

**EPN Testimony on EPA's Proposed Rule: Clean Water Act Section 401
Water Quality Certification Improvement Rule**

Docket No: EPA-HQ-OW-2022-0128

July 18, 2022

Hello, thank you for your time today and for holding this hearing about the Clean Water Act (CWA) Section 401 Water Quality Certification Improvement Rule. My name is Philip Mancusi-Ungaro, and I spent 29 years at EPA, primarily as a Senior Clean Water Act Attorney. I am delivering these comments on behalf of the Environmental Protection Network. EPN is a non-profit, bipartisan organization made up of more than 550 former EPA career staff and confirmation-level appointees who volunteer their time and expertise to respond to EPA actions, and support frontline and fence-line communities through our pro bono community technical assistance program.

We are pleased to comment on this proposed rule. EPN finds that this proposal revising and replacing the 2020 rule is more consistent with the statutory text of the 1972 Clean Water Act and supports an improved certification process that better protects water quality and cooperative federalism principles.

We support EPA's retention of the 2020 rule's requirement for project proponents to participate in pre-filing meetings with the certifying authority. This early communication will result in improved preparation of requests for certification that will speed certification decisions. We also support the proposed new provision giving certifying authorities the ability to waive or shorten the minimum 30-day pre-filing time period to further speed certification decisions when the authority determines that additional time is not needed.

We are also very supportive of the proposed rule's new requirement that all requests for certification include the draft federal permit or license and all available information on the project's water quality impacts. We believe this information is essential for a certifying authority to make a decision about a project's impacts. We commend EPA for proposing that state/tribal certifying authorities be allowed to define additional information requirements "necessary to make an informed decision regarding protecting their water quality" in their regulations. The 2020 rule did not allow these authorities to develop their own information requirements, a restriction that prevented state and tribal authorities from having critical information before facing deadline pressure to grant or deny certification.

We support EPA's proposal to replace the 2020 rule's provision that federal agencies unilaterally set the reasonable time period for review of certification requests with a process in which the federal agency and certification authority collaboratively set the time period. We are also pleased with the proposed provision that the federal agency and certifying authority can agree to extend the reasonable time period after it is set, provided that it does not exceed one year from receipt of the request for certification. We are also supportive of the 60-day default review time if the federal agency and certification authority do not reach agreement on the review time within 30 days of the certification authority's receipt of the request.

We commend EPA for proposing to reinstate the broader scope of review for the project "as a whole" that had been agency practice for 25 years and confirmed by the Supreme Court in 1994, until the 2020 rule replaced it with the narrower "discharge only" approach. This proposed broader review allows states and tribes to look beyond the pollution discharged into waterways and holistically evaluate the impact of a

project on water quality.

We are grateful that EPA is finally proposing definitions of certification decisions, which the 1971 and 2020 rules failed to do. This proposal describes the information required to document the decision to grant certification, grant certification with conditions, deny certification, or expressly waive certification. It is commendable that this proposed rule eliminates the 2020 rule restrictions on incorporating certification conditions into permits/licenses and instead requires all conditions to be included. We are encouraged to see that the proposed rule eliminates the ambiguity in the 2020 rule and makes it clear that federal agency review is limited to determining whether: 1) the certification authority has indicated the nature of the decision, 2) the proper authority has issued the decision, 3) the authority provided public notice on the request for certification, and 4) the decision was issued within the reasonable time period. The 2020 rule stated only that the federal agencies were allowed to review certification decisions for compliance with the 2020 rule and deem non-compliant decisions to be waived.

We also support the proposed rule's requirement that EPA must determine whether a neighboring state or tribe is impacted by a project, eliminating the discretion the 2020 rule gave EPA to make that determination. EPA should be required to make that determination since Section 401 makes EPA responsible for notifying other states or tribes that may be affected by a discharge from a federally licensed or permitted activity and for providing an evaluation and recommendations on the objections of such other states or tribes.

We are in agreement with the proposed rule's provision for Tribes to obtain Treatment in a Similar Manner as a State (TAS) in order to act as the 401 certifying authority or as a neighboring jurisdiction for federally permitted/licensed projects. We also recommend that Tribes be allowed to exercise this Section 401 authority without being required to have TAS for water quality standards under Section 303c.

While overall we are pleased with this proposal, our members, all former EPA staff with years of experience in the 401 program, have identified a problem which is not addressed. Section 401 gives EPA the authority to provide certification when a state or tribe cannot do so, despite the fact that a project affects the waters of their state or reservation. This happens when the federally permitted/licensed project occurs on reservations where the Tribe lacks TAS or on lands exclusively under federal jurisdiction. Our members' experience is that EPA rarely uses this certification authority in these situations. We urge EPA to investigate this issue and take appropriate action to ensure this authority is used appropriately.

In all, we are very supportive of the proposed CWA Section 401 Water Quality Certification Improvement Rule and urge EPA to finalize this as quickly as possible. The 2020 rule currently in effect does not provide protection from the adverse holistic effects of federally permitted or licensed projects and fails to achieve the CWA goal of ensuring states, territories, and tribes are empowered to protect their water resources.

Thank you so much for your time today. We appreciate the work you are all doing to protect public health and the environment.