

** Hydropower Reform Coalition ** Alabama Rivers Alliance ** American Chestnut Land Trust ** American Whitewater ** Anacostia Watershed Society ** Appalachian Mountain Club ** Appalachian Trail Conservancy ** California Outdoors ** California Sportfishing Protection Alliance ** Center for Diversity & the Environment ** Center for Environmental Law and Policy ** Chapman Forest Foundation ** Connecticut River Conservancy ** Connecticut River Valley Chapter of Trout Unlimited ** Environeers ** Foothill Conservancy ** Friends of Merrymeeting Bay ** Friends of the Chemung River Watershed ** Friends of the Eel River ** Friends of the River ** Friends of the White Salmon River ** Hispanic Federation ** Idaho Rivers United ** Illinois Council of Trout Unlimited ** Indigenous Environmental Network ** Michigan Hydro Relicensing Coalition ** New England FLOW ** New York State Council of Trout Unlimited ** Otsego County Conservation Association ** Pacific Coast Federation of Fishermen's Associations ** PennFuture ** Pennsylvania Council of Churches ** Rachel Carson Council ** San Juan Citizens Alliance ** Sierra Nevada Alliance ** Tennessee Riverkeeper ** Virginia Conservation Network ** Waterway Advocates ** Waterkeepers Chesapeake ** Ocean Futures Society **

August 8, 2022

Via Electronic Filing

Ms. Lauren Kasperek
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
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<https://www.regulations.gov/>

Re: Comments on “Clean Water Act Section 401 Water Quality Certification Improvement Rule,” Docket ID No. EPA-HQ-OW-2022-0128

Dear Ms. Kasperek,

The undersigned organizations are writing to express general support for the Clean Water Act Section 401 Water Quality Certification Improvement Rule (Improvement Rule). The Improvement Rule brings the regulations more in line with the statutory text and purpose of the Clean Water Act as a whole, and Section 401 specifically. EPA has stated that one of its objectives for this rulemaking is to restore the principles of cooperative federalism embodied in Section 401, which were upended in the existing regulations. The Improvement Rule largely meets that objective, subject to certain exceptions, like its interpretation of the “reasonable period of time” for a certifying authority to act on a certification request. We are requesting that EPA modify the proposed “reasonable period of time” rule to make one year the default period of time for a certifying authority to act on a request to avoid waiver of its certification authority, in the absence of agreement with the federal agency regarding a shorter period of time.

Under the Improvement Rule, certifying authorities' will be able to better protect waterways from the water quality impacts of federally licensed projects, impacts which have been shown to extend far beyond those related to the specific point source discharges. The cooperative federalism embodied in state and Tribal issuance of certifications for FERC-licensed hydroelectric projects has unquestionably served to protect water quality on rivers and the beneficial uses and users of rivers. In particular, state and Tribal exercise of § 401 authority has been critical to restore water quality and designated uses on rivers where FERC issued original licenses for projects prior to the enactment of the CWA.

We are pleased that the Improvement Rule advances the purpose of § 401 by recognizing that the scope of § 401 certification should cover the entire federally licensed activity's impact(s) on water quality, not just the impact(s) of a particular discharge. This is consistent with the statutory text of § 401, case law interpreting the statute, and EPA's longstanding position prior to 2020. Furthermore, we believe that the Improvement Rule's interpretation of the scope of § 401 certification to include consideration of whether the license activity will comply with water quality standards, not just numeric criteria, is necessary because the Act's primary objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Addressing the water quality impacts of a dam, for example, requires a broader look than the nature of a discharge from a powerhouse or penstock.

The undersigned organizations note that EPA has historically interpreted § 401 to mean that a certification "could broadly address 'all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation'" We support the Improvement Rule's revision of the existing regulations and return to its longstanding interpretation of "activity" to mean "activity as a whole" as consistent with the CWA and necessary to the protection of our nation's waterways.

The Improvement Rule, however, does not redress the undersigned organizations' concerns about the "one year" period enshrined by the Act. In fact, the Improvement Rule creates an unnecessarily restrictive timeline for certifying authorities to respond to certification requests. Section 401 requires a state or Tribe to act on a certification request "within a reasonable period of time (which shall not exceed one year) after receipt of such request" or its certification authority will be deemed waived with respect to the licensing proceeding. Waiver of certification is a significant consequence; one the Improvement Rule should not encourage through more restrictive deadlines not found in the statutory text. The definition of the default "reasonable period of time" in the Improvement rule—60 days—creates a timeframe that is wholly inadequate for the review of hydropower projects. In many cases, certifying authorities need a full year to entirely assess the impacts of a given hydropower project on water quality. A 60-day review period deprives certifying authorities of the valuable time that can be used to make informed 401 permitting decisions and infringes upon the principles of cooperative federalism. It also increases the likelihood of premature denials of certification requests that otherwise might be granted with adequate review time, creating the potential for greater administrative inefficiencies.

The D.C. Circuit already has rejected FERC's claim to authority to unilaterally establish deadlines for another agency with mandatory conditioning authority under the FPA. In *City*

of *Tacoma, Washington v. FERC*, the court reviewed FERC's rejection of conditions submitted by the U.S. Department of Interior's Fish and Wildlife Service under authority of FPA section 4(e) as untimely. The court found FERC's action improper, explaining: "when two or more federal agencies have shared authority to impose license conditions, they can certainly agree on an appropriate time frame to govern the process. FERC, however, has no authority to impose a short 60-day limitation unilaterally, thereby effectively stripping Interior of its statutorily delegated authority." The same logic applies here. A federal agency's unilateral, ad hoc time limitation on the state or Tribe's ability to act would prevent the state or Tribe from meaningfully exercising its delegated authority under § 401, and in regard to federally licensed projects, the CWA as a whole.

Section 401 provides the state or Tribe one year to act on a 401 request before its authority may be deemed waived. EPA's regulations should not contravene the statute, especially in a manner that would undercut the purpose of the Act in ensuring water quality is protected even at federally licensed projects. Accordingly, EPA should revise the rule to provide that a federal agency may request a state or Tribe act in less time than one year, but the state or Tribe must consent to any such request and in no event shall a state or Tribe's refusal or failure to act in less than one year be the basis for a determination the state or Tribe has waived its 401 authority.

In conclusion, we are optimistic about the Improvement Rule's proposals to recognize states and Tribes' primary authority to protect water quality under the CWA and clarify that the scope of their certification authority applies to the entire project proposed to be federally licensed. Consistent with the goal of ensuring states and Tribes' ability to protect water quality, we request that the final Improvement Rule be modified to state that while federal agencies may request that certifying authorities act in less than one year, there be no mechanism to compel action in a timeframe of less than a year. Thank you so much for the opportunity to comment on the Improvement Rule. We look forward to future discussions.

Sincerely,

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