Pennsylvania
Department of
Environmental Protection

February 17, 2026

Honorable Lee Zeldin, Administrator
United States Environmental Protection Agency
EPA Docket Center, Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460
OW-Docket@epa.gov

RE: Docket ID No. EPA-HQ-OW-2025-2929
Comments on the Proposed Rule Updating the Water Quality Certification Regulations – 91 FR 2008 (January 15, 2026)

Dear Administrator Zeldin:

The Pennsylvania Department of Environmental Protection (PADEP) submits these comments on the United States Environmental Protection Agency's (USEPA) Proposed Rule Updating the Water Quality Certification Regulations published in the *Federal Register* on January 15, 2026 at 91 FR 2008.

The attached PADEP comment letters on USEPA's two most recent prior revisions of the water quality certification regulations are incorporated herein by reference and adopted as PADEP's comments on the above referenced 2026 proposed rule. As detailed in the attached comment letters on USEPA's two most recent prior revisions of the water quality certification regulations, PADEP maintains significant concerns that USEPA's proposed rule seeks to constrain the broad authorities that Section 401 of the federal Clean Water Act gives states to evaluate impacts on state waters and to condition certifications on compliance with appropriate state requirements. PADEP also reiterates our comments on those prior revisions of these regulations as relates to the definitions of the term "discharge" and "water quality requirements" and provisions related to those definitions in USEPA's latest proposed rule.

PADEP thanks USEPA for the opportunity to comment on this proposed rule.

Respectfully,

Jessica L Shirley

Jessica Shirley
Secretary

Attachments:

- 2021 PADEP comment letter on USEPA's Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule – 86 FR 29541 (June 2, 2021)
- 2019 PADEP joint comment letter on USEPA's Request for Pre-Proposal Recommendations Regarding Clean Water Act Section 401 Water Quality Certifications

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

August 2, 2021

Honorable Michael S. Regan, Administrator
U.S. Environmental Protection Agency
EPA Docket Center, Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

OW-Docket@epa.gov

Attn: Docket Nos. EPA–HQ–OW–2021–0302; FRL–10023–97–OW

RE: Comments on the Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule. 86 Fed. Reg. 29,541 (June 2, 2021)

Dear Administrator Regan:

The Pennsylvania Department of Environmental Protection ("PADEP" or "Department") submits these comments in response to the Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule published by the U.S. Environmental Protection Agency ("EPA") on June 2, 2021 (86 Fed. Reg. 29,541) ("Section 401 Rule").

The Section 401 Rule represents a significant departure from the legal precedent and processes established over the past 40 years. The Rule contradicts the plain language and legislative history of Section 401 of the federal Clean Water Act ("CWA" or "Act"), as well as binding judicial interpretations of the Act and Section 401, all of which construe the statutory provision as giving States broad authority to serve as a check on projects approved by the federal government and ensure compliance with State Water Quality ("WQ") Requirements. EPA should revise the Section 401 Rule to be consistent with that legal precedent and previously established processes.

Introduction

The Section 401 Rule undercuts the CWA's collaborative and holistic approach to protecting all waters in the United States, which rests in significant part on the preservation and integration of State WQ Requirements, for which the Act sets the floor, in the CWA's regulatory program. The State WQ Certification process authorized by Section 401 is one of the cornerstones of the cooperative federalism framework of the CWA and ensures that the broad powers to protect water quality which are reserved to the States in Section 510 of the CWA, 33 U.S.C. § 1370 ("Section 510") are realized. The cooperative federalism model envisioned by Congress is at the heart of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. In its declaration of the goals and policy

of the Act, Congress expressly states that its policy is to "recognize, preserve, and protect the primary responsibility and rights of States to prevent, reduce, and eliminate pollution."[1]

Consistent with this policy, Section 401 of the Clean Water Act ("Section 401") requires that "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State… that any such discharge will comply [with applicable water quality requirements]."[2] A state's Section 401 certification "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply" with the Clean Water Act, "and with any other appropriate requirement of State law."[3] Any such limitation or requirement (referred to herein generally as "conditions") "shall become a condition on any Federal license or permit subject to the provisions of [Section 401]."[4]

The CWA provides *no* authority for EPA to define how States will exercise their Section 401 WQ Certification responsibilities. This absence of federal authority is not surprising given that the role of States under Section 401 and Section 510 of the CWA is to act as a check on the impacts of federal decision-making on the Nation's waters. The Section 401 Rule ignores the plain language of Sections 401 and 510 by narrowing and diminishing the States' authority under Section 401. The Rule restricts the scope of allowable conditions a State may impose on the project and imposes new procedural hurdles and time restrictions which hamper a State's ability to adequately review a certification application, and to include necessary conditions based upon the specific standards established by the state based upon its unique characteristics. EPA, via the Section 401 Rule, has manufactured a new authority for federal agencies which weakens a State's WQC Conditions by imbuing federal agencies with veto authority over a state's conditions, turning the CWA's well-established cooperative federalism model on its head.

Prior to promulgation of the Section 401 Rule, previous EPA Administrators and the federal courts construed Section 401 as giving States broad authority to serve as a check on projects approved by the federal government and to ensure compliance with State WQ Requirements. In *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991) ("*Keating*"), the U.S. Circuit Court for the District of Columbia found that Congress intended for Section 401 to provide States with "the power to block, for environmental reasons, local water projects that might otherwise win federal approval." 927 F.2d at 622. In *PUD No. 1 of Jefferson County v. Wash. Dep't. of Ecology*, 511 U.S. 700 (1994) ("*PUD No. 1*"), the U.S. Supreme Court rejected the argument that Section 401 limits States' authority to simply impose water quality controls for specific discharges from a federal project and ruled that Section 401 authorizes a State to impose 'other limitations' to compel compliance with the CWA and appropriate requirements of state law. *PUD No. 1*, 511 U.S. at 711. During the forty-eight years since the enactment of Section 401, EPA has

[1] 33 U.S.C. § 1251(b).
[2] 33 U.S.C. § 1341(a)(1).
[3] 33 U.S.C. § 1341(d).
[4] *Id.*

recognized and honored the States' autonomy in the WQ Certification Process consistent with this broad interpretation.

The Section 401 Rule defeats the very purpose of the CWA, i.e., to restore and maintain the integrity of the Nation's waters. 33 U.S.C. § 1251(a). The Rule reinterprets Section 401 to narrow the States' authority by limiting the scope of projects that would require a State WQ Certification solely to projects with point source discharges. The ultimate effect of the Rule is to promote pollution of the Nation's waters by undermining states, such as Pennsylvania, in their review of federal projects or inserting doubt and confusion related to longstanding conditions in State WQ Certifications for many federally permitted or licensed projects that impact state waters in ways other than by direct point source discharge. The attempt to narrow the applicability of the Section 401 Rule threatens Pennsylvania's abundant water resources. The Section 401 Rule conflicts with the intent of the Clean Water Act, diminishes Pennsylvania's right to ensure that water quality standards are maintained, and threatens the health of Pennsylvania's waters by encouraging efforts to circumvent the long-standing protections guaranteed by Pennsylvania law.

Pennsylvania has, with the approval of the state and federal courts, administered the Section 401 WQ Certification Process efficiently and effectively for multiple decades. Pennsylvania relied upon the EPA interpretation of Section 401 reflected in the EPA's 1989 and 2010 Section 401 Handbooks, as well as the language, purpose, and judicial interpretations of the CWA, to create its robust 401 WQ Certification Program.

In the context of dredge and fill projects, which require permits under Section 404 of the CWA, 33 U.S.C. § 1344, and are reviewed by the U.S. Army Corps of Engineers ("ACOE"), Pennsylvania and the ACOE have developed an integrated approach to processing 401 WQ Certification Requests concurrently with state law permit applications. This integrated approach is memorialized in a long-established 1992 settlement agreement between Pennsylvania and the ACOE, as well as the Pennsylvania State Programmatic General Permit, which is renewed every five years.

In the context of projects requiring federal licenses from the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act, 15 U.S.C. §§ 717, et seq. ("NGA"), Pennsylvania DEP has developed an approach that relies on conditions which utilize state law permitting programs for consistent, predictable and efficient mechanisms for assuring compliance with State WQ Standards. The U.S. Court of Appeals for the Third Circuit has reviewed and approved this Pennsylvania water quality certification process in a challenge to PADEP's granting a conditional State WQ Certification for the construction of an interstate natural gas pipeline. See *Delaware Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 903 F.3d 65 (3d Cir. 2018) ("Riverkeeper II").

For years, Pennsylvania has efficiently administered its State WQ Certification authority through coordination with the regulatory programs DEP administers, which has facilitated predictable processes and reliable water protection. PADEP timely issues between 350 to 500 State WQ

Certifications annually and through those Certifications ensures compliance with its State WQ Requirements. Pennsylvania has well-established State WQ Requirements that protect the broad spectrum of activities that have the potential to impact the quality of Pennsylvania's waters. The PA WQC Process is founded on the Pennsylvania WQ Requirements, developed under the Pennsylvania Clean Streams Law, 35 Pa. Stat. §§ 691.1 – 691.1001 ("Clean Streams Law"), and related Pennsylvania laws that ensure the protection and maintenance of water quality in Pennsylvania. The codified State WQ Requirements administered by PADEP are applied through regulatory programs such as those associated with management of sewage and wastewater treatment, erosion and sediment control and stormwater management (associated with land development activities), agricultural activities, industrial discharges, water obstructions and encroachments, water withdrawals, mining, oil and gas development, waste management, management of underground storage tanks, and environmental cleanups. The Section 401 Rule diminishes Pennsylvania's well-established and efficiently administered water protections, particularly in the context of the numerous large-scale energy infrastructure projects created in response to the explosive growth of shale-gas development in the Commonwealth.

Specific Comments on the Section 401 Rule

The Section 401 Rule enacted regulatory amendments that are contrary to law:

1. Subpart A - General:

a. New or changed definitions in § 121.1. Without limiting the foregoing, Pennsylvania identifies the following definitions as particularly concerning:

- The definition of "Certification request" requires certain basic information but, notably, does not require any sort of administrative completeness. This deficient definition triggers the review timeline at § 121.4, ignoring long-established concepts of due process.
- The definition of "Discharge" impermissibly narrows the activities considered in a state's Section 401 water quality certification solely to point source discharges. In contrast to point source discharges and discharges of dredge and fill material, nonpoint sources are the responsibility of States who are charged with regulating nonpoint source discharges consistent with WQ Standards pursuant to Section 319 of the CWA. 33 U.S.C. § 1329. "Discharge" which in the context of CWA Section 401 has been recognized by the United States Supreme Court to be broader than the defined term "point source discharge." *S.D. Warren Co. v. Maine Board of Environmental Protection, et al.*, 126 S.Ct. 1843, 547 U.S. 370, 385 (2006), and *PUD No. 1*, 511 U.S. at 711 (States may impose limitations "on the activity as a whole," not just on specific discharges.") The Clean Water Act framework is based upon: 1) "water quality standards" ("WQ Standards') which must be developed by states, and approved by EPA, 2) "effluent limitations" which must be established by EPA, as well as 3) permitting or other approval requirements for specific activities and discharges which have the potential to

cause pollution to the Nation's waters. 33 U.S.C. §§ 1311, 1312, 1313, 1329, 1341, 1342 and 1344.

- The definition of "Water quality requirements" limits the scope of state review to certain sections of the Clean Water Act and only to EPA-approved state Clean Water Act standards, contrary to the plain language of Section 401 and established caselaw. WQ Standards developed by states, are comprehensive in-stream water quality goals that are implemented by imposing specific regulatory requirements (such as treatment requirements, effluent limitations, and best management practices) on individual sources of pollution that may impact the Commonwealth's surface waters. Water quality standards include "designated uses," "numeric" and "narrative criteria" and "antidegradation" requirements for surface waters. 33 U.S.C. § 1313(c); 40 CFR § 131.6.

2. Subpart B - Certification Procedures:

a. § 121.2 (When certification is required) limits state review of water quality certification requests to when the activity may result from a "discharge" under EPA's definition at §121.1(g), which, as stated above, is contrary to the plain language of Section 401 and established caselaw.

b. § 121.3 (Scope of certification) limits the scope of states' Clean Water Act Section 401 certification to be applicable only to point source discharges under EPA's definition at § 121.1(g), and assures compliance with only certain sections of the Clean Water Act and EPA-approved water quality standards, contrary to the plain language of Section 401, established caselaw[5], and EPA's prior interpretation of Section 401[6]. Limiting the scope of water quality requirements to only point source discharges prevents a certifying authority from evaluating and addressing potential water quality impacts from non-point discharges such as water quality impacts that may occur from a variety of activities associated with water withdrawals, stormwater, or soil and groundwater contamination. For example, the conditions inserted into Pennsylvania WQ0683219-001 included:

> **Soil Contamination Remediation Work Plan** - Applicant shall comply with the PADEP-approved work plan for the remediation of the contamination area identified as a designated Operational Consideration Area (OCA) in the June 29, 1991 Consent Order and Adjudication (CO&A) between DEP and Texas Eastern and the October 11, 1989 Consent Decree between the U.S. Environmental Protection Agency (USEPA) and Texas Eastern. The OCA Remediation Work Plan shall be prepared in accordance with the CO&A and the Federal Consent Decree and all other applicable laws and regulations.

[5] *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 711-713 (1994).
[6] *See* U.S. Environmental Protection Agency, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (2010), at 19 (rescinded June 7, 2019).

> **Soil & Groundwater Management Plan** - Applicant shall comply with the PADEP-approved Soil and Groundwater Management Plan specifying measures the Applicant will develop and implement to prevent the contamination of Waters of the Commonwealth due to the discharge, transport, release, or disposal, whether intentional or non-intentional, of regulated substances, hazardous substances, or contaminated media, including stormwater run-off, groundwater, or soils. The measures to be developed and implemented by the Applicant pursuant to the Plan shall contain, treat, address and/or dispose of contaminated media in a manner that satisfies water quality standards and other applicable laws and regulations, including water quality protection requirements. The Plan shall require the Applicant to conduct sampling and analyses to confirm the agency data and develop and implement actions to prevent the migration of contaminants, hazardous substances, or pollutants due to, but not limited to project activities such as, soil excavation and disposal, hydrovac excavation, decantation operations, trenching, groundwater dewatering, and the creation of preferential contaminant migration paths.

Section 401 of the Clean Water Act recognizes the importance of state water quality laws by prohibiting federal agencies from authorizing an applicant's activity that will discharge into state waters without the state first certifying that the activity will meet state water quality standards. Pennsylvania water quality standards are encompassed in several Pennsylvania state law programs including those under the Clean Streams Law[7], Stormwater Management Act[8], Dam Safety and Encroachments Act[9], and the implementing regulations and attendant state permitting programs administered thereunder[10].

The United States Supreme Court has recognized that "[s]tate certifications under 401 are essential in the scheme to preserve state authority to address the broad range of pollution… These are the very reasons that Congress provided states with power to enforce 'any other appropriate requirement of State law.'"[11] States have "broad discretion" when developing the criteria for their Section 401 certifications.[12] Section 121.3 impermissibly limits that discretion. It should be revised to ensure that the scope includes potential impacts to water quality from the "discharge" to the "activity as a whole."

---

[7] The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. 691.1-691.1001.
[8] Storm Water Management Act of October 4, 1978, P.L. 864, as amended, 32 P.S. 680.1-680.17.
[9] Dam Safety and Encroachments Act, Act of November 26, 1978, as amended, 32 P.S. 693.1-693.27.
[10] *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 69 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1648, 203 L. Ed. 2d 899 (2019) (recognizing conditions placed on Section 401 certification based on state law).
[11] *S.D. Warren Co. v. Maine Bd. of Envt'l Prot*., 547 U.S. 370, 386 (2006).
[12] *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019).

c. § 121.4 (Pre-filing meeting request.) PADEP has utilized the pre-filing meeting request to provide guidance regarding both the federal 401 certification request requirements and certifying authority requirements. During these meetings, PADEP has also proactively identified state permits, authorizations and/or approvals that may be required for the project. The 30-day period is reasonable. However, it does have the potential to delay projects.

   PADEP would recommend that § 121.4 be modified to waive the 30-day timeframe for certification request submittal when the certifying agency declines a prefiling meeting request and to allow the certifying agency to abbreviate the 30-day timeframe after a pre-filing meeting is held.

d. § 121.5 (Certification request) purports to set forth the requirements for a certification request. There remains a question as to whether EPA has the authority under the Act to define this process. That issue notwithstanding, the manner in which EPA has done this is too restrictive and contrary to caselaw. As stated previously, the Section 401 Rule is too restrictive in limiting certification requests to only point source discharges. In addition, the items identified at § 121.5 are mostly administrative in nature and alone do not provide enough information for the certifying authority to make an informed action. States should have the ability to request additional information be submitted with a certification request. The courts have previously found that the certification agencies can prescribe the required procedure for requesting certification and starting the review or waiver countdown. *City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109, 1112 (4th Cir 1989).

   Section 121.5 should be modified to allow the certifying authority to define the elements required for a *complete* certification request in addition to the items now required under § 121.5. The Rule should also be modified to specify that a certification request will not be considered to have been submitted until the certifying authority determines that the certification request contains all required elements necessary for a complete certification request.

e. § 121.6 (Establishing the reasonable period of time) appoints Federal agencies as the sole decision maker as to what constitutes a reasonable period of time for states to act on water quality certification requests associated with applicant activities, contrary to the plain language of Section 401 and established caselaw. Allowing individual federal agencies the ability to determine their own reasonable period of time creates inconsistency for both applicants and certifying agencies. In addition, the reasonable period of time does not require federal agencies to consider constraints related to public comment periods, publication of notices, or the time associated with an applicant's response to technical deficiencies. It also fails to account for more complex projects that require coordination between multiple state environmental regulatory programs as well as inter-agency coordination.

Pennsylvania's Section 401 certification process is effective and efficient. PADEP has a longstanding procedure for Section 401 certifications, designed to meet the Commonwealth's procedural due process requirements. Those requirements include developing and submitting public notice to the Legislative Reference Bureau, publication in the *Pennsylvania Bulletin* with a 30-day public comment period, and when appropriate, extended public comment and/or public hearing.

PADEP has experienced inconsistent timeframes from various federal agencies. In addition, PADEP has received inconsistent information from the same federal agency regarding the reasonable period of time for projects received prior to the revision of the Clean Water Action Section 401 Certification Rule but under review after the Clean Water Action Section 401 Certification Rule was revised.

EPA's rule impermissibly grants federal agencies with sole authority to determine a reasonable period of time, which could include timeframes as short as 60 days. Excessively short timeframes inhibit Pennsylvania's ability to take final action on a Section 401 certification in light of the Commonwealth's crucial public participation and administrative due process requirements. Requests for WQC for programmatic permits, such as the Army Corps of Engineers' ("Corps") State Programmatic General Permit (SPGP) and the Nationwide Permits (NWP) need to provide certifying authorities with adequate timeframes to consider and follow their public participation requirements for granting such certifications.

For example, in 2020, the Corps decreed that the reasonable period of time to consider the Corps' NWPs was only 30 days. Thirty days was not nearly enough time to review those documents, let alone publish public notice and consider any public comments that might be submitted. The Corps ignored stipulations it had agreed to in a 1992 settlement agreement which specify that Pennsylvania has at least 160 days for review. In addition, the Corps' request to certify was based on the "proposed" versions of the NWPs and regional conditions, as well as the proposed version of PASPGP-6. No environmental assessment was provided.

Pennsylvania was forced to issue a conditional WQC with a reopener provision that allowed Pennsylvania to withdraw its WQC should any changes from proposed to final be substantive enough to reconsider its decision to certify. Pennsylvania was initially met with substantial resistance from the Corps Districts, although they did eventually relent and accept Pennsylvania's WQC for the NWPs.

As alluded to above, the ACOE has recognized that Pennsylvania needs additional time under Pennsylvania's Section 401 certification program to properly administer the program. In 1992, the Corps entered into a settlement agreement with PADEP covering the Baltimore, Buffalo, Philadelphia, and Pittsburgh Districts. Under the terms of that agreement, which remains in force today, the Corps agreed that the Commonwealth shall have at least 160 days to act on WQC requests from the date of receipt of a complete

request with the added concession of providing flexible terms for extension requests beyond the initial 160 days.

EPA's rule cripples a state's ability to comply with its due process requirements. As set forth in § 121.6, EPA's timeframes are triggered upon receipt of a Certification request as defined at § 121.1(c). However, the definition of "certification request" lacks any requirement that a request be administratively complete, although a reasonable interpretation could be advanced that a certification request shall not be considered to have been received until an administratively complete request has been submitted to the certifying authority. In the absence of an administratively complete Certification request, a state will not be able to be act upon that request in a manner that conforms with that state's duties to provide due process and accommodate public participation.

Finally, the rule forbids states from requesting that an applicant "withdraw a certification request and is not authorized to take any action to extend the reasonable period of time other than specified in § 121.6(d)." Such a prohibition on state action is unfounded in the Clean Water Act and contrary to well-established practice utilized by both states and applicants for decades.

Section 121.6 should establish a categorical reasonable period of time for a certifying authority to act on a water quality certification request rather than allowing each federal agency to establish a project specific reasonable period of time. Allowing certifying authorities up to one year after receipt of a complete request for water quality certification is a reasonable period of time (See FERC Action: Docket No. RM20-18-000). A one-year categorical reasonable period of time will simplify the process, provide consistency across federal agencies, and alleviate the need for federal agencies to evaluate and extend a shorter reasonable period of time. This approach would also accommodate varying public participation requirements as well as the need for coordinate between state environmental regulatory programs

The reasonable period of time should only begin when the certification request is determined complete by the certifying authority. A "certification request" should be defined as a request containing all of the required elements under the new rule as well as additional elements required by the certifying authority (complete request). EPA could also create separate procedures for programmatic certifications for federal issuing agencies, such as the Corps' SPGPs and NWPs, while allowing flexibility for local level agreements that take into account states' procedural due process and need for inter-agency coordination under state law.

f. § 121.7 (Action on a certification request) narrows the conditions that states can include in their certifications to only those chosen by EPA, and requires states to provide an explanation for each condition included in any granted certification. EPA similarly requires states to justify denial based on limited criteria, all of which are tethered solely to point source discharges. These limitations and requirements contradict the goals and

purpose of the Clean Water Act as declared by Congress and are contrary to the plain language of Section 401. Under Section 401, the authority of States applies to a "project" as a whole and is not limited to point source discharges. 33 U.S.C. § 1341(d); *PUD No. 1*, 511 U.S. at 711. Section 401 of the CWA also requires a federal agency to impose as a condition of its license or permit any condition that a State includes in its water quality certification. 33 U.S.C. § 1341(d). "The state's ability to deny certification ultimately assures that . . . it has sufficient firepower to insist that its standards are accurately interpreted by federal employees." *American Paper Inst. v. EPA*, 996 F.2d 346, 352 (D.C. Cir. 1993)

g. § 121.9 (Waiver) creates authority for federal agencies to unilaterally determine a state's compliance with Section 401 and EPA's regulations, and bestows upon those federal agencies the ability to override state denials as certification "waivers." No authority exists for EPA or any other federal agency to disregard states' rights under Section 401 in this manner. Caselaw interpreting the roles of federal agencies and states in Section 401 certification reinforces that state certification decisions turn on "questions of substantive *state* environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence."[13] As stated previously, Section 401 of the CWA requires a federal agency to impose as a condition of its license or permit any condition that a State includes in its water quality certification. 33 U.S.C. § 1341(d). Section 401 does not permit any federal agency to disregard a condition included in a state's water quality certification.

h. § 121.10 (Incorporation of conditions into the license or permit) elevates federal agencies over states in determining what conditions are appropriate, contrary to the plain language and the cooperative federalism model enshrined in the Clean Water Act. The Rule would essentially permit federal agencies to veto state-imposed conditions. This result flies in the face of the cooperative federalism model at the heart of Section 401. As recognized by the federal courts, "[t]hrough [Section 401], Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval."[14] Federal agencies "are without authority to review the validity of requirements imposed under state law or in a state's certification."[15] The plain language of Section 401(d) requires that any condition that a state includes in its certification "shall become a condition" of the federal license or permit. EPA cannot, as it impermissibly attempts to do, limit the types of conditions a state can include it its certification to only those that EPA deems satisfies the requirements of Section 121.7(d).

Pennsylvania was met with resistance from the Corps over the issue of multiple 401 WQC's being applicable in certain situations. For example, Pennsylvania has a longstanding practice of certifying the PASPGP and the NWPs and to also issue 401

[13] *Keating v. F.E.R.C.*, 927 F.2d 616, 622 (D.C. Cir. 1991) (emphasis added).
[14] *Id*.
[15] *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982).

WQC concurrently with any project-specific state permit or authorization. The Corps Districts do not believe that the Rule allows for multiple 401 WQCs. However, a certification issued concurrently with a state permit or authorization is prudent and necessary, since it is based on project-specific information. Although the permittee may be issued a federal general permit that already has been certified programmatically (NWP or PASPGP), the 401 WQC issued concurrently with the individual state permit is necessary to recognize the project-specific circumstances in which the certifying authority has evaluated potential impacts to its water quality standards. This scenario is also true when a certifying authority issues a 401 WQC for a project requiring a FERC license and that certification is based on limited, preliminary information. In contrast, the final state permit issuance is based on project-specific detailed information.

To avoid confusion and add clarity, EPA should add a section to the Rule explaining the nature of a 401 WQC and the ability for certifying authorities, through their condition, to subsequently issue project-specific certifications, such as what Pennsylvania does concurrently with its own permits, authorizations, and approvals.

i. § 121.11 (Enforcement of and compliance with certification conditions). In Pennsylvania, enforcement of water quality standards is generally done through the respective water quality permits, authorizations, and approvals issued pursuant to state law and not the WQC. When a WQC is issued with conditions, the conditions are typically requirements to obtain and comply with other state water quality permits, although that is not always the case, e.g., hydroelectric dams.

The certifying authority should have the ability to enforce certification conditions when warranted. If the federal issuing agency does not have the authority to enforce a particular condition, it should not be allowed to vacate or decline that condition. Instead, the federal agency should have the flexibility to adopt a certifying authority's condition and state that it is enforceable only by the certifying authority in such cases.

j. § 121.12 (Determination of effects on neighboring jurisdictions). The neighboring jurisdiction coordination process is cumbersome and lacks specificity. It is essentially a requirement for neighboring jurisdictions to provide WQC for projects not occurring within their jurisdictional authority.

Objecting to another certifying authority's issuance and requesting a public hearing should not be the only option if a neighboring jurisdiction has concerns about a project's potential impact on their own water quality standards. The neighboring jurisdiction may only have a need to request that additional conditions be adopted by the federal issuing agency. For instance, a neighboring jurisdiction located downstream from a project may only wish to receive notification from the permittee/licensee should a spill/release occur during construction. In those cases, EPA or the federal issuing agency, should require the project proponent to request an additional WQC from the neighboring jurisdiction. That issuance should have no bearing on the original certifying authority's WQC.

To the extent these procedures are necessary, they should include more options. Neighboring jurisdictions should be allowed to comment without objection or need for public hearing and be able to provide suggested WQC conditions for consideration by the certifying authority. The new procedure should have no bearing on the timeframe or decision to issue by the certifying authority where the project is taking place. Rather the permittee/licensee should not be allowed to begin construction until securing all necessary WQCs from the affected jurisdictions and subsequently any permits, authorizations, and/or approvals required by those jurisdictions' laws or regulations.

3. General Considerations.

a. Modifications. In Pennsylvania, in cases where the WQC is not integral in a Chapter 105 permit, a conditional WQC is generally issued separately. The WQC conditions require the applicant to obtain all necessary authorizations under the various water quality permitting programs. Most project changes are handled under amendments to the various state authorizations and not the WQC. However, there are times where it would be appropriate to modify a WQC, such as when the scope of the proposed project impacts expands beyond those previously included within the original certification request or where there are subsequent changes to the magnitude and location of the proposed impacts. In those instances, a certifying authority should have the ability to modify or reopen a WQC.

b. Data and other information. In Pennsylvania, the majority of WQCs are issued for projects where the federal 404 permit is the sole federal authorization necessitating the need for WQC. Historically, the WQC review has been integrated with the Chapter 105 permit review. The Chapter 105 permit application was also considered a request for WQC. There was no need for a separate WQC request containing the specific elements defined in the new rule. Procedurally, the new rule conflicts with Pennsylvania's long standing 401 procedures. It also conflicts with the 1992 settlement agreement entered into as a result of federal litigation between DEP and the Corps Districts that operate in Pennsylvania.

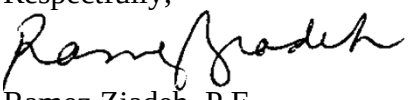
The Rule should be written to allow flexibility for procedures previously established by certifying authorities to govern the certification request process. In the alternative, it should be modified to constitute non-binding recommendations. Another alternative would be to rescind the rule and restore the 2010 WQC Guidance for States and Tribes. Certifying authorities which have equal or more protective water quality standards, or legally binding agreements with a federal issuing agency must be able to continue following longstanding local practices. If a certifying authority has a statutory or regulatory requirement, an application for a permit or authorization under that requirement should be allowed to be considered a concurrent request for 401 WQC.

Conclusion

The Section 401 Rule, in its current state, suffers from serious flaws. It conflicts with the intent and plain language of the Clean Water Act as well as existing caselaw. It fundamentally alters Pennsylvania's long-standing and well-administered program. PADEP is committed to fulfilling its duties under the Commonwealth's Constitution and the state environmental laws that form the backbone of Section 401 certification. The Section 401 Rule imperils PADEP's ability to fulfill those duties. PADEP respectfully urges EPA to revise the Section 401 Rule and engage in a rulemaking process that recognizes the cooperative federalism model envisioned by Congress when it enacted the Clean Water Act.

Thank you for your time and consideration of this important matter.

Respectfully,



Ramez Ziadeh, P.E.
Executive Deputy Secretary for Programs

RESPONSE BY NEW YORK ATTORNEY GENERAL LETITIA JAMES, CALIFORNIA ATTORNEY GENERAL XAVIER BECERRA, COLORADO ATTORNEY GENERAL PHILIP J. WEISER, CONNECTICUT ATTORNEY GENERAL WILLIAM TONG, MAINE ATTORNEY GENERAL AARON M. FREY, MARYLAND ATTORNEY GENERAL BRIAN FROSH, MASSACHUSETTS ATTORNEY GENERAL MAURA HEALEY, MINNESOTA ATTORNEY GENERAL KEITH ELLISON, NEW JERSEY ATTORNEY GENERAL GURBIR S. GREWAL, NEW MEXICO ATTORNEY GENERAL HECTOR BALDERAS, NORTH CAROLINA ATTORNEY GENERAL JOSHUA H. STEIN, OREGON ATTORNEY GENERAL ELLEN F. ROSENBLUM, PENNSYLVANIA ATTORNEY GENERAL JOSH SHAPIRO, RHODE ISLAND ATTORNEY GENERAL PETER F. NERONHA, VERMONT ATTORNEY GENERAL THOMAS J. DONOVAN, JR., WASHINGTON ATTORNEY GENERAL ROBERT W. FERGUSON, CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, AND PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION TO EPA'S REQUEST FOR PRE-PROPOSAL RECOMMENDATIONS REGARDING CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATIONS

Docket ID: EPA-HQ-OW-2018-0855

The undersigned state attorneys general and environmental agencies submit this letter in response to EPA's request for comments and recommendations as it considers revising its current guidance on state water quality certifications under Clean Water Act § 401[1] in response to the President's "Executive Order on Energy Infrastructure and Economic Growth," issued on April 10, 2019.[2] The Executive Order directs EPA to evaluate, among other things, "the appropriate scope of water quality reviews" as well as "the nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time," in order to clear the way for energy development.[3]

We urge EPA not to weaken its existing guidance and regulations. Section 401 explicitly preserves states' independent and broad authority to regulate the quality of waters within their borders. Neither the President's Executive Order nor EPA's guidance and regulations can contradict or undermine the plain language and congressional intent of section 401.[4]

---

[1] 33 U.S.C. § 1341 (section 401).

[2] 84 Fed. Reg. 15,495 (Apr. 15, 2019) (Executive Order).

[3] Executive Order § 3(a)(ii), (v).

[4] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (President cannot use Executive Order to promote policy goals in absence of statutory or constitutional authority); *id.* at 637-38; (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb"); *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013) ("[T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections.").

EPA's expedited and overly broad "consultation" process fails to provide adequate public notice and opportunity for comment. Additionally, revisions to EPA's existing guidance and regulations are wholly unnecessary, as states efficiently and effectively review thousands of water quality certifications each year. Any revisions to EPA's guidance or regulations must be consistent with the Clean Water Act, preserve the states' broad authority to protect water quality, maintain the flexibility contemplated by the Act for states to follow their own administrative processes, and not limit the one-year review period prescribed by Congress. EPA may not upend the well-established, statutorily mandated role of states in implementing the Clean Water Act's water quality protections within their borders.

I. EPA'S REVIEW OF ITS SECTION 401 GUIDANCE AND REGULATIONS UNDER THE EXECUTIVE ORDER IS PROCEDURALLY DEFICIENT

The process EPA is using to solicit input in response to the Executive Order is procedurally deficient and provides no meaningful notice or opportunity for public comment. EPA has broadly requested "pre-proposal recommendations" from states on "provisions that require clarification within section 401 and related federal regulations and guidance."[5] EPA has not issued any actual proposal that states can evaluate and respond to with meaningful comments.

Nor has EPA identified with any specificity the issues on which it seeks comment in preparing to revise its guidance or regulations. EPA suggests that states should use the comment period to "provide feedback" following two multi-state conference calls hosted by EPA.[6] But EPA's efforts to "engage with states" through these "meetings" (as EPA describes them) consisted of little more than two PowerPoint presentations raising more than a dozen broad issues, followed by unstructured discussions.[7] Follow-up documents published by EPA to summarize the comments received during these discussions show 123 separate comments raised by the states on a range of issues, reflecting the confusion and lack of meaningful structure in EPA's process.[8] It is impossible to provide meaningful input on the broad swath of section 401 issues raised by the Executive Order and the multi-state discussions during the two conference calls held by EPA on the short timeline EPA has afforded.

Additionally, the Executive Order requires EPA to issue guidance within only sixty days of the issuance of the Executive Order, *or June 8, 2019*, and to issue draft regulations sixty days

[5] Memorandum from Lauren Kasparek (April 26, 2019) (Docket ID EPA-HQ-OW-2018-0855-0002).

[6] *Id.*

[7] *Id.*; *see also* Slideshow on Clean Water Act Section 401 Water Quality Certification: Follow-up State and Tribal Webinar (May 8, 2019) (Docket ID EPA-HQ-OW-2018-0855-0025); Slideshow on Clean Water Act Section 401 Water Quality Certification: Outreach, Feedback, & Next Steps (April 17, 2019) (Docket ID EPA-HQ-OW-2018-0855-0006).

[8] *See* Follow-up State and Tribal Webinar, Written Input from Participants (May 8, 2019) (Docket ID EPA-HQ-OW-2018-0855-0024); State and Tribal Webinar, Written Input from Participants (April 17, 2019) (Docket ID EPA-HQ-OW-2018-0855-0022).

later, *or August 8, 2019.*[9] EPA cannot possibly review—let alone meaningfully consider—the many substantive comments it receives on the plethora of issues at stake in the mere 17 days between the close of public comments and the Executive Order's deadline for issuing new guidance.

EPA's flawed public engagement process calls into question the legitimacy of any forthcoming guidance or regulatory revisions. If EPA amends its guidance and regulations (and it should not, for the reasons next discussed), it must provide legitimate and meaningful public notice and opportunity for comment.[10]

II. EPA'S REVIEW OF ITS SECTION 401 GUIDANCE AND REGULATIONS UNDER THE EXECUTIVE ORDER IS UNNECESSARY

There is no reason to revise EPA's existing guidance because states are managing their section 401 responsibilities effectively and appropriately. The Executive Order relies on a purported need for revisions to the section 401 guidance and regulations because they are "outdated" and "are causing confusion and uncertainty."[11] Further, statements from EPA Administrator Andrew Wheeler suggest revisions are necessary because states are not implementing section 401 consistently or faithfully.[12] These statements are incorrect.

Rather than exceeding their authority under section 401 or abusing the section 401 process, as the Executive Order and Administrator Wheeler seem to suggest, states efficiently and effectively handle a large volume of section 401 applications annually for a wide range of projects. For example, the New York State Department of Environmental Conservation issued 3,762 water quality certifications in 2018, 5,061 certifications in 2017, and 3,192 certifications in 2016.

---

[9] Executive Order § 3(b), (c). *See also* Timeline, Slideshow on Clean Water Act Section 401 Water Quality Certification: Follow-up State and Tribal Webinar, at 10 (Docket ID EPA-HQ-OW-2018-0855-0025).

[10] *See Prometheus Radio Project v. Fed. Commc'n Comm'n*, 652 F.3d 431, 450 (3d Cir. 2011), *cert. denied* 545 U.S. 1123 (2005) (meaningful opportunity for public comment "means enough time with enough information to comment and for the agency to consider and respond to the comments"); *Rural Cellular Ass'n v. Fed. Commc'ns Comm'n*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) ("The opportunity for comment must be a meaningful opportunity, . . . in order to satisfy this requirement, an agency must also remain sufficiently open-minded"); *Levesque v. Block*, 723 F.2d 175, 187 (1st Cir 1983) ("Public comment contributes importantly to self-governance and helps ensure that administrative agencies will consider all relevant factors before acting. To serve these purposes, notice and the opportunity for comment must come at a time when they can feasibly influence the final rule.").

[11] Executive Order § 3.

[12] Press Release on EPA Implementation of Executive Order (April 10, 2019), *available at* https://www.epa.gov/newsreleases/epa-takes-action-implement-president-trumps-energy-infrastructure-executive-order.

In the rare circumstances where state certification decisions are challenged, ample administrative and judicial remedies are available. An applicant that objects to the substance of a state's determination under section 401 can seek administrative and court review.[13] An applicant that believes a state has taken too long to review a section 401 application can raise that argument with the appropriate agency or court.[14] Revision of EPA guidelines or regulations is not necessary to protect applicants' interests.

III. EPA MAY NOT IMPAIR STATES' WELL-ESTABLISHED AUTHORITY TO INDEPENDENTLY EVALUATE THE WATER QUALITY IMPACTS OF FEDERAL PROJECTS ON STATE WATERS

Any revision to EPA's guidance or regulations interpreting section 401 must recognize and preserve the state's primary and well-established authority to protect water quality within their borders. State agencies have "broad discretion" when developing the criteria for their section 401 certifications.[15] The cooperative federalism system Congress established in section 401 makes clear that decisions relating to the scope of state agency review are vested in state agencies as long as they are at least as stringent as the Clean Water Act, not EPA or other federal agencies.[16]

The Clean Water Act reflects Congress' policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" of waters within their borders.[17] Consistent with this policy and the Clean Water Act's primary objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[18] section 401 mandates that

---

[13] *See, e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Islander E. Pipeline Co.*, 467 F.3d 295 (2d Cir. 2006) (*Islander East I*); *Constitution Pipeline Co. v. N.Y.S. Dep't of Envtl Conservation*, 868 F.3d 87, 90-91 (2d Cir. 2017), *cert. denied* 138 S. Ct. 1697 (2018); *King v. N.C. Envtl. Mgmt. Comm'n*, 436 S.E.2d 865, 869 (N.C. App Ct. 1993); *Arnold Irrigation Dist. v. Dep't of Envtl. Qual.*, 717 P.2d 1274, 1276-77 (Or. App. Ct. 1986).

[14] *See, e.g., Millennium Pipeline Co. v. N.Y.S. Dep't of Envtl. Conservation*, 860 F.3d 696, 701 (D.C. Cir. 2017) (holding that once state agency "has delayed for more than year" an applicant's remedy is to "present evidence of waiver" to relevant federal agency).

[15] *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019).

[16] *See S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, Dep't of Interior*, 20 F.3d 1418, 1427 (6th Cir. 1994), *cert. denied* 513 U.S. 927 (1994) (Clean Water Act "sets up a system of 'cooperative federalism' in which states may choose to be primarily responsible for running federally-approved programs").

[17] 33 U.S.C. § 1251(b); *see also id.* § 1370 (preserving states' right to adopt or enforce water quality protections more stringent than federal standards); *Public Util. Dist. No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994) (*PUD No. 1*) ("The Clean Water Act establishes distinct roles for the Federal and State Governments.").

[18] 33 U.S.C. § 1251(a).

> [a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply [with applicable water quality requirements].[19]

Section 401 further provides that the state's 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 the CWA, "and with any other appropriate requirement of State law."[20] The certification "shall become a condition on any Federal license or permit" for which it is issued.[21] "No license or permit shall be granted if the certification has been denied by the State[.]"[22]

The Supreme Court has recognized that "State certifications under § 401 are essential . . . to preserve state authority to address the broad range of pollution" impacting state water resources.[23] Indeed, section 401 "was meant to 'continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.'"[24] Section 401 thus entitles a state agency to "conduct its own review" of a project's "likely effects on [state] waterbodies" and to determine "whether those effects would comply with the State's water quality standards."[25] Where the state agency determines that a project will not comply with state water quality standards, it can "effectively veto[]" the project, even if the project "has secured approval from a host of other federal and state agencies." [26] Thus, Congress "intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval."[27]

A state that denies an application for a section 401 certification is exercising its statutorily mandated authority to protect water quality under the cooperative federalism system established by the Clean Water Act. And because those decisions are subject to judicial review, there is no danger of states abusing their power or arbitrarily denying applications for section 401

---

[19] *Id.* § 1341(a)(1).

[20] *Id.* § 1341(d).

[21] *Id.*

[22] *Id.*

[23] *S.D. Warren*, 547 U.S. at 386 (2006); *see also Keating v. Fed. Energy Reg. Comm'n*, 927 F.2d 616, 622 (D.C. Cir. 1991) (Section 401 is "[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them" under the Clean Water Act).

[24] *S.D. Warren*, 547 U.S. at 380 (quoting S. Rep. No. 92-414, p. 69 [1971]).

[25] *Constitution Pipeline Co.*, 868 F.3d at 101.

[26] *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008), *cert. denied* 555 U.S. 1046 (2008) (*Islander East II*).

[27] *Keating*, 927 F.2d at 622.

certifications. Any attempt to subsume state authority within the federal regulatory process would violate the plain language and purpose of section 401.

IV. EPA MUST PRESERVE STATE AUTHORITY TO CONDITION CERTIFICATION ON COMPLIANCE WITH ANY "APPROPRIATE REQUIREMENT" OF STATE LAW

The Executive Order directs EPA to review its guidance and regulations and consider the "types of conditions that may be appropriate to include in a certification."[28] Section 401 makes clear that when a state issues a section 401 certification, it "shall" include conditions sufficient to ensure that the applicant will comply not only with state water quality standards, but also with "*any other* appropriate requirement of State law."[29] Thus, "Congress provided the States with power to enforce other appropriate State law by imposing conditions on federal licenses for activities that may result in a discharge.[30] Accordingly, "federal courts and agencies are without authority to review the underlying validity of requirements imposed under state law or in a state's certification."[31]

EPA's current guidance appropriately recognizes the wide range of state statutes and regulations that states have deemed "appropriate" under this provision, including laws protecting threatened or endangered species or cultural or religious values of waters.[32] EPA cannot curtail the breadth of those state laws. Instead, any revision of the guidance or regulations must preserve the states' broad authority to enforce appropriate state laws through section 401 conditions.

V. ANY REVISIONS TO EPA'S SECTION 401 GUIDANCE AND REGULATIONS MUST ENSURE THAT STATES CAN COMPLY WITH THEIR OWN ADMINISTRATIVE PROCEDURES WHEN REVIEWING SECTION 401 APPLICATIONS

The Executive Order directs EPA to evaluate several topics related to the timing and scope of state administrative review of section 401 applications, suggesting that EPA's revised guidance might create federal restrictions on the timing and scope of state administrative processes.[33] This would be a mistake. EPA's guidance and regulations must preserve the flexibility the Clean Water Act affords for states to design and comply with their own administrative processes when reviewing section 401 certification applications.

---

[28] Executive Order § 3(a)(iii), (v).

[29] 33 U.S.C. § 1341(d) (emphasis added); *see also PUD No. 1*, 511 U.S. at 713-14.

[30] *S.D. Warren*, 547 U.S. at 386 (citation omitted).

[31] *Roosevelt Campobello Inter. Park v. U.S. Envtl. Prot. Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982).

[32] 2010 Interim Guidance, at 21.

[33] Executive Order § 3(a).

Section 401(a)(1) requires that a state "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications."[34] A state must not only establish such procedures; it must comply with them.[35] The Clean Water Act allows state agencies to follow state law when complying with section 401's public notice and hearing requirement,[36] and more broadly when determining whether to issue, condition, or deny a section 401 certification.[37] Recognizing that meaningful state agency and public review cannot be rushed, Congress gave states a reasonable period—up to "one year"— to exercise their broad authority pursuant to state administrative procedures (including public notice and, if appropriate, hearings) when making a section 401 certification determination.[38]

States have established a wide range of efficient and fair administrative procedures, which share certain features designed to enable the thorough review contemplated by section 401.[39] Initially, a state reviews a section 401 application to ensure that it includes sufficient information for meaningful review by the state agency and the public. A state that has received a deficient or incomplete application may require the applicant to provide additional information.[40] The process of obtaining required information is not entirely within the reviewing agency's control: applicants can frustrate the timeframe for review by failing to provide requested materials necessary to the state's review of the application.[41] In some cases, states also must await completion of federal

---

[34] 33 U.S.C. § 1341(a)(1).

[35] *See City of Tacoma, Wa. v. Fed. Energy Regulatory Comm'n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006).

[36] *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envt'l Prot.*, 903 F.3d. 65, 75 (3d. Cir. 2018), *cert. denied* ___ U.S. ___, 2019 WL 1886047 (Apr. 29, 2019) (Clean Water Act section 401 provides states with discretion as to how they establish public notice and/or hearing procedures).

[37] *See Berkshire Envtl. Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 112-13, n.1 (1st Cir. 2017) (Clean Water Act section 401 does not affect how agency conducts "internal decision-making before action"); *City of Tacoma, Wa. v. Fed. Energy Regulatory Comm'n*, 460 F.3d 53, 67-68 (D.C. Cir. 2006) ("the decision whether to issue a section 401 certification generally turns on questions of state law").

[38] 33 U.S.C. § 1341(a)(1).

[39] *See, e.g.*, 314 Code of Massachusetts Regulations (C.M.R.) § 9.05(3); 6 New York Code of Rules and Regulations (N.Y.C.R.R.) § 621.7(a)(2), (g); 15A North Carolina Administrative Code (N.C.A.C.) § 02H.0503; 250 Rhode Island Code of Regulations (R.I.C.R.) § 150-05-1.17; Vermont Admin. Code (Vt. A.C.) § 16-3-301:13.11; Conn. Gen. Stat. 22a-6h; 23 Cal. Code of Regulations (Ca.C.R.) §§ 3855-3861.

[40] *See, e.g.*, N.Y. Environmental Conservation Law § 70-0109(2)(a); *see also* 310 C.M.R. § 4.10(8)(g)3.a.-b.; 314 C.M.R. § 9.05(1); 6 N.Y.C.R.R. §621.7(a), (f); 250 R.I.C.R. § 150-05-1.17(B), (D); Vt. A.C. § 16-3-301:13.3(c)(3).

[41] *See, e.g., Constitution Pipeline*, 868 F.3d at 103.

and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications.[42]

Once sufficient information supporting an application has been received for a state to deem an application complete, section 401 requires states to provide public notice and encourages public hearings.[43] Typically, public notice must be accomplished through publication in one or more local newspapers as well as in official agency publications.[44] In almost all cases, states must hold a public comment period ranging from fifteen to forty-five days.[45] To ensure meaningful public review, states appropriately provide extensions of public comment periods for significant projects.[46] The period of public participation may be further extended in situations where states receive requests for a public hearing.[47] After the public comment period and any public hearing

[42] *See, e.g.*, 23 Ca.C.R. §§ 3836(c), 3837(b)(2) (projects subject to section 401 water quality certification must be reviewed under the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., as appropriate, before approval by the State Water Resources Control Board or the Regional Water Quality Control Boards); 6 N.Y.C.R.R. § 621.3(a)(7) (an application is not considered complete until a negative declaration or draft environmental impact statement have been prepared pursuant to state environmental quality review act, ECL article 8).

[43] 33 U.S.C. § 1341(a)(1).

[44] *See, e.g.*, 6 N.Y.C.R.R. § 621.7(a)(2), (c); 15A N.C.A.C. § 02H.0503(a); 250 R.I.C.R. § 150-05-1.17 (D)(1)(a); 9 Va. Admin. Code (Va.A.C.) § 25-210-140(A).

[45] *See, e.g.*, 5 Col. Code of Regulations § 1002-82.5(B)(1) (30 days); Conn. Gen. Statutes Ann. § 22a-6h(a) (30 days); 314 C.M.R. § 9.05(3)(e) (21 days); 6 N.Y.C.R.R. § 621.7(b)(6) (15 to 45 days); 250 R.I.C.R. § 150-05-1.17(D)(2) (30 days); Va. Code § 62.1-33.15:20(C) (45 days for state agencies to provide comment); 9 Va.A.C. § 25-210-140(B) (30 days for public comment); Vt. A.C. §§ 16-3-301:13.3(c), 13.11(c) (30 days); 23 Ca.C.R. § 3858(a) (at least 21 days).

[46] *See, e.g.*, Ca. State Water Resources Control Bd., Draft Water Quality Certification Comment Deadline Extended for Application of Southern California Edison Co. (Sept. 27, 2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/big_creek/docs/final_bc_ceqa_draft_cert_notice_extended.pdf; N.Y. Dep't of Envtl .Conservation, Notice of Supplemental Public Comment Hearing and Extension of Public Comments on Application of Transcontinental Gas Pipe Line Company, LLC (Feb. 13, 2019), https://www.dec.ny.gov/enb/20190213_not2.html.

[47] *See, e.g.*, Conn. Gen. Stat. 22a-6h(d) (applicant may request public hearing within 30 days of publication of a tentative determination); 250 R.I.C.R. § 150-05-1.17(D)(3) (providing for a mandatory public hearing if enough requests are received, notice of which must be provided fourteen days prior to date of hearing); 15A N.C.A.C. §§ 02H.0503(d), 0504 (notice of public hearing must be given thirty days prior to date of hearing, and record of public hearing must be held open for thirty days after the date of hearing); Vt. A.C. § 16-3-301:13.3(g), (h) (public hearing may be requested during public comment period, and notice of public hearing must be given thirty days before date of hearing).

are complete, the state agency must review and, in many cases, respond to the public comments received before making a certification determination.[48]

Any revision to EPA's section 401 guidance and regulations must be sufficiently flexible to accommodate the variety of state administrative processes described above and ensure states can comply with state administrative procedural requirements. Any attempt by EPA to limit state review to particular materials or a particular timeframe (except as specifically set forth in section 401) may prevent the states from complying with their own administrative standards, preclude meaningful public notice and comment and thorough state review, and impermissibly intrude on the states' primary authority to protect their water quality.

Placing unnecessary limitations on the time-frame for state review will not result, as the Executive Order suggests, in more expedited approval of section 401 applications. If a state agency's review time is unnecessarily restricted by federal regulation or guidance, the agency may be forced to deny applications without prejudice. The applicants would then need to re-apply for a section 401 certification, triggering a new time-period for review and delaying a final decision on the application. A state agency that rushes to approve section 401 certifications pursuant to an arbitrary federal deadline could leave itself open to legal challenge from opponents of approved projects, leading to more project delays through litigation and the possible vacatur of section 401 certifications by the courts. Either situation will result in unnecessary delays and greater uncertainty in the regulatory process.[49]

VI. EPA SHOULD CLARIFY THAT THE TIMEFRAME FOR STATE REVIEW OF A SECTION 401 APPLICATION COMMENCES ONCE A STATE DEEMS AN APPLICATION COMPLETE

A state agency's time for issuing or denying a section 401 certification commences upon "receipt of such request [for certification]."[50] To be consistent with section 401 and ensure that states can meaningfully exercise their authority to evaluate certification applications and protect state water quality as mandated by the Clean Water Act, EPA should clarify that only receipt of a complete application triggers commencement of the state review period.

The benefits of requiring a complete application before the timeframe for review commences are manifest. Requiring a complete application is necessary to provide public notice and obtain meaningful public comment.[51] After public notice and comment, state agencies generally must review any public comments and determine whether a public hearing is required or

---

[48] *See, e.g.*, 310 C.M.R. § 4.10(8)(g) 3.b.; 205 R.I.C.R. §150-05-1.17(D)(4).

[49] If EPA must issue new guidance, it should clarify that states have, by default, a full year to review Section 401 applications—an approach currently taken by the Federal Energy Regulatory Commission. 18 C.F.R. § 4.34(b)(5)(iii).

[50] 33 U.S.C. §1341(a)(1).

[51] *See, e.g., Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D. W. Va. 2010) (noting that "[c]ompletion and public notice are inextricably linked" and rejecting public notice and comment process undertaken on incomplete application).

appropriate, respond to the comments, and decide whether the application should be granted, granted with conditions, or denied. A state agency required to act within one year of receiving an incomplete application may not be able to conclude that a project would comply with state standards and could be forced to act on an application before this public notice and comment process has concluded (or even commenced). A complete application is also necessary to trigger the one-year waiver period and ensure that states can fully exercise their authority under section 401. Otherwise, applicants could frustrate the state's mandate to make section 401 determinations by submitting an incomplete or deficient application and waiting until a few days before the expiration of the one-year period to complete their application, thereby depriving states of the ability to meaningfully review the complete application and make a determination within the one-year period. Requiring a complete application avoids this potential for gamesmanship.

Any revisions to EPA's regulations should adopt the U.S. Army Corps of Engineers' rule requiring that the time period for state review commences when an agency receives a *complete* application. The Army Corps' regulations provide that "[i]n determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification."[52] When promulgating this regulation, the Army Corps noted generally that "valid requests for certification must be made in accordance with State laws[.]"[53] The Army Corps regulation requiring that agency to determine whether a state has received a "valid request" for a certification to trigger commencement of the one-year review period has been upheld as "reasonable" and "permissible in light of the statutory text" of section 401.[54] EPA should follow the Army Corps' lead in this respect.

VII. EPA SHOULD CONTINUE TO PROVIDE APPLICANTS WITH THE FLEXIBILITY TO EXTEND ADMINISTRATIVE REVIEW THROUGH THE WITHDRAWAL AND RESUBMISSION OF APPLICATIONS

Any change to EPA's section 401 guidance or regulations relating to timing should preserve applicants' flexibility to functionally extend the timeframe for review by permitting the withdrawal and re-submittal of section 401 certification applications to commence a new review period. States sometimes require more than one year to review section 401 applications, especially for particularly large or complex projects or when an applicant fails to provide relevant information in a timely manner. Historically, applicants have chosen to withdraw and resubmit their section

---

[52] 33 C.F.R. § 325.2(b)(1)(ii).

[53] *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,211 (Nov. 13, 1986).

[54] *AES Sparrows*, 589 F.3d 721, 729 (4th Cir. 209). In this respect, EPA should decline to follow the approach taken by FERC, which has interpreted the section 401 timeframe as commencing upon receipt of *any* written application, no matter how perfunctory or facially incomplete. *See* 18 C.F.R. § 4.34(b)(5)(iii); *Millennium Pipeline Company, L.L.C.*, 160 FERC ¶ 61,065 (Sept. 15, 2017). Although the Second Circuit upheld FERC's interpretation of section 401, the Court did not hold that other interpretations of the triggering event would be impermissible. *See N.Y. State Dep't of Envt'l. Conservation v. Fed. Energy Reg. Comm'n*, 884 F.3d 450, 455-56 (2d Cir. 2018) (*NYSDEC v. FERC*).

401 applications in order to make a new request for a certification, thus creating a new deadline for state action.[55] The withdrawal-and-resubmittal process is well-established and non-controversial in almost all cases.[56] The Second Circuit recently recognized the validity of this process, in noting that, if a state needs more time to review a request for a section 401 certification, it can "request that the applicant withdraw and resubmit the application."[57] And EPA's existing guidance, too, recognizes that the withdrawal-and-resubmittal process could be used to "restart[] the certification clock."[58] Notably, an applicant that desires an expeditious decision remains free to decline to withdraw and resubmit its application, allowing the state to make a decision on the application as it then stands. Applicants therefore retain the power to ensure that the states act on their application within one year if they so choose, which is consistent with Congress' intent when it adopted section 401 to protect applicants from a state's "sheer inactivity" on its application.[59]

[55] *See, e.g.*, *Constitution Pipeline*, 868 F.3d at 94; *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 87 (2d Cir. 2006) (*Islander East I*).

[56] The D.C. Circuit recently rejected the use of the withdrawal and resubmittal process where states and an applicant entered into a written agreement "to defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests" over more than a decade. *Hoopa Valley Tribe v. Fed. Energy Regulatory Comm'n*, 913 F.3d 1099, 1101 (D.C. Cir. 2019). The Court made clear, however, that its decision was narrow and resolving only the "single issue" of "whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification." *Id.* at 1109 (emphasis added); *accord id.* at 1100-01. The Court expressly declined to determine whether, in different circumstances, the withdrawal and resubmittal of a section 401 application would "restart[] the one-year clock." *Id.* at 1104. The period for a party to petition the U.S. Supreme Court for a writ of certiorari in that case has not yet expired.

[57] *NYSDEC v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018).

[58] EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, at 13 (2010).

[59] Conf. Rep. No 91-940, 91st Cong., 2d Sess. (1970), reprinted in U.S. Code Cong. & Ad. News 2712, 2741.

CONCLUSION

Revisions to EPA's section 401 guidance and regulations are not necessary. Any revisions that EPA decides to undertake must be consistent with the terms and intent of section 401, which preserves broad state authority over water quality issues.

Dated: May 24, 2019
Albany, New York

FOR THE STATE OF NEW YORK

LETITIA JAMES
ATTORNEY GENERAL

Lisa B. Burianek
Deputy Bureau Chief
Michael J. Myers
Senior Counsel

By: _____
Brian Lusignan
Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2400

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
ATTORNEY GENERAL

Tatiana K. Gaur
Deputy Attorney General
Office of the Attorney General
Environment Section
300 South Spring Street
Los Angeles, CA 90013

FOR THE STATE OF COLORADO

PHILIP J. WEISER
ATTORNEY GENERAL

Carrie Noteboom
First Assistant Attorney General
Natural Resources and Environment Section
Colorado Department of Law
1300 Broadway
Denver, CO 80203

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
ATTORNEY GENERAL

Matthew I. Levine
Jill Lacedonia
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120

FOR THE STATE OF MAINE

AARON M. FREY
ATTORNEY GENERAL

Scott Boak
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333

FOR THE STATE OF MARYLAND

BRIAN FROSH
ATTORNEY GENERAL

John B. ("J.B.") Howard, Jr.
Special Assistant Attorney General
200 Saint Paul Place
Baltimore, MD 21202

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL

Matthew Ireland
Turner Smith
Assistant Attorneys General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108

FOR THE STATE OF MINNESOTA

KEITH ELLISON
ATTORNEY GENERAL

Nur Ibrahim
Assistant Attorney General
Minnesota Attorney General's Office
Bremer Tower, Suite 900
445 Minnesota Street
St. Paul, MN 55101-2127

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
ATTORNEY GENERAL

Kristina Miles
Deputy Attorney General
Environmental Permitting and Counseling
R.J. Hughes Justice Complex
P.O. Box 093
Trenton, NJ 08625

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
ATTORNEY GENERAL

Anne Minard
Special Assistant Attorney General
State of New Mexico
Office of the Attorney General
Consumer & Environmental
Protection Division
408 Galisteo St.
Santa Fe, NM 87501

FOR THE STATE OF NORTH CAROLINA

JOSHUA H. STEIN
ATTORNEY GENERAL

Taylor Crabtree
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
ATTORNEY GENERAL

Michael J. Fischer
Chief Deputy Attorney General
Pennsylvania Office of Attorney General
16th Floor
Strawberry Square
Harrisburg, PA 17120

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
ATTORNEY GENERAL

Paul A. Garrahan
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
ATTORNEY GENERAL

GREGORY S. SCHULTZ
Special Assistant Attorney General
Office of the Attorney General
150 South Main Street
Providence, RI 02903

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

Laura B. Murphy
Assistant Attorney General
Environmental Protection Division
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

Laura J. Watson
Senior Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117

FOR THE CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION

KATIE DYKES
COMMISSIONER

Brian P. Thompson
Acting Chief
Bureau of Water Protection and Land Reuse
Connecticut Department of Energy and Environmental Protection
79 Elm Street
Hartford, CT 06106-5127

FOR THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

BASIL SEGGOS
COMMISSIONER

New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1050

FOR THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY

MICHAEL S. REGAN
SECRETARY

Sheila Holman
Assistant Secretary of the Environment
North Carolina Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

FOR THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

PATRICK MCDONNELL
SECRETARY

Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17101