October 21, 2019

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Andrew R. Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Environmental Protection Agency, "Updating Regulations on Water Quality Certification," 84 Fed. Reg. 44080 (August 22, 2019), Docket ID No. EPA-HQ-OW-2019-0405.

Dear Administrator Wheeler,

On behalf of Waterkeeper Alliance and the undersigned U.S. Waterkeeper Organizations and Affiliates, and all of our respective members and supporters (collectively, "Waterkeeper"), we respectfully submit these comments in response to EPA's Proposed Rule, signed on August 8, and published in the Federal Register on August 22, 2019, entitled "Updating Regulations on Water Quality Certification."[1]

Waterkeeper Alliance is a not-for-profit environmental organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable and swimmable. Waterkeeper Alliance is comprised of more than 340 Waterkeeper Member Organizations and Affiliates based in 46 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper Alliance represents the interests of more than 170 U.S. Waterkeeper Member and Affiliate Organizations, all of their individual members and supporters, as well as the collective interests of over 15,000 individual supporting members of Waterkeeper Alliance that live, work and recreate in or near waterways across the country – many of which are severely impaired by pollution.

[1] 84 Fed. Reg. 44080 (August 22, 2019) (hereafter the "Proposed Rule").

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

We understand, and have seen firsthand, the importance of robust State[2] 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. Preserving robust and undiluted State authority under § 401, as it has been interpreted for decades by courts and by EPA under longstanding regulations and guidance,[3] and consistent with the Act's plain meaning, objective, and intent, is critical to our collective work to protect public health and the nation's waterways from dangerous pollution.

As we explain herein, the Proposed Rule, if issued as a final rule, would be directly contrary to Congressional intent, would harm public health, water quality, and wildlife, and would constitute arbitrary and capricious agency action, an abuse of discretion, and otherwise be unlawful. It would violate the plain, unambiguous meaning of the statute, and would be inconsistent with decades of U.S. Supreme Court and myriad other federal court precedents. The

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[2] As used herein in relation to CWA § 401 authority, "States" is intended to include Tribes that have obtained section § 401 authority when they receive Treatment As a State (TAS) status. Dozens of Tribes currently have TAS status.

[3] *See* 40 C.F.R. Part 121; *see also* EPA, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (2010) (hereafter "2010 Guidance"); EPA, Wetlands and 401 Certification: Opportunities for States and Eligible Tribes (1989) (hereafter "1989 Guidance"). We note that the 2010 Guidance was recently "withdrawn and rescinded" by EPA and superseded by new guidance at the express direction of the President. *See* Proposed Rule at 44083; *see also* June 7, 2019 letter from EPA Administrator Wheeler to state governors (hereafter "Wheeler Letter"), available at https://www.epa.gov/sites/production/files/2019-06/documents/letter_on_updated_cwa_401_guidance.pdf (last viewed Oct. 13, 2019) (citing Executive Order 13868, 84 Fed. Reg. 15495 (April 15, 2019) (hereafter "Executive Order")). EPA's withdrawn guidance is relevant to demonstrate and contrast EPA's dramatic and draconian new interpretation with its longstanding interpretations and previous administration of § 401 from immediately before President Trump ordered EPA to reinterpret the law. A true and correct copy of the 2010 Guidance is submitted herewith and incorporated by reference as **Ex. A**. A true and correct copy of the 1989 Guidance is submitted herewith and incorporated by reference as **Ex. B**. A true and correct copy of the Wheeler Letter is submitted herewith and incorporated by reference as **Ex. C**. A true and correct copy of the Executive Order is submitted herewith and incorporated by reference as **Ex. D**.

Federal executive branch's draconian actions amount to extreme attempted theft of authority expressly granted by Congress to the States. The Proposed Rule would irresponsibly and dangerously impede the ability of States, Tribes, citizens, and even of other Federal agencies and EPA itself, to protect waters and ecosystems and people who rely on, use and enjoy them across the country. EPA must withdraw, and must never finalize, the Proposed Rule.

I. SUMMARY OF COMMENTS

After decades of widespread and serious water pollution and public health problems across the nation, Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[4] To achieve this objective, the Act explicitly prohibits the "discharge of any pollutant by any person,"[5] and defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."[6] Since 1972, EPA has had Federal responsibility for advancing the Act's objective, as well as its national goal "of eliminating all discharges of pollutants into navigable waters by 1985," and the "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water . . . by 1983."[7]

While Congress clearly intended when it passed the Clean Water Act in 1972 to establish "an all-encompassing program of water pollution regulation," and to "occup[y] the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency,"[8] the Act was not intended by Congress to eliminate the role of States in water pollution control, regulation, and enforcement in the United States. Rather, the Act incorporates a form of "cooperative federalism," such that, despite the creation of new Federal regulatory, permitting, and enforcement regimes to establish minimum standards and provide a Federal water quality "floor" to protect and preserve all of the nation's waters, *i.e.*, the "waters of the United States," the States would continue to have a "primary responsibility" "to prevent, reduce, and eliminate pollution" using those regimes, standards and more stringent state laws within their borders.[9]

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

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[4] 33 U.S.C. § 1251(a).

[5] *Id.* § 1311(a).

[6] *Id.* § 1362(12).

[7] *Id*. § 1251(a).

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

[9] *Id*. § 1251(b).

Federal law very specific and powerful authority that would continue[10] to be held by the States through a mandatory water quality certification process:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, ***shall*** provide the licensing or permitting agency ***a certification from the State*** in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. … If the State ... ***fails or refuses to act*** on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. ***No license or permit shall be granted until the certification required by this section has been obtained or has been waived*** as provided in the preceding sentence. ***No license or permit shall be granted if certification has been denied*** by the State ….[11]

In addition to delegating to the States unique and powerful Federal statutory authority to determine whether to grant or deny a request for a § 401 water quality certification for federally-issued licenses and permits that would be binding on Federal agencies, Congress also granted States extremely broad authority to issue certifications that require satisfaction by applicants of specific conditions. The language that Congress chose plainly and unambiguously demonstrates that such conditioned certificates are entirely within the purview of the States, and that any conditions incorporated by a State into a water quality certification must ("shall") become mandatory requirements in any Federal license or permit:

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

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

[11] 33 U.S.C. § 1341(a) (emphasis added). The cited CWA provisions include a State's effluent limitations, 33 U.S.C. §§ 1311, 1312; water quality standards and implementation plans, *id*. § 1313; national standards of performance, *id*. § 1316; and toxic and pretreatment standards, *id*. § 1317.

> ***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.[12]

As a unanimous U.S. Supreme Court explained in *S.D. Warren v. Maine Bd. of Envt'l Protection*,[13]

> State certifications under § 401 ***are essential in the scheme to preserve state authority to address the broad range of pollution***, as Senator Muskie explained on the floor when what is now § 401 was first proposed:
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> > "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970).
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> These are the very reasons that Congress ***provided the States with power*** to enforce "***any other appropriate requirement of State law***," 33 U.S.C. § 1341(d), by ***imposing conditions on federal licenses for activities*** that may result in a discharge, *ibid*.[14]

S.D. Warren is just one of many rulings by the Supreme Court and other Federal and State courts that have reviewed State decisions under § 401 and consistently held that State authority to deny or condition water quality certifications under § 401 is extremely broad. Generally, as long as State § 401 denials and conditions are founded in protecting water quality (including enforcing State antidegradation policies and maintaining of designated uses), or in imposing other State law-based water quality considerations (such as mitigation requirements), they have been upheld by the courts as valid exercises of States' exclusive statutory authority.[15]

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[12] 33 U.S.C. § 1341(d) (emphasis added).

[13] 547 U.S. 370 (2006). All of the Justices joined in the *S.D. Warren* opinion, with the exception of Justice Scalia, who joined as to all of it except Part III-C.

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

[15] *See, e.g.*, *S.D. Warren*, 547 U.S. 370, 385-86 (2006) (discussing the importance Congress identified in the CWA of respecting the States' concerns, and unanimously upholding State authority to require minimum stream flows and migratory fish passage); *P.U.D. No 1 of Jefferson Cty v. Wa. Dep't of Ecology*,

Notwithstanding the above-quoted plainly and unambiguously expressed intent of Congress that the authority to make § 401 decisions is held by the States – not by the President or federal executive agencies acting on his behalf – and myriad court cases that hold that § 401 provides the States with an exclusive veto authority[16] over federal approvals of projects when States rationally determine that proposed activities may adversely affect state water quality, EPA now attempts, for all intents and purposes, to rewrite the statute and upend decades of precedent. It is no exaggeration to say that the Proposed Rule is a bald-faced effort by EPA to steal the authority granted by Congress to the States, and to misappropriate it to itself and its sister Federal executive agencies.

EPA attempts to cover up its swindle by relying on a brand new purported "holistic analysis" of the CWA. But EPA apparently fails to appreciate that State agencies, State attorneys general, and members of the public can read and understand clear, unambiguous statutory language and judicial precedent. Federal courts can as well. The simple truth is that the overlapping, draconian changes that EPA now proposes to the interpretation and administration of § 401 would have the effect of reversing and overruling decades of consistent interpretations of plain and unambiguous statutory requirements, and would dramatically weaken State authority under the Act, contrary to the law. EPA wholly lacks statutory authority to misappropriate State powers by adopting interpretations of the Clean Water Act that are contrary to its plain statutory language, as well as Supreme Court and other judicial precedent.

Among other unlawful changes EPA's proposal would make to the statutorily mandated § 401 water quality certification process, the Proposed Rule would:

- Dramatically alter, limit, and reduce the "scope" of State water quality certification review, *i.e.*, unlawfully limit the types of activities, discharges, and impacts to waters that

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511 U.S. 700, 715 (1994) (hereafter "*P.U.D.*") (upholding State authority to include conditions in a 401 certification that the State determined were necessary to protect and comply with water quality standards "or any other 'appropriate requirement of State law,'" and explaining that "under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 645-49 (4th Cir. 2018) (hereafter "*Sierra Club*"); *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 731-34 (4th Cir. 2009).

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

States may consider when they review and make decisions upon § 401 certification requests;
- Steal decision-making authority from the States, and gift it to Federal agencies, *i.e.*, render Federal licensing agencies, which for decades have been required to accept and comply with State denials and conditions imposed through § 401 water quality certifications, the new self-arbiters of whether and when they must comply with Federal law;
- Misappropriate review authority over the legality and propriety of State denials of, and conditions placed on, § 401 water quality certifications, from the State and Federal judiciary, and gift that authority without a shred of statutory support to the executive branch of the Federal government;
- Reverse burdens of proof in challenges to State § 401 decisions, *e.g.*, instead of States defending their decisions against challengers under established judicial standards of review, the Proposed Rule would force States to assert challenges to Federal agency decisions that erroneously find that a State has waived its authority or that otherwise disregard a State's § 401 conditioned or denied certifications;
- Strip States and the public of due process by inserting utterly unfair new waiver rules into the § 401 certification process, empowering Federal licensing agencies to "game" their own licensing processes and "run out the clock" on the States' ability to cure any purported defects in their certification decisions;
- Violate other Federal laws such as the Endangered Species Act.

In sum, Congress' language and intent in § 401 is plain and unambiguous, and EPA lacks the interpretive authority it claims in the Proposed Rule to so dramatically shift the balance of statutory power mandated by Congress. Plainly and simply, the Proposed Rule is an *ultra vires* Federal power grab, and EPA should be ashamed of its deplorable attempt to subvert the plain intent of Congress at the expense of all 50 States, dozens of Tribes, and the public health and environment that EPA is instructed by its mission to protect. EPA should immediately withdraw and abandon the Proposed Rule, and cease its perverse and illegitimate effort to misappropriate statutory authority from the States for the benefit of the current administration's polluting industry taskmasters.

II. STATE RELIANCE ON § 401.

States rely every day on CWA § 401 to protect their waters and the public from water pollution. While fossil fuel energy infrastructure projects have recently been politically controversial, and were cited by the President and EPA as the impetus for the Executive Order and Proposed Rule,[17] many other types of activities also require Federal licenses or permits and

[17] Executive Order, 84 Fed. Reg. at 15495; Proposed Rule at 44081-082.

have the potential to discharge. The weakening of States' § 401 authority under the Proposed Rule would not be limited to energy infrastructure projects. Some examples of activities and projects that can require § 401 certifications, listed here with typically involved Federal licensing agencies, include:

- Interstate gas pipelines – FERC, Army Corps
- Hydroelectric dams/facilities – FERC
- Other dams and diversions (water storage and supply, etc.) - Department of the Interior, Army Corps, Fish and Wildlife Service
- Nuclear power plant licensing/relicensing – Nuclear Regulatory Commission
- Bridge/highway construction – Federal Highway Administration, Army Corps
- CWA discharges of pollutants - All NPDES permits (POTWs, power plants, industrial discharges, etc. – EPA (in non-NPDES-delegated states)
- Commercial and housing developments - Army Corps
- Coal and other federally regulated mining projects - SMCRA, Army Corps

The substantive and significant changes to Federal law that EPA now proposes in the Proposed Rule would dramatically curtail State authority to review and address impacts to waters for all of the above activities, and many others.[18]

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

Because Congress's intent behind § 401 is so obvious and straightforward, and its requirements have been so clearly understood by regulators and stakeholders, Federal and State governments, applicants and the public have worked for decades through licensing and permitting processes to ensure robust compliance with § 401. For the vast majority of

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

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

[20] *Id*.

applications and projects, the § 401 certification process is not controversial, and most requests are granted by the States within a matter of weeks or a few months.

However, applicants for large energy, infrastructure, and other significant projects occasionally propose to conduct activities that have enormous potential to adversely affect State water quality. For example, constructing an interstate gas pipeline typically requires crossing hundreds of rivers, streams and wetlands, including States' highest-quality waters, such as drinking water sources and native trout spawning streams, often by ditching directly through stream banks and beds. Such ditching and other construction impacts can be massively destructive to watersheds and have enormous ecological and public health consequences. Pipeline construction also requires that enormous rights-of-way be clear-cut, often through undeveloped greenfield areas, virgin forests and steep slope areas along a planned pipeline route. Tens of thousands of trees are often felled, removed, and never replaced. New access roads are built to bring in heavy construction equipment. All of these activities have the potential to result in discharges to invaluable State water resources, and to not only degrade them, but sometimes to destroy them permanently.

The compelling State interest in protecting water resources is self-evident. Congress recognized that Federal agencies often lack expertise about specific State and local ecosystems and their conditions, sensitivities, and potential impairments, and therefore plainly intended to empower the States to consider such potentially polluting activities and their impacts, and to decide what conditions must be imposed before an activity is conducted to ensure that it will not cause significant adverse impacts to State water quality. Rarely, a State's technical analysis may reveal that water quality impacts will be so severe that they cannot be mitigated to an acceptable level even with a conditioned § 401 certificate, and an application may have to be denied. Again, when those circumstances exist, Congress could not have been more clear that denial of the certification and the Federal license is precisely what was intended when it passed the statute:

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

It is entirely inconsistent with EPA's statutory obligations for the agency to actively attempt to weaken and dilute the authority that Congress expressly granted to the States. EPA should instead be actively encouraging and assisting the States to fully utilize their § 401 authority to advance and achieve the plainly-stated objective and goals of the Act.[22]

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

[22] 33 U.S.C. § 1251(a).

III. WATERKEEPER AND OTHER MEMBERS OF THE PUBLIC RELY ON § 401 TO PROTECT THEIR WATERS AND COMMUNITIES FROM POLLUTION.

Members of the public, including non-profit, public interest organizations such as Waterkeeper Alliance and its member Organizations and Affiliates, also rely upon § 401 as a vital tool to address water pollution impacts from activities that require federal approvals. Waterkeeper Organizations and Affiliates have advocated for States to implement measures to protect water quality using § 401 in matters involving, among many others, proposed pipelines, export facilities, dredging and filling of wetlands, highways and bridge construction, and new and existing power plants and dams. Through § 401, Waterkeeper Organizations and Affiliates have provided States with technical analyses and shared their and their communities' concerns about water impacts with their State environmental agencies. Many States have taken such public input into account when they have made § 401 certification decisions, as the Act requires:

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

The Proposed Rule would adversely impact the ability of Waterkeeper Organizations and Affiliates, and other members of the public to share their concerns about water impacts with the States, and drastically limit the ability of States to take action to address these concerns in their § 401 certification decisions.

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

Several Waterkeeper Organizations have advocated during § 401 notice and comment periods to address concerns about pipeline impacts. For example, Buffalo Niagara Waterkeeper raised concerns with the New York Department of Environmental Conservation about the water impacts of National Fuel Gas Supply Corporation's proposed Northern Access Pipeline, which would cross 192 streams on its 97-mile route through New York State.[24] The New York Department of Environmental Conservation ultimately declined to issue a § 401 certification for the project. The agency based its decision on the National Fuel Gas Supply Corporation's failure

[23] 33 U.S.C. § 1251(e).

[24] Buffalo Niagara Riverkeeper Comments on the Proposed Northern Access 2016 Project (Feb. 22, 2017).

to demonstrate that the project would comply with New York water quality standards due to the impacts that construction would have on streams, wetlands, and important trout habitat.[25]

In 2018, Waterkeeper Alliance, Rogue Riverkeeper, Columbia Riverkeeper, and partners raised concerns with the Oregon Department of Environmental Quality about the water impacts of the Pacific Connector Pipeline and related Jordan Cove LNG Export Facility. Over 43,000 comments were submitted during the § 401 comment period, many from concerned members of the public.[26] In 2019, responding to the many of these concerns, the Department of Environmental Quality denied a § 401 certification for the project without prejudice, citing insufficient information to assure that water quality standards would be met. Additionally, the state found that analysis of the information that was available suggested that water quality standards for temperature and turbidity and would likely be violated and the project would likely result in an overall lowering of water quality, in violation of the state's antidegradation policy.[27]

In 2019, Haw Riverkeeper raised concerns with the North Carolina Department of Environmental Quality about the potential water impacts of the proposed MVP Southgate Pipeline. The Department of Environmental Quality declined to issue a § 401 certificate for the pipeline because the Draft Environmental Impact Statement for the project had not yet been completed and the preferred route of the pipeline had not yet been identified by the Federal Energy Regulatory Commission. The Department of Environmental Quality invited the applicant to resubmit an application when the agency has more thorough and complete information on which the State may base an informed decision.[28]

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[25] New York Department of Environmental Conservation Notice of Denial to National Fuel Gas Supply Corporation (April 7, 2017).

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

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

[28] North Carolina Department of Environmental Quality Notice of Denial of 401 Water Quality Certification and Jordan Lake Riparian Buffer Authorization Application for MVP Southgate (June 3, 2019), *available at* http://appvoices.org/images/uploads/2019/06/NCDEQ-denial-MVPSouthgate-June2019.pdf.

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

In 2010, Hudson Riverkeeper submitted to the New York Department of Environmental Conservation section § 401 comments outlining the impacts that the Indian Point Energy Center has on the Hudson River and groundwater under and near the plant.[29] Riverkeeper noted the significant impact of the cooling water system at the plant on fisheries in the Hudson River, including endangered species, as well as the continuing leaks of radioactive waste from the power plant into the groundwater and the Hudson River. The Department of Environmental Conservation ultimately declined to issue a § 401 certification for the plant, citing the impacts raised by Riverkeeper.[30]

Waterkeepers Chesapeake and Lower Susquehanna Riverkeeper submitted comments to the Maryland Department of the Environment during the § 401 comment period for the relicensing of Exelon's Conowingo Dam. The comments focused on the sediment and associated nutrients that are trapped by the dam and then released by high-flow events. During the § 401 certification process, Exelon's application was submitted, withdrawn, and resubmitted three times, each time because the applicant failed to include the required information, dragging the § 401 certification process on for four years. In 2018, the Department of the Environment issued a certification with conditions that direct Exelon to develop a nutrient management plan. Waterkeepers Chesapeake and Lower Susquehanna Riverkeeper challenged the Department of the Environment's certification for failing to include conditions aimed at reducing the sediment being released by the dam.[31] Exelon challenged the authority of Maryland to require nutrient reductions under § 401, and Waterkeepers Chesapeake and Lower Susquehanna Riverkeeper intervened in this action in support of the State of Maryland.

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[29] Riverkeeper Comments on Entergy Nuclear Operations, Inc. Application for Section 401 Certification for Indian Point Units 2 and 3 (March 25, 2010), *available at* https://www.riverkeeper.org/wp-content/uploads/2010/03/2010.03.25.Riverkeeper-Comments-on-Entergy-Application-for-401-WQC-FINAL.pdf.

[30] New York Department of Environmental Conservation Notice of Denial of Joint Application for CWA § 401 Water Quality Certification NRC License Renewal – Entergy Nuclear Indian Point Units 2 and 3 (April 2, 2010), *available at* https://www.scenichudson.org/sites/default/files/IP_WQC_denial_4.2.10.pdf (hereafter "*Indian Point Denial*"). A true and correct copy of the Indian Point Denial letter is submitted herewith and incorporated by reference as **Ex. F**.

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

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

Hudson Riverkeeper submitted comments to the New York Department of Environmental Conservation on the § 401 certification for the construction of a new bridge crossing the Hudson River. Riverkeeper's concerns focused on impacts of construction on the endangered shortnose sturgeon and on increased turbidity near the construction site. In 2013, after challenging the state's § 401 certification, Riverkeeper and the Department of Environmental Conservation entered into a settlement agreement that put in place conditions on construction to minimize the impacts on the river ecosystem and fish.[32]

San Francisco Baykeeper submitted comments to the San Francisco Bay Regional Water Quality Control Board regarding a § 401 certification for U.S. Army Corps' plans for dredging in San Francisco Bay.[33] The comments focused on the impacts of hydraulic dredging on endangered and threatened native fish. In 2015, the State issued the § 401 certificate with conditions limiting the means and location of dredging in order to protect fish.[34] The U.S. Army Corps has failed to fully implement these conditions, and San Francisco Baykeeper has intervened in support of the State.[35]

IV. THE PROPOSED RULE WILL DRAMATICALLY WEAKEN STATE REGULATORY AUTHORITY CONTRARY TO LAW.

We note initially that EPA has no legitimate regulatory purpose (*i.e.*, a reason for its actions that is consistent with the objective and goals of the Clean Water Act), or any rational explanation, for its decision to so dramatically reinterpret § 401 at this time. EPA does not even

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

[33] San Francisco Baykeeper Comments on Tentative Order and Application for Reissued Waste Discharge Requirements and Clean Water Act 401Water Quality Certification for U.S. Army Corps Engineers San Francisco District 2015-2019 Maintenance Dredging Program (April 20, 2015).

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

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

attempt to rationally explain how weakening and/or depriving the States of their § 401 authority is in any way consistent with advancing EPA's mission, or the objective and goals of the Act.[36]

The truth is that even casual observers of U.S. environmental policy are likely aware that EPA is taking these actions, and doing so on such a fast schedule, because the President has ordered it to do so.[37] EPA has not been shy about acknowledging that it is acting at the behest of the President in direct response to the Executive Order.[38] And the Executive Order could not have been more clear that the President's clear intention is to weaken State authority to stop States from "hindering the development of energy infrastructure."[39]

Despite all of this evidence about what is really going on here, EPA apparently expects States, the public, and eventually the courts, to believe that when the agency performed its new, purportedly first-ever, "holistic analysis" described in the Proposed Rule, it coincidentally reached the precise outcome sought by the Executive Order. States, the public and the courts are all supposed to buy that EPA just so happened to reach the conclusion the President sought after the Agency performed an objective and expert "holistic" statutory analysis? To quote the President, "give [us] a break."[40]

Such an administrative action, which flies in the face of Supreme Court precedent, and is admittedly taken at the explicit direction of the executive with an obvious, predestined result, should not be afforded the level of deference typically offered to agencies owing to their subject matter and technical expertise. The President and EPA are openly abusing the judicial deference

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[36] To the extent that EPA purports to base its legal rationale for the Proposed Rule in whole or in part upon its bizarre and erroneous constitutional analysis, Proposed Rule at 44086-087, or its unsupported proposition that there is a distinction in the Clean Water Act between "nation's waters" and "waters of the United States," Proposed Rule at 44085 n. 8, EPA's rationale is fatally flawed for the reasons explained in Waterkeeper's comments on a separate EPA proposed rule, "Revised Definition of Waters of the United States," Docket No. EPA-HQ-OW-2018-0149 (hereafter "Waterkeeper WOTUS Comments"). A true and correct copy of the Waterkeeper WOTUS Comments (without exhibits) is submitted herewith as **Ex. G**, and incorporated by reference herein. The Waterkeeper WOTUS Comments with their exhibits are already in EPA's possession and available at https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11318.

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

[38] *See* Proposed Rule at 44081-082.

[39] *See* Executive Order, 84 Fed. Reg. at 15496, § 3.

[40] *See, e.g.*, "'I think I'd take it': In exclusive interview, Trump says he would listen if foreigners offered dirt on opponents," *available at*, https://abcnews.go.com/Politics/id-exclusive-interview-trump-listen-foreigners-offered-dirt/story?id=63669304 (last viewed Oct. 14, 2019)

offered by *Chevron* and its progeny.[41] Such circumstances should cause courts to closely scrutinize EPA's purported "holistic" statutory analysis, which the facts surrounding this rulemaking suggest was driven not by a good faith desire to accurately determine Congressional intent to more effectively carry out EPA's legislative directives, but rather simply to appease the President and advance his administration's "energy dominance" agenda.[42] The President's expectation that long-established and well-understood federal statutory requirements can be set aside by agency regulation to achieve his policy goals, which are inconsistent with the objective and goals of the Clean Water Act, obviously fails to provide a sufficient or lawful basis for the Proposed Rule.

A. The Proposed Rule Would Dramatically Reduce the Scope of Activities and Impacts to Waters that States Could Consider in Section 401 Certification Reviews.

EPA proposes for the first time in the Proposed Rule, almost 50 years after it promulgated its current § 401 water quality certification regulations, and despite decades of its own longstanding statutory interpretations, guidance and a plethora of Supreme Court and other judicial authority to the contrary, to substantively limit the scope of activities and impacts that may be considered by the States in their § 401 reviews. EPA now asserts in the Proposed Rule:

- That a reviewing State will no longer be allowed to assess all of the potential water quality impacts from a proposed activity that may result in a discharge to waters and requires a federal license or permit, but rather only any impacts that will arise directly from a potential point source discharge.[43]
- That conditioned § 401 certifications may only include considerations and incorporate conditions that directly address water quality under EPA-approved regulatory program provisions.[44]

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[41] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (hereafter "*Chevron*").

[42] *See* Executive Order §§ 1-2; *see also* White House Fact Sheet, "President Donald J. Trump Is Unleashing American Energy Dominance," May 14, 2019 (referring to the Executive Order's efforts to weaken State § 401 certification authority as "cutting red tape"), *available at* https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unleashing-american-energy-dominance/ (last viewed Oct. 20, 2019).

[43] Proposed Rule at 44095-099, 44119-120 (§ 121.1(g) (definition of "Discharge"), § 121.3 ("Scope of certification")).

[44] Proposed Rule at 44094-095, 44119-120 (§ 121.1(p) (definition of "Water quality requirements"), § 121.3 ("Scope of certification")) .

Each of these draconian limitations would significantly weaken State authority, and is contrary to the plain meaning of the Act, Congressional intent, and binding judicial precedent.

1. "Activities" vs. "Discharges"

EPA asserts that its new "holistic analysis" has revealed that States, courts, the public, and even EPA itself, have all been getting § 401 wrong for nearly five decades. The Supreme Court in *P.U.D.*, when it examined this very issue, *i.e.*, whether § 401 certification requirements apply only to impacts from "discharges," or more broadly to impacts from any "activity," held:

> Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth "any effluent limitations and other limitations ... necessary to assure that *any applicant*" will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). The language of this subsection contradicts petitioner's claim that the State may only impose water quality limitations specifically tied to a "discharge." ***The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose "other limitations" on the project in general to assure compliance with various provisions of the Clean Water Act and with "any other appropriate requirement of State law***."[45]

Realizing the Proposed Rule runs headlong into binding Supreme Court precedent, EPA attempts to reconcile *P.U.D.* with its newly-manufactured and utterly inconsistent position set forth in the Proposed Rule by claiming that the Court in that case was merely deferring to EPA's then (and still) current interpretation articulated in its regulations and guidance.[46] EPA is wrong. While the Court did note later in its opinion that its interpretation of the statute was consistent with EPA's regulations, and later even referenced *Chevron*,[47] it did so in *dicta* after it had performed its own statutory analysis in what can only be reasonably described as the Court's *Chevron* "Step 1" analysis. As Justice Stevens noted in his concurrence:

> While I agree fully with the thorough analysis in the Court's opinion, I add this comment for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. ***Not a single sentence, phrase, or word in the Clean Water Act purports to place***

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

[46] *See* Proposed Rule at 44097.

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

> ***any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards.*** *See, e.g.*, § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).[48]

Of course, even if the Court in *P.U.D.* had more explicitly discussed and deferred to EPA's longstanding statutory interpretation of § 401 instead of performing its own statutory interpretation, this would not mean that the Proposed Rule would meet with similar success in the courts, since the courts would first have to identify a legitimate statutory ambiguity pertaining to State authority in § 401, where none exists. And even in the extremely unlikely event that ambiguity was found to exist, courts would then have to find that EPA's new interpretation is based on a permissible construction of the statute.[49] But EPA's new construction is plainly not permissible. As a unanimous Supreme Court noted in *S.D. Warren*, Congressional awareness of the States' legitimate concerns about the impacts of any "activities" that may affect water quality "are the very reasons that Congress provided the States with power to enforce 'any other appropriate requirement of State law,' 33 U.S.C. § 1341(d)**,** by imposing conditions on federal licenses for ***activities*** that may result in a discharge, *ibid*."[50] However hard it may try, EPA simply cannot excise by regulatory fiat the language that Congress chose in the statute.

In addition to the above-referenced judicial interpretations that foreclose EPA's new interpretation set forth in the Proposed Rule, EPA has not adequately or rationally explained why its new conclusions and interpretations on this issue differ so markedly from its own longstanding interpretations that it consistently and repeatedly articulated for decades. For example, in its current regulations governing State certifications, which the agency acknowledges have been in effect for almost 50 years, EPA repeatedly references that proposed "activities" are subject to certification review.[51] And in its 2010 Guidance, EPA correctly explained that once the trigger, or as the *P.U.D.* Court referred to it, the "threshold condition,"[52] for a required § 401 certification has been crossed (*i.e.*, a proposed activity that requires federal approval and may result in a discharge), "the conditions and limitations included in the certification ***may address the permitted activity as a whole. Certification may address concerns related to the integrity of the aquatic resource and need not be specifically tied to a discharge.***[53]

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[48] *Id*. at 723 (Stevens, J., concurring) (emphasis added).

[49] *Chevron*, 467 U.S. at 842-43.

[50] 547 U.S. at 386 (emphasis added). *See also* [cite additional supporting case law]

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

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

[53] 2010 Guidance, Ex. A, at 23 (citing *P.U.D. No. 1*) (emphasis added).

Any response from EPA that it was merely repeating the holding from *P.U.D. No. 1* in its 2010 guidance would fall far short of a legitimate explanation, since several years prior to that case, in earlier guidance, EPA reached similar conclusions about the powerful breadth of State § 401 review:

> In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that ***the applicant*** will comply with effluent limitations, water quality standards, ... with any State law provisions or regulations more stringent than those sections, and with "any other appropriate requirements of State law."
>
> The legislative history of the subsection indicates that the Congress meant for the States to impose ***whatever conditions on the certification are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns***.[54]

Nowhere in EPA's regulations, or the 1989 or 2010 guidance document is there even a hint that Congress intended the scope of impacts States may consider under § 401 might be limited only to impacts from point source discharges, as opposed to the full breadth of proposed "activities." *P.U.D.* explicitly rejected that notion.[55] EPA has simply cut from whole cloth a draconian new regulatory limit it wishes to place on Congressionally-mandated State authority to appease the President and polluting industries. Its new purported "interpretation" is utterly devoid of statutory and/or judicial support, would seriously interfere with State efforts to protect their waters,[56] and cannot possibly withstand judicial review.

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[54] 1989 Guidance, Ex. B, at 23, 25-26 (emphasis added).

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

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

2. Unlawfully Narrow Definition of "Water Quality Requirements."

EPA also outrageously proposes that States may only consider what it terms "direct" water quality impacts when they perform § 401 certification reviews. EPA proposes to characterize such impacts in the Proposed Rule as "water quality requirements," which the agency then attempts to narrowly define as only the "applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions."[57] This proposal would constitute a dangerous sea change for § 401 certification law.

As previously noted, Congress granted § 401 water quality certification authority to the States, and specifically authorized the States to review requests for certifications and to condition such certifications not only to assure compliance with the referenced statutory provisions and "EPA-approved state or tribal Clean Water Act regulatory program provisions,"[58] but also to meet "any other appropriate requirement of State law set forth in such certification."[59] While State § 401 certification determinations generally involve water quality, – which may include, without limitation, compliance with State antidegradation policies, maintaining best usages of waters set forth in State regulations, and/or a variety of mitigation measures – the Proposed Rule defines "water quality requirements" far too narrowly, in utter defiance of plain statutory language, judicial precedent and prior EPA interpretations.

Congress clearly understood that Federally authorized activities could result in pollution of State waters, and also knew that, in the absence of Congressional direction, principles of federal preemption might well exempt many federally licensed activities from State environmental regulation.[60] Congress accordingly adopted § 401 to ensure that federally licensed activities would not escape state regulation. § 401 expressly enables a State to apply its own water-pollution-control program to such activities.[61]

As EPA made clear three decades ago, "the legislative history of [§ 401(d)] indicates that the Congress meant for the States to impose ***whatever conditions on the certification are necessary to ensure that an applicant complies with all State requirements that are related to***

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[57] Proposed Rule at 44094-44095, 44120 (§ 121.1(p) ("Water quality requirements"), § 121.3 ("Scope of certification")).

[58] Proposed Rule at 44120 (§ 121.1(p)).

[59] 33 U.S.C. § 1341(d).

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

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

water quality concerns."[62] Respecting the State authority granted by Congress, EPA has historically taken a very broad view of the types of conditions that States may impose in § 401 certifications, many of which have gone well beyond enforcing "applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions."[63]

If Congress intended to define or limit the realm of State authority as EPA now proposes in the Proposed Rule, it could and should have said so. Instead, it said exactly the opposite, as the Act expressly allows States to impose "standard[s] or limitation[s] respecting discharges of pollutants" ***or "abatement of pollution"*** that are ***more stringent than, or in addition to***, those federal standards set out under the Act.[64] Through § 401, Congress explicitly left the authority to the States to ensure that their State water pollution laws would continue to be respected after passage of the Act. EPA has no statutory authority whatsoever to attempt to narrowly construe or limit State authority in the Proposed Rule, and its attempt to do so is an unprecedented insult to federalism principles and flies in the face of myriad binding judicial decisions.[65]

B. The Proposed Rule Would Misappropriate Decisional authority from the States and Render Federal Licensing Agencies the Self-Appointed Judges of Whether They Must Comply with Federal Law.

1. Federal Agency Obligations Under § 401 Are Mandatory.

As noted repeatedly above, the clear and unambiguous language in § 401 leaves no legitimate question that it was intended by Congress to empower the States to deny or condition water quality certifications for activities that require federal approval and that may result in a discharge to waters within their borders, and that such State decisions are mandatory and legally

[62] 1989 Guidance, Ex. B, at 23, 25-26 (emphasis added).

[63] Proposed Rule at 44094-44095, 44120 (§ 121.1(p) ("Water quality requirements"), § 121.3 ("Scope of certification")). For numerous such examples, see *Untapped Power*, Ex. E, at 256-58; 1989 Guidance, Ex. B, at 23-27 & App. D.

[64] *See* 33 U.S.C. § 1370 (emphasis added).

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

binding upon Federal licensing agencies:

> The ***plain language*** of Section 1341(d) of the Clean Water Act provides that any state certification "*shall* become a condition on any Federal license or permit." 33 U.S.C. § 1341(d) (emphasis added). ***This language leaves no room for interpretation***. "Shall" is an unambiguously mandatory term, meaning, as courts have uniformly held, that state conditions *must* be conditions of the NWP—i.e., the Corps "***may not alter or reject conditions imposed by the states***." *U.S. Dep't of Interior v. F.E.R.C.*, 952 F.2d 538, 548 (D.C. Cir. 1992) (emphasis added); see also *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 107 (2d Cir. 1997) (recognizing the "unequivocal" and "mandatory" language of Section 1341(d)). ***Every Circuit to address this provision has concluded that "a federal licensing agency lacks authority to reject [state Section 401 certification] conditions in a federal permit***." *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1218 (9th Cir. 2008) (collecting cases); *see also F.E.R.C.*, 952 F.2d at 548 ("FERC may not alter or reject conditions imposed by the states through section 401 certificates." (emphasis added)).[66]

The Supreme Court has also spoken directly to this question, albeit in the context of a similar, but different, mandatory agency conditional certification of a Federal license:

> Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that "'[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.'" *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, (1980)). ***Congress' apparent desire that the Secretary's conditions "shall" be included in the license must therefore be given effect unless there are clear expressions of legislative intent to the contrary***.[67]

Notwithstanding the clear grant of authority by Congress to the States in § 401, and the plain mandatory statutory requirement that conditions included in State certifications "shall become a condition on any Federal license or permit," the Proposed Rule would incredibly and untenably purport to authorize Federal licensing agencies to review the merits and propriety of State certification decisions, and to set aside or ignore States' § 401 denials or conditioned

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

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

certificates if the Federal agency determines that the State's decision is flawed in some manner.[68]

This proposed monumental change to EPA's regulations would be outrageous and completely unprecedented. Nothing in § 401 can reasonably be read to leave any discretion to Federal licensing agencies to choose whether to accept or decline State water quality certification decisions or conditions. The authority to make these decisions plainly and simply rests with the States. It is axiomatic that "shall" creates a mandatory obligation, and EPA's attempt in the Proposed Rule to amend this mandatory language that Congress chose by executive fiat is a shocking and obvious administrative law nonstarter. While Federal licensing agencies have historically had a role in determining "reasonable periods of time" within which States may make § 401 determinations and avoid waiver, the Proposed Rule's newly-manufactured authority for the Federal executive branch to review the merits of State § 401 decisions is utterly unprecedented and inconsistent with plainly expressed Congressional intent and decades of judicial precedent.[69]

Congress has demonstrated in other sections of the CWA that when it intends to grant Federal agencies authority to review, set aside or veto other statutorily-mandated decisions by other State and Federal agencies, it knows precisely how to do so in the terms of the statute. For example, States with delegated NPDES authority are authorized to issue CWA § 402 discharge

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[68] Proposed Rule at 44105-44107, 44121 (§§121.6(c), 121.8(a)(2)).

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

permits, but EPA retains express authority under the statute to review and veto those permits.[70] Similarly, Congress granted the Army Corps authority to issue CWA Section § 404 "dredge and fill" permits, but specifically empowered EPA under the statute to veto those permits under certain conditions.[71] No such statutory review or veto authority exists under § 401, further demonstrating the mandatory and binding nature of State § 401 decisions upon Federal licensing agencies.

Adding insult to injury, EPA's newfound Federal power for agencies to essentially preside over State § 401 decisionmaking, and to review and pass judgment on the merits of State decisions, would overlap with the Agency's newly proposed waiver provisions discussed below[72] such that when a Federal licensing agency believes that a State has somehow overstepped its broad authority, and that its § 401 denial or conditions may thus be disregarded, the Federal agency "may" allow the State an opportunity to cure the purported defect, but only if time remains in the "Reasonable Time" that was set by the Federal Agency when the request was made.[73]

Thus, hypothetically, under the Proposed Rule, if FERC sets its "Reasonable Time" for a State to "act upon" a request for a § 401 certification at six months, and two month after receiving a request the State issues a conditioned certificate that FERC later decides exceeded the State's authority, FERC would have the discretion – but would not be required – to allow the State to cure the purported defect.[74] However, in the event that FERC fails to communicate the purported flaw to the State, and the 6-month "Reasonable Time" clock runs out, the State would be powerless under the Proposed Rule to cure the purported defect.[75] This combination of misappropriated federal review authority, and bright-line time limits for States to complete their § 401 processes regardless of the causes of any delay (including if the delay is caused by the Federal agency), would allow Federal agencies to literally "game" the process and completely gut Congressionally-mandated State authority under the Act. There is simply no plausible argument that can possibly be what Congress intended.

In sum, Congress chose to clearly and explicitly empower States to make decisions concerning their own water quality standards and other appropriate state laws. Congress did not explicitly or implicitly grant Federal licensing agencies any review authority or discretion

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[70] *See* 33 U.S.C. § 1342(c)-(d).

[71] *See* 33 U.S.C. § 1344(c), (j).

[72] Proposed Rule at 44099, 44107-110, 44120 (Subpart B).

[73] *Id.*

[74] *Id.*

[75] *Id.*

whatsoever regarding whether timely State decisions must be respected and accepted by Federal agencies. This entire new federal review-and-waiver scheme that EPA has dreamt up in the Proposed Rule has clearly and unconscionably been designed to completely deprive the States of federal statutory authority they have held for almost a half century. Congress said what it meant and meant what it said: the Federal government "shall" respect and accept such decisions made by the States. Myriad judicial decisions have so held, and EPA lacks authority to rewrite the statute or overrule all of these courts via its flimsy Proposed Rule.

2. **The Proposed Rule Would Shift Authority to Review the Merits and Propriety of State § 401 Decisions from the Judiciary to the Federal Executive Branch, and Dramatically Alter Burdens of Proof in Judicial Challenges.**

The Proposed Rule would not only create new and unprecedented authority for Federal agencies to overrule statutory language and intent and ignore State § 401 decisions, it would also impermissibly and violently encroach on the established functioning and authority of the State and Federal judiciaries. In the history of the CWA, there has never been any serious question that reviewing the propriety and merits of State § 401 decisions is a judicial function, and not the purview of Federal licensing agencies, which are the very subjects of § 401's mandatory duties.[76] There is no statutory or judicial support for EPA's bizarre proposition that Federal agencies could possibly be authorized to invade this judicial function of reviewing final State agency determinations, and appoint themselves to make first-instance determinations about whether they are actually required to respect States' authority and comply with unambiguous mandatory federal statutory obligations. Yet, that is precisely what EPA is doing in the Proposed Rule. If this proposed federal agency review authority is finalized and allowed by the courts to stand, it will render State authority under § 401 virtually toothless.

By self-appointing the federal executive branch as the arbiters of the merits of State § 401 decisions, the Proposed Rule would also irreparably alter party positions and burdens of proof associated with eventual judicial review of § 401 disputes. For decades, challenges to State § 401 decisions have generally been adjudicated in State courts because § 401 certifications are generally treated as State permits, and involve State water quality standards and other State laws:

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

[76] *See* n. 69, *supra* (citing multiple cases).

> ***certification generally turns on questions of state law. FERC's role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless.*** *Id*.[77]

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

Whether brought in the State or Federal courts, virtually every challenge to a § 401 certification decision casts the State certifying agency in the role of defendant (or respondent as the case may be), with the burden of proof always on the plaintiff/petitioner (typically the project applicant or members of the public) to demonstrate that the State's § 401 decision was arbitrary and capricious or otherwise contrary to law. Owing to their water quality expertise and statutory role in the § 401 certification process, State agencies have historically been granted great deference by courts that review their § 401 decisions.

The Proposed Rule would completely shift these burdens and standards of proof in many cases. For example, if a State denies a § 401 certification based upon legitimate water quality impairment concerns, but a federal licensing agency such as FERC decides under EPA's new regulations that the State decision may be set aside because the State purportedly exceeded its authority, took too long or erred in some other manner, the burden would presumably now be carried by the State, placing it in the unprecedented role of having to sue the Federal licensing agency in Federal court to challenge the disqualification of the State's decision. This would turn established burdens of proof and expert agency deference on their heads without a shred of statutory evidence that this was Congress' intent. That EPA would even propose such a rule that would completely shift the balance of power that Congress mandated in § 401 from the States to itself, and force states to have to bring lawsuits to defend their own statutorily-authorized expert agency decisions, is frankly appalling, and a direct assault on the rule of law.

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

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

EPA's apparent attempt in the Proposed Rule's to render enforcement of § 401 certifications and conditions contained therein solely within the domain and authority of Federal licensing agencies[78] would directly violate the plain terms of the CWA. For example, the Clean Water Act's citizen suit provision expressly permits citizens to enforce "effluent limitations," which Congress specifically defined in the very same section of the Act to include "a certification under section 1341 of this title."[79] Once again, despite its apparent desire to erode or eliminate public involvement in, and enforcement of, § 401 certification conditions, EPA lacks authority to attempt to override statutory enforcement authority under its Federal regulations. EPA simply cannot override Congress's grant of authority to the public of citizen suit authority to enforce § 401 certifications by issuing a regulation that seeks to take it away.

C. The Proposed Rule Would Codify Draconian, Unworkable and Unfair New Waiver Rules Into the Section 401 Process, Stripping States and the Public Of Due Process.

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

> If the State ... ***fails or refuses to act*** on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application...[80]

Through this waiver clause, Congress plainly intended that when States receive a request to exercise their § 401 water quality certification authority, they do so in an efficient manner that does not create unbreakable "logjams" and/or cause unreasonable delays in federal licensing processes:

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[78] Proposed Rule at 44116-117, 44121 (§ 121.8).

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

[80] 33 U.S.C. § 1341(a) (emphasis added).

> In imposing a one-year time limit on States to "act," Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request. This is clear from the plain text. Moreover, the Conference Report on Section 401 states that the time limitation was meant to ensure that "sheer inactivity by the State ... will not frustrate the Federal application." H.R. Rep. 91–940, at 56 (1970), reprinted in 1970 U.S.C.C.A.N. 2691, 2741. Such frustration would occur if the State's inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding.[81]

While disputes over § 401 waivers have been extremely uncommon over the past several decades, findings by Federal agencies that States unintentionally and even retroactively waived their § 401 authority have become more common and extremely controversial across the country recently as a result of the D.C. Circuit's Opinion earlier this year in *Hoopa Valley Tribe v. FERC*.[82] In that case, the court held that California and Oregon had waived their § 401 authority because they had purportedly taken too long to make a decision on a series of § 401 applications, notwithstanding that the subject delays were a result of the applicant's repeated voluntary withdrawals of its application, which all parties to the proceedings (including FERC, the Federal licensing agency in that matter) understood and agreed had the effect of stopping the one-year "Reasonable Time" clock that is applicable in licensing matters before FERC. Notwithstanding that the § 401 certification requests in that matter were repeatedly withdrawn, leaving the States no pending "request" upon which to act, the court held that the one-year timeframe that Congress set as a maximum allowable time for a State to "act" on a request was not tolled by the applicant's repeated withdrawals of those requests. As described in more detail below, the court's ruling in that case makes no sense under established principles of administrative law.

However, while the *Hoopa Valley Tribe* case was wrongly decided, its import should have been limited because the court clearly did not intend to draw bright-line rules, but rather limited its holding to the facts of that case. It is clear that the court found the number of times and manner in which the applicant withdrew and resubmitted its § 401 certification request from and to the States to be concerning:

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

[82] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (2019), *reh'g & reh'g en banc denied*, 2019 WL 3928669, 2019 WL 3958147 (D.C. Cir. April 26, 2019), *pet'n for cert. pending*, No. 19-257, docket available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-257.html. On September 27, 2019, 21 states filed an amicus brief in support of the cert. petition. A true and correct copy of the Amicus brief is annexed and incorporated by reference as **Ex. H** ("State Amicus Brief").

> The record does not indicate that PacifiCorp withdrew its request and submitted a wholly new one in its place, and therefore, we decline to resolve the legitimacy of such an arrangement. We likewise need not determine how different a request must be to constitute a "new request" such that it restarts the one-year clock. This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification. PacifiCorp's withdrawals-and-resubmissions were not just similar requests, they were not new requests at all. The KHSA makes clear that PacifiCorp never intended to submit a "new request." Indeed, as agreed, before each calendar year had passed, PacifiCorp sent a letter indicating withdrawal of its water quality certification request and resubmission of the very same ... in the same one-page letter ... for more than a decade. Such an arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.[83]

Since the *Hoopa Valley Tribe* opinion was issued, Federal agencies have apparently seen it as a golden opportunity to rid themselves of the need to obtain certifications from states, and found waiver to have occurred under facts that were far less extreme and much more nuanced and explainable than those presented in *Hoopa Valley Tribe*. FERC has been the worst offender and most draconian of all of these agencies, and has begun applying the decision retroactively and inequitably to completely dissimilar facts, and has repeatedly retroactively ruled that states waived their authority even for projects for which certification decisions were issued or denied by States years earlier.[84]

It is even more unfortunate, and unlawful, for EPA to now propose codifying such an extreme and unsupportable interpretation of *Hoopa Valley Tribe* into the Proposed Rule.[85] The Proposed Rule goes further than *Hoopa Valley Tribe* because it sets draconian and legally binding regulatory traps for States. Setting aside the prudential reasons that such a bright-line waiver rule is arbitrary and capricious, the entire premise of the Proposed Rule on this point, *i.e.*, that an applicant's decision to withdraw a formal request to an agency has no legal effect, is facially and fatally flawed. There is simply no language in § 401 to support the bizarre proposition that an applicant cannot choose to withdraw its own application for a permit and voluntarily render that application a nullity. What law prohibits any applicant from so doing? And in that event, under § 401, there would no longer be a pending "request" upon which a State

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

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

[85] Proposed Rule at 44116-117, 44121 (§ 121.8).

could “act,” even if it wanted to to so. One wonders then, whether EPA has really thought this through. Under the Proposed Rule, will States be required to continue devoting resources to, and ultimately “act” upon, withdrawn requests, in order to avoid a § 401 waiver ruling?

As noted above, there is currently a petition for certiorari pending in *Hoopa Valley Tribe*. As 21 States, from Massachusetts to Idaho, New Mexico to South Dakota, recently argued to the Supreme Court in their amicus brief filed in support of that pending cert. petition:

> Under Section 401, a state waives its certification authority only if it "fails or refuses ***to act on a request*** for certification, within a reasonable time period (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). ***Nothing in that language suggests that a state is required to act on a request for certification that is no longer pending because it has been withdrawn***. … Nor is it reasonable to ascribe to States a project applicant's decision to withdraw a certification request in order to avoid having the request denied. It is the action of the applicant—the very party that the time limitation is intended to protect—that results in a delay of water quality certification, not a failure or refusal by the state agency…. ***Nothing in the text of the statute prohibits an applicant from submitting and then withdrawing its request for certification before the one-year period for making a decision expires.*** *See, e.g., Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010) (court "must enforce plain and unambiguous statutory language according to its terms"). Nor does anything in the text of the statute support the court of appeals' interpretation that resubmissions are "not new requests" unless they differ substantially from previous, withdrawn requests for certification. Under the plain text of Section 401, the period for state review commences upon "receipt of such request" (which refers back to the statutory language "a request for certification"). 33 U.S.C. § 1341(a)(1) (emphasis added); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (noting that '"such" refers to "the santé' object previously described). Section 401 does not speak in terms of "any request" or "any identical request," nor does it call for a judgment regarding how similar a withdrawn application is to a new application for the same project. ***There is simply no textual support for the court of appeals' holding that submittal of a similar or even identical request is not "a request for certification" that triggers a new one-year certification period for states to act***.[86]

EPA should obviously pay closer attention, and respond, to these legitimate concerns of the States as they work to fulfill their § 401 obligations and protect State water quality. The

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

draconian and unworkable new waiver provisions that EPA has included in the Proposed Rule would result in many federally-approved projects, such as hydroelectric dams constructed 50 or more years ago, never undergoing any meaningful environmental review at all, and should be immediately withdrawn. To the extent that EPA finalizes these waiver rules in a final rule, it must clarify that such draconian waiver principles should never have been – and should no longer be – applied retroactively by Federal agencies to unfairly deprive States of their statutory authority.

D. **The Proposed Rule Would Violate Other Federal Laws**

As noted at length throughout these comments, EPA states its intention to dramatically alter the 401 certification process in the Proposed Rule, but does not appear to have conducted any meaningful analysis about the effect of those changes on the environment, including endangered species. Prior to taking any further action to reconsider and revise its § 401 regulations, EPA must comply with all relevant federal laws and policies, including the Endangered Species Act ("ESA"),[87] the National Environmental Policy Act ("NEPA"),[88] as necessary, and any other relevant laws and policies.

With respect to the ESA, EPA must consult with the Fish and Wildlife Service ("FWS") and/or National Oceanic and Atmospheric Administration ("NOAA") under Section 7 of the Act to assess whether its action may jeopardize the continued existence of listed species or adversely modify critical habitat; the extent to which the action may incidentally take listed species; and the specific measures EPA must carry out to minimize and mitigate those adverse effects.[89] Before EPA takes any action that "may affect" species listed as threatened or endangered under the ESA, or modify their critical habitat, the agency must first consult with the FWS and/or NOAA pursuant to Section 7 of the ESA.[90]

Under Section 7, consultation is required to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [critical] habitat . . . ."[91] Agency "action" is broadly defined to include "(a) actions intended to conserve listed species or their habitat; (b) ***the promulgation of regulations***; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or

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[87] 16 U.S.C. § 1531 *et seq.*

[88] 42 U.S.C. § 4321 *et seq.*

[89] *See* 16 U.S.C. § 1536.

[90] 16 U.S.C. § 1536(a)(2).

[91] *Id.*

indirectly causing modifications to the land, water, or air."[92]

As FWS's consultation handbook explains, an action agency may make an initial "no effect" or "may affect" determination to assess whether or not consultation is required.[93] EPA can only avoid undertaking informal or formal consultations when "the action agency determines its proposed action will not affect listed species or critical habitat."[94] The handbook defines "may affect" as "the appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat."[95] A "may affect" determination is appropriate even when the action agency believes that its actions will have either beneficial or uncertain effects because the action agency is not the expert in determining how its actions will impact threatened and endangered species.

If EPA predicts an impact on a listed species may occur, then EPA must undergo consultation with the Services.[96] If the action agency elects to first complete an informal consultation, it must first determine whether its action is "not likely to adversely affect" ("NLAA") a listed species or is "likely to adversely affect" ("LAA") a listed species.[97] The Services define "NLAA" determination to encompass those situations where effects on listed species are expected to be "discountable, insignificant, or completely beneficial."[98] Discountable effects are limited to situations where it is not possible to "meaningfully measure, detect, or evaluate" harmful impacts.[99] Discountable and insignificant impacts are rare if an agency's actions will cause harmful effects.

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

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[92] 50 C.F.R. § 402.02 (emphasis added).

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

[94] *Id.*

[95] *Id*. at xvi.

[96] *Id*. at xv.

[97] *Id*.

[98] *Id*.

[99] *Id*.

EPA may, of course, skip the informal consultation process and move directly to the formal consultation process. During the formal consultation process, FWS will assess the environmental baseline—"the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process [100]—in addition to the cumulative effects to the species—"those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation"—and determine if the agency action jeopardizes the continued existence of each species impacted by the agency action.[101]

The Section 7 consultation process applies to all discretionary actions,[102] and any effort by the EPA to review or revise its position here clearly represents such a discretionary action.

VI. CONCLUSION

For all of the foregoing reasons, EPA should immediately withdraw and abandon the Proposed Rule.

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[100] *Id.* at xiv.

[101] *Id*. at xiii.

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

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