National Hydropower Association

Comments on EPA's Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule

Docket ID No. EPA-HQ-OW-2021-0302

DRAFT OUTLINE

July 2, 2021

Background for NHA Members

Section 401

Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, requires the applicant for a federal license or permit for any activity that may result in a discharge to waters of the United States to provide the federal agency with a certification from the state where the discharge originates that the discharge will comply with specified provisions of the CWA, including water quality standards.[1] The certification requirement is waived, however, if the state does not act on a request for certification within a "reasonable period of time (which shall not exceed one year)." No federal license or permit for the activity may be issued until and unless the certification is obtained or waived. If a certification is issued, it may include conditions "necessary to assure" compliance with the specified CWA sections and also "with any other appropriate requirement of State law." These conditions "shall become a condition on any Federal license or permit" for the activity.

The certification requirement in what is now CWA section 401 predates the CWA and was initially enacted as section 103 of the Water Quality Improvement Act of 1970, P.L. 91-224, 84 State. 108-110. In 1972, Congress incorporated this provision—with substantial revisions—into the new CWA as section 401. P.L. 92-500, 86 Stat. 877-880. Except for minor revisions in 1977, section 401 has remained unchanged since then.

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[1] In some instances, the certifying authority is a federally recognized tribe that EPA has approved for treatment as a state under the CWA, *see* 33 U.S.C. § 1377(e), or an interstate water pollution control agency, *id.*, § 1341(a)(1). Unless otherwise stated, references in this outline to state certifying authorities also include tribal and interstate authorities. If no state, tribe, or interstate agency has the authority to issue a certification, EPA is the certifying authority. *Id.* The procedures for EPA certifications, however, are somewhat different than those for states, tribes, and interstate agencies. *Compare* 40 C.F.R. subpart 121.B *with* 40 C.F.R. subpart 121.D.

EPA's Certification Rules

For nearly fifty years, EPA's certification rules, which it had promulgated in 1971 during the Nixon Administration, reflected the pre-CWA version of the certification requirement. *See* 36 Fed. Reg. 22,487 (Nov. 25, 1971). The rules and several judicial decisions, including two by the U.S. Supreme Court, resulted in generally expansive views of a state's authority under section 401 to block, delay, and regulate federally licensed or permitted projects. In 2019, concerns that some states were using their section 401 authority to thwart coal, oil, and natural gas transportation projects because of the states' opposition to these fuels, rather than the potential water quality effects of the projects, prompted then-President Trump to issue an executive order directing EPA to review and revise its section 401 rules to facilitate the construction of these projects. *See Promoting Energy Infrastructure and Economic Growth* §§ 1-3, Exec. Order 13868 (Apr. 10, 2019), 84 Fed. Reg. 15,495 (Apr. 15, 2019). EPA responded to the order last year by replacing its 1971 section 401 rules with entirely new rules based on the current version of section 401. 85 Fed. Reg. 42,284 (July 13, 2020) (codified at 40 C.F.R. part 121) (2020 Rule).

Problems Associated with State Certification Decisions and EPA's 2020 Rule

Although fossil fuel transportation projects were the impetus for the executive order that led to the 2020 Rule, the hydropower industry shares similar concerns regarding the states' use of their section 401 authority, particularly in the context of licensing decisions by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act. NHA's outreach to EPA and comments on EPA's proposed rule were instrumental in educating EPA regarding these concerns, which were addressed substantially, albeit not completely, in the final rule.

The problems associated with state section 401 certifications generally fall into two broad categories: (1) the often unreasonable time and effort required to obtain a certification and (2) the overly broad scope of certification decisions and conditions, which frequently extend well beyond the water quality effects of the discharge for which certification is required.

States have habitually taken far longer to act on certification requests for FERC license applications than the "reasonable period of time (which shall not exceed one year)" allowed by section 401. Some FERC licensing proceedings have been delayed by more than a decade while FERC waited for the state to issue its certification. Among the more common devices that states have historically employed to circumvent the statutory deadline are deeming a certification request to be "incomplete" to prevent the state's certification clock from starting and pressuring the applicant to withdraw and resubmit its request in order to restart the state's clock. The 2020 Rule now substantially limits the use of these devices by, for example, requiring a certification request to include only minimal, relatively objective information, *see* 40 C.F.R. § 121.5(b); prohibiting extensions of the certification deadline beyond one year for any reason, *id.*, § 121.6(d); prohibiting the certifying authority from asking the applicant to withdraw and resubmit its request, *id.*, § 121.6(e); and requiring a certification denial based on insufficient

information to describe the specific water quality data or information that would be needed to issue the certification, *id.*, § 121.7(e)(1)(iii).[2]

In addition to problems associated with delays in obtaining certifications, state certification decisions and conditions have routinely addressed issues far beyond the water quality effects of the discharge that triggered the need for the certification. As authority for a broad interpretation of the scope of section 401, states have relied on the U.S. Supreme Court's 1994 decision in *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700. In *PUD No. 1*, the Court held that certification conditions could address the effects of the entire federally licensed or permitted activity on a water body and its aquatic life and other uses, not just the narrow water quality effects of the discharge that triggered the certification requirement. States have also pointed to their section 401 authority to condition certifications as necessary to ensure compliance with "any other appropriate requirement of State law" to justify conditions based on state laws and regulations that may have little or no connection to the water quality concerns addressed by the CWA. The 2020 Rule, however, expressly rejects the Supreme Court's interpretation of the scope of section 401 by narrowly restricting certification decisions and conditions to "assuring that a discharge"—not the entire federally licensed or permitted activity—"will comply with water quality requirements," 40 C.F.R. § 121.3. The rule also limits "water quality requirements" to the five CWA sections specified in section 401 and "state or tribal regulatory requirements for point source discharges into waters of the United States," *id.*, § 121.1(n).

Potential Revisions to the 2020 Rule

On his first day in office, President Biden issued an executive order that, among other things, revoked the executive order that prompted the 2020 Rule and ordered agency heads to immediately review all rules and other actions adopted during the Trump Administration that are inconsistent with the national objectives identified in the order. *See Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* § 1-2, 7, Exec. Order 13990 (Jan. 20, 2021), 86 Fed. Reg. 7037 (Jan. 25, 2021). Among these broadly stated objectives are clean water and addressing climate change. *See id.*, § 1. Based on the review directed by the executive order, EPA published in the *Federal Register* a "Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule," 86 Fed. 29,541 (June 2, 2021) (NOI). The NOI makes clear that EPA does not intend to repeal the 2020 Rule or reinstate its 1971 section 401 rules. Rather, EPA intends to leave the 2020 Rule in effect until EPA promulgates revisions, which EPA expects to occur in the spring of 2023. *See id.* at

[2] In response to the 2020 Rule, states that are not yet prepared to act on certification requests before the certification deadline have begun to deny the requests based on insufficient information and "without prejudice" to the applicant resubmitting its request with additional information. Whether the 2020 Rule's requirement that such denials identify "the specific water quality data or information" needed will result, as a practical matter, in faster certifications than before (assuming that the requirement remains in effect), remains to be seen.

29,542; *see also* Declaration of John Goodin (submitted in support of EPA's Motion for Remand Without Vacatur of the 2020 Rule in litigation challenging the 2020 Rule).[3]

The NOI does not propose specific revisions to the 2020 Rule but requests comment by August 2, 2021 on potential revisions, including but not limited to ten specific issues described in the NOI. After considering these comments, EPA intends to develop and issue for public comment proposed revisions to the 2020 Rule in the spring of 2022. The ten issues on which the NOI specifically seeks comment are:

1. Whether the **"pre-filing meeting request"** required by § 121.4 is useful.

2. Whether the definition of **"certification request"** in § 121.5 should be expanded to include additional information.

3. Whether state and tribal certifying authorities should be given a role (in addition to the federal licensing or permitting agency, as currently provided by § 121.6) in defining the **"reasonable period of time"** for making certification decisions (within the maximum one-year period allowed by section 401).

4. Whether the **"scope of certification"** as defined by § 121.3 should be expanded and should include potential water quality effects from the "activity" as a whole, not just the discharge which triggered the need for certification.

5. Whether and to what extent the rule's **procedural requirements for certification decisions** and **federal agency review** of the decisions in §§ 121.7-121.9 should be revised.

6. Whether certifying authorities and citizens, in addition to the federal licensing or permitting agency as provided by § 121.11, may **enforce certification conditions**.

7. Whether the rule should allow **modification** of certification conditions and **"reopener"** conditions.

[3] Challenges to the 2020 Rule are pending in three separate federal courts. *In re Clean Water Act Rulemaking*, No. 20-04869 (consolidated) (N.D. Cal.); *Delaware Riverkeeper Network v. U.S. EPA*, No. 20-03412 (E.D. Pa.); *South Carolina Coastal Conservation League v. Wheeler*, No. 20-03062 (D.S.C.). NHA has intervened in each of these cases to defend the rule. On July 1, 2021, EPA filed a motion in each of the cases asking the court to remand the rule to EPA for reconsideration while leaving the rule in effect ("remand without vacatur"). The challengers to the rule, which include approximately 20 states and environmental advocacy organizations, oppose the motion because it would allow the 2020 Rule to remain in effect while EPA considers revisions.

8. Whether the rule's **"neighboring jurisdiction"** provisions in § 121.12 should be expanded or revised.

9. Data and other information on the **effects of the 2020 Rule** on processing certification requests and certification decisions.

10. Whether the rule should facilitate the **implementation of rule revisions**, including delayed implementation and the **adoption of coordinating rules by federal licensing and permitting agencies**, such as FERC and the U.S. Army Corps of Engineers.

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The following draft outline (1) identifies and briefly explains the issues on which NHA may want to comment and (2) tentatively suggests the positions that NHA might want to take on those issues. Background commentary is *italicized*.

Preliminary Outline of Comments

1. Introduction and Summary of NHA's Views on Revising the 2020 Rule

[*Because climate protection is a central goal of the Biden Administration and of Executive Order 13990, which prompted EPA to issue the NOI, it will be important for NHA's comments to emphasize the essential role that hydropower will play in achieving the Administration's climate protection goals. That emphasis should also help counter the perception that the 2020 Rule benefits only fossil fuel interests.*]

NHA does not support substantial revisions to the 2020 Rule, which closely adheres to the text and purposes of section 401. The rule preserves the ability of states and tribes to fully protect water quality while also preserving the ability of federal agencies to implement broader national interests through their licensing and permitting decisions. Hydropower is a clean, renewable, and reliable energy source that will be essential for achieving the Administration's ambitious climate protection and infrastructure objectives. The 2020 Rule is needed to ensure that existing and new hydropower and other clean energy projects can be timely and efficiently licensed to address water quality, climate, and other national objectives.

1.1 [Summary description of the essential role that hydropower will play in achieving the Administration's climate protection objectives.]

1.2 Section 401 is a limited grant of federal authority to the states to certify and condition federal licenses and permits, including those issued pursuant to statutes that preempt state law, such as FERC hydropower licenses issued pursuant to the Federal Power Act (FPA). This limited grant of authority is intended to enable a state to ensure that discharges from federally licensed or permitted activities comply with the CWA and state water quality requirements implementing the CWA. Section 401, however, does not grant states

comprehensive authority to prohibit or regulate federally licensed or permitted activities, including hydropower and other clean energy projects.

1.3 States play an important and valuable role in protecting water quality, and NHA supports the continued participation of states in federal licensing and permitting decisions through section 401. Some states, however, have sought to use their section 401 authority to prohibit, delay, or impose conditions on federally licensed or permitted activities for reasons that go far beyond the water quality concerns addressed by the CWA. Where federal laws such as the FPA grant exclusive regulatory authority to federal agencies and preempt state requirements in order to further the interests of the Nation, including the national goal to limit and respond to climate change, an overly expansive interpretation of state authority under section 401 undermines the exclusive regulatory authorities that Congress has conferred on federal agencies.

1.4 The 2020 Rule adheres to the text of section 401 and its objective of allowing states to fully protect water quality and implement the objectives of the CWA, while ensuring that states do not abuse their section 401 authority by prohibiting, delaying, or regulating federally licensed or permitted activities for reasons unrelated to water quality. EPA should retain the rule without substantial revisions to facilitate the timely and efficient relicensing of hydropower and other clean energy projects.

2. Background Regarding NHA, Its Members' Interest in Section 401, and the Essential Role That Hydropower Will Play in Achieving Climate Protection Goals

2.1 NHA is a non-profit national association dedicated to securing hydropower as a clean, renewable, and reliable energy source that serves the Nation's environmental and energy objectives. NHA has more than 240 organizational members, including public and investor-owned utilities, independent power producers, equipment manufacturers, and professional organizations that provide legal, environmental, and engineering services to the hydropower industry.

2.2 Many of NHA's members hold licenses issued by FERC. Under the FPA, FERC has the exclusive authority to license nonfederal hydropower projects. This exclusive authority generally preempts state regulation of the projects under state law.

[*Include a summary of FERC's comprehensive authority to regulate hydropower projects, including for the protection of water quality, aquatic life, wildlife, and recreation. Describe the role that states play in the relicensing process in addition to their authority under section 401*.]

2.3 Because hydropower projects typically involve discharges to waters of the United States, FERC's issuance of licenses to the projects is almost always subject to CWA section 401. NHA members must often obtain other federal permits subject to section 401, including

CWA section 404 permits from the U.S. Army Corps of Engineers for discharges of dredged or fill material.

2.4 States and tribes play an important and valuable role in the licensing and permitting of hydropower projects, including through their CWA section 401 certification authority. Historically, however, the many uncertainties related to the timing and scope of section 401 certification decisions has led to substantial licensing delays, conflicts, and other problems.

[*Provide brief examples here to illustrate these problems; provide additional examples below to illustrate specific issues*.]

2.5 [Summarize the essential role that hydropower will play in achieving climate protection goals and the need to ensure that the section 401 certification process does not delay the licensing of hydropower and other clean energy projects or overburden them with requirements unrelated to water quality concerns.]

3. Overview of the Purpose and Structure of Section 401

3.1 [*Provide a brief overview of section 401 and its history and context as a foundation for supporting arguments for a narrow interpretation of state authority under section 401*.]

3.2 The CWA does not preempt or otherwise limit the application of state law. Regardless how narrowly or expansively section 401 is interpreted, neither it nor EPA's 2020 Rule limits in any way the authority of states to regulate any activity *under state law*.

3.3 Section 401 is a limited grant of federal authority to the states to certify and condition federal licenses and permits. This limited grant of authority is intended to enable a state, if it chooses, to ensure that discharges from federally licensed or permitted activities meet the requirements of the CWA and state requirements implementing the CWA—even if the federal license or permit is issued pursuant to a statute that preempts state law.

3.4 For federal laws such as the FPA that grant exclusive regulatory authority to federal agencies in order to further national interests, an interpretation of section 401 that expands its scope beyond the specific water quality concerns that it addresses undermines the scope of the exclusive regulatory authority that Congress has conferred on the federal agency.

3.5 The 2020 Rule interprets and applies section 401 in a manner that is consistent with its text and purpose. It allows states to ensure that discharges from federally licensed or permitted activities meet the water quality objectives of the CWA and implementing state regulations, but it does not go beyond section 401 to undermine the exclusive authority that Congress has assigned to federal agencies such as FERC under the FPA.

4. Comments on Specific Issues

4.1 *Pre-Filing Meeting Requests*

> [*EPA's request for comment: "The rule requires project proponents to submit a 'pre-filing meeting request' to certifying authorities at least 30 days prior to submitting a certification request. 40 CFR 121.4. EPA is interested in the utility of the pre-filing meeting process to date, including but not limited to, whether the pre-filing meetings have improved or increased early stakeholder engagement, whether the minimum 30 day timeframe should be shortened in certain instances (e.g., where a certifying authority declines to hold a pre-filing meeting), and how certifying authorities have approached pre-filing meeting requests and meetings to date."*]

[*Because FERC's rules integrate section 401 certification decisions into the licensing process, the required pre-filing meeting request likely has little or no value for FERC licensing decisions. It may be valuable, however, for other federal permits and licenses.*]

NHA supports engagement between applicants and section 401 certifying authorities well in advance of a certification request. EPA's rule, however, should not mandate pre-request procedures. Federal licensing and permitting agencies are likely to be in a better position to determine whether any such procedural requirements would be helpful and what they should be. Because of the large number and variety of federal licenses and permits that are subject to section 401, a one-size-fits-all approach is not workable or useful. NHA instead encourages EPA to work with federal licensing and permitting agencies and with state and tribal certifying authorities to develop procedures and practices that will facilitate timely certification decisions based on the best information available.

4.2 *Certification Request*

> *[EPA's request for comment: "The rule defines a certification request as 'a written, signed, and dated communication that satisfies the requirements of [section] 121.5(b) or (c).' Id. at 121.1(c). Among other issues, EPA is concerned that the rule constrains what states and tribes can require in certification requests, potentially limiting state and tribal ability to get information they may need before the CWA Section 401 review process begins. EPA is interested in stakeholder input on this definition and the elements of a certification request contained at 40 CFR 121.5, including but not limited to, the sufficiency of the elements described in 40 CFR 121.5(b) and (c), and whether stakeholders have experienced any process improvements or deficiencies by having a single defined list of required certification request components applicable to all certification actions."*]

NHA supports the 2020 Rule's clear and objective definition of a certification request.

4.2.1 It is in the applicant's interest to provide the certifying authority with all relevant information as soon as possible in order to avoid a certification denial based on insufficient information. Section 401, however, does not require a request for certification to include more than the request itself.

4.2.2 Moreover, because the request initiates the period for the certifying authority to act on the certification request, it is essential for the request to be defined clearly and objectively so that the certifying authority, the federal licensing or permitting agency, and the applicant all have a common understanding of when the period begins and ends. Requiring the certification request to include all the information that the certifying authority might need or want to issue the certification is inconsistent with the statute; would delay certification decisions by allowing certifying authorities to subjectively determine that a request is incomplete; and would lead to extended disputes regarding whether a certification request is sufficiently "complete," whether the certification period has begun, and whether the certifying authority has waived certification by failing to act on a request within a reasonable period.

4.2.2.1 [Include examples of pre-2020 Rule delays and disputes caused by states that took the position that the certification period did not begin until the certification request was "complete."]

4.3 *Reasonable Period of Time*

[*EPA's request for comment: "CWA Section 401 requires a certifying authority to act on a certification request within a defined time period known as the 'reasonable period of time.' The rule requires the federal licensing or permitting agency to determine the reasonable period of time using a series of factors, provided that the time does not exceed one year from the date a certifying authority receives a certification request. . . . Additionally, the rule allows federal agencies to extend the reasonable period of time within that one year time period at a certifying authority or project proponent's request, but does not allow certifying authorities to take any other action to extend or modify the reasonable period of time. . . . Among other issues, EPA is concerned that the rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests and limits the factors that federal agencies may use to determine the reasonable period of time. EPA is seeking stakeholder input on the process for determining and modifying the reasonable period of time, including but not limited to, whether additional factors should be considered by federal agencies when setting the reasonable period of time, whether other stakeholders besides federal agencies have a role in defining and extending the reasonable period of time, and any implementation challenges or improvements identified through application of the rule's requirements for the reasonable period of time.*]

NHA supports the 2020 Rule's provisions in § 121.6 for establishing the "reasonable period of time" for acting on certification requests.

4.3.1 The federal licensing or permitting agency is the appropriate entity for determining the reasonable period.

4.3.1.1 Under section 401, the federal licensing or permitting agency must necessarily determine whether and when it may issue the license or permit, based on either a certification or a waiver of certification.

4.3.1.2 Because certification decisions are triggered by federal license or permit applications and are a component of the federal licensing or permitting process, the federal agency is in the best position to determine the reasonable period for making the certification decision.

4.3.1.3 The federal agency has an incentive not to make the certification period unreasonably short because that would result in certification denials based on insufficient information, which would disrupt the federal licensing or permitting process.

4.3.2 The 2020 Rule's criteria for determining the reasonable period are appropriately tailored to the factors that the certifying authority must and may consider in making its certification decision.

4.3.3 The 2020 Rule provides a clear and efficient process for ensuring that both the certifying authority and the applicant know from the outset when the reasonable period will end. It also enables both the certifying authority and the applicant to request an extension of the period up to the statutory limit of one year.

4.4 *Scope of Certification*

[*EPA's request for comment: "The rule limits the scope of certification, which includes both the scope of certification review under CWA Section 401(a) and the scope of certification conditions under CWA Section 401(d), to 'assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.' . . . The rule defines 'water quality requirements,' as the 'applicable provisions of [sections] 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.' . . . Among other issues, EPA is concerned that the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality. EPA is seeking stakeholder input on the rule's interpretation of the scope of certification and certification conditions, and the definition of 'water quality requirements' as it relates to the statutory phrase 'other appropriate requirements of state law,' including but not limited to, whether the agency should revise its interpretation of scope to include potential impacts to water quality not only from the 'discharge' but also from the 'activity as a whole' consistent with Supreme Court case*

law, whether the agency should revise its interpretation of 'other appropriate requirements of State law,' and whether the agency should revise its interpretation of scope of certification based on implementation challenges or improvements identified through the application of the newly defined scope of certification."]

NHA supports the scope of certification provisions in the 2020 Rule.

4.4.1 The 2020 Rule's scope of certification is appropriately limited to discharges to waters of the United States, not to the "activity as a whole."

4.4.1.1 The text of § 401(a)(1) clearly limits the scope of certification to certification that the "discharge into the navigable waters [waters of the United States]" will comply with the applicable provisions of the CWA §§ 301-303, 306-307. EPA has no authority to expand the scope of certification requirement beyond the discharge.

4.4.1.2 As explained in the preamble to the 2020 Rule, the Supreme Court's interpretation in *PUD No. 1* that the authority to condition certifications extended to the "activity as a whole" was based on EPA's 1971 certification rule, which predated and was inconsistent with section 401 as enacted in the CWA in 1972. The reference to "applicant" in § 401(d) does not extend the scope of certification to the activity as a whole. That would create an inconsistency with the certification requirement in § 401(a)(1) and, in context, the reference is clearly intended only to indicate who must comply with certification conditions, not which aspects of an activity are subject to those conditions.

4.4.2 The 2020 Rule's scope of certification is also appropriately limited to the "applicable provisions of §§ 301, 302, 303, 306, 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States."

4.4.2.1 There are only two sources of authority in section 401 for the scope of certification. First, § 401(a)(1) requires certification of compliance "with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title" [CWA §§ 301, 302, 303, 306, and 307]. Second, § 401(d) authorizes certification conditions as "necessary to assure" compliance with these sections and "with any other appropriate requirement of State law."

4.4.2.1.1 The 2020 Rule's scope of certification is fully consistent with the CWA sections referenced in section 401. EPA has no authority to expand the scope of certification beyond the

applicable requirements of these sections, nor could it contract the scope of certification by excluding any of these sections.

4.4.2.1.2 The 2020 Rule appropriately interprets "other appropriate requirement of State law" to be limited to "state or tribal regulatory requirements for point source discharges into waters of the United States." Because the certification requirement itself is limited to the water quality effects of point source discharges to waters of the United States, the only "other appropriate requirement of State law" is a state or tribal regulatory requirement applicable to such discharges.

4.4.3 [Include examples of the inappropriate scope of state certification decisions and conditions prior to the adoption of the 2020 Rule. Connect the inappropriately expansive scope to licensing and permitting delays and to unreasonable burdens on the use of hydropower and other clean energy sources to achieve climate protection objectives.]

4.4.4 [*Based on the statutory text, the basis for certification* ***conditions*** *under § 401(d) is broader than the certification* ***requirement*** *itself under § 401(a)(1). Whereas the certification of compliance is with CWA §§ 301-303, 306-307, certification conditions can be based on the need to "assure" compliance with these sections, as well as with "any other appropriate requirement of State law." The 2020 Rule, however, effectively makes "any other appropriate requirement of State law" a basis for denial of certification, as well as a basis for a certification condition. This may not have much, if any, practical significance, though, and the point may not be worth including in NHA's comments.*]

4.4.5 [*NHA's comments in 2019 on EPA's proposed rule requested further clarification of the scope of certification and asked that EPA add this language to the rule: "Effects that are not within the scope of certification include, but are not limited to: (a) Effects caused by the presence of pollutants in a discharge that are not attributable to the Federally licensed or permitted activity; (b) Effects attributable to features of the Federally licensed or permitted activity other than the discharge; and (c) Effects caused by the absence or reduction of a discharge." EPA declined to include these clarifications in the final rule. Should NHA again suggest these or other clarifications in its comments in response to the NOI?*]

4.5 *Certification Actions and Federal Agency Review*

[*EPA's request for comment: "The rule provides that certifying authorities may take one of four actions on a certification request, including granting certification, granting certification with conditions, denying certification, or waiving certification. . . . The rule requires that certifying authorities include specific information when granting certification, granting certification with conditions or denying certification. . . . Additionally, the rule requires federal agencies to review certifying authority actions to determine whether they comply with the procedural requirements of CWA Section 401 and the 401 Certification Rule. . . . Among other issues, EPA is concerned that a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of nonsubstantive and easily fixed procedural concerns identified by the federal agency. EPA is seeking stakeholder input on the certification action process steps, including but not limited to, whether there is any utility in requiring specific components and information for certifications with conditions and denials, whether it is appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose, and if so, whether there should be greater certifying authority engagement in the federal agency review process including an opportunity to respond to and cure any deficiencies, whether federal agencies should be able to deem a certification or conditions as ''waived,'' and whether, and under what circumstances, federal agencies may reject state conditions."*]

NHA supports the 2020 Rule's requirement that certification denials and conditions include statements explaining the denial or condition. NHA also supports the 2020 Rule's provisions for federal agency review of certification denials and conditions. [*What position should NHA take on giving certifying authorities an opportunity to respond to and cure deficiencies related to the justifications for certification denials and conditions?*] NHA, however, requests that § 121.7(c) be revised to state that a grant of certification shall include a statement that the certifying authority has "reasonable assurance" that the proposed project will comply with water quality requirements.

4.5.1 It is essential that certification denials and conditions include at least the relatively modest explanatory statements required by the 2020 Rule. These statements are necessary to allow meaningful review of certification decisions and, in the case of conditions, to demonstrate that they satisfy the requirement of CWA § 401(d) that the condition is "necessary to assure" compliance with the applicable requirement. Moreover, § 401(d) expressly provides that, when conditions are based on an "appropriate requirement of State law," the requirement must be "set forth" in the certification.

4.5.2 The 2020 Rule also reasonably interprets section 401 to authorize the federal licensing or permitting agency to evaluate whether certification denials and conditions include the required explanatory statements. Federal agency review for compliance with these procedural requirements is essential for enforcing the

requirements. Otherwise, certifying authorities would have little incentive, and perhaps a disincentive, to provide the statements.

4.5.3 [*Should NHA take the position that the 2020 Rule should be revised to allow the federal agency to review the substance of state certification denials and conditions, not just whether the required statements accompany the denials and conditions?*]

4.5.4 § 121.7(c) provides that a "grant of certification . . . shall include a statement that the discharge from the proposed project will comply with water quality requirements." NHA requests that this provision be revised to state that a "grant of certification . . . shall include a statement that *the certifying authority has reasonable assurance* that the discharge from the proposed project will comply with water quality requirements."

4.5.4.1 EPA's 1971 certification rule required certification of "reasonable assurance" of compliance, based on the language of the pre-CWA certification statute. The preamble to the 2020 Rule explains that "reasonable assurance" was not included in the rule because CWA § 401(a)(1) requires a certification that the "discharge will comply." NHA is concerned that omission of the phrase "reasonable assurance" will lead to an impossibly high evidentiary burden for certifications, particularly for FERC hydropower licenses, which may have a term of up to 50 years.

4.5.4.2 Although EPA is correct that the term "reasonable assurance" is no longer found in paragraph 401(a)(1), there is no indication that Congress intended to establish a higher evidentiary burden for certifications. Indeed, the omission appears to have been inadvertent because the term is still found in other portions of section 401, including most notably paragraph 401(a)(3), which provides that a certification fulfills the requirements of future federal licenses and permits unless the certifying agency notifies the federal agency "that there is *no longer reasonable assurance* that there will be compliance with the applicable provisions of [CWA §§ 301, 302, 303, 306, and 307]." (Emphasis added.) This demonstrates that Congress intended certifications to continue to be based on reasonable assurance of compliance.

4.6 *Enforcement*

[*EPA's request for comment: "The rule provides that federal agencies are responsible for enforcing certification conditions that are incorporated into a federal license or permit. . . . The rule does not provide a role for certifying authorities to enforce certification conditions under federal law. Additionally, the rule restates the statutory provision that provides certifying authorities with the ability to inspect certified projects prior to their initial operation. . . . EPA is interested in stakeholder feedback on enforcement of CWA Section 401, including but not limited to, the roles of federal agencies and certifying authorities in enforcing certification conditions, whether the statutory language in CWA Section 401 supports certifying authority enforcement of certification conditions under federal law, whether the CWA citizen suit provision applies to Section 401, and the rule's interpretation of a certifying authority's inspection opportunities.*"]

There is no provision in section 401 or elsewhere in the CWA for enforcement of certification conditions, except by the federal licensing or permitting agency, and then only after the conditions are incorporated into the federal license or permit.

4.6.1 CWA § 401(d) provides that certification conditions "shall become a condition on any Federal license or permit subject to the provisions of this section [§ 401]." Thus, certification conditions, once incorporated into the federal license or permit, are enforceable in the same manner and to the same extent as the other conditions of the federal license or permit. There is no other provision in § 401 or the CWA for enforcing certification conditions. 2020 Rule § 121.11(c) is consistent with § 401 by providing that the "Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit."

4.6.1.1 The CWA's enforcement section, § 309, makes no reference to § 401.

4.6.1.2 The CWA's citizen suit provision, § 505, authorizes citizens (which include states) to enforce the requirement to obtain a certification, but it does not authorize the enforcement of certification conditions. *Contra Deschutes River Alliance v. Portland General Elec.*, 249 F.Supp.3d 1182 (D. Or. 2017).

4.6.1.3 If certification conditions were independently enforceable, there would have been no need for Congress to require incorporation of the conditions into the federal license or permit.

4.6.2 Enforcement of certification conditions except as the conditions of the federal license or permit into which they are incorporated would undermine the authority of the federal agency to enforce the conditions of its own licenses or permits and could lead to duplicative or inconsistent enforcement actions and conditions.

4.7 *Modifications*

> [*EPA's request for comment: "The rule removed the 1971 regulation's provision that allowed for modifications where agreed upon by the certifying authority, federal agency, and EPA. . . . Additionally, the rule prevents certifying authorities from extending the reasonable period time unilaterally, including but not limited to, the use of conditions intended to reopen a certification ('reopeners'). Among other issues, EPA is concerned that the rule's prohibition of modifications may limit the flexibility of certifications and permits to adapt to changing circumstances. EPA is interested in stakeholder feedback on modifications and 'reopeners,' including but not limited to, whether the statutory language in CWA Section 401 supports modification of certifications or 'reopeners,' the utility of modifications (e.g., specific circumstances that may warrant modifications or 'reopeners'), and whether there are alternate solutions to the issues that could be addressed by certification modifications or 'reopeners' that can be accomplished through the federal licensing or permitting process."*]

To address the modification of certification conditions, the 2020 Rule should be revised to provide that, if the certifying authority modifies, adds, or removes a certification condition after the end of the reasonable period, or after the federal license or permit has been issued, the federal licensing or permitting agency may in its discretion revise the license or permit accordingly, provided that the revision complies with the agency's own statutory and regulatory requirements. The 2020 Rule should also be revised to expressly prohibit "reopener" and other certification conditions that purport to authorize the certifying authority to unilaterally modify certification conditions after the end of the reasonable period or after the federal license or permit has been issued.

4.7.1 Section 401 makes no provision for modifying certification conditions. Moreover, allowing the certifying authority to modify a certification condition unilaterally after the end of the reasonable period would be inconsistent with section 401's requirement that certification decisions be made within a reasonable period.

4.7.2 Nothing, however, prohibits the federal agency from incorporating into the federal license or permit modified certification conditions, provided that the modification is consistent with the agency's own statutory and regulatory requirements. *See Airport Communities Coalition v. Graves*, 280 F.Supp.2d 1207, 1214-17 (W.D. Wash. 2003). [*Because § 401(d) requires the incorporation of certification conditions into the federal license or permit, the federal agency likely could not unilaterally modify those conditions.*]

4.7.3 "Reopener" and other conditions that purport to authorize the certifying authority to unilaterally modify certification conditions are plainly inconsistent with the text of section 401 because they would allow certifying authorities to make certification decisions long after the maximum one-year period allowed by

section 401 and long after the federal license or permit has been issued. They would also transform section 401's limited grant of authority to states to certify federal license and permit applications into an ongoing regulatory role. Such an ongoing regulatory role would be particularly problematic in the context of a FERC license under the FPA because the FPA assigns exclusive regulatory authority to FERC.

4.7.3.1 NHA suggests that the 2020 Rule be revised to include the following prohibition: "Certification conditions that purport to authorize the certifying authority to revoke the certification as to issued federal licenses or permits or to modify certification conditions without the approval of the federal agency are inconsistent with section 401 and shall not be incorporated into a federal license or permit."

4.8 *Neighboring Jurisdictions*

[*EPA's request for comment: "The rule addresses the so-called 'neighboring jurisdiction' process in CWA Section 401(a)(2), including interpreting the timeframe in which a federal agency must notify EPA for purposes of Section 401(a)(2) and providing process requirements for the agency's analysis and the neighboring jurisdictions' review and response. EPA is interested in stakeholder feedback on the neighboring jurisdiction process, including but not limited to, whether the agency should elaborate in regulatory text or preamble on considerations informing its analysis under CWA Section 401(a)(2), whether the agency's decision whether to make a determination under CWA Section 401(a)(2) is wholly discretionary, and whether the agency should provide further guidance on the Section 401(a)(2) process that occurs after EPA makes a 'may affect' determination.*"]

[*NHA's 2019 comments did not take a position on the § 401(a)(2) provisions of the 2020 Rule. Is this an issue of concern to NHA members that should be addressed in the comments on the NOI? Note that a federal district court recently held that EPA does not have complete discretion to decide whether to make a "may affect" determination under § 401(a)(2).* See Fond du Lac Band of Lake Superior Chippewa v. Wheeler, *No. 19-2489 (D. Minn., Feb. 16, 2021). This could create procedural complications and delays for federal permitting and licensing decisions.*]

4.9 *Data and Information*

[*EPA's request for comment: "EPA is interested in receiving any data or information from stakeholders about the application of the 401 Certification Rule, including but not limited to, impacts of the rule on processing certification requests, impacts of the rule on certification decisions, and whether any major projects are anticipated in the next few years that could benefit from or be encumbered by the 401 Certification Rule's procedural requirements. Additionally, EPA is interested in stakeholder feedback about existing state CWA Section 401 procedures, including whether the agency should*

consider the extent to which any revised rule might conflict with existing state CWA Section 401 procedures and place a burden on those states to revise rules in the future."]

[*Placeholder for any information from NHA members on experience with the 2020 Rule.*]

4.10 *Implementation Coordination*

[*EPA's request for comment: "EPA is interested in hearing from stakeholders about facilitating implementation of any rule revisions. For example, given the relationship between federal provisions and state processes for water quality certification, should EPA consider specific implementation timeframes or effective dates to allow for adoption and integration of water quality provisions at the state level. Similarly, EPA is interested in receiving feedback on whether concomitant regulatory changes should be proposed and finalized simultaneously by relevant federal agencies (e.g., the Army Corps of Engineers, Federal Energy Regulatory Commission) so that implementation of revised water certification provisions would be more effectively coordinated and would avoid circumstances where regulations could be interpreted as inconsistent with one another.*"]

[*In general, coordination with federal agencies and state certifying authorities on the implementation of revisions to the 2020 Rule would likely be useful, but it may be premature to offer any specific comments on coordinating implementation at the NOI stage.*]

4.11 [Other Issues?]

[*Are there other issues that NHA members believe should be addressed in the comments on the NOI?*]