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EPN Comments on Updating the Water Quality Certification Regulations
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The Environmental Protection Network (EPN) harnesses the expertise of more than 750 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

Introduction

EPA's proposed regulation would establish requirements and standards for state/Tribal water quality certification under Section 401 of the Clean Water Act (CWA) that inappropriately restrict the scope and timing of this important avenue for states and Tribes to protect their waters. The proposed limitations are inappropriate and inconsistent with the statute.

We start with two fundamental provisions of the CWA. Section 510, 33 U.S.C. § 1370, provides that nothing in the statute shall "preclude or deny the right of any State...to adopt or enforce...any requirement respecting control or abatement of pollution..." as long as the requirements are not less stringent than federally-established requirements. It also provides that nothing in the CWA shall "be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters...of such states."[1] Thus states have the right to establish requirements, which include procedural and substantive standards, controlling water pollution. The second principle is found in Section 313(a), 33 U.S.C. § 1323(a), which waives sovereign immunity, making federal agencies subject to state authorities and permit requirements.[2] Taken together, under the CWA, federal agencies are subject to state water pollution and water quality requirements, whether "substantive or procedural." Section 401 itself is written broadly authorizing states, among other things, to include conditions in the certification related to "any other appropriate requirement of State law."[3] Section

[1] Section 510 provides: "Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." (33 U.S.C. 1370)

[2] Section 1323(a) reads, in part: "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government … and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural …, (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." 33 U.S.C. § 1323(a)

[3] Section 401(d) provides in part: "Any certification provided under this section shall set forth any effluent limitations

401 should be construed and applied in a manner that enables states to apply their standards as fully as the statute allows.

In some states, the water quality certification procedures are linked to the state's own permitting requirements, with state issuance of permits serving as the water quality certification as well. This one-step process is efficient for the state and for project applicants who must comply with both federal and state requirements. It makes no sense to have new, narrowing limitations on the Section 401 certification when states already have substantive and administrative requirements for pollution control *with which the federal agencies must comply*.

In the real world, applicants understand that they must meet both state and federal pollution control requirements. As such, it seems more than odd that the proposed regulation would establish limitations on state/Tribal exercise of water quality certification under Section 401, restricting what states/Tribes can consider in making that particular decision and deciding what conditions they can include with their certifications. Section 401 should be construed and applied in a manner that is consistent with other provisions of the CWA that expressly subject federal agencies to state/Tribal pollution control laws and requirements and preserve the states' and Tribes' ability to protect their waters.

EPN recommends that the existing 2023 Section 401 regulations remain unchanged. EPN had previously commented on the proposal[4] supporting that effort, and still finds the existing regulations provide flexibility and support to the states' and Tribes' authority to protect the water quality under their jurisdiction.[5]

EPN has organized its comments topically, addressing provisions of the proposed regulation that are without support, inappropriate, or otherwise warrant re-evaluation prior to finalizing any regulation.

EPN provides comments on the main provisions of this proposed rule.

I. Request for Certification

The rule proposes that the timeline for review begins when the applicant submits a request for certification that only needs to meet the requirements defined in this rule, rather than the required

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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 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section. (33 U.S.C. 1341) (emphasis provided).

[4]https://www.environmentalprotectionnetwork.org/wp-content/uploads/2022/07/EPN-Comments-on-CWA-401-certification-2022.pdf

[5]EPN uses "state/Tribal" and "states and Tribes" to refer to both U.S. states and Tribes that have Treatment in a Similar Manner as a State (TAS) status. TAS status, as defined by the EPA specific to the CWA, refers to "CWA Section 518(e) [which] expressly provides for Indian tribes to play essentially the same role in Indian country that states do within state lands, authorizing EPA to treat eligible federally recognized Indian tribes in a similar manner as a state (TAS) for implementing and managing certain environmental programs."
[https://www.epa.gov/wqs-tech/tribes-and-water-quality-standards] Eligible Tribes must be federally recognized, have a governing body carrying out substantial governmental duties and powers, have appropriate authority, and be or will be capable of carrying out functions of the program.

information defined by the certifying authority. The proposed 40 CFR §121.5 includes a singular enumerated list of documents and information that must be included in the request for certification.

Limiting the required information to the list set out in the proposed regulation restricts the states' and authorized Tribes' ability to properly certify compliance with their applicable water quality requirements. The certifying agency can use that list but must be able to tailor the certification to their specific water quality requirements and programs, including "any other appropriate requirement of State law…" as authorized under Section 401(d). However, the EPA has proposed the removal of the text at 40 CFR §121.5(c), which allows state and Tribal authorities to define additional information, further restricting the states' and Tribes' ability to protect their waters. Further, limiting the requirements to a specific list, combined with the restrictions on the Section 401 certification timeframes,[6] will in some cases result in certifying authorities reviewing incomplete or highly modified applications. Permitting authorities, including federal agencies, do accept and begin processing applications without all the relevant information to process a permit (e.g., applications often lack required avoidance and mitigation requirements, or completed consultations). Permitting agencies often request additional information during the review process. The additional information often provides crucial information that can result in changes to projects and discharges. Allowing the 401 certifying authority to identify additional required information necessary for 401 certification decision-making will help to ensure their decisions are adequately informed and their waters are protected.

EPA also asks for public comment on whether the Section 401 certification process should be retained for general permits despite the lack of a specific applicant. Currently, the regulations and EPA's view has always been that Section 401 certifications are required for federal authorization of general permits. It makes sense that states and Tribes should be able to review and make certification decisions on proposed general permits to ensure those permits when issued by a Federal agency are consistent with their water quality requirements and programs. States and Tribes should retain the authority to grant, grant with conditions, deny, or waive federal general permits, including Regional General Permits, Nationwide General Permits, or Statewide Programmatic General Permits authorized by the U.S. Army Corps of Engineers (USACE), or general permits authorized by the EPA. And then when individual authorizations are made under Federal General Permits, if a state or Tribe (or EPA on behalf of Tribes without "treatment in a similar manner as a state" [TAS]) issues a conditional 401 certification on the General Permits as a whole, they also retain the authority to review and provide an individual certification on individual authorized activities under the general permit if their conditions trigger an individual 401 certification.

EPN supports retaining state and Tribal 401 certification authorities for federal agency general permits, keeping a certifying authority's ability to protect its waters from entire categories of activities over broad areas and varying conditions. For example, over 90% of CWA Section 404 and Rivers and Harbor Act Section 10 authorizations are issued using the 57 Nationwide General Permits program. Also, EPA has issued a General Vessel Permit that covers all commercial vessels over 79 feet in length.[7] Without the ability to certify these and other general permits, states' and Tribes' ability to protect their waters will not exist.

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[6] See discussion below: Timeframe for Certification

[7] Other examples of general permits include but are not limited to: National Pollutant Discharge Elimination System (NPDES) Multi-sector General Permits, Stormwater, Aquaculture, Pretreatment, Concentrated Animal Feedlot Operations, and Industrial Stormwater GP's.

If EPA intends to remove these activities from the list of the activities or permits requiring section 401 water quality certification, EPA must undertake a more significant rulemaking effort, including conforming edits to many other regulations. If EPA does not intend to create confusion or change the current portfolio of projects subject to Section 401 water quality certification, EPA must not make changes to the definition of "project proponent" in the 2023 regulatory text, and EPA must not collapse the lists of minimum required contents in a request for certification otherwise there will be miscommunications with entities seeking certification, especially when the start of the reasonable period of time for review is meant to be a "bright line."

Throughout the preamble for the proposed rule, EPA argues that the agency is "filling up the details" of the certification process (referencing *Loper Bright*[8]). However, EPA has failed to demonstrate that there are any outstanding gaps in the request for certification process under the 2023 Rule, or that EPA has the oversight authority to enforce the proposed limitations on state and Tribal section 401 water quality certification programs. Particularly where the states and Tribes had previously clearly defined the required certification contents in addition to the minimum required contents set by EPA. EPA relies solely on the continued reference to the 2018 case law from the Second Circuit.[9] Further, the agency fails to provide supporting discussion beyond boldly stating "After considering stakeholder input, the Agency has determined that EPA, and not certifying authorities, has the authority to establish a list of contents for a request for certification."[10] This leads to the likely conclusion that the agency's proposed edits to the regulatory text are not supported by the statute and implementing regulations.

If EPA had any data/evidence that the implementation of the 2023 Rule did not sufficiently address the issues from *NYSDEC* (2018), the agency would have had an opportunity to issue guidance and conduct ongoing training to support clear/transparent (and possibly even consistent) lists of required contents for requests for certification across all certifying authorities who have opted to define contents in addition to the minimum required by EPA. Instead, EPA's Economic Analysis for the proposed rule contains unsupported claims that the edits to 40 CFR Section 121.5 would "help ensure all requests for certification include the same predictable baseline information without requiring the applicant to provide duplicative information."[11] EPA cites this as a reason for placing unreasonable limits on state and Tribal certifying authorities. However, EPA has failed to recognize that the "or" and "as applicable" flexibility/nuance still contained in the regulatory text of the proposed rule means that this list does not represent "the same predictable baseline" across all project and license/permit types.

EPA asserts in footnote 26 of the preamble for the proposed rule that it "will consider all asserted reliance interests." However, EPA must acknowledge that state and Tribal certifying authorities have been those receiving and acting upon "requests for certification" unique to the appropriate jurisdiction since the days of section 21(b) of the Federal Water Pollution Control Act.[12] Furthermore, unlike the program oversight EPA retains for state and Tribal permitting programs

[8] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).
[9] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018). ("NYSDEC")
[10] 91 FR 2019.
[11] Economic Analysis for the Proposed Updating the Water Quality Certification Regulations, January 2026, page 17.
[12] The Economic Analysis for the proposed rule does not include any discussion of the costs to certifying authorities required to update their section 401 program implementation regulations which may already clearly outline the contents of a request for certification and applicable submission procedures, consistent with the 2023 Rule framework in 40 CFR section 121.5.

under sections 402 and 404 of the CWA, EPA does not have program oversight for Section 401. (EPA does not have the ability to invalidate certification request forms/portals and cannot ever revoke certifying authority). Therefore EPA's authority to define the required contents of a request for certification must be limited to the framework finalized in the 2023 Rule.

II. Timeframe for Certification Analysis and Decision

The rule repeals the provision allowing for automatic extensions to the reasonable period of time to accommodate a certifying authority's public notice procedures or force majeure events and instead requires agreement by the federal agency and the certifying authority on any extension. The reasonable period defaults to six months if there is no joint agreement. The rule bars certifying authorities from requesting applicants to withdraw their request to avoid exceeding the reasonable period.

EPN notes that the CWA Section 401 allows states and Tribes a "reasonable period of time, which shall not exceed one year" to act on federal permit/license certification requests. The statute is clear that the maximum time is one year, not six months. Federal agencies must recognize that state/Tribal workload, the need for sufficient information, and the propriety of integrating the Section 401 certification with other state/Tribal permitting and regulatory requirements should determine what is a reasonable time. This proposed rule's request for certification/application requirements prohibit states/Tribes from asking for additional information based on site-specific circumstances while requiring a decision within six months. Certifying authorities must be able to retain the right to define what information is required for 401 water quality certification requests. Many states already have those requirements clearly identified in fact sheets, application forms, etc. on their websites. Their ability to request the information up front before beginning the clock for the review is critical. Prohibiting states/Tribes from asking for additional information will slow permitting because they will undoubtedly lead to denial of applications unless applicants voluntarily provide the additional information needed to make an informed review. Federal agencies must also recognize that it is only fair to provide an automatic extension to allow time for public notification processes required under state/Tribal law or delays in decision-making due to government shutdowns or natural disasters. This proposed rule provides no justification for repealing the automatic extension and setting a default decision period of 6 months. The proposed rule simply says an automatic extension is unnecessary because federal agencies and certifying authorities can always negotiate an extension. The elimination of the automatic extension adds more uncertainty to the regulatory process and requires the certifying authority to spend additional time "negotiating" with the federal agency on an extension that should be automatic. If the federal agency refuses to accommodate the needed delay, that will force the certifying authority to forgo an adequate review of a project that could have significant impacts on their water resources. The default reasonable period should be one year, as specified in the statute, not six months, in cases where legally required public participation processes, government shutdowns, or natural disasters slow the certifying authority's decision-making.

The proposed rule explicitly bars certifying authorities from requesting applicants to withdraw their request, stating that this prohibition is needed to ensure the certifying authority is not trying to evade the statutory restriction of a one-year period. Withdrawal of a request is a preferable way for federal agencies to avoid denial of water quality certification. This provision does not prevent a federal agency or applicant from withdrawing the request, but strips the certifying authority of suggesting withdrawal or otherwise working cooperatively with the federal agency and the project applicant to modify the established reasonable period of time. This blanket prohibition is excessive

and inconsistent with fostering cooperative relationships with the states and Tribes to protect water quality. Prohibiting the certifying authority from suggesting withdrawal of an application will likely result in an increase in denials as the certifying authority will not have time to cooperatively work with the federal agency and the project applicant. New applications reset all timeframes, require fees to be paid again, public notice, and associated public hearings, if requested. A new application will take longer and cost more to process than an extension or withdrawal.

In the summary section of the preamble for the proposed rule, EPA argues that the proposed regulatory changes are consistent with the statutory framework but the proposed constraints on certification analysis and decisions are clearly not consistent.

III. Appropriate Scope for Section 401 Certification Review

This rule narrows the 2023 rule's "activity-based" scope to a facility's point source discharge into a water of the U.S. (WOTUS). EPA justifies this change through a review of the 1972 CWA Amendments as compared to the earlier versions, and the changes to "Chevron Deference" which the courts relied on in interpreting Section 401 in several cases. Through this analysis, EPA is proposing that Section 401 be narrowly read to limit Section 401 certification to only the point source discharge to WOTUS itself and not the overall project and associated activity(ies) that could also have impacts on states' or Tribes' water quality. While in some cases, such as permits under sections 402 and 404, the point source discharge triggers the requirement for a federal license or permit for which a 401 certification decision is required, that is NOT the scope of authority that Section 401 of the CWA authorizes states and Tribes to review and ensure their waters are protected. Section 401 can be triggered for broader activities. For example, Federal Energy Regulatory Commission (FERC) licensing requires a section 401 certification even if it does not involve a Section 402 or 404 permit.[13] EPN does not agree with EPA's analysis supporting a narrowed scope and strongly opposes the proposed change.

The rule also proposes changes to water quality requirements by replacing the existing language regarding how water quality requirements and "other appropriate requirement[s] of State Law" are defined.[14] These proposed changes place severe limits on the scope of the 401 certification authority impacting the ability of states and Tribes to protect their waters. EPN opposes this change from "activity" to "discharge."

The rule starts the justification with a review of the 1972 CWA Amendments, noting that the 1971 Rule was based on the prior version of the CWA which included language that the scope of the certification "extended to the entire 'activity' at issue in the Federal license or permit."[15] The 1972 Amendments added language "requiring certifying authorities to certify that 'any such discharge shall comply with certain provisions of the CWA."[16] EPA next turns to *PUD No. 1 of Jefferson County v Washington Department of Ecology*[17] (PUD No. 1). In the PUD No. 1 case, the Court upheld EPA's 1971 broader activity based approach as a reasonable interpretation of the CWA.[18] Turning to the 2023

[13] There are many more examples of activities that would require section 401 certifications.
[14] 91 Fed. Reg. 2008 at 2026
[15] 91 Fed. Reg. 2008 at 2023
[16] 91 Fed. Reg. 2008 at 2023
[17] 311 U.S. 700 (1974).
[18] The dam project in PUD No. 1 was authorized under Section 404. USACE regulations, 33 CFR section 320.3, General Regulatory Policies, in discussing Section 401 notes " the discharge will comply with the applicable effluent limits and

version of the Rule which relied heavily on PUD No. 1, after noting that EPA did not cite *Chevron*, "in the absence of any other applicable framework"[19] EPA has assumed it was based on *Chevron* deference.

EPA then moves on to note that in June 2024, the Supreme Court[20] overruled *Chevron* and announced "a new framework for judicial review that largely eliminates judicial deference to administrative agencies regarding statutory interpretation,"[21] turning to the "best reading" of the statute as the standard.

It is against this confusing backdrop that EPA has narrowed the scope of certification to only the actual direct point source discharge, that triggers the requirement for a federal license or permit, arguing this is the "best reading" of the statute. This however ignores the plain language of the statute, which expressly refers to a "license or permit to conduct any activity…which may result in any discharge."[22] If Congress intended to limit the scope of Section 401 as EPA now proposes, it would not have used this language. It is the breadth of impacts an activity will have that is important when applying the "best reading" framework.

First, this proposed change ignores the basic premise of the CWA set out in Section 101(a), that the objective of the CWA is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."[23] Section 303(c)(2)(A) requires that states must adopt water quality standards "to protect the public health and welfare, enhance the quality of water and serve the purposes of this [Act]."[24] Restricting the ability of states and Tribes to broadly protect their waters through the certification process ignores these basic tenets of the CWA. And it is against this backdrop that the "best reading" of the statute should be made.

Next, this is clearly inconsistent with the plain meaning of the Section 401 language, which uses the term "activity" to describe the scope of certification as applying to the entire activity under Section 401. Based on these changes in the statute and relying on *Loper Bright*, EPA tries to justify this change indicating that "activity" should be narrowly interpreted based on the 1972 language that "'any such discharge shall comply' with certain provisions of the CWA."[25] Thus certifications are limited to effects from only point source discharges, not the broader term "activities." This interpretation must fail against the backdrop of the CWA and as noted, the plain meaning of Section 401.

By limiting the review to that of the discharge only, the state/Tribe has no opportunity to consider the effects of the overall project on water quality, especially on unimpacted waters downstream, and indirect to, the project. For example, if there is a temperature-impaired water a mile downstream, the

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water quality standards. A certification obtained for construction of any facility must also pertain to the subsequent operation of the facility." The Supreme Court in PUD No. 1 established clearly that minimum instream flows must be maintained to ensure that the State of Washington's designated beneficial uses were not impaired ruling that the scope of the State's 401 authority includes the entire scope of activities associated with construction and operation of the permitted facility (in this case a dam and its operation), which must ensure that instream flows were sufficient to maintain designated uses for aquatic life. This included recognizing the interconnectivity between flows and water quality conditions that are required to maintain cold water fisheries and aquatic life stages of anadromous fish.

[19] 91 Fed. Reg. 2008 at 2023.

[20] *Loper Bright,* 603 U.S. 369, (2024).

[21] 91 Fed. Reg. 2008 at 2023

[22] *See* Section 401(a).

[23] 33 U.S.C Section 1251(a).

[24] 33 U.S.C. Section 1313(c)(2)(A).

[25] 91 Fed. Reg. 2008 at 2023

state/Tribe could not impose additional requirements on that project to reduce or eliminate further temperature impairments in that impaired section downstream as a result of the federally-permitted project and its operation. Section 401(1)(a) of the CWA explicitly applies to both the construction and operation of federally-licensed or -permitted facilities/projects, including the full scope of activities, including any and all potential discharges from construction and operations, that may result in water quality impacts.[26]

EPA also does not consider other provisions in the CWA including Section 101(g),[27] which was enacted in 1977. Section 101(g) focuses on state authority over water allocation while promoting federal/state cooperation in water management and pollution control. One of the basic principles that comes from this provision is that water quantity and water quality are "inextricably intertwined." The *PUD No. 1* case specifically involved water quality certification of water flows through the dam. This stands for the premise that water quality is impacted by more than just a direct point source discharge.

Following the *Loper Bright* framework of requiring a plain reading of the CWA to justify a regulation, EPA cannot ignore these other statutory provisions.

The proposed rule defines "water quality requirements" in 40 CFR section 121.1(f) as "applicable provisions of sections 301, 302, 303, 306 and 307 of the Clean Water Act and applicable state or tribal water quality related regulatory requirements for discharges."[28] This changes the 2023 Rule back to the 2020 Rule. The 2023 Rule used the general language "other appropriate requirement of State Law," which is the correct statutory language in Section 401(d). By adding the specific list of statutory provisions and the modifying language "requirements for discharges," this limits the states' and Tribes' ability to use other applicable water quality provisions, narrowing the ability of the states and Tribes to protect their water resources.

Lastly, EPA asks for comment on limiting the state/tribal requirements to numerical water quality criteria.[29] EPA does note that the current requirements "would not limit States to evaluating only numeric water quality criteria in a certification review." EPN does not support making this change. Limiting certification to numeric criteria would ignore the many narrative standards that states and Tribes have established and EPA has approved. In particular, this would be harmful for controlling nutrient pollution, which can contribute to hypoxic dead zones in waterbodies, toxic harmful algal blooms, and excess nitrates in drinking water supplies, as very few states have any numeric criteria for nutrients. This change is inconsistent with EPA's water quality standards regulations, which provide for state adoption of narrative standards for toxic pollutants[30] and EPA's provision for state establishment of narrative criteria or criteria based on biomonitoring methods where numeric criteria cannot be established or to supplement numeric criteria.[31] EPA has no basis for limiting Section 401 certifications to a subset of a state's or Tribe's formally adopted, EPA-approved water quality standards.

IV. Contents of a Certification Decision

[26] *See* Section 401(a).
[27] 33 U.S.C. Section 1251(g).
[28] 91 Fed. Reg. 2008 at 2026
[29] 91 Fed. Reg. 2008, at 2027
[30] 40 CFR Part 131.11(a)(2).
[31] 40 CFR Part 131.11(b)(2).

The rule requires that any action to grant, grant with conditions, deny, or explicitly waive a request for certification must be in writing and must include a statement indicating whether the project will comply with water quality requirements. If the project will not comply, the certifying authority must provide detailed supporting information. If the certifying authority requires any conditions, it must cite to the applicable water quality requirement that is the basis of each condition. The proposed rule also revises the 2023 rule to add the requirement that the applicant, as well as the federal agency and the certifying authority, must agree before the certifying authority can modify a grant of certification. The rule further requires that the applicant, not the federal agency, must agree to the exact language of the modification.

EPN notes that by limiting the scope of a certifying authority's action, the proposed rule limits the scope of what conditions can be included with the certification. As noted above, CWA Section 401(d), addressing conditions of certification, does not support such narrow limitations.

The proposed rule requires the certifying authority to provide specific and time-consuming documentation for the certification decision, particularly for conditions or denials. It will be so time consuming to cross reference every condition with water quality issues that states/Tribes may be deterred from granting conditions and instead deny certification. While it is fair to demand specificity in a denial, taken together with the limited time period for state/Tribal review and this rule's limitations on the ability of the certifying authority to obtain sufficient information, certifying authorities may find themselves stripped of the ability to provide all the information now being required in the certification decision. EPA must provide adequate review time and allow states/Tribes to require the applicant to provide the information they need in the request for certification. The proposed rule requires that if the denial is due to insufficient information, the certifying authority must describe the missing water quality-related information. EPN believes it would be far more efficient if the proposed rule retained the 2023 rule's provision that states/Tribes could require the applicant to submit the information they need in the request for certification. By barring this collection of state/Tribal information, this proposed rule will undoubtedly lead to more denials based on insufficient information. The rule is potentially setting up a situation where states/Tribes don't have enough information to reasonably cite the water quality issues of concern so they deny. The applicant may then litigate the denial and finally provide the information the state/Tribe needed to certify the project, but would lose a lot of time in the process.

EPN is opposed to the proposed rule deleting the requirement that the certifying authority confirm compliance with its public notice procedures established pursuant to CWA section 401(a)(1). EPA justifies the deletion by saying that this confirmation is not part of the nature and rationale of the certification decision. This makes no sense since EPA acknowledges in the preamble that this confirmation would be helpful to federal agencies. EPN is concerned that the deletion of this statement of compliance along with the repeal of the automatic extension to ensure compliance with public notice procedures indicates that EPA does not support the statutory requirement for these procedures (see Sections 401(a)(1) and (a)(2)).

EPN is also opposed to the new requirement that the applicant must agree with the federal agency and the certifying authority to modify a grant of certification and that the applicant must agree to the exact language of the modification. Modifications are useful for addressing small changes to a project schedule or planned activities. They can enhance efficiencies during the certification process and help ensure that waters are protected in light of project changes. This provision is clearly taking power away from the state/Tribe and giving it to the applicant who may be motivated to block any modifications needed to protect waters in light of project changes.

V. Section 401(a)(2) Process

The proposed rule includes many requests for comments on potential changes to the Section 401(a)(2) procedures set out in the regulations and the preamble to the 2023 rule.[32] EPN has reviewed those requests and offers its view on many of the requests. The proposed rule also adds text acknowledging that EPA can conduct "may affect" determinations on a categorical or case-by-case basis. It requires neighboring states/Tribes that object to a permit/license to cite the water quality requirement being violated and limits federal agencies to 90 days to hold a public hearing and make a determination on those objections.

As noted, the preamble contains a number of requests for comments, as well as some specific changes to the existing regulations. EPN has comments on and concerns with many of the proposed changes.

Some of the changes that are framed as a request for comments are potentially significant and would likely require new notice and comment rulemaking for these changes to be made to the regulations. EPN recommends that EPA not finalize the rule until they have made decisions on these changes and then provide proper notice of rulemaking.

Section 401(a)(2) authorizes EPA to notify states and Tribes if EPA determines that a discharge in one state may affect the water quality of other states or authorized Tribes. The 2020 and 2023 rulemakings defined a new term "neighboring jurisdictions" to characterize these affected jurisdictions. "See 40 CFR 121(g) (defining neighboring jurisdictions as 'any state or Tribe with treatment in a similar manner as a state for Clean Water Act section 401 in its entirety or only for Clean Water Act section 401(a)(2), other than the jurisdiction in which the discharge originates or will originate.'"[33] This change recognized that there are two pathways to gaining recognition as an "authorized Tribe" for Section 401. A Tribe could either obtain Treatment in a similar manner as a State (TAS) for Section 401 only, or be recognized as a Tribe under Section 401(a)(2) which would trigger EPA to conduct its 401(a)(2) "may affect" determinations. EPA is seeking comments on changing this back to the narrower interpretation limited to a strict reading of the statutory term "other states." EPA does recognize that the term "neighboring jurisdictions" has been in use long enough that it is "incorporated into stakeholder vernacular"[34] so they plan to continue to use both terms interchangeably in the preamble and "any subsequent materials."[35] Nevertheless, EPA does not believe the term "other states" needs this clarifying definition and are seeking comment on revising it. EPN strongly opposes this revision. The term "neighboring jurisdiction" provides clarity to the statutory term "other states" by explaining that it is referring to states and Tribal lands that are in fact neighboring.

EPA is seeking comments on the type of information that must be included in the notice of a federal license or permit application and certification. Noting that the statute does not include such a list but the current regulations do, including a project summary, EPA is seeking comments on a "minor revision to the text at 40 CFR 121.12(a)(2) to clarify that the project summary must be relevant to the discharge."[36] EPN does not agree with this proposed change. A project summary can provide more context to the nature of a facility or project that even if it is not relevant to the

[32] 91 Fed. Reg. 2008 at 2031 - 2035
[33] 91 Fed. Reg. 2008 at 2032
[34] 91 Fed. Reg. 2008 at 2032
[35] 91 Fed. Reg. 2008, at 2032. Note the term "any subsequent materials" is not defined.
[36] 91 Fed. Reg. 2008 at 2032

discharge and can be helpful for assessing the scope of potential impacts to a neighboring jurisdiction's water quality.

The major issue that EPA is seeking comment on are the factors that EPA must analyze when making a "may effect" determination.[37] Noting that the statute does not specify the factors EPA should consider, and that the current regulations also do not include such a list, the preamble to the 2023 regulations did articulate a list of factors EPA may consider. EPA goes on to note that in many cases additional factors to what is included in the preamble are used. EPA also notes that different types of discharges would require different types of information. EPA is seeking comment on whether there are specific factors that should be included. EPN believes there are a range of factors that should be included, and would start with the 2023 Rule's preamble list, adding any other relevant factors states or authorized Tribes suggest. Importantly, this list should include the caveat that this list is a starting point and that additional relevant information that is needed to make a "may effect" determination may be requested by EPA and included.

EPA next seeks comments on what they refer to as "emerging trends" the agency sees in conducting the hundreds of "may affect" determinations every year.[38] In the 2025 Federal Register notice, the agency was seeking comments on "specific types of activities, geographic regions, types of waterbodies, or other circumstances that may support the development of categorical determinations."[39] EPA notes that this is not a categorical exclusion, but it is "a standardized way of reviewing and acting upon notifications that meet a set of criteria for a 'category' of discharge types, project types, and/or projects in specific locations."[40] The agency does not plan to codify specific categories into 40 CFR 121.12(a), but acknowledge that "may affect" determinations could be made on a case-by-case or categorical basis and is seeking comments on what type of categories and relevant water quality data should be required to establish a category. EPN understands the approach but has concerns that creating general categories could potentially result in missing water quality impacts, and does not see the need for this approach. Using the lists discussed above, while still providing for case-by-case analyses, provides more flexibility in reviewing projects and does not risk missing a specific water quality impact because that category did not include it.

EPA seeks comments concerning the timeframes for a downstream state to object to the issuance of a permit, and request the Federal licensing or permitting agency to hold a hearing, and what must be included in the objection.[41] EPA cites the statute that requires the notified state or Tribe to determine if the discharge will affect their water quality, object to the issuance of the permit or license, and request a hearing within 60 days.[42] Stakeholders raised concerns that although there are requirements for 30 days notice of the hearing, there are no timeframes identified within which to hold the hearing or by when a final permit decision is made. EPA is suggesting that the federal agency to issue the license or permit should hold a hearing and make its determination on how to address the objection within 90 days from receipt of the objection from the neighboring state or Tribe. EPA argues that because the statute has discrete timeframes for EPA to review the certification and the neighboring jurisdiction to review and object under 401(a)(2), there should also be specific time frames for the federal licensing or permitting agency to hold the hearing and issue a determination. That may be, but allowing only 90 days for the federal agency to notice a hearing,

[37] 91 Fed. Reg. 2008 at 2033
[38] 91 Fed. Reg. 2008 at 2033-2034
[39] 91 Fed. Reg. 2008 at 2034, citing 90 Fed. Reg. 29829
[40] 91 Fed. Reg. 2008 at 2034
[41] 91 Fed. Reg. 2008 at 2034 - 2035
[42] 33 U.S.C. 1341(a)(2).

hold that hearing, and then make their decision on whether to condition or deny their license or permit is not realistic and is untenable. This short time frame will severely restrict the ability of the federal agency in coordination with EPA and the state or Tribe to properly address the objections and protect the neighboring jurisdictions water quality. This gets more complicated when there are multiple permits involved (e.g. FERC licenses, CWA Section 402 and 404 permits) and multiple agencies. When EPA is the Section 402 permitting agency, specifying a timeframe in which to hold their public hearing and make their permit decision may be appropriate, including addressing/resolving the 401(a)(2) process neighboring jurisdiction objections. However, EPA cannot and should not impose requirements on other federal licensing or permitting agencies. Accordingly, EPN objects strongly to this proposed change, specifically one that requires that the federal licensing or permitting agency make their final decision within 90 days. EPN recommends each federal agency determine their own more reasonable time frame.

VI. Treatment in a Similar Manner as a State

The proposed rule would repeal the standalone "treatment in a similar manner as a state" (TAS) provisions located at § 121.11 for a Tribe to be recognized as a certifying authority and/or a neighboring jurisdiction under Section 401. EPA would instead "appropriately direct [interested] Tribes to utilize the existing regulation at § 131.8" to obtain TAS concurrently for Section 401 and for Section 303(c) water quality standards.

EPN opposes EPA's proposed repeal of the standalone TAS provisions for Section 401. Removal of these provisions, coupled with the other changes discussed above, would significantly impede the ability of Tribes to ensure that their water quality and resource rights under treaties will be protected.

It is especially important to have the TAS options available for Tribes that want a greater role in decisions affecting their on-reservation waters but have limited resources to meet EPA's expectations for a full water quality standards (WQS) program under the CWA. For example, many Tribes without TAS for WQS have already adopted water quality requirements solely under Tribal law that could form the basis for Section 401 certifications or Section 401(a)(2) objections.

The standalone TAS provisions provide a direct way for such Tribes to ensure upcoming federal permits for activities will not threaten their waters. Over 240 Tribal reservations currently without 401 TAS could potentially benefit from the standalone 401 TAS provision.

Each of EPA's four justifications for the repeal lacks merit. First, EPA implies that its "direction" for Tribes to get TAS for WQS and 401 concurrently is the only way to ensure "genuine and rigorous scientific and legal protection for [Tribal] waters." EPA apparently does not realize that many Tribes without TAS for WQS have already developed water quality requirements that are consistent with EPA's recommended scientific water quality criteria and duly adopted them as Tribal laws or ordinances. The preamble to the proposed rule correctly acknowledges that standards adopted under Tribal law can be used to impose conditions on discharges under CWA 401(d).

Second, EPA notes that no Tribes have applied as yet for standalone 401 TAS. This is not a valid reason for repealing the 401 TAS regulation. It has only been in place since late 2023. Tribes often take awhile to readjust their priorities in response to new developments, especially if they have limited resources and competing priorities.

Third, EPA asserts that the repeal would "reduce redundancies across regulations." Keeping the Code of Federal Regulations tidy hardly justifies removing a feature of such importance to Tribal communities. Furthermore, if reducing redundancies is important to EPA, it could easily modify the § 131.8 WQS TAS regulation to make it usable for both 401 alone and WQS and 401 together. EPA considered such an approach when drafting the 2023 401 rule but opted instead to copy most of the full text of § 131.8 into § 121.11 to make the 401 rule more self-contained and easier to read.

Fourth, EPA asserts that because the § 131.8 rule text is "virtually identical" to the § 121.11 rule text, "EPA does not…anticipate any significant additional [paperwork] burden" in applying for the joint WQS-401 program. EPN strongly disagrees. Applying for TAS for the broader WQS and 401 program could require much more advance planning and more paperwork than applying for 401 alone. For example, both rules require a written staffing and funding plan if the Tribe will need more resources to run the target program. Since the joint WQS and 401 program is more resource intensive than 401 alone, a Tribe's application for WQS and 401 would be more likely to require such a plan, hence placing "additional burden" on the Tribe. EPA's proposal did not account for these "additional [paperwork] burdens," let alone the costs for Tribes to hire staff for two programs rather than one.

EPN also opposes the specific repeal of § 121.11(d), the section that allows a Tribe to obtain TAS solely to participate as a neighboring jurisdiction under CWA section 401(a)(2). This repeal would remove important features that could benefit many Tribes. These features include being entitled (a) to receive a notice from EPA if any upcoming federal permitted or licensed activity may affect the quality of their Tribal waters, (b) to object to that permit or license, and (c) to request a hearing from the federal agency.

EPA asserts that "CWA section 518 does not list CWA section 401(a)(2) as one of the provisions for Tribes to establish [TAS]." EPN disagrees. CWA Section 518 authorizes EPA "to treat an Indian Tribe as a state for the purposes of [twelve CWA sections, including Section 401] *to the degree necessary* to carry out the objectives of [the Act]…" [emphasis added]. Thus, it gives EPA discretion to determine which sections, and arguably which elements of which sections, are "necessary" for Tribes to have.

EPA asserts that it "does not believe the neighboring jurisdiction role under Section 401(a)(2) is reasonably separable from the statute's other water quality certification activities." EPN disagrees. The two processes share a few similar aspects but there are no 401(a)(2) tasks for which a neighboring Tribe would need skills, legal authorities, or information that can only be obtained by having TAS to perform 401(a)(1) certifications.