



The Association of State Wetland Managers, Inc.

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

October 21, 2019

Executive Director

Marla J. Stelk
32 Tandberg Trail, Suite 2A
Windham ME 04062
(207) 892-3399

Administrator Andrew R. Wheeler
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Chair

Mark Biddle
DE Dept. of Natural Resources
and Environmental Control
820 Silver Lake Blvd., Suite 220
Dover, DE 19904
(302) 739-9939

Via regulations.gov

Re: Updating Regulations on Water Quality Certification (Docket ID No. EPA-HQ-OW-2019-0405)

Vice Chair

Tom Harcarik
OH Environmental Protection Agency
50 West Town Street
Columbus, OH 43215
(614) 644-3639

Dear Administrator Wheeler:

The Association of State Wetland Managers (ASWM) submits the following comments in response to the U.S. Environmental Protection Agency’s (EPA) proposed rule, Updating Regulations on Water Quality Certification, for inclusion in Docket ID No. EPA-HQ-OW-2019-0405. ASWM is a nonprofit professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland programs. Since 1983, our organization and our member states and tribes have had long standing positive and effective working relationships with EPA in the implementation of dredge and fill regulations and 401 certifications to protect our nation’s aquatic resources. As an association representing states as co-regulators tasked with implementation of regulations governing water quality, ASWM understands the complexity of the Clean Water Act (CWA), Section 401 and the cases governing implementation of the Act.

Secretary

Amy Lounds
MI Dept. of Environmental Quality
525 W. Allegan Street
Lansing, MI 48933
(517) 331-7966

Treasurer

Lauren Driscoll
WA State Dept. of Ecology
PO Box 47600
Olympia, WA 98504
(360) 407-7045

The important and unique role of states in the management of water resources is clearly recognized in the CWA. Therefore, any action taken by the federal government to either expand or contract the scope of federal protection and the role of states in the cooperative federalism relationship will have direct and significant impacts on the states and tribes. ASWM appreciates the opportunity to provide EPA with our comments on the current rulemaking. The ability of ASWM, states and tribes to weigh in on changes in the regulatory framework and implementation process, timing and strategies can play a critical role in increasing the effectiveness and fidelity of the new rule. Please see our responses to the specific questions posed by the EPA.

Past Chair

Collis Adams
NH Dept. of Environmental Services
29 Hazen Drive
Concord, NH 03302
(603) 271-4054

Members at Large

Jill Aspinwall
NJ Dept. of Environmental Protection

Denise Clearwater
MD Dept. of the Environment

Timothy Rach
FL Dept. of Environmental Protection

Andrew Robertson
Saint Mary's University of Minnesota

ASWM is a proponent of clear, effective policies that provide both transparency and regulatory certainty. Unfortunately, this proposed rule creates new issues for states and tribes, as well as federal agencies, that did not exist previously and risks degradation of both waters of the United States (WOTUS) and state/tribal water quality. EPA’s proposed rule claims to address a problem, but, in reality, the problem does not exist and any

proposed changes that would be useful are undermined by key process issues and a lack of input from states and tribes. The rule as proposed erodes cooperative federalism by tipping the power balance to federal agencies and limiting state authority to condition water quality certifications through changes in the timing, scope federal agency ability to deny state/tribal conditions in the 401 process. The proposed rule relies on unfounded legal and economic analyses and interpretations and presents major technical challenges and burdens for states and tribes. Not only does the rule adversely affect states and tribes as they work to protect their waters, but it also affects additional permitting processes and sets a deeply concerning precedent for state/tribal rights in general.

Critical Role of 401 Certifications for States and Tribes

Through the 1977 amendments to the CWA, Congress more fully recognized and protected the rights and responsibilities of the states by ensuring a major role in the implementation of many CWA programs. In order to address dredge and fill activities, states have the option of assumption of the § 404 dredge and fill permitting program, reliance on § 401 water quality certification to incorporate state concerns, operation of independent state permitting programs, or a combination of the above. Other states operate only non-regulatory wetland programs. States have determined the appropriate balance of these choices for their respective states based in part on the scope of CWA jurisdiction. With § 401 certification being a key element of CWA compliance, without adequate state/tribal review of § 401 certifications, the goals of the CWA will not be met. Section 401 certification has long been identified as a successful model of cooperative federalism.

Section 401 certifications are essential to many states for protecting their wetlands and waters, preserving the uses for those resources (e.g., drinking water, ecological functions), and ultimately protecting public health. All states have statutes and for some, regulations, that provide these protections. However, not all states have a permit process for implementing these protections. Those states without their own state dredge and fill program rely on direct enforcement of their environmental statutes and regulations, which means unless those states know of an entity that is discharging into a wetland or water, those states have no practical way of implementing their environmental statutes and regulations. Section 401 certifications provide that essential link between state environmental statutes and regulations and the activities related to a discharge into a water resource.

Section 401 certifications also help to dispel any confusion on what environmental provisions a project proponent must comply with. Without the certification, a project proponent might erroneously believe that the only environmental conditions required are those in the federal permit. Certification brings both federal and state/tribal conditions into one document, and thus makes it clear what a project proponent must do to comply with both federal and state/tribal laws and regulations.

States rely on the § 401 certification process for many critical functions including (but not limited to): requiring actions that minimize impacts on aquatic resources from construction projects in streams and wetlands, including pre-construction monitoring and assessment of resources; standard conditions to install and maintain best management practices (BMPs for stormwater, such as sediment and erosion controls; time of year restriction for construction activities to protect critical periods for aquatic life, practices that reduce the release of metals bound in sediment, especially in impaired waters; and minimizing work during precipitation events. Examples of other uses of the § 401 certification process by states include: requiring studies necessary for making decisions on water quality certificates, such as Total Suspended Solids (TSS), phosphorus, sulfate and others; requiring specific riparian buffer sizes; conditioning FERC relicensing of hydropower projects and groundwater impacts from mine expansion project permits; developing performance standards for required compensatory mitigation and restoration

of temporary impacts during construction; and securing independent environmental inspectors, answerable to the certifying agency, to oversee construction.

The § 401 certification process is used to protect, restore and maintain designated uses, which commonly include aquatic life and fish and shellfish for human consumption, drinking water, and commercial, agricultural and recreational uses, including activities requiring contact with water. Clean water is vital for economic and public health. For these reasons, state and tribal safeguards using § 401 are essential.

Despite ASWM's support for the task of clarifying § 401, EPA's proposed rule needs significant revision to maintain state/tribal authority. Without revision, the proposed rule should not be promulgated, as it represents a move away from (not towards) cooperative federalism. **For these reasons, ASWM asks EPA to withdraw the proposed rule and re-propose the rule based on the comments shared within this letter. The rule, as proposed, should not go forward to final implementation.**

To assist EPA in considering how the rule should be recrafted, ASWM provides the following comments:

EPA's Claims that the CWA Water Quality Certification Process Is Broken Are Unfounded

ASWM finds no evidence to support EPA's claim that the § 401 certification process is broken. To the contrary, all evidence indicates that the § 401 certification system is working well. EPA has provided no evidence to support the Administration's claim of "state level abuse" of § 401 certifications. Only a few, unique, non-representative cases (Washington § 401 denial related to the Millennium Coal Terminal; New York § 401 denial related to the Constitution Pipeline, and Oregon § 401 denial related to liquid natural gas facilities and pipeline) have been cited as evidence of a problem. Across the nation, § 401 certifications are issued every day without delay or denial. While the three cases mentioned above have gained national attention, thousands of certificates are issued annually without raising any concerns by the current Administration.

The Proposed Rule Has Numerous, Highly Problematic Process Issues

Rushed Crafting of the Proposed Rule: The stimulus for this proposed rule is Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*, (issued April 10, 2019), which directed EPA to issue a proposal within 120 days. Without adequate preparation or consultation, EPA has produced a rule that has numerous, insurmountable process, legal, and implementation issues. An executive order plus a lengthy "holistic" preamble calling for the reversal of decades of case law is not a rational basis for a proposed rule. Nor, given the focus of the Executive Order on energy infrastructure, can it serve for a remaking of the entire 401 certification regime -- which implicates thousands of state actions every year -- many of which have nothing to do with pipelines and energy infrastructure.

Lack of Adequate State/Tribal Consultation: The proposed rule did not provide adequate opportunities for state and tribal consultation (or other input -- whether expert or public). While EPA staff state that they conducted consultation meetings with many different state associations (including ASWM, Association of Clean Water Administrators and others), neither ASWM nor these other organizations were provided notice that they were being formally consulted, nor did EPA provide any form of formal consultations during communications with EPA staff members.

Inadequate Time Was Afforded to Provide Requested Feedback and Content: In addition to not having a pre-rulemaking version of the planned language to review and provide comment on, the current proposed rule reads much more like an Advance Notice of Proposed Rulemaking with numerous questions and alternative proposed rule content included. ASWM's review of the proposed rule document (Appendix A) finds that the new rule includes more than 100 specific requests for comment,

which when broken into individual questions equate to at least 130 individual questions. More than half of these questions require some level of formal legal analysis, needing legal expertise outside the staffing of ASWM, other state associations and state agencies. Review of the rule's accompanying economic analysis is an extensive task as well. The analysis is limited in scope (only analyzes two cases) and would be better served by inclusion of other cases during comment. These economic cases require substantial time to gather and require analysis of data. Finally, at least 35 of the requests for comment in the proposed rule include invitations to submit additional information (in the form of lists, case studies, or other documentation), which also require substantial time to collect and provide in a meaningful manner.

With this massive task set forth by the EPA, the 60-day comment period has been deeply inadequate to thoroughly evaluate the likely effects of the proposed rule, to assess potential intended and unintended consequences of the rule, how it may alter state program structures and responsibilities, and other implementation concerns. For these reasons, ASWM submitted a joint [request for extension](#) to the comment period with the Association of State Floodplain Managers to EPA on September 12, 2019. On October 11, 2019, EPA denied this request and several other formal requests to extend the 60-day comment period¹, thereby eliminating any hope of a reasonable timeline for analysis and review of the proposed language in the rule and adequate time to provide information as requested by EPA in the text of the proposed rule.

Lack of Referenced Questions and Requests for Comment Creates Added Burden for Commenters:

Additional challenges for writing comments are created by the proposed rule document having no reference system for identifying which part of the preamble or proposed rule to which a question pertains (e.g. numbered questions). This requires that commenters undertake the time-consuming development of methodologies to reference the requests for comment and answer questions, resulting in formats and references that will likely be inconsistent among commenters.

Specific Comments on Procedures Stated in Proposed Rule

EPA Should Not Prescribe Procedures that Limit State/Tribal Flexibility in Protecting Waters:

Overly prescriptive procedures in the proposed rule would limit the use of different applications and considerations by states and tribes, given the variability in water resources and state/tribal programs and certifying agency requirements. Certifying agencies would be the appropriate entity to set review procedures, information requirements, and deadlines that would be the most effective and efficient in reviewing projects. For example, states/tribes should not be required to have a pre-application meeting process but may be encouraged to do so for certain projects, in order to increase project proponent understanding of information needed to make informed decisions and provide early input to increase efficiency during the application process.

Lack of Consideration of Federal-level Coastal Zone Consistency Review: Under the Coastal Zone Management Act (CZMA §307(c)(3)), federal agencies are required to submit any proposed activities which have reasonably foreseeable effects on the uses and resources of states' coastal zones to affected states for federal consistency review.² Such federal agency actions are required to be consistent with the

¹ Email correspondence from Jack Bowles, EPA Director of State & Local Relations to State and Local government associations on Friday, October 11, 2019, subject line: *EPA Update on Proposed CWA 410 Rulemaking Comment Period*.

² 16 U.S.C. § 1456(c)(3); 15 C.F.R. § 930 Subpart C.

enforceable policies of affected states' coastal management programs.³ This statutory obligation includes proposed rulemakings that alter the uses of the coastal zone.⁴

Federal consistency procedures under the CZMA and water quality certification procedures under the CWA are closely related.⁵ Permit applications for projects within the coastal zone, such as new construction or disposal of dredged materials, often trigger review under both processes. As such, coastal states⁶ have developed procedures to integrate the two review processes. This includes developing lists of federal licenses subject to review, coordinating state standards between the two statutory regimes, and instituting "one-stop" federal-state joint review processes. Some states rely on the water quality certification review process to determine compliance for federal consistency purposes. Many of these procedures are instituted in state statutory or regulatory law.

By weakening and restricting the § 401 certification process, the proposed rule undermines the effectiveness of State Coastal Management Programs (CMPs) in achieving CWA goals and applying federal consistency to protect coastal resources and avoid or minimize coastal use conflicts. Specifically, the proposed changes fail to consider interactions of § 401 certification and federal consistency. In some states, § 401 reviews and conditions are often intertwined with federal consistency reviews and conditions. Frequently, the Army Corps of Engineers (Corps) permitting process is coordinated with state permitting and 401 certifications in carefully structured agreements and operating procedures. EPA failed to address how the proposed § 401 rule impacts this nexus in state operations and activities and creates extensive confusion around coordination of § 401 with existing state permits that include state conditions and state provisions.

The proposed rule undermines these review processes for coastal states under their CZMPs. Federal consistency provides states with an important tool to manage coastal uses and resources and to facilitate cooperation and coordination with Federal agencies and to work with nonfederal entities seeking federal approval and authorizations. It is the lynchpin of vital federal-state-industry coastal coordination to ensure balance among competing interests such as energy development, tourism, recreation and ecological protection. The proposed rule fails to address impacts on the federal consistency procedures of the coastal states, and proposes changes that would undermine established procedures, creating uncertainty for permit applicants and degrading states' responsible management of coastal resources and ecosystems. Should EPA proceed with this proposed rule, ASWM recommends that EPA make changes to account for potential incompatibilities in states that integrate water quality certification with federal consistency certification. For recommendations about specific ways to address CZMA consistency concerns, ASWM points EPA to the comment letter submitted to the Federal Register by the Coastal States Organization, which outlines suggested changes.

EPA neglects to make record on the issue of impacts from the proposed rule on general and nationwide permit review processes. Many states have denied or conditioned these permits. The proposed rule does not make clear what will occur if the Army Corps of Engineers disagrees with state or tribal conditions.

³ 15 C.F.R. § 930.32(b)(1).

⁴ 15 C.F.R. § 930.31(a) ("The term 'Federal agency activity' includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., ... a proposed rulemaking that alters uses of the coastal zone.").

⁵ Congress recognized the importance of coordinating the procedures under both Acts by automatically incorporating requirements established by the state pursuant to the CWA, including state water quality standards, into the state's CZMA coastal management program. 16 U.S.C. §1456(f).

⁶ 401 Rule Comment Letter submitted via the Federal Register to EPA by the Coastal States Organization (CSO).

ASWM emphasizes to EPA the critical need to consider nationwide and general permits/State Programmatic General Permits (SPGPs) that also undergo § 401 certifications of their own, coordination with Corps permitting, coordination with Coastal Zone Management (CZM) federal consistency and other shared processes. None of these are addressed or even noted in the preamble of the proposed rule.

Standardized National Forms Limit State/Tribal Flexibility: Finally, in terms of procedures outlined in the proposed rule, EPA should not develop a national standard form to meet the needs of all certifying agencies, given the variety of resources and authorities. Forms would be best developed by certifying agencies to take these differences into account.

New EPA 401 Certification Guidance Document (June 22, 2019) Must be Rescinded: The June 7, 2019 Guidance Document⁷ cannot provide guidance for a rule that has not yet been promulgated. The guidance must be rescinded or superseded by new guidance that reflects the content of the new rule upon its promulgation.

Erosion of Cooperative Federalism and State/Authorized Tribal Authority

Proposed Rule Strips State Role in Cooperative Federalism Relationship: While EPA promotes cooperative federalism, the proposed rule does the opposite and significantly erodes state/tribal authority. Cooperative federalism in the CWA recognizes the important role of state expertise based on regional and local conditions. Overall, the proposed revisions, with their intent to weaken state authority⁸ do not reflect the CWA objective of cooperative federalism, the shared responsibility by federal agencies and states to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Under the CWA, Congress recognizes states’ primary authority over water resources, purposefully designates states as co-regulators under a system of cooperative federalism, and clearly expresses its intent to: “...recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.” The CWA clearly gives broad authority to states to make and condition decisions under applicable state authorities.

Rejection of Important State Expertise that is Required to Discern Water Protections: State/tribal insights are critical to the implementation of the CWA and the essential place in reviewing water quality impacts is recognized in the existence of §401. States and tribes come to the review task with a critical understanding of the resources they are tasked with protecting, an understanding of regional- and site-specific needs, and knowledge of the most effective methods for preventing and mitigating impacts within that context. This knowledge and expertise is referenced repeatedly in the CWA and Section 401 as the primary justification for the cooperative federalism relationship documented in the rule. Without the ability to include state and tribal assessment and decision-making in §401, the appropriate water quality protections may not be implemented.

Proposed Expansion of Federal Authority Is Unacceptable And Violates State/Tribal Rights: While it may be argued that EPA is not expanding its own authority *exclusively*, it is rather expanding all federal agencies (including EPA) authority by giving them the legal power to decide whether a state's environmental requirement fits the “definition of water quality” requirement. This expansion is an

⁷ https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf

⁸ Wheeler, Andrew. “Here’s how Team Trump will bust Cuomo’s gas blockade.” New York Post, August 15, 2019, <https://nypost.com/2019/08/15/heres-how-team-trump-will-bust-cuomos-gas-blockade/>.

unacceptable change in the federal/state/tribal regulatory relationship. States and tribes will likely work through the courts to address this reduction in state/tribal authority.

Federal Agencies Should Not Have the Authority to Determine Applicable State Environmental Requirements: The proposed rule moves current state/tribal authority to federal agencies in determining what is an applicable state environmental requirement. For the first time, EPA is giving federal permitting agencies the authority to unilaterally decide whether the basis of a state/tribal certification is acceptable or not (see 121.6(c)), despite the CWA honoring the role of states and tribes as the experts on local resources. Currently, states and tribes make their certification decisions based on their own laws and regulations, and if there is any dispute about these, the courts are the arbitrator, not federal agencies.

Legal Issues

ASWM has identified numerous legal concerns related to the proposed rule. The following comments identify a few of the key issues. ASWM also strongly supports legal analysis submitted by the joint attorneys general from 15 states (CA, CT, MD, ME, MA, MN, NJ, NM, NY, OR, PA, RI, VT, WA and PA) to Administrator Wheeler on July 25, 2019⁹ and asks EPA to carefully review and respond to the requests identified therein. ASWM also concurs with comments submitted by joint attorney generals to Docket ID: EPA-HQ-OW-2018-0405. We are in agreement with their legal analysis supporting urging EPA “not to weaken its existing guidance and regulations. Section 401 explicitly preserves states’ independent and broad authority to regulate the quality of waters within their borders. Neither the President’s Executive Order nor EPA’s guidance and regulations can contradict or undermine the plain language and congressional intent of section 401.”

Limiting the Scope of State/Tribal Review to Discharge, Rather than Activity as a Whole, is Unreasonable: The U.S. Supreme Court in PUD No. 1 of Jefferson County v. Washington Department of Ecology held that states and tribes’ authority under CWA section 401(d) applies to the “activity as a whole.” In doing so, the Court conducted its own thorough textual analysis of the plain language of the statute, rejecting Justice Thomas’s dissenting interpretation. The Court’s “view of the statute” was that it “is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.” Because the conclusion was based on the words of the statute, the Court simply gave effect to Congressional intent.

After conducting this textual analysis, the Court also noted that EPA had reached a similar conclusion and cited *Chevron U.S.A. Inc. v. Natural Resources Defense Council*. The EPA now attempts to use this passing reference to *Chevron* to circumvent a central holding of PUD No. 1 (and Congressional intent), by resurrecting the approach advocated by Justice Thomas in dissent. However, when PUD No. 1 is read as a whole—including the concurring and dissenting opinions—it is clear that EPA lacks the authority to do so.

EPA’s proposed rule is premised on characterizing PUD No. 1 as an application of both steps in *Chevron*. In step one, a court will seek to determine if Congress has spoken to the issue at hand. If so, then Congress’s intent must be followed. If not, if there is ambiguity, then under the second step a court will defer to an agency’s reasonable interpretation of the statute. Yet, as Justice Thomas in dissent pointed out,

⁹ Letter from Attorney Generals of California, Connecticut, Maryland, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Pennsylvania Department of Environmental Protection to the US Environmental Protection Agency on July 25, 2019.

the majority did not identify what portion of the CWA was ambiguous. This is because there was no ambiguity: the plain language of CWA § 401 is clear and thus Congress's intent must be followed.

Justice Stevens concurrence in PUD No. 1 is instructive in this regard:

“While I agree fully with the thorough analysis in the Court's opinion, I add this comment for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards. See, e. g., § 301(b)(1)(C), 33 U. S. C. § 1311(b)(1)(C).”

In sum, the Court has provided a definitive interpretation of CWA § 401, and therefore the EPA may not issue a contrary rule. If the EPA wishes a different interpretation of the CWA, its remedy is to seek a legislative change through Congress.

EPA Is Misusing Chevron Deference as Basis for the Proposed Rule: EPA is also not entitled to rely on Chevron Step 2 deference to reverse nearly 50 years of continuous practice, two Supreme Court decisions, and numerous Court of Appeals decisions. EPA is not newly interpreting an ambiguous statutory program within its unique expertise. CWA § 401 dates back to the 1970 Water Quality amendments (P.L. 91-224), as interpreted by EPA in 1971 regulations, and codified/restated in the Federal Water Pollution Control Act Amendments of 1972. As amended in 1977 (P.L. 95-217), this law became commonly known as the Clean Water Act. The states and tribes have lived with a consistent interpretive regime for nearly 50 years as further illuminated by Supreme Court decisions (PUD No. 1) in 1994, and (S.D. Warren) in 2006, as well as by numerous U.S. Court of Appeals decisions, state regulations issued in reliance on these interpretations, and standard approaches to certification and years of practice coordinating with the Corps and other federal agencies.

Based on Executive Order 13868, EPA developed an entirely new interpretation which is contrary to the Supreme Court opinions, EPA's own prior interpretations, and the Circuit Court opinions (such as *American Rivers v. FERC*). But EPA is not writing on a clean slate here. This is nothing like a first interpretation by an administrative agency of a brand-new statute. This is the overthrow of 50 years of implementation and reliance by ASWM members, applicants, permittees, etc.

Additionally, when an agency undertakes a new interpretation, it needs a factual record on which to make such a change. But there is no such record in the proposed rule, indeed, there is no recognition of prior state and EPA practice or reliance at all. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983), requires the agency to articulate a rational connection between the facts and the choice made in changing its position. See also, *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009) (The agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.”).

The preamble consists of a bare “legal” reinterpretation which claims to be a “first” look by this EPA staff, as though all prior interpretations were unworthy of consideration (In the proposed rule, the EPA includes the following language: “This proposal...provides the EPA's first holistic analysis of the statutory text, legislative history, and relevant case law” (84 Fed. Reg. 44084); the EPA “addresses comprehensively and for the first time...” (84 Fed. Reg. 44092); the EPA has “for the first time conducted a holistic analysis of the text, structure, and history of CWA section 401” (84 Fed. Reg. 44093); the EPA “has now performed a holistic analysis of the text and structure of the CWA” and

“section 401” (84 Fed. Reg. 44096) and the EPA “has for the first time, holistically interpreted the text (84 Fed. Reg. 44097).

ASWM disagrees with EPA’s conclusion in the proposed rule that this is a first- time interpretation and that EPA is revising “unwise judicial constructions of ambiguous statutes” (Brand X legal case). By stating that this is the first interpretation and holistic analysis, EPA discounts all prior agency and court decisions. The proposed rule repudiates numerous Court of Appeals decisions cited in the preamble that follow PUD No. 1.

With this proposal, EPA is essentially trying to reverse a large number of decisions that have been made by the courts about specific roles and activities, by state and federal agencies (including EPA’s own decisions) in their administrative practice and state regulations, and in numerous state guidance documents. EPA itself over the decades has provided analysis and interpretation that is overlooked (or withdrawn). This is *not* the first time EPA has interpreted 401. Most importantly, the Supreme Court has recognized state authority over time (e.g. PUD No 1., S.D. Warren). In all of the history of section 401, this proposal represents the first time that deference has been taken away from states.

Not All Relevant Case Law Is Considered in EPA’s Legal Analysis: The result has been a “cherry picking” of cases and the use of dissenting opinions to develop EPA’s legal foundation, disregarding other court decisions. By doing this, the proposed rule purports to overrule a substantial number of these cases silently (such as American Rivers), with no discussion of why those decisions are no longer proper interpretations of law on which states may rely. The proposed rule silently overrules *American Rivers v. FERC* 129 F.3d 99 (2nd Cir.1997) where it was decided that federal permitting and licensing agencies are not authorized to second guess a state certification. In the end, EPA is taking on decisions that have been made by the courts about specific roles and activities and this is deeply problematic.

ASWM Takes Issue with Proposed Interpretation of “Any Other Appropriate Requirements of State Law”: Section 401 provides the ability for states and tribes to attach conditions to certifications, which are considered under the requirement for review of “any other appropriate requirements of state law.” EPA is proposing to limit water quality certification conditions to EPA-approved state or tribal CWA regulatory programs and disallow provisions that do not meet specific new restrictions. Congress gave broad authority to states and tribes, which includes the development and enforcement of their own laws. This state/tribal authority was recognized and preserved in the CWA. (For a more comprehensive discussion of the history of the CWA and § 401 certification, please review the joint Attorney Generals’ letter submitted to EPA on July 25, 2019¹⁰.)

The CWA does not preempt these laws, nor does it suggest that state laws dealing with buffers, instream flows, land use, groundwater, and other areas committed to state authority may be disregarded as “appropriate requirements of state law” when implementing section 401. Under the proposal, however, if EPA does not approve the condition (or recognize the relationship of the condition to an approved state or tribal CWA regulatory program” requirement, the proposed rule reads that the state/tribal condition will no longer be a requirement of the final approved federal permit. This is clearly against the intent of the CWA and an unacceptable reduction in and violation of state/tribal authority.

It is not EPA’s function under 401 to determine whether a state or tribal condition is appropriate, nor does 401 give this authority to federal permitting and licensing agencies (as the proposal would do). The

¹⁰ Letter from Attorney Generals of California, Connecticut, Maryland, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Pennsylvania Department of Environmental Protection to the US Environmental Protection Agency on July 25, 2019.

system, as designed, functions in such a way that if a proponent disagrees with a state condition, they can challenge the condition in court. The courts are the appropriate venue for state/tribal conditions to be challenged (121.5e), rather than EPA making discretionary decisions that impinge state/tribal authority

New Definition of “Water Quality Requirements” as a way of Limiting the “Scope” of 401, Represents an Unlawful Federalizing of Defining Water Quality Regulations that States Use to Protect Their Waters: The proposed rule includes interlocking definitions of: “condition,” “discharge,” “failure or refuse to act,” “receipt,” and “water quality requirements”. As presented, these definitions are written in a manner that would limit state/tribal authority. It narrows the plain reading of CWA sections 401(a) and (d), which do not condition state water quality requirements and applicable requirements of state law to those that EPA has approved.

ASWM strongly objects to the definitions proposed for the purpose of limiting state and tribal authority. There is no need to further define terms which are commonly understood and properly defined in a dictionary. It purports to limit the scope of 401 denials and conditions imposed by states to CWA provisions and “EPA-approved state or tribal Clean Water Act regulatory program provisions.” This is far narrower than “any other appropriate requirement of State law” which is what 401(d) authorizes the states to address. This action represents a federalization of defining water quality regulations without telling states and tribes what it means. ASWM believes that implementation is more appropriately described through the body of regulations, not definitions.

Also, by limiting the definition to only EPA-approved regulatory programs, EPA has excluded state/tribal water quality requirements that EPA has yet to approve or that EPA has no authority to review and approve. One example is state/tribal wetland permitting programs that have not yet been submitted for CWA approval. By excluding these programs, EPA has created a discrepancy between federal and state permits for the same activity, which will only create confusion for the permit holder.

Another problem in limiting “water quality requirements” to EPA-approved CWA regulatory programs is with state/tribal new water quality standards that have been adopted by the state/tribe but not yet approved by EPA. If a state/tribe receives a certification request during this period, which water quality standards does it use for certification the new ones that the state/tribe is legally bound to use by state/tribe law, or the previous standards that were EPA approved? This conundrum is exacerbated by the time that EPA takes to make decisions of new water quality standards (60 days to approve and 90 days to disapprove and propose). Those time frames may exceed the reasonable period of time for certification, thus putting the state/tribe in a catch-22 where it can do nothing legally. ASWM suggests that the phrase “EPA-approved” be dropped from the definition of “water quality requirement” to prevent these adverse consequences. ASWM also suggests that EPA not define water quality requirement, as the language is plain and appropriate as it stands.

Moving from “Activity” to “Discharge” Reduces State Authority: Any *potential* discharge associated with an entire project (activity) subject to a federal license or permit which *may* enter a navigable water is broadly covered under the CWA. Section 401 applies to activities that may result in a discharge, not from which a discharge is a certainty. Project proponents lack authority for determining for regulatory purposes that there is no potential discharge. The determinations are made by the relevant certifying agencies. States and tribes must be able to consider activities as a whole to ensure the holistic view that the courts embraced in PUD No. 1.

Limiting Discharges to Those from Point Sources Is Contrary to Case Law: ASWM opposes limiting the scope of certification to only point sources. Contrary to Supreme Court decisions, this proposed change narrows the scope to discharges only from point sources, thus excluding review from impacts of

other activities. This narrowing is contrary to case law, relying solely on a dissenting opinion to narrow scope. A dissenting opinion carries no force of law.

ASWM Opposes the Change from “May” to “Will” Around Discharges: The proposed rule uses the word “will,” where the current rule used the word “may” around whether or not a discharge would happen. ASWM requests that EPA keep the current statutory language, which uses the word “may” to allow for consideration of potential and inadvertent discharges. State and tribes rely on the ability to condition around discharges that “may” occur, based on extensive scientific and administrative evidence that certain discharges are likely to occur from specific high-risk activities that are often the consequence of activities in proposals being reviewed as part of the § 401 certification process. Examples of potential discharges considered by states¹¹ include accidental discharges from failures in fracking, landslides, leaks from pipelines, inadvertent return, contaminated soils or waters, improperly following approved plans, leaching (from mines or when building on landfills), incidental spills from trans-loading facilities, prop wash from barges or vessels, and erosion from site development or mitigation activities. Additionally, this new language creates a problem for states working to adopt a new standard. New standards and appropriate conditions for potential discharges actually protect permit and license holders, as well as water quality. Conditions can outline the measures to take in the event of an unintended discharge that the certified entity and regulatory agency understand, while without these measures the permittee/licensee can be held liable for a water quality violation and be subject to additional, costly remedial measures.

ASWM Opposes Elimination of Key State/Tribal Conditions: ASWM believes the broad review over all aspects of pre- through post-construction actions merits that the appropriate conditions should also be wide ranging and commensurate with the scale and potential impacts of the project. All are related to ensuring that waters meet designated uses. These conditions, applied by many states and tribes¹², include but are not limited to:

- Pre-construction monitoring and assessment of resources;
- Use of certain construction practices and equipment;
- Time of year and other seasonal restrictions on construction or operation;
- Hiring of an independent environmental inspector, answerable to the certifying agency; to oversee construction;
- Additional monitoring for construction and post-construction impacts, discharges, and thresholds for meeting water quality standards;
- Preparation and implementation of a plan approved by the certifying agency to address inadvertent discharges and remediation that may be required by the certifying agency;
- Plan and performance standards for required compensatory mitigation and restoration of temporary impacts during construction;
- Validation of § 401 certification contingent upon receiving other approvals; and
- Financial assurances for successfully meeting requirements.

While EPA has never formally approved many state conditions, there are a lot of “appropriate requirements of state law” protections that are not “Clean Water Act regulatory program provisions” that play key roles in protecting water quality under § 401. The proposed definition in § 121.1(p) as incorporated in 121.3 would eliminate these critical water quality protections. Most of these conditions are based on designated uses around the growth and propagation of aquatic life and wildlife as well as

¹¹ ASWM communications with 14 states in October 2019.

¹² Ibid

other uses. Many rely on appropriate provisions of state law that do not apply directly to “discharges” but that are essential to maintenance and improvement of water quality. Some examples include:

- Groundwater protection provisions meant to protect surface waters;
- Maintenance of buffers and requirements for revegetation;
- Temporary disturbances, such as for installation of utility lines in wetlands;
- Requirements for karst surveys and dye studies;
- Restriction in the timing to conduct the activity to times outside of reproductive season for certain fish;
- Requirements for the design of any structure to allow for passage of aquatic life;
- Restriction on untreated stormwater from impervious surface due to the entry of pollutants into the water;
- Requirements for a management plan in place for spills containing pollutants which may enter waters;
- Requirements for compensatory mitigation for the loss of a resource, such as requiring that other resources be created, restored, or enhanced to offset the adverse impacts of a discharge, so that overall the activity may be certified;
- Requirements for use of certain practices and equipment, and the hiring of independent environmental monitors, for activities and sensitive resources (such as minimizing soil disturbance) to meet water quality standards; and
- Restrictions on the loss of tree cover and shade over a water, when loss of this shade would result in heating the water and failing to meet temperature criteria for the water.

EPA should explain in its review of comments exactly how (or whether) these state/tribal certification provisions and conditions will be preserved and which will be eliminated. If EPA believes that some § 401 conditions may be preserved as more or less related to “EPA-approved” state water quality standards, EPA must explain how in each instance federal permitting and licensing agencies will be able to make this determination on a very short time frame, case-by-case, and must further provide a workable mechanism for how states and tribes may contest such determinations. The current 401 system, which works well, simply applies the state/tribal conditions under cooperative federalism.

Federal Agencies’ New Authority Around State Conditions Creates State/Tribal Liabilities: In the proposed rule, if a federal agency determines that a state water quality certification does not satisfy the federal interpretation of the regulations, the state water quality certification is treated as a waiver/refusal to act. This same approach is proposed to apply to conditions in a state/tribal water quality certification if the condition does not comply with the federal regulations, the state/tribal condition is not incorporated. However, all the conditions listed above are relevant to water quality. States and tribes could be held liable when EPA rejects certification conditions, if this failure to condition violates state/tribal water quality standards or regulatory procedures. States/tribes should not be subject to further legal challenges under their own authorities as a result of the federal agency refusing to incorporate conditions that the certifying agency deems appropriate and necessary.

ASWM does not believe that EPA’s new interpretation of limiting conditions to state-approved CWA programs is in accordance with the intention and/or objective of the CWA. The CWA gave broad authority to states/certifying agencies in attaching conditions, and this authority must remain. ASWM also objects to the requirement for states and tribes to provide rationale, citation, and statements described in the proposal. ASWM also strongly rejects the proposed EPA review of already-approved state/tribal

conditions to determine if they do not meet the new interpretation of water quality. In addition to a violation of state/tribal rights, it is also a wasteful use of state/tribal time and resources.

States and Tribal Authorities Do Not Need to Include Specified, Detailed Conditions: Certifying authorities have broad discretion in adding conditions under the CWA and typically under state authorities. Conditions do not have to be itemized in state regulations or statute. A statement that the agency may impose conditions to accomplish the intent of statute or regulation is adequate. EPA does and should not have authority to require justification. If a condition is deemed inappropriate, the proponent or other person with standing can challenge through an appeal or court process. EPA should not play an oversight role in state and tribal certifications/modifications unless invited to by states/tribes.

These proposed changes to the rule represent a transfer of decision-making authority from state and tribal § 401 agencies to federal permitting and licensing agencies. Such agencies may be ill-equipped to address these issues or may respond to pressures from applicants to exclude state conditions or deem constructive waiver, leading to a possible loss of many ordinary state/tribal certification conditions. This new provision of the proposed rule may also create the unintended consequence of providing new grounds for litigation by permit and license applicants arguing that federal agencies should have disallowed various state conditions as outside the scope of EPA's proposed regulation. It may also lead to more litigation by the certifying agencies against the federal agencies for their determination.

By Moving The Final Authority For Approving Conditions to Federal Agencies, Challenges Are Moved from State to Federal Courts: Under the current rule, any legal challenges to conditions placed on permits from states and tribes are under the legal jurisdiction of state courts, where the applicant has to argue its case that the condition is illegal. Under the proposed rule, the onus is put on the state or tribe to defend its conditioning decisions in federal court. A project proponent will have the right to challenge a condition from the certifying agency, challenging why the federal agency allowed the conditioning. This will lead to a shift in the balance of authority and place a new, unnecessary and complex burden on states and tribes who do not have the resources to support a legal defense effort in federal courts.

States/Tribes Should Retain Authority to Modify Previously Issued Permits: States or tribes should have full authority, as included in their own certification program authorities, for modifying any certification as long as the license or permit is in effect. EPA and other federal agencies should not have any authority over state conditions, so if a modification is needed it should only be needed from the certifying agency. A list of modifications would include, but not be limited to minor modifications, such as a change in ownership, or major modifications, as in changes in discharge extent, modifications based on monitoring information or compliance issues, or other new information. States/tribes should retain authority to make any of these described modifications whenever the circumstances warrant the changes.

States and Tribes Must Be Allowed to Assert Enforcement of Their Own Certification Provisions: The proposed rule prohibits states to assert enforcement of their own certification provisions. In the proposed rule, §121.9 allows enforcement inspection by state "prior to the initial operation", at which point the state makes recommendations for remedial measures. However, then the federal agency is solely responsible for enforcement. Enforcement discretion is only provided to the federal agency, because "only the federal agency can make determination of its importance, priorities and resources." However, to date states and tribes often assert their ability to enforce their own certification provisions. Many states have taken action both under their own authority and § 401 where failures have occurred. ASWM does not agree with this interpretation and consequently, this prohibition should not appear in the regulatory text.

Application Requirements, Completeness, Timing and Extensions

The Proposed Rule's List of Required Information Is Inadequate: Information required is commensurate with the type and condition of the resource and extent of impacts; however, items 1-7 are essential, and additional information may be required to address water quality and other integrated and appropriate state requirements, including other items not listed below:

1. Identity of the project proponent(s) and a point of contact;
2. Identification of the proposed project;
3. Identification of the applicable federal license or permit;
4. Identification of the location and type of any discharge that may result from the proposed project and the location of receiving waters;
5. A description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat or control the discharge;
6. Description of all water types on site and areas of direct and projected itemized indirect discharges and impacts (both temporary and permanent);
7. Plans showing construction and limits of disturbance of activities shown in relation to waters onsite, property boundaries and construction practices;
8. Description of methods of construction (if not constructed) and operating procedures;
9. Description of measures to reduce adverse impacts onsite, as well as attempts to overcome constraints to minimizing adverse impacts;
10. Alternate locations for projects over a certain amount of impact, if not yet constructed, and a rationale for the recommended site;
11. Identification of compensatory mitigation actions to offset certain impacts, so that overall water quality standards are still achieved; and
12. Pre-construction monitoring or assessment data of resource condition, if appropriate.

Lack of Requirements for “Complete Applications”: In the proposed rule, the language includes no information about what an applicant must submit in terms of the quality and breadth of content for assessment. There is nothing to compel the applicant to submit adequate information, rather the incentive to provide less information, so that the state/tribe potentially loses review time needed to make an informed certification decision. In order for a state or tribe to complete a review to determine potential impacts from an activity and, if necessary, condition a permit to minimize those impacts, it obviously must have the information necessary to make that judgment. The proposed rule also neglects to include submission deadlines for materials requested by the state or tribe that it deems to be necessary to compose a “complete application” in order to make an informed permitting decision. This creates an untenable loophole in the rule, allowing a project applicant to merely submit the minimal Certification Request, wait up to one year, and then wait for EPA to judge that the certification has been waived by default because the state or tribe did not make a decision, a decision that would have had to be made on incomplete information based on an incomplete application. ASWM strongly recommends that the clock for state or tribal review of an application not commence until the minimum standard for a complete application has been met as defined by the state/tribe.

EPA Must Not Limit Requests from States/Tribes for Additional Information: EPA requests comments on whether the agency should develop nationally consistent procedures for requesting additional information. The proposed list of what can be included in requests for additional information is inadequate. In particular, there is not information required on the amount, extent and impact of discharge. The nature and scope of information needed is best determined by the states and is commensurate with the scope of the project and its potential impacts. The decision as to what

information is needed should be provided by the state to the applicant prior to the applicant making a request and a request should not be considered “bona fide” if it is not accompanied by all of the information that a state or tribe has indicated it needs to complete its review. For examples, states and tribes must be allowed to request existing information on resources and their condition, as well as methods of construction and proposed compensatory mitigation, as much as is known.

States and tribes may ask for information required to determine impacts and appropriate avoidance, minimization or mitigation decisions. Examples include project details around limits of physical disturbance, on the aquatic resources located in the water body, avoidance and minimization efforts, mitigation plans, information on impaired waters or waters with an approved TMDL surrounding the project, alternatives assessment, information on maintaining water quality beneficial uses, sediment quality information, water quality monitoring and protection plans, long-term operational plans, wetland delineations and wetland ratings information. For many states the requests for additional information revolve around ensuring that information initially required to be submitted is accurate. Especially for larger, more complex projects, states indicate that most applications have some piece(s) of required information.

At least seven states have specific requirements or guidelines for what must be included to constitute a complete §401 application at the state level.¹³ Many states have developed their own checklists or guidance documents that enable project proponents to submit a complete application for review. This provides transparency and predictability for applicants. The proposal will force requirements to be adjusted in ways that may lead to incomplete applications and unnecessary delays or denials. These requirements will need to be revised to be in sync with the new rule and may create a statutory conflict between state and federal laws and regulations. However, the majority of states do not have specific requirements for what needs to be in a complete application because they understand that each project is so unique and individual that requirements should be specific to that project. Other states, while not defining “complete application” in statute, provide requirements for specific items through the use of state 401 permitting checklists that are sent to applicants.

For major projects, there should be characterizations for alternate locations of the project, if not yet constructed, and a rationale for the recommended site. Land, water, wetland and human resources within the appropriate area of influence should be characterized by alternatives, if appropriate, with itemized impacts by resource type. This is necessary for agencies to categorize resources according to relevant state requirements. Information requirements are better placed in the body of regulation, rather than trying to regulate wholly by definition. ASWM does not believe that it will be possible to develop a generic national standard form requesting certification, given the diversity of water resources and certifying programs. States and tribes require the ability to retain flexible procedures that comply with § 401, but still allow for context and complexity considerations. ASWM asks that EPA develop a recommended list of information-gathering tasks for states and tribes, rather than developing a set of inflexible nationalized procedures.

“Reasonable Period of Time” for Permit Review Must Not Be Restricted to Less than One Year:

The proposed rule prescribes what is to be included in a certification request and defines the start of the “reasonable period of time” for state decisions to begin when the request is made. However, certification requests submitted according to the proposed rule would lack even the bare minimum information required to begin a defensible review. ASWM strongly objects to EPA defining the content of a request so narrowly. Information on extent of the discharge, methods of construction, post-construction potential

¹³ Ibid.

discharges, as well as additional information on project location are needed to begin review of a project for water quality-related impacts under what will likely be a prescribed tight timeline.

As mentioned earlier, ASWM believes that additional guidance and revisions to existing EPA regulations may be useful to ensure that a request is complete for a § 401 evaluation and includes all the information, data, and analyses needed by a certifying authority in order for it to determine whether to approve, approve with conditions or deny certification within the prescribed timeframes. However, the timeline for § 401 certification decision should not be considered to be started until the request is considered a bona fide request (i.e., a complete application), which means that it includes all the necessary data, information and analyses as determined by the state or tribe in which the § 401 permit is requested.

The proposed rule also indicates that if the federal permitting agency receives the state/tribal certification decision prior to the end of the reasonable period of time and finds it deficient, the federal permitting agency may offer the state the opportunity to “remedy” the deficiency. Without clearly defined processes and procedures, the federal permitting agency has the discretion to determine what constitutes a fair amount of time for states to “remedy” the deficiency. The lack of time frames for federal review and notification to states/tribes about “deficient” conditions allows federal agencies to delay notification so that states have no time to properly respond within the timeframe, after which the federal agency may reject or declare that the state /tribe has waived certification. This is an unacceptable attempt to prevent states/tribes from protecting the quality of their waters. If EPA has not defined timeframes, then neither should the state. However, if states and tribes are held to new timeframes in the proposed rule, ASWM asks that EPA develop complementary timeframes for federal agencies to facilitate adequate time for state/tribal review as well.

The determination of what is a reasonable timeframe for a § 401 certification decision for a particular type of federal license or permit (not to exceed 1 year) should be arrived at in partnership with states/tribes in the spirit of cooperative federalism. Federal agencies alone should not set the time frame for review and decisions on certification - they should be required to work collaboratively with states and tribes to ensure timeframes are achievable.

ASWM strongly objects to EPA setting timeframes for requesting information and mandating what information could be requested. No Agency authority exists for determining timelines except the overall deadline in the CWA, which is one year. EPA’s proposed rule allows federal permitting agencies to prescribe their own “reasonable” periods of time, but EPA should make it clear that in no event should these be shorter than the federal consistency period (6 months) for activities in the coastal zone. Doing so creates serious coordination issues and problems.

ASWM advocates for retaining existing language: “generally considered six months, not to exceed one year” for EPA’s determination of time limits. The current rule does not include adequate requirements to provide information to determine if six months is enough time for review. Rather EPA should look at requiring development of a timeline for the project, then add the complexity consideration to determine if six months is enough time and any individual considerations for different projects. ASWM objects to EPA reviewing conditions and demanding remedies as yet another delaying tactic and usurpation of state/tribal authority.

Prohibiting “Tolling” (Withdraw and Re-submit Requests) Is Unacceptable and Will Lead to Additional State/Tribal Denials: EPA’s proposed rule has the review clock start upon receipt of a certification request. However, this does not equate to the receipt of a complete application by any parties. In fact, many states find that that most applicants do not submit complete and accurate

applications the first time and require additional information.¹⁴ ASWM argues that the Hoopa Valley case did not decide this issue, which was not before it. While ASWM agrees with EPA that it does not want auto-refiling of permits for decades, the new requirements in the proposed rule will likely lead to a lack of information being submitted in an application that would have allowed for the needed assessment. Inability for the state or tribe to stop the clock (or even request a refiling) for any reason is an unlawful reduction in state authority not supported by the statute.

ASWM suggests EPA revisit the potential circumstances where tolling might be appropriate and for what length of time. ASWM also argues that EPA should allow for requests by applicants who would prefer to withdraw and re-submit rather than have denial due to lack of information to determine if water quality standards are met. States should be able to “request” or require that applications be withdrawn and resubmitted with better or more complete data. The Hoopa Valley (No. 14-1271) case does not prohibit this; it merely prohibits a collusive scheme to evade the one-year deadline. ASWM argues also that the Hoopa Valley case appears to have not decided this definitively.

Additionally, in a related case (No. 19-257), an amicus brief submitted in regard to the Hoopa Valley case submitted by 20 states (California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Rhode Island, South Dakota, Utah, Washington and Wisconsin) argues that the court of appeals’ decision “thwarts the CWA’s protection of state regulation of water pollution”, “misconstrues the plain text of § 401” and “threatens significant environmental harm from unintentional waiver of state authority.”¹⁵ The brief goes on to say:

“Applicants choose to withdraw and resubmit applications because they view it as being in their best interest. If the applicant believes a state agency is willfully delaying a project, the applicant always retains the option of not withdrawing its certification request and challenging any denial in court. But that rarely, if ever, occurs. Instead, applicants often prefer withdrawing a request to having it denied, which may delay and jeopardize funding for projects....In contrast, the D.C. Circuit’s holding in this case, if allowed to stand, will force States to prematurely deny applications for complex projects in order to avoid being deemed to have waived their Section 401 certification authority.”¹⁶

EPA also should not develop a definition for “fails or refuses to act.” Defining “fails or refuses to act” does not include allowances for states/tribes to formally request an extension or additional information from a project proponent. Currently, there is no definition for this, and ASWM asks EPA to continue to leave the term undefined. For all the reasons stated above, ASWM asks EPA to remove this no tolling requirement in § 121.4(f).

Option for Extensions Should Be Allowed for States and Tribes, as well as EPA: Extensions are often necessary to address missing information or complexity. The approach in the proposed permit treats states and tribes that are trying to do the same work as EPA unfairly. To honor the cooperative federalism relationship, EPA should also provide this opportunity for states. EPA gives no rationale for treating states and tribes differently than EPA as certifying authorities. Thus, EPA should afford states and tribes the same considerations as EPA as certifying authorities. This same argument, and potential negative impacts to states and tribes, applies to the proposed rule’s treatment of EPA as having sole access to pre-submittal meetings. If EPA claims that extensions are necessary for obtaining more information and thus

¹⁴ ASWM communications with 14 states in October 2019.

¹⁵ Brief for States of Oregon, et al as Amicus Curiae, No. 19-257, in *Hoopa Valley Tribe v. FERC*, No. 14-1271 (D.C. Cir., Jan. 25, 2019), p. ii.

¹⁶ *Ibid*, p. 11.

gives itself the authority to unilaterally give itself an extension when EPA is the certifying authority, why does EPA claim that such extensions are not necessary for states and tribes for the same purpose?

Effects on Downstream States

EPA Needs to Include Time in Review Process for Consideration of Downstream Impacts: As EPA considers timing issues, from an implementation perspective, the rule should take into account that time is needed in the process to be able to include and review potential impacts for downstream states. There are transactional costs that come with this review and incorporation of necessary considerations.

Proposed Rule Does Not Describe the Criteria and Steps for Determinations: Regulations should clearly describe the criteria and steps EPA will take in determining whether other jurisdictions may be affected. We also believe that 60 days would often not be an adequate time for determining if another jurisdiction's water quality requirements would be met or not, when adequate information is not provided by the project proponent. The other affected jurisdiction should have an equivalent period of time as the jurisdiction in which the discharge originated, as well as having authority to require additional information.

Constrained State Authority Increases Risks to Downstream Water Quality: A particular concern is the potential impact to interstate waters of unregulated upstream waters or wetlands, if those states lack independent state authority over, for example, discharges of fill material into wetlands. If a state lacks independent authority, the sole recourse for reviewing federally permitted activities involving a discharge is through CWA § 401 certification. Severely constraining state authority in the § 401 review process increases the risk that activities in upstream waters and wetlands will threaten water quality in downstream waters.

EPA Administrator Should Not Have Discretion to Determine Whether a Discharge May Have An Effect in a Neighboring Jurisdiction: ASWM is also concerned that the proposed rule changes section 401(a)(2) regarding EPA's responsibilities as they pertain to the requirement to notify neighboring states "whenever a discharge may affect, as determined by the Administrator, the quality of the waters of any other State. . . ." EPA proposes by regulation to make this totally discretionary on the part of EPA. EPA's proposed language indicates that "the Administrator *at his or her discretion* may determine that the discharge from the certified project may affect water quality in a neighboring jurisdiction" (emphasis added). ASWM maintains that this is not reflective of the plain reading of the CWA nor is it consistent with the overall purpose of § 401, which is to ensure that state requirements for water quality are met—including water quality requirements in downstream states.

EPA Administrator Should Not Make Final Determinations: Finally, ASWM is concerned about the lack of articulated criteria that would ensure that the EPA Administrator accurately determines whether there may be an effect on water quality in another state. ASWM strongly recommends that additional criteria be provided for how EPA would determine when there may be an impact to another state; that EPA articulate the information that EPA must provide to states; and that EPA develop operating procedures with individual states and tribes to ensure effective implementation of this important provision of the CWA.

Economic Analysis

Request for a Quantitative Analysis by EPA: ASWM recognizes that Executive Order 12866 does not require a quantitative cost and benefit analysis for significant regulatory actions. However, ASWM notes that it has been the EPA's practice to conduct a quantitative analysis unless impractical, in which case the EPA conducts a qualitative analysis. ASWM can find no explanation either in the preamble or the

economic analysis as to why the EPA decided that it could only conduct a qualitative analysis. ASWM requests that the EPA either provide that justifiable explanation with an opportunity to comment on the justification or conduct a quantitative analysis.

Regarding how a quantitative analysis *could* be conducted, EPA could select a random number of both § 401 certification approvals and denials for each of the federal programs requiring certification (CWA § 402 and § 404 permits, Rivers and Harbors Act § 9 and § 10 permits, FERC licenses, and NRC licenses), making sure that the selected number of actions for each program reflects the number of permits or licenses for each program. For example, if EPA chose to evaluate 1% of the certifying actions, then EPA would evaluate 25 CWA § 404 permits, 16 Rivers and Harbor Act § 10 permits, 2 CWA § 402 permits, and 1 permit or license for the remaining programs, based on the numbers EPA provides in Table 3-1 of the economic analysis.

From this subset of certification actions, the EPA could determine the percent of:

- Actions that actually led to legal action;
- Denials that were based on state non-water quality requirements that are inconsistent with the proposed definition of water quality requirements;
- Denials that were based on state water quality requirements (for example, dredge and fill requirements for states without § 404 permit assumption) that are inconsistent with the proposed definition of water quality requirements;
- Denials that were based on incomplete applications or insufficient information, that could have been resolved if the proposed certification request rule had been effective; and
- Actions that exceeded the federal agency's current reasonable period of time.

From analyzing this information, EPA could determine, within bounds of uncertainty, whether the stated costs and benefits were significant or only marginal. At best, the economic analysis now only is based on the best professional judgement of EPA, and it is undocumented as to why EPA considers that judgement to be reasonable.

EPA's Selection of Case Studies Is Not Representative of Universe of § 401 Actions: ASWM identifies three deficiencies with the EPA economic analysis:

- a. Insufficient number of case studies. EPA chose to analyze four recent § 401 certification denials. ASWM can find no information in the EPA economic analysis that explains why these four actions are representative of the annual 2,511 individual and 50,159 general CWA § 404 permits, 1,670 individual and 8,607 general Rivers and Harbors Act § 10 permits, 150 individual and 16 general CWA § 402 permits, 30-35 Rivers and Harbors Act § 9 permits, 47 FERC licenses and 3 NRC licenses identified in Table 3-1 of the economic analysis. Without conducting an analysis of more actions, EPA cannot factually claim that its analysis is representative of § 401 actions.
- b. Analyzed only two programs. EPA analyzed only three FERC licenses and one § 404 permit. ASWM can find no information in EPA's economic analysis that explains why these two programs are representative of all five federal permitting and licensing programs listed above in Item a. EPA should have analyzed actions from all five permitting or licensing programs for the economic analysis to be representative of all these programs. Without conducting an analysis of all federal programs, EPA cannot factually claim that its analysis is representative of § 401 actions.

- c. Analyzed only § 401 denials. EPA analyzed only § 401 certification denials. ASWM recognizes that the implicit purpose of the proposed regulatory language is to reduce the current percentage of certification denials, which is why EPA may have chosen to analyze only denials. However, there are transaction costs for certification approvals, especially with the proposed regulatory language affecting the timing and scope of certifications. EPA failed to consider the costs and benefits resulting from the proposed language on certification approvals. Again, without conducting an analysis of all federal programs, EPA cannot factually claim that its analysis is representative of § 401 actions.

To rectify these deficiencies, EPA could collect information on a representative number of case studies, using the methodology suggested in the previous comment.

EPA Did Not Evaluate Costs to States for Increased Resources to Comply with Regulation Time:

Section 5.1.2. of the economic analysis discusses potential impacts resulting from the proposed regulatory language regarding a reasonable period of time for certification decisions. However, this section does not discuss the impact of a rigid designation of reasonable time on state resources. Certainly, the proposed requirements for a certification could reduce the amount of transactional time and thus give a state sufficient time to conduct its certification analysis. However, the newly proposed consequences of considering a certification waived if late will force states to move more resources into certification analysis. A recent example of this is Army Corps RGL 19-02 from August 7, 2019, that specifies a reasonable period of time to be 60 days, unless modified by the District Engineer. When one considers the requirement for public notice (typically 30 days) and the potential need for additional information (limited to 30 days when the EPA is the certifying agency—see 121.12(a)—as a reasonable time for this action), then 60 days as a default time is impossible. States will very likely move resources into their certification office to preclude being forced to waive certification. This impact should be discussed in this section of the economic analysis.

EPA Did Not Evaluate Costs to States by Excluding Non-EPA-Approved State Water Quality

Requirements: Section 5.2.2. of the economic analysis discusses the potential impacts of excluding non-water quality impacts because they are inconsistent with the proposed regulatory language at §121.1(p). However, the proposed regulatory language also excludes water quality impacts if they are not regulated by an EPA-approved state program. State dredge and fill requirements are an example of this. Unless the state has assumed the § 404 permitting program, its dredge and fill requirements are not approvable by EPA. Yet, these state requirements are water quality based and are used to prevent water quality impacts. The potential impacts of the regulatory revision are likely the same for both water quality and non-water quality impacts; however, the number of instances would be greater where a certification denial would be considered waived under the proposed rule. The economic analysis should recognize this. ASWM has earlier commented on its concerns about the proposed narrow definition of water quality requirements. If EPA decides to revise its proposed definition, then EPA also needs to revise its analysis on potential impacts.

Proposed Revision of Timeline Identifies One Element of a Certification That Is Inconsistent with the Proposed Regulatory Language:

Section 5.1.1 of the economic analysis lays out the seven elements that are proposed to be required in a certification request. Item 3 in the list of required elements specifies identification of the applicable permit or license **and includes a copy of all application materials provided to the federal agency** (emphasis added). The proposed regulatory language at § 122.1(c)(3) does not require that the certification request include the application materials and thus is inconsistent with the economic analysis. ASWM has earlier commented on the importance of the application materials for the certifying agency to make a timely certifying decision. Because EPA conducted the economic analysis with this inconsistency with the regulatory language, EPA's estimated costs and

benefits may be incorrect. ASWM requests that EPA re-evaluate the economics using the correct regulatory language and provide that analysis for the public to review before closure of the public comment period.

In addition to the above suggested analysis, ASWM asks EPA to review and incorporate economic analysis considerations identified in the joint attorneys' letter submitted to Docket ID No. EPA-HQ-OW-2018-0149 commenting on EPA's Revised Definition of Waters of the United States on April 15, 2019. This "Expert Review of the Economic Analysis for the Proposed Revised Definition of 'Waters of the United States'" was prepared by Catherine L. Kling, Ph.D. on behalf of the Office of the New York State Attorney General. The analysis provides valuable insights to EPA about the economic impact of changes to CWA on states and tribes.

Technical Implications of the Proposed Rule for State and Tribal Processes

State and Tribal Wetland Regulatory Programs Have Been Built Around Authority Given by § 401; Changes Mean Some States Will Be Left Unintentionally Unprotected: States and tribes rely on the § 401 program to protect water quality within their boundaries, whether solely or as part of an integrated management effort with state/tribal regulatory programs. As already noted on page 2 of this comment letter, states rely on § 401 certification for many critical functions. States and tribes have developed regulatory programs to meet their needs for protecting water quality based on the current rule and the protection it provides. The proposed rule represents a major revision to how states and tribes can be involved in the review process and what conditions they can include. New requirements, language and interpretations in the proposed rule will create many complex and difficult problems for states, which are detailed in the following comments.

Proposed Rule Largely Ignores Vital Role of States/Tribes as Local Experts: The CWA positions states and tribes as the experts in regional and contextual decisions, understanding the subtle geographic, ecosystem, geological, biological and other considerations that are specific to their location. Recognition of the importance of this local expertise is a cornerstone of the CWA and cooperative federalism. As described earlier, it is the state/tribal entities that are responsible for annual monitoring and biannual reporting on the condition of the state/tribal waters. This results in a level of state/tribal expertise far exceeding what EPA could achieve if responsible for conducting monitoring and assessment itself.

Federal Authority to Deny State/Tribal Conditions a Violation of State/Tribal Programs and May Leave State/Tribal Waters Unintentionally Unprotected: Complications with the elimination of specific conditions in state/tribal use will arise with the proposed rule. If EPA says it means only that the water quality standards of the receiving water must be "EPA-approved," it will create huge conflicts over whether a specific buffer width, or a specific operating condition, or protection of non-WOTUS waters is really needed to meet the water quality standard or not. Under the current regime, the states decide these details; however, under the proposed rule a permitting agency may determine otherwise.

Legal Process to Establish State Statutory Support for Conditions Creates a Massive and Unnecessary Burden for States and Tribes: The requirement by EPA in the proposed rule to provide statutory support for any condition added to a state/tribal § 401 certification is a new and major change in the regulatory relationship around § 401 water quality protections. Most states across the country do not have specific statutes authorizing their state agency to condition permits, let alone document legal support for specific conditions. The requirement to provide this legal justification is a violation of state and tribal authority and places a massive and undue burden on states and tribes to work through a long, complicated and uncertain legal process to achieve EPA's required documentation. State and tribal processes that

move from proposing statute to passing it often take 2-5 years to complete. EPA should not require legal documentation of conditions, especially without funding and technical assistance to help states come into compliance with this new requirement.

No Phase-In Period Creates Immediate Non-Compliance Issue for States and Tribes: Understanding that most states and tribes do not have the legal documentation required by the proposed rule, implementation of the proposed requirements will leave many states and tribes in noncompliance and unable to condition permits until they have passed new state law. Without statutory support, the regulated community will have the ability to argue that state conditions are illegal and challenge conditions that are approved in court.

As mentioned earlier in this letter, the proposed rule creates an impossible situation for states and tribes (a catch-22), requiring the use of the new state standards not yet approved by EPA and have the federal permitting authority claim that certification was waived, OR use the old state standards and be subject to lawsuits for making a certification decision based on no longer effective standards.

Alternative Tools/Mechanisms Can Achieve Same Goal as Statutory-Supported Conditions: ASWM asks EPA to remove the requirement for legal documentation and instead encourage states and tribes to increase transparency and predictability through the development of phased-in BMPs, with a timeline that allows for stakeholder input, review and the development of sustainable implementation mechanisms (staff, funding and other resources). Alternative tools or mechanisms to ensure that certifications/conditions are lawful as an alternative to state statute include reference to state/tribal BMPs, which would allow flexibility at the same time providing regulatory certainty and transparency for proponents, without the same burden of drafting and passing targeted statutes for specific conditions. There may also be provisions for periodic updates. ASWM recommends that EPA provide adequate funding support to any state/tribe developing additional BMPs and improvements to their certification programs, as well as updates.

New Definition of Water Quality Requirements Restricts What Should Be in Processing and Review Requirements: In response to EPA's specific request for feedback on III.D. Proposed Rule, Appropriate Scope for 401 Certification Review on pp. 91-95, ASWM offers the following comments: EPA's new definition of water quality requirements attempts, by definition, to restrict what should be in processing and review regulations. States and tribes may require this information to adequately assess the impacts and/or potential impacts of an activity. As already stated, ASWM asks EPA to maintain the current definition of water quality requirements, which will also remove this restriction on needed information.

Pre-Application Meetings Should Be Voluntary at the Federal and State Level: In response to EPA's specific request for feedback on III.G.2. Proposed Rule; Certification by Administrator; Prefiling Meeting Procedure on pp. 126-127, ASWM has been encouraging EPA to promote voluntary pre-application consultation at both the federal and state/tribal level. The prefiling process would be useful for states and tribes (so they can request state/tribal-specific information at that time) but should be reserved for what the certifying agency considers a major project, is otherwise recommended by the certifying agency requested by the project proponent, or potentially affects interstate waters. If mandated, the volume of requests for each action could overwhelm the smaller programs that may be challenged to perform reviews in a timely manner. There may even be difficulties with meeting § 401 deadlines if these meetings are required for all requests. Program staff should agree to meet upon request or set up regular interagency meetings to discuss major projects and invite project proponents to describe their project; however, this should not be a mandatory EPA requirement in the regulation.

EPA Should Not Develop National Standardized Forms: In response to the specific request in III.G.3. Proposed Rule; Certification by Administrator; Requests for Additional Information, ASWM provides the following comment: As discussed earlier, the development of standardized forms will further reduce the flexibility of states and tribes. For this reason, ASWM recommends that EPA not develop specific federal forms for the § 401 process. States and tribes know the appropriate things to include for their context and are provided the authority in the CWA to make such decisions. If EPA wants to provide a suggested list of requirements and allow the state/tribe the flexibility to develop forms that meet the § 401 requirements and state/tribal needs, this would be an acceptable alternative.

Requirements for Statutory Support for State Conditions Represent a Violation of State Authority and a Massive Additional Burden: Many states do not have statutes crafted in ways that will meet the requirements for legal support for conditions. This new proposal to provide statutory support is not the most efficient way to show justification. Complying with this new requirement will take extensive time to accomplish and presents a major administrative and legal process/burden to states and tribes. In addition, the requirement for statutory support rather than Best Management Practices or the use of best professional judgment removes flexibility required to meet the changing and contextual needs for site review. ASWM argues that there is no authority to restrict or demand justification for conditions outside of the appeals/court process. Even for states/tribes that have clear authority to impose conditions, itemizing and providing rationale each time is onerous and a waste of limited administrative resources.

Another concern is whether a general statement around state/tribal authority to condition permits is adequate. ASWM seeks to better understand how specific a statute needs to be regarding individual conditions. The vast majority of states do not have such statutes, but those that do only have statutes providing general authority to the state/tribal agency to condition permits. ASWM seeks information from EPA about what specific information needs to be in the legal documentation to ensure that states and tribes, if they must develop statutes, do so in a way that meets EPA requirements (§ 121.5e). While ASWM argues that EPA does not have the authority to limit the conditions imposed by a state or tribe, it surely must allow states and tribes to remedy any deficiencies it cites as justification to modify a certification or condition. The process and timeline for notifying states of deficiencies and submission of remedies by states should be clearly outlined prior to any changes taking effect.

Keep § 401(a) and § 401(d) as One Process: The rule proposes an alternative regulatory process where § 404(a) and § 404(d) would be conducted one after the other as separate steps of the § 401 certification process. ASWM disagrees with this alternative approach, as it will likely lead to delays and shortages of time for states and tribes to complete their review of permits.

Requested Feedback on the Extent to Which § 401 Programs Are Funded by States and Tribes: A range of funding mechanisms are in place to support state and tribal § 401 programs. ASWM's knowledge on funding at this time focuses on state programs. Many state § 401 programs are funded primarily through State Appropriations or General Funds with secondary funding generated through permit fees. For example, South Carolina, Maryland and Florida all reported their § 401 programs are supported through these sources. Other state § 401 programs such as Utah, Vermont and New Jersey are funded solely through application fees.

Requested Feedback on the Number of FTE Employees Working on § 401 Certification/Review: The number of employees working on § 401 certification review varies widely from state to state. While some states report as many as 100 or more full-time equivalent (FTE) employees currently working on § 401 certification review, it is much more common for these programs to operate with a small staff of three to five employees, such as Minnesota with a current FTE of 3.75 working on § 401 review. Some states' programs operate with less than 1 FTE, such as Vermont and Arizona.

Requested Feedback on Challenges for State and Tribal Program from Proposed Rule: The Federal Register for the proposed rule requests specific information about the challenges the proposed rule would create for states and tribes. While this information is identified throughout the letter, ASWM has compiled a specific list to respond directly to this specific request for comment:

Restrictions on permit review timeframes represent a significant barrier to many states' ability to adequately review and appropriately condition § 401 applications. Without a clear definition of what a complete application contains, many states indicated that additional staff time would be required to follow-up with applicants to collect the necessary information for review. States also noted that their regulations often go above and beyond the federal regulations. Identifying these variances would also require additional staff time and adjusting state regulations would be a long and difficult process often requiring approval from state legislators. States and tribes will need additional financial assistance to comply with the changes required in the proposed rule and time to develop and approve statutes to support conditions. While the list of challenges states and tribes will face in implementing the proposed rule is extensive, some specific challenges identified by states¹⁷ include:

- State and federal regulations in conflict
- Reduced state/tribal authority
- Additional work by staff to justify and cite conditions
- Higher number of denials
- Lack of time for review
- Reduced time to consult/coordinate with tribal governments
- Increased staff time
 - due to increased denials
 - for applicant follow up regarding additional information
- Increased state costs
- Increased applicant costs due to delays in certification
- Insufficient time to properly notify public in accordance with state regulations
- Barriers to state for reviewing project as a whole
- Barriers to state in conditioning FERC Licenses regarding water quality
- Requirement for applicant to submit very different applications for state wetlands and § 401

Finally, while ASWM addresses concerns around the lack of federal consistency review for the proposed rule with the CZMA, from a state/tribal implementation perspective, the proposed rule undermines the effectiveness of state CMPs in achieving CWA goals and applying federal consistency to protect coastal resources and avoid or minimize coastal use conflicts. In some states, section 401 reviews and conditions are often intertwined with federal consistency reviews and conditions. EPA failed to address how the proposed § 401 rule impacts this nexus in state operations and activities. EPA's proposed rule allows federal permitting agencies prescribe their own "reasonable" periods of time, but in no event should these be shorter than the federal consistency period (6 months) for activities in the coastal zone. Doing so creates serious coordination issues and problems. Proposed provisions that limit the scope of § 401 certification and conditions to "EPA-approved CWA regulatory program provisions" significantly weaken state CMP implementation. Conditions are routinely coordinated between § 401 permitting and federal consistency. The proposed § 401 rule would take many common § 401 conditions off the table. This would mean that the CMP would have to pick them up and make sure they are included in federal

¹⁷ Information collected through ASWM communications with 14 states in October 2019.

consistency conditions. This could require a lot of additional work and coordination issues not evaluated by EPA in its proposal neither in its federalism review nor its “economic analysis. The proposed rule is also unclear about what EPA means by “State-approved CWA program.” As this term plays an integral role in the proposed rule, ASWM asks for clarification on this term.

Conclusion

While this letter focuses on comments regarding this specific proposed rule, the proposal sets a concerning precedent of reducing state authority in cooperative federalism-based regulatory relationships. Cooperative federalism serves as the cornerstone for most of the nation’s environmental policies. Other non-environmental policies also rely on strong state/tribal roles. ASWM requests EPA to reconsider this proposed rule for many reasons, including the problematic move away from cooperative federalism and the precedent it sets for other rules and regulations that are critical to governance and the protection of public goods.

With its novel interpretation of the law and inconsistencies with Supreme Court precedent, the proposed rule will likely be stayed upon promulgation. This creates tremendous confusion for states and tribes who will be unclear about what and how to implement Section 401. If the rule is not stayed, there will be new challenges filling the gaps in state statute to support conditions that may leave resources poorly protected with negative impacts to valuable aquatic resources. In the end, this proposed rule pushes the law further than it currently allows and will create confusion, delays and a potential increase in the number of denials, an unintended consequence counter to the direction of Executive Order 13868.

The cumulative proposed revisions to the § 401 rule fail to achieve the objectives of the Clean Water Act and will worsen water quality and harm all users of waters. ASWM asks EPA to also explore whether this erosion of state authority will increase costs to relevant industries and jurisdictions, such as commercial/industrial users of water, treatment and drinking water plants and the public.

In summary, ASWM opposes the proposed changes to the rule as unwarranted, unproductive, and contrary to the text and intent of the CWA. If EPA proceeds with this rulemaking, numerous sections should be deleted or completely revised and re-proposed.

These include, but are not limited to the following:

- Delete or revise proposed § 121.3 “Scope of certification” to eliminate restrictions on state/tribal protections.
- Revise § 121.1(f) “Condition” to remove the phrase “that is within the scope of certification.”
- Delete or revise § 121.1(p) “Water quality requirements.” At a minimum, delete the words “EPA-approved” and “Clean Water Act regulatory” from the definition.
- Delete § 121.1(h) “Fail or refuse to act.” Alternatively, eliminate the word “constructively” and the phrase “within the scope of certification and.”
- Delete § 121.4 (f)—state/tribe should be able to request a withdrawal and restart.
- Revise § 121.6 “Effect of denial of certification.” Delete from § 121.6(b) the words: “a Federal agency determines that” and the words “and §§121.3 and 121.5(e).” The corrected version would properly read: “Where a certifying authority’s denial satisfies the requirements of Clean Water Act section 401, the Federal agency must...” Delete § 121.6(c).
- Delete/completely revise § 121.8 “Incorporation of conditions.” (The entire section is full of instances where federal agencies are making decisions about validity or invalidity of conditions.)

The proposed rule is the latest in a series of efforts to weaken federal provisions for protecting and restoring waters, to the extent that even state authority is deemed undesirable. These efforts include multiple policy and regulatory changes, with the most impactful to wetlands and waterways being the reduction in federal jurisdictional waters in the proposed WOTUS rule and a significant revision to the Army Corps of Engineers' Mitigation Rule. The changes proposed in the § 401 certification process, when combined with these other federal changes, present a significant and problematic reduction in state/tribal authority and protection of the Nation's waters.

EPA's proposed rule should not be promulgated as it needs significant revision to maintain state/tribal authority and represents a move away from (not towards) cooperative federalism. For these reasons, ASWM requests that EPA withdraw the proposal and re-propose the rule based on the comments shared within this letter. The rule, as proposed, should not go forward to final implementation.

ASWM appreciates the opportunity to comment on EPA's § 401 certification rulemaking. While these comments have been prepared by ASWM with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations. Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,



Marla J. Stelk
Executive Director

Cc: ASWM Board of Directors, EPA HQ Office of Water, EPA HQ Office of Intergovernmental Relations

Number of Question Subparts	Comment Requested	Additional Context	Federal Register Page Number	Pre-Publication Page Number	Rule Section	Where in Rule	Provides Discussion of Alternatives	Specifically Requires Additional Legal Analysis	Defines Terms	Requires a Submission	Open v. Specific Question	Initial Response	Final Response	Comments	Relevant References
1	"The Agency . . . requests comment on whether it should rescind its June 7, 2019 guidance upon completion of this rulemaking or whether separate guidance would be helpful on implementation of the provisions that are finalized in this proposal."		44083	15	D. Guidance Document	Background					Specific				
1	"The EPA solicits comments from state and tribal governments, and the public at large regarding the need for, and potential benefits of, a consistent, national and state regulatory approach to section 401 and how the EPA may best promote such consistency."		44084	16	E. Effect on Existing Federal, State and Tribal Regulations	Background					Open				
2	"[W]hether its proposed regulations appropriately balance the scope of state authority under section 401 with Congress' goal of facilitating commerce on interstate navigable waters, and whether they define the scope in a manner that would limit the potential for states to withhold or condition certifications such that it would place undue burdens on interstate commerce."		44087	28	F. Legal Background	Background		Legal analysis of 1) whether EPA's proposed regulations appropriately balance the scope of state authority under section 401 with Congress' goal of facilitating commerce on interstate navigable waters and 2) whether the proposal defines the scope in a manner that would limit the potential for states to withhold or condition certifications such that it would place undue burdens on interstate commerce.			Specific				
1	"[W]hether the proposed approach appropriately captures the scope of authority for granting, conditioning, denying, and waiving a section 401 certification."		44094	54	6.a. Legal Construct for Proposed Rule, Scope of Certification	Background		Whether the proposed approach appropriately captures the scope of authority for granting, conditioning, denying, and waiving a section 401 certification			Specific				
1	"When states or tribes enact CWA regulatory provisions as part of a state or tribal program, including those designed to implement the section 402 and 404 permit programs and those that are more stringent than federal requirements, those provisions require EPA approval before they become effective for CWA purposes. Because the EPA interprets "appropriate requirements" to mean the regulatory provisions of the CWA, it follows that those would necessarily be EPA-approved provisions. // Whether this interpretation is a reasonable and appropriate reading of the statute and related legal authorities."		44095	59 (cont'd 57-59)	6.a.i. Legal Construct for Proposed Rule; Scope of Certification; Water Quality	Background		Additional Legal Consideration			Specific				
1	EPA seeks public comment on the following proposed interpretation: "While § 401(d) permits a State to place conditions on a certification to ensure compliance of the 'applicant' [] those conditions must still be related to discharges." PUD No. 1, 511 U.S. at 726-27 (Thomas, J., dissenting). The EPA proposes to conclude that this interpretation is a reasonable and appropriate reading of the statute and related legal authorities. . ."	Congress "used the term 'discharge' to frame the scope of the certification requirement under the Act."	44097	64	6.a.ii. Legal Construct for Proposed Rule; Scope of Certification; Activity v. Discharge	Background		Review of whether this interpretation is a reasonable and appropriate reading of the statute and related legal authorities.			Specific				
2	Comment on EPA's proposed interpretation of the CWA and the prevailing case law as discussed above in section II.F.1 and II.F.4 in this preamble.	"The Agency solicits comment on its proposed interpretation of the CWA and the prevailing case law as discussed above in section II.F.1 and II.F.4 in this preamble."	44097	66	6.a.ii. Legal Construct for Proposed Rule; Scope of Certification; Activity v. Discharge	Background		Review of listed prevailing case law			Open				
1	"The Agency solicits comment on an alternate interpretation of the text of section 401(i) suggested by language in the PUD No. 1 majority opinion." Alternate interpretation of the text that would allow imposition of effluent limitations and other similar conditions that address the water quality-related effects of "the activity as a whole," and not just "the discharge," provided such effluent limitations and other conditions are based on "water quality requirements" as defined in this proposal.	"EPA is also seeking comment on an alternate interpretation of the text that would allow imposition of effluent limitations and other similar conditions that address the water quality-related effects of 'the activity as a whole,' and not just 'the discharge,' provided such effluent limitations and other conditions are based on 'water quality requirements' as defined in this proposal."	44097	66-67	6.a.ii. Legal Construct for Proposed Rule; Scope of Certification; Activity v. Discharge	Background	Alternative	Review of alternate interpretation of the text of section 401(i) suggested by language in the PUD No. 1 majority opinion.			Specific				
1	Comment on this revised interpretation of the CWA and associated case law discussed in this section: "EPA proposes to conclude that section 401 is a regulatory provision that creates federally enforceable requirements and its application must therefore be limited to point source discharges to waters of the United States. This proposed interpretation is consistent with the text and structure of the CWA as well as the principal purpose of this rulemaking, i.e., to ensure that the EPA's regulations (including those defining a section 401 certification's scope) are consistent with the current CWA."	"[T]he EPA is proposing to interpret section 401 differently than the Supreme Court did in <i>Pud No. 1</i> because court relied on its own reasonable interpretation. // 'The EPA proposes . . . that section 401 . . . [must be] limited to point source discharges to waters of the United States.' // 'The Agency solicits comment on this revised interpretation of the CWA and associated case law discussed in this section.'"	44099	71	6.a.iii. Legal Construct for Proposed Rule; Scope of Certification; Discharges from Waters of the US	Background		Comment on revised interpretation of the CWA and associated case law discussed in this section.			Specific				
1	Comment on this plain language interpretation of the statute: "[T]he EPA proposes to conclude that a certifying authority must act on a section 401 certification within a reasonable period of time, which shall not exceed one year and that there is no tolling provision to stop the clock at any time. The Agency requests comment on this plain language interpretation of the statute."		44099	72	6.b. Legal Construct for Proposed Rule; Timeline for Sec. 401 Certification Analysis	Background		Comment on the plain language interpretation of the statute.			Specific				
1	"The Agency requests comment on all aspects of this effort to modernize and clarify its section 401 regulations, including any specific suggestions on how any of the proposed definitions or other requirements might be modified to implement Congress' intent in enacting section 401."		44099	74	III. Proposed Rule	Proposed Rule		Additional Legal Consideration	Seeks suggestions to modify definitions		Open				

Number of Question Subparts	Comment Requested	Additional Context	Federal Register Page Number	Pre-Publication Page Number	Rule Section	Where in Rule	Provides Discussion of Alternatives	Specifically Requires Additional Legal Analysis	Defines Terms	Requires a Submission	Open v. Specific Question	Initial Response	Final Response	Comments	Relevant References
	"The EPA solicits comment on whether the Agency should include additional procedures in its final regulations to ensure that the public is appropriately informed of proposed federally licensed or permitted projects, potential discharges, and related water quality effects. At a minimum, such procedures could include public notice and hearing opportunities, but they could also include mechanisms to ensure that the certifying authority is in a position to appropriately inform the public, as required by section 401(a)(1). Such mechanisms could focus on how and when the certifying authority is notified of potential certification requests and what information may be necessary for the certifying authority to act on a request."		44099-44100	74	III. Proposed Rule	Proposed Rule			Suggestions for additional procedures in its final regulations to ensure that the public is appropriately informed of proposed federally licensed or permitted projects, potential discharges, and related water quality effects		Open				
	"Agency also solicits comment on whether it would be appropriate or necessary to require certifying authorities to submit their section 401 procedures and regulations to the EPA for informational purposes."		44100	75	III. Proposed Rule	Proposed Rule			Any legal insights into requirements for submission		Specific				
	"The EPA requests certifying authorities and project proponents to submit comment on prior experiences with undertaking the certification process and later determining that the proposed federally licensed or permitted project would not result in an actual discharge."		44100	76	III.A. Proposed Rule; Certification is Required	Proposed Rule				Comment on prior experiences with undertaking the certification process and later determining that the proposed federally licensed or permitted project would not result in an actual discharge	Open				
	"The EPA also requests comment on whether there are specific procedures that could be helpful in determining whether a proposed federally licensed or permitted project will result in an actual discharge."		44100	76	III.A. Proposed Rule; Certification is Required	Proposed Rule				Suggestions for specific procedures that would be helpful in determining whether a proposed federally licensed or permitted project will result in an actual discharge	Open				
	"[T]he EPA requests comment on how project proponents may establish for regulatory purposes that there is no potential discharge and therefore no requirement to pursue a section 401 certification."		44100	76	III.A. Proposed Rule; Certification is Required	Proposed Rule					Open				
	Requests comment identifying other federal licenses or permits that may trigger the section 401 certification requirement. "The most common examples of licenses or permits that may be subject to section 401 certification are CWA section 402 NPDES permits in states where the EPA administers the permitting program, CWA section 404 permits for the discharge of dredged or fill material, RHA sections 9 and 10 permits issued by the Corps, and hydropower and interstate natural gas pipeline licenses issued by FERC." // "The Agency is not proposing to further define this list but requests comment identifying other federal licenses or permits that may trigger the section 401 certification requirement."	"Unlike other CWA regulatory programs . . . The EPA proposes that section 401 be triggered by an unqualified discharge, rather than by a discharge of pollutants." // "The [Supreme Court in <u>S.D. Warren Co.</u>] concluded that Congress intended [the term discharge] to be broader than the term discharge of pollutants that is used in other provisions of the Act, like section 402." // "EPA proposes that to trigger section 401 a discharge must be from a point source." // "The CWA does not list specific federal licenses and permits that are subject to section 401 certification requirements, instead providing that section 401 applies when any activity that requires a federal license or permit may result in a discharge into waters of the United States."	44100-44101	78	III.A. Proposed Rule; Certification is Required	Proposed Rule				Identify relevant specific federal licenses or permits	Specific				
	Request for Certification: "If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."	Defines: Request for Certification	44101	79	III.B. Proposed Rule; Certification Request/Receipt	Proposed Rule			Definition of Request for Certification						
	Whether this list of documents and information (see below) is appropriately inclusive, and whether it is specific enough to inform project proponents of the submittal requirements, and whether it is clear enough to avoid subjective determinations by a certifying authority of whether submittal requirements have been satisfied. "The EPA acknowledges that not all proposed projects may be subject to monitoring or treatment for a discharge (e.g., section 404 dredge or fill permits rarely allow for a treatment option). Certification request means a written, signed, and dated communication from a project proponent to the appropriate certifying authority that: 1. identifies the project proponent(s) and a point of contact; 2. identifies the proposed project; 3. identifies the applicable federal license or permit; 4. identifies the location and type of any discharge that may result from the proposed project and the location of receiving waters; 5. includes a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat or control the discharge; 6. includes a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received; and 7. contains the following statement: "The project proponent hereby requests that the certifying authority review and take action on this CWA section 401 certification request within the applicable 3 reasonable timeframe."	"[T]he EPA is proposing to define "certification request" and "receipt." // "The EPA is proposing that the statutory timeline for certification review starts upon receipt by the certifying authority of a 'certification request,' rather than the receipt of a 'complete application' or 'complete request' as determined by the certifying authority."	44101	81	III.B. Proposed Rule; Certification Request/Receipt	Proposed Rule		Whether this list of documents and information is clear enough to avoid subjective determinations by a certifying authority of whether submittal requirements have been satisfied.			Specific				
	Whether the fourth and fifth items proposed to be required in a certification request are sufficiently broad to capture all potential federal licenses or permits.	"[N]ot all proposed projects may be subject to monitoring or treatment of discharge (e.g., section 404 dredge or fill permits rarely allow for a treatment option)." // 4. identifies the location and type of any discharge that may result from the proposed project and the location of receiving waters; 5. includes a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat or control the discharge;	44101	82	III.B. Proposed Rule; Certification Request/Receipt	Proposed Rule		Possible review of whether 4th and 5th items are sufficiently broad to capture all potential licenses and permits			Specific				

Number of Question Subparts	Comment Requested	Additional Context	Federal Register Page Number	Pre-Publication Page Number	Rule Section	Where in Rule	Provides Discussion of Alternatives	Specifically Requires Additional Legal Analysis	Defines Terms	Requires a Submission	Open v. Specific Question	Initial Response	Final Response	Comments	Relevant References
1	Whether it should include "any applicable fees" in the definition of certification request.		44101-44102	82	III. B. Proposed Rule; When Section 401 Certification Request/Receipt	Proposed Rule		Analysis of what is necessary to include in definition of "certification request"							
2	"Pre-proposal recommendations to the EPA also requested that the Agency require project proponents to include existing documentation or reports showing prior contamination at the proposed federally licensed or permitted project site." // "The EPA solicits comment on whether this would be an appropriate requirement for all certification requests, or whether this information is best requested on a case-by-case basis by the certifying authority (and whether such documentation or reports would be appropriate if the permit or license is being reissued or amended, or only for initial license or permit processes."		44102	82	III. B. Proposed Rule; When Section 401 Certification Request/Receipt	Proposed Rule					Specific				
1	"The EPA also solicits comment on whether the Agency should generate a standard form that all project proponents can use to submit certification requests. A standard form could help project proponents provide all necessary information and help certifying authorities quickly identify all components of the certification request. If the EPA promulgated a standard form, it could include all seven items included in the proposed definition of certification request. This proposal requires a project proponent to identify the location of a discharge in the certification request. To meet this requirement, the EPA recommends that the project proponent provide locational information about the extent of the project footprint and discharge locations, as shown on design drawings and plans."	Formats identified in rule include 1) ArcGIS File Geodatabase with accompanying Feature Classes 2) ArcGIS Shapefile 3) DXF or DWG (CAD files) projected to WGS 84 Decimal Degrees 4) KMZ/KML (Google Earth)	44102	83	III. B. Proposed Rule; When Section 401 Certification Request/Receipt	Proposed Rule					Specific				
1	"[C]onsider identifying discharge locations on readable maps." // "The EPA solicits comment on whether the location of all potential discharges from proposed federally licensed or permitted projects can be identified with such specificity or if other methods may be more appropriate for different types of activities."		44102	83	III. B. Proposed Rule; When Section 401 Certification Request/Receipt	Proposed Rule					Specific				
1	"[W]hether federal agencies should be subject to the same certification request submittal requirements as proposed, or if they require different considerations and procedures than section 401 certification requests by other non-federal agency project proponents."	Certified Mail & Electronic Submission (Proof of Receipt)	44102	84	III. B. Proposed Rule; When Section 401 Certification Request/Receipt	Proposed Rule		Review of required submittal requirements		Identify different considerations	Specific				
1	"The Agency requests comments on an alternative approach for federal agencies that issue general federal license or permits whereby 'certification request for a general permit or license' would mean a written, signed, and dated communication from a Federal agency to the appropriate certifying authority that: (1) identifies the Federal agency and a point of contact; (2) identifies the proposed categories of activities to be authorized by general permit for which general certification is requested; (3) includes the proposed general permit; (4) estimates the number of discharges expected to be authorized by the proposed general permit or license each year; (5) includes a general description of the methods and means used or proposed to monitor the discharge and the equipment or measures employed or planned for the treatment or control of the discharge; (6) identifies the reasonable period of time for the certification request; and (7) contains the following statement: 'The federal agency hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.'"		44102	84-85	III. B. Proposed Rule; When Section 401 Certification Request/Receipt	Proposed Rule	Comments on alternative approach	Is this legally adequate?							
2	"[W]hether these new definitions will provide sufficient clarity and regulatory certainty or if additional procedures or requirements may be necessary, and if so, what those procedures or requirements might be."	"The EPA intends that the term 'certification request' means only written requests for certification." // "The EPA is proposing to define the term 'receipt' as follows: Receipt means the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures."	44102	85	III. B. Proposed Rule; When Section 401 Certification Request/Receipt	Proposed Rule				Identify additional procedures, if appropriate	Specific				
1	Receipt: Receipt means the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures.	Defines: Receipt	44102	85	III. B. Proposed Rule; When Section 401 Certification Request/Receipt	Proposed Rule			Definition of Receipt		Specific				
2	"[A] certifying authority may take four potential actions pursuant to its section 401 authority: it may grant certification, grant with conditions, deny, or waive its opportunity to provide certification." // "Where section 401 certification has been waived—expressly or implicitly—the federal agency may issue the license or permit. Id. This proposal is consistent with the Agency's longstanding interpretation of what actions may be taken in response to a certification request." // "The EPA solicits comment on this interpretation and continued approach in this proposed rule."		44103	86-87	III. C. Proposed Rule; Certification Actions	Proposed Rule		Legal analysis of whether this interpretation of what actions may be taken in response to a certification request is appropriate			Specific				
1	Proposed Scope: "The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements."	Proposed Scope	44104	89-90	III. D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule		Legal analysis on whether proposed scope is reasonable interpretation of the CWA.							
1	Discharge: Discharge for purposes of this part means a discharge from a point source into navigable waters.	Defines: Discharge	44104	91	III. D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule			Definition of Discharge		Specific				
1	"[W]hether this definition is necessary, whether it provides appropriate clarification, or whether the EPA's proposed regulations would be sufficiently clear without including this new definition." // "Whether an alternate definition of 'DISCHARGE' may provide greater clarity and regulatory certainty"	"Discharge for purposes of this part means a discharge from a point source into navigable waters."	44104	91	III. D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule	Seeks input on alternate definition	Legal analysis of changes to the term "discharge" / Legal analysis of use/non-use of newly defined "discharge" term	Whether alt def of discharge preferable / Is this new definition appropriate, necessary		Specific				
1	Water Quality Requirements: "Water quality requirements means applicable provisions of 302, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions."	Defines: Water Quality Requirements	44104	91	III. D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule			Defined term water quality requirement		Specific				
1	Whether additional specificity should be added to the proposed definition [WATER QUALITY REQUIREMENTS], for example that the term does not include non-water quality related state or local laws	"[W]hether the proposed definition [of 'water quality requirements'] is clear and specific enough to provide regulatory certainty for certifying authorities and project proponents. . . [or] whether additional specificity should be added to the proposed definition."	44104	92	III. D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule		Legal analysis around necessary specificity for the definition of "water quality requirements"	Considers adding definitional specificity	Submit ideas around additional specificity	Specific				

Number of Question Subparts	Comment Requested	Additional Context	Federal Register Page Number	Pre-Publication Page Number	Rule Section	Where in Rule	Provides Discussion of Alternatives	Specifically Requires Additional Legal Analysis	Defines Terms	Requires a Submission	Open v. Specific Question	Initial Response	Final Response	Comments	Relevant References
1	"In an alternate approach, the EPA may consider defining the term "appropriate requirement of State law" to provide additional clarity concerning the scope of section 401. Under this alternate approach, the EPA solicits comment on whether that term should be defined similar to or more broadly or narrowly than "EPA-approved state or tribal Clean Water Act regulatory program provisions" as proposed in this rulemaking."	OR "[Should the EPA] consider defining the term "appropriate requirement of State law" to provide additional clarity concerning the scope of section 401."	44104	92-93	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule	Provides an alternative	Legal analysis of broad/ narrow definition of the term "appropriate requirement of state law"	Determine broadness/narrowness of definition		Specific				
1	"[C]omment on other examples of certification conditions that may have been unrelated to water quality."	"[S]ome certifications have included conditions that may be unrelated to water quality, including requirements for taking and hiking trails to be constructed, one-time and recurring payments to state agencies for improvements . . . and public access for fishing and other activities." (pg. 94)	44105	95	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule				Provide other examples of certification conditions unrelated to WQ	Open				
1	Condition: Condition means a specific requirement included in a certification that is within the scope of certification.	Defines: Condition	44105	95	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule			Defined term Condition		Specific				
1	"The Agency solicits comment on the proposed information needed to support each condition, particularly on the utility of such information for the certification process."	appropriately tailored to the scope and authorized by law, this proposal would require the following information be provided for each condition included in a certification: 1. A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements; 2. A citation to federal, state, or tribal law that authorizes the condition; and 3. A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements." (pg. 96)	44105-44106	97	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule		May need legal review to determine if requirements are adequate			Specific			"Overall, the EPA believes that the benefits of providing this information will significantly outweigh any additional administrative burden that certifying authorities may incur because of these new requirement" (p.97)	
1	"The Agency also requests comment on these alternate approaches."	Information needed to support each condition	44106	97	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule	Asks for review of alternatives	May need legal review to understand what is needed		May be desirable to identify other requirements	Open				
1	"[W]hether the proposed requirements for conditions need to be further refined to allow federal agencies other than the EPA to appropriately determine compliance. Although this review function may be new to some federal agencies, it is consistent with the EPA's own longstanding practice under its NPDES regulations implementing section 401 that allow the EPA to make such determinations under certain circumstances."		44106	98	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule		(Continuation from above) May need legal review to determine if requirements need refinement			Specific				
1	"[W]hether the regulatory text should clarify that deficient conditions do not invalidate the entire certification or the remaining conditions."	"This proposal would also provide federal agencies an opportunity to allow a certifying authority to remedy a condition that the federal agency determines exceeds or conflicts with the scope of section 401 authority under certain circumstances. If a federal agency determines that a condition does not satisfy the proposed requirements . . . this proposal would allow the federal agency to notify the certifying authority . . . and provide an opportunity to remedy." // "A federal agency would not be required to provide this opportunity."	44106	100 (context on 99)	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule		Additional legal question, not posed in draft rule: Does the state have more rights in this area?			Specific				
3	"[W]hether the proposed opportunity to remedy deficient conditions would be helpful and an appropriate use of federal agency resources, [and] whether it should be mandatory for federal agencies to provide this opportunity, and whether it is within the scope of EPA authority to establish through regulation."		44106	100	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule	Identify whether it should be mandatory to provide this opportunity	Is it in the scope of EPA authority? Should it be mandatory to provide this opportunity?			Multiple Specific				
3	"The EPA also solicits comment on an alternative approach where certifying authorities would not have the opportunity to remedy deficient conditions, even if the reasonable period of time has not expired."		44106-44107	100	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule	Shares an alternative	May need legal analysis on whether states/tribes have rights to remedy in this situation			Specific				
1	"[W]hether the proposed approach appropriately captures the scope of authority for granting, conditioning, denying, and waiving a section 401 certification."		44107	101	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule		Whether proposed approach captures scope of authority			Specific				
1	"[T]he extent to which project proponents have received non-water quality related conditions in certifications."		44107	101	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule				Extent to which project proponents have received non-WQ conditions in certifications	Specific				
3	"[W]hether this proposal regarding the scope of certification and conditions is an appropriate and useful way to ensure that federal licenses will not contain non-water quality related certification decisions and conditions, or if there are other more useful and appropriate tools or mechanisms the EPA should consider to address these concerns."	"In particular, the EPA solicits comment on what it means for a certification or its conditions to be 'related to water quality' and how direct that relationship to water quality must be to properly define a certification or condition as within the appropriate scope of section 401."	44107	101-102	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule		Potential legal analysis of appropriate scope of conditions		Share more useful tools/mechanisms to ensure not contain non-WQ conditions	Specific				
2	"What it means for a certification or its conditions to be 'related to water quality' and how direct that relationship to water quality must be to properly define a certification or condition as within the appropriate scope of section 401."	(see directly above)	44107	102	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule		Legal analysis of what it means for a certification or its conditions to be "related to water quality"		Provide input on what it means for a certification or its conditions to be "related to water quality"	Specific				
1	"The EPA solicits comment on its interpretation of the phrase "any other appropriate requirements of State law" as limited to requirements in EPA-approved state and tribal CWA regulatory programs."		44107	102	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule		Legal interpretation of phrase "any other appropriate requirements of state law"			Specific				
1	"In particular, the EPA solicits comment on whether EPA should interpret that phrase more broadly to include any requirement of State law, any water quality-related requirement of State law (regardless of whether it is part of an EPA-approved program), or any different universe of state or tribal requirements (reflecting, or not, CWA sections or programs) that might be broader or narrower in scope than this proposal."		44107	102	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule	Whether should interpret more broadly	Legal analysis of whether should interpret more broadly	Interpretation of a phrase	Possible alternative interpretations	Open				

Number of Question Subjects	Comment Requested	Additional Context	Federal Register Page Number	Pre-Publication Page Number	Rule Section	Where in Rule	Provides Discussion of Alternatives	Specifically Requires Additional Legal Analysis	Defines Terms	Requires a Submission	Open v. Specific Question	Initial Response	Final Response	Comments	Relevant References
	"The EPA also solicits comment on its interpretation of sections 401(a) and 401(d) as limiting the scope of state and tribal section 401 review and conditions to impacts from potential 'discharges,' or whether the state or tribe may also consider a different and broader universe of impacts, such as impacts from the licensed project or activity as a whole, or some other universe of potential impacts to water quality."		44107	102	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule	Whether should interpret more broadly	Legal analysis of whether should interpret more broadly	Interpretation of scope	Possible alternative interpretations	Specific				
	"[W]hether this proposal will facilitate enforcement of certification conditions by federal agencies, or whether there are other approaches the Agency should consider beyond requiring a citation to state, tribal, or federal law or explaining the reason for a condition."		44107	102	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule	Seeking possible alternatives	Review of enforcement approaches		Possible alternative approaches	Specific				
	Whether, given the explicit limitations on conditions in this proposal, it may still be necessary or appropriate to expressly preclude these or other types of conditions that may create regulatory uncertainty. Pre-proposal recommendations identified concerns with certain types of conditions that have created regulatory uncertainty for project proponents, including conditions that extend the effective date of a certification out beyond the reasonable period of time and conditions that authorize certifications to be re-opened.			103	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule		Legality of precluding specific types of conditions		May want to make suggestions around "or other types of conditions"	Specific				
	"The EPA is also soliciting comment on an alternate approach that it is considering taking whereby the Agency would interpret CWA sections 401(a) and 401(d) as providing two different scopes for action on a certification request."	"Specifically, section 401(a) could be read to authorize review of a section 401 certification only on the basis of determining whether the discharge would comply with the enumerated sections of the CWA, and section 401(d) could be read to authorize consideration of 'any other appropriate requirement of State law' only for purposes of establishing conditions once the certifying authority has determined to grant certification. Under this alternate approach, a certification request could be denied only if the certifying authority cannot certify that the discharge will comply with applicable provisions of CWA sections 301, 302, 303, 306 and 307. This proposal would also define the term 'any other appropriate requirement of State law' to mean EPA-approved state or tribal CWA regulatory program provisions (e.g., state water quality	44107	103	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule	Proposal of Alternate Approach	Review of viability of two different scopes for action on a certification			Specific				
	"[W]hether establishing two different scopes for action under section 401 would clarify the certification process or if it could cause further confusion or potential delays in processing certification requests."		44107	103	III.D. Proposed Rule; Appropriate Scope for 401 Certification Review	Proposed Rule	Clarity/ Confusion from Alternative Approach	Review of viability of two different scopes for action on a certification			Specific				
	"[W]hether there is any legal basis to allow a federal agency to extend the reasonable period of time beyond one year from receipt."	"The Agency expects this clarification will reduce delays and help ensure that section 401 certification requests are processed within the reasonable period of time established by the federal agency, and at most, within one year from receipt of the request. The Agency understands that in cases where the certifying authority and project proponent are working collaboratively and in good faith, it may be desirable to allow the certification process to extend beyond the reasonable period of time and beyond the one-year statutory deadline."	44108	106	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule		Whether there is legal basis for extension beyond one year			Specific				
	"[W]hether the pre-filing meeting process would be helpful for other certifying authorities, and whether it is an appropriate mechanism to promote and encourage early coordination between project proponents and certifying authorities, and if there are other options that may also be appropriate from a regulatory perspective."	"EPA also solicits comment on whether the Agency has the authority to propose similar requirements on state and tribal certifying authorities through this rulemaking."	44108	106	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule				Requests input on "other options" that may also be appropriate	Specific				
	Whether the Agency has the authority to propose similar requirements on state and tribal certifying authorities through this rulemaking. The Agency also heard concerns from certifying authorities on staffing challenges, agency priorities, and the need for additional federal funding to support timely action on certification requests.		44108	106-107	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule		Legal review of whether the agency has legal authority to impose requirements on states/ tribes			Specific				
	"[T]he Agency solicits comment from certifying authorities on the extent to which section 401 programs are funded by states and tribes and the number of full or part time employees that are assigned to evaluate and take action on certification requests."	"The Agency also heard concerns from certifying authorities on staffing challenges, agency priorities, and the need for additional federal funding to support timely action on certification requests."	44108	106-107	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule				Requests documentation from states and tribes on "the extent to which section 401 programs are funded by states and tribes" and "number of full or part time employees that are assigned to evaluate and take action on certification requests."	Open				
	"The Agency solicits comment on the responsibilities of federal agencies, ways to facilitate technical and procedural information sharing among federal agencies, project proponents, and certifying authorities, and ways to provide technical and procedural assistance to project proponents and certifying authorities."	"EPA recognizes that federal agencies are uniquely positioned to promote pre-application coordination among federal agencies, certifying authorities, and project proponents to harmonize project planning activities and promote timely action on certification requests."	44108	107	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule									
	"[W]hether these factors are appropriate and whether there are other factors that a federal agency should consider when establishing the reasonable period of time (e.g., permit type within a federal agency, certifying authority resources and capacity to review)."	"In setting the reasonable period of time for a certification—either on a project-by-project basis or categorically through a rulemaking—the EPA proposes to require federal agencies to consider: 1. The complexity of the proposed project; 2. The potential for any discharge; and 3. The potential need for additional study or evaluation of water quality effects from the discharge."	44109	108	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule	Implies there could be alternative factors that should be addressed (reviewers should consider if there are)	Legal review of what factors are appropriate and if others should be considered		Submission of additional factors that should be considered when establishing the reasonable period of time for review	Specific				

Number of Question Subparts	Comment Requested	Additional Context	Federal Register Page Number	Pre-Publication Page Number	Rule Section	Where in Rule	Provides Discussion of Alternatives	Specifically Requires Additional Legal Analysis	Defines Terms	Requires a Submission	Open v. Specific Question	Initial Response	Final Response	Comments	Relevant References
1	"[W]hether the Agency should establish reasonable periods of time for different federal permit types on a categorical basis in its final rule."	"For example, the EPA could establish that section 401 certifications for CWA section 404 permits that disturb a certain acreage threshold must be completed in a prescribed period of time." // Example Provided: "[I]nterstate pipelines that will cross a certain number of states or transport a certain volume of material"	44109	108	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule		Legal discussion about the need for/legality of creating categorical basis for establishing reasonable periods		May want to consider providing input on specific categories for use in establishing reasonable periods of time for review	Specific				
1	"[C]omment on an alternate approach . . . whereby the EPA would retain the language in its existing certification regulations that specifies a reasonable period of time 'shall generally be considered to be 6 months, but in any event shall not exceed 1 year.' 40 CFR 121.16(b)."		44109	109	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule	Proposes alternative of retaining language specifying reasonable period of time	Legal discussion about reasonable period of time	Discusses the language around defining "reasonable period of time"		Specific				
3	"[W]hether six months is an appropriate general rule, [and] if a longer or shorter period of time would be more appropriate as a general rule, and whether having such a general rule is appropriate."	"Such alternate approach would retain the federal agencies ability to determine the reasonable period of time."	44109	109	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule	Seeks feedback on the appropriate-ness of three options (6 months, longer or shorter)	Legal discussion about "appropriateness" of period of time requirements	Relates to definition of "reasonable period of time"		Specific				
2	"[W]hether the proposed process is the most efficient way to provide clarity and transparency, or if there are other procedural or administrative mechanisms that may be more effective. . . [and] whether this alternate approach would provide greater efficiency and transparency in the certification process, or if there are concerns with this approach."		44109	110	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule	Seeks alternate approaches that could increase efficiency and transparency	Possible legal discussion about use of different procedural or administrative mechanisms?		Seeks input on whether there are other procedural or administrative mechanism that are more efficient ways to provide clarity and transparency	Open				
1	"[W]hether, if a federal agency promulgates reasonable periods of time categorically based on project type, the notification process in this proposal would still be necessary."		44109	110	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule		Legal review of whether notification process is necessary			Specific				
1	"[W]hether FERCs's hydropower regulations, or other existing federal regulations, provide clear enough procedure and transparency that the additional notice to the certifying authority proposed in this rule would be redundant, unnecessary, or a waste of resources."		44109	111	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule		Whether notification process is required			Specific				
1	"[R]equirement to obtain certification is waived when a certifying authority fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year). 33 U.S.C. 1341(a)(1)" (pg. 111) // "A certifying authority actually fails or refuses to grant certification when it states its intention unambiguously in writing or takes no action within the reasonable period of time." (pg. 111)		44109-44110	112	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule			Defines Failure/ Refusal to Act		Specific				
2	"Alternatively, the Agency seeks comment on an approach that would not define 'fails or refuses to act' as a separate term." // "[T]he Agency solicits comment on other tools or mechanisms to encourage certifying authorities to act timely and within the scope of certification, consistent with the text of the CWA as defined in this proposal."		44110	114	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule	Seeks input on alternative tools or mechanisms		Should there be a separate term and definition re: Failure/ Refusal to Act	Seeks submission of information on other tools or mechanisms to encourage certifying authorities to act timely and within the scope of certification	Open				
1	"[W]hether the opportunity to remedy deficient certifications or conditions would be helpful and appropriate, or if it could create additional delays in the federal licensing or permitting process."		44110	114	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule		Whether states must be provided the opportunity to remedy deficient certifications or conditions	Check whether the term "deficient" has formally been defined anywhere (likely intended to mean inconsistent with the CWA as defined in this proposal) Does it need to be?		Specific				
1	"The EPA also solicits comment on an alternative approach where certifying authorities would not have the opportunity to remedy deficient denials, even if the reasonable period of time has not expired."		44110	114	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule	Alternative approach where cert auth not given opportunity to remedy	Legal review of whether cert auth must be given opportunity to remedy	How is "opportunity to remedy" defined?		Specific				
1	"The Agency also solicits comment on whether there are other mechanisms that may also promote timely and appropriate action on certification requests."		44110	114	III.E. Proposed Rule; Timeframe for Certification Analysis and Decisions	Proposed Rule	Seeking other mechanisms that promote timely and appropriate action	Potential need to review legality of using other proposed mechanisms)		Seeks submission of other mechanisms that promote timely and appropriate action	Open				
3	"[W]hether this opportunity to remedy a deficient denial would be helpful and an appropriate use of federal agency resources, [and] whether it should be mandatory for federal agencies to provide this opportunity, and whether it is within the scope of Agency authority to establish through regulation."		44111	117	III.F. Proposed Rule; Contents and Effect of a Certification	Proposed Rule		Is it within the scope of authority for fed agency to provide opportunity to correct deficiency?			Specific				
2	"[W]hether the proposed approach appropriately captures the scope of authority for granting, conditioning, waiving, and denying a section 401 certification, and whether the proposed approach also effectively addresses those circumstances where certification is sought for general permits issued by the federal agencies (e.g., 33 U.S.C. 1344(e))."		44412	120-121	III.F. Proposed Rule; Contents and Effect of a Certification	Proposed Rule		Whether approach appropriately captures the scope of authority			Specific				
2	"[W]hether additional information on the TAS process for section 401 certifications would be helpful and how the Agency could best communicate that information to the public."	"[T]here are two scenarios where the EPA acts as the certifying authority: (1) on behalf of federally recognized Indian tribes that have not received TAS for section 401, and (2) on lands of exclusive federal jurisdiction, such as Denali National Park."	44112	121	III.G. Proposed Rule; Certification by Administrator	Proposed Rule				How the agency can best communicate this information to the public	Specific				
2	"The Agency solicits comment on its interpretation of the EPA's advisory role under Section 401 and the utility of maintaining such a role for the EPA."		44112	122	III.G. Proposed Rule; Certification by Administrator	Proposed Rule		Covered under other question analysis			Specific				

Number of Question Subparts	Comment Requested	Additional Context	Federal Register Page Number	Pre-Publication Page Number	Rule Section	Where in Rule	Provides Discussion of Alternatives	Specifically Requires Additional Legal Analysis	Defines Terms	Requires a Submission	Open v. Specific Question	Initial Response	Final Response	Comments	Relevant References
1	"[W]hether providing public notice within 20 days of receipt is appropriate or whether more or less time would be appropriate."		44113	123-124	III.G.1. Proposed Rule; Certification by Administrator; Public Notice Procedure	Proposed Rule	Seeks input on whether more or less time needed	Not user if need legal+08/11/40 review of 20 day notice requirement							
1	"[W]hether the term 'request' as used in the statute is broad enough to include an implied requirement that, as part of the submission of a request for certification, a project proponent also provide the certifying authority with advance notice that a request is imminent."	"This proposal also includes for the first time a requirement that the project proponent request a pre-filing meeting with the EPA when the Agency is the certifying authority."	44113	124	III.G.2. Proposed Rule; Certification by Administrator; Prefiling Meeting Procedure	Proposed Rule			Is the term "request" broad enough to include the implied requirement?		Specific				
1	"The EPA seeks comment on the proposed pre-filing meeting process."	Proposal only requires a "pre-filing meeting process when the EPA is the certifying authority." // "The EPA is particularly interested in comments related to existing state, tribal or federal agency pre-filing notice or meeting requirements and whether such requirements have favorably affected the review and disposition of certification requests, particularly with respect to timely receipt of information relevant for reaching informed section 401 certification decisions."	44113-44114	126-127	III.G.2. Proposed Rule; Certification by Administrator; Prefiling Meeting Procedure	Proposed Rule				Seeks general input on the proposed pre-filing meeting process	Open				
2	"[W]hether states, tribes and project proponents would like this pre-filing meeting process to be required for all certification requests, including those where the EPA is not the certifying authority, and what legal authority the EPA would have to impose such requirements on states and tribes through this rulemaking."		44114	127	III.G.2. Proposed Rule; Certification by Administrator; Prefiling Meeting Procedure	Proposed Rule		Filing meeting process should be required for all certification requests, including those where the EPA is not the certifying authority. 2) What legal authority the EPA would have to impose such requirements on states and tribes through this rulemaking			Specific				
2	"[W]hether such pre-filing meeting process, if adopted nationwide, should be mandatory or discretionary . . . and if mandatory) comment on the regulatory effect of a project proponent or certifying authority failing to participate in this process."		44114	127	III.G.2. Proposed Rule; Certification by Administrator; Prefiling Meeting Procedure	Proposed Rule		May want legal input on whether pre-filing meeting process, if adopted nationwide, should be mandatory or discretionary			Specific				
1	"The EPA also solicits comment on the regulatory effect of a project proponent or certifying authority failing to participate in this process."	(combined with above)	44114	127	III.G.2. Proposed Rule; Certification by Administrator; Prefiling Meeting Procedure	Proposed Rule		Possible non-requested legal discussion: What might the legal consequences of failure to participate in pre-filing meeting be?		Input on the potential regulatory effect of a project or certifying authority proponent failing to participate in this process	Specific				
2	"Whether 30 days would be too long in cases with a 60-day reasonable period of time for a certifying authority to act on a request."	"The EPA understands that providing only 30 days from receipt for the EPA to request additional information may seem short but the proposed pre-filing meeting process is a way for the Agency to understand more about the proposed federally licensed or permitted project before the certification request is submitted."	44115	131	III.G.3. Proposed Rule; Certification by Administrator; Requests for Additional Information	Proposed Rule					Specific				
1	"The EPA also solicits comment on other appropriate timelines for requesting additional information that would be consistent with the reasonable period of time established by the federal agency."		44115	131	III.G.3. Proposed Rule; Certification by Administrator; Requests for Additional Information	Proposed Rule	Seeks input on other appropriate timelines	May need legal analysis of other appropriate timelines		Seeks sharing about other appropriate timelines for requesting additional information	Open				
1	"[W]hether nationally consistent procedures for requesting and receiving additional information to support a certification request would provide additional clarity and regulatory certainty for certifying authorities and project proponents."		44115	131	III.G.3. Proposed Rule; Certification by Administrator; Requests for Additional Information	Proposed Rule					Specific				
2	Whether the procedures in this proposal should be encouraged or required for all certifying authorities, not just the EPA, and under what authority the Agency could require states and tribes to comply with these procedures			131-132	III.G.3. Proposed Rule; Certification by Administrator; Requests for Additional Information	Proposed Rule		Under what authority the Agency could require states and tribes to comply with pre-filing meeting procedures?			Specific				
2	"The EPA solicits comments on this [NOTIFICATION TO NEIGHBORING JURISDICTIONS] approach and whether additional process or clarification is needed to explain the EPA's role in determining the effects on neighboring jurisdictions."		44116	134	III.H. Proposed Rule; Certification by Administrator; Determining the Effect on Neighboring Jurisdictions	Proposed Rule	Whether additional process is needed			Potential input on additional process needed to explain EPA's role in determining effects on neighboring jurisdictions	Open				
1	"[W]hether this proposal is tailored for the EPA to provide appropriate technical assistance to certifying authorities, federal agencies and project proponents, or if the EPA should offer or provide assistance in other specific or additional circumstances."		44116	135	III.I. Proposed Rule; Certification by Administrator; EPA's Role in Review and Advice	Proposed Rule	Whether additional assistance should be provided in additional circumstances			Potential suggestions for EPA to provide assistance in other specific or additional circumstances	Open				
2	"The EPA requests comment on these [ENFORCEMENT] provisions, and whether additional enforcement procedures may be appropriate to further define the federal agency's enforcement obligations."	The EPA's existing certification regulations do not discuss the federal agency's responsibility to enforce such conditions after they are incorporated into the permit. Under this proposal and consistent with the Act, a federal agency would be responsible for enforcing conditions included in a certification that are incorporated into a federal license or permit.	44116	135	III.J. Proposed Rule; Certification by Administrator; Enforcement	Proposed Rule		Whether additional enforcement procedures may be appropriate to further define the federal agency's enforcement obligations		Suggestions for potential additional enforcement procedures to further define the federal agency's enforcement obligations	Open				
1	"[W]hether specific procedures such as these would be reasonable to include in section 401 regulations, or whether the general enforcement provisions of the CWA provide sufficient notice and procedure."		44116	135	III.J. Proposed Rule; Certification by Administrator; Enforcement	Proposed Rule	Poses two alternatives	Which is sufficient?			Specific				

