CALIFORNIA
Water Boards

GAVIN NEWSOM
GOVERNOR

JARED BLUMENFELD
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

October 21, 2019

Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

SECTION 401 CERTIFICATION PROPOSED RULE
DOCKET ID NO. EPA-HQ-OW-2019-0405

Dear Mr. Wheeler:

The California State Water Resources Control Board (State Water Board) and the nine California Regional Water Quality Control Boards (collectively, "Water Boards") are certifying agencies pursuant to section 401 of the Clean Water Act. The Water Boards oppose the proposed changes by the U.S. Environmental Protection Agency (EPA) to the section 401 certification regulations (Proposed Rule). (84 Fed. Reg. 44080-44122 (August 22, 2019).) The Proposed Rule is a clear overreach that ignores the state's authority to regulate its own water resources and disregards the principles of cooperative federalism established by the Clean Water Act and repeatedly affirmed by the United States Supreme Court.

By requiring only negligible information for a valid certification request, the Proposed Rule invites applicants to try to exploit unreasonably rigid timelines to circumvent a state's meaningful review of a project's effects on water quality. A state's only recourse to stave off procedural gamesmanship is denial. A sharp increase in certification denials does not serve EPA's stated goal of promoting efficiency. Indeed, none of the EPA's proffered rationale justify reversing fifty years of agency practice in favor of an untested system that contravenes established law. EPA should withdraw Proposed Rule or revise it to comply with applicable law in a manner that affirms respect for state law and state institutions.

This comment letter addresses the Water Boards' concerns that are applicable to the entirety of the Proposed Rule first, and then sets forth detailed comments on the specific proposed language in Attachment A.

The Proposed Rule is inconsistent with principles of cooperative federalism.

A fundamental defect in the Proposed Rule is that it disregards state interests, thereby undermining cooperative federalism, which is a foundational component of the Clean Water Act. As set forth in Clean Water Act section 101(b), "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." Section 510 further specifies that except as expressly provided, nothing in the Clean Water Act shall preclude or deny the right of any State to adopt or enforce any standard or limitation respecting discharges of pollutants or any requirement respecting control or abatement of pollution.

The section 401 certification program is an embodiment of these cooperative federalism principles. The Supreme Court has explained that "[s]tate certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution . . . ." (*S.D. Warren Co. v. Maine Board of Environmental Protection* (2006) 547 U.S. 370, 385 (*S.D. Warren*).) A state certification is the mechanism of ensuring that a federal license or permit is not used as an excuse to violate a state's water quality standards. (*Id.*) Section 401 is an acknowledgement that states are in the best position to understand their own law and that additional conditions may be necessary to ensure compliance with state law and applicable requirements. As the federal permitting or licensing agency is often not an agency primarily tasked with managing environmental issues, the federal agency may in fact be reliant on the certification authority's expertise regarding water quality. There would not have been a reason to include section 401 certification if the certification was meant to be little more than a rubber stamp. Any attempt to overhaul the section 401 certification program must preserve an expansive view of the federalism principles embodied in section 401 and repeatedly affirmed by the Supreme Court.

Despite the clear and express language of the Clean Water Act, the Proposed Rule attempts to dismantle the existing program that has been built on decades of cooperative federalism. The overall effect of the Proposed Rule would be to strip the states of their Clean Water Act authority to provide a substantive review a project's effect on water quality before a federal permit or license is issued. Three specific aspects of the Proposed Rule highlight how it would undercut cooperative federalism.

First, the Proposed Rule disregards a state's right to impose more stringent water quality requirements. Section 401(d) of the Clean Water Act authorizes a state to condition certification based on, among other things, "any other appropriate requirement of state law." Through its definition of "water quality requirements," the Proposed Rule attempts to rewrite this statutory language. The Proposed Rule purports to restrict certifying authorities from considering anything other than specifically enumerated sections of the Clean Water Act or "EPA-approved state or tribal Clean Water Act regulatory program provisions." "Any other appropriate requirement of state law" cannot be reasonably interpreted to be so limited. This constricted and unprecedented

interpretation of "water quality requirements" is an unwarranted intrusion into a state's authority to impose stricter conditions to protect the quality of waters within its borders. As is accounted for and endorsed by the Clean Water Act, many states, including California, have state-based programs and attendant requirements that exist outside the ambit of EPA-approved regulatory programs. A state's authority to establish and enforce more stringent state requirements is not contingent on EPA approval of those more stringent requirements.

Second, sections 121.6 and 121.8 of the Proposed Rule would require federal agencies to review the validity of any denials and any conditions set forth in a certification before incorporation. This federal agency oversight would supplant state court review of certifications, which is the established process for challenging a certification. Review of state certification is properly in state court because state courts are well-versed in state law. Review by federal agencies erodes the cooperative federalism scheme by unnecessarily entangling federal agencies in review and second-guessing interpretations of state law. Further, the Proposed Rule's chosen remedy for any allegedly invalid conditions or an invalid denial is that the federal agency may remand only if there is still remaining time in the review period. Given the already untenable list of actions that must occur during the reasonable period of time, it is extremely unlikely that there would ever be any time remaining, and even if there were, remand is permissive, not mandatory. The ultimate result is that the certifying authority would never have the opportunity to fix any perceived deficiencies, and a federal agency can unilaterally convert a denial into a waiver or only incorporate certification conditions that it deems acceptable.

Third, the Proposed Rule is susceptible to being construed as deeming enforcement of certification conditions the exclusive province of the federal agency. Although the express language in section 121.9 only references federal enforcement authority, the preamble seemingly affirms federal enforcement authority to the exclusion of state enforcement. (84 Fed. Reg. at 44116 ("Once the certifying authority acts on a certification request, section 401 does not provide an additional or ongoing role for certifying authorities to enforce certification conditions under federal law; rather, that role is reserved to the federal agency issuing the federal license or permit.").) EPA should clarify that the Proposed Rule was not intended to strip enforcement authority from the states because nothing in section 401 even impliedly precludes state enforcement. EPA has previously acknowledged different state practices with respect to section 401 enforcement in its interim handbook, entitled "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes." In this handbook, which represented EPA's guidance for ten years, EPA described various levels of state involvement in section 401 enforcement, including state-only enforcement, state inspections and investigations with referral to federal agencies for prosecution, bifurcated enforcement, and state-led, but federally assisted enforcement actions. The handbook noted that the California Water Code specifically sets forth potential civil liability and criminal penalties for violations of section 401 certifications. (Water Code §§ 13385, 13387.) These Water Code sections confirm that the California Legislature intended the Water Boards to have enforcement authority of section 401

certifications. Moreover, while section 401 is silent on enforcement, enforcement is authorized under the Clean Water Act citizen suit provisions. (*Oregon Natural Desert Association v. Dombeck* (9th Cir. 1998) 172 F.3d 1092, cert. denied (1999) 528 U.S. 964). It is established that states are among the persons authorized to bring citizen suits. (*U.S. Dept. of Energy v. Ohio* (1992) 503 U.S. 607, 615–616.) Enforcement of certification requirements is unquestionably within the scope of protection from preemption set forth in Clean Water Act section 510.

The Proposed Rule invites procedural gamesmanship.

By requiring only cursory information in a certification request and imposing unreasonably inflexible time constraints on review decisions, the Proposed Rule invites applications that are crafted to frustrate meaningful state review of projects. An applicant may successfully stymy substantive review by refusing to disclose complete information during the appointed period of time for review. If the certifying agency is forced to take action before it is fully informed, there would be an increased risk that the federal agency would deem the certification or denial invalid, thereby resulting in a de facto waiver. In any such cases of unintentional waiver, the Water Boards would use their authority under state law to protect water quality to the extent feasible, but they would be preempted in some instances from relying on state law. In such cases, unintentional waiver would weaken protections afforded to California's waters.

By EPA's own description, incomplete initial certification requests are the most common cause of section 401 review delay. The solution to that delay is to ensure and to incentivize applicants for federal licenses to provide the states a complete initial request for state certification, not to pare down the information required. EPA concedes that the data gaps between the scant information required by the Proposed Rule and a complete application may be significant and may result in more denials. More denials will not achieve EPA's stated goal of creating a more efficient regulatory process. Instead, an influx of denials and reapplications could lengthen decision timelines and prioritize resources on procedural, rather than substantive, review. As the federal agencies would have a new obligation to review every denial, this unnecessary process also wastes federal resources.

EPA fails to offer a supportable justification for the abrupt changes that run contrary to the Clean Water Act and Supreme Court precedent.

Pursuant to the express language of the Clean Water Act, and as affirmed by the Supreme Court, certifying authorities have the authority to impose conditions on the activity as a whole to ensure compliance with certain provisions of the Clean Water Act and appropriate requirements of state law. As the Supreme Court noted, section 401(d) expressly refers to "'any effluent limitations and other limitations . . . necessary to assure that *any applicant*' will comply with various provisions of the Act and appropriate state law requirements." (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 711 (*PUD No. 1*) (emphasis in original).) Based on the

unambiguous language of the statute itself, the Supreme Court held that once it is determined that the activity may result in a discharge, the certifying agency's authority extends to the entire activity, not just the discharge. (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700 (*PUD No. 1*).) And in *S.D. Warren*, the state's conditions of certification were not limited to the triggering discharge.

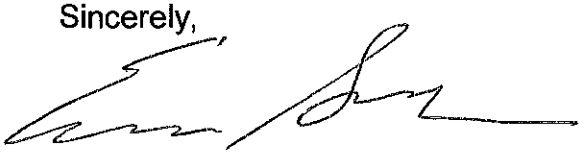
The Supreme Court's holding in *PUD No. 1* did not solely rely on EPA's regulations, as the preamble asserts. Rather the decision was founded in the interpretation of the express language of the Clean Water Act itself. "And § 401(a)(1) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition the existence of a discharge, is satisfied." (*PUD No. 1* at 712.) This conclusion was consistent with, but not dependent on, the language used in EPA's regulations. In affirming the conditions set forth in the certification, *PUD No. 1* ratified the system of cooperative federal federalism envisioned by the Clean Water Act whereby a state may set forth more stringent requirements in a certification to protect the quality of its waters.

The preamble emphasizes that the regulations have not been amended since they were promulgated in the early 1970s. This point underscores that the existing interpretation of the scope of the Clean Water Act has been in place for half a century. The preamble provides no compelling rationale or justification for upending fifty years of agency practice. When an agency is changing an existing position, an agency should be aware that longstanding policies may have engendered serious reliance issues. (*Encino Motorcars, LLC v. Novarro* (2016) 136 S.Ct. 2117, 2125 (holding that an agency's change in practice without explaining a prior inconsistent finding is arbitrary and capricious).) In such cases, a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. (*Id.*) The Proposed Rule involves a complete overhaul of existing practices, yet it fails to offer a reasoned explanation for the change. To attempt to explain its reasoning, EPA expresses its agreement "with the logic of Justice Thomas's dissent in *PUD No. 1*," 84 Fed. Reg. at 44095, and conveys its belief that *PUD No. 1* was wrongly decided, 84 Fed. Reg. at 44089 fn. 16 (highlighting an argument that the Supreme Court "failed to identify or understand"). But EPA cannot unilaterally impose its preference for a dissenting opinion via this Proposed Rule because the majority opinion in *PUD No. 1* was based on the unambiguous text of the Clean Water Act. (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) (*Chevron*) 467 U.S. 837; *United States v. Home Concrete & Supply, LLC* (2012) 566 U.S. 478, 488-89.) Even if the Clean Water Act was ambiguous as to whether certification could only consider impacts resulting from the discharge, which it is not, EPA is not entitled to *Chevron* deference for an interpretation that contravenes the Clean Water Act's legislative history, statutory objective, and its own prior interpretation and practices.

EPA must withdraw or revise the Proposed Rule in accordance with applicable law.

Although the Water Boards would rely on their state authority to continue to preserve robust protection of water quality whenever possible, state authority would not be an available remedy where the state is preempted. To avoid deleterious effects on California's waters, EPA should withdraw this disruptive dismantling of the certification process or revise the Proposed Rule to comply with applicable law in a manner that affirms respect for state law and state institutions. In addition to the objections explained above, detailed comments regarding the specific sections of the Proposed Rule and the proposed language therein are attached.

Sincerely,



Eileen Sobeck
Executive Director
State Water Resources Control Board

ATTACHMENT A

§ 121.1 Definitions

"Certification request" (§ 121.1(c))

A certifying agency cannot be expected to determine whether water quality standards will be met based on the limited information provided. Even the minimal amount of required information is insufficiently detailed or specific. With respect to the proposed discharge, the certification request need only include "the location and type of any discharge that may result from the proposed project and the location of receiving waters." (§ 121.1(c)(4).) The request does not have to indicate the volume, timing, chemical composition, or other specific information about the discharge, only the "type" of discharge. Further, "location" alone is insufficient detail. Applicants should be required to a provide a map of the project that includes identification of waters within the boundaries of the project area, not only "receiving waters."

Other information is also necessary to assess the effect of the proposed discharges on water quality. For dredge or fill projects not involving an appropriation of water or FERC license, the Water Boards have developed a comprehensive list of items that should be required for all applications and items that may be required in a case-by-case basis. (The State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State is available on the Water Boards' website at: https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html.) Many of these items are missing from the definition of certification request. For example, where applicable, draft compensatory mitigation and temporary impact restoration plans should be submitted with the application as it frequently takes a significant amount of time to finalize those plans. Applicants should also be required to submit any applicable fees, especially if the application request is the event that triggers the agency's obligation to act and applicable timelines.

To make matters worse, the Proposed Rule makes no provision for the certifying agency to require submission of additional information beyond that provided in the applicant's request for certification. The preamble recognizes that certifying agencies may develop their own procedures for requesting additional information (84 Fed. Reg. at 44115), but that authority is illusory given the rigid application of deadlines that are not extended for any reason, including an applicant's failure to adhere to the certifying authority's requests for additional information, in the Proposed Rule. As is discussed below, section 121.13 allows EPA to make requests for additional information when EPA is the certifying agency. But because the request is not a requirement and there is no penalty for the applicant's failure to provide the requested information, this authorization is meaningless. Certification authorities need the ability to request additional information when such information is necessary to determine whether the project will comply with water quality standards.

The definition of certification request is also not a good fit for general permits, such as U.S. Army Corps of Engineers (Corps) Regional General Permits, where the Corps, not the project proponent, is making the request and details about individual projects are not known. The suggested list of information for general permits on page 44102 is more helpful, particularly because it includes the proposed general permit itself. However, this is still insufficient information to issue a certification for a general permit when the proposed permitted activities would not be exempt from the California Environmental Quality Act (CEQA, Cal. Pub. Resources Code, § 21000 et seq.). For example, the Water Boards typically certify only general nationwide permits that include activities that are CEQA exempt because there is insufficient time in the review period to develop a CEQA document.

Under the Proposed Rule, the clock starts on the period for certification as soon as a "request" for certification is submitted, but a request need not include anything but a bare bones summary of the project. If EPA is going to define the elements that must be included in a "certification request" and thereby trigger the one-year statutory deadline, the proposal should be revised to provide more fulsome and detailed information. Without such a revision, the effect of the Proposed Rule would be to deprive the certifying agency of any meaningful opportunity to determine the water quality effects of the proposed activity.

"Fail or refuse to act" (§ 121.1(h))

"Constructively" is not defined, but the preamble indicates a certifying authority fails or refuses to act "in a way Congress intended" or "acts outside the scope of certification," this constitutes a constructive failure or refusal to grant or deny certification. (84 Fed. Reg. at 44110.) Such a broad interpretation of fail or refuse to act is inconsistent with the language of the Clean Water Act. A certifying authority that issues or denies certification on time has not failed or refused to act. This definition invites abuse, as it would allow federal agencies to impose a waiver, despite timely action by the certifying authority, simply because the certifying authority and the federal agency disagree about the scope of the certifying authority's authority under section 401 of the Clean Water Act.

"Water quality requirements" (§ 121.1(p))

Section 401(d) of the Clean Water Act authorizes a state to condition certification based on "appropriate requirements of state law." The regulation effectively rewrites this statutory language to exclude all water quality requirements of state law other than those of "EPA-approved state or tribal Clean Water Act regulatory program provisions." The Proposed Rule would exclude both requirements of state law not submitted to EPA and requirements of state law submitted to EPA under voluntary programs such as those under section 208 and 319 of the Clean Water Act. Nor would it include programs addressing water quality issues outside of federal jurisdiction, such as impacts to isolated wetland or groundwater. Further, it would arbitrarily exclude water quality

requirements where EPA declines to approve state water requirements in reliance on Clean Water Act section 101(g). In effect, EPA proposes to define "appropriate" to mean EPA-approved. Nothing in the Clean Water Act, which seeks to preserve state law, remotely supports such a narrow interpretation.

§ 121.3 Scope of certification

Section 121.3, which seeks to limit state authority to the discharge that triggers the need for certification, in disregard of other water quality effects of the project or activity, is inconsistent with *PUD No. 1* and *S.D. Warren*. Without authority to set conditions addressing the entire activity, the certifying agency would be powerless to use the certification to address impacts to groundwater, impacts to isolated surface waters, or impacts from non-point sources, even though these are water quality impacts that would not occur without issuance of the federal permit or license.

Attempting to limit the certifying authority's authority to the discharge also creates ambiguities as to what is considered within the scope of certification under the regulation. For example,

- If the discharge triggering certification requirements is a discharge of fill material that blocks fish passage or current circulation, are the impacts of the "discharge" limited to the impacts that occur at the time the fill material is deposited in waters of the United States, or do they include the impacts that continue to occur for as long as the fill material is in place?

- If the discharge triggering certification requirements is a release of water from a dam or hydropower tailrace, do the impacts of the discharge include characteristics of the discharge that are the result of the impoundment of water by the facility from which water is released, such as elevated temperatures or toxins from harmful algal blooms? Do they include impacts resulting changes in the timing or amount of water discharged from what would result in the absence of the dam or hydropower facility?

§ 121.4 Establishing a reasonable period of time

As set forth in proposed section 121.1(o), "receipt" means the date that the request is documented as received by the certifying authority. Per section 121.4(c)(2), the federal agency shall provide the date of receipt to the certification agency. The federal agency will not necessarily know the date that the request is documented as received by the certifying authority. Instead, this requirement is worded as if date of receipt is assumed to be the date the request was sent.

Subsection (f) would prohibit the state from requesting withdrawal or other action to restart the clock. The effect of this subsection, in conjunction with the skeletal

information required for a certification request, may be to force the states to issue denials because the request for certification and any supplemental information provided by the applicant does not provide sufficient information find compliance with water quality standards. This may pose a problem for FERC applicants, as FERC will dismiss an application for an original license if certification is denied twice. (*City of Harrisburg*, 45 F.E.R.C. ¶ 61053 (1988); *Rugraw, Inc.* (1999) 89 FERC ¶ 61287.)

§ 121.5 Action on a certification request

The requirement that a certification must include a "statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements" is inconsistent with the express language of the Clean Water Act. Certifications impose conditions that provide reasonable assurance of compliance. (*See* 33 U.S.C. § 401(a).) The Clean Water Act does not limit conditions to those that "could" satisfy applicable requirements. There are several problems with this requirement, including:

- Given the often very short time allowed for certification (either because the federal licensing agency sets a short certification period, or because the federal agency requires the filing of the request before completion of studies being prepared for licensing), a requirement for additional findings may be hard to meet on a timely basis.

- Given the Proposed Rule's unduly narrow definition of "water quality requirements," such a finding is inappropriate for many conditions. For example, monitoring requirements may serve to provide baseline data, identify the need for updating water quality standards, or to help evaluate the effectiveness of treatment technology and best management practices in order to develop or refine water quality requirements, not just to determine whether the project is complying with existing water quality standards and effluent limitations.

- Determinations of possible "less stringent" requirements would be subjective. For example, for all conditions related to timing, it would be less stringent to give the discharger more time to comply, and generally speaking, regulations do not specify a timeframe for compliance.

Subsection (e), which addresses denial requirements, is impermissible to the extent that it puts the burden of proof on the certifying authority. Nothing in section 401 suggests that it is the certifying agency's burden to remediate deficiencies in an applicant's request.

In addition, where the certifying authority lacks information to determine compliance, it is unreasonable to expect the certifying agency to specify what water quality requirements will be violated. For example, when the request for certification does not include the volume and chemical composition of the proposed discharge, the agency would not

know what is in the discharge, and it cannot be expected to specify which standards would be violated. Likewise, if the certifying agency has properly determined that the project will not comply, it should not be required to go further and specify what would be necessary to bring the project into compliance. It should not be the Water Boards' obligation to fix deficiencies in the application.

Subsection (f) should be deleted because it is unnecessary. Under the Clean Water Act, water quality standards are required for all waters of the United States. Where there are water quality standards, there should always be applicable water quality requirements, otherwise water quality standards would be purely aspirational. Hence, the circumstances described in subsection (f)—no water quality requirements are applicable to the waters receiving the discharge—would not occur unless the state is in violation of section 303 and EPA, also in violation of section 303, has failed to take action.

§ 121.6 Effect of denial of certification

The Water Boards support revisions to the regulations that would override FERC's policy that it will dismiss an application for an original license after a second denial of certification, even if the denial is without prejudice. However, there are some situations where a denial of certification should preclude a new certification request. For FERC license renewals, where the certifying authority has definitively determined that certification cannot be issued and the license should be allowed to expire, FERC should not administratively extend the license indefinitely so long as the licensee files another request for certification each time the previous one is denied.

Subsections (b) and (c) are inappropriate because the propriety of state certification decisions should be reviewed in state court, not by the federal agency. In the preamble, EPA ignores the many cases, including *American Rivers v. Federal Energy Regulatory Commission* (2d Cir. 1997) 129 F.3d 99 and *Roosevelt Campobello Roosevelt Campobello Internat. Park Com. v. U.S. Environmental Protection Agency* (1st Cir. 1982) 684 F.2d 1041, that say federal agencies have no authority to review certifications, relying instead on cases like *City of Tacoma, Washington v. Federal Energy Regulatory Commission* (D.C. Cir. 2006) 460 F.3d 53 and *Hoopa Valley Tribe v. Federal Energy Regulatory Commission* (D.C. Cir. 2019) 913 F.3d 1099, petn. for cert. pending. But the cases relied upon do not authorize substantive review of whether the conditions are authorized or supported by the evidence. Rather, they address procedural issues, including whether the state acted on time to avoid waiver and whether the state allowed for public participation.

In addition to ignoring established precedent, these subsections disregard basic principles of administrative law. If a reviewing court finds error in an administrative agency's decision, a reviewing court's action is to set aside the agency decision and to remand to the agency for further action. If an agency denies an application, but fails to make adequate findings, the court will set aside the denial and remand to the agency to

determine if, after making appropriate findings, it would still deny approval, approve with conditions, or approve unconditionally. Instead, the Proposed Rule would have a federal agency that determines the certifying agency failed to make adequate findings treat the lack of adequate findings as a waiver, which amounts to an unconditional approval. The Proposed Rule allows for remand in the unlikely event that there is time remaining in the reasonable period for review, but given all the actions that must happen during this short period, this would be virtually impossible. Moreover, remand would be discretionary. This result is particularly outrageous given the requirements under section 121.5(e) that go beyond what a reviewing court would need to know if the denial is consistent with applicable law and supported by the evidence.

State courts are in the best position to review certification decisions, not federal agencies. State courts will have a greater understanding and respect for state law and state institutions. In contrast, the Proposed Rule illustrates a lack of understanding or regard for state law.

§ 121.8 Incorporation of conditions into the license or permit

Section 121.8 would have the federal agency determine the validity of conditions of certification, and if it determine the conditions to be inappropriate, the Proposed Rule would prohibit incorporation of the condition into the permit. As with denials, the treatment of invalid conditions is inconsistent with applicable precedent providing that review should be in state court, and inconsistent with applicable principles for review of administrative action. Ordinarily, if an agency approves with conditions that are inappropriate, or not supported by adequate findings, a court will remand to the agency for it to determine which of several options it wants to follow. On remand, the agency may revise the condition or make additional findings as appropriate and consistent with the court's opinion; it may remove the condition with no other changes; it may remove the condition, but add others that the agency finds necessary in the absence of the removed condition; or it may deny approval. Under the Proposed Rule, only one of these options would apply—removal of the condition—regardless of the circumstances. This would include circumstances where the record clearly indicates that the project will violate water quality standards in the absence of the condition, but the federal agency concludes that the certifying agency did not adequately explain whether a less stringent condition could meet water quality standards. The Proposed Rule allows the federal agency discretion to remand, but only in the highly unlikely event that there is still remaining time in the original period of review.

§ 121.9 Enforcement and compliance of certification conditions

Section 121.9(a) should be deleted. The certifying agency should decide whether and when to inspect. As a condition of certification, the certifying agency may set appropriate conditions for monitoring and inspections. Section 121.9(a) is also confusing for projects where "operation" is not a distinct phase of the project. The preamble attempts to clarify that "operation may include implementation of a certified

project," 84 Fed. Reg. at 441116 fn. 47, but that provides little help. For example, does "implementation" mean when any activity on the project commences or only when the discharges to waters begin? For dredging associated with the maintenance of a flood control project, is "implementation" or "operation" of the project the dredging or use of the flood control project? At least the regulations should be revised to clarify that a pre-operation inspection is the minimum, and not the certification authority's only opportunity to inspect. The certification authority will not always be able to determine compliance with all conditions of the certification prior to "operation." For example, restoration of temporary impacts and procedures for in-water work may need to be assessed for compliance after "operation" has begun.

Section 121.9(b) seeks to impose a duty on a certifying authority to provide notification and recommend remedial measures if the certifying agency determines there will be a violation. Especially because neither the applicant nor the federal agency is required to do anything in response, there is no justification for imposing this duty on certifying agency.

Although the language of section 121.9(c) only specifies that the federal agency is "responsible" for enforcement, the preamble seemingly implies that the regulation is intended to deprive states of enforcement authority by stating that "section 401 does not provide an independent regulatory enforcement role for certifying authorities." (84 Fed. Reg. at 44116.) States do not derive their enforcement authority under section 401 or any other section of the Clean Water Act. They enforce water quality requirements, including NPDES requirements, under state law. Indeed, states seeking approval authority under the NDPES program are required to show they have adequate enforcement authority under state law. Also, while section 401 of the Clean Water Act is silent on certification agency enforcement, it is also silent on federal agency enforcement. Nothing in section 401 states or implies that federal agencies' independent enforcement authority is to the exclusion of certification authorities' independent enforcement authority. Some states may not have enacted legislation authorizing certifying agencies to take enforcement action, but nothing in section 401 operates to override enforcement authority in those states that have provided for it.

Moreover, while section 401 is silent on enforcement, enforcement is authorized under the Clean Water Act citizen suit provisions. (*Oregon Natural Desert Association v. Dombeck* (9th Cir. 1998) 172 F.3d 1092, cert. denied (1999) 528 U.S. 964). It is established that states are among the persons authorized to bring citizen suits. (*U.S. Dept. of Energy v. Ohio* (1992) 503 U.S. 607, 615–616.)

Aside from being inconsistent with the language of the Clean Water Act and all applicable precedent, depriving certifying agencies of enforcement authority is inconsistent with the principles of cooperative federalism embodied in the Clean Water Act. Section 101(b) recognizes "the primary responsibilities and rights of States to prevent, reduce and eliminate pollution." Limiting state enforcement authority is

inconsistent with this principle and EPA should clarify that the Proposed Rule would not affect the states' enforcement authority.

Moreover, section 510 of the Clean Water Act specifies that: "Except as expressly provided" in the Clean Water Act, nothing in the Act shall "preclude or deny the right of any State . . . or interstate agency to adopt and enforce" any "requirement respecting control or abatement of pollution." Enforcement of certification requirements is unquestionably within the scope of this protection from preemption, and nothing in Section 401 even impliedly precludes state enforcement.

Subpart D – Certification by the Administrator (§§ 121.12-121.14)

The proposed revisions to the regulations governing certification by the Administrator highlight the absurdity of the process that certifying authorities would face. For example, pursuant to revised section 121.12, applicants would be required to adhere to pre-request procedures because, as the preamble explains, the EPA has a "relatively short time" to act or waive. (84 Fed. Reg. at 44113.) That the Proposed Rule would render pre-application procedures necessary when EPA is the certifying agency illustrates that the timelines set forth in the Proposed Rule for states are not reasonable.

Similarly, revisions to section 121.13 acknowledge that additional information would sometimes be necessary to certify the project, highlighting the woeful deficiency of the meager information required in the initial certification request. It is unclear why the ability to request additional information is only included when EPA is the certifying authority. But even if this ability to request additional information was expressly available to all certifying authorities, because the failure to provide additional information does not modify the established "reasonable" period of time, the failure to comply carries no real penalty. Accordingly, a request for additional information with an unenforceable response deadline is an empty directive that does not cure the fatal flaws of the definition of a certification request.