



**HYDROPOWER
REFORM
COALITION**
*Putting water, wildlife,
and people back in rivers.*

Via Electronic Filing

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**Re: Proposed “Updated Regulations on Water Quality Certifications,”
Docket No. EPA-HQ-OW-2019-0405**

The Hydropower Reform Coalition (HRC) and several of its member organizations provide these comments in response to the U.S. Environmental Protection Agency’s (EPA) formal notice of the proposed “Updated Regulations on Water Quality Certifications” rule, *see* 84 Fed. Reg. 44084 (Aug. 22, 2019) (Proposed Rule).

The HRC intends for these comments to assist the EPA in its evaluation of the legal, policy, and technical implications of the Proposed Rule, and to inform revisions to the Proposed Rule. Generally, the HRC is concerned that the Proposed Rule is contrary to the Clean Water Act (CWA or Act), and regulations and precedent implementing and interpreting Section 401 of the Act, 33 U.S.C. § 1341 (§ 401). It would exacerbate rather than clarify uncertainty regarding the respective obligations of the federal and state governments in implementing § 401 and contribute to rather than avoid greater delays in complex federal permitting decisions. In sum, the Proposed Rule would impede rather than advance the Act’s objective to “restore and

maintain the chemical, physical, and biological integrity of the Nation's waters.”¹

These comments are organized as follows: Section I provides a brief description of the HRC and several of its member organizations, including their collective expertise and interests in effective regulation of hydroelectric development to promote the sustainability of the Nation’s water resources; Section II provides brief background on § 401’s application to the Federal Energy Regulatory Commission’s (FERC) licensing of non-federal hydropower projects; Section III provides general comments regarding the Proposed Rule; Section IV addresses specific provisions of the Proposed Rule; and Section V concludes the comments.

I. Description of Commenting Organizations

The HRC is an association of over 160 national, regional, and local membership groups² dedicated to enhancing the quality of rivers controlled by hydropower projects, ensuring public access to these lands and waters, and reforming the federal licensing process to ensure public participation and to improve the quality of the resulting decisions.

Since its founding in 1992, the HRC’s member groups have intervened and participated in over 75% of licensing proceedings before FERC. These groups are signatories to more than 200 comprehensive settlement agreements which, as the basis for new licenses, have restored water quality, fisheries, and recreational access to thousands of miles of rivers and streams. The HRC negotiated with the National Hydropower Association, federal and state agencies, and other opinion leaders in hydropower regulation to develop the concepts FERC adopted as the Integrated Licensing Process (ILP) in 2003.

¹ 33 U.S.C. § 1251(a).

² These groups represent more than 1.5 million people across the country.

The HRC is governed by a Steering Committee comprised of conservation and recreation organizations that have regional and/or national interests in river protection, *see* <https://www.hydroreform.org/about/steeringcommittee>. Its policies for hydropower regulation, press releases on significant developments, and information on member groups are published at www.hydroreform.org. In addition to participating as members of the HRC, the organizations described below sign-on independently to these comments.

Alabama Rivers Alliance is a statewide network of 50+ groups and 630 members working to protect and restore all of Alabama's water resources through building partnerships, empowering citizens, and advocating for sound water policy and its enforcement. The EPA actions described herein directly affect the interests of the organization and their membership.

American Rivers is a national non-profit organization working to protect and restore rivers and streams for the benefit of people, fish and wildlife. Since 1973, American Rivers has helped protect and restore more than 150,000 miles of rivers through advocacy, science and on-the-ground projects with local partners. American Rivers has offices across the country, and more than 100,000 supporters, members, and volunteers nationwide. The actions proposed by the EPA threaten the interests of our members and jeopardize the conservation objectives that drive our work.

American Whitewater is a national 501(c)(3) non-profit organization with a mission to protect and restore America's whitewater rivers and to enhance opportunities to enjoy them safely. Our members are primarily conservation-oriented kayakers, canoeists, and rafters who enjoy exploring whitewater rivers. As outdoor enthusiasts who spend time on and in the water, our members have a direct interest in the health and water quality of our nation's waterways. American Whitewater works throughout the country to protect healthy free-flowing rivers and

restore rivers that have been dammed, degraded, and dewatered through hydropower development. The EPA actions described herein threaten the river conservation and recreation interests of the organization and their membership.

The Appalachian Mountain Club has promoted the protection, enjoyment, and understanding of the mountains, forests, waters, and trails of the Appalachian region since 1876. It is the largest conservation and recreation organization in the Northeast with more than 90,000 members, many of whom visit and enjoy our rivers for recreation. The EPA actions described herein threaten the interests of the organization and their membership.

California Outdoors is a trade industry group comprised of fifty whitewater companies. Based in the foothills of California's Sierra Nevada Mountains, California Outdoors represents outfitters that provide recreational whitewater opportunities for clients on west slope Sierra Nevada rivers. The Proposed Rule will directly affect the interests of California Outdoors.

California Sportfishing Protection Alliance (CSPA) is a non-profit, public benefit fishery conservation organization incorporated in 1983 to protect, restore and enhance California's fishery resources and their aquatic ecosystems. It works to ensure that public fishery resources are conserved to enable public sport fishing activity. As an alliance, CSPA represents over 1,000 members that reside in California. CSPA is concerned about the prolonged and extensive decline of California's fish species and works with many government agencies to reverse these declines. The proposed actions by EPA directly affect the interests of CSPA.

The Connecticut River Watershed Council, Inc., d/b/a the Connecticut River Conservancy (CRC), is a 501(c)(3) organization that was established in 1952. We are the voice for the Connecticut River watershed, from source to sea. We collaborate with partners across four states to protect and advocate for rivers and educate and engage communities. We bring

people together to prevent pollution, improve habitat, and promote enjoyment of the Connecticut River and its tributary streams. Healthy rivers support healthy economies. CRC has been an active stakeholder participating in the ongoing relicensing of six hydropower projects on the Connecticut River and the Deerfield River, and we were intervenor in three other past relicensing efforts on the Connecticut River. Many of these relicensing efforts involved two or more states impacted by project operations.

Foothill Conservancy is a 501(c)(3) California nonprofit corporation whose mission is to restore, protect, and sustain the natural and human environment in central Sierra counties. The interests of the organization and nearly 300 members are directly affected by the Proposed Rule.

Friends of the River is a non-profit organization founded in 1973. It has more than 3,000 members dedicated to the protection, preservation, and restoration of California's rivers, streams, and aquatic ecosystems. Friends of the River's extensive experience in hydropower relicensing includes participation in 10 relicensing proceedings in the past 15 years. The EPA's actions described herein threaten the river conservation and recreation interests of the organization and their membership.

Idaho Rivers United is a 501(c)(3) non-profit corporation registered in the State of Idaho with 3,500 members. Its mission is to protect and restore the rivers of Idaho. To this end, Idaho Rivers United works to safeguard Idaho's imperiled wild steelhead and salmon, protect and enhance stream flows, improve water quality, and defend and promote the many benefits that flow from Idaho's rivers through advocacy and outreach. The EPA's actions described herein threaten the river conservation and recreation interests of the organization and their membership.

New England Flow (NE FLOW) is the largest coalition of whitewater boaters in the northeastern United States. Since 1988, NE FLOW has promoted the protection, enjoyment, and

understanding of the mountains, forests, waters, and trails of the New England region. Over the past three decades, NE FLOW has secured agreements that have expanded recreation opportunities at numerous hydropower projects throughout the region. The Proposed Rule directly affects the interests of the coalition and its members.

The South Yuba River Citizens League is a membership-based public benefit 501(c)(3) organization, with over 3,500 members and nearly 1,000 active annual volunteers supporting the mission to protect and restore the Yuba river and the greater Yuba watershed. The EPA's actions described herein threaten the river conservation and recreation interests of the organization and their membership.

Trout Unlimited (TU) is the nation's largest coldwater fisheries conservation organization with over 300,000 members and supporters nationwide. TU's mission is to conserve, protect, and restore North America's coldwater fisheries and their watersheds. Its national office is in Arlington, Virginia and it has offices and/or local chapters in several states across the country. TU has actively participated in dozens of hydropower proceedings with the potential to adversely affect salmon, steelhead and trout populations. It has a strong interest in ensuring that hydropower and other large interstate energy and infrastructure projects are appropriately conditioned to ensure that water quality and fish populations are adequately protected.

II. Clean Water Act § 401 in FERC Licensing Proceedings

While HRC's member groups participate in a wide range of federal permitting proceedings, the HRC's focus is on proceedings before FERC to license or relicense non-federal hydropower projects.

Under the Federal Power Act (FPA), FERC has exclusive jurisdiction to issue a license to construct, operate, and maintain a non-federal hydropower project located on navigable waters,

federal lands, or otherwise affecting interstate or foreign commerce.³ Section 6 of the FPA provides that licenses shall be issued for a term not to exceed 50 years.⁴ Upon license expiration, the licensee must apply for a new license. Section 15 of the FPA provides that new licenses shall be issued for a term “not less than 30 years, nor more than 50 years, from the date on which the license is issued.”⁵ Thus, licensing and re-licensing proceedings provide a once-in-a-generation opportunity to re-evaluate and re-design the comprehensive plan of development⁶ for the waterway(s) on which a given project is located.

Licensing is an important milestone in the regulation of rivers because a hydropower project can be the primary point of control for many miles on a given waterway. There is no dispute that hydropower projects affect water quality, including designated beneficial uses. “[D]ams ‘can cause changes in the movement, flow, and circulation of a river ... caus[ing] a river to absorb less oxygen and to be less passable by boaters and fish.’”⁷

Under CWA § 401, FERC may license a hydropower project only if the state, tribe or other certifying authority⁸ certifies that the project will comply with applicable water quality

³ 16 U.S.C. § 817(1).

⁴ 16 U.S.C. § 799.

⁵ 16 U.S.C. § 808.

⁶ Under FPA section 10(a)(1), 16 U.S.C. § 803(a)(1), any license as issued “shall be such as in the judgment of [FERC] will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes”

⁷ *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 385 (2006) (*SD Warren*).

⁸ U.S. territories are considered “states” under the Act. *See* 33 U.S.C. § 1362(3). Native American tribes may also exercise section 401 certification authority if they receive “Treatment As a State” status from the EPA.

standards or waives certification.⁹ FERC must include in the license any conditions the state requires in order to certify the project.¹⁰

The state where the project is located must assure the project's compliance with the CWA water quality standards before issuing a water quality certification.¹¹ If the state finds that a project would violate water quality standards and cannot be reasonably expected to meet water quality standards through remedial actions, the state must deny certification, and FERC must also deny the license.¹² A state, however, may include limitations or conditions on the federally licensed activity to assure compliance with water quality standards and "any other appropriate requirement of State law."¹³

Depending on the relevant water quality standards, states have used their § 401 authority to establish different types of conditions in hydropower licenses. For example, a certification may establish a minimum flow schedule or flow storage,¹⁴ require fish passage, erosion control

See 33 U.S.C. § 1341(a)(1). As of June 2019, 45 tribes have been granted "Treatment As a State" status. *See* U.S. Env'tl. Prot. Agency, EPA Actions on Tribal Water Quality Standards and Contacts (June 24, 2019), <https://perma.cc/E465-9GPS>.

For brevity, we use the terms "state" or "states" to refer collectively to the states, U.S. territories, and any tribe that has received "Treatment As a State" status.

⁹ 33 U.S.C. § 1341(a)(1).

¹⁰ *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 107-111 (2d Cir. 1997) (*American Rivers*).

¹¹ Each state's water quality standards are made up of beneficial uses, narrative and numeric criteria, and the anti-degradation policy. *See* www.epa.gov/waterscience/standards/handbook for examples of such standards.

¹² 33 U.S.C. § 1341(a)(1); 33 U.S.C. § 1341(a)(3).

¹³ 33 U.S.C. § 1341(d).

¹⁴ *See PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 723 (1994).

measures, or creation of a recreational facility for enhanced access.¹⁵ States have also expressly reserved their authority to reopen the certification in order to assure compliance over a 30- to 50-year license term. As described in more detail below, the courts that have reviewed this issue have universally found the plain language of § 401 (“Any certification . . . shall become a condition on any Federal license . . .”) to mandate FERC’s inclusion of timely issued certification conditions in the license, holding that FERC may not amend or delete a certification condition.¹⁶ A licensee (or other participant) may challenge an objectionable certification only in state court.¹⁷

The cooperative federalism embodied in the states’ issuance of certifications for FERC-licensed hydroelectric projects has hands down served to protect water quality on rivers. In particular, the state’s exercise of § 401 authority has been critical to restore water quality and designated uses on rivers where FERC issued original licenses for projects prior to the enactment of the CWA.

III. The Proposed Rule is Unlawful, Would Disrupt Federal Licensing Proceedings, and Would Degrade Water Quality

EPA is charged with administering and enforcing the CWA. Section 401 is typically the exclusive method to assure a federally licensed facility’s compliance with the Act. EPA’s Proposed Rule is contrary to the Act’s plain language and would severely limit any certifying authority’s ability to ensure a federally licensed facility’s compliance with water quality standards duly enacted under the Act. The Proposed Rule would do this by advancing two

¹⁵ See *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 105 (2d Cir. 1997).

¹⁶ 33 U.S.C. § 1341(d); *American Rivers, Inc.*, 129 F.3d at 107.

¹⁷ See *id.* at 102.

inappropriate goals: (1) narrowing § 401’s applicability from the federally-licensed activity’s impact(s) on water quality to that of the impact(s) of a particular discharge, and (2) by completely upsetting the cooperative federalism and long-standing reservation of state authority recognized and enshrined by the Act. This section addresses these two fundamental points. The next section then addresses problems with specific provisions of the Proposed Rule.

A. Artificially Limiting the Scope of § 401 to Whether a Discharge Complies with Water Quality Standards Subverts the CWA and State Authority

Section 121.5 of the Proposed Rule is intended to limit the scope of § 401 certification to whether a “discharge” complies with water quality standards. However, the Act’s primary objective is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁸ Addressing the water quality impacts of a dam, for example, requires a broader look than the nature of a discharge from a powerhouse or penstock. A dam alters the chemical, physical, and biological integrity of a river by placing a barrier across it, blocking upstream and downstream passage of nutrients and aquatic species, altering the timing and volume of flows, transforming a free-flowing riverine reach to a reservoir, and converting the energy that oxygenates water into electricity. In short, the chemical, physical and biological integrity of the river is fundamentally altered by the federally-licensed “activity”¹⁹— not just the discharge from the powerhouse or tailrace. FERC-licensed hydropower projects, which may

¹⁸ 33 U.S.C. § 1251(a).

¹⁹ 33 U.S.C. § 1341(a)(1).

include multiple dams, can also limit public access to a river, adversely affecting fishing, swimming, boating, and other recreational designated uses.

Under § 401(a), an applicant for a federal license “to conduct any activity” which “may result in any discharge” must obtain a certification from the state “that any such discharge will comply” with applicable water quality standards.²⁰ Under § 401(d), a certification must “set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant” will comply with the applicable water quality requirements “and with any other appropriate requirement of State law set forth in such certification. . . .” Section 401(d) further requires that the limitations and requirements set forth in the certification be incorporated as conditions in the federal license.

As EPA noted in the preamble to the Proposed Rule, it has historically interpreted § 401 to mean that a certification “could broadly address ‘all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation’”²¹ The Proposed Rule reverses this position without valid reason.²²

The U.S. Supreme Court reviewed this issue in *PUD No. 1 of Jefferson County v. Washington Department of Ecology (Jefferson PUD)*.²³ There it ratified the broader interpretation of § 401(d), upholding a certification issued by the State of Washington that

²⁰ *Id.*

²¹ Proposed Rule at 44094 (quoting EPA, *Wetlands and 401 Certification* 23 (Apr. 1989)).

²² An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is “entitled to considerably less deference” than a consistently held agency view. *Watt v. Alaska*, 451 U.S. 259, 273, (1981); see also *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

²³ 511 U.S. 700 (1994).

imposed minimum stream flow requirements on a FERC-licensed hydropower project. The project proponent claimed that such requirements exceeded the state’s authority under § 401, which it argued should be limited to addressing only “discharges” from the FERC-licensed project.

The Court examined the statute and found, according to the plain language of §§ 401(a) and 401(d), the state’s authority was not limited to imposing conditions specifically tied to a discharge.

The text [of § 401(d)] refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose “other limitations” on the project in general to assure compliance with various provisions of the Clean Water Act and with “any other appropriate requirement of State law.” Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous . . . we see no such anomaly. Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.²⁴

Consistent with *Jefferson PUD*, states review the impacts from the entire “activity” that is associated with the discharge. This is the only interpretation that is consistent with the “purpose of the certification mechanism . . . [which] is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.”²⁵ By contrast, limiting the states’ certification authority to the “discharge” rather than the “activity” would severely curtail the states’ ability to assure compliance with designated uses and narrative criteria.

²⁴ *Id.* at 711.

²⁵ S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, 3735.

This in turn would subvert the states’ ability to restore the chemical, biological, and physical integrity of a river affected by a federally-licensed project.²⁶

Further, states are charged with developing water quality standards that meet the CWA’s purposes.²⁷ In addition to eliminating the discharge of pollutants,²⁸ one such purpose is the “national goal [of] . . . water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water”²⁹ As such, standards are encouraged to be narrative to protect uses including habitat, fishing, aesthetics, and recreation. Merely addressing the quality of a dam’s discharge precludes implementation of designated uses and other water quality standards approved by EPA as meeting the Act’s purposes.

EPA is charged with implementing – not subverting – the CWA. It has contravened this charge by proposing a rule that would violate the CWA’s plain language and EPA’s mandate.

B. The Proposed Rule Violates the Act’s Plain Language Barring Federal Agency Review of State § 401 Certification Decisions

1. Federal Agency Review Is Unlawful

Sections 121.6 and 121.8 of the Proposed Rule provide for federal agency review of state § 401 conditions and denials. These provisions attempt to allow what the courts have uniformly

²⁶ See *S.D. Warren*, 547 U.S. at 386 (as Senator Muskie explained on the floor when what is now § 401 was first proposed, “No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s].”).

²⁷ 33 U.S.C. § 1313(c)(2)(A).

²⁸ 33 U.S.C. § 1251(a)(1).

²⁹ 33 U.S.C. § 1251(a)(2).

held to be unlawful. Section 401’s plain language leaves no room for federal agency review of state certification conditions and denials. Under § 401(d), certification conditions “*shall* become a condition on any federal license or permit”³⁰ Under § 401(a), “[*n*]o license or permit *shall be granted* until the certification required by this section has been obtained or has been waived *No license or permit shall be granted* if certification has been denied by the state”³¹

Each court to have addressed the question of whether the CWA, or any other authority, allows for federal agency review of state § 401 decisions has, without exception, ruled that federal agencies have no such authority: *American Rivers v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) (FERC’s review of state § 401 decisions is barred by CWA’s plain language and not otherwise authorized by the FPA); *Roosevelt Campobello Int’l Park Comm’n v. U.S. E.P.A.*, 684 F.2d 1041, 1056-57 (1st Cir. 1982); *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 292-93 (D.C. Cir. 2003); *City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53, 67 (D.C. Cir. 2006);³² *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1218 (9th Cir. 2008). As the U.S. Court of Appeals for the Fourth Circuit explained:

The plain language of Section 1341(d) of the Clean Water Act provides that any state certification “*shall* become a condition on any Federal license or permit.” 33 U.S.C. § 1341(d) (emphasis added). This language leaves no room for interpretation. “Shall” is an unambiguously mandatory term, meaning, as courts have uniformly held, that state conditions *must* be conditions of the [nationwide permit (NWP)]—i.e., the Corps “may

³⁰ 33 U.S.C. § 1341(d) (emphasis added).

³¹ 33 U.S.C. § 1341(a)(1) (emphases added).

³² “The decision whether to issue a section 401 certification generally turns on questions of state law. FERC’s role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state’s power to block the project would be meaningless.” *City of Tacoma*, 460 F.3d at 67.

not *alter or reject* conditions imposed by the states.” *U.S. Dep’t of Interior v. F.E.R.C.*, 952 F.2d 538, 548 (D.C. Cir. 1992) (emphasis added); *see also Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 107 (2d Cir. 1997) (recognizing the “unequivocal” and “mandatory” language of Section 1341(d)). Every Circuit to address this provision has concluded that “a federal licensing agency lacks authority to reject [401 certification] conditions in a federal permit.” *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1218 (9th Cir. 2008) (collecting cases); *see also F.E.R.C.*, 952 F.2d at 548 (“FERC may not *alter or reject* conditions imposed by the states through section 401 certificates.” (emphasis added)). The plain language of the statute does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, even if the Corps determines that the alternative condition is more protective of water quality.³³

All of these cases are firmly based on § 401’s plain language. Plain language—the words “shall” and “denied by the state”—leave no gaps to fill, or ambiguity to interpret, through rulemaking. Rules contrary to the CWA’s plain language are beyond EPA’s rule-making authority and unlawful.

2. Federal Agency Review of State Certification Decisions Would Create Jurisdictional Chaos, Delay, Litigation, and Regulatory Uncertainty

In addition to being unlawful, Sections 121.6 and 121.8 of the Proposed Rule would create jurisdictional chaos for applicants, intervenors, and the several state and federal agencies participating in federal permitting proceedings. The Proposed Rule does not and cannot change or eliminate a state’s review of its certifying agency’s decisions.³⁴ This state review is subject to review by state courts.³⁵

³³ *Sierra Club v. United States Army Corps of Engineers*, 909 F.3d 635, 645–46 (4th Cir. 2018).

³⁴ *See e.g.* 10 Vt. Stat. Ann §§ 1004, 8503; 38 Me. Rev. Stat. Ann. § 341-H; Wis. Stat. § 227.29; Cal. Code Regs. tit. 23, § 3867, subd. (a)(1).

³⁵ *See e.g.* 10 Vt. Stat. Ann §§ 1004, 8503; 25 Ohio Rev. Code Ann. § 2506.01; 5 Me. Rev. Stat. Ann. § 11001; 17 N.Y. Law § 17-0909; 2 Mass. Gen. Laws ch. 21, § 46A; 3 Mass. Gen. Laws ch. 30A, §§ 10, 14; Wis. Stat. § 299.95; Cal. Water Code § 13330.

Federal permitting decisions generally come after a final state decision under § 401 and, in the case of FERC relicensing proceedings, sometimes years after.³⁶ The review contemplated by the Proposed Rule could upset final state decisions, and potentially put a federal agency in the position of reviewing and overturning a state court decision. For example, on March 12, 2019, the Vermont Supreme Court heard argument on appeals of the Vermont certifying agency's § 401 conditions in FERC Project No. P-2629.³⁷ The Vermont Supreme Court's decision is expected shortly. FERC is not expected to issue its licensing decision until sometime afterwards. In theory, Sections 121.6 and 121.8 of the Proposed Rule could allow FERC to overrule the Vermont Supreme Court. Such a result would be inappropriate and unlawful.

A final decision by the state is binding, cannot be collaterally attacked, and is subject to state enforcement. The Proposed Rule will create dueling review processes and potentially conflicting decisions regarding the state's decision under § 401. It will encourage forum shopping, leaving applicants, intervenors, and state and federal participating agencies caught in the middle. Far from resolving ambiguity, the Proposed Rule will spawn gamesmanship, uncertainty, delay, and litigation.

It is also important to note that the several federal agencies charged by the Proposed Rule to review state § 401 denials and conditions do not have expertise with regard to state water quality standards, the CWA, or water quality issues. Further, some § 401 conditions are equally applicable across various types of projects being reviewed by different federal agencies. For example, a pipeline being reviewed by FERC and a wetlands project being reviewed by the U.S.

³⁶ See *American Rivers*, 129 F.3d at 102-103 (the § 401 certification issued in 1991 was final for three years before FERC's 1994 licensing decision).

³⁷ See *In re: Morrisville Hydroelectric Project Water Quality Certification*, No. 2018-339, Vt. Supreme Ct. *Hydropower Reform Coalition's Comments re Proposed Rule* Docket No. EPA-HQ-OW-2019-0405

Army Corps of Engineers may both have identical certification conditions regarding erosion control measures. Uncoordinated parallel review by federal agencies could lead to inconsistent results. This is not desirable for applicants, states, or intervenors.

In short, the jurisdictional chaos that the Proposed Rule will create is anathema to needed certainty in the regulatory process.

3. The Proposed Federal Agency Review is Unworkable

The federal agencies reviewing a state's § 401 denial or conditions will not have the benefit of the record developed by the state in making its § 401 decision.³⁸ The absence of a record necessarily limits federal agency review because this review would be based on the § 401 condition or denial itself without the evidence and analysis on which the condition or denial is based. This type of review, known as a "facial"³⁹ challenge or review only addresses the question of whether a § 401 certification condition or denial, *simply on its face and regardless of factual or scientific context*, is beyond § 401's scope.⁴⁰

The absence of a record compels a strict standard of review. A facial review "must establish that no set of circumstances exists under which [the § 401 condition or denial] would be valid."⁴¹ This is a very high bar that would severely limit a federal agency's ability to reject §

³⁸ Proposed Rule § 121.5 requires some stock language to be included with each condition or denial. This required language is not a substitute for a record. The licensing agency would review only the § 401 condition(s) or denial.

³⁹ The corollary to a facial challenge is an "as-applied" challenge. An as-applied challenge is grounded in the facts and circumstances – a record – of how a statute or regulation is implemented in a particular matter.

⁴⁰ See *Reno v. Flores*, 507 U.S. 292, 300-01 (1993).

⁴¹ *Reno*, 507 U.S. at 301 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Able v. U.S.*, 88 F.3d 1280, 1289 (2d Cir. 1996).).

401 conditions or denial. Facial reviews are disfavored because they are decided in the vacuum created by the absence of an administrative record.⁴² As a result, facial challenges are quite rare and even more rarely successful.⁴³ The Proposed Rule’s routine use of facial review, even if legal, is contrary to applicable standards and would be wholly ineffective.

Ironically, the federal agency’s inability to review the record behind a § 401 condition or denial that may or may not be within the Proposed Rule’s newly defined scope of § 401 will compel review through the state process. For example, a challenge to certification conditions relating to temperature could likely raise two issues: whether the conditions are (1) within the Proposed Rule’s scope of certification, and (2) required to meet state water quality standards. A record is needed to vet the supporting explanation required by Section 121.5(d)(1) of the Proposed Rule. Likewise, a record is needed to substantively determine whether there is a rational basis for the conditions. The limited, facial nature of the federal agency review provided by the Proposed Rule cannot address these questions.

⁴² *Sabri v. United States*, 541 U.S. 600, 609 (2004) (Facial challenges are to be discouraged because “not only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication . . .”); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (“Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records) (quote marks and citation omitted); *Richmond Med. Ctr. For Women v. Herring*, 570 F.3d 165, 173 (4th Cir. 2009) (“slipping into the embrace of a facial challenge can tend to leave behind the limitations imposed by Article III and, indeed, to trample on legislative prerogatives, in violation of separation of powers principles. Moreover, as the Supreme Court has observed, ‘Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks.’ *Sabri v. United States*, 541 U.S. 600, 608–09, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004).”).

⁴³ *See id.*; *Dickerson v. Napolitano*, 604 F.3d 732, 742 & n. 8 (2d Cir. 2010).

The result is that the dueling review paths created by the Proposed Rule will cause jurisdictional confusion and gamesmanship leading to expensive litigation and delay. Aside from being unlawful, the limited nature of any federal agency review simply is not worth it.

It is also important to note that the Proposed Rule brokers no disagreement with a federal agency's determination regarding a § 401 condition or denial. Only if there is sufficient time, a federal agency that receives a certification with allegedly deficient conditions “*may* notify the certifying authority and provide an opportunity [assuming sufficient time] to remedy the deficient conditions.”⁴⁴ The Proposed Rule's use of the word “*may*” indicates that a federal agency has full discretion on whether to even allow a state to remedy a condition. The Proposed Rule makes no provision allowing a state or party to dispute the federal agency's determination. This will force unnecessary appeals of and challenges to federal agency decisions, either interlocutory appeals of decisions regarding § 401 conditions or denial or appeals of final licensing decisions. The result would again be delay, uncertainty, chaotic and confusing decision-making, and added expense. For the reasons explained in Section III.B.1. *supra*, it is also contrary to the Act and the stated intent of this proposed rulemaking.

IV. The Specific Provisions of the Proposed Rule Are Unlawful and Unworkable

A. Section 121.1 Definitions

1. Certification request

Section 121.1 defines “certification request” as “a written, signed, and dated communication from a project proponent to the appropriate certifying authority that” includes basic information regarding the project proponent, project, and project discharge.⁴⁵ It also

⁴⁴ Proposed Rule at 44121 (emphasis added).

⁴⁵ *Id.* at 44120.
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specifies that the request should include the language: “*The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.*”⁴⁶

We read this definition to describe the required contents for a valid certification request. Read as such, the definition is incomplete. In particular, any certification request must include information regarding the proposed activity, not just the proposed discharge, consistent with the scope of § 401. *See* Section III.A, *supra*. This definition also omits information regarding the project proponent’s proposed measures to avoid or mitigate impacts to applicable water quality standards. Thus, this definition is inadequate even as a statement of minimum requirements for a certification request.

Many states have promulgated their own regulations that detail the required contents of a certification request. In the preamble, EPA recommends, “following establishment of final EPA regulations defining ‘certification request’ and ‘receipt,’ certifying authorities update their existing § 401 certification regulations to ensure consistency with the EPA’s regulations.”⁴⁷ This recommendation should be withdrawn because the minimum contents stated in EPA’s definition are an inadequate basis for a certification decision by a state.

Consistent with their primary role in regulating water quality, states should be responsible for determining the information they need to process a certification request and whether a project proponent has met its burden in providing a complete request. It is also

⁴⁶ *Id.*

⁴⁷ Proposed Rule at 44102.

important to note that the CWA and EPA rules implementing the CWA generally set a floor, and that states are free to impose stricter or more comprehensive water quality requirements.⁴⁸ Any definition of “certification request” cannot limit the states’ rights under the Act.

2. Condition

The Proposed Rule defines “condition” as “a specific requirement included in a certification that is within the scope of certification.”⁴⁹ This definition anticipates Section 121.3, which limits the “scope of certification” to assuring that the *discharge* from the project will comply with water quality *requirements*, and Section 121.8 that allows the federal agency to determine whether certification conditions are directly related to the project discharge and thus within the *scope of certification*. The definition, read with these other provisions, appears to preclude conditions that are not directly related to a project discharge but are nonetheless necessary to assure the proposed *activity* complies with the applicable water quality standards. As such, the definition is inconsistent with the plain language of § 401, as discussed in Section III.A, *supra*. Further, contrary to the preamble to the Proposed Rule,⁵⁰ there is no ambiguity in the term “condition” that necessitates interpretation as proposed by EPA.

⁴⁸ 33 U.S.C. § 1370; *Jefferson PUD*, 511 U.S. at 705.

⁴⁹ Proposed Rule at 44120.

⁵⁰ The Proposed Rule’s preamble states, “the lack of a statutory definition for the term ‘condition’ . . . creates ambiguity and uncertainty over the types of conditions that may be included in a certification.” Proposed Rule at 44105.

3. Discharge

The Proposed Rule defines “discharge” as “a discharge from a point source into navigable waters.”⁵¹ EPA has specifically solicited comment on whether this decision is necessary or helpful.⁵²

The HRC views this definition as unnecessary and unhelpful. The term discharge as it applies to § 401 is sufficiently clear without this new definition.⁵³ The U.S. Supreme Court found that the ordinary meaning of “discharge” – a flowing out – applies in the context of § 401:

When it applies to water, ‘discharge’ commonly means a ‘flowing or issuing out,’ . . . and this ordinary sense has consistently been the meaning intended when this Court has used the term in prior water cases [¶] In fact, this understanding of the word ‘discharge’ was accepted by all Members of the Court sitting in our only other case focused on § 401 of the Clean Water Act, [*Jefferson PUD*].⁵⁴

The Court expressly rejected the dam owner’s several arguments that “discharge” in the context of § 401 is limited to a discharge from a point source:

Warren’s arguments against reading the word “discharge” in its common sense fail on their own terms. They also miss the forest for the trees. [¶] Congress passed the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a); see also *PUD No. 1*, 511 U.S., at 714, 114 S.Ct. 1900, the “national goal” being to achieve “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water,” 33 U.S.C. § 1251(a)(2). To do this, the Act does not stop at controlling the “addition of pollutants,” but deals with “pollution” generally, see § 1251(b), which Congress defined to mean “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,” § 1362(19).⁵⁵

⁵¹ Proposed Rule at 44120.

⁵² *Id.* at 44104.

⁵³ See *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006).

⁵⁴ *Id.* at 376.

⁵⁵ *Id.* at 384-385.

In sum, there is no ambiguity in the term “discharge” that necessitates interpretation as proposed by EPA, *see* Section III.A, *supra*, especially as that interpretation is unlawful.

4. Fail or refuse to act

The Proposed Rule defines “fail or refuse to act” to mean “the certifying authority actually or constructively fails or refuses to grant or deny certification, or waive the certification, or waive the certification requirement, within the scope of certification and within the reasonable period of time.”⁵⁶ This definition inappropriately expands what constitutes “failure to act” and restricts the states’ time to act.

Under § 401, a state waives its certification authority only if it “fails or refuses to act on a request for certification, within a reasonable time period (which shall not exceed one year) after receipt of such request.” This language does not tie a state’s action to any substantive requirements. The legislative history shows that Congress intended the waiver provision to prevent states from exercising a de facto veto over a proposed project through *sheer inactivity*.⁵⁷

As discussed in § III.B.1, *supra*, substantive review of a certification decision exceeds the federal agency’s authority under § 401. Even if, for the sake of argument, substantive review of a certification decision was within a federal agency’s purview, this proposal is ripe for potential abuse. A federal agency’s failure to issue a timely determination regarding whether the “scope

⁵⁶ Proposed Rule at 44120.

⁵⁷ “[T]he Conference Report on Section 401 states that the time limitation was meant to ensure that ‘sheer inactivity by the State ... will not frustrate the Federal application.’ H.R. Rep. 91–940, at 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2741. Such frustration would occur if the State’s inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding.” *Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963, 972 (D.C. Cir. 2011).

of certification” is valid could result in its finding that a state has constructively failed to act within a reasonable amount of time and has thereby waived certification. This is another attempt to subvert the primacy of the state’s role under § 401 to block or condition federally licensed activities that would violate water quality standards.⁵⁸

Our concerns regarding the Proposed Rule’s definition of a “reasonable period of time” are stated below.

5. Reasonable period of time

The Proposed Rule defines “reasonable period of time” to mean “the time period during which a certifying authority may act on a certification request, established in accordance with § 121.4.”⁵⁹ Section 121.4(a) proposes: “[t]he Federal agency shall establish the reasonable period of time categorically or on a case by case basis, which shall not exceed one year from receipt.”⁶⁰

This proposal is unlawful and unworkable. The D.C. Circuit already has rejected FERC’s purported authority to unilaterally establish deadlines for another agency with mandatory conditioning authority under the FPA. In *City of Tacoma, Washington v. FERC*, the court reviewed FERC’s rejection of conditions submitted by the Department of Interior’s Fish and

⁵⁸ *Id.* at 971.

⁵⁹ Proposed Rule at 44120.

⁶⁰ *Id.*

Wildlife Service under authority of FPA section 4(e)⁶¹ as untimely.⁶² The court found FERC's action improper, explaining: "when two or more federal agencies have shared authority to impose license conditions, they can certainly agree on an appropriate time frame to govern the process. FERC, however, has no authority to impose a short 60-day limitation unilaterally, thereby effectively stripping Interior of its statutorily delegated authority."⁶³ The same logic applies here. A federal agency's unilateral, ad hoc time limitation on the state's ability to act would prevent the state from meaningfully exercising its delegated authority under § 401, and in regard to federally licensed projects, the CWA as a whole.

Further, federal agencies lack expertise regarding water quality as well as knowledge regarding individual state's procedures for implementing § 401 or general workload at any given point in time. Federal agencies also lack knowledge regarding the information the state needs to make its decision, or the schedule on which information gathering and studies (which may be restricted to certain seasons) can or should be conducted. This makes federal agencies entirely unqualified to unilaterally determine (within the 15 days set by § 121.4(c)) how much time a state reasonably needs to issue a project-specific certification decision.

It is also important to note that § 121.4(e) provides that a federal agency "may modify an established reasonable period of time." This could allow a federal agency to shorten the

⁶¹ 16 U.S.C. §797(e). FPA section 4(e) gives the Secretaries for the U.S. Departments of Agriculture and Interior mandatory conditioning authority over licenses issued for projects located on a federal reservation: "licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." In *American Rivers v. FERC*, 129 F.3d at 109-110, the U.S. Court of Appeals for the Second Circuit relied in part on precedent holding that FERC lacked authority to review of mandatory conditioned by the Secretary of Interior under FPA section 4(e) to find that FERC lacked authority to review mandatory conditions issued by a state under CWA § 401.

⁶² 460 F.3d 53 (D.C. Cir. 2006).

⁶³ *Id.* at 65.
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reasonable period of time for a pending certification request to the prejudice of the state and the parties to the state § 401 process. The federal agency should only be allowed to enlarge a generally established reasonable period of time that does not exceed one year from the date of a given request.

Further, EPA has not addressed the increased administrative burden and regulatory uncertainty inherent in the establishment of case-by-case deadlines. FERC previously has expressed an unwillingness to engage in case-by-case review of state procedures in the context of § 401.⁶⁴ Instead, it adopted a generally applicable one-year deadline following receipt of a certification request for the state's action to avoid the difficulties of case-by-case review.⁶⁵

⁶⁴ In 1991, FERC issued a final rule intended to clarify FERC's practices in a several areas, including when water quality certifications are deemed waived or must be renewed. In promulgating the rule starting the clock when the certification request is filed, FERC stated the difficulties associated with its interpreting state procedure:

The prior regulation, as construed in *City of Fredericksburg*, was unduly burdensome, because it put the Commission in the frequently difficult posture of trying to ascertain and construe the procedural requirements of numerous and divergent state statutes and state agency regulations. The amendment proposed in the NOPR in effect implements the Commission's original intent in adopting those regulations. . . . It does not override the procedural requirements of state agencies. To the contrary, it fully preserves those requirements, and in that sense is fully consistent with the court's decision in *City of Fredericksburg*. Under both the old and the new regulations, there is no issue of whether state agency procedural requirements apply; clearly they do, and they must be complied with. The sole issue is who has the responsibility for determining whether the applicant has complied with those procedural requirements. The amended regulation places that responsibility squarely where it belongs, and where the Commission always intended it to be: on the state agencies responsible for implementing those procedural requirements.

Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters, 56 Fed. Reg. 23108-01 (May 20, 1991).

⁶⁵ 18 C.F.R. § 4.34(b)(5)(i).

6. Water quality requirements

The Proposed Rule defines “water quality requirements” to mean “applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.”⁶⁶

CWA section 303(c)(2)(A),⁶⁷ provides that state water quality standards “shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters involved and the water quality criteria for such waters based upon such uses.” Pursuant to 40 C.F.R. § 131.12(a), states also are required to develop, adopt, and implement a statewide antidegradation policy that maintains and protects existing instream water quality and the level of water quality necessary to protect such uses.

In *Jefferson PUD*, the Supreme Court found “the language of § 303 is most naturally read to require that a project be consistent with *both* components, namely, the designated use *and* the water quality criteria.”⁶⁸ Thus, “under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.”⁶⁹ In addition to examining the plain text of the statute, the Court referred to EPA’s regulations, which provide that “[w]hen criteria are met, water quality will generally protect the designated use.”⁷⁰ The Court reasoned, “[w]hile enforcement of criteria will in general protect

⁶⁶ Proposed Rule at 44120.

⁶⁷ 33 U.S.C. § 1313(c)(2)(A).

⁶⁸ *Jefferson PUD*, 511 U.S. at 715 (emphasis in original).

⁶⁹ *Id.*

⁷⁰ 40 C.F.R. § 131.3(b).

the uses of these diverse waters, a complementary requirement that activities also comport with designated uses enables the States to ensure that each activity—even if not foreseen by the criteria—will be consistent with the specific uses and attributes of a particular body of water.”⁷¹

Further, the Proposed Rule’s definition of water quality requirements treats § 401(d)’s language that the certification must assure the applicant complies with the applicable water quality requirements “*and* with any other appropriate requirement of State law set forth in such certification. . . .” (emphasis added) as surplusage and fails to give it any effect. States may set § 401 conditions assuring compliance with water quality standards because water quality standards are “other limitations” already within the scope of § 401(d).⁷² Congress chose to use the word “and” and authorized states to fashion § 401 conditions to assure compliance with “other appropriate requirements of state law” in addition to water quality standards.⁷³ The words Congress chose must be given effect. The Proposed Rule cannot repeal portions of § 401(d).

B. Section 121.3 Scope of Certification

Section 121.3 of the Proposed Rule states, “[t]he scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.”⁷⁴

As stated in Sections III.A and IV.B.2, *supra*, the statutory text as interpreted by the U.S. Supreme Court, EPA’s previous regulations, and the legislative history of § 401 do not support

⁷¹ *Jefferson PUD*, 511 U.S. at 717.

⁷² *Id.* at 712-13.

⁷³ *Id.*

⁷⁴ Proposed Rule at 44120.
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the Proposed Rule’s attempt to limit the scope of § 401 to a proposed activity’s discharge from a point source.

C. Section 121.4 Establishing the Reasonable Period of Time

Section 121.4 of the Proposed Rule provides, “[t]he Federal agency shall establish the reasonable period of time categorically or on a case by case basis, which shall not exceed one year from receipt”⁷⁵ It expressly prohibits a state from requesting the project proponent’s withdrawal and resubmittal of a certification request.

As stated in Section IV.A.5, *supra*, establishing unilateral, case-by-case deadlines for the states’ exercise of their § 401 authority is outside the federal agencies’ authority and expertise, and would increase uncertainty and inefficiencies in federal licensing proceedings.

Section 121.4(f) proposes to prohibit states from requesting a project proponent withdraw and resubmit an application. In doing so, the EPA suggests that the practice of withdraw-and-resubmit is driven by the states. It is not. The practice of withdraw-and-resubmit is entirely voluntary. Project proponents use this practice because it avoids a potentially premature denial by the state, which could jeopardize project funding and/or delay other necessary project approvals. There is nothing in the text of § 401 that bars a project proponent from the practice of withdraw-and-resubmit. The project proponent always retains the option of not withdrawing the certification request and challenging any denial in state court.

States are not responsible for a project proponent’s decision to withdraw-and-resubmit its certification request, and so they should not be penalized for that decision by a finding of waiver for failure to act within the one year allowed under § 401. Nothing in the language of § 401 suggests that a state is required to act on a request for certification that is no longer pending

⁷⁵ Proposed Rule at 44120.
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because it has been withdrawn. It is the project proponent’s action – the party that the time limitation in § 401 is intended to protect – that results in a delay of a certification decision, not a failure or refusal to act by the state.

The preamble to the Proposed Rule relies on the U.S. Court of Appeals for the D.C. Circuit’s decision in *Hoopa Valley Tribe v. FERC*⁷⁶ in support of this provision. In *Hoopa Valley*, the court reversed FERC’s finding, which was based on longstanding FERC practice, that the applicant’s withdrawal-and-resubmittal reset the one-year clock under § 401. The court instead found that withdraw-and-resubmit did not reset the one-year clock where the § 401 applications had been “complete and ready for review for more than a decade,” but the applicant had entered into an express agreement with the state water quality agencies to hold the § 401 proceeding in abeyance.⁷⁷ This holding is narrower than the Proposed Rule here and did not address the question of a federal agency’s unilateral imposition of case-by-case deadlines.

D. Section 121.5 Action on a Certification Request

Section 121.5(a) provides, “[a]ny action to grant, grant with conditions, or deny a certification request must be within the scope of certification and completed within the established reasonable period of time.”⁷⁸ This provision is unlawful and unworkable for the reasons given in Section III.B, *supra*.

Section 121.5(c) also requires an affirmative statement that the “discharge from the proposed project will comply with water quality requirements.” Typically, a project’s compliance with water quality requirements is premised on full compliance with § 401

⁷⁶ 913 F.3d 1099 (D.C. Cir. 2019) (“*Hoopa Valley*”).

⁷⁷ *Id.* at 1104-1105.

⁷⁸ Proposed Rule at 44120.
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certification conditions. The statement required by sub-section (c) would be inaccurate in most cases. As explained in Section III.A, *supra*, a certification must address the activity – not just the discharge. As explained in Section III.B, *supra*, a federal agency cannot review state certification decisions. Required language should be left to the states and their review processes.

Section 121.5(d) places additional requirements for issuing a certification with conditions:

“Any grant of certification with conditions shall be in writing and shall for each condition include, at a minimum;

- (1) A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements;
- (2) A citation to federal, state, or tribal law that authorizes the condition; and
- (3) A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.”

This required language is set for the contemplated and unlawful federal agency review process and is therefore unnecessary. Further, the statement required by sub-section (d)(3) regarding less stringent conditions is unnecessary make-work. Such cost-benefit analyses are outside of § 401’s scope. For the reasons explained above, language needs to be tailored to the states’ review processes. Further, as explained in Section III.B.3, *supra*, this language is not a substitute for the record created by a state certifying agency and is wholly inadequate to allow review by a federal agency, even assuming for the sake of argument that the federal agency has the legal authority to conduct this review.

Section 121.5(e) places additional requirements for denying a certification:

“Any denial of certification shall be in writing and shall include:

- (1) The specific water quality requirements with which the proposed project will not comply;

(2) A statement explaining why the proposed project will not comply with the identified water quality requirements;

(3) The specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project complies with water quality requirements.”

This language contemplates the unlawful agency review process and is unnecessary for the above-stated reasons.

E. Section 121.6 Effect of Denial of Certification

As written, Section 121.6(a) appears to preclude the state from denying a certification request with prejudice: “[a] certification denial shall not preclude a project proponent from submitting a new certification request, in accordance with the substantive and procedural requirements of this part.”⁷⁹

Under § 401, a state is permitted to deny a certification request for a given project with prejudice if it determines the proposed project cannot be conditioned in a manner that will assure compliance with applicable water quality standards. To the extent this provision is seeking to remove or limit a state’s right to deny a certification with prejudice following review on the merits, it is impermissible. Whether a certification denial is final and with prejudice is a matter of state law that the Proposed Rule cannot alter. *See* Sections III.B.2, *supra* and IV.H, *infra*. Further, states and interested persons should not be required to expend their time and resources reviewing substantially similar certification requests for the same project once it determines the project cannot comply with applicable water quality standards.⁸⁰

⁷⁹ Proposed Rule at 44121.

⁸⁰ For example, a state should be permitted to deny with prejudice a certification request for construction of a new dam on a river that is designated for fish habitat and migration.

This provision is unnecessary to the extent it seeks to preserve an applicant’s right to file a new certification request *for a different project* following a denial with prejudice.

Section 121.6(b) also provides that the federal agency must determine whether the certifying agency’s certification decision is valid: “[w]here a Federal agency determines that a certifying authority’s denial satisfies the requirements of [CWA] section 401 and §§ 121.3 and 121.5(e), the federal agency must provide written notice of such determination to the certifying authority and project proponent, and the license or permit shall not be granted.”⁸¹ *See also* § 121.6(c). For the reasons explained in Section III.B, *supra*, federal agencies are barred from reviewing a state’s decision to deny certification.⁸²

F. Section 121.7 Waiver

Section 121.7(a) provides in part that, “(a) the certification requirement for a license or permit shall be waived upon: . . . (2) The certifying authority’s failure or refusal to act on a certification request.”⁸³ As discussed in Section V.A.4, *supra*, under § 401, the only bases for a state’s waiver are (1) a state’s affirmative waiver, or (2) the passage of an unreasonable amount of time in excess of one year.

Sections 121.6(c)(2) and 121.8(a)(2) of Proposed Rule allow for waiver stemming from a federal agency’s review of state § 401 decisions. A waiver based on these provisions of the

⁸¹ Proposed Rule at 44121.

⁸² Leaving aside that it would be unlawful for federal agencies to review the validity of a certification decision, this sub-section on its face systematically disadvantages certifying agencies. The regulations do not specify a timeframe for the federal agency to notify the certifying authority of a determination of deficiency. This omission would allow federal agencies to deprive certifying authorities of the opportunity to remedy any deficiencies in the certification decision simply by running clock.

⁸³ Proposed Rule at 44121.

Proposed Rule would be unlawful. Federal agencies are barred from reviewing state § 401 decisions and cannot parlay such review into a waiver of an otherwise timely state action.

G. Section 121.8 Incorporation of Conditions into the License or Permit

Section 121.8 “describes a process whereby the Federal agency will review certification conditions to determine whether they will be included in the new license or permit,” notify the state as to its determination, and eventually include any accepted conditions in the license as issued.⁸⁴ As explained in Section III.B, *supra*, federal agency review of state § 401 decisions is unlawful and unworkable.

H. Section 121.9 Enforcement and Compliance of Certification Conditions

Section 121.9 of the Proposed Rule is confusing and unnecessary. Subsection (a) provides an opportunity to inspect a “discharge” and determine whether this discharge will comply with certification conditions. Subsection (b) allows for the discharge to come into compliance with certification conditions. Subsection (c) states that the licensing agency shall be responsible for enforcing certification conditions incorporated into a federal license or permit.

As explained in Section III.A, *supra*, certification conditions address not just the discharge, but whether the federally licensed activity complies with water quality requirements.

It is also important to note that the mechanisms established by Sections 121.9(b) and (c) are not exclusive and cannot create an exclusive enforcement mechanism. A federal agency already has the authority to enforce its licensing or permitting conditions. Likewise, state laws

⁸⁴ Proposed Rule at 44121.

provide for enforcement of certification conditions.⁸⁵ The Act’s citizen suit provision also provides a separate mechanism for enforcement of water quality certification conditions.⁸⁶

Importantly, the EPA rules cannot preempt statutory provisions for state and citizen enforcement. To the contrary, the Act provides the States with the central role of administering and enforcing the Act.⁸⁷ The Proposed Rule, including Section 121.9, cannot alter the federalism or “partnership” enshrined by the Act.

Moreover, under CWA section 301(a),⁸⁸ the “discharge of any pollutant by any person” is prohibited, unless done in compliance with a permit issued under the Act. Under CWA section 101, states have the “primary responsibilities and rights” for “prevent[ing], reduc[ing], and eliminat[ing] pollution.”⁸⁹

The legislative history of the Act shows that Congress determined that the states should have a primary enforcement role under the Act: “the enforcement presence of the Federal government shall be concurrent with the enforcement powers of the States.”⁹⁰ Congress was clear:

⁸⁵ See, e.g. 10 Vt. Stat. Ann. § 8504; 15 Ohio Rev. Code Ann. § 1501.31; 38 Me. Rev. Stat. Ann. § 348; 2 Mass. Stat. Ann. § 14; 8 N.Y. Law § 8-0107; Wis. Stat. § 283.89; Cal. Water Code § 13300 *et seq.*

⁸⁶ 33 U.S.C. § 1365(f) (including “certification under section 1341 [§ 401]” as an enforceable effluent standard or limitation).

⁸⁷ *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (“The Clean Water Act anticipates a partnership between the States and the federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’ 33 U.S.C. § 1251(a)”).

⁸⁸ 33 U.S.C. § 1311(a).

⁸⁹ See 33 U.S.C. § 1319(a).

⁹⁰ *Id.* at 3730.

The Committee does not intend this jurisdiction of the Federal government to supplant state enforcement. Rather the Committee intends that the enforcement power of the Federal government be available in cases where States and other appropriate enforcement agencies are not acting expeditiously and vigorously to enforce control requirements....

[T]he authority of the Federal Government should be used judiciously by the Administrator in those cases deserve Federal action because of their national character, scope, or seriousness. The Committee intends the great volume of enforcement actions be brought by the State. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.⁹¹

In the event federal and state agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of CWA section 505.⁹²

I. Section 121.12 Pre-request Procedures

Section 121.12 requires the project proponent to consult with the certifying authority 30 days prior to filing a certification request and encourages “information sharing throughout the certification process.”⁹³

Pre-filing consultation and information sharing throughout the certification process are important for efficient certification proceedings. Project proponents should be required to engage in pre-filing consultation and information sharing regardless of whether the certifying authority is a state, tribe, or the EPA Administrator. However, it is not clear this is required under the Proposed Rule because this section only appears in Subpart D, “Certification by the Administrator.”

⁹¹ *Id.*

⁹² *Id.*; see also *Deschutes River All. v. Portland Gen. Elec. Co.*, 331 F. Supp. 3d 1187, 1192 (D. Or. 2018) (“citizens may sue to enforce *conditions* in a Section 401 certification” (emphasis in original)).

⁹³ Proposed Rule at 44122.
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J. Section 121.13 Request for Additional Information

Section 121.13(a) affords the state a limited period of time to seek additional information: “[the] certifying authority shall have 30 days from receipt to request additional information from the project proponent.”⁹⁴ Further, sub-section (b) proposes to limit the state’s requests to information regarding project discharge(s) and sub-section (c) proposes to limit the state’s requests to studies that can be completed in less than one year.

As stated above, EPA lacks authority to unilaterally impose a deadline on the states’ exercise of their responsibilities under § 401. There is nothing in the Act that limits a state’s authority to request additional information it deems necessary to act on a certification request. Similar to federal agencies, state agencies are subject to state laws that require them to base their final decisions on findings of fact and law that are documented in an administrative record. The proposal to limit the timing and number of additional information and study requests made by a state would impede the state’s ability to develop the required administrative record, potentially resulting in unreasonable decisions and unnecessary litigation.

Additional information and study requests are an important tool for both FERC and the states in the context of hydropower licensing. FERC licenses have a term of 30 to 50 years. States generally issue certifications that have a concurrent term with the FERC license. Thus, states must evaluate and make findings regarding a project’s potential impacts on water quality and conditions that would effectively avoid or mitigate those impacts 30 to 50 years into the future. This is not a simple undertaking, especially given the rapid unfolding of climate change science in relation to the nation’s water resources.

⁹⁴ Proposed Rule at 44122.
Hydropower Reform Coalition’s Comments re Proposed Rule
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In FERC (re)licensing proceedings the applicant is required to develop a study plan for FERC’s approval which will direct the applicant’s completion of studies to support its license application. FERC seeks to coordinate the development of the study plan with state and federal agencies so that the study results will, to the extent possible, satisfy the informational needs of all the agencies with mandatory conditioning authority. This coordination increases the efficiency of the federal (re)licensing by avoiding duplicative or inconsistent study requests, and by allowing an applicant to conduct studies concurrently rather than sequentially (e.g., the applicant can conduct studies relevant to compliance with the FPA and CWA at the same time). Section 121.13 potentially would interfere with that coordination by placing different time limitations on state information and study requests.

Although a singular study plan that addresses the informational needs of FERC and other agencies with mandatory conditioning authority is the goal, FERC has made clear that it will only require the applicant to conduct studies that FERC needs to exercise its authority under the FPA.⁹⁵ In those cases, Section 121.13 would prevent a state from requesting certain studies

⁹⁵ According to FERC Staff:

There are limits to what the Commission can do to coordinate its activities with state processes. Some states, for instance, indicate that the problem of incomplete water quality certification applications when the license application is filed would be eliminated if the Commission would treat states as “full partners” in the licensing process, which appears to entail, among other things, complete deference to state agency study requests. The Commission may in fact require an applicant to complete all of the information-gathering or studies requested by a state agency, but must exercise its independent judgment with respect to each study request

Hydroelectric Licensing Under the Fed. Power Act, 102 FERC ¶ 61,185, *21 (Feb. 20, 2003). Commission staff has testified to Congress that “Commission staff makes every effort to require only those studies that are necessary for the Commission to obtain an understanding of a Project sufficient to carry out its responsibilities under the FPA and NEPA.” Testimony of Ann F. Miles to the Committee on Energy and Commerce Subcommittee on Energy and Power U.S. House of Representatives (May 13, 2015).

under its § 401 authority that are necessary to evaluate a project’s potential impacts on water quality standards and to develop appropriate measures to avoid, minimize, or mitigate those impacts.

EPA previously has recognized the importance of multi-year studies in (re)licensing proceedings, filing comments in support of specific multi-year studies in several proceedings. For example, EPA argued that the FERC relicensing of the Conowingo Hydroelectric Project should include the results of the Lower Susquehanna River Watershed Assessment, a three-year, \$1.4 million study which yielded findings and recommendations for future sediment and nutrient management in the Susquehanna River located in Maryland to protect water quality and aquatic life in the Chesapeake Bay.⁹⁶ In another example, EPA recommended FERC require the applicant to undertake several multi-year studies as necessary to understand the proposed Susitna-Watana Hydroelectric Project’s potential impacts on water quality in the Susitna River located in Alaska.⁹⁷

As stated in Section IV.C, *supra*, project proponents often prefer withdrawing their certification requests to allow for the additional information gathering and studies needed to demonstrate the conditions under which a proposed project can achieve water quality compliance

In its Final Rule for the Integrated Licensing Process, the Commission acknowledged that there could be instances where the Commission-approved study plan would not meet the information needs of State agencies exercising § 401 authority. In those instances, the Commission affirmed “that the Commission’s dispute resolution process does not bind state water quality certification agencies in the sense that participation by such agencies in the Commission’s processes does not affect whatever independent authority it has to require a potential license applicant to produce data or information in the context of the water quality certification application.” *Hydroelectric Licensing Under the Fed. Power Act*, 104 FERC ¶ 61,109, *36 (July 14, 2003).

⁹⁶ See letter from John R. Pomponio, EPA, to Kimberly D. Bose, FERC, FERC eLibrary no. 20141006-0046 (Sept. 29, 2014); letter from John R. Pomponio, EPA, to Kimberly D. Bose, FERC, FERC eLibrary no. 20130812-0009 (Aug. 6, 2013).

⁹⁷ See letter from Christine B. Reichgott, EPA, to Kimberly D. Bose, FERC, FERC eLibrary no. 20130326-0002 (Mar. 23, 2013).

over a 30- to 50-year term. Rather than providing an advantage to project proponents, the proposal to limit additional information requests will result in denial of certification requests for complex projects that may have ultimately merited certification.

V. Conclusion

The Proposed Rule is contrary to the Act’s plain language and would severely limit any certifying authority’s ability to ensure a federally licensed facility’s compliance with applicable water quality standards. It would exacerbate rather than clarify uncertainty regarding the respective obligations of the federal and state governments in implementing § 401 and contribute to rather than avoid greater delays in complex federal permitting decisions. In sum, the Proposed Rule would impede rather than advance the Act’s objective to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”

Accordingly, the EPA should not pursue the Proposed Rule.

Dated: October 21, 2019

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