



October 21, 2019

Via Regulations.gov Portal

Water Docket
U.S. Environmental Protection Agency
EPA West, Room 3334
1301 Constitution Ave., NW
Washington, DC 20004

Re: Comments of the American Fuel & Petrochemical Manufacturers, the American Exploration and Production Council, the American Petroleum Institute, the Domestic Energy Producers Alliance, and the Independent Petroleum Association of America on the Environmental Protection Agency’s Proposed Rule Updating Regulations for Water Quality Certifications under Section 401 of the Clean Water Act; EPA-HQ-OW-2019-0405.

Dear Sir/Madam:

This letter provides comments from the American Fuel & Petrochemical Manufacturers (“AFPM”), the American Exploration and Production Council (“AXPC”), the American Petroleum Institute (“API”), the Domestic Energy Producers Alliance (“DEPA”), and the Independent Petroleum Association of America (“IPAA”) (collectively, “the Associations”), in response to the Environmental Protection Agency’s (“EPA’s” or “The Agency’s”) Request for Comments on the Agency’s Proposed Rule Updating Regulations for Water Quality Certifications under Section 401 of the Clean Water Act (“CWA” or “the Act”).¹ The Associations appreciate EPA’s efforts to provide long overdue updates to the regulations governing water quality certifications as well as the Agency’s commitment to pursue these regulatory reforms through transparent stakeholder engagement.

I. SUMMARY OF COMMENTS

The Associations support EPA’s proposed updates to its regulations governing water quality certifications under Section 401 of the CWA. These changes matter greatly to the Associations

¹ 84 Fed. Reg. 44,080 (Aug. 22, 2019).

and their members. Our members are on the forefront of a transformational era of increased domestic oil and natural gas production. The growth of domestic oil and natural gas production and our ability to responsibly develop these resources in new areas of the country have created the need for more infrastructure to safely bring these resources to consumers, refineries, and processing facilities. For all but the staunchest opponents of any oil and natural gas developments, expanding and updating America's energy infrastructure is viewed as a prudent investment for the safe and environmentally responsible movement of important resources to areas that need those resources. For those opposed to any oil or natural gas development, America's energy infrastructure needs are viewed as little more than convenient opportunities to deploy regulatory strategies designed to delay needed projects and sever resources from markets. And increasingly, those regulatory tactics include use of the Section 401 certification process to attempt to delay, constrain, or altogether veto nationally important energy projects.

As discussed in the detailed comments below, interpreting Section 401 to allow a single state to wield disproportionate power over projects of national importance is intensely problematic. The efficient permitting of energy projects requires the collaboration of state and federal authorities and the consideration of state and national interests. In enacting Section 401, Congress preserved an important role for states in evaluating the water quality impacts of federal infrastructure projects, but it did not prescribe that role as without limit or to the detriment of federal licensing or permitting authority.

More specifically, Section 401 preserves for states the highly circumscribed role of evaluating a proposed project's potential impacts on certain enumerated CWA provisions. CWA Section 401 does not empower a state to deny a certification request based on generalized objections about hydrocarbon development or hydraulic fracturing, concerns about the continued role of natural gas in power generation, or interests in expanding the use of renewable sources of energy. Nor does CWA Section 401 allow states to deny or withhold a certification based on potential environmental impacts of the proposed project other than potential point source discharges to waters of the United States ("WOTUS") that can result in possible violations of water quality standards.²

Notwithstanding this temporally limited role of state Section 401 certifications in federal permitting and licensing decisions, as acknowledged by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), "it is now commonplace for states to use Section 401 to hold federal licensing hostage."³ Using Section 401 "to hold federal licensing hostage,"⁴ or basing state certification decisions on policy considerations that cannot realistically be construed as credible concerns over water quality impacts is impermissible under the CWA and several other statutes through which Congress tasked federal agencies with decision-making authority.

The Associations therefore welcome EPA's recognition that the Agency has a role in improving the implementation of Section 401 by states and other certifying authorities. The Agency's Section 401 regulations were promulgated before the 1972 CWA Amendments that entirely transformed the Act to impose the discharge prohibition and permitting framework that is now the cornerstone

² 40 C.F.R. § 121.2(a)(3).

³ *Hoopa Valley Tribe v. Federal Energy Regulatory Comm'n*, No. 14-1271, slip op. at 9, (D.C. Cir. Jan. 25, 2019).

⁴ *Hoopa Valley Tribe v. Federal Energy Regulatory Comm'n*, No. 14-1271, slip op. at 9, (D.C. Cir. Jan. 25, 2019).

of the CWA. EPA's 1971 regulations also obviously predate the increased strategic misuse of state Section 401 authority. The specific examples of state misuse that are discussed further in the detailed comments below clearly informed EPA's proposed regulatory changes. The Associations believe that these proposed changes were appropriately tailored to the known avenues for state misuse of Section 401 and crafted in a way that helps further, rather than undermine, the principles of cooperative federalism that Congress established in the CWA. In the detailed discussion below, the Associations also offer the following specific comments on EPA's proposal:

- The Associations support EPA's proposed determination that the need for Section 401 certification arises only when a federally licensed or permitted activity has the potential to result in a discharge *from a point source into a WOTUS*.⁵ We believe this restrained application of Section 401 is commanded by the text and structure of the CWA, consistent with the applicable case law, and in harmony with the Agency's longstanding interpretations.
- The Associations support EPA's proposed interpretation of the reasonable limits the Act places on the scope of the review undertaken by, and therefore the types of conditions that can be imposed by, states and other certifying authorities.
- The Associations concur with EPA's proposed conclusion that "section 401 is best interpreted as protecting water quality from federally licensed or permitted activities with point source discharges to waters of the United States by requiring compliance with the CWA as well as EPA-approved state and tribal CWA regulatory programs."⁶
- The Associations support EPA's proposed conclusion that "[t]he scope of a section 401 certification is limited to assuring that a discharge from a federally-licensed or permitted activity will comply with water quality requirements."⁷
- The express text of Section 401 plainly states that a certifying authority waives its certification authority over a federal license or permit if the certifying authority "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request."⁸
- The Associations support EPA's proposal to reaffirm that federal agencies have the discretion to impose reasonable timeframes of less than one year.⁹ As explained by the D.C. Circuit, "while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year."¹⁰
- The Associations support EPA's proposed conclusion that the review period for a certification request begins when the project proponent submits the certification request to the certifying authority. We believe that this interpretation is consistent with the Act and, given recent experiences with states that have sought to toll the start date of their review

⁵ See 84 Fed. Reg. at 44,100.

⁶ 84 Fed. Reg. at 44,103.

⁷ 84 Fed. Reg. at 44,106.

⁸ 33 U.S.C. 1341(a)(1).

⁹ 84 Fed. Reg. 44,108.

¹⁰ *Hoopa Valley Tribe v. FERC*, 913 F. 3d 1099, 1104 (D.C. Cir. 2019).

long after their receipt of certification requests, we believe this proposed interpretation is quite necessary.

- The Associations support EPA’s proposed conclusion that the CWA does not allow certifying authorities to stop and restart their review in order to artificially extend Section 401’s statutorily prescribed deadlines.

II. THE ASSOCIATIONS AND THEIR INTERESTS

AFPM is a national trade association representing virtually all U.S. refining and petrochemical manufacturing capacity. AFPM members strengthen economic and national security while supporting more than 3 million jobs nationwide. AFPM’s member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make the millions of products that make modern life possible. To produce these essential goods, AFPM members depend on all modes of transportation to move their products to and from refineries and petrochemical facilities and have made significant infrastructure investments to support and improve the safety and efficiency of the transportation system. AFPM member companies depend upon an uninterrupted, affordable supply of crude oil and natural gas as feedstocks for the transportation fuels and petrochemicals they manufacture. Pipelines are the primary mode for transporting crude oil and natural gas to refiners and petrochemical facilities and refined products from those same facilities to distribution terminals serving consumer markets. Pipelines provide a safe, reliable, efficient, and cost-effective way to move bulk liquids, particularly over long distances. AFPM member companies own, operate, and rely on pipeline infrastructure as part of their daily operations. AFPM member companies also are leaders in human safety and environmental responsibility. AFPM acknowledges the need for robust analyses of infrastructure projects to ensure that environmental impacts are appropriately considered.

API is a nationwide, non-profit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API’s more than 600 member companies include large integrated companies, as well as exploration and production, refining, marketing, pipeline and marine businesses, and service and supply firms. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability. API and its members are committed to the safe transportation of natural gas, crude oil and petroleum products, and support sound science and risk-based regulations, legislation, and industry practices that have demonstrated safety benefits. API members engage in exploration, production, and construction projects that routinely involve both state and federal water permitting and are, and will continue to be, affected by CWA Section 401.

The AXPC is a national trade association representing 29 of America’s largest and most active independent natural gas and crude oil exploration and production companies. The AXPC’s members are “independent” in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts which operate in different segments of the energy industry, such as refining and marketing. The AXPC’s members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce the natural gas and

crude oil that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

DEPA is a nationwide collaboration of 32 coalition associations—from California to West Virginia, Texas to Montana—representing about 10,000 individuals and companies engaged in domestic onshore oil and natural gas exploration and production. DEPA believes in seeking common sense solutions to ensure environmentally responsible exploration and production of oil and natural gas throughout the nation.

The IPAA represents the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that will most directly be impacted by federal regulatory policies. Independent producers develop about 91 percent of American oil and natural gas wells, produce about 83 percent of American oil, and produce more than 90 percent of American natural gas and natural gas liquids. The IPAA is dedicated to ensuring a strong, viable American oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

The Associations' members have a substantial interest in ensuring that the CWA Section 401 certification process preserves the important role of states in protecting water quality, while at the same time providing appropriate limits where states use their certification authority to achieve policy goals or outcomes unrelated to water quality. The Associations' members' operations are subject to numerous environmental laws and regulations, including those promulgated under the CWA. While each of these laws provides a role for the federal government, the states often are the primary regulators.¹¹

Notwithstanding the role states play in regulating industry, certain oil and natural gas projects require federal licenses or permits that may trigger the need to obtain one or more state certifications under Section 401. Of the various sectors of the energy industry that are subject to Section 401 certification requirements, the midstream sector is perhaps impacted to the greatest degree.

With the advent of the shale revolution, America's energy landscape has transformed. In just the last decade, as U.S. oil production has doubled and natural gas production has risen by 46 percent, the U.S. has gone from importing crude oil and liquefied natural gas to exporting it. Today, our nation is an energy superpower and leads the world in petroleum production. Energy infrastructure connects the dots to make this economic prosperity and energy security possible and brings benefits of its own. For example, federal safety data shows that pipelines are the safest way to deliver large volumes of oil, petroleum products, and natural gas. Over one million American jobs

¹¹ States have discretion to determine the scope and extent of the regulatory authority they exercise under the CWA. For instance, Section 402 of the CWA allowed, but did not compel, states to obtain authority to issue National Pollutant Discharge Elimination System permits. Most states sought and obtained the delegation of authority from EPA but Massachusetts, New Hampshire, and New Mexico each opted to allow EPA to remain the primary permitting authority.

could be supported on an average annual basis by investing in oil and natural gas infrastructure between 2014 and 2025.¹²

As the Associations' members continue to redraw America's energy map by more efficiently and effectively unlocking hydrocarbon resources in new areas, the importance of the pipeline projects necessary to connect production sites with processing centers, refining centers, and ultimately consumers has also increased. In the significant majority of instances in which companies seek state certifications for such projects, states dutifully approach their Section 401 certification obligations with a genuine interest in identifying and addressing discharges with potential adverse impacts on water quality. At times, however, some states have viewed their Section 401 authority as a means to thwart or attack projects as a whole, to extract concessions unrelated to water quality, or to promote state-specific energy policies or political goals.

The CWA authorizes EPA to delegate water quality standard-setting and effluent permitting to approved state programs. So, while Congress largely assigned the federal government exclusive jurisdiction over certain projects of national importance, it did not ignore the important role of states, tribes, and other jurisdictions. Striking a balance between federal and state authority, Section 401 is a mechanism by which Congress preserved a finite, precisely circumscribed, but very important role for states within otherwise purely federal project approvals. Appropriately balancing the role of states and tribes in these inherently federal approvals is an unquestionably difficult task, and the Associations commend EPA for the care and transparency with which the Agency has approached this effort. Like EPA, the Associations and their members are committed to the protection of our nation's water resources and recognize the critical role that the CWA preserved for states, through Section 401 and otherwise, to protect these resources. We are ardent in our desire to work with federal and state regulators to ensure that EPA's regulations respect state sovereignty under the CWA and to identify the least restrictive means possible to prohibit the still relatively uncommon, but increasingly prevalent, misuse of Section 401 by states attempting to make energy policy decisions that Congress committed to the federal government.

Our commitment toward clear and consistent compliance under Section 401 is reflected in the Associations' engagement on this particular issue. On October 18, 2017, API and AFPM submitted comments to the Subgroup to the Department of Defense ("DoD") Regulatory Reform Task Force on existing Army Corps regulations that may be appropriate for repeal, replacement, or modification to alleviate unnecessary regulatory burdens as specified under Executive Order 13777. Both API and AFPM implored the Army Corps to streamline its regulatory requirements in ways that protect the environment and promote transparency while increasing the clarity, certainty, and timely decision-making needed for effective investment decisions.

API had also asked the Army Corps to modify its Section 401 rules in 33 CFR Section 325.2(b)(ii) and other applicable regulations to clearly reflect statutory requirements relating to review periods for states to issue Section 401 certifications, to provide direction in its regulations to states and other authorities as to conditions that trigger the review time, and to strictly and consistently enforce compliance with Army Corps regulations.

¹² [https://www.api.org/~media/Files/Policy/American-Energy/EnergyWorks-Primer-High.pdf](https://www.api.org/~/media/Files/Policy/American-Energy/EnergyWorks-Primer-High.pdf)

The Associations also supported the underlying policy goals laid out in the President’s April 10, 2019 Executive Order on Promoting Energy Infrastructure and Economic Growth (“EO”), which sought to promote private investment in the nation’s energy infrastructure through, among other efforts, “the efficient permitting processes procedures...”¹³. This support was reflected in the May 24, 2019 comments that API and IPAA each submitted to EPA in response to the Agency’s solicitation of recommendations for reforming EPA’s Section 401 regulations. Once again, although the Association expressed the need for EPA to reform its regulations to minimize state misuse of the Section 401 certification process, we remained steadfast in our belief that EPA must undertake these reforms through a balanced, transparent, and cooperative process that respects state sovereignty.

The Associations are pleased that EPA’s proposal reflects the Agency’s continued support for a rigorous, consistent, and transparent process for Section 401 certifications. We are encouraged that EPA’s proposal would maintain the vital role of states in protecting water quality within their borders. Section 401 reviews that are timely conducted and appropriately focused on potential water quality impacts of project discharges are integral to developing infrastructure that reliably provides clean and affordable energy to American families and businesses every day.¹⁴

III. DETAILED COMMENTS

While states’ exercise of Section 401 authority has not historically been a significant issue for pipeline, wellsite, or refinery projects, in recent years, energy project opponents have increasingly utilized CWA Section 401 to delay or effectively veto various projects without just cause. As discussed below, interpreting Section 401 to allow a single certifying authority to wield disproportionate power over projects of national importance is problematic. The efficient permitting of energy projects requires the collaboration of state and federal authorities and the consideration of state and national interests. In enacting Section 401, Congress preserved an important role for states in evaluating the water quality impacts of federal infrastructure projects, but it did not prescribe that role as without limit or to the detriment of federal licensing or permitting authority. Unfortunately, in some cases, state misuse of Section 401 has compromised the permitting and licensing process. Increased clarity about the proper scope of, and limits to, state certification authority is therefore needed to ensure that critical energy and other infrastructure projects can be planned and permitted in a timely manner. EPA’s proposed changes with respect to the scope and timing of Section 401 reviews reflect that the Agency also recognizes the need for greater clarity and efficiency in the permitting process.

A. Context for, and Role of, CWA Section 401 Certifications

Under Section 401 of the CWA, “[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters” must seek “a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions” of the CWA.¹⁵ Section 401 further provides that “[n]o license or permit

¹³ <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-energy-infrastructure-economic-growth/>.

¹⁴ <https://www.api.org/news-policy-and-issues/news/2019/08/09/cwa-certifications>.

¹⁵ 33 U.S.C. § 1341(a)(1).

shall be granted if certification has been *denied* by the State,” but, if a state “*fails or refuses to act* on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived.”¹⁶

When read in isolation, state authority under CWA Section 401 appears comprehensive and definitive. When state certification authority under CWA Section 401 is read in the context of the exclusive jurisdiction preserved for the federal government in issuing certain permits and licenses, however, the narrow role of states under the CWA Section 401 program becomes much more apparent.

Indeed, Section 401 preserves for states the highly circumscribed role of evaluating a proposed project’s potential impacts on certain enumerated CWA provisions. Notwithstanding this temporally limited role of state Section 401 certifications in federal permitting and licensing decisions, as acknowledged by the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”), “it is now commonplace for states to use Section 401 to hold federal licensing hostage.”¹⁷ As such, in order to provide context for the limited role of state Section 401 certifications in the overall federal licensing in permitting process, the Associations herein provide an overview of the process Congress prescribed for permitting natural gas pipelines. While natural gas pipeline permitting is but one of several types of federal approvals that can trigger state certification requirements under Section 401,¹⁸ we believe it illustrates that state Section 401 review is a component in a much larger, and more complex, interstate approval process that is inherently federal in nature. And, as is likely obvious, instances of state misuse of the Section 401 certification process are of utmost concern to the Associations’ members.

1. The Natural Gas Act of 1938 (“NGA”)

Companies seeking to build interstate natural gas pipelines must first obtain federal approval. The Natural Gas Act of 1938 (“NGA”) provides the statutory framework for this process.¹⁹ Congress passed the NGA to ensure patch-work state-by-state regulatory regimes would not impede interstate commerce. Specifically, under Section 7(c) of the NGA, “a natural gas company must obtain from the Federal Energy Regulatory Commission (“FERC”) a ‘certificate of public convenience and necessity’ before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce.”²⁰ In assessing “public convenience and necessity,” FERC considers “all factors bearing on the public interest,”²¹ including potential environmental impacts.²² “FERC will grant the certificate only if it finds the company able and

¹⁶ *Id.* (emphasis added).

¹⁷ *Hoopa Valley Tribe v. FERC*, No. 14-1271, slip op. at 9, (D.C. Cir. Jan. 25, 2019).

¹⁸ The Associations’ members are also routinely subject to Section 401 reviews in the context of Section 404 permitting and in permitting oil pipelines.

¹⁹ 15 U.S.C. Sec. 717.

²⁰ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 302 (1988); see 15 U.S.C. § 717f(c)(1)(A).

²¹ See *Office of Consumers’ Counsel v. FERC*, 655 F.2d 1132, 1146 (D.C. Cir. 1980).

²² e.g., *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967–68 (D.C. Cir. 2000).

willing to undertake the project in compliance with the rules and regulations of the federal regulatory scheme.”²³

FERC’s authority under the NGA is exclusive: “Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.”²⁴ “FERC’s exclusive purview” includes the regulation of “facilities [that] are a critical part of the transportation of natural gas and sale for resale in interstate commerce.”²⁵ In this “exclusively federal domain,” states may not regulate.²⁶

Pipeline routing is the definitive example of an issue committed to FERC’s exclusive authority.²⁷ Nor could it be otherwise. Determining an interstate pipeline’s route—including which states it will cross, where it will do so, and how far it will travel within their borders—is a task that must be completed by a centralized body with the entire nation’s public interest in mind, not by local “agencies with only local constituencies.”²⁸ Otherwise, each state would be free to say, “Not in my backyard,” thereby depriving other states and the nation of the pipeline’s benefits and undermining the NGA’s purpose of “ensur[ing] that natural gas consumers have access to an adequate supply of natural gas at ‘just and reasonable rates.’”²⁹

FERC also has primary authority to consider a pipeline project’s potential environmental impacts, which includes consideration of routes that could reduce environmental impacts. Under the NGA, FERC is “the lead agency ... for the purposes of complying with” the National Environmental Policy Act (“NEPA”).³⁰ Thus, “FERC undertakes its own environmental analysis pursuant to the requirements of” NEPA, “which ... FERC considers in reaching its ultimate routing determination.”³¹ This authority is likewise exclusive, except as to the narrow question of water-quality compliance under Section 401.³² Here again, the Associations discuss NEPA reviews in

²³ *Schneidewind*, 485 U.S. at 302.

²⁴ *Id.* at 305.

²⁵ *Id.* at 308.

²⁶ *Id.* at 305; see, e.g., *N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 819–20, 822–24 (8th Cir. 2004) (NGA preempted state-law environmental provisions); *E. End Prop. Co. No. 1, LLC v. Kessel*, 851 N.Y.S.2d 565, 571 (N.Y. App. Div. 2007) (similar); *No Tanks Inc. v. Pub. Utils. Comm’n*, 697 A.2d 1313, 1315 (Me. 1997) (similar).

²⁷ See *Wash. Gas Light Co. v. Prince George’s Cty. Council*, 711 F.3d 412, 423 (4th Cir. 2013) (“the NGA gives FERC jurisdiction over the siting of natural gas facilities”); see also, e.g., *Guardian Pipeline, LLC v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 975 (N.D. Ill. 2002) (where “FERC has approved the route ... [a]ny objections to the condemnation of public land for the construction of a natural gas pipeline [are] preempted”); *Skyview Acres Co-op., Inc. v. Pub. Serv. Comm’n*, 558 N.Y.S.2d 972, 975 (N.Y. App. Div. 1990) (State’s “authority [was] preempted ... to the extent that it purported to approve the route of an interstate gas pipeline”); cf. *No Tanks*, 697 A.2d at 1315 (“[State] review of safety and environmental issues surrounding the siting of the [natural gas] tank would be an attempt to regulate matters within FERC’s exclusive jurisdiction”).

²⁸ *Id.* at 1316.

²⁹ *Wash. Gas*, 711 F.3d at 422–23.

³⁰ 15 U.S.C. § 717n(b)(1).

³¹ *Skyview Acres*, 558 N.Y.S.2d at 975.

³² 15 U.S.C. § 717b(d)(3); see *infra* p. 18. The NGA also preserves States’ authority under the Coastal Zone Management Act and the Clean Air Act, 15 U.S.C. § 717b(d)(1)–(2), which are not at issue here.

the context of natural gas pipeline permitting, but as discussed below, these extensive NEPA reviews are required for many other types of federal licensing and approvals.

2. NEPA

For any “major Federal action[] significantly affecting the quality of the human environment,” NEPA requires federal agencies to prepare “a detailed statement,” known as an Environmental Impact Statement (“EIS”), on “ (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed action.”³³

The preparation of an EIS has three basic stages. First, the agency must “determin[e] the scope of issues to be addressed,” with the input of (among many others) “affected Federal, State, and local agencies.”³⁴ Second, the agency prepares a draft EIS, which must “disclose and discuss ... all major points of view on the environmental impacts of the alternatives including the proposed action.”³⁵ The agency must then obtain comments from any other federal agency with relevant jurisdiction or expertise, “[a]ppropriate State and local agencies,” and the public.³⁶ Finally, the agency must prepare a final EIS that “respond[s] to comments,” “discuss[es] ... any responsible opposing view,” and “indicate[s] the agency’s response to the issues raised.”³⁷

These “‘action-forcing’ procedures” serve to ensure “that agencies take a ‘hard look’ at environmental consequences.”³⁸ Affected parties—including states—can challenge the adequacy of an agency’s NEPA review and its consideration of an EIS by seeking judicial review of the final agency determination.³⁹ The courts carefully review an agency’s NEPA compliance to ensure that its “duty ... to consider environmental factors not be shunted aside in the bureaucratic shuffle.”⁴⁰ “NEPA itself does not mandate particular results,” however: “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.”⁴¹

In the natural gas pipeline permitting context, FERC’s regulations require the preparation of an EIS for “[m]ajor pipeline construction projects ... using rights-of-way in which there is no existing natural gas pipeline.”⁴² A FERC EIS must comply with the NEPA regulations and also summarize the project’s “significant environmental impacts”; any “alternative ... that would have a less severe

³³ *Id.* Agencies typically begin by preparing an Environmental Assessment, or EA, which must “provide sufficient evidence and analysis for determining whether” the project will have a “significant impact.” 40 C.F.R. § 1508.9(a). If so, an EIS must be prepared. If not, the EA’s thorough assessment helps ensure NEPA compliance. *See id.*

³⁴ 40 C.F.R. § 1501.7(a)(1).

³⁵ *Id.* § 1502.9(a).

³⁶ *Id.* § 1503.1(a).

³⁷ *Id.* § 1502.9(b).

³⁸ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

³⁹ *See id.* at 345–46.

⁴⁰ *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 787 (1976).

⁴¹ *Robertson*, 490 U.S. at 350.

⁴² 18 C.F.R. § 380.6(a)(3).

environmental impact,” which includes alternative routes; any potential “mitigation measures” and impacts that cannot be mitigated; and studies that might provide useful data.⁴³

FERC’s “public convenience and necessity” analysis carefully accounts for these environmental impacts, alternatives, and potential mitigation measures. Based on this comprehensive process, FERC may deny approval, or it may require the adoption of alternatives or mitigation measures.⁴⁴ FERC’s “environmental assessment ... is not subject to modification” by state agencies; instead, they must intervene in the FERC proceedings to offer their input and then, if necessary, seek judicial review.⁴⁵ And with good reason: “Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate needs.”⁴⁶

Importantly, while the NEPA review process provides meaningful opportunities for states and other stakeholders to engage with federal agencies on the potential impacts of federal action, the NEPA review process is far from the only avenue for state and local engagement. Numerous other statutes provide mechanisms for state and stakeholder engagement on a wide variety of potential impacts from federal projects:

- Endangered Species Act (“ESA”)⁴⁷ - Section 7 of the ESA requires that federal agencies consult with the ESA administering services to ensure that any projects authorized, funded, or carried out by them are not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of critical habitat of such species.
- National Historic Preservation Act (“NHPA”)⁴⁸ - Section 106 of the NHPA and implementing regulations require federal agencies, before issuing a license (permit), to adopt measures when feasible to mitigate potential adverse effects of the licensed activity and properties listed or eligible for listing in the National Register of Historic Places. The Act's requirements are to be implemented in cooperation with state historic preservation officers.
- Coastal Zone Management Act (“CZMA”)⁴⁹ – The CZMA was enacted to protect the nation's coastal zone and is implemented through state-federal partnerships. Under CZMA Section 307, applicants for federal licenses or permits must obtain from potentially impacted coastal states certification that the proposed project complies with the states’ coastal zone management plan.
- Essential Fish Habitat Provisions (“EFH”) of the Magnuson-Stevens Act – The EFH provisions promote the protection of essential fish habitat in the review of projects conducted under federal permits, licenses, or other authorities that affect or have the

⁴³ *Id.* § 380.7.

⁴⁴ *E.g., Midcoast Interstate*, 198 F.3d at 966, 968.

⁴⁵ *Skyview Acres*, 558 N.Y.S.2d at 975; see 15 U.S.C. § 717r(a).

⁴⁶ *No Tanks*, 697 A.2d at 1316.

⁴⁷ 16 U.S.C. 1531 *et seq.*

⁴⁸ 16 U.S.C. 470 *et seq.*

⁴⁹ 16 U.S.C. 1451 *et seq.*

potential to affect such habitat. EFH requires that federal agencies consult with the National Marine Fisheries Service for any permits which may adversely affect essential fish habitat identified under the Magnuson-Stevens Act.

These are just a few of the statutory provisions through which states and other stakeholders can engage with agencies like FERC, raise concerns about potential impacts from projects, and request consideration of alternatives.⁵⁰ They are an important part of the cooperative federalism approach through which Congress apportioned jurisdiction between the federal government and the states. These statutory provisions, and others like them, demonstrate that states have multiple opportunities outside of Section 401 to provide input on federal projects. They also provide context for the narrow but important jurisdiction conferred to states by Section 401. In light of all these other meaningful engagement and review opportunities, one recognizes that requiring states to focus their 401 reviews on water quality furthers, rather than undermines, cooperative federalism.

3. Section 401 of the CWA

In this subsection, the Associations discuss Section 401 in specific relation to natural gas pipeline permitting.⁵¹ By examining Section 401 in the context of other statutes, like the NGA and NEPA, one appreciates that Section 401 certification is but one part of a larger federal process.

As noted above, the NGA vests FERC with exclusive authority over all salient aspects of the natural gas pipeline permitting process. This exclusive jurisdiction is necessary to facilitate the nation's collective interest in promoting the safe movement of natural gas in interstate commerce. The rigorous process by which FERC analyzes the "public convenience and necessity" of a natural gas pipeline requires an extensive and meticulous review of potential environmental impacts, including consideration of potential impacts to water quality, drinking water resources, and aquatic species. It is from this comprehensive analytical framework that CWA Section 401 carves out a carefully cabined exception to FERC's exclusive authority in this area by permitting states to certify whether potential discharges from a federally licensed project will comply with water-quality standards.⁵²

Embedded within the text of CWA Section 401 are meaningful limits on the requirements to obtain a certification. Most significantly, applicants are only required to obtain certification from states where a project could result in a *point source* discharge to *WOTUS*.⁵³ Section 401 is not implicated for nonpoint discharges or other diffuse releases to groundwater. Nor is Section 401 implicated

⁵⁰ Indeed, these are just a few of the examples of statutory provisions through which federal projects are reviewed and state feedback is solicited and considered. For a large pipeline project that would traverse federal, state, and tribal lands, the statutory authorities under which the project is reviewed are far more numerous.

⁵¹ While the Associations herein discuss Section 401 in the context of the NGA's Federal Approval process, it is important to note that pipeline projects also often require Section 404 permits that are also subject to state review under Section 401.

⁵² 33 U.S.C. § 1341(a).

⁵³ See *Oregon Natural Desert Assoc. v. Dombeck*, 151 F. 3d. 945 (9th Cir. 1998); See also *Oregon Natural Desert Assoc. v. US Forest Service*, 550 F.3d 778 (9th Cir. 2006).

when the discharge enters waterbodies that are purely within state jurisdiction and outside the definition of WOTUS.

Consistent with this limited applicability, and with few exceptions, courts have correctly construed this limited delegation as “[r]elinquish[ing] only one element of the otherwise exclusive jurisdiction granted [to FERC] It authorizes states to determine and certify only the narrow question whether there is ‘reasonable assurance’ that the construction and operation of a proposed project ‘will not violate applicable water quality standards.’”⁵⁴ “Congress did not empower the States to reconsider matters unrelated to their water quality standards, which [FERC] has within its exclusive jurisdiction”⁵⁵ Such second-guessing would “countermand the carefully worded authority of section 401(a)(1)” and “usurp the authority that Congress reserved for FERC.”⁵⁶

Thus, CWA Section 401 does not empower a state to deny a certification request based on generalized objections about hydrocarbon development or hydraulic fracturing, concerns about the continued role of natural gas in power generation, or interests in expanding the use of renewable sources of energy. Nor does CWA Section 401 allow states to deny or withhold a certification based on potential environmental impacts of the proposed project other than potential point source discharges to WOTUS that can result in possible violations of water quality standards.⁵⁷

States exercising authority under CWA Section 401 must do so in a way that is reasonable and adequately explained.⁵⁸ When deciding whether or not to issue a certification, a state 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.’”⁵⁹

As such, when a state endeavors to use Section 401 “to hold federal licensing hostage,”⁶⁰ or otherwise base its certification decision on policy considerations that cannot realistically be construed as credible concerns over water quality impacts, that determination is impermissible under the CWA and several other statutes through which Congress tasked federal agencies with decision-making authority. As discussed in more detail below, the Associations therefore welcome EPA’s efforts to ensure that the Agency’s regulations preserve the very important, but highly circumscribed, role of states under Section 401.

B. Support for Proposed Updates

In the following subsections, the Associations express support for EPA’s effort to reform its Section 401 regulations and provide our comments on specific elements of the Agency’s proposal.

⁵⁴ *Niagara Mohawk Power Corp. v. DEC*, 624 N.E.2d 146, 149 (N.Y. 1993).

⁵⁵ *Power Auth. v. Williams*, 60 N.Y.2d 315, 325 (N.Y. 1983).

⁵⁶ *Niagara Mohawk*, 624 N.E.2d at 150.

⁵⁷ 40 C.F.R. § 121.2(a)(3).

⁵⁸ *National Fuel Gas Supply Corporation v. New York State Dep’t. of Envtl. Conservation*, No. 17-1164-cv, (2d Cir. 2019).

⁵⁹ *Appalachian Voices v. State Water Control Bd.*, No. 18-1079, (4th Cir. 2019) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

⁶⁰ *Hoopa Valley Tribe v. FERC*, No. 14-1271, slip op. at 9, (D.C. Cir. Jan. 25, 2019).

1. Regulatory Updates are Long Overdue and Increasingly Necessary

The Associations believe that the Agency's Section 401 regulations are out of date and in great need of revision. EPA first promulgated these regulations in 1971,⁶¹ and since revised them only once in 1979.⁶² While the age of these regulations certainly indicates they may be amenable to revision, the Associations believe that certain events and actions that have transpired in the ensuing decades provide additional and extremely persuasive justification for EPA's present effort to reform the Agency's water quality certification regulations.

i. 1972 Amendments to the Federal Water Pollution Control Act of 1948

As the significant majority of EPA's overall regulatory framework for state water quality certifications came into being through a 1971 rulemaking, the rules predate the 1972 amendments⁶³ to the Federal Water Pollution Control Act of 1948 ("FWPCA").⁶⁴ While Congress also amended the FWPCA before and after the 1972 Amendments, no statutory revision was more central to Congress's transformation of the FWPCA to today's CWA. Indeed, as Congress noted at the time, the 1972 Amendments represented a "total restructuring" and "complete rewriting" of the existing statutory framework.⁶⁵ EPA's proposal recognized the profound impact of 1972 Amendments and used that understanding to interpret and distinguish some of the earlier case law on Section 401.

Prior to the 1972 Amendments, the regulatory framework for the FWPCA, as amended by the Water Quality Act of 1965,⁶⁶ was based exclusively on ambient water quality standards that Congress anticipated would be used to develop standards for discharge to the receiving waters. While the predecessor Act regulated only water quality (largely as defined by states) and could only be used to regulate the discharging sources of impairment if water quality standards were not being met,⁶⁷ practical application of the framework demonstrated its ineffectiveness; between 1948 and 1972, the Act's enforcement framework "resulted in only one prosecution."⁶⁸ This deficiency informed Congress's 1972 effort to amend the Act, and this deficiency was the impetus for Congress's enactment of Section 301, which states, "Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."⁶⁹

Congress then defined the term "pollutant" quite broadly to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and

⁶¹ 36 Fed. Reg. 22,487 (Nov. 25, 1971).

⁶² 44 Fed. Reg. 32,899 (June 7, 1979).

⁶³ Pub. L. No. 92-500, 86 Stat. 816 (1972).

⁶⁴ Pub. L. No. 80-845, 62 Stat. 1155 (1948).

⁶⁵ *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (quoting legislative history of 1972 amendments).

⁶⁶ Pub. L. No. 89-234, 79 Stat. 903 (1965).

⁶⁷ See *NDRC v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990). Thus, a discharger needed no permit to deposit pollutants into a water that had "room to spare" in achieving its water quality standards.

⁶⁸ See David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENVTL. L. 267, 304 (2009).

⁶⁹ 33 U.S.C. 1311(a).

industrial, municipal, and agricultural waste discharged into water.”⁷⁰ In contrast to Congress’s *broad definition* of pollutant, Congress much more *narrowly defined* the “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source,” such as a pipe, ditch, or other “discernible, confined and discrete conveyance.”⁷¹

Therefore, when Section 301 was enacted, together with its concordant definitions, for the first time, it became unlawful to discharge pollutants into WOTUS from a point source unless the discharge is in compliance with certain enumerated sections of the CWA, including obtaining authorizations pursuant to the Section 402 National Pollutant Discharge Elimination System (“NPDES”) permit program or the Section 404 dredge-and-fill permit program.⁷²

Because of the 1972 Amendments, the NPDES permitting program now constitutes “[t]he primary means for enforcing these limitations and standards” from point sources.⁷³ Point source dischargers are now required to obtain NPDES permits that “place limits on the type and quantity of pollutants that can be released into the Nation’s waters”⁷⁴ through point sources, and “defines, and facilitates compliance with, and enforcement of ... a discharger’s obligations under the [CWA].”⁷⁵

The 1972 Amendments similarly resulted in the first ever regulation of the discharge of dredged or fill material into WOTUS, including wetlands. Section 404 now requires putative dischargers to obtain a permit before any dredged or fill material may be discharged into WOTUS from activities such as fill for water resource development, infrastructure development, and mining projects.

In addition to fundamentally shifting the Act from its purely “harm-based” regulatory approach to its focus on point source discharges of pollutants to WOTUS, the 1972 Amendments also protected and preserved a role for states and tribes. These amendments first authorized states to assume program authority for issuing Section 402 and 404 permits within their borders.⁷⁶ States also became responsible for developing water quality standards for WOTUS within their borders,⁷⁷ developing total maximum daily loads (“TMDLs”) for waters that are not meeting established water quality standards⁷⁸ while at the same time retaining authority to protect and manage waters that are not considered WOTUS.⁷⁹

Most important to the present comments, however, the 1972 Amendments enacted Section 401, which updated the preexisting Section 21(b) of the FWPCA so it that could be implemented consistent with the 1972 Amendments’ focus on, and definition of, *point source discharges to WOTUS*. In other words, because the predecessor Act regulated only water quality and could only

⁷⁰ 33 U.S.C. at 1362(6).

⁷¹ 33 U.S.C. 1362(12), (14).

⁷² 33 U.S.C. 1342, 1344.

⁷³ *Arkansas et al. v. Oklahoma et al.*, 503 U.S. at 101 (1992).

⁷⁴ *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. at 102 (2004).

⁷⁵ *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. at 205 (1976).

⁷⁶ 33 U.S.C. 1342(b), 1344(g).

⁷⁷ 33 U.S.C. at 1313, 1315.

⁷⁸ 33 U.S.C. 1313(d).

⁷⁹ *See, e.g.*, 33 U.S.C. 1251(b), 1251(g), 1370, 1377(a).

be used to regulate the pollution-contributing sources of impairment if water quality standards were not being met, Congress drafted Section 21(b), and EPA promulgated its 1971 regulations pursuant to Section 21(b)⁸⁰ to focus on those *federal activities* that could adversely impact ambient water quality standards. Once the 1972 Amendments fundamentally changed the Act to prohibit all *discharges* “[e]xcept as in compliance with” precisely enumerated CWA provisions, Congress made a corresponding change to Section 21(b) so that it reflected the new prohibition and permitting regime for *discharges*. Unfortunately, EPA never followed suit to update the regulations the Agency promulgated in 1971. Thus, the Agency’s regulations have for nearly five decades remained out-of-step with Congress’s most consequential changes to the CWA—the prohibition on point source discharges to WOTUS “[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of th[e] Act.”⁸¹

It is also important to recognize, as EPA’s proposal does,⁸² that FWPCA Section 21(b) was enacted prior to the statutory requirement that the federal government consider the potential environmental impacts of its actions. It provided states authority to examine the water quality impacts of federal actions in the absence of any federal obligation to examine their own obligations. Section 401, on the other hand, is informed by the 1969 passage of NEPA, which requires the federal government to consider the potential environmental consequences—water quality-related or otherwise—of its actions. While NEPA does not subsume the Section 401 water quality certification process, it does place Section 401 in a context distinct from that which existed in 1971. The state water quality certification process is not the sole means by which potential environmental impacts of federal actions are identified, scrutinized, mitigated, or avoided. The 1972 Amendments followed the passage of NEPA by a mere two years. Congress understood the important role NEPA would play in examining the impacts of federal actions, including those subject to state certifications under Section 401. Congress continued to view state water quality certifications as important, but it clearly did not intend them to duplicate NEPA’s processes in scope, scale, or duration. Section 401 was intended to be, and should remain, a focused inquiry on very specific types of discharges and a very narrow set of potential impacts.

ii. Increasing Misuse of Section 401 Certification Authority

In addition to the major statutory changes that took place after EPA first promulgated its state certification regulations, in recent years, the Associations have observed increasing instances of misuse of Section 401 certification authority by a handful of states. This strategic misuse, which was not contemplated by EPA when it promulgated the Agency’s certification regulations in 1971, also demonstrates the need for EPA’s effort to update its regulations.

In some cases, states misuse their Section 401 certification authority by either ignoring the Act’s deadlines for review or employing tactics designed to allow the states to stop or restart deadlines at will. This was the case with the \$683 million Constitution Pipeline, for which project proponents

⁸⁰ See *NDRC v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990). Thus, a discharger needed no permit to deposit pollutants into a water that had “room to spare” in achieving its water quality standards.

⁸¹ 33 U.S.C. 1311(a).

⁸² See 84 Fed. Reg. at 44,088.

were forced to wait three years before the New York Department of Environmental Conservation (“NYDEC”) ultimately issued its renewal decision (a denial).⁸³

In other cases, some states have begun denying certifications based on alleged impacts that have nothing to do with the proposed project’s anticipated discharges or their presumed effect on water quality standards. An example of this type of misuse is found in NYDEC’s denial of a certification request for the Millennium Valley Lateral pipeline, not because of water quality impacts, but because the state did not concur with FERC’s analysis of the potential impacts of greenhouse gas emissions associated with the ultimate combustion of the natural gas the pipeline would convey to power plants and other markets.⁸⁴ This was also the case with the Millennium Bulk Terminals – Longview LLC project in Washington State, where the state denied the project proponent’s certification request five years after receipt based on assertions of “significant unavoidable adverse impacts” such as air quality, vehicle traffic, and noise.⁸⁵

At other times, states will approve projects but will only do so after imposing on the project proponent onerous conditions for licensing, many of which have nothing to do with protecting water quality. This was the case with Exelon Generation Co., LLC’s attempt to renew the license for the Conowingo dam and hydroelectric project.⁸⁶ Notwithstanding that the project contributes no phosphorus or nitrogen to the river in which it operates (the Susquehanna River), “[a]s the cost of such a federal license, Maryland insists that the Conowingo Project remove the phosphorus and nitrogen that flow downriver from New York, Pennsylvania, and Maryland. In lieu of cleaning the Susquehanna, Maryland would accept \$172 million from Exelon each year for the next 50 years.”⁸⁷

It is examples like these that caused the D.C. Circuit to recently conclude that “it is now commonplace for states to use Section 401 to hold federal licensing hostage.”⁸⁸ And while this increased misuse of state certification authority occurs for a wide variety of federal authorizations, the impact of this misuse is perhaps felt most acutely in the energy industry and among those who rely on affordable and dependable energy.

This is particularly a problem for consumers in New England, where consumers pay 53 percent more for their electricity than the U.S. average in part because pipeline project delays have inhibited access to natural gas supplies from the Marcellus Shale. Additionally, regional utilities have begun to impose natural gas new connection moratoriums in New York and Massachusetts, citing an inability to meet growing demand with current pipeline capacity constraints. For example, in January 2019, Consolidated Edison, Inc., (Con Edison)—the largest utility provider in the New York City area, serving 10 million customers—announced a moratorium on new

⁸³ *Petition for Review, Constitution Pipeline Co. v. FERC*, No. 18-1251 (D.C. Cir. Sept. 14, 2018).

⁸⁴ Letter from Thomas S. Berkman, Deputy Comm’r and Gen. Counsel, N.Y. State Dep’t of Env’tl. Conservation, Re: 3-3399-0071/00001 – Valley Lateral Project Notice of Decision, to Georgia Carter, Vice President and Gen. Counsel, Millennium Pipeline Co. (Aug. 30, 2017); *see also* 84 Fed. Reg. at 44,090 (FN 19).

⁸⁵ WDEC, In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals-Longview, LLC, Order # 15417 (Sept. 26, 2017).

⁸⁶ *Exelon Generation Co. v. Grumbles*, Slip. Op at 18-1224 (March 29, 2019).

⁸⁷ *Id.* at 1.

⁸⁸ *Hoopa Valley Tribe v. Federal Energy Regulatory Comm’n*, No. 14-1271, slip op. at 9, (D.C. Cir. Jan. 25, 2019)

natural gas connections in most of Westchester County, effective March 16. Demand for natural gas in the New York City area has increased in recent years, leading to concerns about reliability of service. Con Edison claimed it cannot guarantee uninterrupted service to new natural gas connections. Between the announcement of the moratorium and its start on March 16, Con Edison received 1,600 applications for firm natural gas service in the moratorium area. Customers on firm natural gas service contracts have delivery priority above those on interruptible contracts.⁸⁹

This misuse of Section 401 certification authority to attempt to dismantle the federal-state balance in approving important energy projects could not have been foreseen, and in fact, was not foreseen by EPA when the Agency promulgated its state certification regulations in 1971. There is no doubt, however, that this misuse is increasingly prevalent today and that it hurts our nation's ability to safely bring energy to consumers. There is also no doubt that EPA is right to:

update its regulations to provide a common framework for consistency with CWA section 401 and to give project proponents, certifying authorities, and federal licensing and permitting agencies additional clarity and regulatory certainty.⁹⁰

2. EPA has thus far Proceeded and Should Continue to Proceed in a Manner that Meaningfully Preserves Cooperative Federalism While Restraining the Water Quality Certification Process to the Scope Intended by CWA Section 401

Grounded on principles of cooperative federalism, the CWA establishes states as the primary permitting and enforcement authorities:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.⁹¹

Thus, in recognition of the states' sovereignty and the fact that states are best situated to regulate their own resources, the CWA required EPA to coordinate its water resource protection efforts with the states.⁹² Nonetheless, while the Associations vehemently oppose any effort to intrude on state regulatory authority, we recognize those circumstances where Congress deemed it necessary

⁸⁹ <https://www.eia.gov/todayinenergy/>.

⁹⁰ See 84 Fed. Reg. at 44,081.

⁹¹ 33 U.S.C. § 101(b).

⁹² 33 U.S.C. § 101(g); 33 U.S.C. § 102(a).

to rest primary decision-making authority with federal agencies and/or more closely circumscribe the otherwise broad authority of states.

Section 401 of the CWA represents one of those circumstances where Congress deemed it necessary to prescriptively delineate a more narrow and focused role for states, so that the broad jurisdiction that the Act otherwise provides to states could not overwhelm or subsume the federal government's ability to issue licenses and permits for projects of national importance. Of particular relevance to the Associations' members, these projects of national importance include pipeline projects requiring "Notices to Proceed" from FERC and dredge-and-fill activities in WOTUS that require CWA Section 404 permits from the Army Corps. But Congress also designated federal agencies as the approval authorities for Section 402 industrial and municipal point source discharge permits issued by EPA, Army Corps permits issued under Sections 9 and 10 of the Rivers and Harbors Act ("RHA"), U.S. Coast Guard permits for bridges and causeways under Section 9 of the RHA, hydroelectric projects requiring FERC licenses, and nuclear power plants licensed by the Nuclear Regulatory Commission ("NRC").

Each of these seemingly diverse types of projects or actions require federal permits and/or licenses because Congress expressly and purposely committed these licensing/permitting decisions to the federal government. It did so for these very specific types of projects because of the profound impacts they have on the nation as a whole. These are the types of projects that protect and promote interstate commerce, trade, and national security. Federal decisions made in accordance with these statutory authorities are intended to facilitate policies and goals deemed necessary to the entire nation. Congress certainly understood that projects authorized pursuant to these statutes would have localized impacts, but it viewed it as inappropriate to allow these projects to be principally steered by parochial interests.

This is not to say that Congress's directive that federal agencies wield decision-making authority over a narrow set of projects and approvals requires the states to cede the entirety of their jurisdiction over projects requiring federal approval or preclude the states from otherwise exercising their primary permitting and enforcement authority. In enacting Section 401, Congress expressly preserved an important role for states in projects requiring federal approvals, but it imposed reasonable boundaries on state roles. Congress uniquely provided these boundaries in Section 401 because, unlike other provisions of the Act that direct federal agencies to cede authority to states, Congress recognized that for a handful of federal projects, federal agencies must share their authority with, rather than cede their authority to, the states. And unlike Agency interpretations of other provisions of the CWA, which require EPA to assess whether Congress conferred jurisdiction over a certain matter to federal agencies or states, the Agency's interpretation of Section 401 requires EPA to determine precisely how Congress intended federal agencies and states to share jurisdiction.

Interpretations that must balance, rather than assign, jurisdiction among states and federal agencies necessarily require a more precise and nuanced inquiry, and like all line-drawing exercises, are likely to result in disagreement about the precise distinctions made by the Agency. The Associations therefore recognize that reforming the Agency's Section 401 regulations presents a difficult but incredibly important task, and one that the Associations commend EPA for taking on.

i. *Support for EPA’s Engagement and Transparency*

We also commend EPA for its approach. When faced with the need to interpret their statutes to make fine-scale determinations about the precise interplay of federal and state jurisdiction, agencies must proceed with utmost caution and transparency. EPA has done just that.

To begin with, EPA examined the role of states under Section 401 in the context of the multiple statutes through which Congress expressly preempted state regulatory authority in order to reserve for the federal government decision-making authority over certain nationally important projects. In doing so, the Agency recognized that, in enacting Section 401, Congress was conferring to states a narrow exception to what otherwise are fields occupied entirely by federal law.⁹³ EPA was also guided by judicial interpretations noting that, although Section 401 does afford certain authority to states in an otherwise-preempted field, “that authority is not unbounded.”⁹⁴

In recognition that it must interpret Section 401 consistent with the bounded inquiry prescribed by Congress, EPA attempted to identify ways to preserve and protect the legitimate exercise of state authority under Section 401 while prohibiting state actions intended to expand that authority. The Agency did so through a very open and collaborative process, through which EPA engaged with states and tribes directly and through their various associations in a series of meetings, conference calls, hearings, and webinars.⁹⁵ EPA also reached out to federal agencies and project proponents about their experience with Section 401 certification processes. And finally, the Agency then meaningfully considered the feedback received during these outreach efforts to inform this present proposal. As such, EPA’s approach to this regulatory reform effort has not only complied with the APA’s requirements, it has exceeded these requirements.

Given the Agency’s efforts to obtain and be guided by stakeholder feedback, the Associations believe that EPA clearly recognized the unique import of interpreting the CWA as it relates to cooperative federalism. And while the Agency cannot be assured that all stakeholders will support the outcome of this regulatory reform effort, the Associations commend EPA for ensuring that the Agency approached this effort with care, clarity, and collaboration.

3. The Associations Support EPA’s Proposed Clarification of When a Section 401 Certification is Required⁹⁶

The Associations support EPA’s proposed determination that the need for Section 401 certification arises only when a federally licensed or permitted activity has the potential to result in a discharge *from a point source into a WOTUS*.⁹⁷ We believe this restrained application of Section 401 is

⁹³ See, e.g., *First Iowa Hydro-Elec. Coop.*, 328 U.S. at 164, 180; See also *California v. FERC*, 495 U.S. 490, 506 (1990).

⁹⁴ *PUD No. 1 of Jefferson Cty. v. Washington Dep’t of Ecology*, 511 U.S. 700, 712 (1994).

⁹⁵ “Clean Water Act Section 301 Water Quality Certification: Outreach, Feedback, & Next Steps” USEPA Office of Water (Apr. 17, 2019).

⁹⁶ See 84 Fed. Reg. at 44,100, “When Section 401 Certification is Required.” (emphasis added).

⁹⁷ See 84 Fed. Reg. at 44,100.

commanded by the text and structure of the CWA, consistent with the applicable case law, and in harmony with the Agency’s longstanding interpretations.

As explained in Section III.B. above, the same 1972 Amendments through which Section 401 was enacted also shifted the Act’s regulatory focus away from ambient standards and toward a prohibition and permitting framework for “the discharge of any pollutant by any person . . .”⁹⁸ The 1972 Amendments defined the phrase “discharge of any pollutant”⁹⁹ as “any addition of any pollutant to *navigable waters from any point source*.”¹⁰⁰

Congress then also further defined “navigable waters” as “the waters of the United States [“WOTUS”], including the territorial seas.”¹⁰¹ While the precise contours of this definition are the subject of a great deal of debate, there is no question that Congress intended the definition of WOTUS, and therefore “navigable waters,” to refer to a subset of surface waterbodies within the United States. The Associations submitted comments in strong support of the Agency’s most recent proposal to define WOTUS.¹⁰² We continue to support the proposed new WOTUS definition, but for purposes of these comments, the Associations simply note that the Act’s definition of “navigable waters” as WOTUS and the Agency’s interpretation of the meaning of “WOTUS” act as a limit on the types of projects subject to Section 401 certification in the same way these definitions act as a limit on the scope of activities subject to the Section 402 NPDES program or the Section 404 dredge-and-fill program. Like the permit requirements in Sections 402 and 404, Section 401 certification requirements are triggered based on discharges to WOTUS—not potential releases to groundwater, soil, isolated waterbodies, ephemeral flows, or any of the many other categories of waters that are outside of the definition of WOTUS.

The CWA’s definition of “point source” also serves as a limitation on the types of potential discharges that are subject to Section 401 certification requirements. When the definition is considered in context with the key phrases “to navigable waters” and “from any point source,” the intended concept of “discharge” becomes more discernable and narrow. The CWA defines “point source” as:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.¹⁰³

While the nonexclusive list of conveyances that follow the definition of “point source” identify some examples of possible conveyances to navigable waters, it is the definition itself (“any discernible, confined and discrete conveyance”¹⁰⁴) that provides meaning to the term “point source” and establishes limitations to the scope of activities subject to Section 401 certification

⁹⁸ 33 U.S.C. 1311(a).

⁹⁹ 33 U.S.C. § 1311(a).

¹⁰⁰ 33 U.S.C. § 1362(12) (emphasis added).

¹⁰¹ 33 U.S.C. § 1362(7).

¹⁰² 84 Fed. Reg. 4,154 (Feb. 14, 2019).

¹⁰³ 33 U.S.C. § 1362(14).

¹⁰⁴ 33 U.S.C. § 1362(14).

requirements.¹⁰⁵ Importantly, these are only examples, and these examples are only point sources *if* they are discernible, confined, and discrete. They do not subsume the CWA’s definition of a “point source,” nor do they turn groundwater or other diffuse releases into discrete conveyances. The meaning of the term “point source,” and therefore the scope of the Section 401 certification program, are not governed by the scope of the examples Congress provided—they are governed by the statutory definition of “point source” as “any discernible, confined and discrete conveyance.”¹⁰⁶

Within this statutory definition of “point source,” “conveyance” is the only noun, and therefore, the sole object with which to classify the meaning of the term “point source.”¹⁰⁷ According to the Supreme Court, the term “conveyance” “makes plain” that a point source must “convey the pollutant to ‘navigable waters.’”¹⁰⁸

Several other courts have similarly recognized that a “discharge of a pollutant” occurs only when a point source conveys the pollutant to navigable waters. The United States Court of Appeals for the Second Circuit (“Second Circuit”) explained that the term “‘point sources’ ... does not necessarily refer to the place where the pollutant was created but rather refers only to the proximate sources from which the pollutant is directly introduced to the designation water body.”¹⁰⁹ The D.C. Circuit has also long recognized that “the discharge of any pollutant” does not occur, nor are NPDES permitting requirements triggered, simply because a pollutant originated from or passed through a “point source” prior to being introduced to a navigable water:

[I]t does not appear that Congress wanted to apply the NPDES system whenever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, ‘all pollution released through a point source.’ Instead, as we have seen, the NPDES system was limited to ‘addition’ of ‘pollutants’ ‘from’ a point source.¹¹⁰

In other words, the CWA classifies whether a “discharge . . . to navigable waters” occurs based on whether a point source conveys the pollutant, as either point source or nonpoint source, at the point “when the pollutant first enters navigable water.”¹¹¹ A point source “need not be the original source of the pollutant,” but it does “need [to] convey the pollutant to ‘navigable waters.’”¹¹² Were the Act to be interpreted to conclude otherwise:

any non-point source pollution . . . could invariably be reformulated as point-source pollution by going up the causal chain to identify the initial point sources of the

¹⁰⁵ This definition also delineates the scope of other Sections of the CWA, such as Section 301, 402, and 404.

¹⁰⁶ 33 U.S.C. § 1362(14).

¹⁰⁷ 33 U.S.C. § 1362(14).

¹⁰⁸ *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

¹⁰⁹ *Catskill Mtns. v. City of New York*, 273 F. 3d 481, 493 (2nd Cir. 2001).

¹¹⁰ *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982).

¹¹¹ *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).

¹¹² *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (emphasis added).

pollutants that eventually ended up through non-point sources to come to rest in navigable waters.¹¹³

While the majority of the above-referenced case law discussed point source discharges in the context of the Act's discharge prohibitions and permit requirements, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") went further to expressly conclude that the word "discharge" as used consistently throughout the CWA refers to the release of effluent from a point source, and that this concept of "discharge" is also applicable to Section 401.¹¹⁴ Indeed, the distinct role and regulation of point sources is an "organizational paradigm of the Act."¹¹⁵

Moreover, as a practical matter, Congress's precise definition of "point sources" as the mechanisms that actually convey effluent into navigable waters makes sense. In the absence of the Act's more specified definition, there would be no reasonable limit to the universe of projects that could potentially require Section 401 state certifications which would effectively erase Congress's "clear and precise" distinction between point source discharges and nonpoint source pollution.¹¹⁶ As such, the Associations support EPA's proposal¹¹⁷ to explicitly specify that Section 401 certification is triggered only when the federally permitted or authorized activity may result a discharge that enters a WOTUS through a "discernible, confined and discrete conveyance."¹¹⁸

4. The Associations Support EPA's Proposed Clarification of the Appropriate Scope of a Section 401 Certification Reviews and Conditions

In addition to supporting the Agency's interpretation of the types of actions that Congress intended to trigger the Section 401 certification process, the Associations support EPA's proposed interpretation of the reasonable limits the Act places on the scope of the review undertaken by, and therefore the types of conditions that can be imposed by, states and other certifying authorities.

i. Scope of Section 401 Reviews¹¹⁹

The Associations concur with EPA's proposed conclusion that:

section 401 is best interpreted as protecting water quality from federally licensed or permitted activities with point source discharges to waters of the United States by requiring compliance with the CWA as well as EPA-approved state and tribal CWA regulatory programs.¹²⁰

¹¹³ *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 15-cv-1439, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017), *appeal docketed*, No. 17-2426 (2d Cir. Aug. 4, 2017).

¹¹⁴ *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1099.

¹¹⁵ *Or. Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008).

¹¹⁶ *See* S. Rep. No. 95-370, at 8.

¹¹⁷ *See* 84 Fed. Reg. at 44,098.

¹¹⁸ 33 U.S.C. § 1362(14).

¹¹⁹ *See* 84 Fed. Reg. at 44,103, "Appropriate Scope for Section 401 Certification Review."

¹²⁰ 84 Fed. Reg. at 44,103.

Under Section 401(a)(1), a state’s decision on whether to grant or deny certification must be based on whether the “*discharge*” will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of the Act:

Any 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 . . . that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title.¹²¹

As such, while the Associations support EPA’s proposal to identify limits to the scope of a state’s review of a certification request, in reality, many of these limits have already been established by the CWA or cases interpreting the Act. EPA’s proposal is simply noting, as the U.S. Supreme Court did, that “Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges”).¹²² Consistent with the Agency’s interpretation of the types of actions that trigger Section 401, EPA interpreted the term “discharge” in conformance with the term’s usage throughout the Act as it was fundamentally altered by the 1972 Amendments, and in accordance with court interpretations holding that “discharge” refers to the release of effluent from a point source to a WOTUS.¹²³ The Associations therefore support the Agency’s proposed conclusion that the Act directs that the term “discharge” be interpreted to refer to a discrete and confined point source release directly into WOTUS.¹²⁴

The Associations also support EPA’s proposal to more precisely define the water quality requirements that certifying authorities must use in determining whether the “discharge” is in compliance. As proposed by the Agency, the phrase “water quality requirements” would be defined to mean the “applicable provisions of 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.”¹²⁵

The term “water quality requirements” appears throughout Section 401, but it is not defined in the statute. Nonetheless, the enumerated provisions of the CWA (*i.e.*, Sections 301, 302, 303, 306, and 307) are specified within Section 401 of the Act, and therefore EPA’s inclusion of those provisions in the proposed definition of “water quality requirements” is appropriate and, in fact, nondiscretionary.¹²⁶ The Agency’s inclusion of “EPA-approved state or tribal Clean Water Act regulatory program provisions,” on the other hand, did require EPA to interpret certain ambiguous language within the CWA.

The ambiguity comes from Section 401(d), which requires a certification to “set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [enumerated provisions of the CWA],

¹²¹ 33 U.S.C. § 1341(a)(1).

¹²² *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 711-12 (1994).

¹²³ *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1099.

¹²⁴ The preceding section (II.B.3) already provides the Association’s analysis in support of this interpretation, and we therefore refrain from repeating that discussion here.

¹²⁵ 84 Fed. Reg. at 44,104.

¹²⁶ 33 U.S.C. § 1341(a)(1).

and with any other appropriate requirement of State law.” The CWA does not define what constitutes an “appropriate requirement” of state law, and therefore EPA is entitled to some discretion in interpreting this undefined phrase.¹²⁷ It is necessary and appropriate, for instance, for EPA to interpret the phrase “appropriate requirement” as referring to those requirements that are directly related to water quality, rather than the non-water quality impacts that some states increasingly consider in their Section 401 reviews.

As noted throughout these comments, a handful of states have expanded their Section 401 authority in order to block or constrain projects for reasons that have nothing to do with the protection of water quality. By broadly construing the scope of their Section 401 authority beyond what the CWA provides, many states demand project proponents develop and/or submit documentation wholly unrelated to water quality, such as environmental assessments of impacts to other environmental media, demonstrations of the need for the project, alternative route analyses, and analyses of air impacts, traffic impacts, and other reviews already undertaken by FERC or other federal agencies pursuant to the NEPA, the ESA, the NGA, and other statutes.¹²⁸ Indeed, the State of New York has routinely denied water quality certifications on grounds outside of water quality, expressing concern for the potential climate change impacts of projects and purported lack of assessment of such impacts.¹²⁹

This implausibly broad construction of the scope of state review is perhaps most clearly exemplified in the Millennium Bulk Terminals – Longview LLC project in Washington State.¹³⁰ In the course of Washington State’s 5-year review of the project, the state compiled an EIS that expressly concluded that the terminal would not result in significant adverse effects on water quality, aquatic life, or designated uses; and that any potential water quality impacts could be fully mitigated. And yet, even after concluding that the project would not adversely impact water quality, Washington State denied the certification request based on concerns about capacity of the interstate rail system, the impact of trains operating anywhere in that system, and impacts of the project on the overall capacity of the Federal Columbia River Navigation Channel to accommodate additional vessels at state ports.”

To state the obvious, no aspect of the CWA’s text, structure, or purpose can be construed to suggest that Congress envisioned Section 401 to authorize state certifications based on impacts wholly unrelated to water quality—impacts that, in many cases, Congress required be assessed under different statutes.¹³¹ To the contrary, the CWA, as it was transformed through the 1972 Amendments, created a comprehensive scheme that protected water quality primarily through regulation of the discharge of pollutants into WOTUS. Where Washington State’s interpretation of its Section 401 authority to consider any other “appropriate requirement” of state law appears

¹²⁷ See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹²⁸ *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1103-04 (D.C. Cir. 2019); *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017).

¹²⁹ <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14670874>.

¹³⁰ WDEC, In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals-Longview, LLC, Order # 15417 (Sept. 26, 2017).

¹³¹ For example, NEPA requires review of multi-media effects, while other statutes address impacts to air (Clean Air Act), land (Resource Conservation and Recovery Act), wildlife (Endangered Species Act), and cultural resources (National Historic Preservation Act).

to largely ignore the text, structure, and purpose of the CWA, EPA’s proposed interpretation of the term “appropriate requirement” is directly informed by the statute.

On a more granular level, EPA’s proposed interpretation also attempts to derive the meaning of “appropriate requirement” by looking to the specific provisions of the CWA that Congress expressly identified in Section 401. In doing so, the Agency correctly found that term “appropriate requirement” “follows an enumeration of four specific sections of the CWA that are all focused on the protection of water quality from point source discharges to waters of the United States.”¹³² Indeed, Section 401 is replete with references to requirements deemed necessary to ensure compliance with “applicable effluent limitations” and “water quality requirements.”

Given the overall focus of the Section 401, we believe that EPA’s proposed interpretation of the phrase “appropriate requirements” correctly connotes that these requirements must be limited to regulatory provisions of the CWA.¹³³ These regulatory provisions include those EPA-approved provisions of state or tribal law that implement the Section 402 and 404 permit programs or otherwise control point source discharges to WOTUS. In this respect, the Associations agree, as EPA does, with Justice Thomas’s dissent in *PUD No. 1*, in which Justices Thomas and Scalia concluded that “the general reference to ‘appropriate’ requirements of state law is most reasonably construed to extend only to provisions that, like other provisions in the list, impose discharge-related restrictions.”¹³⁴

EPA’s interpretation is also in accord with the legislative history of the 1977 Amendments that added Section 303, which governs state water quality standards and implementation plans, to Section 401’s enumerated list of CWA provisions. According to the Conference Report for the 1977 Amendments:

The inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303. The inclusion of section 303 is intended to clarify the requirement of section 401. It is understood that section 303 is required by the provisions of section 301.¹³⁵

As relevant here, Section 303 is the provision through which EPA approves state standards—standard which, like those promulgated under Section 301, apply only to “discharges” from “point sources.”

¹³² 84 Fed. Reg. at 44,095. Section 301, 302, and 306 impose effluent limits on new and existing sources, Section 303 governs water quality standards and implementation plans, and Section 307 addresses pretreatment standards for effluents.

¹³³ 84 Fed. Reg. at 44,095.

¹³⁴ *PUD No. 1*, 511 U.S. at 728 (Thomas, J., dissenting).

¹³⁵ H. Rep. No. 95-380 (95th Cong. 1st Sess. (1977)).

ii. *Scope of Section 401 Conditions*

As the Agency noted in its preamble, “[t]he scope of certification established in this proposal also informs the scope of conditions that may be included in a certification.”¹³⁶ Section 401 provides that certifying authorities may condition a “license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.”¹³⁷ Section 401 further states that:

[a]ny 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 . . . and with any other appropriate requirement of State law set forth in such certification.¹³⁸

Although the structure and content of Section 401(d) provide some context for the types of conditions that can be imposed in a federal license or permit, the CWA does not define the term “condition.” As such, here again, EPA is entitled to some degree of deference in interpreting the scope of this provision. And like EPA’s examination of the proper scope of the Section 401 review, the Agency’s examination of the types of conditions that states could impose through Section 401 focused first on those few states that have misused Section 401 for purposes wholly unrelated to water quality. In particular, EPA identified state Section 401 certification “requirements for biking and hiking trails to be constructed, one-time and recurring payments to state agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and public access for fishing and other activities along waters of the United States.”¹³⁹

EPA also indicated that it was “aware of certification conditions that purport to require project proponents to address pollutants that are not discharged from the construction or operation of a federally licensed or permitted project.”¹⁴⁰ The conditions Maryland sought to impose on the license for Exelon Generation Co., LLC’s Conowingo dam and hydroelectric project presents a particularly egregious example of this practice.¹⁴¹ Even though the project does not discharge phosphorus or nitrogen, “[a]s the cost of such a federal license, Maryland insists that the Conowingo Project remove the phosphorus and nitrogen that flow downriver from New York, Pennsylvania, and Maryland. In lieu of cleaning the Susquehanna, Maryland would accept \$172 million from Exelon each year for the next 50 years.”¹⁴² The CWA cannot reasonably be interpreted to make allowance for such a scheme, and the Associations appreciate EPA’s efforts to reign in state interpretations such as these.

¹³⁶ 84 Fed. Reg. at 44,104.

¹³⁷ 33 U.S.C. § 1341(a)(2).

¹³⁸ 33 U.S.C. § 1341(d).

¹³⁹ 84 Fed. Reg. at 44,105.

¹⁴⁰ 84 Fed. Reg. at 44,105.

¹⁴¹ *Exelon Generation Co. v. Grumbles*, Slip. Op at 18-1224 (March 29, 2019).

¹⁴² *Id.* at 1.

Section 401(d) indeed authorizes a state to condition a certification, only to the extent “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.”¹⁴³ As the Supreme Court held in *PUD 1*, “[a]lthough § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded.”¹⁴⁴ The Court went on to determine that a state requirement imposed to “ensure compliance with the state water quality standards adopted pursuant to § 303 of the Clean Water Act” was such an appropriate restriction, but declined to “speculate on what additional state laws, if any, might be incorporated by this language.”¹⁴⁵ For their part, Justices Thomas and Scalia evidently foresaw the prospect of state misuse of Section 401 conditions in circumstances like those presented in Exelon’s Conowingo project, and therefore cautioned in their dissent that “conditions that have little relation to water quality,” if allowed, would significantly “disrupt[] the careful balance between state and federal interests” established under other statutory regimes.¹⁴⁶

Many other courts have similarly sought to restrain the types of conditions states can impose through Section 401 to those necessary to protect water quality.¹⁴⁷ In recent years, FERC has also confirmed that conditions not directly related to the licensee’s “activity” are improper under Section 401. Indeed, although FERC interprets its governing statutes as compelling it to incorporate all state conditions into federal licenses, FERC has often noted its opinion that conditions “unrelated” to a project’s activities are not proper Section 401 limitations.¹⁴⁸

As such, the structure and purpose of the Act, a large body of case law, and the position of one of the federal agencies most familiar with state Section 401 certification conditions support EPA’s proposed conclusion that “[t]he scope of a section 401 certification is limited to assuring that a discharge from a federally-licensed or permitted activity will comply with water quality requirements.”¹⁴⁹ Further, under EPA’s proposal, any condition added to a Section 401 certification that is not within the proposed scope of certification may not be included in the federal

¹⁴³ 33 U.S.C. § 1341(d).

¹⁴⁴ *Pub. Util. Dist. No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 712 (1994).

¹⁴⁵ *Pub. Util. Dist. No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 712 (1994).

¹⁴⁶ *Pub. Util. Dist. No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 732-33 (1994).

¹⁴⁷ *Am. Rivers v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) (“Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another.”); *e.g.*, *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019) (upholding certification conditions when they “deal[t] with project-related activities”); *Miners Advocacy Council, Inc. v. State, Dep’t of Envtl. Conserv.*, 778 P.2d 1126, 1138 (Alaska 1989); *Town of Arcadia Lakes v. S.C. Dep’t of Health & Envtl. Control*, 745 S.E.2d 385, 389 (S.C. Ct. App. 2013) (upholding conditions that address “impacts to adjacent water bodies or wetlands resulting from the activity”); *Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 659, 681 (Wash. 2004) (invalidating section 401 certification conditions that did not relate to the licensee’s activity).

¹⁴⁸ *See, e.g.*, Order Issuing New License, Portland Gen. Elec. Co., Project No. 2195- 011, 133 FERC 62281, at 64620 57, 2010 WL 11404139 (FERC Dec. 21, 2010); Order Issuing New License, Pub. Utility Dist. No. 1 of Snohomish Cty., Wash., Project No. 2157-188, 136 FERC 62188, at 64488 92, 2011 WL 13045891 (FERC Sept. 2, 2011); Order Issuing New License, Pub. Utility Dist. No. 1 of Douglas Cty., Wash., Project No. 2149-152, 141 FERC 62104, at 64270 53, 2012 WL 12372998 (FERC Nov. 9, 2012); *see also* Mitchell Cty. Conservation Bd., Project No. 11530-000—Iowa, 77 FERC 6202, 64458 n.4 (FERC Dec. 27, 1996) (refusing to require a hydropower licensee to spend project revenues on improvements at county parks “unrelated to the project”).

¹⁴⁹ 84 Fed. Reg. at 44,106.

license or permit, and the condition does not become federally enforceable. If a state denies Section 401 certification for reasons outside of the scope of certification, EPA is proposing that the federal agency will treat the action as a waiver of the state's Section 401 authority. For both certifications with conditions and denials, EPA is proposing that if a federal agency receives the certification decision prior to the end of the reasonable time period and determines that the bases for denial or scope of the approval conditions are inconsistent with Section 401, the federal agency may provide the certifying authority an opportunity to remedy any deficiencies within the remaining time period.

The Associations believe EPA's proposal presents cogent arguments that this federal agency oversight is consistent with Section 401 of the Act, as interpreted by the D.C. Circuit in *City of Tacoma, Washington v. FERC*.¹⁵⁰ In that case, the court noted that "[i]f the question regarding the state's section 401 certification is not the application of state water quality standards, but compliance with the terms of section 401, then [the federal agency] must address it. This conclusion is evident from the plain language of section 401: 'No license or permit shall be granted until the certification required by this section has been obtained or has been waived.'"¹⁵¹ The court went on to explain that even though the federal licensing or permitting agency did not need to "inquire into every nuance of the state law proceeding . . . it [did] require [the federal agency] to at least confirm that the state has facially satisfied the express requirements of section 401."¹⁵²

The Associations also believe that the Agency has identified a significant problem with the way a handful of states currently interpret their authority to impose conditions through the Section 401 review process. There is no question that certain states have misused their Section 401 authority, used it as a tool to effectuate goals wholly unrelated to water quality, and deployed it to inappropriately extract concessions from project proponents. Truly these are the practices which, if allowed, would significantly "disrupt[] the careful balance between state and federal interests" established under other statutory regimes.¹⁵³ As such, the Associations appreciate and support EPA's efforts to rein in these practices.

5. The Associations Support EPA's Proposed Measures to Enforce Section 401 Time Limits¹⁵⁴

As the Section 401 state certification process is only part of a more comprehensive and protracted federal licensing or permitting process, timely issuance of certifications can be integral to the overall viability of important energy and infrastructure projects. Depending on the extent of a delay in obtaining the requisite certifications and authorizations or the level of uncertainty about the schedule or outcome for those processes, many important projects can be cancelled altogether.

Congress clearly understood the significant adverse impacts that delay and uncertainty could have on nationally important energy and infrastructure projects, such that it required states' exercise of Section 401 certification authority to be highly circumscribed and completed within "a reasonable

¹⁵⁰ 460 F.3d 53, 67-68 (D.C. Cir. 2006).

¹⁵¹ 460 F.3d 53, 67-68 (D.C. Cir. 2006) (citing 33 U.S.C. 1341(a)(1)).

¹⁵² *Id.* at 68.

¹⁵³ *Pub. Util. Dist. No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 732-33 (1994).

¹⁵⁴ See 84 Fed. Reg. at 44,108, "Timeframe for Certification Analysis and Decision."

period of time (which shall not exceed one year) . . .”¹⁵⁵ A handful of states also seemingly recognize the adverse impacts delay can have on the energy or infrastructure projects they oppose, and have therefore relied on various procedural sleights of hand to impermissibly extend statutory deadlines in hopes of killing locally unpopular projects, leveraging unwarranted concessions from project proponents, or otherwise elevating their own parochial agendas above the nation’s interests.

For its part, the Agency also clearly recognizes that the deadlines Congress imposed in Section 401 are explicit, unambiguous, and binding. EPA also recognizes that, charged with implementing the CWA, EPA must craft regulations reining in those certification tactics that are plainly intended to evade, rather than comply with, Section 401’s congressionally mandated deadlines. In crafting this proposal, EPA carefully examined the various ways in which a small minority of states have circumvented certification deadlines, and proposed interpretations that the Associations believe will more fully ensure that certifications are completed within a reasonable period of time, not to exceed one year. Cognizant of the importance of the CWA’s cooperative federalism framework, the Agency’s proposed regulations do not solely restrict or restrain state certification actions, but instead seek to facilitate engagement, information sharing, and other mechanisms that can help states conduct timely reviews. And as the agency that is not only tasked with implementing Section 401, but that also serves as the certifying authority in some cases, EPA’s proposal candidly identifies steps EPA is taking to correct the Agency’s own inefficiencies and missteps in conducting certifications.¹⁵⁶ By proposing to impose on the Agency the same limits and obligations EPA proposes to require of other certifying authorities, the Agency is demonstrating a noteworthy respect for the important cooperative relationship EPA shares with state and tribal partners. EPA is also making clear that its proposal is not an attempt to wrest authority from the states, but rather an attempt to update and improve the Section 401 certification process irrespective of the identity of the certifying authority. For these reasons, and as further explained in the subsections that follow, the Associations support the measures EPA has proposed to improve compliance with the Section 401 deadlines.

i. The CWA Requires State Water Quality Certifications to be Completed Within a Reasonable Period of Time, Which Shall Not Exceed One Year

The express text of Section 401 plainly states that a certifying authority waives its certification authority over a federal license or permit if the certifying authority "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request."¹⁵⁷ "[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401."¹⁵⁸ Given the clarity of the CWA with respect to the one-year deadline and the lack of ambiguity about the purpose intended by this language, the text of the

¹⁵⁵ 33 U.S.C. § 1341(a)(1).

¹⁵⁶ 84 Fed. Reg. at 44,108.

¹⁵⁷ 33 U.S.C. 1341(a)(1).

¹⁵⁸ *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

CWA leaves EPA no room to interpret Section 401 as allowing certifying authorities any amount of time in excess of one year.¹⁵⁹

However, for those certifying authorities that may experience genuine difficulty in conducting a certification review of an appropriate scope within the prescribed timeframe, EPA is proposing to establish a number of mechanisms that can help facilitate compliance with Section 401 deadlines. The Associations support EPA’s proposal to provide mechanisms such as early coordination opportunities, and assistance with information collection because these measures offer targeted assistance to those certifying authorities that are dutifully pursuing their certification obligations without advantaging those states intent on using certification delay as a tactic.

The Associations also support EPA’s proposal to reaffirm that federal agencies have the discretion to impose reasonable timeframes of less than one year.¹⁶⁰ As explained by the D.C. Circuit, “while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year.”¹⁶¹ For instance, Army Corps regulations state that “[a] waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act.”¹⁶² Pursuant to Executive Order 13868’s directive that federal agencies update and clarify their certification regulations, the Army Corps recently released a Regulatory Guidance Letter explaining the deadlines applicable to Army Corps certifications and factors that are considered in setting those deadlines.¹⁶³

While the Associations support EPA’s proposal to allow the federal agencies—like the Army Corps—to determine the reasonable time periods for certifications applicable to their license or permit actions, we also agree with the factors EPA proposes to require the agencies to consider when setting timeframes for certification decisions. As outlined in Section E of the Draft Rule, these considerations include: (1) the complexity of the proposed project; (2) the potential for discharge; and, (3) the potential need for additional study or evaluation of water quality effects from the discharge.¹⁶⁴ Regardless of the type of project under consideration or which federal agency is overseeing the certification process, these factors are relevant to ensuring that the timeframes are appropriately tailored and commensurate with the complexity of the task at hand. These factors are also relevant to the federal agencies’ goal of ensuring that certifying authorities focus their analysis and decision-making on the potential water quality effects of discharges from the proposed project.

¹⁵⁹ Consistent with our comments in Section III.B.4. above, the Associations believe that Congress’s establishment of one-year as the outermost limit for Section 401 certifications reveals that Congress understood and expected Section 401 reviews to be narrowly focused on discharges from the federal project, rather than broader or more tangentially related impacts.

¹⁶⁰ 84 Fed. Reg. 44,108.

¹⁶¹ *Hoopa Valley Tribe v. FERC*, 913 F. 3d 1099, 1104 (D.C. Cir. 2019).

¹⁶² 33 CFR 325.2(b)(1)(ii).

¹⁶³ Regulatory Guidance Letter No. 19-02, “Timeframes for Clean Water Act Section 401 Water Quality Certifications and Clarification of Waiver Responsibility.” (August 7, 2019).

¹⁶⁴ 84 Fed. Reg. 44,109.

Furthermore, the Associations believe that EPA is correct in proposing that the federal agencies are best positioned to determine when a state “fails or refuses to act,” thereby triggering a waiver of the state’s certification authority. Given the plain language of the Act and the jurisprudential limits discussed in the subsection below, we do not believe it will be difficult for federal agencies to identify when a state “fails or refuses to act” by being untimely, and we support the clarifying definition.

The Associations also believe that EPA’s proposal cogently argues that the phrase “fails or refuses to act” “could also mean that—while the certifying authority took some action in response to the request—the action it took was outside the statute’s permissible scope and thus the certifying authority failed or refused to act in a way Congress intended, and that such failure amounts to a failure or refusal to act, triggering a waiver.”¹⁶⁵ For example, as noted in the Agency’s proposal, the D.C. Circuit held in *City of Tacoma, Washington v. FERC* that “[i]f the question regarding the state’s section 401 certification is not the application of state water quality standards but compliance with the terms of section 401, then [the federal agency] must address it. This conclusion is evident from the plain language of section 401: ‘No license or permit shall be granted until the certification *required by this section* has been obtained or has been waived.’”¹⁶⁶ According to the court, Section 401 does not oblige a federal agency to “inquire into every nuance of the state law proceeding . . . [but] it [did] require [the federal agency] to at least to confirm that the state has facially satisfied the express requirements of section 401.”¹⁶⁷

ii. *Enforcement of the CWA’s Section 401 Deadlines Requires EPA to Promulgate a Clear and Objective Starting Point for Review*

The Associations support EPA’s proposed conclusion that the review period for a certification request begins when the project proponent submits the certification request to the certifying authority. We believe that this interpretation is consistent with the Act and, given recent experiences with states that have sought to toll the start date of their review long after their receipt of certification requests, we believe this proposed interpretation is quite necessary.

Section 401 plainly states that:

[i]f 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.¹⁶⁸

A plain reading of this language shows that the Act not only provides the time frame for a certifying authority’s review, it instructs that the receipt of the request for certification serves as the starting

¹⁶⁵ 84 Fed. Reg. 44,111.

¹⁶⁶ 460 F.3d at 67-68 (citing 33 U.S.C. 1341(a)(1)) (emphasis in original).

¹⁶⁷ *Id.* at 68; *see also Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019) (“had FERC properly interpreted Section 401 and found waiver when it first manifested more than a decade ago, decommissioning of the Project might very well be underway”); *Airport Communities Coalition v. Graves*, 280 F. Supp.2d 1207, 1217 (W.D. Wash. 2003) (holding that the Army Corps had discretion not to incorporate untimely certification conditions).

¹⁶⁸ 33 U.S.C. 1341(a)(1) (emphasis added).

point for the review period. The statutory text therefore created a “bright-line rule”¹⁶⁹ for identifying the start of the review period, without which the Act’s review deadlines would be rendered meaningless.

While EPA seemingly concurs with the Associations’ view that the Act commands the certification review period commence upon receipt of the certification request, the Agency suggests that there may be ambiguity about what may be considered “receipt” of a certification request.¹⁷⁰ The Associations believe that the term “receipt” is clear and widely understood through its common usage. Nonetheless, given project proponents’ experience with certain states that have strategically sidestepped straight-forward interpretations of the term “receipt,” the Associations support EPA’s efforts to curb the creative misreckoning of this provision with definitions of “certification request” and receipt. As the following examples show, however, the divergent constructions of the term “receipt” by certain states are much more the product of the states’ interest in evading application of the Act than they are the product of the authorities’ sincere misinterpretations of the Act.

Consider, for instance, the Northern Access Pipeline, a project for which the State of New York received a certification request on March 2, 2016. In order to comply with the one-year review deadline, New York asked and received consent from the project proponent to change the date “on which the application was deemed received” so that New York’s April 7, 2017 decision on the certification request (a denial) would appear to conform to the Section 401 time limits. While FERC ultimately concluded that the state waived its Section 401 obligation for failure to act within the prescribed deadlines, this example demonstrates how some certifying authorities are willing to manipulate the concept of “receipt” to avoid strict application of the Section 401 deadlines.¹⁷¹

Another way certifying authorities manipulate the starting date for calculating review deadlines is by interpreting Section 401 as allowing them to commence the review period on the date that the certifying authority determines that the certification application is complete. To be fair, EPA’s now-rescinded CWA Section 401 Handbook seemingly agreed that “the certifying agency determines what constitutes a ‘complete application’ that starts the timeframe clock.”¹⁷² As it were, in addition to conflicting with time limits clearly prescribed in Section 401 of the Act, this interpretation allowed certifying authorities unmitigated discretion to declare a certification incomplete and therefore conferred the certifying authorities unchecked authority to select the date on which their review-period would begin.¹⁷³

For instance, the New Jersey Department of Environmental Protection (“NJDEP”) recently deemed as incomplete a certification request for a project proposed by PennEast Pipeline Company, LLC because the project proponent had not provided NJDEP with surveys of the entire

¹⁶⁹ *N.Y. State Dep’t of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

¹⁷⁰ 84 Fed. Reg. at 44,101.

¹⁷¹ See *Nat’s Fuel Gas Supply Corp.*, 164 FERC 61,084 at PP 35,42 (2018).

¹⁷² EPA OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES, 11 (2010). Further, while EPA took this position for a period of time, FERC has long held that the one-year review period begins upon receipt of a request for certification. See 18 C.F.R. § 4.34(b)(5)(iii) (2018).

¹⁷³ Given the way EPA’s previous Section 401 Handbook furthered, rather than limited, the prospect of Section 401 misuse, the Associations herein reiterate our support for rescinding that document.

pipeline route.¹⁷⁴ As it is clear that this data request was irrelevant to the state’s review or the proposed project’s potential water quality impacts in New Jersey, it can only be construed as a tactic for delay.

Importantly, the Second Circuit recently held that this same tactic violated Section 401 of the CWA.¹⁷⁵ That case involved a November 23, 2015 certification application submitted by Millennium Pipeline Company LLC (“Millennium Pipeline”) to the New York State Department of Environmental Conservation (“NYSDEC”) for a 7.8 mile extension of an existing pipeline, (the “Valley Lateral” project).¹⁷⁶ For several months following the submittal of the certification request, NYSDEC continued to demand additional information from the project proponent, and used the absence of that information as a basis for declaring the certification application incomplete, thereby stopping the commencement of NYSDEC’s review period. While the legal and regulatory procedures that followed are complex, the ultimate holding of the Second Circuit was clear, unambiguous, and directly relevant to EPA’s present proposal:

[t]he plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state’s action regarding a request for certification ‘shall not exceed one year’ after ‘receipt of such request.’ It does not specify that this time limit applies only for ‘complete’ applications. If the statute required ‘complete’ applications, states could blur this bright-line rule into a subjective standard, dictating that applications are ‘complete’ only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.¹⁷⁷

While the Associations do not believe the CWA is at all unclear about how the Section 401 review deadlines should be applied, this decision leaves little doubt that EPA is correct to propose measures to prohibit the arbitrary and strategic tolling of Section 401 review periods. The Associations also recognize that, in most instances, when a certifying authority requests additional information, it is in furtherance of a legitimate review, and not a delay tactic. As such, we support the measures EPA has proposed to help identify certifying authorities’ genuine informational needs.

In particular, the Associations support the Agency’s identification of the specific elements required to be included in a certification request. Identification of these elements eliminates any confusion about whether the project proponent has, in fact, requested a certification and, at the same time, ensures that the certifying authority has the core information necessary to review the request. It is likely that some highly complex projects may warrant the submittal of additional information either within or subsequent to the original certification request, but EPA’s proposal can accommodate those project-specific requests as well. Under EPA’s proposal, certifying authorities remain free to request information relevant to a project’s potential water quality affects after the

¹⁷⁴ Letter from Virginia Kop’Kash, Assistant Comm’r, N.J. Dep’t of Env’tl. Prot., Re: Freshwater Wetlands Individual Permit Application, DLUR File #0000-17-0007.2 FWW170001,

¹⁷⁵ *N.Y. State Dep’t of Env’tl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2nd Cir. 2018).

¹⁷⁶ *N.Y. State Dep’t of Env’tl. Conservation v. FERC*, 884 F.3d at 453.

¹⁷⁷ *N.Y. State Dep’t of Env’tl. Conservation v. FERC*, 884 F.3d at 455-56.

original submittal of the certification request, but doing so does not render the original certification request incomplete nor provide a basis to restart the clock on the Section 401 review.

iii. *Enforcement of the Section 401 Certification Deadlines Requires EPA to Prohibit States from Artificially Extending Timeframes by Stopping and Restarting the Certification Process*

The Associations support EPA’s proposed conclusion that the CWA does not allow certifying authorities to stop and restart their review in order to artificially extend Section 401’s statutorily prescribed deadlines. Here again, the need for EPA to propose these restrictions was made evident by the actions of a handful of states that have increasingly relied on a “withdrawal and resubmittal” tactic to circumvent statutory deadlines. Indeed, the D.C. Circuit’s recent decision in *Hoopa Valley Tribe v. FERC* (“*Hoopa Valley*”)¹⁷⁸ makes plain that the reforms EPA is proposing are legally sound and increasingly necessary.

In *Hoopa Valley*, the D.C. Circuit considered whether California and Oregon could lawfully rely on a “withdrawal-and-resubmission scheme” to avoid the Section 401 deadline for certifying the relicensing of the Klamath Hydroelectric Project.¹⁷⁹ The project proponent had originally submitted its certification requests to the states in 2006, and pursuant to the states’ demand, withdrew and resubmitted the same certification requests annually for more than a decade.¹⁸⁰ When the D.C. Circuit drafted its decision “*more than a decade later*, the states still ha[d] not rendered certification decisions.”¹⁸¹ The court went on to bemoan that:

it is now commonplace for states to use Section 401 to hold federal licensing hostage. At the time of briefing, twenty-seven of the forty-three licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade*.¹⁸²

While the problem identified by the D.C. Circuit was pervasive, its resolution was remarkably straight-forward. According to the court, “[d]etermining the effectiveness of such a withdrawal-and-resubmission scheme is an undemanding inquiry because Section 401's text is clear.”¹⁸³

While the statute does not define ‘failure to act’ or ‘refusal to act,’ the states’ efforts . . . constitute such failure and refusal within the plain meaning of these phrases. Section 401 requires state action within a reasonable period of time, not to exceed one year. California and Oregon's deliberate and contractual idleness defies this requirement. By shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal

¹⁷⁸ 913 F. 3d 1099 (D.C. Cir. 2019).

¹⁷⁹ *Hoopa Valley*, 913 F. 3d at 1103.

¹⁸⁰ *Hoopa Valley*, 913 F. 3d at 1104.

¹⁸¹ *Hoopa Valley*, 913 F. 3d at 1104 (emphasis in original).

¹⁸² *Hoopa Valley*, 913 F. 3d at 1104 (emphasis in original).

¹⁸³ *Hoopa Valley*, 913 F. 3d at 1103.

licensing proceedings and undermine FERC's jurisdiction to regulate such matters.¹⁸⁴

The court went on to explain that “Congress intended Section 401 to curb a *state’s* ‘dalliance or unreasonable delay.’ This Court has repeatedly recognized that the waiver provision was created ‘to prevent a State from indefinitely delaying a federal licensing proceeding.’”¹⁸⁵ And based on this, the court “conclude[d] that California and Oregon have waived their Section 401 authority with regard to the Project.”¹⁸⁶

Given this unequivocal decision by the D.C. Circuit, and the equally unambiguous statutory text on which the decision was based, the Associations believe that EPA has little choice but to interpret Section 401 such that “[t]he certifying authority is not authorized to request the project proponent to withdraw a certification request or to take any other action for the purpose of modifying or restarting the established reasonable period of time.”¹⁸⁷

III. CONCLUSION

The Associations support EPA’s efforts to update and reform the Agency’s regulations governing the Section 401 certification process. These updates are long overdue and, given the misuse of Section 401 certification procedures by some states, increasingly necessary.

As noted throughout these comments, the Associations believe that EPA’s proposed approach is well explained and appropriately targeted to those aspects of Section 401 that are most often misconstrued and/or misused by states and other certification authorities. While we believe that the proposal would rein in state misuse of the Section 401 process, we also believe that the proposal respectfully adheres to the principals of cooperative federalism that Congress required in the CWA and other statutes. As such, if finalized, we believe EPA’s proposed approach would preserve the important role of states under the CWA while at the same time ensuring that projects of national importance are not held hostage by parochial interests bearing little or no relation to water quality.

Thank you in advance for your consideration of our comments. Please do not hesitate to reach out to us if we can be of further assistance on this important issue.

¹⁸⁴ *Hoopa Valley*, 913 F. 3d at 1105.

¹⁸⁵ *Hoopa Valley*, 913 F. 3d at 1105-6 (internal citations omitted).

¹⁸⁶ *Hoopa Valley*, 913 F. 3d at 1105.

¹⁸⁷ 84 Fed. Reg. at 44,108.

Respectfully submitted,



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