

**ATTORNEYS GENERAL OF THE STATES OF WASHINGTON, CALIFORNIA,
CONNECTICUT, MARYLAND, NEW MEXICO, OREGON, AND THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

May 11, 2021

By U.S. Mail and E-Mail: Scott.a.spellmon@usacoe.army.mil
Attn: United States Army Corps of Engineers
Lieutenant General Scott A. Spellmon
55th Chief of Engineers and
Commanding General of the U.S. Army Corps of Engineers
441 G Street NW
Washington, D.C. 20314-1000

Re: State Section 401 Certifications of Nationwide Permits

INTRODUCTION

The undersigned States have significant concerns regarding the United States Army Corps of Engineers (the Corps) handling of the reauthorization of Nationwide Permits pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. We mince no words: the Corps' actions will cost jobs, millions of dollars in unnecessary delays, and will allow some projects to go forward without any conditions to protect state water quality, resulting in significant environmental degradation. Moreover, these actions are purportedly based on the United States Environmental Protection Agency's (EPA) 2020 section 401 regulation that: (1) is subject to review and potential rescission or significant revision pursuant to Executive Order 13990; and (2) even as written, the Corps is misapplying. It is not too late to correct these issues and repair the longstanding cooperative relationship between the States and the Corps in the implementation of the Clean Water Act. In fact, the impacts of these actions are wholly avoidable, and both the States and EPA have proposed ways in which this situation can be remedied. We urge the Corps to immediately engage with the States to address the concerns set out below.

BACKGROUND

On September 11, 2020, EPA's "Clean Water Act Section 401 Certification Rule," 85 Fed. Reg. 42210 (section 401 Rule), which drastically alters section 401 certification procedures, went into effect. Little more than a month later, on October 20, 2020, the Army Corps began requesting that certifying authorities issue section 401 certifications for more than 40 Nationwide Permits affecting tens of thousands of projects across the country. In doing so, the Corps took the unprecedented step of requesting that States certify draft Nationwide Permits that had only just been proposed for public comment a few weeks earlier and were thus still subject to change. Even though the existing Nationwide Permits would not have expired until 2022, the Corps stated that the reasonable period of time for certifying authorities to act on its request to certify all new Nationwide Permits was only 60 days, contrary to longer time periods allowed in previous years, and despite the fact that the Corps had express agreements with numerous states permitting up to one year for section 401 certification decisions. Numerous States requested that

this time period be extended as authorized under the Corps' and EPA's regulations and section 401 of the Clean Water Act. In a departure from its long-established practice of granting requests for expansion of review periods for far less complex and onerous section 401 certification reviews, the Corps summarily denied the States' requests.

This brief review period provided no time for States to consult with the Corps regarding how it intended to interpret and apply the new section 401 Rule. Indeed, the Corps provided no advance notice to States that it intended to take unprecedented actions such as refusing to incorporate state certification conditions and finding waivers of state section 401 authority based on the section 401 Rule.

1. "Decline to Rely" Letters

Despite the unjustifiably short review period imposed by the Corps, the States worked to review the Nationwide Permits and provide their certification decisions by the required deadlines. Rather than accepting these certifications as mandated by the both the Clean Water Act and the section 401 Rule, the Corps issued, or threatened to issue, letters that "decline to rely" on many of the state 401 certifications. Though rationale for these letters is somewhat unclear, our understanding is that the Corps apparently believes that certain language within the section 401 certifications creates a "re-opener" for states to revisit their 401 certifications for the Nationwide Permits. In addition, in California, the Corps identified certain certification conditions as "not acceptable" because of a purported "inconsistency with Corps Regulations."

The impact of the "decline to rely" letters is significant. Because of the letters, projects that would otherwise qualify for the streamlined Nationwide Permit process and the programmatic certifications that the state agencies specifically developed for these projects must now obtain individual section 401 certifications in affected states, resulting in costly and unnecessary delays.

These "decline to rely" letters are both illegal and unfounded. To begin with, the law is abundantly clear as to the proper means and forum for resolving disputes over the legality of section 401 certification conditions. If the Corps has a substantive issue with a state's section 401 condition, its only options are to accept the condition as written or file a lawsuit in state court challenging the condition. *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (stating that federal agencies' "role [in the section 401 certification process] is limited to awaiting and then deferring to, the final decision of the state."); *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").

The preamble to the section 401 Rule clearly makes this point: "[t]he EPA's final regulatory text . . . contemplate[s] that the federal licensing or permitting agency will review certifications only to ensure that certifying authorities have included certain required elements

and completed certain procedural aspects of a section 401 certification.” 85 Fed. Reg. 42267. If those requirements are met, “the federal agency must implement the certifying authority’s action, irrespective of whether the federal agency may disagree with aspects of the certifying authority’s substantive determination.” *Id.* at 42,268. As 40 C.F.R. § 121.10 expressly instructs, “[a]ll certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit.” The Corps cannot by unilateral action refuse to implement a state’s section 401 certification based on its own substantive disagreement with a particular certification condition.

Moreover, even if the “decline to rely” letters were procedurally valid, the Corps is incorrect in concluding that the certifications include re-opener provisions. While we do not agree that so-called “re-opener” provisions are unlawful, the specific language that the Corps found unacceptable falls into a few categories. Most of the objected-to language reflects the States’ concerns over being asked to certify Nationwide Permits with draft regional permit conditions. For that reason, the States’ section 401 certification decisions included provisions allowing them to revisit their certification to address final Nationwide Permit conditions that differ from the draft permit conditions. Other States, such as Washington and California, included language long used in prior Nationwide Permit 401 certifications stating that projects that do not qualify for Nationwide Permit coverage may need to obtain individual section 401 certifications.¹

Neither case creates the re-opener alleged by the Corps. For one, and as described in the preamble to the section 401 Rule, re-opener provisions are purportedly inconsistent with section 401 because such provisions would allow the certifying authority to “take an action to reconsider or otherwise modify a previously issued certification at some unknown point in the future.” 85 Fed. Reg. at 42,280. But regardless of whether this analysis is consistent with the Clean Water Act, neither of the certification conditions discussed above creates the re-opener alleged by the Corps because the conditions only allow the certifying authority to determine which projects fall within the proper scope of their certifications.

With regard to section 401 certification conditions allowing States to revisit the certification if the final permit conditions change, that language reflects the fact that the States were put in the untenable position of certifying Nationwide Permits when it was unclear as to what the final regional conditions would look like. It is our understanding that some States were not even provided draft regional conditions to evaluate. It should go without saying that States cannot provide final water quality certification of permits *that are not final*, and any interpretation of either section 401 or the section 401 Rule determining otherwise is manifestly unreasonable. A certification only applies to the permit as it was described in the request for

¹ Note that this letter does not discuss all the States’ section 401 certification conditions that the Corps has “declined to rely on” on the ground that they constitute “re-openers” in the Nationwide Permits context. Rather, the letter focuses on the most common examples of purported “re-opener” language.

certification. To the extent that what was described in the request changes, the certification is no longer valid. In the end, however, the draft conditions in most States were adopted unchanged. Thus, and as has been pointed out to the Corps repeatedly, most States' concerns over the need to revisit the final Nationwide Permits have been eliminated and the language in question rendered moot.

The Corps' concerns are similarly unfounded with regard to language stating that projects that do not qualify for Nationwide Permit coverage may need to obtain individual certifications. This language was used by California not as a condition that is imposed on dischargers that seek coverage under a Nationwide Permit, but simply as a reservation of rights. In Washington, the language in question was simply carryover language from prior certifications and that had indeed rarely—if ever—been invoked during the decades in which such language was in place. Washington has repeatedly offered to remove the conditions or agree not to invoke them. Despite these offers, the Corps has inexplicably refused to meaningfully engage with Washington on resolving the issue.

In both cases, the Corps should do what multiple States have urged: simply acknowledge that the conditions in question do not create a re-opener of the Nationwide Permit certifications, rescind the “decline to rely” letters, and not issue additional letters. In the alternative, we request that the Corps either re-open public comment on the final Nationwide Permits or extend its reasonable period of time determination, and allow States to supplement their certifications for the limited purpose of removing and/or clarifying the language at issue.

2. Waiver Determinations

In addition to the “decline to rely” letters, the Corps also issued waivers to several of the States' Nationwide Permit section 401 certifications based on alleged failures to comply with Section 121.7 of the section 401 Rule. This section of the rule purports to grant federal agencies the authority to declare waiver where certifying authorities fail to provide written explanations and citations to legal authority for the conditions imposed in their section 401 certification. In one case, the Corps declared waiver with regard to a State that failed to include certain material required by the section 401 Rule as result of a simple clerical error. That state swiftly sought to correct the error, only to be rebuffed by the Corps.

The federal government's authority to declare waiver based on federal procedural requirements is—at best—highly questionable. In drafting this provision of the section 401 Rule, EPA cited no authority for this position. Indeed, this portion of the rule flies in the face of congressional intent, applicable case law, and the foundation of “cooperative federalism” upon which the Clean Water Act is built. By the plain language of the Act, a State waives its section 401 authority only by “failing or refusing to act.” 33 U.S.C. § 1341(a)(1). An error of not marking off a procedural checkbox is not equivalent to “failing or refusing to act” on a

certification request. *See id.* Even if EPA does not rescind this provision of the section 401 Rule in the coming months, we have every confidence that it will be invalidated by the court in the States' pending legal challenge to the rule.

Placing legal deficiencies aside, however, the Corps' waiver declarations represent bad governance and are a slap in the face to the Corps' State partners. Impacted States where the Corps has declared waiver have requested an opportunity to remedy alleged procedural defects. The Corps has refused for reasons that defy logic. The Corps' assertion that it cannot allow certifying authorities to supplement section 401 certification decisions in the absence of regulations governing that process is clearly erroneous. The preamble to the section 401 Rule preserves federal agencies' authority to allow States to remedy purportedly deficient denials. 85 Fed. Reg. at 42,269. There is also nothing in the Clean Water Act that forbids an agency from allowing a state to correct a non-substantive clerical error in a certification decision. It is important to note that the Corps' requests for certifications of the Nationwide Permits were among the first to be received by the States after the section 401 Rule took effect. It is thus patently unreasonable for the Corps' to refuse to allow any flexibility to the States considering there were, and still are, many questions and uncertainties regarding the application of the rule.

More importantly, even if supplementation was substantive, allowing the States to supplement is well within the Corps' authority, especially under the circumstances here. The Clean Water Act allows state certifications to occur within a "reasonable period of time (which shall not to exceed one year)." 33 U.S.C. § 1341(a)(1). While we disagree with this portion of the section 401 Rule, the rule authorizes the Corps to determine what constitutes a reasonable amount of time within that one-year timeframe. Because the Corps' certification requests were received by the States several months ago, we are still well within the one-year window authorized by the Clean Water Act. Neither section 401 itself nor the section 401 Rule prevent the Corps from extending its reasonable period determination to allow the States to supplement their certification decisions. Section 401 requires certification to occur before a federal license or permit authorizes an "activity." *Id.* A Nationwide Permit by itself does not authorize anything until an applicant applies for, and is granted, coverage. As such, limitations on modifying section 401 certifications contained in other subsections of section 401 do not apply to a state's programmatic certification of a general permit. The Corps, therefore, has clear authority to extend its arbitrary 60-day timeframe for certifying authorities to supplement certification decisions for the Nationwide Permits. Its refusal to do so here is unreasonable and unacceptable.

CONCLUSION

In summary, the Corps must change course and engage with the States to find solutions to the current Nationwide Permit situation—a situation that is the direct result of the Corps' misapplication of an already haphazard section 401 Rule that may be rescinded or significantly revised in coming months. Refusal to rectify the situation will result in significant harm to the

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environment, regulated parties, impacted industries, and impacted states. We look forward to your response.

SIGNATURES

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General of Washington

By: /s/ Kelly T. Wood
KELLY T. WOOD
Managing Assistant Attorney General
Washington Office of the Attorney General
PO Box 40117
Olympia, Washington 98504-0117
Telephone: (360) 586-5109
E-mail: Kelly.Wood@atg.wa.gov

FOR THE STATE OF CALIFORNIA and
THE CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD

ROB BONTA
Attorney General of California

By: /s/ Tatiana K. Gaur
TATIANA K. GAUR
ADAM LEVITAN
Deputy Attorneys General
California Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone (213) 269-6329
E-mail: Tatiana.Gaur@doj.ca.gov

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General of Connecticut

By: /s/ Jill Lacedonia
JILL LACEDONIA
Assistant Attorney General
Connecticut Office of the Attorney General
165 Capitol Avenue
Hartford, Connecticut 06106
Telephone: (860) 808-5250
E-mail: Jill.lacedonia@ct.gov

FOR THE STATE OF MARYLAND

BRIAN FROSH
Attorney General of Maryland

By: /s/ John B. Howard, Jr.
JOHN B. HOWARD, JR.
Special Assistant Attorney General
Maryland Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
Telephone: (401) 576-6970
E-mail: jbhoward@oag.state.md.us

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FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico

By: /s/ William Grantham
WILLIAM GRANTHAM
Assistant Attorney General
New Mexico Office of the Attorney General
Consumer and Environmental Protection Div.
201 Third Street NW, Suite 300
Albuquerque, NM 87502
Telephone: (505) 717-3520
Email: wgrantham@nmag.gov

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon

By: /s/ Paul Garrahan
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301-4096
Telephone: (503) 947-4593
E-mail: paul.garrahan@doj.watate.or.us

cc: Radhika Fox
Principle Deputy Administrator
Office of Water
United States Environmental Protection Agency
Fox.Radhika@epa.gov