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 6
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 9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12

13
 14 In re

15 Clean Water Act Rulemaking
 16
 17

Case: No. 20-cv-04636-WHA
 (consolidated)
 Applies to all actions

**DECLARATION OF LOREE’
 RANDALL IN SUPPORT OF
 PLAINTIFF STATES’ OPPOSITION
 TO DEFENDANTS’ MOTION FOR
 REMAND WITHOUT VACATUR**

Courtroom: 12, 19th Floor
 Date: August 26, 2021
 Time: 8:00 A.M.

ORAL ARGUMENT REQUESTED

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 22
 23 I, Loree’ Randall, declare under penalty of perjury under the laws of the State of Washington
 24 that the following is true and correct:

25 1. I am now and at all times mentioned herein have been a citizen of the United States
 26 and a resident of the State of Washington, over the age of 18 years, and competent to make this
 27 declaration. The following is based on my own personal knowledge and understanding.
 28

1 2. I am now and have been employed by the State of Washington, Department of
2 Ecology (Ecology), since October, 1984. For the last 20 years (beginning April, 2001), I have been
3 the Shorelands and Environmental Assistance Program Section 401/CZM Policy Lead. As the
4 Section 401 Policy Lead, I am familiar with Ecology's procedures for processing Section 401
5 certification requests. Part of my duties include providing training and guidance on Section 401,
6 including recommendations to Ecology's upper management when new rules or policies are
7 developed regarding section 401 certification. I also review requests for Section 401 Certification
8 under the Clean Water Act, coordinate with other staff and programs within Ecology in performing
9 that review, and draft section 401 decisions on behalf of Ecology. In addition, I review draft section
10 401 decisions made by other staff within Ecology and provide comments and technical assistance
11 to them.

12 3. Department of Ecology is the certifying agency in Washington State under
13 Section 401 of the U.S. Clean Water Act. As such, Ecology reviews and approves, approves with
14 conditions, or denies proposed projects, actions, and activities directly affecting waters of the
15 United States.

16 4. The Environmental Protection Agency's (EPA) final Rule (2020 Rule), *Clean Water*
17 *Act Section 401 Certification Rule*, which took effect in September 2020, is a significant departure
18 from EPA's prior 401 certification practice. It is already causing significant adverse impacts to
19 Washington State, its residents, and its waters. EPA's decision to revise instead of repeal the 2020
20 Rule, with an estimated date of completion of Spring, 2023, will only exacerbate these harms as
21 regulated entities continue to seek 401 certifications prior to the Rule's revision.

22 5. Ecology receives 401 requests daily, typically four hundred per year. However, this
23 year, Ecology's 401 workload has nearly tripled. Each certification request Ecology receives is now
24 subject to the 2020 Rule and the administrative, fiscal and environmental concerns it raises. To
25 date, a little more than half way through the year, Ecology has received at least 393 new requests
26 (predominantly from state shellfish farmers due to the Nationwide Permit decision, explained
27 below), and reviewed and issued 396 certifications.

Scope:

1
2 6. EPA’s Rule dramatically curtails the scope of water quality impacts that Washington
3 can look at—and attempt to address—when it comes to reviewing project proposals. EPA’s 2020
4 Rule narrowly defines the scope of 401 certification as “limited to assuring that a discharge from a
5 federally licensed or permitted activity will comply with water quality requirements” and defines
6 “discharge” as from “a point source to a water of the United States.” 40 C.F.R. §§ 121.1(f), 121.3.
7 This is directly contrary to EPA’s and Ecology’s longstanding 401 practice and guidance that, in
8 line with relevant Supreme Court decisions, directed states to view *all* potential water quality
9 impacts from a project proposal, both upstream and downstream and over the entire life of the
10 project. For decades, Washington has used this clear, consistent authority to examine the full range
11 of water quality impacts from proposed projects and condition (or deny) projects accordingly, in
12 order to satisfy state law requirements applicable to both point and non-point water pollution.

13 7. For example, hydropower projects implicate a broad range of water quality impacts
14 from the project as a whole that are unassociated with any specific point-source discharge. Dams
15 specifically contribute to increased water temperature from decreased water flows within streams
16 and decreased flow rates caused by ponding behind dam structures. Dam reservoirs also cause
17 resuspension of shoreline sediments due to wave action and pool level fluctuations and overall
18 vegetation loss, reducing shading and increasing temperatures. Wave impacts within reservoirs also
19 cause increased turbidity and sedimentation. This, in turn, can result in further temperature
20 increases, smothered aquatic habitat, interference with predation patterns, and lower oxygen levels.
21 Increased turbidity can also cause an increase in toxin mobility, including PCBs and other “forever
22 chemicals,” due to increased absorption of these chemicals to sediment particles. These impacts are
23 unrelated to any particular discharge from the project, but can have significant detrimental effects
24 on water quality in and around project sites.

25 8. Typically, Section 401 is one of the primary mechanisms by which Ecology would
26 mitigate these water quality impacts—by including conditions necessary to assure compliance with
27 any “appropriate” requirements of state law and applicable state water quality laws. For example,
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1 conditions to 401 certifications could include requirements to mitigate vegetation loss, geoengineer
2 shorelines to decrease erosion, and have the reservoir discharge point lower in the water column
3 where temperatures are lower.

4 9. These conditions are crucial as hydropower licenses can last up to 50 years. As such,
5 it becomes necessary to allow for 401 certifications to adapt to changing conditions (such as a
6 change in state water quality standards) and provide the critical ability to adjust water quality
7 protections as new research and data establish needs for further or modified water quality
8 protections during that time frame; however, this is another thing that the Rule does not allow. The
9 Rule prohibits the states from amending, modifying or having any type of reopener to deal with the
10 need to adapt to changes.

11 10. The 2020 Rule greatly complicates Washington's ability to implement these
12 protections. Washington is facing this reality now and will continue to as EPA works to revise the
13 Rule. For instance, three hydropower dams on the Skagit River will require 401 certifications
14 between now and Spring, 2023, when EPA proposes to revise the Rule. The Skagit River is home
15 to numerous anadromous fish species, including Chinook salmon, which is a threatened species
16 and the primary source of food for the endangered Southern Resident Orca population in Puget
17 Sound. Southern Resident Orcas are in severe decline and threatened with extinction. The Puget
18 Sound population is down to only 73 individuals, its lowest level in over four decades. To minimize
19 adverse impacts, such as temperature (among others), Washington relies on its section 401 authority
20 to impose conditions as a key part of its Southern Resident Orca recovery efforts.

21 11. Therefore, as explained above, because FERC licenses for dams last between 30-50
22 years, the lack of adequate water quality conditions attached to these licenses would have adverse
23 impacts for generations.

24 **Nationwide Permit Problems:**

25 12. Pursuant to 33 U.S.C. § 330.1(b), the Army Corps issues nationwide permits for
26 activities occurring under section 404 of the Clean Water Act and section 10 of the Rivers and
27 Harbors Act of 1899 with regard to certain activities that have "minimal impacts" to water quality.

1 13. Nationwide permits are considered “general” permits, and certifying authorities
2 typically make programmatic section 401 decisions that apply to all activities within their
3 respective jurisdictions issued under a nationwide permit, thereby eliminating the need for project
4 proponents covered under such a permit to seek individual section 401 certifications. Nationwide
5 permits are valid for a period of no more than 5 years, after which they are renewed. 33 U.S.C. §
6 1344(e)(2). Renewal triggers the need for re-certification under section 401.

7 14. After the 2020 Rule was finalized, the Corps moved to re-issue and re-certify the
8 Nationwide Permit Program, which included 16 Nationwide Permits covering oil and gas pipelines,
9 surface coal mining, residential development, and various aquaculture activities. *See* 86 Fed.
10 Reg. 2,744. On October 20, 2020, citing the new 401 Rule as justification, the Army Corps required
11 certifying authorities issue section 401 certifications on the Nationwide Permit Program while they
12 were still in draft form and were still subject to change—only just proposed for public comment a
13 few weeks earlier. The Corps also stated that, despite a long-standing agreement with Washington
14 allowing for a full year on all Corps-related 401 certifications, the reasonable period of time for
15 review would be limited to 60 days. Attached hereto as Exhibit A is a true and correct copy of the
16 October 14, 2020 letter to Laura Watson, Director of Washington State Department of Ecology,
17 from Michelle Walker, U.S. Army Corps of Engineers.

18 15. Washington, along with numerous other states, requested that the time period be
19 extended as authorized by both Corp and EPA regulations, but the Corps denied those requests.
20 Attached hereto as Exhibit B is a true and correct copy of the November 19, 2020 letter to Colonel
21 Alexander Bullock, U.S. Army Corps of Engineers, from Laura Watson, Director of Washington
22 State Department of Ecology. Also, attached hereto as Exhibit C is a true and correct copy of the
23 December 7, 2020 letter to Laura Watson, Direct of Washington State Department of Ecology,
24 from Colonel Alexander Bullock, U.S. Army Corps of Engineers.

25 16. Some of the implications of this were identified in a letter submitted by various
26 states, including Washington, to the Army Corps on May 11, 2021. Attached hereto as Exhibit D
27 is a true and correct copy of the May 11, 2021 letter to Lieutenant General Scott A. Spellmon, U.S.
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1 Army Corp of Engineers from the Attorneys General of the States of Washington, California,
2 Connecticut, Maryland, New Mexico, Oregon, and the California State Water Resources Control
3 Board.

4 17. On July 8, 2021, the Council on Environmental Quality responded by letter agreeing
5 that the previous administration’s process to renew and revise the Nationwide permits was both
6 “unusual” and also “complicated an important process” by which states carry out responsibilities
7 to protect water quality. Attached hereto as Exhibit E is a true and correct copy of the July 8, 2021
8 letter from Brenda Mallory, Chair, Council on Environmental Quality, to State of Washington
9 Governor Jay Inslee.

10 18. Despite the short time frames, Ecology worked hard to review and provide
11 programmatic 401 certification decisions. Rather than accept these certifications, the Corps
12 “declined to rely” on them causing major impacts statewide.

13 19. For example, without programmatic 401 certifications, projects that would have
14 qualified before for the streamlined permit procedure must now be processed individually. Prior to
15 this, in 2020 Ecology’s programmatic decisions applied to roughly 472 of the nationwide permits
16 received from the Corps—only around 169 projects triggered an individual review. This allowed
17 staff time to thoroughly review and issue decisions. In sharp contrast, already in 2021, Ecology has
18 issued 396 individual decisions, 361 of these solely for aquaculture projects.

19 20. Ecology’s ability to review these requests in a thorough and timely manner is
20 essential to protecting Washington state’s environment and economy, but the significant increase
21 in applications and other procedural requirements of the EPA Rule has overwhelmed Ecology and
22 Army Corps partners. Additionally, the invalidation of the nationwide aquaculture permits resulted
23 in a flood of individual 401 certification requests for shellfish growing operations.

24 21. Because the planting of shellfish seed must occur during specific, narrow windows
25 of the growing season (usually between March and August), timely permitting is essential. Without
26 the necessary permits, growers cannot plant farms and are impacted for a season or, in some cases,
27 permanently.

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1 22. Prior to the increase in individual 401 applications, Ecology relied on a staff of five
2 environmental specialists to review and issue Section 401 decisions. Those staff also developed
3 and supported Ecology’s aquatics database and made federal Coastal Zone Management Program
4 consistency decisions. So, to meet the huge increase in demand for individual aquaculture permits,
5 Washington was forced to hire four new staff, and reassign at least two existing employees to
6 process the surge in applications. Ecology anticipates hiring up to five more additional staff to deal
7 with this increase in workload associated with the nationwide permit decision, but also with 2020
8 Rule changes—for example shortened timeframes, validation of 401 requests and other related
9 tasks.

10 23. This expenditure and increase in staff has allowed Ecology to keep pace with the
11 increase (for now), but the Corps has not been able to keep up. The Corps recently notified
12 Washington and its growers of a potential two-year delay in processing individual aquaculture
13 permits.

14 24. It is our understanding that the Corps plans to renew the remaining 40 nationwide
15 permits in the next two years (as the current ones are set to expire in March, 2022).

16 **Additional Harms:**

17 25. In addition to the ongoing harms detailed above, the 2020 Rule imposes countless
18 others, further explained below.

19 26. Overall, the 2020 Rule significantly shortens the amount of time Ecology has to
20 process 401 certification requests and limits the amount of information Ecology can seek from
21 project proponents resulting in unpredictable and increased workloads. Ecology has traditionally
22 viewed the 401 timeline to begin when it receives a signed and completed Joint Aquatic Resource
23 Permit Application (JARPA), which requires project proponents to submit a detailed suite of
24 information related to the proposed project and its potential impacts, including impacts to water
25 quality. The information required in a JARPA is substantially more in depth than what project
26 proponents are now required to submit to start the 401 review clock pursuant to the Rule. In terms
27 of project impacts, proponents of individual licenses or permits need only identify the location and
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1 nature of potential discharges, along with the receiving water(s), and a description of how the
2 proponent plans to monitor and “treat, control, or manage” the discharge. 40 C.F.R. § 121.5(b). For
3 general licenses or permits, proponents need only identify the “number of discharges expected to
4 be authorized by the proposed general license or permit each year.” 40 C.F.R. §121.5(c). Under the
5 Rule, project proponents can submit this minimal information to certifying authorities well before
6 information required in the JARPA is submitted.

7 27. Taken together, project proponents are able to start the 401 clock with far less
8 information than Ecology would typically have in order to appropriately evaluate and address
9 potential water quality impacts from proposed projects. This truncated timeline means that Ecology
10 may be forced to make 401 decisions without critical documentation that is often developed for
11 projects that also require 401 certification.

12 28. For just one example, environmental reviews conducted under both the National
13 Environmental Policy Act (NEPA) and the State Environmental Policy Act (SEPA) provide critical
14 information for Ecology’s review of water quality impacts. While 401 certifications themselves are
15 exempt from SEPA, Washington law provides that if any non-exempt permits are required for a
16 project that also requires 401 certification, the certification cannot occur unless the lead agency
17 completes the SEPA process. So, in other words, Ecology will be required to conduct its 401 review
18 either before the bulk of materials that actually describe the water quality impacts (typically
19 gathered during SEPA) are complete, or be in conflict with state law.

20 29. In all, because of this (especially with regard to larger and more complex projects)
21 Ecology is forced to evaluate and complete 401 certification requests without adequate information,
22 requiring Ecology either broadly condition project proposals in anticipation of “worst-case-
23 scenario” impacts, or deny permits outright because of lack of information. Rather than make the
24 process more efficient, the 2020 Rule has resulted in more uncertainty and more delay.

25 30. On top of this, this year alone, Ecology has already received 387 pre-filing meeting
26 requests (which are now required by the 2020 Rule without exception). Each request has multiple
27 steps associated with it. This is a significant workload increase for staff, who receive these requests,
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1 upload them to the Ecology database, check for “validity” under the new Rule, communicate with
2 both project proponents and the federal agency to determine the reasonable period of time, and
3 route them appropriately. None of this accounts for the applicant’s timing needs —the applicant
4 must wait the 30-day period before submitting the 401 certification request, making this pre-filing
5 meeting requirement disruptive and time consuming to say the least. Ecology has a number of
6 projects that have been working to receive funding just to learn that there is another time delay
7 causing the project to no longer be able to be constructed this year.

8 31. Overall, the 2020 Rule also caused the need for significant internal procedural
9 changes, which strains agency resources. In response to the changes, Ecology was forced to develop
10 all new 401 certification templates and forms, engage in significant staff training, re-design
11 webpages, draft focus sheets and completely alter databases to address the changes.

12 32. The 2020 Rule also removed the provision that allowed for modifications, which
13 has led to confusion and delay. For example, recently, Ecology issued a 401 certification with a
14 specific in water work window (also referred to as a fish window in order to protect salmonids),
15 based on information submitted by the applicant. Later, Ecology learned that the applicant had
16 provided conflicting information in their request and needed to conduct work outside the work
17 window that Ecology specified in the 401 certification. The applicant proposed a different work
18 window based upon U.S. Fish and Wildlife Service’s regulations. With the 2020 Rule in place,
19 Ecology is unable to modify, amend or change the 401 certification conditions. Therefore, the
20 applicant must start the whole process over again, reapply, and obtain a new 401 certification to
21 conduct the work as proposed.

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EXHIBIT A

October 14, 2020 Letter



**DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, SEATTLE DISTRICT
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755**

Regulatory Branch

October 14, 2020

Ms. Laura Watson
Director, Washington State Department of Ecology
Post Office Box 47600
Olympia, Washington 98504

Reference: 2020 Nationwide Permits
401 Water Quality Certification

Dear Ms. Watson:

On September 15, 2020, the U.S. Army Corps of Engineers (Corps), Seattle District (Seattle District) published in the Federal Register its proposal to reissue the Nationwide Permits (NWP).

The Seattle District requests water quality certification under Section 401 of the Clean Water Act for the proposed issuance of those NWPs that may result in a discharge in waters of the United States where Ecology has 401 water quality certification authority in the State of Washington. The Seattle District believes the proposed NWPs meet Ecology's water quality requirements. However, we recognize that you may need to add conditions or require individual review for some activities to ensure compliance with water quality requirements.

In accordance with the U.S. Environmental Protection Agency's current water quality certification regulations at 40 CFR part 121, the Seattle District is providing the following information to comply with section 121.5(c) of those regulations:

(1) The Seattle District's point-of-contact for the proposed issuance of the NWPs is: Mr. Andrew Shuckhart, Phone: (206) 316-3822, Email: andrew.j.shuckhart@usace.army.mil. General NWP questions may also be submitted to NWP-SeattleTeam@usace.army.mil

(2) The proposed categories of activities to be authorized by the NWPs for which certification is requested are described in the text of the proposed NWPs. Nationwide permits numbered 15, 16, 17, 18, 21, 25, 29, 30, 34, 39, 40, 41, 42, 43, 46, 49, 50, and E would authorize activities that result in discharges of dredged or fill material and therefore 401 water quality

- 2 -

certification is required for those NWP's. Nationwide permits numbered 3, 4, 5, 6, 7, 12, 13, 14, 19, 20, 22, 23, 27, 31, 32, 33, 36, 37, 38, 44, 45, 48, 51, 52, 53, 54, C, and D would authorize various activities, some of which may result in a discharge of dredge or fill material and require 401 water quality certification, and others which may not. Nationwide permits numbered 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B do not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States. In the case of NWP 8, it only authorizes activities seaward of the territorial seas.

(3) Enclosed is a copy of the text of the proposed NWP's.

(4) Enclosed is a table that provides estimates of the annual number of times each of the proposed NWP's may be used in the Seattle District. This estimate reflects the number of discharges anticipated to be authorized by each of the proposed NWP's in a given year. A graph has also been enclosed to display the total amount of permits issued by the Seattle District during the 2017 NWP's.

(5) A pre-filing meeting request was submitted to your office on September 14, 2020. A copy of the pre-filing meeting request is enclosed.

(6) The Seattle District hereby certifies that all information contained herein is true, accurate, and complete to the best of its knowledge and belief.

(7) The Seattle District hereby requests that the certifying authority review and take action on this 401 water quality certification request within the applicable reasonable period of time which the Seattle District has determined is 60 days.

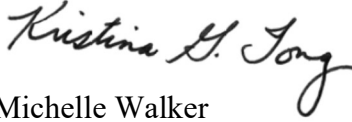
The Seattle District is proposing regional conditions for the proposed NWP's. Enclosed is a copy of the Seattle District's public notice inviting public comment on the proposed regional conditions.

In accordance with the Corps' regulations at 33 CFR 330.4(c), if you deny water quality certification for certain activities authorized by the proposed NWP's where Ecology has 401 water quality certification authority in the State of Washington, then the Corps will deny without prejudice authorization for those activities. Anyone wanting to perform such activities must first obtain an activity-specific water quality certification or waiver thereof from your office before proceeding under the NWP.

- 3 -

Thank you for your attention regarding this matter. We remain available to discuss issues or proposed conditions you may be considering for the NWP's. We look forward to working with your office on this effort.

Sincerely,


For Michelle Walker
Chief, Regulatory Branch

Enclosures

EXHIBIT B

November 19, 2020 Letter



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000

711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

November 19, 2020

Colonel Alexander Bullock
PO Box 3755
Seattle, WA 98124-3755

Dear Colonel Alexander Bullock:

I write to request an extension for water quality certifications of 57 nationwide permits (NWP), submitted to the Washington State Department of Ecology (Ecology) by the U.S. Army Corps of Engineers (Corps) on October 14, 2020, via letter. In your request, the Corps asserts that Ecology is limited to a window of sixty days for Ecology to grant, condition, or deny the certifications. We disagree that federal agencies have the authority to dictate to states the timeline for exercise of section 401 authority. But, even putting that disagreement aside, sixty days is insufficient for Ecology to review these requests and meet requirements under the U.S. Environmental Protection Agency's (EPA) new Clean Water Act §401 rule. For these reasons, we request an additional sixty days, extending the due date from December 13, 2020, to February 11, 2021.

The new §401 rule became effective on September 11, 2020, establishing new requirements that each condition included in a certification reference an existing water quality law or regulation. Because this is the first time that Ecology, as the certifying authority, will be required to reference laws and regulations when developing a Section 401 water quality certification, it is imperative that Ecology have sufficient time to review the NWP program and cite the appropriate laws and regulations. Our review must take into consideration: (1) major changes in many NWP permits; (2) changes in general considerations; (3) the addition of five new permits; and (4) any cumulative and interconnecting impacts from other recent federal rulemaking actions. As always, we must also consider input from the public.

Moreover, Ecology's certification decisions will apply for up to 5 years, until the next reissuance of the NWPs. Thus, we need to ensure that every effort be made now to exercise due diligence in considering the water quality laws and regulations as these pertain to Ecology's Section 401 certification decisions under the NWP Program. It benefits both Ecology and the Corps to develop solid and legally defensible permit decisions. Unfortunately, the sixty-day review and comment period is inadequate for this volume of review and analysis and will undermine our joint goal of well-informed and defensible decisions.

Finally, in past iterations of the NWP program, Ecology has worked closely with the Corps to review and develop appropriate regional conditions. In this renewal cycle, and in a reversal from what has been done in the past, we are being asked to issue decisions on draft regional conditions from the Corps. The requested extension of time will allow the Corps and Ecology to coordinate further on regional decisions and potential effects to our Section 401 certification decisions so that we can exercise our water quality certification authority and protect state waters.

Colonel Alexander Bullock

November 13, 2020

Page 2

Thank you for your prompt consideration of our request. I look forward to our continued partnership on this issue. If you have questions, please contact Ecology's lead on 401 water quality certifications, Loree' Randall at loreer.randall@ecy.wa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Watson", written in a cursive style.

Laura Watson

Director

EXHIBIT C

December 7, 2020 Letter



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SEATTLE DISTRICT
PO BOX 3755
SEATTLE, WA 98124-3755

DEC 07 2020

Regulatory Branch

Ms. Laura Watson, Director
Washington State Department of Ecology
Post Office Box 47600
Olympia, Washington 98504-7600

Dear Ms. Watson:

I am responding to your letter dated November 19, 2020, requesting an additional sixty days to provide water quality certification decisions on the 57 nationwide permits. I understand the importance of developing a solid and legally defensible decisions on this matter and I also completely understand the added complexity brought on because of the new Section 401 recently promulgated by the Environmental Protection Agency. The U.S. Army Corps of Engineers is pursuing an aggressive schedule for completion of the Nationwide Permit re-authorization and therefore, I cannot support your extension request. There is little room for delay in the reauthorization schedule and the water quality certifications are an important element of the process. Therefore, the 60-day period ends on December 13, 2020.

I appreciate your attention to this matter and if you have any additional questions, we have our next monthly call scheduled for December 11, 2020. Additional questions can also be directed to my Regulatory Branch Chief, Ms. Muffy Walker at (206) 764-6915 or michelle.walker@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read "X Bullock".

Alexander "Xander" L. Bullock
Colonel, Corps of Engineers
District Commander

EXHIBIT D

May 11, 2021 Letter

**ATTORNEYS GENERAL OF THE STATES OF WASHINGTON, CALIFORNIA,
CONNECTICUT, MARYLAND, NEW MEXICO, OREGON, AND THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

May 11, 2021

By U.S. Mail and E-Mail: Scott.a.spellmon@usacoe.army.mil
Attn: United States Army Corps of Engineers
Lieutenant General Scott A. Spellmon
55th Chief of Engineers and
Commanding General of the U.S. Army Corps of Engineers
441 G Street NW
Washington, D.C. 20314-1000

Re: State Section 401 Certifications of Nationwide Permits

INTRODUCTION

The undersigned States have significant concerns regarding the United States Army Corps of Engineers (the Corps) handling of the reauthorization of Nationwide Permits pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. We mince no words: the Corps' actions will cost jobs, millions of dollars in unnecessary delays, and will allow some projects to go forward without any conditions to protect state water quality, resulting in significant environmental degradation. Moreover, these actions are purportedly based on the United States Environmental Protection Agency's (EPA) 2020 section 401 regulation that: (1) is subject to review and potential rescission or significant revision pursuant to Executive Order 13990; and (2) even as written, the Corps is misapplying. It is not too late to correct these issues and repair the longstanding cooperative relationship between the States and the Corps in the implementation of the Clean Water Act. In fact, the impacts of these actions are wholly avoidable, and both the States and EPA have proposed ways in which this situation can be remedied. We urge the Corps to immediately engage with the States to address the concerns set out below.

BACKGROUND

On September 11, 2020, EPA's "Clean Water Act Section 401 Certification Rule," 85 Fed. Reg. 42210 (section 401 Rule), which drastically alters section 401 certification procedures, went into effect. Little more than a month later, on October 20, 2020, the Army Corps began requesting that certifying authorities issue section 401 certifications for more than 40 Nationwide Permits affecting tens of thousands of projects across the country. In doing so, the Corps took the unprecedented step of requesting that States certify draft Nationwide Permits that had only just been proposed for public comment a few weeks earlier and were thus still subject to change. Even though the existing Nationwide Permits would not have expired until 2022, the Corps stated that the reasonable period of time for certifying authorities to act on its request to certify all new Nationwide Permits was only 60 days, contrary to longer time periods allowed in previous years, and despite the fact that the Corps had express agreements with numerous states permitting up to one year for section 401 certification decisions. Numerous States requested that

May 11, 2021
Page 2

this time period be extended as authorized under the Corps' and EPA's regulations and section 401 of the Clean Water Act. In a departure from its long-established practice of granting requests for expansion of review periods for far less complex and onerous section 401 certification reviews, the Corps summarily denied the States' requests.

This brief review period provided no time for States to consult with the Corps regarding how it intended to interpret and apply the new section 401 Rule. Indeed, the Corps provided no advance notice to States that it intended to take unprecedented actions such as refusing to incorporate state certification conditions and finding waivers of state section 401 authority based on the section 401 Rule.

1. "Decline to Rely" Letters

Despite the unjustifiably short review period imposed by the Corps, the States worked to review the Nationwide Permits and provide their certification decisions by the required deadlines. Rather than accepting these certifications as mandated by the both the Clean Water Act and the section 401 Rule, the Corps issued, or threatened to issue, letters that "decline to rely" on many of the state 401 certifications. Though rationale for these letters is somewhat unclear, our understanding is that the Corps apparently believes that certain language within the section 401 certifications creates a "re-opener" for states to revisit their 401 certifications for the Nationwide Permits. In addition, in California, the Corps identified certain certification conditions as "not acceptable" because of a purported "inconsistency with Corps Regulations."

The impact of the "decline to rely" letters is significant. Because of the letters, projects that would otherwise qualify for the streamlined Nationwide Permit process and the programmatic certifications that the state agencies specifically developed for these projects must now obtain individual section 401 certifications in affected states, resulting in costly and unnecessary delays.

These "decline to rely" letters are both illegal and unfounded. To begin with, the law is abundantly clear as to the proper means and forum for resolving disputes over the legality of section 401 certification conditions. If the Corps has a substantive issue with a state's section 401 condition, its only options are to accept the condition as written or file a lawsuit in state court challenging the condition. *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (stating that federal agencies' "role [in the section 401 certification process] is limited to awaiting and then deferring to, the final decision of the state."); *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) ("a State's decision on a request for Section 401 certification is generally reviewable only in State court").

The preamble to the section 401 Rule clearly makes this point: "[t]he EPA's final regulatory text . . . contemplate[s] that the federal licensing or permitting agency will review certifications only to ensure that certifying authorities have included certain required elements

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and completed certain procedural aspects of a section 401 certification.” 85 Fed. Reg. 42267. If those requirements are met, “the federal agency must implement the certifying authority’s action, irrespective of whether the federal agency may disagree with aspects of the certifying authority’s substantive determination.” *Id.* at 42,268. As 40 C.F.R. § 121.10 expressly instructs, “[a]ll certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit.” The Corps cannot by unilateral action refuse to implement a state’s section 401 certification based on its own substantive disagreement with a particular certification condition.

Moreover, even if the “decline to rely” letters were procedurally valid, the Corps is incorrect in concluding that the certifications include re-opener provisions. While we do not agree that so-called “re-opener” provisions are unlawful, the specific language that the Corps found unacceptable falls into a few categories. Most of the objected-to language reflects the States’ concerns over being asked to certify Nationwide Permits with draft regional permit conditions. For that reason, the States’ section 401 certification decisions included provisions allowing them to revisit their certification to address final Nationwide Permit conditions that differ from the draft permit conditions. Other States, such as Washington and California, included language long used in prior Nationwide Permit 401 certifications stating that projects that do not qualify for Nationwide Permit coverage may need to obtain individual section 401 certifications.¹

Neither case creates the re-opener alleged by the Corps. For one, and as described in the preamble to the section 401 Rule, re-opener provisions are purportedly inconsistent with section 401 because such provisions would allow the certifying authority to “take an action to reconsider or otherwise modify a previously issued certification at some unknown point in the future.” 85 Fed. Reg. at 42,280. But regardless of whether this analysis is consistent with the Clean Water Act, neither of the certification conditions discussed above creates the re-opener alleged by the Corps because the conditions only allow the certifying authority to determine which projects fall within the proper scope of their certifications.

With regard to section 401 certification conditions allowing States to revisit the certification if the final permit conditions change, that language reflects the fact that the States were put in the untenable position of certifying Nationwide Permits when it was unclear as to what the final regional conditions would look like. It is our understanding that some States were not even provided draft regional conditions to evaluate. It should go without saying that States cannot provide final water quality certification of permits *that are not final*, and any interpretation of either section 401 or the section 401 Rule determining otherwise is manifestly unreasonable. A certification only applies to the permit as it was described in the request for

¹ Note that this letter does not discuss all the States’ section 401 certification conditions that the Corps has “declined to rely on” on the ground that they constitute “re-openers” in the Nationwide Permits context. Rather, the letter focuses on the most common examples of purported “re-opener” language.

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certification. To the extent that what was described in the request changes, the certification is no longer valid. In the end, however, the draft conditions in most States were adopted unchanged. Thus, and as has been pointed out to the Corps repeatedly, most States' concerns over the need to revisit the final Nationwide Permits have been eliminated and the language in question rendered moot.

The Corps' concerns are similarly unfounded with regard to language stating that projects that do not qualify for Nationwide Permit coverage may need to obtain individual certifications. This language was used by California not as a condition that is imposed on dischargers that seek coverage under a Nationwide Permit, but simply as a reservation of rights. In Washington, the language in question was simply carryover language from prior certifications and that had indeed rarely—if ever—been invoked during the decades in which such language was in place. Washington has repeatedly offered to remove the conditions or agree not to invoke them. Despite these offers, the Corps has inexplicably refused to meaningfully engage with Washington on resolving the issue.

In both cases, the Corps should do what multiple States have urged: simply acknowledge that the conditions in question do not create a re-opener of the Nationwide Permit certifications, rescind the “decline to rely” letters, and not issue additional letters. In the alternative, we request that the Corps either re-open public comment on the final Nationwide Permits or extend its reasonable period of time determination, and allow States to supplement their certifications for the limited purpose of removing and/or clarifying the language at issue.

2. Waiver Determinations

In addition to the “decline to rely” letters, the Corps also issued waivers to several of the States' Nationwide Permit section 401 certifications based on alleged failures to comply with Section 121.7 of the section 401 Rule. This section of the rule purports to grant federal agencies the authority to declare waiver where certifying authorities fail to provide written explanations and citations to legal authority for the conditions imposed in their section 401 certification. In one case, the Corps declared waiver with regard to a State that failed to include certain material required by the section 401 Rule as result of a simple clerical error. That state swiftly sought to correct the error, only to be rebuffed by the Corps.

The federal government's authority to declare waiver based on federal procedural requirements is—at best—highly questionable. In drafting this provision of the section 401 Rule, EPA cited no authority for this position. Indeed, this portion of the rule flies in the face of congressional intent, applicable case law, and the foundation of “cooperative federalism” upon which the Clean Water Act is built. By the plain language of the Act, a State waives its section 401 authority only by “failing or refusing to act.” 33 U.S.C. § 1341(a)(1). An error of not marking off a procedural checkbox is not equivalent to “failing or refusing to act” on a

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certification request. *See id.* Even if EPA does not rescind this provision of the section 401 Rule in the coming months, we have every confidence that it will be invalidated by the court in the States' pending legal challenge to the rule.

Placing legal deficiencies aside, however, the Corps' waiver declarations represent bad governance and are a slap in the face to the Corps' State partners. Impacted States where the Corps has declared waiver have requested an opportunity to remedy alleged procedural defects. The Corps has refused for reasons that defy logic. The Corps' assertion that it cannot allow certifying authorities to supplement section 401 certification decisions in the absence of regulations governing that process is clearly erroneous. The preamble to the section 401 Rule preserves federal agencies' authority to allow States to remedy purportedly deficient denials. 85 Fed. Reg. at 42,269. There is also nothing in the Clean Water Act that forbids an agency from allowing a state to correct a non-substantive clerical error in a certification decision. It is important to note that the Corps' requests for certifications of the Nationwide Permits were among the first to be received by the States after the section 401 Rule took effect. It is thus patently unreasonable for the Corps' to refuse to allow any flexibility to the States considering there were, and still are, many questions and uncertainties regarding the application of the rule.

More importantly, even if supplementation was substantive, allowing the States to supplement is well within the Corps' authority, especially under the circumstances here. The Clean Water Act allows state certifications to occur within a "reasonable period of time (which shall not to exceed one year)." 33 U.S.C. § 1341(a)(1). While we disagree with this portion of the section 401 Rule, the rule authorizes the Corps to determine what constitutes a reasonable amount of time within that one-year timeframe. Because the Corps' certification requests were received by the States several months ago, we are still well within the one-year window authorized by the Clean Water Act. Neither section 401 itself nor the section 401 Rule prevent the Corps from extending its reasonable period determination to allow the States to supplement their certification decisions. Section 401 requires certification to occur before a federal license or permit authorizes an "activity." *Id.* A Nationwide Permit by itself does not authorize anything until an applicant applies for, and is granted, coverage. As such, limitations on modifying section 401 certifications contained in other subsections of section 401 do not apply to a state's programmatic certification of a general permit. The Corps, therefore, has clear authority to extend its arbitrary 60-day timeframe for certifying authorities to supplement certification decisions for the Nationwide Permits. Its refusal to do so here is unreasonable and unacceptable.

CONCLUSION

In summary, the Corps must change course and engage with the States to find solutions to the current Nationwide Permit situation—a situation that is the direct result of the Corps' misapplication of an already haphazard section 401 Rule that may be rescinded or significantly revised in coming months. Refusal to rectify the situation will result in significant harm to the

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environment, regulated parties, impacted industries, and impacted states. We look forward to your response.

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EXHIBIT E

July 8, 2021 Letter



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

July 8, 2021

Governor Jay Inslee
Washington

Dear Governor Inslee,

Thank you for your May 17, 2021 letter to President Biden regarding the U.S. Army Corps of Engineers Nationwide Permits and water quality certification by states and Tribes under section 401 of the Clean Water Act. I appreciate your commitment to work in good faith with federal partners on water quality.

As you note in your letter, the 2020 Clean Water Act Section 401 Certification Rule is under review at the Environmental Protection Agency (EPA) in accordance with Executive Order 13990. As part of this review, EPA held listening sessions on June 14, 15, 23, and 24, 2021. As you also note, the Nationwide Permit renewals initiated under the previous administration are in process, and your comments regarding the interaction between the Certification Rule and the Nationwide Permits are timely.

The process undertaken by the previous administration to renew and revise Nationwide Permits was in many ways unusual. The timing for renewal of the permits occurred earlier than in previous renewals, 401 certification was requested on proposed permits rather than final ones, and requests for extensions of the reasonable period of time by which to submit 401 certifications were declined. Without question, this approach has complicated an important process by which the federal government, states, Tribes, and territories carry out shared responsibilities to protect water quality.

We are grateful for your participation in the ongoing processes and look forward to working with you as this matter unfolds.

Thank you,

A handwritten signature in black ink that reads "Brenda Mallory".

Brenda Mallory
Chair