August 8, 2022

The Honorable Radhika Fox
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Proposed Rule, Environmental Protection Agency; Clean Water Act Section 401 Water Quality Certification Improvement Rule (87 Fed. Reg. 35,318 - 35,381, June 9, 2022)

Dear Assistant Administrator Fox:

The undersigned organizations appreciate the opportunity to comment on the Environmental Protection Agency's (EPA's or Agency's) proposed "Clean Water Act Section 401 Water Quality Certification Improvement Rule." 87 FR 35318 (June 9, 2022). The proposal is intended to modify EPA's Certification Rule, finalized in 2020 (the 2020 Rule). 85 FR 42210 (July 13, 2020).

Our coalition of trade associations includes companies across all sectors across the economy that are affected by the Clean Water Act (CWA or Act) and section 401—property owners, construction, developers, farmers, manufacturers, forestry, energy producers, miners, and transportation, among others. For projects that will cause a discharge to a navigable water, CWA section 401 requires federal permittees to obtain a water quality certification from the state or authorized tribe where the discharge originates. The certification helps ensure that local water quality will not be impaired by the federally-permitted project. Certification must be issued before the federal permit may be issued; if certification is denied, the federal permit may not be issued.

The certification process is foundational to the American business community's ability to advance this Administration's ambitious climate and infrastructure goals and to support a more equitable future. Clear, consistent, predictable, and efficient federal permitting is necessary to meaningfully and effectively advance these priorities. We urge EPA to carefully consider the economic, legal, and practical issues outlined in our comments.

The proposed rule would create significant regulatory uncertainty and could cause lengthy delays and interference in the certification and federal permitting processes. We, therefore, respectfully request that EPA retain certain aspects of the 2020 Rule, including the scope of certification and the definition of "water quality requirements." Additionally, we are concerned that the proposed provisions requiring submittal of a draft permit with a certification request and allowing certification modifications would disrupt federal permitting, financing, and construction timelines and would undermine the certainty of a federally-issued permit. With respect to matters relating to tribes' acting as certifying authorities pursuant to section 401, we also urge the inclusion of more dialogue between the tribal certifying authority and project sponsors at appropriate stages throughout the process.

I. Scope of Certification

EPA proposes to expand the scope of certification beyond what Congress intended in the 1972 amendments to the CWA. The proposed scope of certification would require states and tribes to evaluate "whether the activity as a whole will comply with all applicable water quality requirements." Proposed 121.3, 87 FR 35378. Our organizations are concerned that requiring evaluation of the "activity as a whole" is inconsistent with the text of the statute, and that the proposed definition of "water quality requirements" is vague and ill defined.

a. The "discharge" is the proper scope of CWA section 401 authority and EPA's proposed interpretation impermissibly broadens the plain text of the Act

Section 401(a)(1) states that a state must certify that any "*discharge* will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act." CWA section 401(a)(1); see also 85 FR 42232. Despite the unambiguous focus of the statutory text on a discharge to navigable waters and the dozens of pages of legal analysis that EPA presented in the 2020 Rule proposal and final preambles, EPA now believes that applying CWA section 401 to the "activity as a whole" is "more consistent with the statutory text, legislative history, and water quality protective goals of the CWA than the 2020 Rule's 'discharge only' approach." 85 FR 35343 . EPA correctly notes that there is some degree of ambiguity in section 401; however, an agency's interpretation of an ambiguous statutory provision must still be reasonable in light of the text and structure of the Act. See *Cuozzo Speed Technologies, LLC. v. Lee*, 579 U.S. 276-277 (2016) ("[W]here a statute leaves a gap' or is ' ambigu[ous]' . . the agency [has] leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute.") (citing *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001)); see also *Ferring Pharmaceuticals, Inc. v. Burwell*, 169 F.Supp.3d 199, 212 (D.C. Cir. 2016) ("The permissibility of an agency's interpretation is assessed 'in light of [the statute's] language, structure, and purpose.'" (citing *Nat'l Treasury Empls. Union v. Fed. Labor Relations Auth.*, 754 F.3d 1031, 1042 (D.C. Cir. 2014)). As described more fully below, EPA's analysis, interpretation, and conclusion that 401 applies to the "activity as a whole" does not meet that threshold.

EPA has proposed to define a term, "activity as a whole," that appears nowhere in section 401. In fact, in 1972 Congress explicitly removed the term "activity" from the operative provisions of section 401. The proposed rule relies on legislative history and on a single word in 401(d)—"applicant"—to disregard the text of 401(a) and broadly expand the scope of CWA section 401. 87 FR 35344.

The proposal asserts that the term "'activity as a whole' is meant to include all activity at the proponent's 'project in general' with the potential to affect water quality (e.g., construction and operation of the project or facility)." 87 FR 35345. The proposal further states that the proposed definition "is consistent with previously issued EPA guidance, which identified the scope of review as 'all potential water quality impacts of the project, both direct and indirect, over the life of the project.'" 87 FR 35345 (citing 1989 Guidance and rescinded 2010 handbook). Without further limitation, the proposal suggests that the term "activity as a whole" could include any

aspect of construction or operation of the project in general, including those aspects that are not subject to the federal permit. 87 FR 35345. It is unclear if this could include aspects of the project that are either not subject to regulation at all or that may be subject to zoning or other local regulatory programs.

The proposal is not legally or factually supported and would create an unworkable and unimplementable certification program. First, the proposal is arbitrary because it ignores that Congress explicitly revised section 401(a) and replaced the word "activity" with the word "discharge." Second, EPA's proposal could be read so broadly that, for example, a CWA section 404 permit issued for a discrete dredge and fill project could remain in effect with the Corps retaining regulatory and enforcement authority over the project for as long as whatever is built on, around, or near the permitted fill exists or operates. This approach is inconsistent with the 404 regulatory program and not supported by the Act.

The proposal also relies on the Supreme Court's decision in *PUD No. 1* to support its interpretation that 401 applies to the "activity as a whole," which rests on uncertain legal foundations. 87 FR 35342. As described in the 2020 Rule preamble, the Court's *PUD No. 1* decision was made with incomplete information and based in part on a crucial, but mistaken, factual assumption—the assumption that EPA's then-current regulations reflected the agency's interpretation of section 401. None of the parties briefing the case, including EPA, informed the Court that EPA's regulations were outdated and reflected a previous version of the statute. This misunderstanding significantly undermines the validity and applicability of the *PUD No. 1* decision, and the Agency should not reflexively rely upon it in this rulemaking.

In the 2020 Rule preamble, EPA explained how it read sections 401(a) and (d) together, to be consistent with one another, and explained why the single word "applicant" used in (d) did not have the power to undo the explicit change in language by Congress in section 401(a). In 2020, EPA explained, "The ordinary meaning of the word 'applicant' is '[o]ne who applies, as for a job or admission.' See Webster's II, New Riverside University Dictionary (1994)). In section 401(d), this term is used to describe the person or entity that applied for the federal license or permit that requires a certification. The use of this term in section 401(d) is consistent with the text of the CWA, which uses the term ''applicant'' throughout to describe an individual or entity that has applied for a grant, a permit, or some other authorization." 85 FR 42232. In the proposed rule, EPA arbitrarily rejects its prior analysis and uses the term "applicant" to significantly, unreasonably, and unlawfully expand the scope of section 401 beyond the "discharge" that is the foundation of the 1972 CWA and section 401.

b. The proposed scope is vague and unimplementable

Even if the use of the term "activity as a whole" were lawful (which it is not, as is explained above), EPA has not adequately explained in the proposal how its use of the term would function in practice. EPA has proposed to define the term "activity as a whole" as "any aspect of the project activity with the potential to affect water quality." 87 FR 35377. However, nowhere in the proposal preamble does the Agency attempt to describe the extent of "project activity." As proposed the definition introduces significant regulatory uncertainty into section 401 and threatens the development and deployment of all kinds of new and resilient infrastructure,

including for renewable energy. For example, for a wind farm, solar farm, hydroelectric dam, or other power generation source, does "project activity" include the transmission line? For a dredging project supporting an offshore wind farm, does "project activity" include the approval of the ocean disposal site for the dredged material? For a wetland fill, does "project activity" include the disposal of solvents that might be used at the manufacturing facility that is constructed after the wetland is filled?

These questions are not merely academic, as the lack of clarity not only affects the project proponent at the certification request stage (by creating uncertainty as to how much and what kind of information should one be prepared to submit to the certifying authority), but it also raises the back-end litigation risk for any issued certification. In the wind farm example, suppose the state considers the water quality impacts from the staging areas, installation of the turbines, and the proposed operation of the turbines, and issues a certification covering those components of the "project activity." Wind farm opponents then challenge the certification because it does not also consider water quality impacts from the transmission line that will carry wind energy across multiple states. The project would be stuck in litigation pending the outcome of such a challenge. EPA can at least mitigate this litigation risk by not using the uncertain term "project activity," or at minimum by setting some limits and providing more clarity about the extent of "project activity" that must be considered under EPA's "activity as a whole" interpretation of section 401. At a minimum, EPA should clarify that the scope of certification is not broad enough to reach aspects of a project that have already received authorization for construction or operation.

EPA also explains that a certification under this proposal would address "water quality requirements for the life of the license or permit and not just at the moment the license or permit is issued." 87 FR 35352. The proposal embraces the concept of "adaptive" conditions in a certification—those are springing conditions that come into effect upon the passage of time or the happening of a certain event. 87 FR 35353. Given the ambiguous nature of "activity as a whole" and "the life of the license or permit," even a comprehensive and future-looking adaptive management-style certification would be vulnerable to legal challenge by those who believe *more* related activities must be considered *further* into the future and further away from the site of the project to account for every potential contingency. This is an untenable place for certifying authorities and project proponents and will make every certified project legally vulnerable regardless of how extensive the certification may be. In addition, these problems are likely to multiply for resilient infrastructure that is built to last for many decades, as "the life of a license or permit" is more likely to include a very long time period in such cases.[1]

Again, even if the statute authorized EPA to go beyond the 2020 Rule's 'discharge only' approach," it would still be the case that any final rule that EPA issues must provide objective boundaries on what constitutes the "activity as a whole," and in a much more specific way than

[1] EPA previously found that the 2020 Rule's scope of certification "will increase clarity and regulatory certainty for certifying authorities and project proponents, resulting in net cost savings due to reduced project delays, reduced litigation, and clear information requirements for certifications." EPA's Economic Analysis for the Clean Water Act Section 401 Certification Rule (May 28, 2020), Section 4.2.2. The proposed rule would unwind all of that certainty and process improvement and would once again make the scope of section 401 unknowable. EPA does not adequately explain how these foreseeable consequences will be avoided.

simply saying, "any aspect of the project activity with the potential to affect water quality" and "for the life of the license or permit." 87 FR 35352. The proposal is too vague to be implemented with any consistency and would violate the Administrative Procedure Act as arbitrary and capricious.

c. Non-Navigable Waters

For the first time in the history of the CWA, EPA is proposing that section 401 applies to all waters, not just "navigable waters." To support this radical change in the scope of section 401, EPA rehashes the *PUD No. 1* analysis and asserts that the discharge to a navigable water is merely a triggering event, and that once such an event occurs, the true scope of section 401 can be applied to any and all waters. Once section 401 is triggered, EPA proposes that the discharge becomes almost irrelevant as states and authorized tribes are required to certify that all aspects of the activity as a whole—throughout construction and its entire operational existence—must not cause a violation of water quality requirements in any water, including non-federal waters that could be "some distance from the triggering discharge." 87 FR 35348. The proposal turns section 401 into an overly expansive watershed-management tool and the CWA into a sweeping, highly restrictive land-use statute.

Application of section 401 to non-federal waters is not a natural expansion of federal regulation. As explained in the 2020 Rule preamble, the CWA sets out a very careful line between (1) federal regulation of federal waters, and (2) state management and regulation of state waters. Application of section 401 to state waters would mean that certification conditions related to state waters would be incorporated into federal permits for administration and enforcement purposes. This would be contrary to the careful balance Congress struck in the CWA and would not be consistent with the fundamental concept of cooperative federalism that is embodied in the CWA and other environmental statutes.[2]

To support the proposal, EPA asserts that because section 401 does not expressly prohibit federal regulation of state waters, Congress must have intended it to be authorized. 87 FR 35348 ("there is no indication in the text or legislative history that Congress intended the scope of review under sections 401(a) and (d) to assure compliance be limited to 'navigable waters.'"). EPA asserts that "Had Congress desired to create such a limited scope of review, it could easily have done so." 87 FR 35348. In other words, Congressional silence in this instance gives EPA license to expand 401 beyond the scope of any other regulatory provision in the CWA and to allow federal regulation of state waters (conditions of a certification become conditions of the federal permit, federally enforceable for the life of the permit). EPA's proposal egregiously disregards, again, the plain language in section 401(a) that explicitly applies section 401 to "discharges" to "navigable waters."

[2] 85 FR 42239 ("The final rule's interpretation that a discharge must be into a water of the United States to trigger the section 401 certification requirement is consistent with the plain text of the statute, is supported by the legislative history, and is consistent with other CWA regulatory program requirements that apply to discharges to waters of the United States, not discharges to State or Tribal waters. [Citing authorities.] If section 401 was expanded to cover activities with discharges to non-federal waters, such an expansion would authorize the federal government to regulate waters and features that are beyond the scope of CWA regulatory authority; Congress did not intend these waters to be subject to federal regulation.").

EPA's tenuous legal justification for expanding the reach of section 401 was expressly rejected in the Supreme Court's landmark decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (2001) (*SWANCC*). Where an "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must make its intention unmistakably clear in the language of the statute. *Id*. at 173. In *SWANCC*, the federal government had asserted authority over waters the Court found were within the traditional state land use power and rejected the notion that Congress would intrude upon that power absent a "clear statement" in the statute itself. *Id*. at 172-73. Congressional silence in this context does not authorize additional federal encroachment. Even if the intended effect of EPA's proposed rule change is to give the states greater involvement in analyzing the potential impacts of federally-permitted projects, the federalization of state permitting conditions and regulatory application of the CWA to state-only waters is authority that has not been expressly delegated to EPA by Congress.

d. Water Quality

The proposal asserts that it is limiting section 401 certifications to considerations of "water quality." EPA is legally required to do so, because section 401 is a provision of the Clean *Water* Act; section 401 does not authorize EPA or other regulators to impose conditions on permits and licenses that pertain to matters other than water quality. To convert this discrete provision of the CWA into a grant of such sweeping authority would be to stuff a legal elephant into a statutory mousehole. See generally *Whitman v. American Trucking Ass'ns, Inc*., 531 U.S. 457, 468 (2001 (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes"). In the past, improper—and indeed illegal—efforts have been made to use section 401 to address air emissions, energy policy, and other matters outside the scope of the CWA, which are properly addressed under other statutes. Notwithstanding the proposal's statement that it is respecting this crucial limit on the reach of section 401, a close look reveals that the proposal is not so clear cut.

Specifically, in a discussion of "water quality," EPA includes a long list of certification conditions that it considers to be appropriate and says that certifying authorities should "consider the broadest possible range of water quality effects and that the appropriateness of any given condition will depend on an analysis of all relevant facts." 87 FR 35343. The conditions EPA believes are appropriate include the construction of recreational facilities including parking spaces, tree planting in upland areas, and construction of public access for fishing, among others. EPA erroneously claims that these types of conditions would be "protecting recreational/fish consumption designated uses." 87 FR 35343. Water quality standards and related designated uses, including those providing for recreational fishing and fish consumption, require that the *water quality in the water resource* be sufficient to support the propagation of live fish that could be caught for recreational or other purposes. While the business community supports recreational fishing, the designated use is about *water quality,* it is not about building upland infrastructure to facilitate the activity of fishing.

To further demonstrate the point, if EPA's interpretation of "designated uses" in the proposed rule is correct, EPA would require states to list as "impaired" those waters with a recreational fishing designated use where the riparian landowner has not provided sufficient public access for

fishing. We are not aware that EPA or any state has designated a water impaired based on the lack of access for fishing, nor would it be an appropriate designation under the CWA. Upland infrastructure, whether it is parking lots, public restrooms, or fishing docks, does not promote water quality (in fact, some would argue they can create the potential to degrade water quality in nearby resources), do not achieve water quality standards or designated uses, and are not appropriate conditions for a CWA *water quality* certification. EPA must leave land use planning and other non-water-quality matters to the states and must avoid the unconstitutional drift that is contemplated by its proposed rule. If Congress intended the federal government to engage or participate in local land use planning, energy policy planning, or other non-water-quality matters it would have made a clear statement to that effect; and any EPA regulation that encompasses such matters would risk triggering the major questions doctrine, as well as the simple conclusion that EPA is acting outside the scope of the authority granted it by Congress in the CWA.

II. Modifications

The CWA does not explicitly authorize certifications to be modified after they are issued. However, EPA proposes to conclude that because the Act does not expressly prohibit modifications, modifications must be authorized even absent input or agreement by the project proponent or permittee – a suggestion that is in significant tension with the text, structure, and purposes of the statute. The proposal would allow certifying authorities and federal agencies to agree upon a certification modification without input or agreement by the project proponent/permittee. At a minimum, the project proponent should receive notice that the certifying authority and federal agency are considering whether to modify a certification; but a more transparent and legally defensible approach would be to provide expressly that any decision to re-open and modify its certification can be made only with the consent of the project proponent. Such an approach would respect the reliance interests of the proponent and would fit better with the statutory text, structure, and purposes.

The examples in the proposal for when a modification may be necessary appear to be administrative in nature (correcting a typographical error, changing a point of contact, adjusting an expiration date). 87 FR 35362. If the final rule authorizes only non-substantive administrative or ministerial modifications to certifications after they are issued, then notice to the project proponent/permittee may be sufficient. However, if EPA intends to authorize substantive modifications to certifications, like adding, removing, or revising conditions, the project proponent/permittee must have an active role in these discussions. Moreover, no substantive modification should be made to an issued permit absent the consent of the proponent/permittee, as such changes would directly impact the conditions of the federal permit and the compliance obligations of the permittee.

Certification conditions should not be modified simply because state law changes. State laws change with some frequency and should not form an independent justification for modifying a certification. Additionally, changes to state law can be litigated and ultimately reversed either by courts or state regulators. Projects must be certified based on the law in place at the time the federal license or permit is issued.

Where a court of competent jurisdiction remands or vacates a certification after the federal license or permit is issued, the certifying authority has an obligation to comply with the court order. In these cases, the certification would be modified or reissued as compelled by the court, not as independently and separately authorized by an EPA rulemaking or other regulatory action. We see no reason why a certification should or would need to be modified in response to a court issuing a stay of the certification (see 87 FR 35363), and EPA should clarify in the final rule or response to comments that it did not intend to suggest it could authorize stayed certifications to be modified absent a court order addressing the merits of the challenged requirement.

III. Draft Permit Requirement

Marking a sharp departure from historical EPA practice, the proposal would require all project proponents to secure a draft permit from the federal agency before requesting certification under 401. EPA says this new requirement would "ensure that states and tribes have the critical information they need to make a timely and informed certification decision." 87 FR 35332. EPA further justifies this proposed requirement by again relying on the silence of the CWA: "Section 401 does not specify when a request for certification must be submitted in relation to the related federal licensing or permitting process, nor does the 1971 Rule or 2020 Rule specify when a project proponent must submit a request for certification." 87 FR 35332.

While we understand the potential value in seeing conditions that the federal agency has included in a draft permit, the disruption that this proposed requirement would create significantly outweighs its potential value. This proposed requirement, along with other provisions of the proposed rule, would create significant delays with respect to timing and regulatory uncertainty for the project proponent. For example, it can take federal agencies many months or years after a permit application is submitted to get to a draft permit phase—these delays can be related to workload issues, internal federal agency procedures and requirements, or other reasons. If the certification process is delayed until a draft permit is prepared, this will add even more time to an already lengthy process that has been known to take longer than the statutory one-year timeline, and has the potential to affect project financing, scheduling, and viability.[3]

Additionally, nothing in CWA section 401 suggests that EPA is authorized to dictate when a project proponent may or must request certification. The only timing element of section 401 is for a certifying authority to act on a request within one year of receipt. 33 U.S.C. § 1341(a)(1). The proposed rule's prohibition on requesting certification until an unknown point in time exceeds EPA's authority. EPA should also clarify that the "shall not exceed one year" language in the section 401(a)(1) is in fact a deadline and that if a certifying authority does not act within that statutory deadline, certification is waived. The agency requested comment on whether it should, in the alternative, require that a certification request include an officially submitted application for a license or for a permit. In our view, a permit application would provide more

[3] Prior to the 2020 Rule, the certification process was fraught with lengthy delays resulting from a scope of certification that was ill-defined and confusing, a regulation that lacked clear deadlines, and states that would impose conditions beyond the appropriate scope set forth in the statute. 85 FR 42215, 42261. The proposal would return to the pre-2020 Rule status with respect to the scope, deadlines, and certification conditions, which would no doubt lead to lengthy and protracted certification processes. See EPA's Economic Analysis for the Clean Water Act Section 401 Certification Rule (May 28, 2020). EPA does not adequately explain why these consequences would not occur or why such consequences are desirable or justified.

than sufficient information for the certifying authority to understand the location and water quality-related aspects of the project and to act on a certification request. In addition, if a permit application is required, EPA should allow a limited exception to such a requirement for circumstances in which the proponent demonstrates a substantial practical obstacle to providing the application in a timely fashion and is able to furnish an adequate substitute for the application.

IV. Neighboring jurisdiction provisions

EPA is proposing several revisions to the neighboring jurisdiction provisions in section 401 (a)(2): first, that a waiver of certification triggers the section 401(a)(2) neighboring jurisdiction procedures; and second, changes to the treatment as a state (TAS) process for section 401. Each is addressed below.

a. Waiver triggering the neighboring jurisdiction provisions

EPA is proposing that when a state or tribe waives certification, the federal agency must notify EPA as though a certification had been issued, and EPA must complete the section 401(a)(2) process. The proposed rule preamble acknowledges that the statute is clear, and that the section 401(a)(2) procedure is triggered when EPA receives an "application and certification" from the federal permitting authority. EPA nonetheless proposes to expand the neighboring jurisdiction provision beyond what Congress provided because "it seems reasonable." 87 FR 35366. EPA also seems to suggest that this expansion of the statutory procedures is "consistent with the Agency's approach to section 401(a)(2) for over 50 years." 87 FR 35366. EPA's analysis is fundamentally and irreparably flawed because the regulations EPA cites were not implementing "section 401(a)(2) for over 50 years" as EPA claims. Rather, EPA's regulations continued to implement section 21(b) of the Federal Water Pollution Control Act, despite Congress modifying the statutory structure over 50 years ago.

In any case, EPA's 1971 regulations did not provide any legal analysis or justification to support the agency's expansion of the neighboring jurisdiction provision of section 21(b), and the proposed rule is similarly void of legal analysis in support of expanding the provision beyond what Congress provided. The rationale also cannot overcome the plain language of the statutory provision that requires EPA to receive the certification to trigger section 401(a)(2); EPA's proposed waiver trigger lacks foundation in the statute.

b. Technical considerations regarding treatment as a state (TAS) status for eligible tribes under section 401

EPA is proposing to establish specific authorization for eligible tribes to obtain TAS status for purposes of considering and acting on certification requests pursuant to section 401. We recognize tribes' critical role in managing their water resources, and we support improving implementation of the TAS provisions of the statute to enhance tribes' participation in the section 401 certification program. At the same time, we have technical and practicability concerns about certain aspects of what the proposed rule would do in this area. First, as the proposal explains, tribes historically have received TAS status for section 401 at the same time

when they receive TAS status for establishing water quality standards under CWA section 303. As a technical matter, tribes that have not obtained TAS status for 303 water quality standards purposes would, presumably, also not have established water quality standards or effluent limitations available for evaluating against a section 401 certification request. It is unclear from the proposal what types of water quality standards or effluent limitations a tribal certifying authority would consider under section 401 if the tribe has not obtained TAS for any other CWA program.

Second, EPA is also proposing to create authorization for tribes to obtain TAS only for purposes of the 401(a)(2) neighboring jurisdiction provision. 87 FR 35379-80. EPA explains that "some tribes may not desire or have the resources to apply for the section 401 certification program" TAS, but still "wish to be notified about, and have the ability to object to and provide information regarding, potential federal licenses and permits that may affect their waters." 87 FR 35372. This proposed provision creates even more questions about how the mechanics of tribal participation in a 401(a)(2) proceeding would work if the tribe has no water quality standards or "water quality requirements" as the term is intended in section 401.

Third, section 401(a)(2) provides that, after receiving notification, the authorized tribe has 60 days to determine if the discharge will affect its water quality such that it will "violate water quality requirements." If the tribe does not have TAS for any other CWA program and does not have any water quality standards or requirements established in law, it is unclear what technical resources would be available to evaluate the proposed discharge or its potential effect on water quality in areas that may be tens or hundreds of miles away from the location of the discharge. It is even more unclear in this context what might be "violated," as 401(a)(2) contemplates, if there are no water quality requirements established in law.

Finally, we note that the federal regulation that authorizes a tribe to obtain TAS for a partial Clean Air Act (CAA) program establishes criteria for determining whether certain aspects of the CAA are in fact severable from the larger program. EPA's proposed rule would not authorize partial TAS for severable elements but would only authorize the ability for tribes to receive notice from EPA and object to certifications. This provision is based only on EPA's statement that it believes the section 401(a)(2) process to be "reasonably severable" from the rest of section 401 and the fact that section 401 does not, on its face, prohibit this approach. 87 FR 35372. EPA should provide additional legal support for its proposed conclusion that the section 401(a)(2) process is in fact severable from the broader section 401 process.

V. Economic Analysis and Information Collection Request

In addition to the proposed rule, EPA has published for review an Economic Analysis (EA) in support of the proposed rule and an Information Collection Request (ICR) that is intended to reflect the relative burdens of project proponents and certifying authorities to develop certification requests and act on those requests. Both documents are flawed and require significant revision before either can be finalized.

The EA published by the EPA is vague and without any quantification of either costs or benefits with respect to either the 1971 or the 2020 baseline. EPA also provides no reasonable basis for

concluding that the likely incremental costs of the proposed rule would be offset by incremental benefits compared to the presently in force 2020 Rule. Indeed, EPA asserts without evidence that the more cabined assessment approach in the 2020 Rule would result in lower water quality benefits in terms of human health and environmental services. The very short period of time of actual, practical experience implementing the 2020 Rule makes such claims challenging to substantiate. However, if EPA has real and specific data or evidence to support a finding that the 2020 Rule resulted in lower water quality, it has an obligation to make that information available to allow the public to assess and comment on it.

Additionally, EPA admits that it does not have a complete and accurate record of all of the permitting processes that have been conducted under CWA section 401. That is a situation that can and should be rectified by reconstructing the past record, and by putting into place procedures to accurately track the experience of reviewing and approving or disapproving certifications going forward.

Finally, we note that EPA has proposed a new ICR for the proposed rule. An ICR describes the estimated cost and burden associated with the rule it supports. In the case of CWA section 401, an ICR should estimate the cost and burden incurred by the project proponent from requesting a certification, and the cost and burden incurred by the certifying authority from processing the certification request. The estimated costs and burdens for project proponents are of great interest to our organizations.

The proposed ICR estimates there could be between 57,000 and 97,000 certification requests filed annually under the proposed rule. The proposed ICR also estimates that a project proponent will, on average, spend only four hours per certification request under the proposed rule. In other words, EPA anticipates it will take only four hours for a project proponent to collect, compile, and submit "any existing and readily available data or information related to potential water quality impacts from the proposed project" and also collect, compile and submit any other information that a state or tribe may require for a complete certification request. This burden estimate would also presumably include such matters as the time needed to request and attend a pre-filing meeting.

The estimate is flawed. First, this number seems quite low for the likely actual burden created by EPA's proposed open-ended certification request requirement (and even more so considering requirements that may be imposed by of states or tribes). Second, this is the same hourly burden EPA estimated a project proponent would incur under the 2020 Rule. In other words, EPA estimates that it will take no more time for a project proponent to complete a certification request under the proposal than it would have under the 2020 Rule. This is not an objectively reasonable assumption.

Thank you for the opportunity to provide public comment. If you have any questions about these comments or if you would like to discuss further, please do not hesitate to contact us. We would welcome further engagement by EPA concerning the proposed rule.

Sincerely,

American Exploration & Mining Association
American Gas Association
Associated General Contractors of America
National Mining Association
National Sand, Stone & Gravel Association
U.S. Chamber of Commerce