August 2, 2021

Filed via upload to electronic
docket at http://www.regulations.gov

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Environmental Protection Agency, "Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule," 86 Fed. Reg. 29541 (June 2, 2021), Docket ID No. EPA-HQ-OW-2021-0302.

Dear Administrator Regan,

Thank you for this opportunity to comment on the U.S. Environmental Protection Agency's ("EPA") notice of intention to reconsider and revise the Clean Water Act § 401 water quality certification rule finalized by the Trump administration in 2020 (the "2020 Rule").[1] On behalf of Waterkeeper Alliance, the undersigned U.S. Waterkeeper groups, and our respective tens of thousands of individual members and supporters, we respectfully urge you to fully restore cooperative federalism and state and tribal authority under § 401 of the Clean Water Act consistent with plain congressional intent, binding Supreme Court precedent, and decades of EPA interpretation and practice.

While we applaud EPA's announcement that it will "reconsider and revise" the 2020 Rule, we are extremely concerned about (1) the agency's stated intention to keep the current harmful and unlawful rule in place for the duration of a lengthy two-step rulemaking process, and (2) that the agency may use the 2020 Rule as its starting point, or baseline, and attempt to address the rule's many serious infirmities with minor revisions rather than a necessary complete rewrite. As we explain in detail herein, the 2020 Rule is, quite frankly, an utter disaster. It flies in the face of congressional intent; is harming public health, water quality, and wildlife; constitutes

[1] EPA, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020), *codified at* 40 C.R.R. Part 121.

arbitrary and capricious agency action and an abuse of discretion; and is otherwise unlawful.[2] It violates the plain, unambiguous meaning of the Clean Water Act ("CWA"), and disrespects decades of binding U.S. Supreme Court and myriad other federal court precedents. The 2020 Rule irresponsibly and dangerously impedes the ability of states, tribes, communities, and even of other federal agencies and EPA itself, to protect waters and ecosystems and the people and wildlife that depend on them across the country. EPA must change its stated course and repeal the 2020 Rule as soon as possible.

Waterkeeper Alliance is a not-for-profit environmental organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable and swimmable. We are composed of approximately 350 Waterkeeper groups based in 48 countries on 6 continents, covering over 2.75 million square miles of watersheds. In the United States, Waterkeeper Alliance represents the interests of more than 170 U.S. Waterkeeper groups, all of their individual members and supporters, as well as the collective interests of more than 15,000 individual supporting members that live, work and recreate in or near waterways across the country – many of which are severely impaired by pollution.

The CWA is the bedrock of our collective work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of all of our members and supporters, as well as to protect people and communities that depend on clean water for drinking, sustenance fishing, recreation, their livelihoods, and their survival. Our work – in which we have answered Congress' call for "private attorneys general" to enforce and defend the CWA when regulators lack the willingness or resources to do so themselves – requires us to develop and maintain scientific, technical, and legal expertise on a broad range of water quality and quantity issues.

We understand, and have seen firsthand, the importance of robust state and tribal[3] authority to review the potential impacts of proposed activities that have potential to discharge, and to deny or condition water quality certifications where such projects or activities will violate water quality standards or otherwise have adverse impacts on water quality and the environment. Restoring robust and undiluted state and tribal authority under § 401, as it had been interpreted

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[2] Waterkeeper Alliance and multiple Waterkeeper groups are currently plaintiffs in legal challenges to the 2020 Rule. *See, e.g., S.C. Coastal Conserv. League v. Regan*, 2:20-cv-03062 (D.S.C. filed Aug. 26, 2020) (Waterkeeper Alliance, Savannah Riverkeeper); *Suquamish Tribe v. Regan*, 3:20-CV-06137 (N.D. Ca. filed Aug. 31, 2020) (Columbia Riverkeeper); *Del. Riverkeeper Network v. EPA*, No. 2:20-CV-03412 (E.D. Pa. filed July 13, 2020) (Delaware Riverkeeper Network).

[3] As used herein in relation to CWA § 401 authority, "states" is intended to include tribes with § 401 authority via designation with Treatment as a State (TAS) status. 74 tribes currently have TAS status for purposes of administering § 401. *See* EPA, *Tribes Approved for Treatment as a State (TAS)*, *available at* https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.

for decades by courts and by EPA under longstanding regulations and guidance,[4] and consistent with the CWA's plain meaning, objective, and intent, is critical to our collective work to protect public health and our nation's waterways from dangerous pollution.

For nearly 50 years, § 401 generally functioned as Congress intended, with the vast majority of water quality certifications granted by states and tribes promptly after a request. Some certifications have included appropriate conditions necessary to protect communities and the environment from pollution, with very few outright denials. Notwithstanding the longstanding success of the § 401 water quality certification program, the previous administration, frustrated that a few states exercised their statutory authority to block a few fossil fuel projects that those states concluded would have harmed water quality, promulgated the 2020 Rule. The 2020 Rule codified new and unlawful substantive restrictions and unprecedented draconian procedural requirements that have hamstrung not only states and tribes, but also communities and individuals who regularly participate in and rely upon state certification processes, from protecting themselves and their waters from pollution, degradation, and destruction.

We implore EPA to reconsider its announced plans and to immediately repeal the 2020 Rule. In addition, the new § 401 rule EPA intends to promulgate must completely restore the long-established authority of states and tribes under § 401 as plainly intended by Congress, as recognized by decades of EPA interpretation and practice, and as reflected in Supreme Court precedent, and address the following serious and fundamental infirmities and illegalities:

- **Restore the full scope of authority under §401**: Inconsistent with the plain language of the CWA and binding U.S. Supreme Court precedent, the 2020 Rule unlawfully limits review by states and tribes to water quality impacts only from a "discharge" associated with a project, and not from the entire project "activity." The 2020 Rule further unlawfully defines "discharge" to mean a point source discharge to waters of the United States, which further contradicts the Supreme Court's interpretation of the statute and impinges on states' and tribes' authority to review many projects that have been subject to § 401 review for decades.
- **Reverse capricious and unreasonable timing and waiver provisions**: The oppressive and inflexible time limits and application of waiver provisions in the 2020 Rule appear to have been designed to make it impossible for many states and tribes to fulfill their

[4] *See* EPA, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (2010) (hereafter "2010 Guidance"); EPA, Wetlands and 401 Certification: Opportunities for States and Eligible Tribes (1989) (hereafter "1989 Guidance"). True and correct copies of the 2010 Guidance and the 1989 Guidance are submitted herewith and incorporated by reference as **Exhibits A and B**, respectively.

statutory obligation to protect water quality, especially for complex projects such as fossil fuel pipelines which often cross hundreds of waterways.
    - While Congress plainly intended to include reasonable time limits for §401 reviews, cases such as *Hoopa Valley Tribe v. FERC* have been grossly misinterpreted by EPA and other federal agencies to compel draconian and oppressive results inconsistent with plain congressional intent.
    - The 2020 Rule's timing and waiver provisions also create unnecessary uncertainties and inefficiencies for states that are wholly inconsistent with long-settled administrative law principles.
- **Ensure that the public's rights are protected**: Members of the public, and particularly environmental justice and other underserved communities, regularly rely upon § 401 by engaging in certification processes to protect their communities and waterways from pollution. By unreasonably and inflexibly restricting the substantive scope of § 401 and states' and tribes' authority and time to complete their reviews, the 2020 Rule also severely impinges upon the public's substantive and procedural rights. This is utterly inconsistent with the statute and settled federal authority, including the very first section of the Act, which demands that public participation "shall be provided for, encouraged, and assisted by the Administrator and the States."
- **Undo the federal agency "power grab"**: The 2020 Rule creates unconscionable procedural "traps" plainly designed to allow federal licensing agencies to "call foul" based on a purported defect in a state or tribe's § 401 review process, and conclude that the state or tribe has therefore waived its statutory authority because there is no remaining time to cure the purported defect. This bizarre regulatory construct turns the intent of § 401 on its head and plainly contradicts the statute, which requires that federal agencies "shall" respect state and tribal § 401 decisions. Federal agencies cannot be the arbiters of whether they must comply with unambiguous statutory requirements. Disputes regarding state § 401 decisions, whether substantive or procedural, are the domain of the judiciary, not of the very federal agencies that are the subjects of § 401's mandatory duties.
- **Repair the unlawful § 401 enforcement provision**: The 2020 Rule arguably (and clumsily) attempts to limit enforcement of § 401 certifications to federal licensing agencies, but in many states such certifications are issued as state permits that are enforceable under state law, and EPA has no business attempting to block states from enforcing their own water quality permits. In addition, § 505 of the CWA plainly allows individuals to enforce any "effluent standard or limitation" in a citizen suit, with "effluent standard or limitation" explicitly defined to include "a certification under [§ 401]."

In light of the many overlapping and compounded problems and illegalities baked into the 2020 Rule, we believe that it would be an egregious error for the agency to leave the rule on the books for even one day longer than is absolutely necessary. It would also be irresponsible and unwise for EPA to start with the current unlawful 2020 Rule as its "baseline." Instead, EPA should immediately repeal the 2020 Rule and write a new protective rule from scratch to fulfill the

objective and goals of the CWA, restore EPA's longstanding § 401 interpretation and practice, and comply with binding judicial precedent.

I. STATUTORY AND REGULATORY BACKGROUND

After decades of widespread and serious water pollution and public health problems across the nation, Congress enacted the modern CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[5] To achieve this objective, the Act explicitly prohibits the "discharge of any pollutant by any person,"[6] and defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."[7] Since 1972, EPA has had federal responsibility for advancing the Act's objective, as well as its national goal "of eliminating all discharges of pollutants into navigable waters by 1985," and the "interim 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 . . . by 1983."[8]

While Congress clearly intended when it passed the CWA to establish "an all-encompassing program of water pollution regulation," and to "occup[y] the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency,"[9] the Act was not intended by Congress to eliminate the role of states in water pollution control, regulation, and enforcement in the United States. Rather, the Act incorporates principles of "cooperative federalism," such that, despite the creation of new federal regulatory, permitting, and enforcement regimes to establish minimum standards and provide a federal water quality "floor" to protect and preserve all of the nation's waters, *i.e.*, the "waters of the United States," the states would continue to have a "primary responsibility" "to prevent, reduce, and eliminate pollution" using those regimes, standards and more stringent state laws within their borders.[10]

One of the clearest and most explicit steps that Congress took to respect the continuing role of the states when it passed the Act was to include § 401, which codified into federal law

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[5] 33 U.S.C. § 1251(a).

[6] *Id.* § 1311(a).

[7] *Id.* § 1362(12).

[8] *Id*. § 1251(a).

[9] *Milwaukee v. Illinois*, 451 U.S. 304, 317-18 (1981).

[10] *Id*. § 1251(b).

very specific and broad authority that would continue[11] to be held by the states through a water quality certification process that would be legally binding on federal licensing agencies:

> Any 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*** in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. … If the State ... ***fails or refuses to act*** on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. ***No license or permit shall be granted until the certification required by this section has been obtained or has been waived*** as provided in the preceding sentence. ***No license or permit shall be granted if certification has been denied*** by the State….[12]

In addition to empowering the states with this unique and important statutory authority, Congress also granted states extremely broad authority to issue certifications that require satisfaction by applicants of specific conditions. The language that Congress chose plainly and unambiguously demonstrates that such conditioned certificates are entirely within the purview of the states, and that any conditions incorporated by a state into a water quality certification must ("shall") become mandatory requirements in any federal license or permit:

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

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[11] State water quality certification authority pre-existed the CWA under the Water Quality Improvement Act of 1970, § 103. *See S.D. Warren v. Maine Bd. of Envt'l Protection*, 547 U.S. 370, 374 (2006) (hereafter "*S.D. Warren*") .

[12] 33 U.S.C. § 1341(a) (emphasis added). The cited CWA provisions include a state's effluent limitations, 33 U.S.C. §§ 1311, 1312; water quality standards and implementation plans, *id*. § 1313; national standards of performance, *id*. § 1316; and toxic and pretreatment standards, *id*. § 1317.

> ***shall become a condition on any Federal license or permit*** subject to the provisions of this section.[13]

As a unanimous U.S. Supreme Court explained in *S.D. Warren*:[14]

> State certifications under § 401 ***are essential in the scheme to preserve state authority to address the broad range of pollution***, as Senator Muskie explained on the floor when what is now § 401 was first proposed:
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> > "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970).
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> These are the very reasons that Congress ***provided the States with power*** to enforce "***any other appropriate requirement of State law***," 33 U.S.C. § 1341(d), by ***imposing conditions*** on federal licenses for activities that may result in a discharge, *ibid*.[15]

S.D. Warren is just one of many rulings by federal and state courts that have reviewed state decisions under § 401 and consistently held that state authority to deny or condition water quality certifications under § 401 is extremely broad. Generally, as long as state § 401 denials and conditions are founded in protecting water quality (including enforcing state antidegradation policies and maintenance of designated uses), or in imposing other appropriate state law-based environmental considerations (such as environmental mitigation requirements), they have been upheld by the courts as valid exercises of states' exclusive and binding statutory authority.[16]

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[13] 33 U.S.C. § 1341(d) (emphasis added).

[14] 547 U.S. 370 (2006). All of the Justices joined in the *S.D. Warren* opinion, with the partial exception of Justice Scalia, who joined as to all except Part III-C.

[15] *Id*. at 386 (emphasis added) (citations omitted).

[16] *See, e.g.*, *S.D. Warren*, 547 U.S. 370, 385-86 (2006) (discussing the importance Congress identified in the CWA of respecting the states' concerns, and unanimously upholding state authority to require minimum stream flows and migratory fish passage); *P.U.D. No 1 of Jefferson Cty v. Wa. Dep't of Ecology*, 511 U.S. 700, 715 (1994) (hereafter "*P.U.D.*") (upholding state authority to include conditions in a 401 certification that the state determined were necessary to protect and comply with water quality standards "or any other 'appropriate requirement of State law,'" and explaining that "under the literal terms of the

Notwithstanding the above-quoted plainly and unambiguously expressed intent of Congress that the authority to make § 401 decisions is held by the states – and myriad court decisions holding that § 401 provides the states with an exclusive veto authority[17] over federal approvals of projects when states determine that proposed activities may adversely affect state water quality – the 2020 Rule essentially rewrote the statute and upended decades of precedent. Plainly and simply, the 2020 Rule was an *ultra vires* federal power grab, and EPA must immediately correct the previous administration's unfortunate attempt to subvert the plain intent of Congress at the expense of all states, tribes, and the public health and environment that EPA is required by its mission and by law to protect.

II. CWA § 401 IS A VITAL AND NECESSARY TOOL FOR STATES AND TRIBES TO PROTECT THEIR WATERS AND COMMUNITIES FROM POLLUTION.

States and tribes rely every day on § 401 to protect their waters and the public from pollution. While fossil fuel infrastructure projects have been controversial in recent years, and their promotion was cited by the previous administration as the primary impetus for the Executive Order and resulting 2020 Rule, many other types of projects and activities also require federal licenses or permits and have the potential to discharge. In other words, the weakening of state and tribal § 401 authority under the 2020 Rule was not limited to energy infrastructure projects. Some examples of activities and projects that often require § 401 certifications, listed here with typically involved Federal licensing agencies, include without limitation:

- Interstate gas pipelines – FERC, Army Corps
- Hydroelectric dams/facilities – FERC
- Other dams and diversions (water storage and supply, etc.) - Department of the Interior, Army Corps, Fish and Wildlife Service
- Nuclear power plant licensing/relicensing – Nuclear Regulatory Commission
- Bridge/highway construction – Federal Highway Administration, Army Corps

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statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 645-49 (4th Cir. 2018) (hereafter "*Sierra Club*"); *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 731-34 (4th Cir. 2009).

[17] *See, e.g.*, *Constitution Pipeline Co. v. N.Y. Dep't of Envt'l Conserv.*, 868 F.3d 87, 101 (2d Cir. 2017) ("Thus, we have indeed referred to § 401 as 'a statutory scheme whereby a single state agency *effectively vetoes* an energy pipeline that has *secured approval from a host of other federal and state agencies*.'") (citing cases) (emphasis in original); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (hereafter "*Keating*") (explaining that through the § 401 requirement, Congress intended that the states would retain power to block, for environmental reasons, local water projects that might otherwise win federal approval"); *U.S. v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989).

- CWA discharges of pollutants - All NPDES permits (POTWs, power plants, industrial discharges, etc. – EPA (in non-NPDES-delegated states)
- Commercial and housing developments - Army Corps
- Coal and other federally regulated mining projects - OSMRE, Army Corps

The substantive and significant changes to federal law that EPA codified in the 2020 Rule dramatically curtailed state and tribal authority to review and address impacts to waters for all of the above activities, and many others.[18]

As EPA has noted, the § 401 certification process is often the only opportunity for states and tribes to weigh in and ensure compliance with state water quality standards and other appropriate requirements for federally approved projects.[19] This is particularly true for licensing matters before federal commissions, in which the commissions control virtually every aspect of, *e.g.*, the hydroelectric, interstate gas pipeline, and nuclear power plant licensing and environmental review processes pursuant to regulatory authority granted under the National Power Act (FERC), the Natural Gas Act (FERC), and the Atomic Energy Act (NRC).[20]

Because Congress's intent behind § 401 is so obvious and straightforward, and its requirements have been so clearly understood, federal, state, and tribal agencies, applicants, and the public have worked for decades through licensing and permitting processes to ensure robust compliance with § 401. For the vast majority of applications and projects, the § 401 certification process has not been controversial, and most requests are granted by states within a matter of weeks to a few months. Occasionally, applicants propose to conduct activities that have enormous potential to adversely affect water quality. For example, constructing an interstate gas pipeline typically requires crossing hundreds of rivers, streams and wetlands, often including a state or tribal government's highest-quality waters, such as drinking water sources and native trout spawning streams, and often by ditching directly through stream banks and beds. Such ditching and other construction impacts can be massively destructive to watersheds and have enormous ecological and public health consequences. Pipeline construction also requires that enormous rights-of-way be clear-cut, often through undeveloped greenfield areas, virgin forests and steep slopes along a planned pipeline route. Tens of thousands of trees are often felled, removed, and never replaced. New access roads are built to provide access to heavy construction

[18] For numerous other examples of activities that may discharge and require federal licenses or permits, and thus are likely to trigger the § 401 certification requirement, *see* Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 Ecology L. Q. 201, 219-29 (1996) (hereafter "*Untapped Power*"). A true and correct copy of *Untapped Power* is submitted herewith and incorporated by reference as **Exhibit C**.

[19] *See, e.g.*, 2010 Guidance, Ex. A, at 2.

[20] *Id*.

equipment. All of these activities have the potential to result in discharges to invaluable state and tribal water resources, and to not only degrade them, but sometimes to destroy them permanently.

The compelling state, tribal and public interest in protecting such water resources is self-evident. Congress recognized that federal agencies often lack expertise about specific state, tribal, and local ecosystems and their conditions, sensitivities, and potential impairments, and therefore plainly intended to empower states and tribal governments to consider such potentially polluting activities and their impacts, and to decide what conditions must be imposed to ensure that the proposed activity will not cause significant adverse environmental impacts. Rarely, a state's or tribal government's technical analysis may reveal that such resources are so valuable and/or that the resulting environmental impacts will be so severe that they cannot be mitigated to an acceptable degree even with a conditioned § 401 certificate, and a request for certification may have to be denied. Again, when such circumstances exist, Congress could not have been more clear that denial of the certification and of the federal license is precisely what was intended when it passed the statute:

> ***No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State***….[21]

It was entirely inconsistent with EPA's mission and statutory obligations for the agency to actively attempt to weaken and dilute the authority that Congress expressly granted to the states and tribes, as it did in the 2020 Rule. EPA must reverse course and do everything in its power to actively encourage and assist the states to fully utilize their § 401 authority to advance and achieve the plainly-stated objective and goals of the Act.[22]

III. WATERKEEPER ALLIANCE, WATERKEEPER GROUPS, AND OUR COLLECTIVE INDIVIDUAL MEMBERS DEPEND UPON § 401 TO PROTECT OUR WATERS AND COMMUNITIES FROM POLLUTION.

In addition to states and tribes, members of the public, including non-profit, public interest organizations such as Waterkeeper Alliance and Waterkeeper groups and many environmental justice and other underserved communities, also heavily rely upon § 401 as a vital tool to address environmental impacts from activities that require federal approvals. Waterkeeper

[21] 33 U.S.C. § 1341(a) (emphasis added).

[22] 33 U.S.C. § 1251(a).

groups have frequently advocated for states to implement measures to protect water quality in § 401 matters involving, among other projects, proposed fossil fuel pipelines, export facilities, dredging and filling of wetlands, highways and bridge construction, and new and existing power plants and dams. Relying on the substantive and procedural protections provided by § 401, Waterkeeper groups have provided states with technical analyses and expertise, and shared their and their communities' concerns about water impacts with state regulators. Many states have taken such public input into account when making § 401 certification decisions, as the Act requires:

> Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter ***shall be provided for, encouraged, and assisted by the Administrator and the States***.[23]

The 2020 Rule has already adversely impacted the ability of Waterkeeper groups and other members of the public to share their expertise and concerns about environmental impacts with states and tribes, and has drastically limited the ability of states and tribes to take action to address these concerns in their § 401 certification decisions.

A. Waterkeeper Groups Have Utilized § 401 Notice and Comment Processes to Assist States in Preventing or Mitigating Extensive Impacts from Proposed Pipelines.

Waterkeeper Alliance and myriad Waterkeeper groups have advocated during § 401 notice and comment periods to address concerns about fossil fuel pipeline impacts. For example, in 2018, Waterkeeper Alliance, Rogue Riverkeeper, Columbia Riverkeeper, and partners raised concerns with the Oregon Department of Environmental Quality (ODEQ) about the water quality impacts of the Pacific Connector Pipeline and related Jordan Cove LNG Export Facility. Over 43,000 comments were submitted to the state during the § 401 comment period,[24] many from members of Waterkeeper Alliance and Waterkeeper groups. In 2019, agreeing with many of our concerns, ODEQ denied a § 401 certification for the project without prejudice, citing insufficient information to assure that water quality standards would be met. Additionally, the state found that analysis of the information that was available suggested that water quality standards for temperature and turbidity would likely be violated and the project would likely result in an

[23] 33 U.S.C. § 1251(e) (emphasis added).

[24] Juliet Grable, Water Watchdogs Keep Up Fight Against Oregon LNG Terminal, Earth Island Journal (Nov. 28, 2018), available at http://www.earthisland.org/journal/index.php/articles/entry/water-watchdogs-fight-oregon-liquified-natural-gas-lng-terminal/.

overall lowering of water quality, in violation of the state's antidegradation policy.[25] Notably, Pembina, the project sponsor, has the right to reapply to the state for a § 401 certification, and any new application would likely be governed by the defective and unlawful 2020 Rule.

Waterkeeper Alliance, Hudson Riverkeeper, and other groups also intervened in a FERC proceeding in connection with orders issued by FERC that granted a petition by Constitution Pipeline Company and ruled that New York had waived its § 401 authority with respect to a major fracked gas pipeline project in central New York State.[26] New York had denied the subject § 401 application more than three years before FERC changed its position after *Hoopa Valley Tribe* was decided and then unfairly and retroactively applied its draconian new position against states whose conduct FERC had repeatedly acknowledged was appropriate at the time New York had acted. Shortly after we filed our petition for review of FERC's orders,[27] the company announced that it had decided to abandon the project. We are currently awaiting a decision from the Second Circuit regarding potential remand and/or vacatur of the challenged FERC orders.

Over the past two years, Haw Riverkeeper has also submitted comments that raised concerns with the North Carolina Department of Environmental Quality ("NCDEQ") about the potential impacts of the proposed Mountain Valley Pipeline, Southgate extension. NCDEQ has now twice denied a § 401 certificate for the pipeline.[28]

B. Waterkeeper Organizations Have Utilized § 401 Certification Processes to Assist States in Mitigating or Stopping Water Quality Impacts of Existing Power Plants and Hydroelectric Dams.

In 2010, Hudson Riverkeeper submitted section § 401 comments to the New York Department of Environmental Conservation ("NYSDEC") detailing the impacts that the Indian Point Energy Center has on the Hudson River and groundwater under and near the plant.[29]

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[25] Oregon Department of Environmental Quality, DEQ issues a decision on Jordan Cove's application for 401 Water Quality Certification (May 6, 2019), available at https://www.oregon.gov/newsroom/pages/NewsDetail.aspx?newsid=3273.

[26] *See, e.g.*, In re Constitution Pipeline Company, LLC, *Order on Voluntary Remand*, 168 FERC ¶ 61,129 (Aug. 28, 2019), available at https://cms.ferc.gov/sites/default/files/2020-06/20190828174308-CP18-5-000.pdf.

[27] NYS Dep't of Envtl. Conserv. v. FERC, No. 19-4338 (2d Cir. filed Dec. 30, 2019).

[28] North Carolina Department of Environmental Quality, Reissuance of DENIAL of 401 Water Quality Certification and Jordan Lake Riparian Buffer Authorization Application with Supplement for MVP Southgate project (April 29, 2021), *available at* https://files.nc.gov/ncdeq/pipelines/2018-1638v3-MVP-Southgate-04292021.pdf.

[29] Riverkeeper Comments on Entergy Nuclear Operations, Inc. Application for Section 401 Certification for Indian Point Units 2 and 3 (March 25, 2010), *available at*

Riverkeeper noted the significant impact of the cooling water intake system at the plant on fisheries in the Hudson River, including endangered species, as well as the continuing leaks of radioactive waste from the power plant into the groundwater and the Hudson River. NYSDEC ultimately declined to issue a § 401 certification for the plant, citing the impacts raised by Riverkeeper.[30]

Waterkeepers Chesapeake and Lower Susquehanna Riverkeeper submitted comments to the Maryland Department of the Environment ("MDE") during the § 401 comment period for the relicensing of Exelon's Conowingo Dam. The comments focused on the sediment and associated nutrients that are trapped by the dam and then released by high-flow events. During the § 401 certification process, Exelon's application was submitted, withdrawn, and resubmitted three times, each time because the applicant failed to include the required information, dragging the § 401 certification process on for four years. In 2018, MDE issued a certification with conditions that directed Exelon to develop a nutrient management plan. Waterkeepers Chesapeake and Lower Susquehanna Riverkeeper challenged MDE's certification for failing to include conditions aimed at reducing the sediment being released by the dam.[31] Exelon challenged the authority of MDE to require nutrient reductions under § 401, and Waterkeepers Chesapeake and Lower Susquehanna Riverkeeper intervened in that action in support of MDE. In 2019, MDE and Exelon announced a secret settlement had been reached that fell far short of protecting Maryland's waterways and required the state to waive its 401 authority to protect local water quality from impacts of dams, without any details on how water quality would be protected. In March 2021, FERC approved Exelon's Conowingo relicensing for the next 50 years. This license includes the extremely flawed 2019 settlement agreement between MDE and Exelon. Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper and Sassafras Riverkeeper have challenged FERC's 50-year dam license in court arguing, *inter alia*, that FERC's action is unlawful because it does not include the cleanup requirements that the MDE determined are

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https://www.riverkeeper.org/wp-content/uploads/2010/03/2010.03.25.Riverkeeper-Comments-on-Entergy-Application-for-401-WQC-FINAL.pdf.

[30] New York Department of Environmental Conservation, Notice of Denial of Joint Application for CWA § 401 Water Quality Certification (April 2, 2010), *avialable at* https://www.scenichudson.org/sites/default/files/IP_WQC_denial_4.2.10.pdf. A true and correct copy of the Notice of Denial is submitted herewith and incorporated by reference as **Exhibit D**. Several years after this denial, NYSDEC issued a § 401 certification to Indian Point after a settlement between the parties resulted in an agreement to shutter the plant. The plant has since been shut down.

[31] Administrative Appeal Final Decision to Issue Clean Water Act Section 401 Certification for the Conowingo Hydroelectric Project, June 8, 2018, *available at* https://mde.maryland.gov/programs/Water/WetlandsandWaterways/Documents/ExelonMD/Administrative_Appeal_06-08-2018_FINAL.pdf.

necessary to assure the Dam's compliance with water quality standards and, in particular, to restore the health of the Lower Susquehanna River and the Chesapeake Bay.[32]

C. Waterkeeper Organizations Have Utilized Section 401 Notice and Comment and Hearing Processes to Assist States in Mitigating Water Quality Impacts Of Other Projects, Including Bridge Construction and Dredging.

Hudson Riverkeeper submitted comments to NYSDEC on a § 401 certification request regarding the construction of a new bridge to replace the Tappan Zee Bridge across the Hudson River connecting Westchester and Rockland Counties. Riverkeeper's concerns focused on impacts of construction on endangered Atlantic and shortnose sturgeons and on increased turbidity near the bridge construction site that violated New York's narrative water quality standard. In 2013, Riverkeeper and the NYSDEC entered into a settlement agreement that established conditions on construction to minimize the impacts on the river ecosystem and fish.[33]

San Francisco Baykeeper submitted comments to the San Francisco Bay Regional Water Quality Control Board regarding a § 401 certification for U.S. Army Corps' plans for dredging in San Francisco Bay. The comments focused on the impacts of hydraulic dredging on endangered and threatened native fish. In 2015, the State issued the § 401 certification with conditions limiting the means and location of dredging in order to protect fish.[34] The U.S. Army Corps has failed to fully implement these conditions, and San Francisco Baykeeper has intervened in support of the State.[35] The district court ruled in favor of the Army Corps, and the appeal was argued on June 14, 2021 before a Ninth Circuit panel.[36]

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[32] Waterkeepers Chesapeake, *Waterkeeper Groups File Legal Challenge of Federal Order to Relicense Conowingo Dam* (June 17, 2021), *available at* https://waterkeeperschesapeake.org/waterkeeper-groups-file-legal-challenge-of-federal-order-to-relicense-conowingo-dam/

[33] Riverkeeper, *Riverkeeper Reaches Settlement Agreement with NY State on Tappan Zee Bridge Project* (March 27, 2013), *available at* https://www.riverkeeper.org/news-events/news/preserve-river-ecology/settlement-with-ny-state-on-tappan-zee-bridge/.

[34] California Regional Water Quality Control Board, San Francisco Bay Region, Reissued Waste Discharge Requirements and Water Quality Certification for U.S. Army Corps of Engineers, San Francisco District San Francisco Bay Federal Channel Maintenance Dredging Program 2015 Through 2019, Order No. R2-2015-0023.

[35] Pl. and Pl. Intervenor's Joint Notice of Mot. and Mo. for Summ. J.; Mem. of Points and Authorities in Supp. Thereof, *San Francisco Bay Comm'n v. United States Army Corps of Eng'rs*, No. 3:16-cv-05420-RS (N.D. Cal. 2019).

[36] https://www.ca9.uscourts.gov/media/video/?20210614/20-15576/

The above examples represent only a small percentage of the myriad matters in which Waterkeeper Alliance and Waterkeeper groups have frequently relied on CWA § 401 to protect their watersheds and communities, demonstrating our collective interest in an immediate repeal of the 2020 Rule and a prompt and complete restoration of EPA's § 401 regulations.

IV. THE 2020 RULE DRAMATICALLY WEAKENED STATE AND TRIBAL AUTHORITY CONTRARY TO LAW.

We note initially that the previous administration had neither a legitimate regulatory purpose (*i.e.*, a reason for its actions that is consistent with the objective and goals of the CWA), nor any rational explanation, for its decision to so dramatically reinterpret § 401 in the 2020 Rule. EPA did not even attempt to rationally explain how weakening and/or depriving states and tribes of their § 401 authority is in any way consistent with advancing EPA's mission or the objective and goals of the CWA. The truth is that the EPA took those actions because the President ordered it to do so, and the decision had nothing to do with a purported new "holistic" legal interpretation of the CWA.[37]

Congress clearly understood in 1972 that federally-authorized activities could result in water pollution, and also knew that, in the absence of congressional direction, principles of federal preemption might well exempt many federally licensed activities from state environmental oversight.[38] Congress accordingly adopted § 401 to ensure that federally licensed activities would not escape state regulation, and § 401 expressly enables states to apply their own water pollution control programs to such activities.[39] As EPA made clear three decades ago, "the legislative history of [§ 401(d)] indicates that the Congress meant for the States to impose ***whatever conditions on the certification are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns***."[40] Respecting the state and tribal authority granted by Congress, EPA has historically taken a very broad view of the types of conditions that states may impose in § 401 certifications.[41]

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[37] *See* Executive Order, 84 Fed. Reg. at 15496, § 3(a)-(c).

[38] *See California v. FERC*, 495 U.S. 490, 506-507 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 175-76 (1946).

[39] *See Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 292-293 (D.C. Cir. 2003); *American Rivers, Inc. v. FERC,* 129 F.3d 99, 111 (2d Cir. 1997).

[40] 1989 Guidance, Ex. B, at 23, 25-26 (emphasis added).

[41] For numerous such examples, see *Untapped Power*, Ex. C, at 256-58; 1989 Guidance, Ex. B, at 23-27 & App. D.

The 2020 Rule never rationally explains why the agency's new conclusions and interpretations differ so markedly from its own longstanding interpretations that it consistently and repeatedly articulated for decades. For example, in its previous regulations governing state certifications, which were in effect for almost 50 years, EPA repeatedly referenced that proposed "activities," not just "discharges,"are subject to certification review.[42] And in its 2010 Guidance, EPA correctly explained that once the trigger, or as the *P.U.D.* Court referred to it, the "threshold condition,"[43] for a required § 401 certification has been crossed (*i.e.*, a proposed activity that requires federal approval and may result in a discharge), "the conditions and limitations included in the certification ***may address the permitted activity as a whole. Certification may address concerns related to the integrity of the aquatic resource and need not be specifically tied to a discharge.***"[44]

If Congress intended to define or limit the realm of state and tribal authority as EPA concluded in the 2020 Rule, it could and would have said so. Instead, it said exactly the opposite, as the Act expressly allows states to impose "standard[s] or limitation[s] respecting discharges of pollutants" or "abatement of pollution" that are more stringent than, or in addition to, those federal standards set out under the Act.[45] Through § 401, Congress explicitly left the authority to the states to ensure that their state water pollution laws would continue to be respected after passage of the Act. EPA has no statutory authority whatsoever to attempt to narrowly construe or limit state and tribal authority in the 2020 Rule, and the rule is an unprecedented insult to federalism principles and flies in the face of myriad binding judicial decisions.[46]

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[42] *See* former 40 C.F.R. §§ 121.1, 121.2(a)(3), (4).

[43] *P.U.D.*, 511 U.S. at 712.

[44] 2010 Guidance, Ex. A, at 23 (citing *P.U.D. No. 1*) (emphasis added).

[45] *See* 33 U.S.C. § 1370.

[46] *See, e.g.*, *S.D. Warren*, 547 U.S. at 386-87 (2006) (unanimously upholding State authority to require minimum stream flows and migratory fish passage); *P.U.D.*, 511 U.S. at 715 (upholding state authority to include conditions in a 401 certification that the state determined were necessary to protect and comply with water quality standards "or any other 'appropriate requirement of State law")*; Keating*, 927 F.2d at 622-23 (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. It is for these reasons that a number of courts have held that disputes over such matters, at least so long as they precede the issuance of any federal license or permit, are properly left to the states themselves.") .

A. The 2020 Rule Unlawfully Reduced the Scope of Activities, Impacts, and Conditions that States and Tribes May Consider in Section 401 Certification Reviews.

EPA asserted in the preamble to the 2020 Rule that a "holistic analysis" it purportedly undertook following the former president's 2019 Executive Order revealed that states, tribes, courts, the public, and even EPA itself, have all been getting § 401 wrong for five decades.[47] Accordingly, almost 50 years after it promulgated its previous § 401 water quality certification regulations, EPA for the first time unlawfully limited the scope of activities, impacts, and conditions that may be considered by states and tribes in their § 401 reviews. EPA's primary means of accomplishing this gutting of § 401 was via a new provision expressly limiting the "scope of certification," combined with impermissibly narrow definitions of "water quality requirements" and "discharge."

With respect to the "scope of certification," the 2020 Rule states:

> The scope of a Clean Water Act section 401 certification ***is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements***.[48]

"Water quality requirements" are defined in the 2020 Rule as:

> applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements ***for point source discharges into waters of the United States***.[49]

"Discharge" is defined in the 2020 Rule as:

> a discharge ***from a point source into a water of the United States***.[50]

These unprecedented and unlawful restrictions on the scope of § 401 authority, and the extremely narrow definitions of "water quality requirements" and "discharge," pervade and infect virtually every aspect of the 2020 Rule, in direct violation of the Supreme Court's opinions in *P.U.D.* and *S.D. Warren*. For example, when the *P.U.D.* Court examined whether § 401 certification

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[47] 2020 Rule, 85 Fed. Reg. at 42229-230.

[48] 40 C.F.R. § 121.3 (emphasis added).

[49] 40 C.F.R. § 121.1(n) (emphasis added).

[50] 40 C.F.R. § 121.1(f) (emphasis added).

requirements apply only to impacts from "discharges," or more broadly to impacts from any "activity," it explained:

> Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth "any effluent limitations and other limitations ... necessary to assure that *any applicant*" will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). ***The language of this subsection contradicts petitioner's claim that the State may only impose water quality limitations specifically tied to a "discharge." The text 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***."[51]

Additionally, as the unanimous Supreme Court in *S.D. Warren* held, congressional awareness of the states' legitimate concerns about the impacts of any "activities" that may affect water quality "are the very reasons that Congress provided the States with power to enforce 'any other appropriate requirement of State law,' 33 U.S.C. § 1341(d)**,** by imposing conditions on federal licenses for ***activities*** that may result in a discharge...."[52] The previous administration's virtual thumbing of its nose at such direct and binding Supreme Court precedent in favor of the views of a two-Justice dissent is an insult to the rule of law, and simply cannot stand.

Several years prior to *P.U.D.*, in earlier formal guidance, EPA reached similar conclusions about the breadth of state § 401 review:

> In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that ***the applicant*** will comply with effluent limitations, water quality standards, ... with any State law provisions or regulations more stringent than those sections, and with "any other appropriate requirements of State law."
>
> The legislative history of the subsection indicates that the Congress meant for the States to impose ***whatever conditions on the certification are necessary to***

[51] *P.U.D.*, 511 U.S. at 711-12 (emphasis added).

[52] 547 U.S. at 386 (emphasis added).

ensure that an applicant complies with all State requirements that are related to water quality concerns.[53]

Nowhere in the CWA or its legislative history, in EPA's prior § 401 regulations, or in the 1989 or 2010 guidance documents, is there even a hint that Congress intended the scope of impacts that states and tribes may consider under § 401 might be limited only to point source discharges to waters of the United States, as opposed to the full breadth of proposed "activities" that might affect water quality. The Supreme Court in *P.U.D.* explicitly rejected that notion.[54] Nor is there any support for the concept that EPA has authority under § 401 to limit the scope of a state's or a tribe's protectable interests in its waters to "point source discharges to waters of the United States."

In sum, EPA simply cut from whole cloth draconian new regulatory limits it decided to impose on state statutory authority to appease the former President and polluting industries. The 2020 Rule is utterly devoid of statutory and/or judicial support, is seriously interfering with states' and tribes' efforts to protect their waters,[55] and must be immediately repealed and replaced.

B. The 2020 Rule Misappropriated Decisional Authority from the States and Tribes, and Unlawfully Rendered Federal Licensing Agencies the Arbiters of Whether They Must Comply with Federal Law.

1. Federal Agency Obligations Under § 401 Are Mandatory.

As noted above, the clear and unambiguous language in § 401 leaves no question that it was intended by Congress to empower the states and tribes to deny or condition water quality certifications for activities that require federal approval and that may result in a discharge to

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[53] 1989 Guidance, Ex. B, at 23, 25-26 (emphasis added).

[54] *P.U.D.*, 511 U.S. at 711-12.

[55] *See, e.g.*, Indian Point Denial, Ex. D, at 10 (basing denial, in part, on the conclusion that the "continued operation of Units 2 and 3 in once-through cooling mode for an additional 20 years, as proposed by Entergy in its Joint Application, would continue to exacerbate the adverse environmental impact upon aquatic organisms caused by the facilities' [cooling water intake structures]. ***Consequently, the continued operation of Units 2 and 3 would be inconsistent with the best usage of the Hudson River in 6 NYCRR § 701.11 for fish, shellfish, and wildlife propagation and survival.***) (emphasis added). This is but one example where a state could seek to deny or condition a § 401 water quality certification for an ***activity*** upon grounds explicitly authorized by the statute, but the 2020 Rule's new discharges-only limitation could preclude the state's exercise of its clear statutory authority to regulate cooling water intakes under § 401.

waters within their borders, and that such state and tribal decisions are mandatory and legally binding upon federal licensing agencies:

> 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 NWP—i.e., the Corps "***may 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 [state Section 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)).[56]

The Supreme Court has also spoken directly to this question, albeit in the context of a similar (but not identical) mandatory agency conditional certification of a Federal license:

> Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that "'[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.'" *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, (1980)). ***Congress' apparent desire that the Secretary's conditions "shall" be included in the license must therefore be given effect unless there are clear expressions of legislative intent to the contrary***.[57]

Notwithstanding the clear grant of authority by Congress to the states and tribes in § 401, and the plain mandatory statutory requirement that conditions included in state and tribal certifications "shall become a condition on any Federal license or permit," the 2020 Rule incredibly and untenably authorizes federal licensing agencies to review the propriety of state

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[56] *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635 (4th Cir. 2018) (emphasis added).

[57] *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma & Pala Band of Mission Indians*, 466 U.S. 765, 772 (1984) (emphasis added) (parallel citations omitted).

certification decisions, and to set aside or ignore states' § 401 denials or conditioned certificates when the federal agency determines that the state's process was flawed in some manner.[58]

Nothing in § 401 can reasonably be read to leave any discretion to federal licensing agencies to decide whether to accept or decline state water quality certification decisions or conditions. The authority to make these decisions plainly and simply rests with the states and tribes. It is axiomatic that "shall" creates a mandatory obligation, and EPA's attempt in the 2020 Rule to amend this mandatory statutory language by regulatory fiat is an obvious administrative law nonstarter. The 2020 Rule's newly-manufactured authority for the federal executive branch to review state and tribal § 401 decisions is utterly unprecedented and inconsistent with plainly expressed Congressional intent and decades of judicial precedent.[59]

Notably, Congress has demonstrated in other sections of the CWA that when it intends to grant federal agencies authority to review, set aside or veto statutorily-mandated decisions by other state, tribal, and federal agencies, it knows precisely how to do so in the terms of the statute. For example, states with delegated NPDES authority are authorized to issue CWA § 402 discharge permits, but EPA retains express authority under the statute to review and veto those

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[58] *See* 40 C.F.R. § 121.9 (allowing federal agencies to determine that states have waived their authority if they conclude that the state has failed to satisfy one or more of numerous procedural requirements set forth in the 2020 Rule, even where the subject state has timely and rationally "acted" upon the request.)

[59] *See, e.g., S.D. Warren*, 547 U.S. at 386-87 (2006) (unanimously upholding state authority to require minimum stream flows and migratory fish passage); *P.U.D.*, 511 U.S. at 715 (upholding state authority to include conditions in a 401 certification that the state determined were necessary to protect and comply with water quality standards "or any other 'appropriate requirement of State law"); *Sierra Club*, 909 F.3d at 648 ("We decline to sanction this level of discretionary authority that would allow the Corps, with few guardrails, to replace state-imposed conditions. … Put simply, the state may prefer protecting the environment in one way to protecting it in another way. But in enacting Section 1341(a)(1), Congress did not intend to allow federal agencies to "override" such state policy determinations. S. Rep. 92–414, at 69 (1971). … Absent any further limiting principles, the Corps' interpretation would radically empower it to unilaterally set aside state certification conditions as well as undermine the system of cooperative federalism upon which the Clean Water Act is premised"); *American Rivers,* 129 F.3d at 110-11 (the CWA and its scheme for administrative and judicial review does not suggest that Congress wanted federal agencies to "second-guess the imposition of conditions."); *Keating*, 927 F.2d at 622-23 (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. It is for these reasons that a number of courts have held that disputes over such matters, at least so long as they precede the issuance of any federal license or permit, are properly left to the states themselves.") (collecting cases); *see also Escondido Mut. Water Co.*, 466 U.S. at 765, 777 (1984) ("The real question is whether the Commission is empowered to decide when the Secretary's conditions exceed the permissible limits. … However, the statutory language and legislative history conclusively indicate that it does not; the Commission "shall" include in the license the conditions the Secretary deems necessary. It is then up to the courts of appeals to determine whether the conditions are valid.").

permits.[60] Similarly, Congress granted the Army Corps authority to issue CWA § 404 "dredge and fill" permits, but specifically empowered EPA under the statute to veto those permits under certain conditions.[61] No such statutory review or veto authority exists under § 401, further demonstrating the mandatory and binding nature of state and tribal § 401 decisions upon federal licensing agencies.

In sum, Congress chose to clearly and explicitly empower states and tribes to make decisions concerning their own water quality standards and other appropriate state or tribal laws. Congress did not explicitly or implicitly grant federal licensing agencies any review authority or discretion whatsoever regarding whether timely state or tribal decisions must be respected and accepted by federal agencies. This entire new federal review-and-waiver scheme that the previous administration manufactured in the 2020 Rule has clearly and unconscionably been designed to eviscerate and deprive the states and tribes of federal statutory authority they have held for a half century. Congress said what it meant and meant what it said: the federal government "shall" respect and accept such decisions made by the states.

2. The 2020 Rule Shifted Authority to Review the Propriety of State and Tribal § 401 Decisions from the Judiciary to the Federal Executive Branch, Potentially Altering Burdens of Proof in Judicial Challenges.

The 2020 Rule purports to not only create new and unprecedented authority for federal agencies to ignore state and tribal § 401 decisions, it also impermissibly encroaches on the established functioning and authority of the state and federal judiciaries. In the history of the CWA, there has never been any serious question that review of the propriety and merits of state and tribal § 401 decisions is a judicial function. It is certainly not the purview of federal licensing agencies, which are the subjects of § 401's mandatory duties.[62] There is no statutory or judicial support for EPA's bizarre proposition that federal agencies are authorized to invade this judicial function of reviewing final state and tribal agency determinations, and to make first-instance determinations about whether they are actually required to respect states' and tribes' authority and comply with unambiguous mandatory federal statutory obligations. Yet, that is precisely what EPA has done in the 2020 Rule via a combination of procedural "traps" and overbroad waiver provisions.

The 2020 Rule also appears to have altered party positions and burdens of proof associated with judicial review of § 401 disputes. For decades, challenges to state § 401

[60] *See* 33 U.S.C. § 1342(c)-(d).

[61] *See* 33 U.S.C. § 1344(c), (j).

[62] *See* n.59, *supra* (citing multiple cases).

decisions have generally been adjudicated in state courts because § 401 certifications are generally treated as state permits, and involve state water quality standards and other state laws and regulations:

> In most cases, if a party seeks to challenge a state certification issued pursuant to section 401, it ***must do so through the state courts***. The reason for this rule is plain enough. The Clean Water Act gives a primary role to states "to block ... local water projects" by imposing and enforcing water quality standards that are more stringent than applicable federal standards. *Keating v. FERC*, 927 F.2d 616, 622 (D.C.Cir.1991). ***Therefore, 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.*** *Id*.[63]

Federal courts also sometimes adjudicate § 401 disputes, *e.g.*, when issues of federal law must be adjudicated, or when federal jurisdiction exists under a statute such as the Natural Gas Act, which sets original jurisdiction in federal courts to hear state permitting disputes, including § 401 certification challenges.

Whether brought in the state or federal courts, virtually every challenge to a § 401 certification decision has historically cast the certifying state or tribal agency in the role of defendant or respondent, with the burden of proof always on the plaintiff or petitioner (typically the project applicant or community groups) to demonstrate that the state's or tribe's § 401 decision was arbitrary and capricious or otherwise contrary to law. Owing to their technical water quality expertise and their role in the § 401 certification and permitting processes, certifying agencies have historically been granted significant deference by courts that review their § 401 decisions.

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[63] *City of Tacoma v. FERC*, 460 F.3 53, 67 (D.C. Cir. 2006); *see also Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2006) (explaining that the Supreme Court construed states' § 401 certification authority broadly in *S.D. Warren* "to admit few restrictions on a State's authority to reject or condition certification," and that "[f]or this reason, a State's decision on a request for Section 401 certification is ***generally reviewable only in State court, because the breadth of State authority under Section 401 results in most challenges to a certification decision implicating only questions of State law***") (emphasis added); *see also* S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971) (stating that § 401 "continues 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 or jurisdiction of the interstate agency" and that "[s]hould such an affirmative denial occur no license or permit could be issued by such Federal agencies as the ... Federal Power Commission ... ***unless the State action was overturned in the appropriate courts of jurisdiction***." (emphasis added).

The 2020 Rule will likely shift these burdens and standards of proof in many cases. For example, if a state denies a § 401 certification based upon legitimate water quality impairment concerns, but a federal licensing agency decides pursuant to the 2020 Rule that the state's decision may be ignored because the state purportedly waived its authority due to an alleged error in its processing of the request, the burden of proof will presumably now have to be carried by the state, placing it in the unprecedented role of having to sue a federal licensing agency to challenge the federal agency's determination to set aside the state's decision. This turns established burdens of proof and expert agency deference on their head without a shred of statutory evidence that this was Congress' intent. The 2020 Rule's shift of the balance of power that Congress mandated in § 401, forcing states and tribes to have to bring lawsuits to defend their own statutorily-authorized expert agency decisions, is frankly appalling, and a direct assault on the rule of law.

3. The 2020 Rule's Enforcement Provisions are Unlawful.

EPA's apparent attempt in the 2020 Rule to render enforcement of § 401 certifications and conditions contained therein solely within the domain and authority of federal licensing agencies[64] directly violates the plain terms of the CWA. For example, the CWA's citizen suit provision expressly permits citizens to enforce "effluent limitations," which Congress specifically defined in the very same section of the Act to include "a certification under section 1341 of this title."[65] Once again, despite its apparent desire to erode or eliminate public involvement in, and enforcement of, § 401 certification conditions, EPA lacked authority to override statutory enforcement authority with inconsistent federal regulations. EPA simply cannot overrule Congress's grant of authority to the public of citizen suit authority to enforce § 401 certifications by issuing a regulation that arguably removes that enforcement arrow from the public's quiver.

C. The 2020 Rule Codified Draconian, Unworkable and Unfair New Waiver Rules Into the Section 401 Process, Stripping States, Tribes, and the Public of Due Process.

These comments have thus far focussed on grants, grants with conditions, and denials of § 401 certifications, but as noted above, states and tribes may also intentionally or inadvertently waive their § 401 authority if they take too long (or are erroneously deemed by a federal agency to have taken too long) to make a decision on a request for certification:

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[64] 40 C.F.R. § 121.11.

[65] *See* 33 U.S.C. § 1365(a)(1), (f)(6). Moreover, many states issue § 401 certification in the form of state permits under state statutes and regulations, and EPA lacks authority to attempt to override state authority to enforce state permits issued pursuant to state law.

> If the State ... ***fails or refuses to act*** on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application...[66]

As courts have noted, Congress plainly intended that when states receive a request to exercise their § 401 water quality certification authority, they do so in a manner that does not create unbreakable "logjams" and/or cause unreasonable delays in federal licensing processes:

> In imposing a one-year time limit on States to "act," Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request. This is clear from the plain text. Moreover, the 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.[67]

While legal disputes over § 401 waivers have been uncommon over the past several decades, findings by federal agencies that states unintentionally, and even retroactively, waived their § 401 authority have become more common and extremely controversial across the country as a result of the D.C. Circuit's 2019 opinion in *Hoopa Valley Tribe v. FERC*.[68] In that case, the court held that California and Oregon had waived their § 401 authority because they had purportedly taken too long to make a decision on a series of § 401 applications, notwithstanding that the subject delays were a result of the applicant's repeated voluntary withdrawals of its application, which all parties to the proceedings at the time (including FERC, the lead federal licensing agency) understood and agreed had the effect of resetting the one-year "Reasonable Time" clock that is applicable in licensing matters before FERC. Notwithstanding that the § 401 certification requests in that matter were repeatedly withdrawn (leaving the states no pending "request" upon which to act) and then refiled, the court held that the one-year timeframe that Congress set as a

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[66] 33 U.S.C. § 1341(a) (emphasis added).

[67] *Alcoa Power Generating Inc.*, 643 F.3d at 972.

[68] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, *cert. denied*, 140 S. Ct. 650 (2019), docket available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-257.html. On September 27, 2019, 21 states filed an amicus brief in support of the cert. petition. A true and correct copy of the amicus brief is annexed and incorporated by reference as **Exhibit E** ("State Amicus Brief").

maximum allowable time for a state to "act" on a request was not tolled by the applicant's repeated withdrawals of those requests.

Setting aside that the *Hoopa Valley Tribe* case was wrongly decided as a matter of basic administrative law, its import should have been limited because the court clearly did not intend to draw bright-line rules, but rather limited its holding to what it viewed as the extreme facts of that case. It is clear that the *Hoopa Valley Tribe* court found the number of times and manner in which the applicant withdrew and resubmitted its § 401 certification request to be concerning:

> The record does not indicate that PacifiCorp withdrew its request and submitted a wholly new one in its place, and therefore, we decline to resolve the legitimacy of such an arrangement. We likewise need not determine how different a request must be to constitute a "new request" such that it restarts the one-year clock. This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification. PacifiCorp's withdrawals-and-resubmissions were not just similar requests, they were not new requests at all. The KHSA makes clear that PacifiCorp never intended to submit a "new request." Indeed, as agreed, before each calendar year had passed, PacifiCorp sent a letter indicating withdrawal of its water quality certification request and resubmission of the very same ... in the same one-page letter ... for more than a decade. Such an arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.[69]

In the two years since the *Hoopa Valley Tribe* opinion was issued, certain federal agencies have overzealously misapplied the holding to completely circumvent any need to obtain certifications from states and tribes, and found waiver to have occurred under facts that were far less extreme and much more nuanced and understandable than those presented in *Hoopa Valley Tribe*. FERC has been the worst offender and most draconian of all of these federal agencies, and has applied the decision retroactively and inequitably to completely dissimilar facts, repeatedly retroactively ruling that states waived their authority even for projects for which certification decisions were issued with conditions or denied by states years earlier.[70]

It is even more unfortunate, and unlawful, that EPA codified such an extreme and unsupportable interpretation of *Hoopa Valley Tribe* into the 2020 Rule. The 2020 Rule goes even

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[69] *Hoopa Valley Tribe*, 913 F.3d at 1104.

[70] *See, e.g.*, *Placer County Water Agency*, Order Denying Rehearing, 169 F.E.R.C. ¶ 61,046 (Oct. 17, 2019); *Constitution Pipeline Company, LLC*, Order on Voluntary Remand, 168 F.E.R.C. ¶ 61,129 (Aug. 28, 2019).

further than *Hoopa Valley Tribe* because it sets draconian and legally binding regulatory "traps" for states and tribes. Ignoring for the moment the prudential reasons that such a bright-line waiver rule is arbitrary and capricious, the entire premise of the 2020 Rule on this point, *i.e.*, that an applicant's decision to withdraw a formal request to an agency has no legal effect, is facially and fatally flawed. There is simply no language in § 401 to support the bizarre proposition that an applicant cannot choose to withdraw its own application for a permit and render that withdrawn application a nullity. What law prohibits any applicant from doing so? And in that event, under § 401, there would no longer be a pending "request" upon which a state or tribe could "act," even if it wanted to do so. It is perfectly reasonable to ask whether, under the 2020 Rule, states and tribes will feel compelled to continue devoting resources to, and to ultimately "act" upon, withdrawn requests, in order to avoid later being found to have waived their authority.

As 21 States, from Massachusetts to Idaho, New Mexico to South Dakota, argued to the Supreme Court in an amicus brief filed in support of a certiorari petition in *Hoopa Valley Tribe*:

> Under Section 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." 33 U.S.C. § 1341(a)(1). ***Nothing in that language suggests that a state is required to act on a request for certification that is no longer pending because it has been withdrawn***. … Nor is it reasonable to ascribe to States a project applicant's decision to withdraw a certification request in order to avoid having the request denied. It is the action of the applicant—the very party that the time limitation is intended to protect—that results in a delay of water quality certification, not a failure or refusal by the state agency…. ***Nothing in the text of the statute prohibits an applicant from submitting and then withdrawing its request for certification before the one-year period for making a decision expires.*** *See, e.g., Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010) (court "must enforce plain and unambiguous statutory language according to its terms"). Nor does anything in the text of the statute support the court of appeals' interpretation that resubmissions are "not new requests" unless they differ substantially from previous, withdrawn requests for certification. Under the plain text of Section 401, the period for state review commences upon "receipt of such request" (which refers back to the statutory language "a request for certification"). 33 U.S.C. § 1341(a)(1) (emphasis added); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (noting that '"such" refers to "the santé' object previously described). Section 401 does not speak in terms of "any request" or "any identical request," nor does it call for a judgment regarding how similar a withdrawn application is to a new application for the same project. ***There is simply no textual support for the***

court of appeals' holding that submittal of a similar or even identical request is not "a request for certification" that triggers a new one-year certification period for states to act.[71]

In a recent opinion, the 4th Circuit raised similar concerns regarding FERC's gross misapplication of *Hoopa Valley Tribe*:[72]

> Section 401 requires the state agency to *certify* or *deny* compliance with water quality standards. The waiver portion of the statute, however, uses a different verb and provides that a state waives its certification authority if it "fails or refuses to *act* on a request for certification" within a year. 33 U.S.C.A. § 1341(a)(1) (emphasis added). If Congress had intended for the states to take final action on § 401 applications within a year of filing, the statute could have made that clear by providing that waiver occurs if the agency "fails to certify or deny compliance with water quality standards within one year." Since Congress instead hinged waiver on the agency's failure "to act" on a certification request, traditional rules of statutory construction would generally require us to interpret "acting" on a certification request as meaning something other than certifying or denying compliance with water-quality standards.
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> * * *
>
> If this reading of the statute is correct, a state would not waive its certification authority if it takes significant and meaningful action on a certification request within a year of its filing, even if the state does not finally grant or deny certification within that year. Such a reading of the statute would be consistent with the legislative history of the amendment to § 401 that added the waiver provision, which indicates that the review period was added to prevent States effectively vetoing federal projects by taking no action on § 401 applications. *See Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) ("[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.'").

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[71] State Amicus Brief, Ex. E, at 12-13 (emphasis added).

[72] *N.C. Dep't of Envt'l Quality v. FERC*, No. 20-1655 (4th Cir. July 2, 2021), *available at* https://www.ca4.uscourts.gov/opinions/201655.P.pdf. A true and correct copy of this opinion is annexed and incorporated by reference as **Exhibit F**.

> This understanding of the statute would also be consistent with the purposes of the Clean Water Act generally and § 401 specifically. As this court explained in *Sierra Club v. United States Army Corps of Engineers*, 909 F.3d 635 (4th Cir. 2018), the CWA reflects a "carefully prescribed allocation of authority between federal and state agencies" that preserves "'the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" Id. at 647 (quoting 33 U.S.C. § 1251(b)) (emphasis added). And while the purpose of § 401's one-year review period was to prevent States from delaying federal projects by taking no action on certification requests, ***the purpose behind § 401 itself and its certification requirement is "'to assure that Federal licensing or permitting agencies cannot override State water quality requirements***.'" Id. (quoting S. Rep. 92–414, at 69 (1971)). ***Under this reading of the statute, a State that in good faith takes timely action to review and process a certification request likely would not lose its authority to ensure that federally licensed projects comply with the State's water-quality standards, even if it takes the State longer than a year to make its final certification decision.***[73]

The draconian, unworkable, and unnecessary new waiver provisions that EPA adopted in the 2020 Rule have empowered federal agencies to find that states and tribes have waived their authority even where they have acted diligently and where there is no rational basis for such a finding. These unconscionable regulatory changes have repeatedly resulted – and will continue to result – in many federally-approved projects – such as hydroelectric dams constructed 50 or more years ago that have never undergone any environmental review – being relicensed for decades longer without any meaningful environmental review by states or tribes. We again urge EPA to immediately repeal the 2020 Rule and to start from scratch with a new rule designed to achieve, and not flout, the objective and goals of the CWA.

D. EPA Must Ensure Compliance with Other Federal Laws

EPA dramatically altered the § 401 certification process in the 2020 Rule without conducting any meaningful analysis about the effect of those changes on the environment, including on endangered species. EPA must ensure compliance with all relevant federal laws and policies, including the Endangered Species Act ("ESA"),[74] and any other relevant laws and policies.

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[73] *Id.*, slip op. at 22-24 (emphasis added).

[74] 16 U.S.C. § 1531 *et seq.*

With respect to the ESA, EPA must consult with the Fish and Wildlife Service ("FWS") and/or National Oceanic and Atmospheric Administration ("NOAA") under Section 7 of the Act to assess whether its action may jeopardize the continued existence of listed species or adversely modify critical habitat; the extent to which the action may incidentally take listed species; and the specific measures EPA must carry out to minimize and mitigate those adverse effects.[75] Before EPA takes any action that "may affect" species listed as threatened or endangered under the ESA, or modify their critical habitat, the agency must first consult with the FWS and/or NOAA pursuant to Section 7 of the ESA.[76]

Under Section 7, consultation is required to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [critical] habitat . . . ."[77] Agency "action" is broadly defined to include "(a) actions intended to conserve listed species or their habitat; (b) ***the promulgation of regulations***; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[78]

As FWS's consultation handbook explains, an action agency may make an initial "no effect" or "may affect" determination to assess whether or not consultation is required.[79] EPA can only avoid undertaking informal or formal consultations when "the action agency determines its proposed action will not affect listed species or critical habitat."[80] The handbook defines "may affect" as "the appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat."[81] A "may affect" determination is appropriate even when the action agency believes that its actions will have either beneficial or uncertain effects because the action agency is not the expert in determining how its actions will impact threatened and endangered species.

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[75] *See* 16 U.S.C. § 1536.

[76] 16 U.S.C. § 1536(a)(2).

[77] *Id.*

[78] 50 C.F.R. § 402.02 (emphasis added).

[79] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act (hereafter "Consultation Handbook") at 3-12 (1998).

[80] *Id.*

[81] *Id*. at xvi.

If EPA predicts that an impact on a listed species may occur, then EPA must undergo consultation with the Services.[82] If the action agency elects to first complete an informal consultation, it must first determine whether its action is "not likely to adversely affect" ("NLAA") a listed species or is "likely to adversely affect" ("LAA") a listed species.[83] The Services define "NLAA" determination to encompass those situations where effects on listed species are expected to be "discountable, insignificant, or completely beneficial."[84] Discountable effects are limited to situations where it is not possible to "meaningfully measure, detect, or evaluate" harmful impacts.[85] Discountable and insignificant impacts are rare if an agency's actions will cause harmful effects.

Under the informal consultation process, if the agency reaches an NLAA determination, and the FWS concurs in that determination, then no further consultation is required. In contrast, if the action agency determines that its activities are likely to adversely affect listed species, then formal consultations must occur.

EPA may, of course, skip the informal consultation process and move directly to the formal consultation process. During the formal consultation process, FWS will assess the environmental baseline—"the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process[86] —in addition to the cumulative effects to the species—"those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation"—and determine if the agency action jeopardizes the continued existence of each species impacted by the agency action.[87]

The Section 7 consultation process applies to all discretionary actions,[88] and any effort by the EPA to review or revise its position here clearly represents such a discretionary action.

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[82] *Id*. at xv.

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *Id.* at xiv.

[87] *Id*. at xiii.

[88] *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

VI. CONCLUSION

We thank you again for your decision to reconsider and revise the 2020 Rule, and for this opportunity to provide early input into your rulemaking. We respectfully implore you to immediately repeal the 2020 Rule, to start from scratch with drafting a new protective rule to avoid corruption by the significant flaws and illegalities in the 2020 Rule, and to otherwise fulfill to the best of your capability the objective and goals of the Act and EPA's mission of protecting human health and the environment.

Respectfully submitted,

Daniel E. Estrin, Esq.
Waterkeeper Alliance
New York, New York

Nelson Brooke
Black Warrior Riverkeeper
Birmingham, Alabama

Myra A Crawford
Cahaba Riverkeeper
Birmingham, Alabama

Michael Mullen
Choctawhatchee Riverkeeper
Troy, Alabama

Justinn Overton
Coosa Riverkeeper
Birmingham, Alabama

Bill Shugart
Little River Waterkeeper
Fort Payne, Alabama

Cade Kistler
Mobile Baykeeper
Silverhill, Alabama

David Whiteside
Tennessee Riverkeeper
Decatur, Alabama

Sue Mauger
Cook Inletkeeper
Homer, Alaska

Brett VandenHeuvel
Columbia Riverkeeper
Hood River, Oregon

Ben Lomeli
Friends of Santa Cruz River, a
Waterkeeper Alliance Affiliate
Rio Rico, Arizona

Timmarie Hamill
CA Urban Streams Alliance-The Stream Team,
a Waterkeeper Affiliate
Chico, California

Sean Bothwell
California Coastkeeper Alliance
Sacramento, California

Garry Brown
Inland Empire Waterkeeper
Riverside, California

Garry Brown
Orange County Coastkeeper
Huntington Beach, California

Sejal Choksi-Chugh
San Francisco Baykeeper
Oakland, California

Gary Wockner
Poudre Waterkeeper
Fort Collins, Colorado

Cindy Medina
Alamosa Riverkeeper
La Jara, Colorado

Phillip Musegaas
Potomac Riverkeeper Network
Washington, D.C.

John Cassani
Calusa Waterkeeper
Fort Myers, Florida

Justin Bloom
Suncoast Waterkeeper
Sarasota, Florida

Megan Eakins
Tampa Bay Waterkeeper
Tampa, Florida

Damon Mullis
Ogeechee Riverkeeper
Savannah, Georgia

Jennifer Kalt
Humboldt Baykeeper
Arcata, California

Kim Lewand Martin
Los Angeles Waterkeeper
Los Angeles, California

Melinda Booth
Yuba River Waterkeeper
Nevada City, California

Marcel Gaztambide
Animas Riverkeeper
Durango, Colorado

Ted Ross
Boulder Waterkeeper
Boulder, Colorado

Bill Lucey
Long Island Soundkeeper
New Haven, Connecticut

Georgia Ackerman
Apalachicola Riverkeeper
Apalachicola, Florida

Jen Lomberk
Matanzas Riverkeeper
St. Augustine, Florida

Rachel Silverstein
Miami Waterkeeper
Miami, Florida

Kevin Jeselnik
Chattahoochee Riverkeeper
Atlanta, Georgia

Shelley Austin
Lake Coeur d'Alene Waterkeeper
Coeur d'Alene, Idaho

Steve Holt
Lake Pend Oreille Waterkeeper
Sandpoint, Idaho

Alan Banks
Kentucky Riverkeeper
Richmond, Kentucky

Ivy Frignoca
Friends of Casco Bay
South Portland, Maine

Annie Richardson
Chester Riverkeeper
Chestertown, Maryland

Elle Bassett
Miles-Wye Riverkeeper
Easton, Maryland

Betsy Nicholas
Waterkeepers Chesapeake
Takoma Park, Maryland

Robert Burns
Detroit Riverkeeper
Taylor, Michigan

Abby Braman
Pearl Riverkeeper
Madison, Mississippi

Guy Alsentzer
Upper Missouri Waterkeeper
Bozeman, Montana

Michele Langa
Hackensack Riverkeeper
Hackensack, New Jersey

Bill Schultz
Raritan Riverkeeper
Keasbey, New Jersey

Buck Ryan
Snake River Waterkeeper
Boise, Idaho

Dean Wilson
Atchafalaya Basinkeeper
Plaquemine, Louisiana

Kathy Phillips
Assateague Coastkeeper
Berlin, Maryland

Matt Pluta
Choptank Riverkeeper
Easton, Maryland

Zack Kelleher
Sassafras Riverkeeper
Galena, Maryland

Alice Volpitta
Baltimore Harbor Waterkeeper
Baltimore, Maryland

Chauncey Moran
Yellow Dog Riverkeeper
Big Bay, Michigan

Rachel Bartels
Missouri Confluence Waterkeeper
St Louis, Missouri

Kyle Roerink
Great Basin Waterkeeper
Baker, Nevada

Gregory A. Remaud
NY/NJ Baykeeper
Hazlet, New Jersey

Jen Pelz
Rio Grande Waterkeeper
Santa Fe, New Mexico

Sean Keller
Hudson Riverkeeper
Ossining, New York

John Peach
Upper St. Lawrence Riverkeeper
Clayton, New York

Chris Navitsky
Lake George Waterkeeper
Lake George, New York

David Caldwell
Broad Riverkeeper
Lawndale, North Carolina

Brandon Jones
Catawba Riverkeeper
Charlotte, North Carolina

Andrew Hill
Watauga Riverkeeper
Boone, North Carolina

Earl Hatley
Grand Riverkeeper
Vinita, Oklahoma

Ashley Short
Tualatin Riverkeepers
Tualatin, Oregon

Ted Evgeniadis
Lower Susquehanna Riverkeeper
Wrightsville, Pennsylvania

Kate McPherson
Narragansett Bay Riverkeeper
Providence, Rhode Island

David Prescott
South County Coastkeeper
Westerly, Rhode Island

Peter Topping
Peconic Baykeeper
Hampton Bays, New York

Angie Rosser
West Virginia Headwaters Waterkeeper
Charleston, West Virginia

Margaux Valenti
Buffalo Niagara Waterkeeper
Buffalo, New York

Kemp Burdette
Cape Fear Riverkeeper
Wilmington, North Carolina

Emily Sutton
Haw Riverkeeper
Chapel Hill, North Carolina

Sandra Bihn
Lake Erie Waterkeeper
Toledo, Ohio

Emily Bowes
Rogue Riverkeeper
Ashland, Oregon

Travis Williams
Willamette Riverkeeper
Portland, Oregon

Scott Gollwitzer
Three Rivers Waterkeeper
Pittsburgh, Pennsylvania

Michael Jarbeau
Narragansett Baykeeper
Providence, Rhode Island

Andrew Wunderley
Charleston Waterkeeper
Charleston, South Carolina

Bill Stangler
Congaree Riverkeeper
Columbia, South Carolina

Kristen Schlemmer
Bayou City Waterkeeper
Houston, Texas

Diane Wilson
San Antonio Bay Estuarine Waterkeeper
Seadrift, Texas

John Weisheit
Colorado Riverkeeper
Moab, Utah

Sue Patnude
Deschutes Estuary Restoration Team
Olympia, Washington

Sean Dixon
Puget Soundkeeper
Seattle, Washington

Eleanor Hines
North Sound Baykeeper
Bellingham, Washington

Jerry White, Jr
Spokane Riverkeeper
Spokane, Washington

Lee First
Twin Harbors Waterkeeper
Cosmopolis, Washington

Cheryl Nenn
Milwaukee Riverkeeper
Milwaukee, Wisconsin

Yvonne Taylor
Seneca Lake Guardian, a Waterkeeper Alliance Affiliate
Watkins Glen, New York

Steve Box
Environmental Stewardship, a Waterkeeper Alliance Affiliate
Bastrop, Texas