification “without prejudice” when they lack data necessary for their analysis, and then encouraged the applicant to resubmit the application with the application fee waived as long as they continue to abide by the standard public notice requirements.⁷⁰

2. Certification Timeframe for Permits to Construct and Operate Facilities

Another issue related to timeframes occurs when one federal permit or license is required for the construction of a facility and a separate federal permit or license is required for its operation. Generally, §401 requires certification of the construction permit or license and then only notice of application for a permit or license to operate the new facility, unless construction and operation would be certified by a different state certification authority.⁷¹ Upon receiving notice of application for a permit or license to operate the new facility, the certifying agency has 60 days to determine if;

[T]here is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of this [CWA] title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which

⁶⁹ The Fourth Circuit observed that certification agencies prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

⁷⁰ This handbook does not endorse either of the two approaches, but emphasizes the need for coordination regarding necessary information early in the certification process in order to avoid denial or withdrawal due to data gaps. FERC believes that both of these approaches can often result in delays and impair FERC’s ability to act on hydropower license, relicense, and amendment applications in a timely manner.

⁷¹ CWA §401(a)(3); 33 USC 1341(a)(3); *Keating v. Federal Energy Regulatory Commission*, 927 F.2d 616, 623 (DC Cir 1991)(The statute allows a state to revoke a prior certification only within a specified time limit and only pursuant to certain defined circumstances.); *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997) (Section 401(a)(3) does not, however, require a state with certification rights pertaining only to the operation of a project to assert those rights at the time a construction permit is issued for the project).

such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements.⁷²

If the certifying agency does not respond within sixty days to the notice, the certification of construction of the facility also serves as certification of operation of the facility.⁷³ CWA §401 certification of any federal permit or license required for construction of a facility will satisfy §401 certification requirements for federal permits or licenses required for operation of the facility as well, if the certification agency finds the project has not changed in any of the ways laid out in §401(a)(3) discussed above.⁷⁴ Note that certification of construction cannot serve as certification of operation if the applicant has failed to provide notice to the certifying agency of: (1) the application for a permit or license to operate the facility, or (2) any proposed changes in the construction or operation of the facility that may result in a violation of effluent limitations (CWA §301), water quality related effluent limitations (CWA §302), water quality standards and implementation plans (CWA §303), national standards of performance (CWA §306), toxic and pretreatment effluent standards (CWA §307) or other appropriate requirements of state or tribal law.⁷⁵

In the case where construction requires a federal permit or license and §401 certification, but operation of the facility does not require a federal permit or license, the facility must provide an opportunity for the §401 certification authority:

[T]o review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated.⁷⁶

If the certifying agency finds that the operation of the facility will violate water quality requirements but will not trigger the review procedure under §401(a)(3) (change in construction, operation, or water quality requirements), the certifying agency notifies the federal agency that issued the permit or license authorizing construction of the facility. Then the “Federal agency may, after public hearing, suspend such license or permit.”⁷⁷ If suspension is issued, it shall remain in effect until the certifying agency provides notice to the federal agency that the facility will not violate the applicable water quality requirements.⁷⁸ To ensure that adequate consideration is given to water quality impacts of facility operation, as well as to minimize the need for such after-the-fact suspensions (which are solely at the discretion of the Federal agency), states should review all such impacts at the time of initial certification, and include conditions in their certifications to address them as appropriate.

⁷² CWA §401(a)(3); 33 USC 1341(a)(3).

⁷³ CWA §401(a)(3); 33 USC 1341(a)(3); *Keating v. FERC*, 927 F.2d 616, 623 (DC Cir 1991).

⁷⁴ *Keating v. FERC*, 927 F.2d 616, 624 (DC Cir 1991).

⁷⁵ *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989); CWA §401(a)(3); 33 USC 1341(a)(3); CWA §401(d); 33 USC 1341(d).

⁷⁶ CWA §401(a)(4); 33 USC 1341(a)(4).

⁷⁷ CWA §401(a)(4); 33 USC 1341(a)(4).

⁷⁸ CWA §401(a)(4); 33 USC 1341(a)(4).

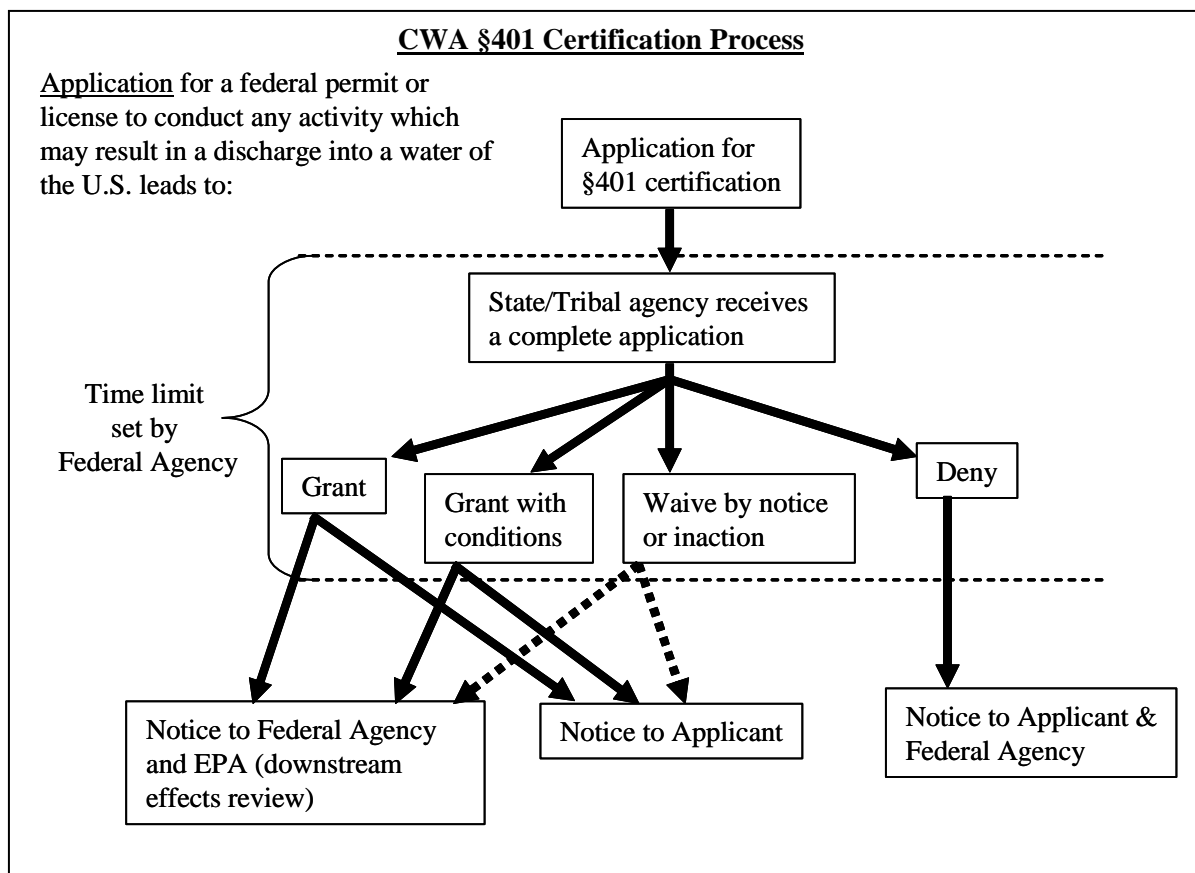


Figure 3. The Water Quality Certification Process

B. Start of the 401 Certification Process

Section 401 indicates that an application for a federal permit or license that may result in a discharge to waters of the U.S. cannot be considered complete unless accompanied by a grant or waiver of §401 certification.⁷⁹ “No license or permit shall be granted until the certification ... has been obtained or has been waived.”^{80, 81} As a result, the applicant is responsible for requesting the necessary §401 certification from the state or tribe.⁸²

States and tribes often establish their own specific requirements for a complete application for water quality certification.⁸³ Generally, the state or tribe’s §401 certification review timeframe begins once a request for certification has been made to the certifying agency,

⁷⁹ 33 USC 1341(a)(1); CWA §401(a)(1); *Puerto Rico Sun Oil Company v. EPA*, 8 F.3d 73, 74 (1st Cir 1993); *US v. Marathon Development Corporation*, 867 F.2d 96 (1st Cir. 1989).

⁸⁰ CWA §401(a)(1); 33 USC 1341(a)(1).

⁸¹ Note that the process in practice is not always linear. For example, FERC’s licensing regulations indicate that once the Commission determines that the application is complete, it issues a “Ready for Environmental Analysis” notice instructing the license applicant to request water quality certification from the state certifying agency within 60 days of notice issuance.

⁸² *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989).

⁸³ *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

accompanied by a complete application. A complete application for §401 certification typically includes the completed application for a federal license or permit, including detailed descriptions of the proposed project and anticipated aquatic resource impacts.⁸⁴ At times, the list of components of a complete application can be lengthy. For example, Oregon has identified a complete §401 certification application for a §404 permit as including: the legal name and address of activity owner or operator; legal name and address of the authorized representative; name and addresses of contiguous property owners; complete written description of activity, including maps, diagrams, and other information; names of affected waters, including wetlands and tributary streams; land use compatibility statement; identified steps that will be undertaken to prevent violation of water quality standards; copies of environmental information submitted to the federal licensing or permitting agency; confirm status of waters impacted by the project, including if they are on 303(d) lists or subject to a Total Maximum Daily Load (TMDL) calculation; evaluation of potential water quality standard violations or contribution to violation; and identification of mitigation measures.⁸⁵ Oregon also identifies additional information that may be required for projects in wetlands and streams and for hydropower projects.

The advantage of a clear description of components of a complete §401 certification application is that applicants know what they must be prepared to provide, and applicant and agencies alike understand when the review timeframe has begun.

C. Scope of Analysis For §401 Certification Decisions

U.S. Supreme Court in *PUD v Washington Department of Ecology*:

“Section 401(d) thus allows the State to impose ‘other limitations’ on the project in general to assure compliance with various provisions of the Clean Water Act and with ‘any other appropriate requirement of State law’ ... Section 401(a)(1) identifies the category of activities subject to certification--namely, those with discharges. And §401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”⁸⁸

When Congress enacted the water quality certification provisions in 1970, it wanted to ensure that no federal license or permit would be issued “for an activity that through inadequate planning or otherwise could in fact become a source of pollution.”⁸⁶ As incorporated into the 1972 CWA, §401 water quality certification was intended to ensure that no federal license or permits would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate CWA provisions. Specifically, the statute calls for states or tribes to base their certification on a consideration of whether the permit or license would be consistent with a list of CWA authorities including water quality standards and effluent limitations, as well as “any other appropriate

requirement of State [or tribal] law set forth in such certification.”⁸⁷ It is important to note that, while EPA-approved state and tribal water quality standards may be a major consideration driving §401 decision, they are not the only consideration.

⁸⁴ CWA §401(a)(1,3); 33 USC 1341(a)(1, 3); *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997); *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1111-1112 (4th Cir 1989).

⁸⁵ OAR 340-048-0020; see also <http://www.deq.state.or.us/wq/sec401Cert/process.htm#min>.

⁸⁶ 115 Cong. Rec. H9030 (April 15, 1969)(House debate); 115 Cong. Rec. S28958-59 (Oct. 7, 1969) (Senate debate).

⁸⁷ CWA §401(d); 33 USC 1341(d).

As noted in the previous section, the CWA indicates that §401 certification of a permit or license for the construction of any facility may fulfill the requirements for certification in connection with any other federal license or permit required for the operation of such facility.⁸⁹ In other words, certification of a construction permit or license generally also operates as certification for an operating permit or license. Thus, it is important for the §401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.⁹⁰ For example, certification of a new hydroelectric dam subject to licensing by FERC would consider water resource implications of both the dam’s construction and operation, for the life of the permit.

Three exceptions to this general rule of “one certification” exist. First, if the §401 certification of permits for project construction is from a different jurisdiction than where a potential discharge would originate during facility operation, then the federal operating permit would require an additional certification from the state or tribe in which the operational discharge would originate.⁹¹ The second exception exists where there have been unanticipated changes to the facility, receiving water quality, water quality standards, or other CWA requirements (see the box below).⁹² Third, the general rule does not apply if the applicant failed to provide notice to the certifying agency, “of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted.”⁹³ In short, certification of a permit or license for the construction of a facility will fulfill the requirements for certification of any other construction or operation permits or licenses for the facility as long as the potential impacts from construction and operation are within the same jurisdiction and there is no change in the facility, the receiving water, water quality standards or other CWA requirements.

Certification of Construction And Certification of Operation: CWA §401(a)(3)

“The certification obtained...with respect to the construction of any facility shall fulfill the...certification...for the operation of such facility unless, after notice to the certifying... agency...[the certifying] agency...notifies such [federal] agency within sixty days...that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying...agency... with notice of any proposed changes in the construction or operation of the facility...which changes may result in violation of section 301, 302, 303, 306, or 307 of this title.”

⁸⁸ *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

⁸⁹ 33 USC 1341(a)(3); CWA §401(a)(3); “The statute allows a state to revoke a prior certification only within a specified time limit and only pursuant to certain defined circumstances” *Keating v. Federal Energy Regulatory Commission*, 927 F.2d 616, 623 (DC Cir 1991); “Section 401(a)(3) does not, however, require a state with certification rights pertaining only to the operation of a project to assert those rights at the time a construction permit is issued for the project.” *State of North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir 1997).

⁹⁰ In *PUD I* the court found that, “activities—not merely discharges—must comply with state water quality standards.” *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994).

⁹¹ *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-1484 (DC Cir 1990).

⁹² 33 USC 1341(a)(3); CWA §401(a)(3); See also *Keating v. FERC*, 927 F.2d 616, 622 (DC Cir 1991).

⁹³ 33 USC 1341(a)(3); CWA §401(a)(3).

Section 401 applies to any federal permit or license for an activity that may discharge into a water of the U.S. The Ninth Circuit Court of Appeals has ruled that the discharge must be from a point source, and agencies in other jurisdictions have generally adopted the requirement.⁹⁴ Once these thresholds are met, the scope of analysis and potential conditions can be quite broad. As the U.S. Supreme Court has held, once §401 is triggered, the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law.⁹⁵

For example, water quality implications of fertilizer and herbicide use on a subdivision and golf course might be considered as part of a §401 certification analysis of a CWA §404 permit that would authorize discharge of dredged or fill material to construct the subdivision and golf course. Note that the Corps may decide to consider a certification with conditions it views as beyond its statutory authority as a denial, and not issue the section 404 or section 10 permit.⁹⁶

1. Basis for Certification Decisions – Generally

In order to obtain certification of any proposed activity that may result in a discharge to waters of the U.S., an applicant must demonstrate that the proposed activity and discharge will not violate or interfere with the attainment of any limitations or standards identified in §401(a) and (d). Specifically, the statute provides that an applicant for a federal license or permit obtain a certification that the discharge and activity is consistent with state or tribal effluent limitations (CWA §301), water quality related effluent limitations (CWA §302), water quality standards and implementation plans (CWA §303), national standards of performance (CWA §306), toxic and pretreatment effluent standards (CWA §307) and “any other appropriate requirement of State [or Tribal] law set forth in such certification.”⁹⁷

Water Quality Standards:
A benchmark for water quality protection

Standards provide the foundation for a broad range of water quality management activities including, but not limited to, monitoring under §§ 305(b) and listing /TMDL development under section 303(d), permitting under §§ 402 and 404, water quality certification under §401, and the control of non-point source pollution under §319. Standards also provide a benchmark for the assessment of wetland impacts. Such standards, however, are not the only consideration during a §401 certification analysis.

Figure 4. The Water Quality Standards Benchmark

Certifying agencies often develop procedures and a list of considerations that they deem necessary as part of their certification analysis to ensure compliance with the appropriate CWA provisions and requirements of state or tribal law related to the maintenance, preservation, or enhancement of water quality. For example, North Carolina has developed a list of assessment formulas and general certification conditions relating to project impacts, buffers, violation sites,

⁹⁴ *Oregon Natural Desert Association v. Michael P. Dombeck*, 151 F.3d 945, 5 (9th Cir.(Or.) 1998); *ONDA v. U.S. Forest Service*, 550 F.3d 778 (9th Cir. 2008). Discussions with more than a dozen certification agencies in 2005 did not reveal one case of certification being given or required for federal permits or licenses for non-point source discharges into waters of the U.S.

⁹⁵ *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711-712 (1994); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

⁹⁶ See, e.g., RGL 92-04, “Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits.”

⁹⁷ CWA §401(d); 33 USC 1341(d).

stormwater, surface water classifications, dams and ponds, wetlands and others that are reviewed for applicability to each project, so that all projects are held to the same standards and undergo the appropriate level of scrutiny. In Georgia, coordination between the certifying agency and the state fish and wildlife agencies has led to certification conditions designed to protect state species of concern that are tied to water quality goals in state law. Texas and Virginia certifications both rely on “No Net Loss” goals laid out in statute or regulation when requiring adherence to the avoidance, minimization and mitigation standards found in the CWA §404(b)(1) guidelines.

Whatever the basis of the certifying agency’s decision, thorough and clear documentation of the information and rationale used to reach the decision will help to educate the applicant and the public of the importance of water quality protection. Equally important, thorough and clear documentation can help to ensure that the certification is defensible should it be challenged in court or during public comment.

2. 401 Certification Consideration: Consistency With Water Quality Standards

As noted above, water quality standards are often the starting point for determining an appropriate response to a §401 certification request. States and tribes adopt EPA-approved water quality standards pursuant to CWA §303, and base those standards on the waters’ use and value for “. . . public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.”⁹⁸ These water quality standards and the state’s and tribe’s §401 implementing regulations and guidelines are, perhaps, the most important tools for the implementation of §401. Note that water quality standards adopted by a state or tribe but not yet approved by EPA may still be relevant during the §401 certification process as “other appropriate requirement” of state or tribal law.⁹⁹

Water quality standards consist of designated uses, criteria (narrative and numeric), and an antidegradation policy, which together provide environmental benchmarks for each class of water body. In practice, narrative and numeric criteria are often the clearest benchmarks for assessment of potential project impacts.

Across the country water quality standards have been developed for different open water bodies such as lakes, rivers and estuaries. In most areas of the country, however, water quality standards have not been developed specifically for wetlands. Wetland types vary over a wide gradient of physical, chemical and biological conditions that do not always reflect the characteristics of adjacent open water bodies. Therefore, the application of open water standards to wetlands can present challenges. One way to help ensure comprehensive consideration of wetlands in the §401 certification process is by creating wetland-specific water quality standards. Several states rely on their antidegradation policies for developing certification conditions. South Carolina has developed an implementation manual for applying its antidegradation policy to wetlands which has helped them more comprehensively assess wetlands impacts.¹⁰⁰

⁹⁸ CWA §303(c)(2)(A); 33 USC 1313 (c)(2)(A).

⁹⁹ They fall under the, “other appropriate requirement of State law set forth in such certification” requirement of 33 USC 1341(d); CWA §401(d).

¹⁰⁰ Antidegradation Implementation for Water Quality Protection in South Carolina. Department of Health and Environmental Control, Bureau of Water. July 1998. <http://www.scdhec.net/environment/water/docs/antideg.pdf>

For more information on water quality standards see the *National Guidance on Water Quality Standards for Wetlands*¹⁰¹, the *Water Quality Standards Handbook*¹⁰², or Section II of the April 1998 Advance Notice of Proposed Rule Making seeking comments from interested parties on possible revisions to the Water Quality Standards Regulation at 40 CFR Part 131.¹⁰³

3. 401 Certification Considerations: Effluent Guidelines, New Source Performance Standards and Toxics

In addition to water quality standards, §401 certification decisions must reflect consistency with effluent guidelines, New Source Performance Standards (NSPS), the CWA's toxics provisions, and other considerations.¹⁰⁴

Effluent guidelines are national technology-based effluent limitations for the discharge of pollutants directly to surface waters and to publicly owned treatment works (POTWs).¹⁰⁵ Effluent guidelines are developed for a wide range of specific industrial sectors and discharges -- from manufacturing to agricultural and service industries. As of 2010, effluent guidelines have been issued for 55 industry sectors and subsectors.¹⁰⁶ National effluent guideline regulations typically specify maximum daily allowable concentration and a 30-day average for a pollutant that may be discharged by facilities within the targeted industry, often per unit of production.¹⁰⁷ Regardless of the quality of the receiving water, all permits must include effluent limitations at least as stringent as those called for under the effluent guidelines.¹⁰⁸ While effluent guidelines serve as a national minimum of pollution control, the CWA requires permitting authorities to develop more stringent water quality-based standards if the effluent guideline requirements are insufficient to meet water quality standards on a particular water body.¹⁰⁹

NSPS are technology-based discharge limits placed on new facilities. They are developed similarly to effluent guidelines, tailored to specific industrial sectors, and applicable nationwide regardless of the quality of the receiving water.¹¹⁰ As a general rule, NSPS are more stringent than effluent limitations guidelines placed on existing sources in the same industrial sector.

4. 401 Certification Considerations: Consistency With Other Appropriate Requirements of State and Tribal Law

¹⁰¹ National Guidance: Water Quality Standards for Wetlands. US EPA. July 1990. pvii. as Appendix B to Chapter 2 - General Program Guidance of the Water Quality Standards Handbook, December, 1983.

¹⁰² Water Quality Standards Handbook, Second Edition. US EPA. September 1993.

¹⁰³ Found on EPA's website at <http://www.epa.gov/waterscience/standards/laws.htm>; Federal Register: July 7, 1998 (Volume 63, Number 129), Page 36741-36806, From the Federal Register Online via GPO Access, wais.access.gpo.gov, DOCID:fr07jy98-27.

¹⁰⁴ CWA §404(a)(1); 33 USC 1341(a)(1).

¹⁰⁵ CWA §304(b); 33 USC 1314(b).

¹⁰⁶ See CWA section 307(b) and (c); and CWA section 402(a) (1); EPA's Industrial Limitations Guidelines <http://www.epa.gov/waterscience/guide/industry.html>.

¹⁰⁷ CWA section 307(b) and (c); and CWA section 402(a) (1); 40 CFR §425.01-§620 (effluent guidelines).

¹⁰⁸ Exceptions to this statement include where a facility is eligible for a variance from the effluent guideline limitation, such as under the Fundamentally Different Factors (FDF) variance, CWA §301(n), 33 USC 1311(n). Similar variances from effluent guidelines can be found at CWA § 301, 33 USC §1311. For a general discussion see: Water Quality Standards Handbook. Second Edition. US EPA. August 1994. Chapter 7.6.3.

¹⁰⁹ CWA §301(b)(1)(C), §303(e)(3)(A); 33 USC 131(b)(1)(C), 1313(e)(3)(A); 40 CFR 122.44(d). Effluent guidelines may be insufficient to meet water quality standards in a number of circumstances, such as where a particular waterbody receives discharges from numerous facilities, or flows are low during some times of the year.

¹¹⁰ CWA §306(b)(1)(B); 33 USC 1316(b)(1)(B).

Water quality certifications under §401 reflect not only that the licensed or permitted activity and discharge will be consistent with the specific CWA provisions identified in sections 401(a) and (d), but also with “any other appropriate requirements of State [and Tribal] law.”¹¹¹ Some State regulations explicitly identify considerations relevant for §401 certification, while others do not. For example, Ohio’s regulations state that certification may be denied if the activity will “result in adverse long or short term impact on water quality.”¹¹² Similarly, river designation under the Wild and Scenic Rivers Act might be a relevant consideration independent of a state or tribe’s water quality standards.¹¹³ For example, Georgia considers a suite of other state regulations under its review including compliance with the state Erosion and Sedimentation Act for buffer integrity, construction and post-construction stormwater management, and the adequacy of mitigation. In addition, the Georgia water quality certification authority also coordinates with the Coastal Resources Division to insure project compliance with coastal protection regulations. Another relevant consideration when determining if granting 401 certification would be appropriate is the existence of state or tribal laws protecting threatened and endangered species, particularly where the species plays a role in maintaining water quality or if their presence is an aspect of a designated use. Also relevant may be other state and tribal wildlife laws addressing habitat characteristics necessary for species identified in a waterbody’s designated use.

Similar to the discussion in section *III.C.2. 401 Certification Consideration: Consistency with Water Quality Standards*, protection of the cultural or religious value of waters expressed in state or tribal law can also be relevant to a certification decision, even when not included as part of a water quality standard.¹¹⁴

D. Conditioning Federal Licenses and Permits Through §401 Certification

States and tribes frequently place conditions on their water quality certifications when such conditions are deemed necessary to ensure compliance with the identified CWA provisions and any other appropriate requirements of state or tribal laws.¹¹⁵ These §401 certification conditions must be included in the resulting federal permit or license.¹¹⁶

Many state and tribal governments use §401 certification as one of their primary regulatory tools for protecting water quality.¹¹⁷ Some states frequently grant §401 certification unconditionally, while other states have a set of basic conditions involving Best Management Practices (BMPs) that are attached to most permits or licenses.¹¹⁸

¹¹¹ CWA §404(d); 33 USC §1341(d).

¹¹² OH ADC 3745-32-05 (B).

¹¹³ 16 USC §1271.

¹¹⁴ Ceremonial use standards were upheld by the 10th Circuit Court of Appeals in *Albuquerque v. Browner*, 97 F.3d 415, 423 (1996).

¹¹⁵ CWA §401(d); 33 USC 1341(d).

¹¹⁶ CWA §401(d); 33 USC 1341(d). *See also, e.g., American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 107 (2nd Cir 1997); *Department of Interior v. FERC*, 129 P.U.R.4th 632, 952 F.2d 548 (DC Cir 1992).

¹¹⁷ *State Wetland Program Evaluation: Phase I*, Environmental Law Institute, 2005; *State Wetland Program Evaluation: Phase II*, Environmental Law Institute, 2006.

¹¹⁸ *State Wetland Program Evaluation: Phase I*, Environmental Law Institute, 2005; *State Wetland Program Evaluation: Phase II*, Environmental Law Institute, 2006.

In addition to CWA-derived requirements, §401 certification conditions may be based on “any other appropriate requirement of State [or Tribal] law set forth in such certification.”¹¹⁹ The ability to condition §401 certifications has been used by states and tribes to ensure that water quality has been comprehensively addressed in the design and implementation of projects and that unavoidable impacts will be mitigated. For example, North Carolina regulators believe that the mitigation demanded in their §401 certification conditions, specifically the requirement for at least 1:1 restoration or creation for wetland loss, allows the goal of No Net Loss of wetlands to be met at the state level.

As stated earlier, all conditions in a §401 certification must be included in any resulting federal permit or license, and the federal agency must incorporate the conditions without amendment.¹²⁰ The U.S. Supreme Court stated in 2006, “[i]t is still the case that, when a State has issued a certification covering a discharge that adds no pollutant, no federal agency will be deemed to have authority under NEPA to ‘review’ any limitations or the adequacy of the §401 certification.”¹²¹ The federal permitting agency does not have authority to review and amend the conditions on a §401 certification. All conditions must be included in the permit or license or the permit or license may not be issued.¹²²

As discussed in the dispute resolution section below, federal courts have established that the state or tribal court system is the proper forum to review the substance of certification decisions¹²³, including the consistency of the conditions with CWA §401 and state or tribal water quality goals.¹²⁴ It is advisable that conditions placed on a §401 certification include a reference to the law or regulation that was the impetus for that condition.¹²⁵

1. Appropriate Conditions

Section 401 provides that:

Any certification provided under this section [401] shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [enumerated provisions of the CWA]... and with any other appropriate requirement of State law set forth in such certification.¹²⁶

¹¹⁹ CWA §401(d); 33 USC 1341(d).

¹²⁰ *American Rivers, Inc. v. FERC.*, 129 F.3d 99, 107 (2nd Cir 1997).

¹²¹ *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006); Also supported by, *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1125 (DC Cir. 1971).

¹²² CWA §401(d); 33 USC 1341(d). *American Rivers* at 110-111.

¹²³ The Supreme Court has at least implied that a remedy may be had in federal court, at least with respect to certifications involving FERC hydro licenses. In *Jefferson County PUD*, 511 U.S. 700 (1994), the Court stated that “[i]f FERC issues a license containing a stream flow condition with which petitioners disagree, they may pursue judicial remedies at that time.” Since appeals of FERC licensing orders may be had only in the federal courts of appeals, this statement implies – perhaps confusingly – that the federal courts may examine the merits of conditions contained in a water quality certification in the context of reviewing a FERC order.

¹²⁴ *US v. Marathon Development Corporation*, 867 F.2d 96, 102 (1st Cir. 1989); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir 1982); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

¹²⁵ See e.g., 40 CFR 124.53(e)(2).

¹²⁶ 33 USC 1341(d); CWA §401(d).

Accordingly, a state or tribal certification should incorporate those conditions necessary to ensure a resulting federal license or permit will include effluent limitations at least as stringent as the applicable national technology-based guidelines established under the CWA, and as stringent as needed to attain and maintain water quality standards, including their designated uses and criteria. Under CWA §401(d) the water quality concerns to consider, and the range of potential conditions available to address those concerns, extend to any provision of state or tribal law relating to the aquatic resource.

Considerations can be quite broad so long as they relate to water quality. The U.S. Supreme Court has stated that, once the threshold of a discharge is reached (necessary for §401 certification to be applicable), the conditions and limitations included in the certification may address the permitted activity as a whole.¹²⁷

Certification may address concerns related to the integrity of the aquatic resource and need not be specifically tied to a discharge.

As the Supreme Court pointed out, “§401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”¹²⁸ For example, the Supreme Court upheld the imposition of minimum stream flows to support spawning salmon in the certification of a proposed hydroelectric dam in Washington State.¹²⁹

2. Role of Monitoring and Mitigation

Conditions accompanying §401 certifications may include monitoring requirements and compensatory mitigation if a state or tribe believes them necessary to comply with the CWA or appropriate requirements of state or tribal laws.¹³¹ Several states have included monitoring and reporting requirements as §401 conditions.¹³² Such requirements help the state determine whether water quality is being degraded. In addition, monitoring and reporting requirements allow agencies to assess the effect of operational practices and conditions on water quality in order to shape the development of certification decisions and conditions in the future. As an

The U.S. Supreme Court ruled in *PUD v. Washington Department of Ecology*. that:

“Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth “any effluent limitations and other limitations ... necessary to assure that *any applicant*” will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a “discharge.” The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose “other limitations” on the project in general to assure compliance with various provisions of the Clean Water Act and with “any other appropriate requirement of State law.” Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post*, at 1916, we see no such anomaly. Section 401(a)(1) identifies the category of activities subject to certification--namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”¹³⁰

¹²⁷ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).

¹²⁸ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).

¹²⁹ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).

¹³⁰ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 711-12 (1994).

¹³¹ CWA §401(d), 33 USC 1341(d).

¹³² Missouri, Confederated Tribes of the Warm Springs Reservation, and North Carolina, among others.

added benefit, monitoring and reporting helps applicants see and understand the impact, or averted impact, on water quality of their permitted actions. Monitoring and reporting helps to educate the regulated community about their impact on water quality and is essential for institutional learning to guide future certification decisions.

Mitigation requirements are often included in certification conditions to set the location, type, and extent of mitigation already required for a §404 dredge and fill permit or other permits. Although state and tribal certification regulations and conditions can require mitigation for any federal permit or license, mitigation is most commonly associated with CWA §404, under which EPA and the Corps follows the mitigation framework set out in the §404(b)(1) guidelines to evaluate applications for §404 dredge and fill permits. Missouri developed mitigation guidelines which regulators have implemented through CWA 401 certifications to increase the mitigation obtained from Corps permits. Some states have also elected to require mitigation in certifications for federal permits and licenses other than under §404, such as for FERC licenses. When mitigation is required for any permit or license, the state or tribe considers whether sufficient assurances should be incorporated into the certification to ensure the long-term functional success of the project. In North Carolina, for example, mitigation projects must be permanently protected by conservation easements or other similar protections.¹³³

3. State and Tribal Laws and Certification Conditions

State and tribal laws pertaining to water quality are used to guide decision making in the §401 certification process. As discussed above, conditions are developed to ensure compliance with the CWA or other appropriate requirements of state or tribal laws. State or tribal water quality standards, developed under the CWA and approved by EPA, are often the initial standard considered by states and tribes when drafting conditions. Also relevant is any state or tribal law establishing a more stringent standard or goal for water quality. Applicable state and tribal laws may establish quantitative standards, or narrative criteria that set qualitative goals. For example, Virginia has established a “No Net Loss” of wetland acreage and function goal in statute¹³⁴ and the state often relies on it when certifying wetlands projects to require avoidance, minimization, and - when necessary - mitigation measures.

Some states have laws that limit their agencies’ abilities to impose environmental requirements more stringent than those imposed by federal law, commonly referred to as “No More Stringent” laws. Section 401 certification programs in states with any type of restriction may wish to develop a process that ensures compatibility between their §401 certification and the limitation on stringency. Texas law prevents the state from permitting the discharge of dredged or fill material into waters of the state, but does not limit the state’s role in the 401 water quality certification process.¹³⁵ However, budget constraints led to a reduction in the resources available for the state’s 401 certification review activities. In response, the state developed a two-tiered system of review under a Memorandum of Agreement with the Corps. For projects under the impact thresholds identified as Tier 1, water quality certification is essentially waived by the state if the applicant self-selects one Best Management Practice (BMP) from each of three

¹³³ N.C. Division of Water Quality, Wetlands/401 Unit, Project Specific Condition List, July 2004 (Version 2). 18 pages; For more information on federal regulation, guidance and research on the use and performance of mitigation under the CWA and the Rivers and Harbors Act visit the <http://www.epa.gov/wetlandsmitigation/>.

¹³⁴ Code of Virginia § 62.1-44.15:21; Explained in regulation as “no net loss of wetland acreage and functions or stream functions and water quality benefits” 9VAC25-210-80.B.1(k)(5).

¹³⁵ Texas Water Code Title 2. Subtitle D. Chapter 26. Section 26.027(d).

classes to become conditions on their Corps permit.¹³⁶ While Texas does not individually review Tier 1 projects, it does develop the BMP options and requirements applicants must follow. Tier 2 projects receive individual state §401 water quality certification review.

E. Certification Process

CWA section 401 indicates that an applicant for a federal permit or license must include as part of the application for the federal permit a 401 certification or waiver¹³⁷, implying that federal agencies would not evaluate an application for a permit or license until the §401 certification decision is made. In practice, states and tribes frequently review certification requests while the federal permitting or licensing agency is reviewing the project application.¹³⁸

1. Regulations Describing §401 Certification

Although regulations or guidelines on implementation of §401 are not required under the CWA, establishing a procedure by which certification decisions are made, and clarifying what information will be used to make those decisions, helps educate and inform applicants and the public about the CWA 401 process and the importance of water quality protection. State and Federal Section 401 certification regulations and guidelines vary in their detail. Some define the specific quantitative and qualitative limitations or standards used to assess aquatic resource impacts, while others merely note where applications for §401 certification should be sent.

States that have developed implementation guidelines for making §401 certification decisions have found them very useful in helping to ensure the project applicant, agency staff, and the general public understand the §401 process and requirements. Some state and tribal laws and regulations define specific elements of the §401 certification process. For example, a particularly important component of the 401 process is a state or tribal definition of what constitutes a complete application. Because the timeframe for 401 certification review starts upon receipt of a complete application¹³⁹, inadvertent waiver due to passage of time is less likely where the standard for a complete application is well-defined.

California has defined a complete application as, “an application that includes all information and items and the fee deposit required.” California’s regulations identify a detailed list of required application information including: full contact information of applicant; technical description of full activity through the final stage; identification of all federal permits or licenses being sought and all supporting information and correspondence produced for those permits or license(s) both draft and final; the correct certification fee; and a complete project description.¹⁴⁰ The California regulation goes on to clarify that a complete project description identifies receiving waterbody(ies) and impacts, location, mitigation, all avoidance and minimization

¹³⁶ Memorandum of Agreement Between the U.S. Army Corps of Engineers and the Texas Natural Resource Conservation Commission on Section 401 Certification Procedures, August 17, 2000.

¹³⁷ CWA §401(a)(1); .33 USC §1341(a)(1).

¹³⁸ An example of how the process in practice is not always as linear as the CWA suggests is FERC’s licensing regulations. Under those regulations, once the Commission determines that the application is complete, it issues a “Ready for Environmental Analysis” notice instructing the license applicant to request water quality certification from the state certifying agency within 60 days of notice issuance.

¹³⁹ The Fourth Circuit observed that certification agencies prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

¹⁴⁰ CACR Title 23. Division 3. Chapter 28. Article 4. § 3856. Contents of a Complete Application.

efforts, and a brief list with the estimated adverse impacts of all projects implemented by the applicant within the last five years (or planned for implementation within the next five years) that are in any way related to the proposed activity or receiving water body(ies).¹⁴¹

The state of North Carolina's administrative code identifies the information required in an application for §401 certification, including maps and a description of the receiving waters, the discharge, the activity, and the applicant. In addition, North Carolina regulations reserve the right to request additional information and conduct on site investigations as deemed necessary by North Carolina Department of Environmental Health and Natural Resources.¹⁴²

State implementation guidelines may be codified in statute or regulations, or described in guidance. A description of the §401 certification implementation process typically addresses standard operating procedures (SOPs) and the scope of review in terms of applicable state provisions, effects over the lifetime of the project, and certifying the operation of the facility in the construction certification. In addition, maintaining a list of all of the laws, regulations, and guidance documents referenced during §401 review can help ensure consistent application of standing policies.

2. Certification Practices Viewed as Effective by States or Tribes

Certification practices vary across States and Tribes. Some states have explicit procedures calling for comprehensive documentation of the rationale used to make certification decisions, while others adopt a less formal approach. In general, several states have found that providing comprehensive and detailed information in certifications and guidance on the certification review process and standards of review allows 401 certification to serve as an effective water quality protection tool while minimizing administrative costs and maximizing public transparency.

a. Substance of Certifications

Although not all federal licenses and permits reviewed under §401 will warrant conditioning, §401 certification is an important (and, sometimes, the only) regulatory opportunity to address water quality in draft federal permits and licenses. Therefore, when necessary, states and tribes should seek to include conditions that protect against the full range of reasonably possible impacts.

Conditions placed on §401 certifications should be as specific as necessary to ensure that water quality will be protected. Conditions that enumerate "how" to address "what" potential adverse effect from "where" help all parties understand what is being called for. As a result, conditions that are specific are more likely to be consistent with water quality standards and protect aquatic resources in accordance with the water quality goals of the state or tribe. For example, where protection of sensitive fisheries is a concern, some states and tribes have found it helpful to specify minimum flow volumes or regimes and stocking practices including species, size class, number, frequency and location.

In some circumstances, the provisions states or tribes would wish to see reflected in the permit or license can be achieved through early discussions with the applicants, rather than through formally conditioning the 401 certification. Some states such as North Carolina and

¹⁴¹ CACR Title 23. Division 3. Chapter 28. Article 4. § 3856. Contents of a Complete Application.

¹⁴² 15A NC ADC 2H.0502.

Oregon use the comment period when project proponents are developing their applications for Corps and state permits to give applicants the chance to include in the project description the changes that are likely to be required anyway. The use of Best Management Practices (BMPs) and practices needed for Total Maximum Daily Load (TMDL) implementation are often added to projects during this stage. BMPs can include such actions as using constructed wetlands or bioretention areas rather than retention ponds for catching nutrients and sediments. A related action often recommended in Kansas is the creation of a lake protection plan for developments around old watershed dams that were previously used for flood control and agriculture.¹⁴³ The lake protection plans emphasize BMPs around the lake and informs the residents that discharges from the water body that cause water quality exceedences downstream may result in violations and enforcement actions. In addition, Kansas has developed a coordination group of most of the state and federal natural resource agencies that meets quarterly and shares information on BMPs, TMDLs, water quality standards, federal and state regulations including mitigation regulations, relevant literature references and similar resources useful to §401 and other programs. The group also works to coordinate technical assistance for permittees (of various programs) needing help understanding and implementing their permit requirements or state expectations.

In addition to carefully crafted and detailed conditions placed on the original permit, re-opener provisions and deed notifications have been used where the state or tribal certifying agency anticipates changes in water quality standards or other considerations. Section 401 certification conditions that call for interaction with the state or tribe when a specified action or condition occurs are often called ‘adaptive management’ conditions and may help to ensure that water quality goals are met under changing conditions. In the context of hydropower licensing adaptive management is a process in which the licensee and stakeholders collaborate on “fine tuning” required environmental measures within a Commission prescribed range. For example, in response to a 401 certification adaptive management condition, FERC may require in a license a minimum flow between 100 and 500 cubic feet per second to protect a particular resource and within that range of flow the licensee and certifying agency make flow decisions on a reoccurring basis depending on the conditions occurring at the time. Some states have included an adaptive management condition in their 401 certification for FERC hydroelectric licenses that require facility operators to get review and approval of a dredging management plan prior to dredging operations associated with the dam. Adaptive management in general helps to anticipate and address potential future changes in the circumstances used as the basis for the 401 certification decisions. For example, Oregon regularly includes re-opener clauses when certifying Corps permits and under state law may modify the certification, with public comment, if water quality standards change.¹⁴⁴

Another approach to extend the effect of 401 certification conditions is to require deed notifications to be placed on the land title for all remaining jurisdictional waters (and buffers where applicable). This helps to alert future land owners to permit requirements. As noted in section III.C.1. *Basis for Certification Decisions – Generally* above, North Carolina maintains a list of issues, evaluation tools and standard conditions including re-opener and deed notification provisions that are reviewed during every §401 certification evaluation.¹⁴⁵ In fact, North Carolina

¹⁴³ In Kansas this is common for old impoundments.

¹⁴⁴ Oregon Administrative Rules 340-048-0050.

¹⁴⁵ N.C. Division of Water Quality, Wetlands/401 Unit, Project Specific Condition List, July 2004 (Version 2). 18 pages.

includes a re-opener clause on almost all certifications issued. North Carolina §401 staff have also noted several applicants who indicated they saw the deed notification and realized they needed a certification.

b. Procedures used to Minimize the Administrative Burden of Certification

Many states and tribes have adopted procedures that minimize administrative burden by merging their 401 certification application and public notice process with those of the federal licensing or permitting agency. For example, many states and tribes have established joint applications and public notice arrangements with Corps Districts for CWA §404 permits and RHA §9 and §10 permits. Joint procedures help to ensure that all available project information is provided to all parties while simplifying the administrative requirements for applicants. Such procedures ensure that public comments on a project are collected at one time and provided to all relevant agencies. A number of states and tribes use the notice date as the start of the countdown to automatic waiver of certification, provided that they have received a complete application, which can be defined by the state or tribe.¹⁴⁶ A particular benefit of joint application and public notice requirements is that they help improve communication and coordination between the state and tribal agencies and the federal agencies while establishing a standard information requirement for both applications.

Close coordination with the federal permitting or licensing authority can provide certification agencies with valuable access to the applicant prior to the official request for certification. Several states, including Oregon, Georgia, Montana and Kansas, rely heavily on the pre-application consultation process to provide an opportunity to discuss potential water quality concerns and obtain changes to the proposed project prior to official application for a permit or license and certification. Kansas uses pre-application meetings for a variety of purposes. Along with the standard information gathering and dissemination function, Kansas also attempts to use pre-application meetings to discuss low-impact and smart growth design features with the applicant and other agencies involved. In addition, Kansas focuses on communication within affected watersheds to ensure that proposed projects will not disrupt other permitted activities in the watershed such as Public Water Supplies, Waste Water Treatment Plants and other permittees. Kansas has found that assessing a project in regard to the existing impacts and uses of the watershed is especially important when considering changes to channel morphology and other baseline conditions upon which other permittees or users rely. Montana uses pre-application meetings to discuss and distribute copies of their water quality standards, a stormwater / erosion control handbook, and information pertinent to other permits the applicant might need relative to other permitting authorities. Georgia works to have projects 'modified to address concerns' during the application process, so that the main water quality issues are addressed prior to final certification. Oregon provides information to the applicant on BMPs and fact sheets about water quality, including *Stormwater Management Plan Submission Guidelines for Removal/Fill Permit Applications Which Involve Impervious Surfaces*.¹⁴⁷

¹⁴⁶ See e.g., *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1111-1112 (4th Cir 1989). When invalidating a FERC license issued without a 401 certification, the Fourth Circuit referenced FERC's regulations (18 C.F.R. § 4.38(c)(2)) requiring water quality certification requests be made in compliance with state law. In this instance Virginia's application requirements for 401 certification defined a complete application.

¹⁴⁷ Oregon Department of Environmental Quality, *Stormwater Management Plan Submission Guidelines for Removal/Fill Permit Applications Which Involve Impervious Surfaces*. (2005).

Certification review can also take many forms within a state or tribal government. Some jurisdictions conduct certification review through one office for all projects (e.g. North Carolina, Nebraska, Georgia, Confederated Salish and Kootenai Tribes of the Flathead Reservation, and Pueblo of Sandia). Alternatively, other jurisdictions separate certification review into project type such as FERC license or Corps permit (e.g. Oregon or Montana). In addition, certification review may be a state or tribe's only regulatory look at a project affecting water quality or it may run parallel to review for other state or tribal permits.

U.S. v. Marathon Development Corporation:

“Neither the language nor the history of section 404(e) of the Clean Water Act (‘General permits [for dredged or fill material] on State, regional, or nationwide basis’), 33 U.S.C. § 1344(e), suggests that states have any less authority in respect to general permits than they have in respect to individual permits.”¹⁴⁸

As discussed more fully in the *Resolution of §401 Certification Related Disputes* section below, conditions on a federal permit or license are reviewable in state or tribal courts for consistency with water quality standards and other relevant laws. Certification practices discussed above, such as implementation procedures and evaluation criteria, will help to ensure the documentation of the §401 certification decision is thorough, making internal agency and even external legal review of a 401 certification decision easier.

F. Issues Raised by General Permits, After-the-Fact Permits, and Provisional Permits

The Clean Water Act authorizes general permits for activities that do not have significant environmental impacts either individually or cumulatively.¹⁴⁹ General Permits allow projects of a specifically defined type of impact or activity to proceed with limited or no individualized review. Some general permits require only notification to the Federal agency issuing the permit about a proposed project; others do not even require notification. General permits may be developed at and apply to a national or a smaller regional geographic scale. General permits are widely used in the Section 402 NPDES and section 404 permit programs.

A general permit may result in a discharge from a point source into a water of the United States, and as such is subject to the same §401 water quality certification requirements as individual permits, but at the point it is being initially issued and not as it is applied to particular projects. When a state or tribal agency is considering whether to provide §401 certification for a proposed general permit, the agency has the same options as it would for an individual permit or license —grant, deny, condition or waive.¹⁵⁰ Nationwide and Regional General Permits issued by the Army Corps of Engineers under CWA §404 are certified at the issuance and re-issuance of the general permit.

When certification is denied for a Nationwide or Regional General Permit, the District offices of the Army Corps of Engineers have responded primarily in two ways. In some instances Districts allow projects to be covered by a general permit provided the project proponent first

¹⁴⁸ *US v. Marathon Development Corporation*, 867 F.2d 96, 100 (1st Cir. 1989).

¹⁴⁹ *See, e.g.*, CWA §404(e); 33 USC 1344(e); 33 CFR § 330.1(b), 40 CFR §122.28(b)(2).

¹⁵⁰ Demonstrated in general practice nationwide and supported in the 1st Circuit Court of Appeals; *US v. Marathon Development Corporation*, 867 F.2d 96, 100 (1st Cir. 1989).

obtains §401 certification from the state or tribe, for a specific project to be covered by the general permit. The Corps often will issue a provisional authorization that only becomes effective when accompanied by a §401 water quality certification. In other cases, the certifying agency has worked with District to develop a more acceptable General Permit for which the state can provide a certification, that would not need additional certification review when specific projects are covered. When a state or tribe imposes conditions on a Nationwide or Regional General Permit, often the Corps District offices have responded by incorporating the conditions into a state- or tribe-specific version of the Nationwide Permit, or by requiring an individual §401 certification in order to qualify for the General Permit.

EPA-issued CWA §402 general permits are also reviewed by states and tribes under CWA §401. When a state or tribe denies certification the general permit is issued by the Regional Administrator with the notation that the following permit is not valid for that state or tribe's jurisdiction. In addition, if the state or tribe grants certification but imposes conditions on an EPA issued general permit, the conditions are attached to the general permit for application in that area.

If certification has been waived or granted for a general permit, any applicant approved to make use of that general permit faces no further certification review.¹⁵¹

Under limited circumstances, agencies have issued permits authorizing a discharge after a discharge has commenced. For example, after-the-fact permits are sometimes issued under CWA §404 for discharge of dredged or fill material into waters of the U.S. A state or tribe's §401 certification considerations for these after-the-fact permits should be conducted in the same manner as for normal pre-discharge permit applications. The burden of proof remains on the applicant to show that the requirements of the CWA have not been and will not be violated as a result of the activity.

Even in the case of after-the-fact permits, the state or tribe has the option of granting, denying, conditioning or waiving certification. If the applicant fails to adequately demonstrate that the fill activity did not and will not violate the CWA sections enumerated in §401 or any appropriate requirement of state or tribal law, certification should be denied. If certification is denied on an after-the-fact permit, the Corps may not issue a permit

¹⁵¹ Further certification review may be applicable as outlined in the certification conditions (if present) or under §401(a)(3) or (a)(4) .

American Rivers v. FERC:

“First, applicants for state certification may challenge in courts of appropriate jurisdiction any state-imposed condition that exceeds a state's authority under §401. In so doing, licensees will surely protect themselves against state-imposed *ultra vires* conditions. Second, even assuming that certification applicants will not always challenge *ultra vires* state conditions, the Commission may protect its mandate by refusing to issue a license which, as conditioned, conflicts with the F[ederal]P[ower]A[ct]. In so doing, the Commission will not only protect its mandate but also signal to states and licensees the limits of its tolerance.”¹⁵²

In some cases the permitting or licensing authority will issue a provisional authorization that only becomes effective when accompanied by a water quality certification. If certification is waived through the passage of time the applicant may then return to the permitting or licensing authority for a final authorization. If a certification is denied, the provisional authorization never becomes valid, and if certification is granted with conditions the provisional authorization is restricted by those conditions (with or without further modification by the permitting or licensing authority). Provisional authorizations are common in the context of Nationwide or Regional General Permits under CWA §404.

G. Resolution of §401 Certification-Related Disputes

Applicants or others who disagree with the 401 certification, including its conditions, may seek to have the decision reviewed and overturned. Complaints to the federal permitting or licensing agency are unlikely to be effective, since the agencies do not have authority to modify or overturn the state 401 certification. The initial forum for appealing a decision to grant, condition, or deny certification is often a state or tribe's courts or administrative appeals process for which the details are likely to vary among states and tribes. Some jurisdictions have an administrative appeals process that needs to be exhausted prior to proceeding to state or tribal court, while other jurisdictions do not.

Legal Review for §401 Certification

State or Tribal Courts

- Certification decision consistent with water quality standards; other enumerated CWA provisions; and appropriate provisions of state or tribal law

Federal Courts

- Timeframe for automatic waiver of certification
- Re-certification needed due to changes in circumstances outlined in §401(a)(3)
- Whether threshold conditions required for 401 certification to apply are met (i.e., federal permit or license, discharge, water of the U.S.)

Figure 5. Courts of Review for §401 Certifications

If a permit applicant wishes to challenge conditions included in a certification, the “only recourse is to challenge the state certification in state judicial proceedings.”¹⁵³ State or tribal

¹⁵² *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997).

¹⁵³ *US v. Marathon Development Corporation*, 867 F.2d 96, 102 (1st Cir. 1989); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir 1982); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

courts review §401 certification conditions for consistency with state or tribal water quality standards and other provisions of the state judicial proceedings.”¹⁵⁴ Review is typically limited to the question of whether the certifying agency’s decision is supported by the record and is consistent with applicable law (states and tribes often have a standard for administrative behavior similar to the arbitrary or capricious standard established for federal administrative actions).¹⁵⁵

Some issues regarding the §401 certification may be heard in federal administrative proceedings and courts.¹⁵⁶ For example, the federal permitting or licensing authority may review the procedural requirements of §401 certification, including whether the proper state or tribe has certified, whether the state or tribe complied with applicable public notice requirements, and whether the certification decision was timely.¹⁵⁷ In instances where federal permits were issued without the required §401 certification or certification conditions have not been enforced, the courts have found challenges under the citizen suit provisions of the CWA permissible on procedural grounds.¹⁵⁸

H. Enforcement of §401 Certifications

Enforcement practices for §401 certification vary across the country. Many states and tribes assert they may enforce 401 certification conditions using their water quality standards authority. While authority may be available, states and tribes may face challenges due to programmatic funding and support to carry out enforcement actions. Federal agencies also have the authority to enforce 401 certification conditions once incorporated as conditions in their permit or license.

401 certification conditions may be enforced by a variety of parties. The federal issuing agency may enforce the §401 certification conditions placed on permits or licenses as a mandatory requirement of the permit or license.¹⁵⁹ As discussed above, states and tribes assert they may enforce §401 certification conditions directly. In addition, the general public potentially may enforce 401 certification conditions as well; the 9th Circuit Court of Appeals notes that “nothing in the language of the Clean Water Act, the legislative history, or the implementing regulations restricts citizens from enforcing the same conditions of a certificate or permit that a State may enforce.”¹⁶⁰

A challenge with enforcement of 401 certification conditions arises from the fact that, as authors, the state or tribal certifying agency likely best understands what the condition requires

¹⁵⁴ *US v. Marathon Development Corporation*, 867 F.2d 96, 102 (1st Cir. 1989); *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir 1982); *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

¹⁵⁵ *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 112 (2nd Cir 1997).

¹⁵⁶ *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 107, 111-112 (2nd Cir 1997); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 867 (9th Cir 1993)

¹⁵⁷ *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 110-111 (2nd Cir 1997); *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006).

¹⁵⁸ *Oregon Natural Desert Association v. Michael P. Dombek*, 151 F.3d 945, 2 (9th Cir.(Or.) 1998); *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 988 (9th Cir 1995).

¹⁵⁹ See e.g., *American Rivers Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 108 (2nd Cir 1997) (“...§ 401(a)(5) of the CWA, 33 U.S.C. § 1341(a)(5), [FN20] which provides the licensing agency (in this case FERC) with authority to enforce the terms of a license--which pursuant to § 401(d) include a state's § 401 certification conditions--once such a federal license has issued.”)

¹⁶⁰ *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 988 (9th Cir 1995).

even though the condition is reflected in a permit or license issued by a federal agency. As a result, some federal agencies are reluctant to enforce 401 certification-derived conditions in their permits. State approaches to 401 certification violations vary. In New Mexico the State will find violations and report them to the Corps for enforcement action. North Carolina enforces violations to their own water quality standards and certification conditions. In Kansas the Corps enforces based on any conditions of the permit that they have jurisdiction over and then hands over the information to state and local authorities for compliance with any independent requirements, and if it is a water quality issue specific to a water quality compliance then enforcement is left to the state. If a Montana Water Quality Act violation occurs related to noncompliance with a 401 Certification condition, Montana's certification program writes the first letter identifying the violation and what needs to be done to reach compliance. If no action is taken the matter is directed to the Department of Environmental Quality Enforcement Division for further action. The Confederated Salish and Kootenai Tribes conduct the initial investigations and the Water Quality Program reports to the Corps, who then works alongside the Tribe on compliance assistance and enforcement when needed.

States and tribes may establish enforcement regulations and programs specifically for §401 certification, or instead simply expand the jurisdiction of existing enforcement programs. The California Water Code establishes civil liability for any person who violates §401 and criminal penalties for any person who knowingly or negligently violates §401, with a penalty chart for each.¹⁶¹

I. Suspension of §401 Certifications

Once a federal permit or license is issued with the required §401 certification, the certification can only be changed under limited circumstances.¹⁶² Certification “may be suspended or revoked by the federal agency...upon the entering of a judgment...that such facility or activity has been operated in violation of the applicable [CWA] provisions.”¹⁶³ This statutory provision suggests that a certifying agency can not revoke or suspend a certification without the action of the federal permitting or licensing authority. In contrast, if a certified permit or license is modified by the applicant or the federal agency, the certification agency has an opportunity to change conditions, but only those affected by the permit or license modification.¹⁶⁴

The federal permitting or licensing agency possesses very limited authority to review state or tribal water quality certifications to change final permit or license conditions after certification has been granted, even at the request of the certifying agency. If certification has already been granted for the construction of a facility and the certifying agency wants to either revise the certification of the construction or issue a new certification for the operation of the facility, the federal agency must assess whether the request for revision complies with §401(a)(3). The request for revision of a certification decision must be timely and in response to

¹⁶¹ Porter-Cologne Water Quality Control Act. CAWC. Division 7. Chapter 5.5. § 13385 Civil Liability. And § 13387 Criminal Penalties.

¹⁶² *Caribbean Petroleum Corporation v. EPA*, 28 F.3d 232, 235 (1st Cir 1994).

¹⁶³ CWA §401(a)(5), 33 USC 1341(a)(5); These provisions include of section 301, 302, 303, 306, and 307.

¹⁶⁴ Under these circumstances the certification agency receives the entire permit for review, even though only the conditions subject to the modification are reopened. *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 867 (9th Cir 1993).

changed circumstances since the issuance of the original certification.¹⁶⁵ The authority to review a final certification decision or the substance of conditions has been reserved to the state or tribal court system (as discussed above in the *Resolution of §401 Certification-Related Disputes* section). If the requirements of §401 (a)(3) have not been met, the federal agency may still use the information and recommendations from the certification agency in formulation of the federal permit or license, but they are not bound to follow the advice of the certifying agency.¹⁶⁶

¹⁶⁵ 33 USC 1341(a)(3); CWA §401(a)(3); *Keating v. FERC*, 927 F.2d 616, 621-622 (DC Cir 1991).

¹⁶⁶ 33 USC 1341(a)(3); CWA §401(a)(3); *Puerto Rico Sun Oil Company v. EPA*, 8 F.3d 73, 79 (1st Cir 1993); *Del Ackels v. United States Environmental Protection Agency*, 7 F.3d 862, 867 (9th Cir 1993).

IV. Leveraging Available Resources

A §401 certification program still needs funding and adequate resources to be implemented fully, even with a solid foundation in federal and state or tribal law and an exemplary staff. This section discusses some of the approaches that states and tribes have taken to leverage available funding, staffing, and data sources.

A. Funding and Permit Fees

States and authorized Tribes¹⁶⁷ vary greatly in their implementation of the program and also in their funding sources which include such diverse sources as general government funds, certification fees, federal grants, and State Departments of Transportation (DOT). Many, but not all, states and tribes augment program budgets with application fees for §401 certification.¹⁶⁸

California Water Code §13160.1:
Federal Certificate Fee

“The state board may establish a reasonable fee schedule to cover the costs incurred...but is not limited to including, the costs incurred in reviewing applications...prescribing terms...and monitoring requirements, enforcing and evaluating compliance...and monitoring requirements, conducting monitoring and modeling, analyzing laboratory samples, reviewing documents..., and administrative costs...The fee schedule may provide for payment of a single fee...or for periodic or annual fees...”¹⁶⁹

States and Tribes establish the fee requirements, schedules and final allocation of the funds collected; practices vary across the country.

Fees vary amongst states and tribes in at least two respects: revenues return either directly to the 401 certification program or to a general fund, and fees are either based on project size or a flat fee. The state of California’s Regional Water Quality Control Boards requires filing fees for §401 certification and related state permits which includes a flat fee based on the activity and a

rate per the volume or area of impact.¹⁷⁰ The fee structure allows for part of the cost of the §401 certification program to be recovered through appropriately set fees that are directed to the California Water Rights Fund.¹⁷¹

In contrast to California, some other states are authorized to charge 401 certification fees that are remitted back to the program. For example, fees for water quality certification in Ohio go back to the agency’s surface water protection budget in accordance with Ohio Revised Code 3745-114 (C). There is a base fee of \$200 plus a review fee which is determined by the

¹⁶⁷ Tribes authorized to use §401 certification authority have Treatment as State (TAS) authority, and typically have developed water quality standards and designated an agency to administer the certification authority, as further discussed in *I.B.I. States and Authorized Tribes* on page 9.

¹⁶⁸ The CWA is silent on administrative fees for 401 certification, neither encouraging nor discouraging their use. Potential use of fees is more dependent on state and tribal law and custom.

¹⁶⁹ Porter-Cologne Water Quality Control Act. CAWC. Division 7. Chapter 3. Article 4. § 13160.1. Federal certificate fee.

¹⁷⁰ Title 23, Division 3, Chapter 9, Article 1, Sections 2200, 2200.4, 2200.5 And 2200.6 of the California Code of Regulations, for fee calculator see http://www.waterboards.ca.gov/water_issues/programs/cwa401/.

¹⁷¹ Porter-Cologne Water Quality Control Act. CAWC. Division 7. Chapter 3. Article 4. § 13160.1. Federal certificate fee.

magnitude of the impact and the funds go back into the agency budget.¹⁷² Ohio's administrative code also establishes that the state can "require that the applicant perform various environmental quality tests," at any point, "prior to the issuance of the §401 water quality certification or prior to, during, or after the discharge of dredged or fill material."¹⁷³

Missouri charges a flat fee of \$75 for any certification request. In contrast, for certification of Corps permits Oregon fees have been based on the amount of removal or fill above set thresholds, unless activities are exempt from fees. Oregon bases application fees for hydroelectric projects on the theoretical horsepower of the proposed project and uses them for the certification program's base funding. In addition, each applicant for hydropower 401 certification must pay for DEQ's costs to review the application and make a decision; these costs are invoiced and are separate from the annual fee.¹⁷⁴

North Carolina's permit fee for §401 certification is \$240 for an impact less than 150 feet of stream or 1 acre of wetlands and \$570 for larger impacts; any changes to or renewals of a certification require a new permit fee before processing will begin.¹⁷⁵ North Carolina also offers express permits, stormwater management plan review, and stream origin and perennial or intermittent determinations that are given priority and turned around twice as fast and cost roughly five times as much; permits and plan reviews starting at \$1000 and stream determinations starting at \$200 for 2 calls per property.¹⁷⁶ In Montana, certification fees are established in regulations as a minimum of \$400.00, or 1% of the gross value of the proposed project, not to exceed \$20,000.00.¹⁷⁷ Authority for certification fees in Montana is based in statutory authority granting ability to charge a fee sufficient to cover the direct and indirect costs of reviewing an application, conducting compliance inspections, monitoring water quality and preparing water quality rules or guidance documents, however in reality most projects eligible for certification in Montana are reviewed under state §318 authorities and assessed a \$250 fee.¹⁷⁸ Many tribal certification programs do not charge any fee for water quality certification.

B. Staffing Sources

States and tribes vary in staff sizes. States with independent permitting authorities for the aquatic resources covered under §401 and additional waters of the state can have very large staffs and budgets. North Carolina has upwards of 40 people working on §401 certification and their permitting program for aquatic resources not covered under the CWA. In contrast, Nebraska has a staff of one-half a Full Time Equivalent (FTE) to address both 401 water quality

¹⁷² Ohio Revised Code 3745-114: \$500 per acre of wetland; \$5 per linear foot or \$200, whichever is greater, for ephemeral streams; \$10 per linear foot or \$200, whichever is greater, for intermittent streams; \$15 per linear foot or \$200, whichever is greater, for perennial streams; \$3 per cubic yard of dredged or fill material for lakes.

¹⁷³ Ohio Revised Code 6111.

¹⁷⁴ Oregon Revised Statute §468.065, (2003).

¹⁷⁵ North Carolina Department of the Environment and Natural Resources, Wetlands/401 Certification Unit, 401 Water Quality Certification Fee Memorandum, <http://h2o.enr.state.nc.us/ncwetlands/fees.html> (accessed 5/4/06).

¹⁷⁶ NC Division of Water Quality, Wetland Buffer Program Express Review Fees (2004), found at http://h2o.enr.state.nc.us/ncwetlands/express_review.htm.

¹⁷⁷ Administrative Rule of Montana 17.30.201(6).

¹⁷⁸ Administrative Rule of Montana 17.30.201(6).

certification for discharges into waters of the US and letters of opinion for impacts to waters that are only state waters.¹⁷⁹

Some agencies that frequently request 401 certification have found it helpful to fund a position in the certification agency dedicated to their project requests. This seems particularly common with State DOTs.¹⁸⁰ Since DOTs are frequent applicants for certification and often involve large complex projects with fragmented impacts that demand significant time and resources to evaluate, they are often very interested in helping speed up the certification review. North Carolina and Oregon have arranged for §401 certification program staff to be funded by their DOT under the conditions that the staff almost exclusively work on DOT projects (ensuring immediate attention and therefore a quicker review turnaround) but answer and report exclusively to the certification program management. In Oregon, the 401 staff for certification of non-hydroelectric projects consists of two to three positions, one of which is periodically DOT funded. In North Carolina the certification program staff is roughly 40 people of which 11 are funded by the DOT. North Carolina also gets funding from other state programs and EPA grants. However resource constraints are handled at the state and tribal agency, the following information may help program staff obtain data and technical resources more easily and perhaps expand the recuperative effect of permit fees.

C. Data Sources

Certification decisions are based on the potential impacts to water quality goals as specified in water quality standards, other CWA provisions identified in Section III.C. *Scope of Review For §401 Certification Decisions* above, and other appropriate water quality based state or tribal laws and regulations.¹⁸¹ However, to support a 401 certification decision, the certifying agency may need additional information on the site, associated aquatic resources, or the effect of the potential impacts, than what may have been included in the application materials. The most relevant source of information to the §401 program is the water quality standards and the information used to develop them. Also helpful may be information used to develop or contained in a Total Maximum Daily Load (TMDL). In addition, other state and tribal departments and agencies such as those implementing the CWA §402 National Pollutant Discharge Elimination System program house information that could be applicable to the potential impacts associated with project proposals. Old certifications should also provide insight into not only the type and extent of information used in the past to assess similar projects but also potential sources of information on the resource, the potential impacts or the possible conditions that would mitigate the effects on water quality. Useful and important data may also be found outside the application and state government sources. For example, the professional community

¹⁷⁹ The letters of opinion identify that the project as proposed or with the listed changes / additions, likely will not violate title 117 Water Quality Standards, however these letters are not legally binding or directly enforceable.

¹⁸⁰ State DOTs and Port authorities also fund positions at in the US Army Corps of Engineers and other permitting agencies. However, no examples have been identified where private entities have funded state or tribal 401 certification positions.

¹⁸¹ 33 USC 1341(d); CWA §401(d); *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006); *Jefferson County PUD v. Washington Dept. of Ecology*, 511 U.S. 700, 711 (1994).

including the federal informational tools, professional societies, academic publications and trade journals contain copious amounts of information. But their usefulness is dependent on the extent to which the user can find the most salient information quickly.

1. The Applicant

Information provided by the applicant is the logical first resource to consult when evaluating a proposed project. Since time is often at a premium, the materials received from the applicant can not always be recreated by the certifying agency to ensure accuracy; therefore they must be trusted when verified against the best professional judgment of the staff and outside experts as needed. Several states and Corps Districts have developed lists of consultants and applicants who have established records of accurate submissions, which helps certifying agencies focus their verification efforts on less established or familiar applications and applicants. In some states such as Kansas, applicants must research other permitted impacts and uses in the watershed and alert them to the proposed project, helping to identify and address cumulative and cross project impacts in the watershed.

2. Other State, Tribal or Local Agencies

Other state, tribal and local agencies may also house relevant and valuable information for the certification process. Departments of Transportation conduct large studies of cumulative and secondary impacts to aquatic resources which can be a rich source of information on ways to analyze and address large projects with fragmented impacts. State natural resource inventories are often developed by the cooperative extension service and can provide detailed information on the natural resource base and conservation issues facing the region. Local governments may have developed watershed plans that could provide useful site specific data, many local watershed groups and monitoring efforts are registered through EPA's Adopt Your Watershed program and can be found by searching the website.¹⁸² Similarly, looking at the activities and experiences of neighboring state and tribal water quality certification programs, and their analysis could provide valuable information.

State Natural heritage programs are a good place to find detailed information on aquatic resources, plants, animals, communities, land cover and land ownership. The Natural Heritage Programs focus on providing information on the status and distribution of native animals and plants, emphasizing species of concern and high quality habitats such as wetlands. Heritage specialists collect, verify, and disseminate information to a broad community of users for many applications including the listing and delisting of threatened and endangered species and the development of environmental assessments. In addition, NatureServe works with the network of state (and international) natural heritage programs to provide information about rare and endangered species and threatened ecosystems.¹⁸³ NatureServe collects and manages detailed local information on plants, animals, and ecosystems, and develops information products, data management tools, and conservation services. NatureServe's publications include an analysis of the biodiversity value of geographically isolated wetlands in all 50 states which may be a useful starting point for assessing the habitat value of potentially impacted wetland resources.¹⁸⁴

3. Federal Information Tools

¹⁸² <http://cfpub.epa.gov/surf/locate/index.cfm>

¹⁸³ <http://www.natureserve.org/>.

¹⁸⁴ <http://www.natureserve.org/publications/isolatedwetlands.jsp>.

Many federal programs and agencies develop, collect, disseminate and produce informational tools that could provide valuable information to a certification decision. When using databases that may be more historical than current, it is always important to verify that the data remains valid. The United States Geological Survey (USGS) studies and provides information on a variety of topics including biology, geography, hydrology, geology, regional studies, natural hazards, the environment, and wildlife and human health.¹⁸⁵ The National Wetlands Inventory (NWI) produces and provides information on the characteristics, extent, and status of the nation's wetlands and deepwater habitats and other wildlife habitats.¹⁸⁶ The national wetland plant list, status and trends reports, and other reports focusing on national, geographic or resource specific areas are also available from the NWI.

EPA's Watershed Assessment, Tracking and Environmental Results (WATERS) tool unites water quality information from several independent and unconnected databases and displays the information in maps and reports.¹⁸⁷ The EPA programs covered in WATERS are: water quality standards, water quality inventory (§305(b) report), total maximum daily load (TMDL – §303(d) list), water quality monitoring, NPDES permits, safe drinking water, fish consumption advisories, nonpoint source pollution, nutrient criteria, beach program and vessel sewage discharge. One of the tools in WATERS is the EPA's EnviroMapper which provides access to environmental information in a geographic format.

EnviroMapper can display various types of environmental information, including air releases, drinking water, toxic releases, hazardous wastes, water discharge permits, and Superfund sites. EnviroMapper includes: federal, state, and local information about environmental conditions and features, facility and chemical-based information from the Envirofacts Warehouse, information about surface water features and their environmental condition, the Superfund program's National Priorities List sites, results from environmental sampling and monitoring in the New York City area in the aftermath of the events of September 11, 2001, information on demographic characteristics, and areas served by Brownfields Grantees and select brownfield's properties. It combines interactive maps and aerial photography to locate, display and query brownfield grant types and properties addressed by cities, counties, states, and tribes.

The Natural Resource Conservation Service (NRCS) provides technical expertise in such areas as animal husbandry and clean water, ecological sciences, engineering, resource economics, and social sciences. In particular, the NRCS' expertise focuses on soil science and natural resource conditions and trends in the United States, represented in soil surveys and the National Resources Inventory.¹⁸⁸ Technical guides are the primary scientific references for NRCS. They contain technical information about the conservation of soil, water, air, and related plant and animal resources. The technical guides used in each field office are localized so that they apply specifically to the geographic area for which they are prepared and are referred to as Field Office Technical Guides (FOTGs). The electronic FOTGs (eFOTGs) include automated data bases, computer programs, and other electronic-based materials and are broken into five sections of information: general information, soil and site information, conservation management

¹⁸⁵ <http://www.usgs.gov/science.html>.

¹⁸⁶ <http://www.nwi.fws.gov/>.

¹⁸⁷ <http://www.epa.gov/waters/about/index.html>.

¹⁸⁸ <http://www.nrcs.usda.gov/about/>.

systems, practice standards, and specifications and conservation effects.¹⁸⁹ The NRCS also provides soil survey information through their online mapping tool the Web Soil Survey.¹⁹⁰ Because 401 certification decisions may require consideration of soil characteristics which can affect the aquatic resource impacts of a proposed project, such as stormwater runoff.

Surf Your Watershed is an EPA web based service that helps to locate, use, and share environmental information about states and watersheds.¹⁹¹ Information is provided by 8 digit HUC (Hydrologic Unit Code) but can be accessed using stream name, state, city, zip code, tribe or county. Links to United States Census Bureau information and USGS data on stream flow, science, water use and selected abstracts are provided as well as information on the counties, American Heritage Rivers, National Estuary Programs, states, and watersheds upstream and downstream. Surf Your Watershed contains the following databases: Adopt Your Watershed, Wetlands Restoration Projects, American Heritage Rivers Service and SURF-Environmental Websites Database. Adopt Your Watershed is a database of watershed groups throughout the nation. You can search for a group in your area either by state, zip code, group name, keywords or even stream name. Wetlands Restoration Projects includes self reported information about ongoing wetlands projects organized by state and watershed. American Heritage Rivers Services is a multi-agency initiative to help communities find support for their rivers. The database offers a "yellow pages" directory of services to help communities revitalize their rivers environmentally, economically and culturally. SURF-Environmental Websites Database is a directory of websites dedicated to environmental issues and information. It is searchable by keywords, geography, organization, or even by the information medium.

The USGS' National Hydrography Dataset (NHD) is the underlying data maps for surf your watershed and many other geo-referenced programs however it can also be viewed independently of these other applications.¹⁹² The NHD is a comprehensive set of digital spatial data that contains information about surface water features such as lakes, ponds, streams, rivers, springs and wells. Within the NHD, surface water features are combined to form "reaches," which provide the framework for linking water-related data to the NHD surface water drainage network. These linkages enable the analysis and display of water-related data in upstream and downstream order. The NHD Viewer provides direct access to the NHD through an interactive web viewer.¹⁹³ In addition to the NHD, the USGS also collects surface water data nationally at thousands of sites. The information varies from historical only to daily values or even real time measurements. The USGS also houses a repository of water quality measurements and assessments taken at surface water monitoring stations and independent locations. Both the surface water and water quality information is available through the USGS's National Water Information System (NWIS) website.¹⁹⁴

EPA also hosts two data warehouses for water quality information, the Legacy Data Center (LDC), and STORET. The LDC is a static, archived database and STORET is an operational system actively being populated with water quality data. Both systems contain raw

¹⁸⁹ <http://www.nrcs.usda.gov/technical/efotg/>.

¹⁹⁰ <http://websoilsurvey.nrcs.usda.gov/app/>

¹⁹¹ <http://www.epa.gov/surf/>.

¹⁹² <http://nhd.usgs.gov/>.

¹⁹³ <http://nhd.usgs.gov/data.html>; or directly to the viewer at <http://nhdgeo.usgs.gov/viewer.htm>.

¹⁹⁴ Surface water monitoring: <http://waterdata.usgs.gov/nwis/sw>; Water quality monitoring: <http://waterdata.usgs.gov/nwis/qw>.

biological, chemical, and physical data on surface and ground water collected by federal, state and local agencies, Indian Tribes, volunteer groups, academics, and others. All 50 States, territories, and jurisdictions of the U.S. are represented in these systems. Both the LDC and STORET are web-enabled and available to the public.¹⁹⁵

The Federal Emergency Management Agency (FEMA) publishes flood hazard zone maps which may also be useful in 401 certification assessments. The FEMA Flood Insurance Rate Maps (FIRMs) available online are identified as FIRMette and are free on the Map Service Center website.¹⁹⁶

Note, the above geographic tools are not complete or definitive sources for location specific information. They have been developed using information reported by local, state and regional governments and non-governmental organizations. The presence or absence of information should be treated as informative but not a definitive indication of conditions on the ground.

4. Professional Societies and Private Sector Tools

In addition to state, tribal and federal programs and tools, private industry and professional organizations and their associated journals can provide very detailed information on individual aquatic resource types and impacts. The Society of Wetland Scientists (SWS)¹⁹⁷, American Water Resources Association (AWRA)¹⁹⁸, American Society of Limnology and Oceanography (ASLO)¹⁹⁹, American Fisheries Society (AFS)²⁰⁰, American Society of Ichthyologists and Herpetologists²⁰¹, North American Benthological Society²⁰², and the American Ornithologists' Union²⁰³ are a few such professional organizations that may provide access to valuable information for certification decisions and condition development. Non-profit organizations dedicated to watershed protection also produce many reports, technical guides, and often review and compare assessment methods focusing on everything from site design to watershed modeling and planning – one such organization is the Center for Watershed Protection²⁰⁴ and specifically its Stormwater Manager's Resource Center.²⁰⁵

The number of internet mapping tools available to the public has grown dramatically in recent years and offers users various types of information and levels of detail. Google Earth and Microsoft's Bing are the most popular examples of desktop mapping tools that are novice user friendly, allow for some integration of information from independent sources, and provide satellite imagery.²⁰⁶ For more advanced users Geographic Information System (GIS) platforms

¹⁹⁵ <http://www.epa.gov/storet/index.html>

¹⁹⁶ <http://msc.fema.gov/webapp/wcs/stores/servlet/FemaWelcomeView?storeId=10001&catalogId=10001&langId=-1>

¹⁹⁷ <http://www.sws.org/>.

¹⁹⁸ <http://www.awra.org/index.html>.

¹⁹⁹ <http://aslo.org/index.html>.

²⁰⁰ <http://www.fisheries.org/html/index.shtml>.

²⁰¹ <http://www.asih.org/>.

²⁰² <http://www.benthos.org/index.cfm>.

²⁰³ <http://www.aou.org/>.

²⁰⁴ <http://www.cwp.org/index.html>

²⁰⁵ <http://www.stormwatercenter.net/>

²⁰⁶ Microsoft Bing Maps <http://www.microsoft.com/maps/>; Google Earth <http://earth.google.com/>.

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allow users to import existing geo-referenced maps and datasets and create new, or manipulate existing, data layers to produce customized maps and geographic analysis.

Note, the use of any private software for official government business may require licensing fees and agreements.

Appendix A: Clean Water Act Section 401

33 USC 1341; CWA §401

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any 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 in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302 of this title, and there is not an applicable standard under sections 306 and 307 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 511(c) of this title. Such State or interstate agency shall 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. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or

permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 301, 302, 303, 306, or 307 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 301, 302, 303, 306, or 307 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 301, 302, 303, 306, or 307 of this title.

(6) Except with respect to a permit issued under section 402 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.