August 8, 2022

VIA ELECTRONIC FILING (www.regulations.gov)

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
ATTN: Docket EPA-HQ-OW-2022-0128

Re: Clean Water Act Section 401 Water Quality Certification Improvement Rule, Proposed Rule, 87 Fed. Reg. 35,318 (June 9, 2022)

Dear Administrator Regan:

The undersigned members of Waterkeepers Chesapeake (WKC) thank you for the opportunity to provide the following comments on the U.S. Environmental Protection Agency's (EPA) Proposed Rule that would revise and replace a 2020 rule outlining substantive and procedural requirements for water quality certifications under Section 401 of the Clean Water Act (CWA), 33 U.S.C. §1341. WKC is a coalition of 17 riverkeepers from Pennsylvania to Virginia working to make the waters of the Chesapeake and Coastal Bays swimmable, drinkable, and fishable once again. We are committed to maintaining and restoring clean water to the rivers and streams throughout the Chesapeake Bay region, and we rely on the CWA as the foundation of restoration and protection efforts. An important tool under the CWA is the requirement to obtain water quality certifications under Section 401. We have experienced the importance of robust state authority to review the potential impacts of proposed activities that require federal approvals, and to deny or condition water quality certifications where such projects or activities will violate state water quality standards or otherwise have adverse impacts on state water quality.

This year, WKC has been celebrating the 50th anniversary of the 1972 legislation establishing what is known as the CWA today. The Proposed Rule seeks to change the existing requirements for water quality certifications, which reflect the Trump Administration's revisions to EPA's 1971 regulations in 2020, to be more consistent with the statutory text of the 1972 CWA. WKC supported EPA's decision to review the 2020 regulations due to concerns that the Trump Administration's revisions undermined the cooperative federalism established under the CWA and diluted, and effectively eliminated, state and tribal authority under Section 401 of the CWA. WKC urged EPA to establish regulations that are consistent with plain congressional intent,

binding Supreme Court precedent, and decades of EPA interpretation and practice.[1] The Proposed Rule does address many of the most problematic aspects of the 2020 regulations. In particular, it is eliminating or replacing several regulatory provisions that numerous States and the District of Columbia found violated the principles of cooperative federalism. The Proposed Rule would properly remove or replace provisions from the 2020 regulations that limit the certifying authorities' ability to consider a broad range of impacts of the federally approved activity on water quality, effectively give federal agencies veto authority, limit the ability to enforce certification requirements and conditions, and potentially limit participation of neighboring states. The Proposed Rule would also better ensure participation of tribal certifying authorities in protecting water quality.

Nonetheless, because of the increasing threats of climate change to our waters, the substantial impacts projects can have on communities, especially those that have been marginalized and experience disproportionate environmental and public health impacts, and the importance of protecting our waters, we urge EPA to consider some of the suggested modifications to the proposal to further support state and tribal efforts and ensure protection of water quality.

- While the Proposed Rule properly re-affirms that certifying authorities can consider a broad range of impacts to water quality in the scope of certification, EPA should reconsider the limitation that only point source discharges trigger Section 401 certification requirements in the first instance.
- If EPA finalizes minimum requirements for a "request for certification," it should ensure that the certifying authority retains full authority to determine the needed information to conduct its review.
- EPA should defer to certifying authorities' determination of a "reasonable period of time" and should eliminate the default time period or, alternatively, extend the 60-day time period.
- EPA should consider providing guidance that allows certifying authorities to "restart" the reasonable period of time to issue the certification in appropriate circumstances, such as when the certifying authority has insufficient information, has not completed its state law required reviews, or requires more time to ensure public participation.
- EPA properly identifies the types of certification decisions and the limits of federal agencies' review of those decisions, but EPA should be clear that such review does not include ensuring the elements of such decisions are met and should consider requiring an explanation for the public to understand any decision of the certifying authority to expressly waive its certification authority.
- EPA should allow certifying authorities to modify certifications based on reopener provisions and changed circumstances, including effects of climate change.

Thanks to a decision by the Supreme Court, the 2020 regulations from the Trump Administration remain in effect, and states and tribes have less power to prevent heavy pollution in their waterways. We urge EPA to finish this rule efficiently and effectively and restore protections to this Nation's waters.

[1] *See* Comment submitted by Waterkeepers Chesapeake et al., Aug. 2, 2021 (EPA-HQ-OW-2021-0302-0059); Comment submitted by Waterkeeper Alliance, et al., Aug. 2, 2021 (EPA-HQ-OW-2021-0302-0096).

I. Section 401 of the CWA Sought to Protect Water Quality, Giving States Primary Responsibility for Protecting Their Waters.

Section 401 of the CWA creates a cooperative federalism type structure which gives state and tribal authorities primary authority to ensure that federally authorized activities will not adversely impact water quality.[2] This is a logical system because state and tribal authorities have a more localized knowledge of their waterways. Congress also had expressed concerns with federal agencies issuing permits and licenses without any assurance that water quality standards would be met or even considered. 87 Fed. Reg. at 35,321. In passing the 1972 legislation, as EPA recognizes in the Proposed Rule, "Congress reaffirmed 'the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." *Id.* (quoting 33 U.S.C. §1251(b)). "Consistent with Congress's intent to empower states to protect their waters from the effects of federally licensed or permitted projects, [Section 401(d)] 'assure[d] that Federal licensing or permitting agencies cannot override State water quality requirements.'" *Id.* at 35,322 (quoting S. Rep. No. 92-414, at 69 (1971)).

Courts long have recognized the states' broad authority to take appropriate actions under Section 401 to protect water quality, including enforcing state antidegradation policies and maintaining of designated uses.[3] As the Supreme Court explained, "State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution," such that "[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]." *S.D. Warren Co.*, 547 U.S. at 386 (citation omitted). Consistent with this intent, States have increased their efficacy under Section 401 to prevent projects from being developed within their borders from having lasting impacts on the quality of their local waterways.

In 2020, EPA published the Clean Water Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) ("2020 Rule"). The 2020 Rule purported to establish procedures that promote consistent implementation of CWA Section 401 and regulatory certainty in the federal licensing and permitting process. As explained in comments on the proposal, the 2020 Rule eroded state authority under the CWA by: (1) preventing states from denying projects that will, as a whole, directly and negatively impact the state's water quality; (2) preventing states from placing conditions on projects that relate to the overall water quality impacts of a project, rather than just a specific point source "discharge"; (3) restricting the time available to states and tribes to review and make decisions about major projects impacting their local waterways; and (4) providing an outsized role for federal agencies in the certification process, in the name of economic

[2] *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (CWA 401 certifications are "essential in the scheme to preserve state authority to address the broad range of pollution" that would affect state waterways); *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007) (explaining that Congress intended to entrench the role of states in the CWA by maintaining a system of cooperative federalism); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 645-49 (4th Cir. 2018).

[3] *P.U.D. No 1 of Jefferson Cty. v. Wa. Dep't of Ecology*, 511 U.S. 700, 714-715 (1994) (upholding state authority to include conditions in 401 certification 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 statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards"); *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 731-34 (4th Cir. 2009).

development.[4] With respect to several of these aspects of the 2020 Rule, EPA "identified substantial concerns about whether portions of the 2020 Rule impinged on the cooperative federalism principles central to CWA section 401." 87 Fed. Reg. at 35,325 (citing 86 Fed. Reg. 29,541, 29,543-29,544 (June 2, 2021)). EPA properly chose to revise and replace the 2020 Rule to "better reflect the 1972 CWA's statutory text, the legislative history regarding section 401, and the broad water quality protection goals of the Act." *Id.* EPA also proposes to update the regulatory text to "foster a more efficient and predictable certification process" and to make conforming changes to its part 124 NPDES regulations. *Id.* at 35,326.

The compelling state interest in protecting water resources is self-evident. Numerous activities can require Section 401 water quality certifications. While many may not be controversial and can be relatively straightforward, major projects, such as interstate gas pipelines, hydroelectric dams/facilities, other dams and diversions (water storage and supply, etc.), and highways and bridges, have enormous potential to adversely affect water quality. The federal approvals also can last a long time or possibly be permanent, making it crucial that the actions are taken in a way that will not have long-lasting adverse impacts. Because these approvals can last a long time, certifications also must consider adapting to future conditions. *See, e.g.,* 87 Fed. Reg. at 35,353 ("EPA encourages certifying authorities to develop certification conditions in a way that enables projects to adapt to future water quality-related changes, i.e., so-called 'adaptive management conditions.'").

For example, in 2021, the Federal Energy Regulatory Commission (FERC) granted a 50-year license to the Conowingo Hydroelectric project, which is located in the Susquehanna River—the largest tributary of the Chesapeake Bay. The 50-year license was granted without including the State's water quality certification in which the Maryland Department of the Environment (MDE) found that the Project's dam "has significantly and adversely impacted biota in the Lower River and the northern Bay over the past 90 years of operation." MDE, Clean Water Act Section 401 Certification for the Conowingo Hydroelectric Project, Apr. 27, 2018, at 11, *available at* https://mde.maryland.gov/programs/water/WetlandsandWaterways/Documents/ExelonMD/Conowingo_WQC_04-27-18.pdf. The Conowingo Dam causes adverse impacts on aquatic resources because it is an obstacle to fish passage, degrades habitat, and disrupts the natural flow of the river. *Id.* Failure to include sufficient conditions to ensure water quality will continue to have long-term impacts on the vital resources of the Bay. The impacts of climate change will exacerbate those impacts, as increased rain and scour events are expected. FERC essentially ignored those impacts and excluded much needed mitigation requirements in approving the 50-year license, favoring the economic condition of the project over the environment.[5]

In addition, a key aspect of the certification process is the requirement that states include and follow public notice and comment provisions as part of their water quality certification process. Members of the public, including non-profit, public interest organizations, also rely on

[4] *See, e.g.,* Comment submitted by Waterkeepers Chesapeake et al., Oct. 21, 2019 (EPA-HQ-OW-2019-0405-0791); Comment submitted by Waterkeepers Alliance et al., Oct. 21, 2019 (EPA-HQ-OW-2019-0405-0948).

[5] Despite the fact that MDE issued a water quality certification in 2018, MDE subsequently asked FERC to finalize a license that included provisions as part of a settlement agreement entered between the project proponent and Maryland. FERC agreed to do so and also declined to include stronger provisions to protect water quality, despite these significant impacts. WKC, among others, filed a petition for review of the FERC license in the U.S. Court of Appeals for the District of Columbia Circuit, Case No. 21-1139 and 21-1186, which remains pending.

Section 401 as a vital tool to address water pollution impacts from activities that require federal approvals. Members of the public provide states with technical analyses and share their concerns about water impacts with their state environmental agencies. The 2020 Rule also adversely impacted the ability of members of the public to share their concerns about water impacts with the states, and drastically limited the ability of states to take action to address these concerns in their Section 401 certification decisions. The 2020 Rule also had substantial implications for environmental justice. This Administration has recognized the need to consider and protect against disproportionate environmental harms being faced by low income and minority communities, including tribal communities. Ensuring these communities can meaningfully participate in the decision-making process should be of substantial importance to EPA.

In short, it is inconsistent with the statute to weaken and dilute the authority that Congress granted to the states and to limit the ability of the public to participate in the process. Restoring certifying authorities' ability to curb projects that could jeopardize wetlands, rivers, and streams is a win for the health of the environment. The new proposed Section 401 regulations do a significantly better job in this regard compared to the 2020 Rule. Given the importance of this key tool under the CWA, EPA also has the opportunity to strengthen the ability of certifying authorities to protect local waterways through this Proposed Rule. EPA should be actively encouraging and assisting the states to fully utilize their Section 401 authority to advance and achieve the plainly-stated objective and goals of the Act. EPA also should take its obligations with respect to environmental justice seriously and ensure that meaningful public participation can take place. While we urge EPA to remove the problematic 2020 Rule as soon as possible, we ask EPA to keep these considerations in mind as it works to finalize Section 401 certification regulations.

II. The Proposed Rule Properly Affirms that States and Tribes May Consider a Broader Range of Impacts to Water Quality in the Scope of the Certification.

In the Proposed Rule, EPA states that "a point source discharge, or potential for one, is required to trigger section 401." 87 Fed. Reg. at 35,328 (citing Proposed §121.2). EPA also clarifies that, consistent with the Supreme Court, "a point source discharge triggering section 401 does not require the addition of pollutants." *Id.* As EPA explains, discharge has long been defined broadly to include, but not be limited to "discharges of pollutants." *Id.*; *see also S.D. Warren Co.*, 547 U.S. at 385-86 (finding hydroelectric dams releasing water constituted a discharge for purposes of section 401 certification). Importantly, the Proposed Rule recognizes "once the certification requirement is triggered by the prerequisite of a point source discharge into a water of the United States, the certifying authority may choose to grant, condition, or deny water quality certifications based on the potential impact of the 'activity as a whole' on waters of the United States and other state or tribal waters." *Id.* at 35,329. While we fully support the return to the "activity as a whole" in defining the scope of the certification, we also urge EPA to reconsider the requirement that only point source discharges trigger Section 401 certification in the first instance. A broader reading of "any" discharge under Section 401 could assist states and tribes in protecting their waters from a host of potential sources of pollution that might not otherwise be addressed under EPA's Proposed Rule.

A. EPA properly reaffirms that certifying authorities may address water quality impacts from the "activity as a whole" in their Section 401 certifications (Proposed §121.3).

The Proposed Rule proposes to "return to the scope of certification standard affirmed by the Supreme Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, which held that Section 401 "'is most reasonably read' as authorizing the certifying authority to evaluate and place conditions on what the Court described as the 'project in general' or the 'activity as a whole' to assure compliance with various provisions of the [CWA] and 'any other appropriate requirement of State law'…." 87 Fed. Reg. at 35,342 (quoting *PUD No. 1 of Jefferson Cty*., 511 U.S. at 711-712). EPA proposes to define "activity as a whole" as "any aspect of the project activity with the potential to affect water quality." 87 Fed. Reg. at 35,377 (Proposed §121.1(a)); *see also id.* at 35,345. We fully support EPA's recognition that certifying authorities can consider a full range of potential harms to water quality when determining what requirements should be placed on a proposed project. The 2020 Rule improperly limited certifying authorities to considering the impacts of a particular potential discharge only, and EPA should not adopt the "discharge only" scope of review announced in the 2020 Rule.

The ability to impose water quality certification conditions that are not directly related to a sole "discharge" from a point source can play a major role in state waterways. For example, operation of the Conowingo Dam in Maryland has led to major pollution in the Susquehanna River and the Chesapeake Bay. The excess sediment and nutrients building up behind the dam, which are released through storm events and operation of the dam, have a significant negative effect on the water quality in the Chesapeake Bay region. EPA recognizes the potential non-discharge related conditions that may be required with respect to a hydroelectric dam facility to protect water quality and designated uses. 87 Fed. Reg. at 35,342. "EPA believes that it is appropriate for the certifying authority to consider the broadest possible range of water quality effects and that the appropriateness of any given condition will depend on an analysis of all relevant facts." *Id.* at 35,343. The return to ensuring certifying authorities can consider the activity of the entity seeking certification as a whole rather than the discharge itself is vital to ensure the ability of certifying authorities to protect their waters and the communities that rely and use those waters.

In 1972, Congress understood that federally-authorized activities could result in adverse impacts on water quality and adopted Section 401 to ensure that federally licensed activities would not escape state regulation. Section 401 expressly enables states to apply their own water pollution control programs to such activities. Until the 2020 Rule, EPA had long recognized that the legislative history of Section 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." EPA, Office of Water, Wetlands and 401 Certification, Opportunities and Guidelines for States and Eligible Tribes, at 23 (Apr. 1989) (EPA-HQ-OW-2022-0128-0015); *see also* EPA, Office of Wetlands, Oceans, and Watersheds, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes, at 22 (Apr. 2010) (EPA-HQ-OW-2022-0128-0067). In the Proposed Rule, "EPA has concluded that the statutory text, legislative history, and goals of section 401 more reasonably support the 'activity as a whole' standard that was accepted practice for the preceding 50 years." 87 Fed. Reg. at 35,344. The Proposed Rule's return to these long-

standing precedents is consistent with the CWA, granting state and tribal authorities more autonomy to control the quality of local waterways.

B. The Proposed Rule Properly Repeals and Replaces the Definition of "Water Quality Requirements" in the 2020 Rule (Proposed §121.1(m))

When a certifying authority does its review under Section 401, it must determine whether the "activity as a whole" will comply with "water quality requirements." 87 Fed. Reg. at 35,346. The 2020 Rule defined the term "water quality requirements" to be limited to the enumerated provisions of the CWA listed in Section 401(a)(1) and only those state or tribal regulatory requirements for point source discharges. *Id.* at 35,347 (citing 40 C.F.R. §121.1(n)). The 2020 Rule significantly narrowed the "scope of review and ability of certifying authorities to include conditions to protect their water quality." *Id.* Repealing the definition of "water quality requirements" at 40 C.F.R. §121.1(n) is necessary to stop violating the plain language of the Act.

Here, EPA proposes to define "water quality requirements" to include "any limitation, standard, or other requirement under the provisions enumerated in section 401(a)(1), any Federal and state laws or regulations implementing the enumerated provisions, and any other water-quality related requirement of state or tribal law regardless of whether they apply to point or nonpoint source discharges." 87 Fed. Reg. at 35,347; *see also id.* at 35,377 (Proposed §121.1(m)). We agree that the text, purpose, and legislative history of the statute support a broad interpretation of water quality requirements to assure that any applicant will comply with "any other appropriate requirement of State law." *Id.* at 35,347 (quoting 33 U.S.C. §1341(d)). As further explained below, the CWA is concerned with a broad range of pollution sources, not just discharges from point sources. As EPA recognizes, "Congress intended section 401 to afford states broad power to protect their waters from harm caused by federally licensed or permitted projects." *Id.* at 35,348.

C. EPA must reconsider its limitation that only point source discharges trigger Section 401 certification requirements (Proposed §121.2).

Under the Proposed Rule, permitted actions that result in "non-point source" pollution would not trigger Section 401 certification. While states and tribes can consider such impacts in addition to a triggering point source discharge as part of the scope of certification, other sources of pollution can have significant impacts on water quality. EPA defines the term "nonpoint source" as any source of water pollution that does not meet the legal definition of "point source" in Section 502(14) of the CWA. EPA, *Basic Information about Nonpoint Source (NPS) Pollution*, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (last updated July 7, 2022). Certifying authorities should be able to review federally authorized activities generating non-point-source pollution as a part of the Section 401 certification process.

In support of the Proposed Rule, EPA references a 1998 decision of the U.S. Court of Appeals for the Ninth Circuit, *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998), which held that the term "discharge" in Section 401 refers to releases from point sources,

distinguishing the Act's use of the term "discharge" compared to "runoff."[6] 87 Fed. Reg. at 35,328. EPA also refers to a 2008 Ninth Circuit decision that "reaffirmed" the earlier decision. *Id.* (citing *Or. Natural Desert Ass'n v. USFS*, 550 F.3d 778 (9th Cir. 2008)). However, Section 401 is triggered by any activity "which may result in *any* discharge into the navigable waters." 33 U.S.C. §1341 (emphasis added). The U.S. Supreme Court recently again confirmed reading a statute as having an "expansive meaning" when Congress uses the term "any." *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n,* 141 S. Ct. 2172, 2179 (2021) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).

"Any" discharge is not limited to only those from point sources. "Discharge" is defined as "a flowing or issuing out" or "a rate of flow" or "something that is emitted."[7] Throughout the CWA, "discharge" has been used more broadly than discharges from point sources.[8] Section 502 of the CWA clarifies that the "term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants," which in turn is defined as a discharge from a point source. 33 U.S.C. §1362(12). Although the Ninth Circuit limited the term as it is used in Section 401, it nonetheless recognized that this provision indicates that "discharge" is broader than just a discharge of pollutants, meaning that the term "include" must be viewed as an enlargement rather than a limitation. This is further supported by the use of the term "any" by Congress in Section 401.

Reading "discharge" broader than just being discharges from point sources is also consistent with the structure of the CWA. While the Ninth Circuit argued that the CWA was focused on regulating discharges from point sources, Congress envisioned that the goals of the CWA would "be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. §1251(a)(7). The CWA also "clearly indicates that there is a category of nonpoint source pollution, and leaves the regulation of nonpoint source pollution to the states." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) (citations omitted). Where Congress sought to ensure that federal agencies do not restrict a state's ability to protect its waters when it established Section 401, 87 Fed. Reg. at 35,321, it seems illogical to find that the certification cannot also be triggered by such discharges.

---

[6] While the Ninth Circuit referred to "runoff," EPA does not explain whether or how that defines the universe of "nonpoint sources" of pollution. "Runoff" is defined as "the portion of precipitation on land that ultimately reaches streams often with dissolved or suspended material." https://www.merriam-webster.com/dictionary/runoff.

[7] https://www.merriam-webster.com/dictionary/discharge; *see also S.D. Warren Co.*, 547 U.S. at 376 ("When it applies to water, 'discharge' commonly means a 'flowing or issuing out,' Webster's New International Dictionary 742 (2d ed. 1954); *see also id*. ('[t]o emit; to give outlet to; to pour forth; as, the Hudson *discharges* its waters into the bay'), and this ordinary sense has consistently been the meaning intended when this Court has used the term in prior water cases.") (citations omitted).

[8] *See, e.g.,* 33 U.S.C. §1342(l)(1) (addressing "discharges composed entirely of return flows"), (l)(2) (addressing "discharges of stormwater runoff" from mining operations or oil and gas operations), (l)(3) (addressing "discharge from runoff" from silviculture activities), (r) (addressing "discharges incidental to the normal operation of recreational vessels" including "discharge of … weather deck runoff"); *id.* §1321(a) (defining "discharge" for oil and hazardous substance liability as including, but not limited to, "any spilling, leaking, pumping, pouring, emitting, emptying or dumping" except permitted discharges); *id.* §1322(a)(9) (defining "discharge" related to marine vessels as including, but not limited to, "any spilling, leaking, pumping, pouring, emitting, emptying or dumping").

III. EPA Properly Proposes to Retain Seeking Pre-Filing Meetings but also to Provide Certifying Authorities Flexibility to Waive Pre-Filing Meetings (Proposed §121.4).

EPA is proposing to retain the requirement for a project proponent to request a pre-filing meeting with the certifying authority at least 30 days before submitting a water quality certification request, while providing certifying authorities with the flexibility of waiving or shortening the time frame. 87 Fed. Reg. at 35,329. Having pre-filing meetings can have significant benefits, particularly with respect to complex projects, and should be encouraged.

We support early engagement and coordination between the certifying authority and the project proponent before the statutory timeframe for review begins. Such early engagement can help ensure the certifying authority receives sufficient information to conduct its review before the request is submitted. This notification can also assist states in providing public notice of such requests, which can help support efforts at improving environmental justice by providing communities with notice of such actions to identify issues of potential concern. For example, the Pennsylvania Department of Environmental Protection (DEP) has found that "[i]t is important that DEP assist community members understand the value of being involved throughout all phases of the decision-making process, which often begins before DEP receives a permit application." Pennsylvania DEP, Environmental Justice Policy, at 13, draft March 12, 2022. EPA should encourage certifying authorities to provide affected communities with notice of pre-filing meeting requests. Early public notice could help communities provide input to ensure the state is considering all relevant information and factors when reviewing the certification requests. Such early engagement can yield (and has yielded) significant, positive impacts on project development and the protection and management of trust resources and community values.

However, we also understand that resources may be limited and not every certification may require a pre-filing meeting. Giving the certifying authority flexibility to determine if a pre-filing meeting is necessary and an opportunity to waive the pre-filing meeting 30-day timeline also recognizes the authority of the certifying authority. The certifying authority should retain discretion on what information is needed for such meetings, whether to hold or waive any pre-filing meeting, and the procedure for such meetings.

IV. EPA Properly Seeks to Return the Authority to Determine Receipt of Valid "Requests for Certification" to the Certifying Authorities (Proposed §121.5).

A significant concern with the 2020 Rule was that it sought to strip power from states and tribes to determine when an application can, in fact, be deemed a "request" under Section 401, preventing states and tribes from promptly getting the materials they need and artificially triggering the start of the one-year clock under the statute. Each project is different, and each state or tribe has different state water quality standards and has to address different water quality circumstances. As such, states and tribes are in the best position to determine what materials are required and whether they have sufficient information to initiate the evaluation of the project. To meaningfully review an application under Section 401, it is critical that the information provided be sufficiently robust.

Like the 2020 Rule, the Proposed Rule seeks to clarify when there is a "request for certification" to the certifying authority that would be considered "receipt" to start the "reasonable period of time" the certifying authority has to review the application. EPA distinguishes "receipt" of the request from determining the request is "complete," citing *NYSDEC v. FERC*, 884 F.3d 450 (2d Cir. 2018). 87 Fed. Reg. at 35,331. The Second Circuit raised concerns that allowing a certifying authority to deem an application "complete" before it determines it has received the request under Section 401 could eliminate the statute's "bright line rule" by indefinitely requesting more information. The State in that case argued that this "bright line rule" would result in incomplete applications, undermine the State's public notice and comment procedures, and spur litigation. The Second Circuit's solution to these problems was that the certifying authority can simply deny the incomplete application without prejudice to refile. *NYSDEC*, 884 F.3d at 455-56; *see also Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1183 (D.C. Cir. 2022) (affirming finding that California did not waive certification authority when it denied requests for certification without prejudice to refile within one year of receipt because it "'act[ed]' within the meaning of section 401(a)(1)"), *petition for rehearing en banc filed Aug. 1, 2022*. While we do not necessarily oppose EPA providing guidance as to what minimum elements should be included in any application to address the concerns raised by the Second Circuit, it is unclear how the Second Circuit's resolution to the valid concerns of certifying authorities and the public over insufficient information being provided would help make the process more efficient. While we understand that Congress has set a deadline in the statute and other stakeholders have raised concerns with delays to the federal permitting process, the certifying authority's need for sufficient information to determine the potential impacts of a project on its waters should take precedence. *See AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009) (affirming Army Corps' determination that "only a valid request for § 401(a)(1) water quality certification ... will trigger the one-year waiver period").

EPA attempts to resolve these concerns by proposing that any request for certification include "a draft license or permit for the proposed project." 87 Fed. Reg. at 35,332. EPA contends that this will allow the certifying authority to have "the most important pieces of information—the water quality-related conditions and limitations the Federal agency has preliminarily decided to include in the draft license or permit and information informing that preliminary decision—to evaluate and determine whether it can certify (with or without additional conditions and limitations) that the project will comply with all applicable Federal and state water quality requirements." *Id*. at 35,333. We are concerned that this approach would not necessarily provide the information the state or tribal authority needs to address their water quality concerns and could still dilute the primary role of the certifying authorities in ensuring that water quality is protected.

For example, as part of the re-licensing project for the Conowingo Dam project, FERC conducted its environmental review without the State of Maryland's view on potential impacts of water flow from the dam and measures to address those impacts. As such, its review was based on limited information, and Staff for FERC indicated it would choose its recommendations over that of Maryland in any certification. FERC, Final Multi-Project Environmental Impact Statement for Hydropower Licenses: Susquehanna River Hydroelectric Projects, at 429, 439 (2015). This is problematic on several grounds. As an initial matter, FERC is not the expert on water quality, and it is unclear how the federal agency's view of water quality impacts and

mitigation measures could/should supersede the State's.[9] More important, Congress did not give federal agencies veto power over the State's determinations. Indeed, despite having FERC's Environmental Impact Statement, which outlined the Staff's recommendations for any license for the project, Maryland found the project proponent had provided insufficient information to address all the relevant water quality concerns raised by the project and, as the Second Circuit suggested, initially leaned toward denying the certification request. Ultimately, concerns over litigation won the day, as Maryland backed away from its certification issued in 2018 and FERC granted a 50-year license without adequate protections for water quality, which, as noted above, is currently under review in the D.C. Circuit.

While we believe EPA should allow the certifying authorities to identify the information they need for a "valid" application, an alternative approach identified by EPA is to submit the application instead of a copy of the draft license or permit, all existing and readily available data or information related to potential water quality impacts (e.g., Environmental Impact Statements), and "proposed activity information." 87 Fed. Reg. at 35,336. EPA lists six components that would be included in "proposed activity information." These additional components make sense, but we would suggest EPA ensure sufficient information on the discharges, such as: (1) the designation of the waterway, (2) the volume of the discharge, (3) how and to what extent the discharge might impair the waterway and its existing designation, and (4) whether and to what extent the project might result in more than one discharge in the same waterway that could have cumulative effects. EPA also should clarify that the diagram of the proposed activity site also should identify nearby waters, including, but not limited to, wetlands and waters in neighboring states. Such information would likely be readily available as project proponents must determine if there are jurisdictional waters within the project area.

While EPA is seeking to provide parameters as to what a request for certification entails, it also appears to be placing authority to make the determination whether it has received a request for certification back into the hands of the certifying authority. The Proposed Rule's definition of "receipt" (Proposed §121.1(k)) acknowledges that the request for certification meet the *certifying authority's* definition and procedures.[10] 87 Fed. Reg. at 35,337. The Proposed Rule would require the certifying authority to confirm in writing for the project proponent and Federal agency the date it received a certification request that meets *its definition* and is submitted in accordance with its applicable submission authority. *Id.* Under the Proposed Rule, EPA contends that "states and authorized tribes remain free to identify their own additional contents of a request for certification under state or tribal law." *Id.* Certifying authorities should have the authority to determine when the project proponent has provided adequate information for a certification request and when the one-year clock starts for determining a reasonable period of time. To clarify this, however, EPA should consider revising Proposed §121.5(a) to be clear that these are *minimum* requirements for a request for clarification (*e.g.,* "A request for certification shall be in writing, signed, and dated and shall***, at a minimum,*** include a copy of the draft license or permit (unless legally precluded from obtaining a copy of the draft license or permit) and any existing and readily available data or information related to potential water quality impacts from

[9] Because the permit or license *must* include any conditions in a Section 401 water quality certification, EPA appropriately is not requiring a final permit or license be provided.

[10] EPA also requests comment on whether it should define applicable submission procedures. 87 Fed. Reg. at 35,337. We do not believe EPA needs to develop procedures for submitting requests to the certifying authorities.

the proposed project").[11] EPA should also make clear that the certifying authority's definition of a valid request for certification need not be codified. For example, the required elements could be identified as part of the pre-filing meeting or consultations or after an initial review of any submission.[12]

V. While EPA Must Revise the 2020 Rule's Provisions on "Reasonable Period of Time," the Proposed Rule Should Allow Certifying Authorities to Determine How Much Time they may Need and EPA Must Eliminate the 60 Day Default Time Period (Proposed §121.6).

Certifying authorities must have enough time to reasonably be able to evaluate the projects presented to them and not have that time arbitrarily set or truncated by a federal agency with no expertise regarding water quality or conditions on-the-ground in a particular state. The CWA gives certifying authorities a "reasonable period of time" to meet their obligations under Section 401, which may not be longer than one year. How much time is needed to fulfill their Section 401 obligations should be up to states and tribes—not federal agencies. The rule also should expand the list of events that would automatically extend the time certifying authorities have to act on an application.

We support EPA's proposal to remove the 2020 Rule's provision that federal agencies unilaterally set the reasonable time period for review of certification requests. Certifying authorities are often more knowledgeable about local requirements and water quality, and their certification processes. In many cases, certifying authorities are in the best position to determine how much time is reasonable to address local water quality in accordance with local procedures.

The Proposed Rule also should ensure meaningful state and public certification review. Congress gave certifying authorities a reasonable period—up to "one year"—to complete the necessary administrative procedures when making a Section 401 certification determination. Once sufficient information has been received to initiate review, Section 401 requires states to provide public notice and encourages public hearings. Depending on their own procedures, states must hold a public comment period that may be as much as sixty days and undergo any additional environmental reviews required, such as state environmental review acts, before making determinations on applications. The 2020 Rule artificially constrained these decision-making timeframes and placed significant authority in the hands of federal agencies, rather than the certifying authorities. This was inconsistent with Section 401 and impinged on the ability of states and tribes to protect water quality and the public to meaningfully participate.

In place of the 2020 Rule, the Proposed Rule would allow the federal agency and certifying authority to "jointly" set the reasonable period of time for the certifying authority to act. 87 Fed. Reg. at 35,337. While the regulations say "may" jointly agree on a time period, the Proposed Rule would also set a default time period of 60 days "[i]f the Federal agency and the certifying

[11] As noted above, we have concerns with the requirement that a draft permit or license be included with the request for certification.

[12] It is unclear how often a certifying authority provides a series of requests for more information prior to deeming a request "complete." But the certifying authority should at least have some opportunity to request additional information before deeming a request for certification "valid" for purposes of initiating review.

authority do not agree on the length of a reasonable period of time within 30 days of receipt of a request for certification." *Id.* at 35,378 (Proposed §121.6(b) and (c)). The default period appears to render the "may" jointly agree into a "must" agree or be limited to a 60-day time period. Although the Proposed Rule would provide for instances to extend these time periods, we are concerned that these regulations could give federal agencies the authority to overrule certifying authorities by simply not agreeing to a reasonable period of time and defaulting to a 60-day time frame or, at a minimum, gives federal agencies leverage to force the certifying authorities to agree to the time frame viewed as reasonable by the federal agency. Federal agencies then can put pressure on state agencies to rush their reviews of complex projects and create the incentive for applicants to submit bare-bones applications and simply wait out the clock.

EPA portrays its Proposed Rule as promoting collaboration between the Federal agency and the certifying authority, and we agree that the Proposed Rule is better than giving the federal agency sole responsibility for determining the reasonable period of time.[13] We do not oppose a federal agency indicating how much time it believes may be needed (or, as EPA says, "to opine on timing in relation to their Federal licensing or permitting process," 87 Fed. Reg. at 35,338), but, ultimately, Congress gave states and tribes the authority to issue the certification, which federal agencies must include in their license or permit. While EPA properly proposes not to place the authority to identify the reasonable period of time with the Federal agency as in the 2020 Rule and the 1971 regulations, EPA should ensure that the final rule does not unduly impinge on the certifying authorities' ability to conduct a thorough review of the certification request. Federal agencies should defer to the certifying authorities, so long as it is within the one year deadline in the statute. The risk to the states and tribes in missing this time frame is high in that it could be deemed a waiver, regardless of how diligent the certifying agency is acting. *See* 87 Fed. Reg. at 35,357 ("The Agency recognizes that a constructive waiver is a severe consequence…."). EPA does not explain why it must outline in regulations that federal agencies and state and tribal authorities can reach agreements. Nothing prevents them from doing so for a standard set of approvals. To require it in all cases or be subject to a default period of time, however, is not adequately explained. Mere transparency and consistency in the process are not grounds to undermine the primary responsibility Congress gave to states to regulate water quality.

Although we believe that the certifying authority should determine how much time they may need to undertake the certification review, if a default time period is provided, sixty days cannot be supported, even with the limited ability to extend that time. EPA acknowledges that FERC has found one year is the "reasonable period." 87 Fed. Reg. at 35,338 (citing 18 C.F.R. §§4.34(b)(5)(iii), 5.23(b)(2), 157.22(b)). Even the 1971 regulations provided only that the reasonable period of time "shall generally be considered to be six months." *Id*. EPA recognizes that more time may be needed in certain circumstances and that certifying authorities noted that more time is often needed due to lack of necessary information from project proponents. *Id.* Indeed, the federal agency could drag its feet for 30 days or extend negotiations before the 60-day default is triggered, which could effectively give the certifying authority only 30 days for its review because of its limited resources to engage in negotiations and conduct the review during the initial 30 day period by when agreement must be reached.

[13] As such, we oppose EPA's "alternative approach[]" to giving this authority to federal agencies as in the 2020 Rule for which it seeks comment. 87 Fed. Reg. at 35,339.

While EPA refers to its 60-day reasonable period of time established for requests for certifications for draft NPDES permits, 87 Fed. Reg. at 35,339, the NPDES permit involves discharges into navigable waters, and EPA is uniquely positioned to consider water quality impacts. Such a time period, even if reasonable in these cases, should not be the basis for all federal permits and licenses. States and tribes, not federal licensing agencies, are the ones that know what amount of time is "reasonable." Comments submitted to the agency explained that the time periods can depend significantly on the complexity of the project. *See* Comment Submitted by Southern Environmental Law Center, Aug. 2, 2019, at 22-25 (EPA-HQ-OW-2021-0302-0075). Comments explained "Projects with minimal or no water quality impacts" taking thirty to sixty days to make a decision. *Id.* at 23 (citing Comments Submitted by Ass'n of Clean Water Administrators, May 24, 2019, Attachment A: Survey summary (EPA-HQ-OW-2018-0855-0045), Attachment 15 to EPA-HQ-OW-2021-0302-0075). "Projects that involve large watershed area, a high degree of complexity, or a high potential for water quality impacts" take six to twelve months, and require the consideration of conditions to "offset water quality impacts;" and "[p]rojects that involve multiple or large watershed areas, a very high degree of complexity, very high potential for water quality impacts, or a high level of public involvement" take up to one year. *Id.* These timelines were based on years of experience certifying authorities have had with countless types of projects.[14] As was also pointed out, certifying authorities have vastly different staffing resources and Section 401 workloads, which can greatly affect how quickly they can make certification decisions. *Id.*

In addition, the reasons for extension under the Proposed Rule are limited to situations involving force majeure events (such as government closure or natural disaster) or where more time is needed for notice and comment processes. Although we disagree with the 60-day default time period, as discussed further below, we agree that any reasonable period of time should be extended automatically to accommodate public notice requirements as force majeure events. under the Proposed Rule, extensions for any other reason, however, must involve the project proponent and must be agreed upon by the Federal agency and the certifying authority. 87 Fed. Reg. at 35,340. For example, in cases where a certifying authority has determined more information or data is needed to make a certification decision or where the project proponent has not been responsive, the certifying authority should be able to make its own determination if an extension is needed and not require the federal agency to "agree."

The Proposed Rule also recognizes that certifying authorities have requested project proponents to withdraw and resubmit their certification requests in order to restart the clock. 87 Fed. Reg. at 35,341. Although the Proposed Rule would properly remove the 2020 Rule's prohibition on this practice and EPA recognizes that "there may be situations where withdrawing and resubmitting a certification request is appropriate," the Proposed Rule does not take a position on the legality of withdrawing and resubmitting a certification request. *Id.* Instead, the Proposed Rule allows "the courts and the different state and tribal certifying authorities to make case-specific decisions or to issue their own regulations addressing this practice." *Id.* While we support EPA's decision to remove provisions established by the 2020 Rule that would prohibit this practice, we also believe that EPA can provide guidance to reduce litigation on the issue.

[14] EPA's own Economic Analysis for the Clean Water Act Section 401 Water Quality Certification Improvement Rule (EPA-HQ-OW-2022-0128-0016) gave several examples of when certification review required more than 60 days and explained how 60 days can be too short to accommodate public comment requirements (at 16-19).

For example, as noted above, MDE asked the project proponent for the Conowingo Dam to withdraw its Section 401 Certification request as it determined it needed more information to properly review the project's water quality impacts and more time was needed to obtain that information. The project proponent used the threat of litigation over whether this request implicated *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), to constitute a "waiver" of Section 401 certification authority. This led MDE to back away from the Section 401 certification it issued in 2018 and enter into a settlement agreement that was substantially less protective of water quality. As previously noted, the license FERC subsequently granted without the more protective conditions in the 2018 water quality certification is for 50 years, and the settlement agreement substantially restricts the State's ability to reassess the conditions imposed in light of changed circumstances, such as climate change impacts, during this 50-year period. This surely is not what Congress intended.[15]

VI. The Proposed Rule Properly Recognizes that Federal Agency Review of Certifications Must be Limited and Cannot Override the Certifying Authorities' Determinations (Proposed §§121.7, 121.8 and 121.9).

Under the CWA, when a certifying authority says it is denying a certification, it is a denial, and "[n]o license or permit shall be granted if certification has been denied by the State." 33 U.S.C. §1341(a)(1). In addition, "any" limitation that a certifying authority imposes on a certification it grants "shall become a condition on any Federal license or permit." *Id.* §1341(d). While federal agencies may review certifying authority actions for consistency with procedural requirements, it is not appropriate for federal agencies to consider certifications or denials as waived. The 2020 Rule, however, stated that the federal agencies were allowed to review certification decisions for compliance with the 2020 Rule and deem non-compliant decisions to be waived. As such, the 2020 Rule effectively granted federal authorities the power to override state or tribal decisions regarding their own water quality. But there is no basis in the text of the statute for giving federal agencies any authority to reject state certification decisions under Section 401 or reject or modify conditions states choose to impose.

The Proposed Rule, on the other hand, recognizes that "circuit courts have routinely held that Federal agencies may not question or criticize a state's water quality conditions." 87 Fed. Reg. at 35,349 (citations omitted). The Proposed Rule also finds that "Federal agency review does not permit a Federal agency to review whether a certifying authority included certain regulatorily defined elements in its certification decisions" and, therefore, "it is unnecessary to provide the Federal agency with the role of confirming that a denial is sufficient in the regulatory text." *Id.* Further, EPA properly rejects the 2020 Rule's interpretation of a constructive waiver, proposing that constructive waivers "may only occur if a certifying authority fails or refuses to take one of the four actions described in [the Proposed Rule]." *Id.* at 35,351.

Instead of the provisions in the 2020 Rule, the Proposed Rule proposes to identify the types of certification decisions that constitute an action under Section 401 that is required within the reasonable period of time (Proposed §121.7 and §121.8) and to clarify the limits of federal

[15] Indeed, the Proposed Rule may have restricted MDE's ability to change its "action" under Section 401 from issuing a certification with conditions to being an express waiver. (Proposed §121.10(a)(4)).

agency review (Proposed §121.9).[16] Through these provisions, EPA should restore the strong cooperative federalism partnership that "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution" of their waters. 33 U.S.C. §1251(b). We support EPA's efforts to ensure that the regulations do not result in effective veto power for federal agencies by clarifying what it means to act under the statute and making 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 Proposed Rule does purport to outline the contents of a certification decision. 87 Fed. Reg. at 35,378 (Proposed §121.7(c)-(e)). EPA is properly proposing to replace the 2020 Rule's requirement to include specific statutory or regulatory citation in support of a certification condition, and the Proposed Rule "will let certifying authorities decide what relevant information to provide in support of any conditions." *Id.* at 35,353. EPA should make clear that the federal agency review of the certification decision does not require a determination that the decision contains all the required contents.[17] A Federal agency should not be able to use disagreements over the required contents of a certification decision to override the state's certification authority.

Regarding the list of required contents, the Proposed Rule includes very limited contents, but would require a denial to include a "statement explaining why the certifying authority cannot certify that the activity as a whole will comply with water quality requirements" and a grant with conditions to include a "statement explaining why each of the included conditions is necessary to assure that the activity as a whole will comply with water quality requirements." 87 Fed. Reg. at 35,378 (Proposed §121.7(d)(3), (e)(2)). EPA states that "at least a succinct explanation … will provide necessary transparency and clarity for project proponents and Federal agencies." *Id*. at 35,354. However, this goal seems inconsistent with EPA's determination that a certifying authority "does not need to make any statement about why it has decided to waive or its assessment of the project's impacts on its water quality." *Id.* Such explanation would provide transparency and clarity to the public, particularly the potentially affected communities.

[16] Project proponents, such as in the Conowingo Dam case, have attempted to assert that a certification is not "final" until all administrative and judicial appeals are completed. Such appeals generally cannot occur within the one-year time frame. The Proposed Rule would appear to clarify that this is not the case, and challenges filed on certifications would not result in a waiver, even if the certifying authority must ultimately revise the certification as a result of the appeals. As EPA has recognized, the U.S. Court of Appeals for the Fourth Circuit has recognized that a certifying authority that "takes significant and meaningful action" and "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."* 87 Fed. Reg. at 35,350 (quoting *N.C. Dep't of Envtl. Quality v. FERC*, 3 F.4th 655, 670 (4th Cir. 2021)) (emphasis added). While EPA notes it is concerned that the Fourth Circuit's interpretation "might inject significant uncertainty and subjectivity into the certification process (e.g., what is a 'significant and meaningful action?') causing significant confusion for stakeholders," issuing a decision, even if subject to appeal, is a "significant and meaningful action." *Id.*

[17] Under Proposed Section 121.9(a)(1), the Federal agency may review whether the certification decision "indicates whether it is a grant, grant with conditions, denial, or express waiver." 87 Fed. Reg. at 35,378-35,379. If this element is not met, the certification requirements could be deemed waived. *Id.* (Proposed §121.9(b)). Such element should not include a determination if all the required contents of the certification decision are met.

VII. EPA Should Not Restrict a Certifying Authority's Ability to Reopen a Certification (Proposed §121.10).

EPA is proposing to reintroduce a certification modifications provision similar to the 1971 regulations that "allows a certifying authority to modify a certification after reaching an agreement to do so with the Federal licensing or permitting agency (but not EPA)." 87 Fed. Reg. at 35,361; *see also id.* at 35,379 (Proposed §121.10(b)). Such modifications are limited to an element or portion of a certification or its conditions, but "does not mean the wholesale reversal of a certification decision." *Id.* at 35,362. EPA also recognizes that such modifications may occur "at any point after certification issuance." *Id.* We agree with EPA that modifications to a certification are not and should not be affected by the reasonable period of time limitation in Section 401 and can occur at any time.[18] *Id.* at 35,361 and 35,362. We also agree that the modification cannot convert a grant into a waiver or denial. *Id.* at 35,362. However, EPA acknowledges that the "proposal would not allow for unilateral modifications by certifying authorities." *Id.* But, certifications often have reopener provisions included, and the Proposed Rule would appear to give Federal agencies veto authority over a certifying authority's ability to reopen (i.e., modify) the certification.

EPA indicates that it "does not view conditions in the original certification that require ongoing or future monitoring or modeling activities, including when paired with clearly defined adaptive management response actions, as unilateral certification modifications." 87 Fed. Reg. at 35,362. Such conditions can be particularly important where future water quality-related impacts may occur due to climate change or other events. This is extremely important as some federal permits and licenses can last for decades. However, it is unclear how EPA would treat reopener provisions, which are often included in certifications to allow for revisions such as when the certification is no longer deemed protective of water quality. Reopener provisions recognize the potential for changed circumstances. EPA should not restrict the use of reopener provisions.

Section 401 is the main tool that the CWA provides states and tribes to have meaningful input for major federally licensed and permitted projects that might otherwise threaten their water supplies, fisheries, and other water resources. With climate change, states and tribes will need more authority – not less – to manage and protect their water resources. Maintaining climate resilience aquatic systems will also demand that, in order for measures to be successful, they must be monitored and oftentimes modified. Thus, it is important that states and tribes are again able to "re-open" or modify certification conditions over time. Re-openers should be restored, so that states and tribes have the ability to re-visit conditions and ensure that they are protecting resources and communities as conditions change as a result of climate change and other factors.

Even without a reopener provision in the certification, Federal agencies should not unduly restrict a certifying authority's ability to modify the grant of certifications. During the lifetime of a permitted facility, new evidence and changed circumstances will often make it advisable to change permit terms. A certifying authority is in the best position to determine if project

[18] EPA requests comment on whether the interests of finality and reliance calls for a temporal limitation on the ability to modify certifications. 87 Fed. Reg. at 35,363. There should not be a temporal limitation on the ability of a certifying authority to modify a certification. Modifications are necessary to reflect changing conditions, scientific understanding of water quality effects, changes to the project, etc.

activities will meet water quality standards and other appropriate requirements of state law. If a certifying authority is made aware that the nature and/or scope of the permitted action has changed substantially, the certifying authority should have the opportunity to review the proposed change and should be able to modify or amend the certification if it determines there may be additional impacts to water quality resulting from changes to the project. If denial of the certification of the portion of the project proposed to be changed is deemed necessary, then that too should be an option available to the certifying authority.

As far as alternative approaches on which EPA seeks comment, we do not agree that the actual language of a certification modification should be agreed upon by both the Federal agency and the certifying authority. 87 Fed. Reg. at 35,362. While one could imagine some role for the Federal agency to provide input as to which provisions should be modified as that might impact operation of the federal license or permit, requiring the Federal agency to agree to the language would allow Federal agencies to usurp the state's or tribe's authority. We also agree with EPA's decision not to propose that the project proponent agree to the modification. *Id.* The project proponent will likely be involved in the process as the certifying authority would likely need information from the project proponent and they would not be precluded from presenting their position on any modifications to the certifying authority. As such, we also do not see the need for EPA to provide project proponents with a more explicit and expansive role in the modification process in these regulations. *Id.*

VIII. EPA is Properly Not Retaining Any Regulatory Text from the 2020 Rule Regarding Enforcement of the Section 401 Requirements or of Certification Conditions.

The 2020 Rule arguably limited enforcement of Section 401 certifications to federal licensing agencies, raising concerns with respect to the state's ability to enforce their own permits under state law and the ability to enforce Section 401 requirements under the CWA's citizen suit provision. In the Proposed Rule, EPA "is **not** proposing to retain any regulatory text regarding enforcement" from the 2020 Rule. 87 Fed. Reg. at 35,363 (emphasis added). We support EPA's decision.

In the Proposed Rule, EPA also provides some general views on enforcement of Section 401 certification requirements. EPA explains that Section 401 certification conditions that are incorporated into the Federal license or permit are enforceable by the Federal licensing or permitting agencies. 87 Fed. Reg. at 35,364. But it also has "consistently taken the view that nothing in section 401 precludes states from enforcing certification conditions when so authorized under state law." *Id.* EPA also recognized that case law supports finding that certification requirements and conditions can be enforced through the CWA citizen suit provisions. *Id.* Finally, EPA clarifies that, unlike the 2020 Rule, it does not believe that CWA Section 401(a)(4) requires regulatory text to implement and explains that CWA Section 401(a)(4) does not limit the ability of certifying authorities or Federal agencies to inspect facilities or activities in accordance with the applicable laws and regulations. 87 Fed. Reg. at 35,365. We appreciate and support EPA's returning to its prior interpretations and case law with respect to enforcement.

IX. The Proposed Rule Properly Clarifies that EPA Must Determine Whether a Neighboring State or Tribe is Impacted by a Federally Authorized Project.

Section 401(a)(2) states that whenever a discharge "may affect, as determined by the Administrator, the quality of the waters of any other State," EPA must notify the other neighboring jurisdiction, Federal agency, and the project proponent of their determination within thirty days of the date of notice of the application. 33 U.S.C. §1341(a)(2). The 2020 Rule gave EPA discretion to make the "may affect" determination in the first instance. The Proposed Rule would clarify that EPA must determine whether a neighboring state or tribe is impacted by a project. 87 Fed. Reg. at 35,367. EPA cites to *Fond du Lac Band of Lake Superior Chippewa v. EPA*, which determined that the statutory language of Section 401(a)(2) does not allow EPA to decline to make a determination whether or not a discharge from the certified project may affect water quality in a neighboring jurisdiction. 519 F.Supp.3d 549, 565, 567 (D. Minn. 2021), *cited in* 87 Fed. Reg. at 35,365 n.58, 35,367. 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. The primary goal of the Proposed Rule should be to ensure that potentially affected states and tribes are informed about any project that could have an effect on their water quality as early in the process as possible. Information on how discharges might affect neighboring states or tribes to ensure that this issue should be sought as soon as possible and that those neighboring jurisdictions have the time to understand the potential risks.

X. EPA Should Ensure Affected Tribes Can Participate as Certifying Authorities.

The Proposed Rule would include provisions for Tribes to obtain Treatment in a Similar Manner as a State (TAS) in order to act as the Section 401 certifying authority or as a neighboring jurisdiction for federally permitted/licensed projects. To date, tribes have received TAS for Section 401 when granted TAS to administer the Section 303(c) program. 87 Fed. Reg. at 35,370. We support Tribes being allowed to exercise Section 401 authority without being required to have TAS for water quality standards under Section 303(c). We also support ensuring Tribes can have such status as a neighboring jurisdiction.

It is also important that EPA prioritize environmental justice and addressing disproportionate harm to communities of color and low-income communities and concerns about climate change – which pose immense threats to state and tribal waters. Tribal engagement and empowerment should be a strong focus of certification authority, and EPA is properly seeking to ensure the participation of tribal authorities, as appropriate.

* * *

We support EPA's decision to remove or replace the unlawful provisions of the 2020 Rule and the Proposed Rule's efforts to ensure the cooperative federalism sought by Congress in the CWA. While we urge EPA to finalize these revisions as soon as possible, we also respectfully urge EPA to further strengthen the ability of states and tribes to protect the quality of their waters to ensure they are safe and clean for the public that use and rely on them.

Thank you for your time and consideration of these comments.

Sincerely,
Betsy Nicholas
Waterkeepers Chesapeake
P.O. Box 11075
Takoma Park, MD 20913-1075
info@waterkeeperschesapeake.org

ShoreRivers
Elle Bassett, Miles-Wye Riverkeeper
Matt Pluta, Choptank Riverkeeper
Annie Richards, Chester Riverkeeper
Zack Kelleher, Sassafras Riverkeeper

Brent Walls, Upper Potomac Riverkeeper

Ted Evgeniadis, Lower Susquehanna Riverkeeper

Alice Volpitta, Baltimore Harbor Waterkeeper

Gabby Ross, Assateague Coastkeeper