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August 2, 2021

Mr. Michael S. Regan
Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2021-0302
Comments of the National Hydropower Association on EPA's Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule
86 Fed. Reg. 29,541-44 (June 2, 2021)

Dear Administrator Regan,

National Hydropower Association (NHA) welcomes the opportunity to comment on EPA's Notice of Intention (NOI) to consider revisions to the Clean Water Act (CWA) Section 401 Certification Rule adopted by EPA in July 2020.[1] NHA is joined in these comments by the Northwest Hydroelectric Association (NWHA).

The 401 Certification Rule replaced rules that had not been substantially revised since before the CWA was enacted in 1972. The failure to update the rules allowed numerous problems related to the interpretation and application of Section 401 to accumulate, which negatively affected the hydropower industry and its ability to implement infrastructure projects needed to address environmental and energy issues, including climate change. As EPA reviews the 401 Certification Rule, it should carefully consider the problems that the rule is intended to address and whether any potential revisions would resurrect those problems, particularly for the licensing of hydropower projects that will be essential for meeting the urgent need to reduce greenhouse gas emissions. Because NHA and NWHA believe that the rule reasonably and effectively addresses the problems that predated it while adhering closely to the text and purposes of Section 401, NHA and NWHA urge EPA to retain the rule without substantial revisions.

Introduction

NHA and NWHA members operate hydropower projects licensed by the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act (FPA). Under the FPA, FERC has the exclusive authority to license nonfederal hydropower projects, and it has comprehensive authority to deny or condition licenses to ensure the protection and enhancement of fish and wildlife and to achieve a balance of other public and environmental benefits, such as flood control, water supply, and recreation.

[1] The 401 Certification Rule was published in the *Federal Register* on July 13, 2020, 85 Fed. Reg. 42,210-87, took effect on September 11, 2020, and is codified at 40 C.F.R. pt. 121.

Applications for FERC licenses are also subject to the Section 401 certification requirement. Through Section 401, states and tribes play a vital role in ensuring that discharges from federally licensed and permitted activities, including hydropower projects licensed by FERC, comply with the CWA and state and tribal water quality requirements. In the years before the adoption of the 401 Certification Rule, however, the issues that states sought to address in their certification decisions expanded far beyond the water quality concerns reflected in Section 401. This expanded scope is both inconsistent with Section 401 and a substantial intrusion on the exclusive licensing authority that Congress has assigned to FERC. Indeed, in many instances FERC's role in the licensing of a hydropower project had as a practical matter become subordinate to that of the certifying state. Moreover, the expansive scope of state certification decisions and limited state resources prevented states from acting on certification requests within a reasonable time and within the maximum of one year allowed by Section 401. This delayed the licensing and permitting decisions of FERC and other federal agencies, often by many years and sometimes more than a decade. These delays have hindered approvals for new hydropower projects and other clean energy sources, as well as the implementation of environmental protection measures for existing projects.

The 401 Certification Rule substantially addresses these problems by closely adhering to the text of Section 401 and the cooperative federalism principles that are at its core. The rule focuses the certification decision on Section 401's water quality objectives and better implements Section 401's requirement that certification decisions be made within a reasonable time not to exceed one year. It ensures the ability of states and tribes to fully protect water quality, while also preserving the ability of federal agencies such as FERC to fulfill through their licensing and permitting decisions the broad, national objectives assigned to them.

Hydropower is a clean, renewable, and reliable energy source that will play a key role in achieving the President's ambitious climate protection and infrastructure goals. With licenses for 281 existing hydropower facilities expiring by 2030—representing more than 13 gigawatts of clean energy capacity—retaining the 401 Certification Rule will be essential for ensuring that existing as well as new hydropower projects can be timely and efficiently licensed to combat climate change, protect water quality, and achieve other national objectives. For these and other reasons detailed below in response to the questions posed in the NOI, EPA should retain the 401 Certification Rule without substantial revisions.

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1. BACKGROUND

1.1 NHA and NWHA

NHA is a non-profit national association dedicated to securing hydropower as a clean, carbon-free, renewable, and reliable energy source that serves the nation's environmental and energy objectives. Its membership consists of more than 240 organizations, including public and investor-owned utilities, independent power producers, equipment manufacturers, and professional organizations that provide legal, environmental, and engineering services to the hydropower industry. NHA promotes innovation and investment in all waterpower technologies, including conventional hydropower, marine and hydrokinetic power systems, and pumped storage to integrate other clean power sources, such as wind and solar.

NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy while protecting the fisheries and environmental quality that characterize our Northwest region. NWHA's membership consists of 130 members and represents all segments of the hydropower industry: public and private utilities; independent developers and energy producers; manufacturers and distributors; local, state, and regional governments including water and irrigation districts; consultants; and contractors.

NHA and NWHA will collectively be referred to as NHA throughout the remainder of these comments.

1.2 FERC's Exclusive and Comprehensive Authority to License Nonfederal Hydropower Projects

NHA's members own and operate the majority of the nonfederal hydropower projects licensed by FERC. FERC has jurisdiction over more than 2,500 hydropower projects with a combined capacity of approximately 55,500 megawatts.[2] Hydropower generates more than 7 percent of all utility-scale electricity generated in the United States and nearly 40 percent of all utility-scale renewable power.[3]

Under the FPA, FERC has the exclusive authority to license nonfederal hydropower projects. Congress intended to centralize decision-making in the Federal Power Commission and its successor, FERC, and the U.S. Supreme Court has long held that the FPA preempts most state and local regulation of the projects under state law.[4] FERC's authority under the FPA is also comprehensive. When issuing licenses, FERC may include conditions not only to promote power and water development, but also to protect and promote irrigation, flood control, water

[2] FERC's "Hydropower Primer: A Handbook of Hydropower Basics" (Feb. 2017), HydropowerPrimer.pdf (ferc.gov).

[3] U.S. Energy Information Administration, "Hydropower explained" (Apr. 8, 2021), https://www.eia.gov/energyexplained/hydropower/.

[4] *See* 16 U.S.C. §§ 797(e), 817(1); *California v. FERC*, 495 U.S. 490 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946).

supply, public safety, recreation, and the environment.[5] In addition, federal agencies that manage certain types of federal land (referred to by the FPA as "reservations") may prescribe license conditions for the protection and use of those lands.[6] FERC also must specifically consider recommendations from the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Services (NMFS), and state fish and wildlife agencies for the protection of fish and wildlife,[7] and the USFWS and NMFS may prescribe license conditions requiring the construction, maintenance, and operation of "fishways."[8] In deciding whether to issue a license, FERC must "give equal consideration" to both the "power and development purposes for which licenses are issued" and "the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."[9]

The FPA authorizes FERC to issue hydropower licenses for a term of up to 50 years.[10] Because of the long license term and the many interests and objectives that FERC must consider and balance, the application process is lengthy and designed both to develop comprehensive information regarding the project and its effects and to ensure that all interested stakeholders have an opportunity to present their views. At least five years before a license expires, an applicant must submit a notice of intent to apply for a "new" license, and at least two years before the license expires, it must submit the license application.[11] If FERC does not issue a new license to an existing licensee before the license's expiration, FERC must issue an "annual license" on the same terms and conditions as the existing license until a new license is issued.[12]

1.3 Section 401 Certification of FERC Hydropower Licenses

Hydropower projects licensed by FERC typically involve a "discharge[] into . . . navigable waters," which the CWA defines as "waters of the United States."[13] Such discharges may include water flowing through a dam and turbines directly into a waterbody immediately downstream and water that is diverted from a waterbody and then returned to the same or a different waterbody after passing through a turbine.

Because an application for a federal license or permit to conduct any activity that may result in a discharge to waters of the United States requires a certification under Section 401 from the state

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[5] *See* 16 U.S.C. § 803(a).

[6] *See id.* §§ 796(2), 797(e); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 (1984).

[7] 16 U.S.C. § 803(j).

[8] *Id.* § 811.

[9] *Id.* § 797(e).

[10] *Id.* §§ 799, 808(e).

[11] *Id.* § 808(b), (c)(1).

[12] *Id.* § 808(a)(1).

[13] 33 U.S.C. § 1362(7), (11).

or tribe that has authority over the area in which the discharge originates,[14] FERC's issuance of a hydropower license—including issuance of a new license upon expiration of an existing license—is almost always subject to Section 401.[15] License amendment applications that would result in certain changes in the discharge are also subject to Section 401.[16] Outside of the FERC licensing process, members often must obtain other federal licenses and permits that are subject to Section 401. For example, streambed work for constructing new or modified projects typically requires a permit from the U.S. Army Corps of Engineers for the discharge of dredged or fill material under CWA Section 404,[17] which also requires a certification under Section 401.

FERC's rules include procedures intended to ensure timely and efficient Section 401 certification decisions.[18] An applicant must consult with the Section 401 certifying authority on information needs and procedures years before the applicant submits a request for certification.[19] Further, FERC conducts early scoping under the National Environmental Policy Act (NEPA) to identify all issues associated with the project, including cumulative impacts.[20] The certifying authority may submit comments to FERC that identify information and studies that the certifying authority believes are needed for its certification decision.[21] In addition, the applicant must prepare and submit a study plan for FERC's approval.[22] If the certifying authority is dissatisfied with the study plan, it may file a formal notice of dispute with FERC, which FERC must consider before giving final approval of the study plan following the recommendation of a three-person dispute resolution panel.[23]

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[14] *Id.* § 1341(a)(1).

[15] The U.S. Supreme Court has held that the term "discharge," as used in Section 401, "means a 'flowing or issuing out,'" and includes water flowing through a dam or turbine "into" waters of the United States downstream. *See S.D. Warren Co. v. Maine Bd. of Env't Prot.*, 547 U.S. 370, 375-78 (2006) (quoting *Webster's New Int'l Dictionary*). The Court rejected an argument that a "discharge" for purposes of Section 401 also required an addition of a pollutant, as would be required for a "discharge" that must be authorized by a National Pollutant Discharge Elimination System (NPDES) permit under CWA Section 402, 33 U.S.C. § 1342. *See S.D. Warren Co.*, 547 U.S. at 375-87.

[16] *See Ala. Rivers All. v. FERC*, 325 F.3d 290, 299-300 (D.C. Cir. 2003) (license amendment that would result in an increased discharge was subject to Section 401); *cf. North Carolina v. FERC*, 112 F.3d 1175, 1185-89 (D.C. Cir. 1997) (license amendment that would result in a decreased discharge would not "result in a discharge" and was therefore not subject to Section 401 (quotation simplified)).

[17] 33 U.S.C. § 1344.

[18] The Section 401 certification procedures described here are those under FERC's default "integrated license application process." 18 C.F.R. pt. 5. Somewhat different procedures apply under FERC's "traditional" and "[a]lternative" licensing procedures, which an applicant must obtain FERC's approval to use. *See* 18 C.F.R. § 5.1(f).

[19] *See id.* § 5.1(d).

[20] *See id.* §§ 5.9-5.10.

[21] *See id.* § 5.9(a).

[22] *See id.* §§ 5.11-5.14.

[23] *See id.* § 5.14.

Once the environmental study plan is established, the license applicant then spends the next few years conducting environmental studies and preparing its license application.[24] Throughout this study period, the certifying authority can review and comment on study results, advocate for additional studies and information, and comment on the applicant's licensing proposal.[25] After the license application is complete and filed, FERC then reviews the application for completeness and requires the applicant to prepare any additional environmental studies or information that may be necessary.[26] Only after this years-long process—after extensive collaboration, environmental study, and review—is the applicant required to submit its certification request to the certifying authority.

1.4 The Role of States and Tribes in Licensing Decisions

States and tribes play an important and valuable role in protecting water quality, and NHA supports the participation of states and tribes in federal licensing and permitting decisions through Section 401. Some certifying authorities, however, have sought to use Section 401 to prohibit, delay, or impose conditions on federally licensed or permitted activities for reasons that have nothing to do with the water quality concerns addressed by the CWA. Where federal laws such as the FPA grant exclusive regulatory authority to federal agencies and preempt state requirements in order to further national objectives, including developing and enhancing clean energy sources to respond to climate change, an overly expansive interpretation of the scope of Section 401 would undermine these national objectives by diminishing the exclusive regulatory authorities that Congress has conferred on FERC and other federal agencies.

Before the adoption of the 401 Certification Rule, the issues addressed in certification decisions had expanded far beyond the water quality concerns of Section 401. Without clearly defined limits in EPA's previous rule, some certifying authorities issued certifications with conditions that had little or nothing to do with the water quality effects of discharges from hydropower projects. These conditions included, for example, requirements for recreational facilities, wildlife protection and enhancement measures, vegetation management plans, and fish passage facilities. Such conditions substantially exceed the scope of Section 401 and are a substantial intrusion on Congress's clearly expressed intention in the FPA that these issues should be addressed exclusively by FERC or through the specific authorities that Congress assigned to USFWS and NMFS to prescribe "fishways" and to other federal agencies to prescribe license conditions to protect federal reservations under their management.[27]

Certifying authorities also often took far longer to issue certification decisions than the statutory maximum of one year from their receipt of the certification request—sometimes more than a

[24] The environmental study phase of hydropower licensing is typically two years. *See id.* § 5.15.

[25] *Id.* §§ 5.15-5.16.

[26] *Id.* § 5.21.

[27] *See* 16 U.S.C. §§ 796(2), 797(e), 803(a), 803(j), 811. FERC's licensing decisions are also subject to a host of other federal laws, including but not limited to NEPA, 42 U.S.C. §§ 4321-4370m-12; the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544; the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1466; and the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101-307108; *see, e.g.*, 18 C.F.R. §§ 5.18(b)(3), 5.25.

decade.[28] Various devices have been used in an attempt to extend the time for making a decision, including deeming a certification request to be "incomplete" in order to prevent the one-year period from starting,[29] asking the applicant to withdraw and resubmit its certification request to start a new one-year period,[30] and denying certification "without prejudice" to force the applicant to resubmit its request.[31] Shortly before the 401 Certification Rule was adopted, 17 pending FERC hydropower licensing decisions were delayed by the failure of the certifying authority to timely act on a certification request, and eight of these had been delayed for more than 10 years.[32] These delays prevented FERC from updating existing licenses that were 30 to 50 years old to include new environmental protection measures, and they left project owners in limbo for years regarding the conditions under which their projects would be operated in the future. For proposed projects, delay could mean that the project was never financed or built.

For certification decisions that are within the appropriate scope of Section 401, certifying authorities have sufficient time to make a fully informed decision within the period allowed by Section 401 and the 401 Certification Rule. The FERC regulations described in the preceding section further ensure that sufficient time is available by involving certifying authorities in the licensing process and allowing them to identify and obtain needed information years before a certification request is submitted. The regulations also do not require an applicant to submit a certification request until 60 days after FERC has determined that the license application is complete (including completion of approved studies) and is "ready for environmental analysis."[33] These procedures provide ample opportunities for certifying authorities to identify and obtain the information they need to make timely certification decisions.

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[28] *See, e.g.*, *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (no decision on certification more than 12 years after the initial request for certification was received). Under CWA Section 401(a)(1), certification decisions must be made "within a reasonable period of time (which shall not exceed one year) after receipt of [the] request" for certification. 33 U.S.C. § 1341(a)(1). FERC's rules allow a certifying authority the full one year to act on a certification request before deeming the certifying authority to have waived the certification requirements. 18 C.F.R. § 5.23(b)(2).

[29] *See, e.g.*, *N.Y. State Dep't of Env't Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018) (rejecting certifying authority's argument that the period for acting on a certification request did not begin until the certifying authority deemed the request to be complete).

[30] *See, e.g.*, *Hoopa Valley Tribe*, 913 F.3d at 1103-05 (holding that withdrawing and resubmitting the same certification request did not extend the time for acting on a certification request).

[31] Certifying authorities have also attempted to effectively extend their time for making certification decisions by including certification conditions that purport to give them the right to modify or "reopen" certification conditions at any time, including long after the federal license or permit has been issued.

[32] *See* FERC Project Nos. 2086 (Vermilion Valley), 2105 (Upper N. Fork Feather River), 2174 (Portal), 1971 (Hells Canyon), 67 (Big Creek Project 2A), 120 (Big Creek Project 3), 2085 (Mammoth Pool), 2175 (Big Creek Project 1 & 2), 2088 (South Feather), 2106 (McCloud-Pit), 2615 (Brassua), 2079 (Mid-Fork American), 2179 (Merced River), 2467 (Merced Falls), 848 (Trout Creek), 12532 (Pine Creek Mine), 2337 (Prospect Number 3); *see also* Testimony of John Katz, FERC Deputy Associate General Counsel, House Committee on Energy and Commerce Subcommittee on Energy and Power, Hearing on Legislation Addressing Pipeline and Infrastructure Modernization, at 8 (May 3, 2017), https://docs.house.gov/meetings/IF/IF03/20170503/105916/HHRG-115-IF03-Wstate-KatzJ-20170503.pdf ("Over a third of all pending hydropower re-license applications . . . are awaiting these approvals [CWA section 401 certifications and ESA biological opinions] from other agencies.").

[33] *See* 18 C.F.R. §§ 5.22, 5.23(b)(1).

1.5 Hydropower's Role in Achieving Climate Protection and Infrastructure Goals

In April 2021, the President announced an aggressive new greenhouse gas reduction target for the United States: a 50 to 52 percent reduction of economy-wide net greenhouse gas pollution by 2030, based on 2005 greenhouse gas emission levels.[34] The United States has further set a goal to reach 100-percent carbon-pollution-free electricity by 2035.[35] The President has emphasized that infrastructure investment and the creation of millions of well-paying, middle-class jobs are integral to an effective and equitable climate policy.[36]

The nation's hydropower infrastructure is a critical resource for achieving the Administration's policy goals. Hydropower is a clean, renewable, and reliable energy source that contributes to more than 140,000 well-paying jobs for Americans.[37] Currently, FERC operating licenses for 281 existing hydropower facilities are scheduled to expire by 2030.[38] These licenses include 4,700 megawatts of hydropower capacity, which translates into 10 million metric tons of carbon dioxide emissions avoided per year, electricity for 1.8 million homes and 2.2 million cars annually, and an economic value of $733 million per year based on the Social Cost of Carbon.[39] The licenses also include 9,100 megawatts of pumped storage capacity, which accounts for 38 percent of the nation's total energy storage capacity, which is 400 percent more energy storage capacity than that of all battery installations constructed from 2010 to 2020.[40]

The nation has a vital interest in ensuring that Section 401 certifications do not delay the licensing of hydropower and other clean energy infrastructure projects, or overburden them with license requirements that exceed the scope of the water quality protections that Congress intended.

2. OVERVIEW OF THE PURPOSE AND STRUCTURE OF SECTION 401

To provide context for NHA's comments, this section briefly describes the history of Section 401 and EPA's implementing rules, as well as Section 401's purpose and structure.

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[34] The White House, *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies* (Apr. 22, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/.

[35] *Id.*

[36] *See id.*; The White House, *Fact Sheet: The American Jobs Plan* (Mar. 31, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.

[37] FERC, "Hydropower Primer: A Handbook of Hydropower Basics," HydropowerPrimer.pdf (ferc.gov).

[38] National Hydroelectric Association, *13 GWs of Hydropower at Risk* (2021), https://www.hydro.org/wp-content/uploads/2021/07/NHA-Hydro-Relicensing-by-2030-Fact-Sheet.pdf.

[39] *Id.*

[40] *Id.*

2.1 History of Section 401 and EPA's Implementing Rules Before the 401 Certification Rule

Section 401's certification requirement predates the substantial 1972 amendments to the Federal Water Pollution Control Act (FWPCA), which became the CWA. Congress originally enacted the certification requirement as part of the Water Quality Improvement Act of 1970.[41] As enacted in 1970, the predecessor to Section 401 was designated as Sections 21(b)-(d) of the FWPCA. Before the 401 Certification Rule, EPA's most recent, and only, Section 401 rule had been promulgated in 1971 and was based on the provisions of the 1970 predecessor to Section 401.[42] When Congress enacted the CWA in 1972, it carried over the certification requirement as Section 401 with several substantial revisions.[43] Apart from minor revisions in 1977, Section 401 has remained unchanged since 1972. Until 2020, however, EPA had not updated its 1971 rules to reflect these statutory revisions.

The 1972 revisions reworded the required certification and, through the new Subsection 401(d), added express authority to condition certifications. The certification language was revised as follows:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters ~~of the United States~~, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . ~~that there is reasonable assurance, as determined by the State . . . that such activity will be conducted in a manner which will not violate applicable water quality standards~~ that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

There are three differences in the wording of the 1970 certification requirement and the current requirement under Section 401. First, whereas the 1970 version required certification of the "activity" for which the federal license or permit was sought, Section 401 now requires certification only of the "discharge" that results from the activity. Second, whereas the 1970 version required certification that there is "reasonable assurance" of compliance, Section 401 now requires certification that the discharge "will comply."[44] Finally, whereas the 1970 version required certification of compliance with "applicable water quality standards," Section 401 now requires certification that the discharge will comply with "sections 1311, 1312, 1313, 1316, and 1317 [CWA Sections 301-03, 306-07]." These CWA sections require point source discharges of pollutants to comply with instream water quality standards and various pollution control technology standards, such as "best available technology economically achievable."[45]

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[41] Pub. L. No. 91-224, § 103, 84 Stat. 91, 107-10 (1970).

[42] *See* 36 Fed. Reg. 22,487 (Nov. 25, 1971).

[43] Pub. L. No. 92-500, § 2, 86 Stat. 877 (1972).[could not find § 2]

[44] But see the discussion below in Section 3.5 of these comments.

[45] *See, e.g.*, 33 U.S.C. §§ 1311(b)(1)(C) (limits to achieve water quality standards, including standards established pursuant to CWA Section 303(c) and 33 U.S.C. § 1313(c)), 1311(b)(2) (limits based on implementing various levels

The revised certification language reflected the new emphasis in the CWA on controlling and, where feasible, eliminating point source discharges of pollutants, rather than the previously diffuse and ineffective efforts of the FWPCA to achieve water quality standards.[46] Thus, the required certification is of the "discharge," not the entire "activity" for which a federal license or permit is sought. Similarly, the certification is that the discharge will comply with CWA Sections 301, 302, 303, 306, and 307,[47] which all apply specifically to point source discharges of pollutants.[48]

The new Subsection 401(d), which expressly authorized certification conditions, also focused on point source discharges. It authorized conditions as

> necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification . . . .[49]

Although "other appropriate requirement of State law" is not defined, the CWA sections referenced in Subsection 401(d) all establish or provide for effluent limits on point source discharges. The phrase "other appropriate requirement[s] of State law," then, could only have been intended by Congress to refer to state requirements for point source discharges that are similar to those in the CWA.

2.2 Section 401 Does Not Preempt State Law or Limit State Authority Under Other Federal Laws or Other Provisions of the CWA

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of pollution control technology), 1316(a)(1) (limits for new sources based on implementing "best available demonstrated control technology").

[46] The regulatory heart of the CWA is Subsection 301(a), which provides, "Except as in compliance with this section [1311] and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title [the CWA], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).

[47] 33 U.S.C. §§ 1311-13, 1316-17.

[48] CWA Section 301 requires "effluent limitations for point sources" to implement pollutant discharge control technology requirements set forth in that section, *see* 33 U.S.C. § 1311(b), and as "necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations . . . or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter [the CWA]," *id.* § 1311(b)(1)(C). CWA Section 302 authorizes EPA to establish effluent limitations for "discharges of pollutants from a point source or group of point sources" as needed to protect water quality. *See id.* § 1312(a). CWA Section 303 requires the establishment of water quality standards, *see id.* § 1313, which are implemented through "effluent limitations for point sources" pursuant to CWA Section 301, *see id.* § 1311(b)(1)(A). CWA Section 306 requires EPA to establish discharge limits for categories of new point source discharges based on "best available demonstrated control technology." *See id.* § 1316(a)(1), (b). And CWA Section 307 authorizes EPA to establish point source discharge limits for toxic pollutants. *See id.* § 1317(a).

[49] *Id.* § 1341(d).

Importantly, neither Section 401 nor other provisions of the CWA preempt or otherwise limit the application of state law or limit state authority under other federal laws.[50] Section 401, then, is not the states' only means of protecting water quality or of addressing other environmental, economic, or social concerns. Insofar as the CWA is concerned, states may choose to enact and implement laws that protect water quality more expansively than the CWA or that address any other issue of concern to the state. States may also exercise their authorities under other federal environmental laws, such as the Clean Air Act[51] and Coastal Zone Management Act.[52] In addition, states may regulate activities through authority delegated to them under CWA provisions other than Section 401, such as the National Pollutant Discharge Elimination System (NPDES) permitting program.[53] Regardless of how narrowly or expansively Section 401 is interpreted, neither it nor the 401 Certification Rule limits, in any way, the authority of states to regulate any activity under state law, other federal laws, and other provisions of the CWA.

2.3 Section 401 Is a Limited Grant of Federal Authority to States and Tribes to Allow Them to Certify and Condition Federal Licenses and Permits for the Protection of Water Quality

Section 401 authorizes states and tribes to certify and place conditions on federal licenses and permits for the specific purpose of ensuring that point source discharges that result from the federally licensed or permitted activities will comply with CWA Sections 301, 302, 303, 306, and 307 and similar requirements of state and tribal law. But Section 401 is not a regulatory program like the NPDES and dredged and fill material permit programs under CWA Sections 402 and 404, respectively.[54] This is evident from Section 401's waiver provision. Under Section 401(a)(1), a state or tribe may in its unfettered discretion waive certification, and some states and tribes do, either in individual cases or for certain types of projects.[55] At least insofar as Section 401 is concerned, a state or tribe need not explain its waiver decision, and there is no appeal from the decision.[56] Nor does the applicant, if there is a waiver, need to obtain a certification from any other entity or provide any further explanation to the federal licensing or permitting agency.

Similarly, a certification and any accompanying conditions have no legal effect until and unless a federal license or permit is issued that is based on the certification and that incorporates its conditions.[57] There is no mechanism under the CWA for giving effect to a certification decision

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[50] *See id.* § 1370.

[51] *See, e.g.*, 42 U.S.C. §§ 7410 (air quality implementation plans), 7661a (Title V air emissions permitting program).

[52] *See, e.g.*, 16 U.S.C. §§ 1455b (coastal zone management programs), 1456(c) (requirements for federal consistency with state coastal zone management programs).

[53] *See* 33 U.S.C. § 1342.

[54] *See id.* §§ 1342, 1344.

[55] *See, e.g.*, Terror Lake Hydroelectric Project, FERC No. 2743 (Alaska DEC, June 3, 2015 letter waiving certification).

[56] State or tribal law may restrict a state certifying authority's discretion to voluntarily waive certification, but nothing in CWA Section 401 constrains that discretion.

[57] *See* 33 U.S.C. § 1341(a)(1), (d).

independently of the federal license or permit. If the applicant does not proceed with its federal application, or if the application is denied, the certification and its conditions have no effect. Certification conditions also have no effect pending the issuance of the federal license or permit.[58]

2.4 An Expansive Interpretation of Section 401 Would Undermine FERC's Exclusive and Comprehensive Authority to Regulate Nonfederal Hydropower Projects

Section 401's limited grant of federal authority to states and tribes to certify and condition federal licenses and permits is intended to enable a state or tribe, if it chooses, to ensure for itself that point source discharges from federally licensed or permitted activities meet the point source discharge requirements of the CWA and similar state requirements. But certification decisions that address issues beyond the specific requirements identified in Section 401 necessarily undercut any exclusive authority that Congress has delegated to federal agencies to address those issues. The more broadly the scope of Section 401 is construed, the more limited will be the exclusive authority of the federal agency.

As described above, one such federal law that preempts state law is the FPA. Through the FPA, Congress has granted FERC the exclusive authority to license nonfederal hydropower projects. The FPA sets forth the national interests that FERC must consider and balance in issuing a license. It also includes limited delegations of authority to other federal agencies to prescribe license conditions within their specific areas of expertise.[59] Section 401, although not part of the FPA, is also a limited grant of authority to the states to prohibit or condition the issuance of a federal license or permit as necessary to ensure compliance with specified sections of the CWA and similar state or tribal requirements.

Care must be taken in construing the scope of Section 401 because that scope directly and inversely affects the scope of the exclusive authority that Congress has granted to federal agencies such as FERC under the FPA. Section 401 must be interpreted to provide states and tribes with all the authority that Congress intended to grant them, but it is also important not to adopt an expansive interpretation that undermines the exclusive authority that Congress intended to assign to FERC and other federal agencies. For example, the FPA directs FERC to balance the interests of power development, flood control, irrigation, water supply, fish and wildlife protection, and other public interests when issuing licenses to hydropower projects.[60] In arriving at this balance, FERC must consider, but is not required to adopt, the recommendations of state fish and wildlife, recreation, and other agencies.[61] If FERC rejects the recommendations as not in the national public interest, state Section 401 certifying authorities have often made the recommendations Section 401 certification conditions because FERC has no choice but to

[58] For example, the CWA's enforcement section, Section 309, does not mention Section 401, much less authorize the enforcement of certification conditions. *Id.* § 1319.

[59] *See* 16 U.S.C. §§ 797(e), 811.

[60] *Id.* § 797(e).

[61] *Id.* § 803(a), (j).

include the conditions in the license.[62] An expansive interpretation of the scope of Section 401 can thereby become a mechanism for undermining Congress' express directive in the FPA that FERC has the exclusive authority for balancing these competing interests.[63]

2.5 The 401 Certification Rule Is Consistent with the Text and Purpose of Section 401

The 401 Certification Rule interprets and applies Section 401 in a manner that is faithful to its text and purpose and the cooperative federalism principles that underlie the CWA. Consistently with Section 401, states and tribes have broad authority under the rule to ensure that discharges from federally licensed or permitted activities are consistent with the water quality requirements of the CWA and similar state and tribal regulations. But also consistently with Section 401, the rule does not expand the scope of certification authority to issues other than the water quality effects of discharges, which would undermine the exclusive authority that Congress has assigned to FERC under the FPA to regulate nonfederal hydropower projects.[64] In addition, the rule's clarification of the proper scope of Section 401 is consistent with the time that Congress has allocated to certifying authorities to act on certification requests. An expansive interpretation of the scope of Section 401 would be inconsistent with Congress' directive that certification decisions be made within a reasonable time that does not exceed one year. As described above, Congress has made clear that it intends the broader issues associated with the relicensing of hydropower projects to be addressed comprehensively by FERC under the FPA and other applicable federal statutes.[65]

NHA urges EPA to retain the 401 Certification Rule to help ensure that new and existing hydropower projects and other clean energy sources can be licensed expeditiously and efficiently to help achieve the nation's ambitious climate, energy, and water quality objectives.

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[62] *See, e.g.*, *PacifiCorp*, 168 FERC ¶ 62,175 at P 51 (2019) (concluding that a state minimum flow recommendation was unjustified but nonetheless incorporating the recommendation into the license because it was also a condition of the state's Section 401 certification).

[63] As FERC explained to Congress before the adoption of the 401 Certification Rule: "State water quality certifications now impose a wide array of requirements on projects, without any obligation to take into account the benefits of hydropower or other competing interests, or to concern themselves with whether their requirements duplicate or conflict with those imposed by the Commission or other agencies. Most troublesome are the conditions controlling minimum instream flows, as these flows have a direct impact on a project's power generation and economic viability." FERC, "Report on Hydroelectric Licensing Policies, Procedures, and Regulations: Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000" at 16 (May 2001). And more recently: "Even after the Commission staff has completed analysis of a hydroelectric project and is ready to take final action on the application, the case may be delayed, sometimes for years, until the issuance of a water quality certification under the Clean Water Act." Testimony of Ann Miles, Director, Office of Energy Projects, before the House Committee on Energy and Commerce (May 13, 2015).

[64] Again, if the federal licensed or permitted activity is not subject to federal preemption—for example a U.S. Army Corps of Engineers permit for the discharge of dredged or fill material under CWA Section 404, 33 U.S.C. § 1344—states and tribes have the ability to fully regulate the licensed or permitted activity under state or tribal law, regardless of the extent of their authority to certify or condition the license or permit under Section 401.

[65] *See* 16 U.S.C. §§ 796(2), 797(e), 803(a), 803(j), 811 (FPA); 16 U.S.C. §§ 1451-1466 (CZMA); 16 U.S.C. §§ 1531-1544 (ESA); 42 U.S.C. §§ 4321-4370m-12 (NEPA); 54 U.S.C. §§ 300101-307108 (NHPA); 18 C.F.R. §§ 5.18(b)(3), 5.25; *California*, 495 U.S. 490; *First Iowa Hydro-Elec. Coop.*, 328 U.S. 152.

3. COMMENTS ON SPECIFIC QUESTIONS POSED BY THE NOI

This section responds to each of the specific issues on which the NOI has requested feedback. As an initial matter, NHA notes that the 401 Certification Rule has been in effect for less than a year. This has provided few opportunities to observe the practical effects of the rule. For that reason alone, substantial revisions to the rule are premature. NHA's members, however, have had substantial experience with the Section 401 certification process prior to the adoption of the rule, and these comments are informed by that experience.

3.1 Pre-Filing Meeting Requests

> *"The rule requires project proponents to submit a 'pre-filing meeting request' to certifying authorities at least 30 days prior to submitting a certification request. 40 CFR 121.4. EPA is interested in the utility of the pre-filing meeting process to date, including but not limited to, whether the pre-filing meetings have improved or increased early stakeholder engagement, whether the minimum 30 day timeframe should be shortened in certain instances (e.g., where a certifying authority declines to hold a pre-filing meeting), and how certifying authorities have approached pre-filing meeting requests and meetings to date."*

NHA supports engagement between applicants and Section 401 certifying authorities well in advance of a certification request. EPA, however, should not mandate pre-request procedures. Many different federal licenses and permits are subject to Section 401, and each has its own procedures and timelines. For this reason, federal licensing and permitting agencies are in a much better position than EPA to determine whether any such procedural requirements would be helpful and what they should be. As described above in Section 1.3 of these comments, FERC's hydropower licensing rules include extensive pre-request procedures to facilitate discussions among certifying authorities, FERC, the license applicant, and other parties regarding the certification and to ensure that certifying authorities can act on certification requests expeditiously.[66] But other federal licensing and permitting processes are likely to have much different needs.[67] A one-size-fits-all approach mandated by EPA would not be workable or useful.

NHA has no objection to the relatively minor burden imposed by the 401 Certification Rule's requirement for a pre-filing meeting request. But the rule should not be revised to include additional pre-request procedures. NHA instead encourages EPA to work with federal licensing and permitting agencies and with state and tribal certifying authorities to develop their own procedures and practices to facilitate timely and informed certification decisions that are consistent with Section 401.

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[66] *See also* 18 C.F.R. §§ 5.1(d)(1), 5.8(d)(4), 5.9(a), 5.14(a), 5.18(b)(3)(i), 5.23(b).

[67] See, for example, the U.S. Army Corps of Engineers' Section 401 procedures at 33 C.F.R. 33 C.F.R. § 325.2(b)(1).

3.2 Certification Request

> *"The rule defines a certification request as 'a written, signed, and dated communication that satisfies the requirements of [Section] 121.5(b) or (c).' . . . Among other issues, EPA is concerned that the rule constrains what states and tribes can require in certification requests, potentially limiting state and tribal ability to get information they may need before the CWA Section 401 review process begins. EPA is interested in stakeholder input on this definition and the elements of a certification request contained at 40 CFR 121.5, including but not limited to, the sufficiency of the elements described in 40 CFR 121.5(b) and (c), and whether stakeholders have experienced any process improvements or deficiencies by having a single defined list of required certification request components applicable to all certification actions."*

NHA supports the 401 Certification Rule's clear and objective definition of a certification request: a "written, signed, and dated communication that satisfies the requirements of § 121.5(b) or (c)."[68] In turn, Subsections 121.5(b) and (c) set forth clear and objective submittal requirements that are consistent with the scope of Section 401.[69]

Section 401 does not require a request for certification to include more than the request itself. Section 401 provides simply, "If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived."[70] There is no basis in the text of Section 401, and no other reason to believe, that a "request" must include anything more than a clear indication that the applicant seeks the certification required for a federal license or permit application.[71]

A clear and objective definition of "certification request," as currently contained in the 401 Certification Rule, is also necessary to identify when the certification period begins and ends and to avoid certification delays caused by disputes over whether a certification request is "complete" or otherwise sufficient. FERC has recently observed:

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[68] 40 C.F.R. § 121.1(c).

[69] *Id.* § 121.5(b), (c).

[70] 33 U.S.C. § 1341(a)(1). *See also N.Y. State Dep't of Env't Conservation*, 884 F.3d at 455-56 ("The plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request.' It does not specify that this time limit applies only for 'complete' applications.").

[71] In particular, there is no requirement that a request for certification include, or that it be delayed pending the completion of, an environmental assessment or impact statement under the National Environmental Policy Act (NEPA), *see* 42 U.S.C. § 4332(C), or similar provisions of state law. Nothing in the text of Section 401 remotely suggests such a requirement. Moreover, the comprehensive range of environmental issues addressed in these assessments extends far beyond the scope of Section 401, which is limited to the water quality effects of discharges that may result from federally licensed or permitted activities. Certifying authorities do not need the results of these assessments to act on the much narrower scope of certification requests.

> [B]y tying commencement of the certification waiver period to the date of receipt [of the certification request by the certifying agency] rather than the date on which the state certifying agency accepts the request, the Commission [has] deliberately extracted itself from deciding whether a certification application is complete under state rules. Determining whether such an application is complete would require the Commission to interpret state rules in order to resolve a litany of questions arising from the information request (*e.g.*, whether the information request was appropriate under state law; whether the applicant provided the requested information; whether the provided information was significant enough to be treated as a "new" application; and, if provided during the course of the year, whether the information resulted in an extension of the one-year deadline). Under the Commission's regulations, the Commission need not make such findings – the clock starts on the date the certifying agency receives the certification request.[72]

To avoid just such disputes and the time required to resolve them, defining "certification request" clearly and objectively is essential.

A clear and objective definition of "certification request" also ensures compliance with Section 401's deadline for acting on certification requests. If, contrary to the 401 Certification Rule, the request were not deemed to have been submitted until the certifying authority was satisfied that it had all the information that it might need or want, the certifying authority could indefinitely postpone its decision deadline by subjectively determining the request to be "incomplete" and demanding more and more information. This would render Section 401's strict deadlines for making a certification decision a nullity.[73]

It is in the applicant's interest to timely provide the certifying authority with all the information that it legitimately needs to issue the certification. If the applicant does not, the 401 Certification Rule provides that the certifying authority may deny certification "due to insufficient information" by specifying the water quality data or information that would be needed to issue the certification.[74] This provision, together with the rule's clear and objective definition of certification request, ensures the timely certification decisions required by Section 401 while protecting the interests of both the applicant and the certifying authority.

3.3 Reasonable Period of Time

> *"CWA Section 401 requires a certifying authority to act on a certification request within a defined time period known as the 'reasonable period of time.' The rule requires the federal licensing or permitting agency to determine the reasonable*

[72] *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at P 38 (2019).

[73] *See N.Y. State Dep't of Env't Conservation*, 884 F.3d at 455-56 ("If the statute required 'complete' applications, states could blur this bright-line rule [regarding the commencement of the one-year period] into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.").

[74] 40 C.F.R. § 121.7(e)(1)(iii), (e)(2)(iii).

period of time using a series of factors, provided that the time does not exceed one year from the date a certifying authority receives a certification request. . . . Additionally, the rule allows federal agencies to extend the reasonable period of time within that one year time period at a certifying authority or project proponent's request, but does not allow certifying authorities to take any other action to extend or modify the reasonable period of time. . . . Among other issues, EPA is concerned that the rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests and limits the factors that federal agencies may use to determine the reasonable period of time. EPA is seeking stakeholder input on the process for determining and modifying the reasonable period of time, including but not limited to, whether additional factors should be considered by federal agencies when setting the reasonable period of time, whether other stakeholders besides federal agencies have a role in defining and extending the reasonable period of time, and any implementation challenges or improvements identified through application of the rule's requirements for the reasonable period of time."

NHA supports the 401 Certification Rule's provisions for establishing the "reasonable period of time" for acting on certification requests, which affirm that the federal licensing or permitting agency is responsible for establishing the reasonable period of time, which statutorily may not exceed one year.[75]

Under Section 401, the federal licensing or permitting agency is the appropriate entity to determine the reasonable period because it must necessarily determine whether and when it may issue the license or permit, based on either a certification or a waiver of certification.[76] Because certification decisions are triggered by federal license or permit applications and are a component of the federal licensing or permitting process, the federal agency is in the best position to determine the reasonable period for making the certification decision within the one-year statutory limit. Further, the federal agency has an incentive not to make the certification period unreasonably short. An unreasonably short certification period would likely result in a certification denial based on insufficient information, which would disrupt the federal licensing or permitting process.

Many federal agencies have longstanding rules establishing Section 401 procedures and deadlines based on their unique licensing and permitting needs and their experience processing license and permit applications. For example, because of the scope and complexity of FERC hydropower licensing decisions, FERC's rules provide the certifying authority the full year allowed by Section 401 to act on certification requests and also include extensive provisions for pre-request consultation with the certifying authority regarding its information needs.[77] On the other hand, the U.S. Army Corps of Engineer's permitting rules establish a 60-day period for acting on certification requests, with provisions for shorter or longer periods based on the

[75] 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 121.6(a).

[76] *See* 33 U.S.C. § 1341(a)(1); *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 67-69 (D.C. Cir. 2006); *Jackson Cty., N.C. v. FERC*, 589 F.3d 1284, 1289 (D.C. Cir. 2009); *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991).

[77] *See* 18 C.F.R. §§ 5.1(d)(1), 5.8(d)(4), 5.9(a), 5.14(a), 5.18(b)(3)(i), 5.23(b)(2).

circumstances of individual permit applications.[78] EPA should not revise the 401 Certification Rule in a way that would interfere with these longstanding agency procedures or that would prevent federal agencies from successfully integrating Section 401 requirements into their own individual licensing and permitting processes.

The 401 Certification Rule appropriately supplements these existing federal agency procedures by ensuring that they include a clear and efficient process to ensure that both the certifying authority and the applicant know from the outset when the reasonable period will end.[79] The federal agency must notify the certifying authority within 15 days of the federal agency's receipt of the certification request of what the reasonable time to act on the request is and the specific date on which waiver will occur if certifying authority fails to act. The rule sets forth factors that the federal agency must consider in determining the reasonable period of time, which are appropriately tailored to the factors that the certifying authority must and may consider in making its certification decision.[80] Further, the rule ensures that the certifying authority and the applicant can provide input on the reasonable period of time determination by authorizing them to request an extension of the period within the one-year statutory limit.[81]

3.4 Scope of Certification

> *"The rule limits the scope of certification, which includes both the scope of certification review under CWA Section 401(a) and the scope of certification conditions under CWA Section 401(d), to 'assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.' . . . The rule defines 'water quality requirements,' as the 'applicable provisions of [Sections] 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.' . . . Among other issues, EPA is concerned that the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality. EPA is seeking stakeholder input on the rule's interpretation of the scope of certification and certification conditions, and the definition of 'water quality requirements' as it relates to the statutory phrase 'other appropriate requirements of state law,' including but not limited to, whether the agency should revise its interpretation of scope to include potential impacts to water quality not only from the 'discharge' but also from the 'activity as a whole' consistent with Supreme Court case law, whether the agency should revise its interpretation of 'other appropriate requirements of State law,' and whether the agency should revise its interpretation of scope of certification based on implementation challenges or improvements identified through the application of the newly defined scope of certification."*

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[78] *See* 33 C.F.R. § 325.2(b)(1)(ii).

[79] 40 C.F.R. § 121.6(b).

[80] *Id.* § 121.6(c).

[81] *Id.* § 121.6(d).

NHA supports the scope of certification provisions in the 401 Certification Rule, which appropriately limit certification decisions to (1) discharges to waters of the United States, rather than the "activity as a whole," and (2) the specific CWA sections referenced in Section 401 and "state or tribal regulatory requirements for point source discharges into waters of the United States."[82] These limits are derived directly from the text of Section 401(a)(1), which limits the scope of certification to certification that the "*discharge* will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317" of the CWA,[83] and which limits certification conditions to these CWA sections and "any other appropriate requirement of State law."[84] EPA has no authority to expand the scope of certification to other aspects of the federally licensed or permitted activity or other requirements.

As explained in the preamble to the 401 Certification Rule,[85] the U.S. Supreme Court's 1994 determination[86] that the authority to condition certifications extended to the "activity as a whole" was based on EPA's 1971 certification rule, which predated and was inconsistent with Section 401 as enacted in the CWA in 1972. This led the Court to incorrectly interpret the reference to the "applicant" in Section 401(d) to extend the authority to condition certifications from the discharge that triggered the certification requirement to the entire federally licensed or permitted activity.[87] Section 401(d) provides, "Any certification . . . shall set forth any effluent limitations and other limitations . . . necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations . . . set forth in such certification." In context, the statutory reference to the "applicant" is clearly intended only to indicate who must comply with certification conditions, not which aspects of an activity are subject to those conditions. Because the certification requirement in Section 401(a)(1) is limited to the "discharge," there is no reason to conclude that Congress intended the mere reference to "applicant" in Section 401(d) to extend the authority to condition certifications to the entire project. Indeed, it would be bizarre to assume that Congress intended that states and tribes could place conditions on aspects of a project for which certification was not required and for which they could not deny certification. The 401 Certification Rule appropriately limits the scope of certification—as it must—to the discharges for which certification is required.

The 401 Certification Rule's scope of certification is also appropriately limited to the "applicable provisions of [Sections] 301, 302, 303, 306, 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States."[88] There are only two sources of authority in the text of Section 401 for the requirements on which certification decisions may be based. First, Section 401(a)(1) requires certification of compliance "with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this

[82] *See id.* §§ 121.1(n), 121.3.

[83] 33 U.S.C. § 1341(a)(1) (emphasis added).

[84] *Id.* § 1341(d).

[85] 85 Fed. Reg. at 42,211.

[86] *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994).

[87] *See* 85 Fed. Reg. at 42,211 (setting forth this analysis).

[88] 40 C.F.R. § 121.1(n) (defining "water quality requirements" for purposes of 40 C.F.R. § 121.3).

title" [CWA Sections 301, 302, 303, 306, and 307].[89] Second, Section 401(d) authorizes certification conditions as "necessary to assure" compliance with these sections and "with any other appropriate requirement of State law."[90] EPA cannot expand the scope of certification beyond the applicable requirements of these sections, nor can it contract the scope of certification by excluding any of these sections.

In addition, the 401 Certification Rule properly interprets Section 401(d)'s reference to "other appropriate requirement of State law"[91] to be limited to "state or tribal regulatory requirements for point source discharges into waters of the United States."[92] Because the CWA does not define which state requirements are "appropriate," the best evidence of what Congress intended are the other provisions listed in Subsection 401(d)—CWA Sections 301, 302, 306, and 307. These CWA sections all establish effluent limits for point source discharges to ensure that the discharges meet water quality standards and are controlled using some form of the "best" pollutant control technology.[93] Accordingly, "appropriate requirement of State law" should be limited to similar state requirements applicable to point source discharges, such as water quality standards and discharge limits based on the application of specified pollutant control technologies.[94]

Another reason to interpret "other appropriate requirements of State law" to include only state provisions similar to the CWA provisions listed in Subsection 401(d) is that any expansion of the phrase's meaning necessarily limits the scope of the exclusive authority that Congress has assigned to FERC under the FPA. If, for example, "appropriate requirement of State law" were interpreted to mean any requirement of State law that the certifying authority deemed to be "appropriate," FERC's exclusive authority to license nonfederal hydropower projects would expand or contract at the whim of the certifying authority.

Before EPA adopted the 401 Certification Rule, there were myriad examples of certification conditions for hydropower projects that addressed issues having little or nothing to do with the water quality effects of the project's discharges or, in some instances, nothing to do with the effects of the project at all. Many of these conditions required projects to develop and maintain public recreational facilities and opportunities; to monitor, study, or enhance fish and wildlife populations; or to address pollutants that flow into the project from upstream sources. Certification conditions have required hydropower projects to:

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[89] 33 U.S.C. § 1341(a)(1).

[90] *Id.* § 1341(d).

[91] *Id.*

[92] 40 C.F.R. § 121.1(n).

[93] *See* 33 U.S.C. §§ 1311(b)(1)(C) (CWA § 301) (discharge limits necessary "to meet water quality standards"),1311(b)(2) (discharge limits based on implementing "best available technology economically achievable" and "best conventional pollutant control technology"), 1312(a) (CWA § 302) (discharge limits to protect the beneficial uses of water), 1316(a) (CWA § 306) (discharge limits based on the "best available demonstrated control technology"), 1317(a) (CWA § 307) (discharge limits for toxic pollutants).

[94] *See also* S. Rep. 92-414 at 69 (1971) ("The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State *water quality* requirements." (emphasis added)).

- Support a feral pig task force and allow state access to the project area to trap and kill feral pigs;

  Other certification conditions addressing similar terrestrial or aquatic wildlife issues unrelated to project discharges have included:

  - Fund annual rearing and planting of resident fish in non-project waterbodies
  - Make financial contributions to a non-governmental organization for habitat improvements or fish stocking in the project watershed
  - Develop and implement an invasive species management and monitoring plan
  - Evaluate amphibian and reptile habitat and develop a species presence monitoring plan
  - Study the hybridization of trout in the project area, including collecting tissue samples for genetic analysis
  - Increase the sturgeon population "to levels commensurate with available habitat and levels that would support harvest"
  - Assess juvenile lamprey habitat and study lamprey distribution, population status, and juvenile out-migration timing

- Construct and enhance public recreational facilities, including biking and hiking trails, parking, signage, boat access, portage routes, sanitary facilities, and trash receptacles

  Other certification conditions similarly requiring enhancements to public recreational opportunities and facilities unrelated to project discharges have included:

  - Make annual payments for maintaining and enhancing public recreational facilities on non-project lands
  - Pay for improvements and enhancements to a recreation site for improved public boating access
  - Release water to enhance boating opportunities
  - Develop and maintain public websites with information on stream flow rates and reservoir levels
  - Investigate introducing into project waters new fish species for recreational fishing

- Pay for annual fish stocking

- Fund full-time sediment and erosion control specialists for the counties surrounding the project

Other certification conditions wholly unrelated to project discharges have included:

- Actively manage sediment input into a project's reservoirs from upstream sources

- Donate or lease to the certifying state parcels of undeveloped, non-project land bordering a river and place restrictive covenants on non-project lands

- Provide fish samples to the certifying state for testing of contaminants unrelated to the project

- Dredge project areas where sedimentation from upstream sources is impeding access, including private access

Many of these requirements would have been within *FERC's* authority to impose in conjunction with its exclusive FPA licensing authority, but they are well beyond the scope of Section 401. Interpreting Section 401 expansively to include authority to impose conditions such as these interferes with FERC's exclusive licensing authority, leads to unreasonable burdens on hydropower projects, and contributes to delays in the issuance of licenses.

For these reasons, NHA urges EPA to retain the 401 Certification Rule's provisions regarding the scope of certification.

3.5 Certification Actions and Federal Agency Review

> *"The rule provides that certifying authorities may take one of four actions on a certification request, including granting certification, granting certification with conditions, denying certification, or waiving certification. . . . The rule requires that certifying authorities include specific information when granting certification, granting certification with conditions or denying certification. . . . Additionally, the rule requires federal agencies to review certifying authority actions to determine whether they comply with the procedural requirements of CWA Section 401 and the 401 Certification Rule. . . . Among other issues, EPA is concerned that a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of nonsubstantive and easily fixed procedural concerns identified by the federal agency. EPA is seeking stakeholder input on the certification action process steps, including but not limited to, whether there is any utility in requiring specific components and information for certifications with conditions and denials, whether it is appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose, and if so, whether there should be greater certifying authority engagement in the federal agency review process including an opportunity to respond to and cure any*

deficiencies, whether federal agencies should be able to deem a certification or conditions as 'waived,' and whether, and under what circumstances, federal agencies may reject state conditions."

NHA supports the 401 Certification Rule's requirement that certification denials and conditions include statements explaining the denial or condition.[95] NHA also supports the rule's limited provisions for federal agency review of certification denials and conditions. Subsection 121.7(c) of the rule, however, should be revised to state that a grant of certification shall include a statement that the certifying authority has "reasonable assurance" that the proposed project will comply with water quality requirements.

It is essential that certification denials and conditions include at least the relatively modest explanatory statements required by the 401 Certification Rule.[96] These statements are necessary to allow meaningful review of certification decisions and, in the case of conditions, to demonstrate that they satisfy the requirement of CWA Section 401(d) that the condition is "necessary to assure" compliance with the applicable requirement.[97] Moreover, Section 401(d) expressly provides that, when conditions are based on an "appropriate requirement of State law," the requirement must be "set forth" in the certification.[98]

The 401 Certification Rule also reasonably interprets Section 401 to authorize the federal licensing or permitting agency to evaluate whether certification denials and conditions include the required explanatory statements.[99] Federal agency review for compliance with these procedural requirements is essential for enforcing the requirements. Otherwise, certifying authorities would have little incentive, and perhaps a disincentive, to provide the statements.[100]

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[95] A federal court of appeals recently suggested, but did not decide, that a certifying authority could satisfy its obligation to "act on a request for certification, within a reasonable period of time (which shall not exceed one year)" by taking "significant and meaningful action on a certification request within a year of its filing, even if the state does not finally grant or deny certification within that year." *North Carolina Dept. of Envtl. Quality v. FERC*, Nos. 20-1655, 20-1671 (4th Cir. 2021). As the court acknowledged, no other court has adopted this interpretation of "act on," and with good reason. *See, e.g., New York State Dept. of Conservation v. FERC*, 991 F.3d 439, 450 (2d Cir. 2021) (state waived its certification authority by failing to certify or deny certification within one year of receipt of the request). In context, "act on" could not reasonably mean anything other than granting or denying the certification request. Congress clearly intended to prevent certifying authorities from delaying federal licenses and permits by requiring them to take *final* action on a certification request within a reasonable time and not to exceed one year. Otherwise, the one-year requirement could be evaded indefinitely simply by taking some step to process the request before the end of that period. Having taken that step, the certifying authority could, without fear of waiving its certification authority, take no further action to process the request.

[96] *See* 40 C.F.R. § 121.7(d), (e).

[97] 33 U.S.C. § 1341(d).

[98] *Id.*

[99] 40 C.F.R. §§ 121.8(b), 121.9(a)(2), (b).

[100] The federal licensing or permitting agency has an obligation to determine that a certification decision "compli[es] with the terms of section 401." *City of Tacoma*, 460 F.3d at 67-69 (holding that FERC was required to verify that a certification was issued following public notice and comment, as required by section 401); *see also Jackson Cty., N.C.*, 589 F.3d at 1289 (same); *Keating*, 927 F.2d 616 (holding that FERC had the authority to determine the continuing validity of a certification pursuant to CWA paragraph 401(a)(3)).

With respect to the NOI's question regarding whether certifying authorities should be given an opportunity to respond to and cure any deficiencies, NHA has no objection in principle to providing such an opportunity. NHA, however, does have practical concerns. Corrections must be made within the reasonable period allowed for certification decisions, and corrections should be allowed only for errors made in good faith. The opportunity to correct should not provide an incentive to ignore procedural requirements in the initial certification decision.

There is one respect in which the 401 Certification Rule should be revised. Section 121.7(c) provides that a "grant of certification . . . shall include a statement that the discharge from the proposed project will comply with water quality requirements." This provision should be revised to state that a "grant of certification . . . shall include a statement that *the certifying authority has reasonable assurance* that the discharge from the proposed project will comply with water quality requirements." EPA's 1971 certification rule required certification of "reasonable assurance" of compliance, based on the language of the pre-CWA certification statute. The preamble to the 401 Certification Rule explains that "reasonable assurance" was not retained in the rule because CWA Section 401(a)(1) requires a certification that the "discharge will comply."[101] NHA believes that the rule misconstrues the significance of this statutory change and is concerned that omission of the phrase "reasonable assurance" will lead to an impossibly high evidentiary burden for certifications, particularly for FERC hydropower licenses, which may have a term of up to 50 years.

Although the preamble to the 401 Certification Rule is correct that the term "reasonable assurance" is no longer found in Section 401(a)(1), there is no indication that Congress intended to establish a higher evidentiary burden for certifications through this change in wording. Indeed, the omission appears to have been inadvertent because the term is still found in other portions of Section 401, including most notably Section 401(a)(3), which provides that a certification fulfills the requirements of future federal licenses and permits unless the certifying agency notifies the federal agency "that there is *no longer reasonable assurance* that there will be compliance with the applicable provisions of [CWA Sections 301, 302, 303, 306, and 307]."[102] This wording is identical to that used in Section 401(a)(1) except for the addition of the term "reasonable assurance." The term's omission from Section 401(a)(1) was clearly inadvertent because it would make no sense to provide in Section 401(a)(3) that a certification ceases to be effective if the certifying authority finds that there is "no longer reasonable assurance" of compliance if that were not the original standard for issuing the certification.

To address this concern, the certification statement required by Section 121.7(c) should be revised to read: "Any grant of certification shall be in writing and shall include a statement that there is reasonable assurance that the discharge from the proposed project will comply with water quality requirements." Other sections of the rule, including Sections 121.3, 121.7(b), 121.7(d)(1)(i), 121.7(e)(1)(iii), 121.7(e)(2)(iii), 121.12(c)(3)(iii), (iv), 121.13(a), should be similarly revised to incorporate the phrase "reasonable assurance."

[101] 85 Fed. Reg. at 42,277-78.

[102] 33 U.S.C. § 1341(a)(3) (emphasis added).

3.6 Enforcement

> *"The rule provides that federal agencies are responsible for enforcing certification conditions that are incorporated into a federal license or permit. . . . The rule does not provide a role for certifying authorities to enforce certification conditions under federal law. Additionally, the rule restates the statutory provision that provides certifying authorities with the ability to inspect certified projects prior to their initial operation. . . . EPA is interested in stakeholder feedback on enforcement of CWA Section 401, including but not limited to, the roles of federal agencies and certifying authorities in enforcing certification conditions, whether the statutory language in CWA Section 401 supports certifying authority enforcement of certification conditions under federal law, whether the CWA citizen suit provision applies to Section 401, and the rule's interpretation of a certifying authority's inspection opportunities.*"

The 401 Certification Rule correctly limits the enforcement of certification conditions to the federal licensing or permitting agency, and only to those conditions that are incorporated into the federal license or permit.[103] There is no provision in Section 401 or elsewhere in the CWA authorizing enforcement of certification conditions, except by the federal licensing or permitting agency as conditions of the federal license or permit.

Section 401(d) provides that certification conditions "shall become a condition on any Federal license or permit subject to the provisions of this section [401]."[104] This means that certification conditions, once incorporated into the federal license or permit, are enforceable in the same manner and to the same extent as the other conditions of the federal license or permit. This makes sense. If certification conditions were independently enforceable, there would have been no need for Congress to require incorporation of the conditions into the federal license or permit. Further, expanding enforcement authority beyond the conditions of the federal license or permit into which they are incorporated would undermine the authority of the federal agency to enforce the conditions of its own licenses or permits and could lead to duplicative or inconsistent enforcement actions and conditions.

This interpretation of Section 401(d) is consistent with the absence of any provision in the CWA for enforcing certification conditions. The CWA's enforcement section, Section 309, makes no reference whatsoever to Section 401.[105] The CWA's citizen suit provision, Section 505, does authorize citizens (which include states) to enforce the requirement *to obtain* a certification, but it does not authorize the enforcement of certification *conditions*.[106] Were certification conditions

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[103] 40 C.F.R. § 121.11(c).

[104] 33 U.S.C. § 1341(d).

[105] *Id.* § 1319.

[106] *Id.* § 1365(a)(1), (f)(6). *Contra Deschutes River All. v. Portland Gen. Elec.*, 249 F. Supp. 3d 1182 (D. Or. 2017) (incorrectly concluding that states do have ongoing authority to independently enforce certification conditions). CWA Section 505(a)(1) authorizes a citizen suit "against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under [the CWA]." 33 U.S.C. § 1365(a)(1). For purposes of a citizen suit, the CWA defines an "effluent standard or limitation" to include "certification under section 1341 of this title [CWA section 401]." *Id.*, § 1365(f)(6). Although this provision authorizes enforcement of the requirement for "certification under

independently enforceable, through a citizen suit or otherwise, Section 401 would be transformed into an independent regulatory program, rather than a mechanism for allowing states and tribes to ensure that federal licenses and permits include all conditions necessary to ensure that discharges resulting from the federally licensed or permitted activity meet applicable water quality requirements.

3.7 Modifications

> *"The rule removed the 1971 regulation's provision that allowed for modifications where agreed upon by the certifying authority, federal agency, and EPA. . . . Additionally, the rule prevents certifying authorities from extending the reasonable period time unilaterally, including but not limited to, the use of conditions intended to reopen a certification ('reopeners'). Among other issues, EPA is concerned that the rule's prohibition of modifications may limit the flexibility of certifications and permits to adapt to changing circumstances. EPA is interested in stakeholder feedback on modifications and 'reopeners,' including but not limited to, whether the statutory language in CWA Section 401 supports modification of certifications or 'reopeners,' the utility of modifications (e.g., specific circumstances that may warrant modifications or 'reopeners'), and whether there are alternate solutions to the issues that could be addressed by certification modifications or 'reopeners' that can be accomplished through the federal licensing or permitting process."*

Neither Section 401 nor the 401 Certification Rule makes any provision for modifying certification conditions. Moreover, allowing the certifying authority to modify a certification condition unilaterally after the end of the reasonable period for it to act on certification requests would be flatly inconsistent with Section 401's requirement that certification decisions be made within a reasonable period after the receipt of a request, not to exceed one year.[107]

Similarly, "reopener" and other conditions that purport to authorize the certifying authority to unilaterally modify certification conditions are plainly inconsistent with the text of Section 401 because they would allow certifying authorities to make certification decisions long after the maximum one-year period allowed by Section 401 and long after the federal license or permit had been issued. They would also transform Section 401's limited grant of authority to states to certify federal license and permit applications into an ongoing regulatory role. Such an ongoing

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section [401]," *see, e.g., Or. Nat. Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998) (holding that a citizen suit could be used to challenge the U.S. Forest Service's issuance of a permit without an allegedly required Section 401 certification), it makes no reference to the enforcement of certification *conditions*. By contrast, the citizen suit provision authorizes enforcement of "a permit *or condition* of a permit issued under [CWA] section [402] [NPDES permits]." 33 U.S.C. § 1365(f)(7) (emphasis added). Similarly, although the requirement to *obtain* a CWA Section 404 from the U.S. Army Corps of Engineers is enforceable in a citizen suit, the *conditions* of a Section 404 permit are not because the citizen suit provision makes no mention of these conditions. *See Atchafalaya Basinkepper v. Chustz*, 682 F.3d 356 (5th Cir. 2012); *see also Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, 118 F. Supp. 2d 1115 (D. Or. 2000). Had Congress intended to authorize citizen enforcement of both the certification requirement and the conditions of a certification, it would have referred to the enforcement of certification conditions in Section 505.

[107] 33 U.S.C. § 1341(a)(1).

regulatory role would be particularly problematic in the context of a FERC license under the FPA because the FPA assigns exclusive regulatory authority to FERC.[108]

Section 401, however, does not prohibit the federal licensing or permitting agency, in its discretion, from incorporating into the federal license or permit modified certification conditions, provided that the modification is consistent with the agency's own statutory and regulatory requirements.[109] To clarify the circumstances under which modified certification conditions may be incorporated into the federal license or permit, the 401 Certification Rule should be revised to:

- Expressly prohibit "reopener" and similar certification conditions that purport to authorize the certifying authority to unilaterally modify certification conditions after the end of the reasonable period or after the federal license or permit has been issued.

- Provide that, if the certifying authority modifies, adds, or removes a certification condition, at the applicant's request or with the applicant's consent, after the end of the reasonable period, or after the federal license or permit has been issued, the federal licensing or permitting agency may in its discretion revise the license or permit accordingly, provided that the revision complies with the agency's own statutory and regulatory requirements.

3.8 Neighboring Jurisdictions

> *"The rule addresses the so-called 'neighboring jurisdiction' process in CWA Section 401(a)(2), including interpreting the timeframe in which a federal agency must notify EPA for purposes of Section 401(a)(2) and providing process requirements for the agency's analysis and the neighboring jurisdictions' review and response. EPA is interested in stakeholder feedback on the neighboring jurisdiction process, including but not limited to, whether the agency should elaborate in regulatory text or preamble on considerations informing its analysis under CWA Section 401(a)(2), whether the agency's decision whether to make a determination under CWA Section 401(a)(2) is wholly discretionary, and whether the agency should provide further guidance on the Section 401(a)(2) process that occurs after EPA makes a 'may affect' determination.*"

The 401 Certification Rule's provisions regarding other jurisdictions closely track the requirements of Section 401(a)(2) or reasonably elaborate on them.[110] This includes interpreting EPA's "may affect" determination under Section 401(a)(2) to be at EPA's discretion.[111] The

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[108] *See* 16 U.S.C. §§ 797(e), 817(1); *California*, 495 U.S. 490; *First Iowa Hydro-Elec. Coop.*, 328 U.S. 152.

[109] *See, e.g., Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1219 (9th Cir. 2008); *Airport Communities Coal. v. Graves*, 280 F. Supp. 2d 1207, 1214-17 (W.D. Wash. 2003). Some federal statutes could bar or restrict the federal agency from modifying its license or permit based on a modified certification condition. For example, in the absence of authority reserved in the license, FPA Section 6 prohibits FERC from revoking or modifying a license without the consent of the licensee. *See* 16 U.S.C. § 799.

[110] *See* 33 U.S.C. § 1341(a)(2); 40 C.F.R. § 121.12.

[111] *See* 40 C.F.R. § 121.12(b).

statute provides, "Whenever such a discharge may affect, *as determined by the Administrator*, the quality of the waters of any other State, the Administrator . . . shall so notify such other State . . . ."[112] Because italicized phrase emphasizes that the "may affect" determination is "as determined by" EPA—rather than simply providing that EPA must notify the state whenever the discharge may affect the quality of its waters—it is reasonable for the 401 Certification Rule to interpret this determination to be within EPA's discretion. Moreover, any other interpretation would lead to ancillary disputes regarding EPA's "may affect" determination, which could substantially delay and otherwise interfere with the federal licensing or permitting process.[113]

3.9 Data and Information

> *"EPA is interested in receiving any data or information from stakeholders about the application of the 401 Certification Rule, including but not limited to, impacts of the rule on processing certification requests, impacts of the rule on certification decisions, and whether any major projects are anticipated in the next few years that could benefit from or be encumbered by the 401 Certification Rule's procedural requirements. Additionally, EPA is interested in stakeholder feedback about existing state CWA Section 401 procedures, including whether the agency should consider the extent to which any revised rule might conflict with existing state CWA Section 401 procedures and place a burden on those states to revise rules in the future."*

Because the 401 Certification Rule has been in effect for less than a year and has been the subject of ongoing litigation, experience with the rule is limited. When considering revisions to the rule, EPA should carefully consider the many problems described in these comments, as well as in the preamble to the rule, that the rule is intended to address. Until there is more experience with the implementation of the rule, EPA should not risk resurrecting these problems by substantially revising the rule.

3.10 Implementation Coordination

> *"EPA is interested in hearing from stakeholders about facilitating implementation of any rule revisions. For example, given the relationship between federal provisions and state processes for water quality certification, should EPA consider specific implementation timeframes or effective dates to allow for adoption and integration of water quality provisions at the state level. Similarly, EPA is interested in receiving feedback on whether concomitant regulatory changes should be proposed and finalized simultaneously by relevant federal agencies (e.g., the Army Corps of Engineers, Federal Energy Regulatory Commission) so that implementation of revised water certification provisions*

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[112] 33 U.S.C. § 1341(a)(2) (emphasis added).

[113] Neighboring jurisdictions that are concerned about the affects of a project on their waters have other ample opportunities to make their concerns known to both the federal licensing or permitting agency and the Section 401 certifying authority through the required public notice and comment process for the certification. *See* 33 U.S.C. § 1341(a)(1).

would be more effectively coordinated and would avoid circumstances where regulations could be interpreted as inconsistent with one another."

For the reasons discussed elsewhere in these comments, NHA does not support substantial revisions to the 401 Certification Rule. NHA does support EPA engagement and consultation with certifying authorities and federal agencies regarding implementation of Section 401, but EPA should be cautious about imposing one-size-fits-all procedural requirements on certifying authorities and federal agencies because of the many disparate contexts in which Section 401 certification requirements arise.

CONCLUSION

NHA does not support substantial revisions to the 401 Certification Rule, which closely adheres to the text and purposes of Section 401 and the cooperative federalism principles that are at its core. The rule ensures the ability of states and tribes to fully protect water quality, while also preserving the ability of federal agencies such as FERC to fulfill through their licensing and permitting decisions the broad, national objectives assigned to them. Retaining the rule will be essential for facilitating the timely and efficient licensing of hydropower projects and other clean energy projects that will be critical to achieving the nation's ambitious climate, environmental, and infrastructure objectives.

NHA does recommend minor but important revisions, as explained in these comments, to better align the rule with Section 401 and clarify its implementation. Specifically, NHA requests that EPA:

- Revise Section 121.7(c) and related provisions to clarify that certification decisions must be based on "reasonable assurance" that a discharge will comply with water quality requirements.

- Include a new provision that expressly prohibits "reopener" and similar certification conditions that purport to authorize the certifying authority to unilaterally modify certification conditions after the end of the reasonable period or after the federal license or permit has been issued.

- Include a new provision that provides that, if the certifying authority modifies, adds, or removes a certification condition, at the applicant's request or with the applicant's consent, after the end of the reasonable period, or after the federal license or permit has been issued, the federal licensing or permitting agency may in its discretion revise the license or permit accordingly, provided that the revision complies with the agency's own statutory and regulatory requirements.

Thank you very much for your consideration of these comments. NHA would welcome the opportunity to discuss these issues further with EPA.

Sincerely,

_____/s/_____
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