

May 20, 2019

Anna Wildeman, Deputy Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

Re: Submission of Pre-proposal Recommendations to EPA regarding Executive Order 13868
Submitted to EPA-HW-OW-2018-0855 on-line

Dear Ms. Wildeman,

The attached comments were prepared by the Association of State Wetland Managers (ASWM) in response to Executive Order 13868: *Protecting Energy Infrastructure and Economic Growth* issued on April 10, 2019. The issue of new guidance and following rulemaking to clarify Section 401 of the Clean Water Act (§401) is of immense importance to the states and tribes we serve, as well as to the foundation of cooperative federalism upon which the Clean Water Act is based. ASWM appreciates the opportunity to provide recommendations to the Environmental Protection Agency (EPA) in response to this Executive Order. We respectfully request that any changes made to Section 401 uphold existing state authority, as established by Congress, in reviewing and approving permits through the §401 Water Quality Certification process.

ASWM is a nonprofit professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland programs. Our organization and our member states and tribes have a long history of positive and effective working relationships with EPA in the implementation of dredge and fill regulations designed to protect our nation's water resources. We trust that our comments will assist in clarifying elements of the permitting process in ways that allow for effective protection of state aquatic resources while also providing for greater efficiency in permitting processes and increased regulatory certainty.

The important and unique role of states in the management of water resources is clearly established in the Clean Water Act (CWA), starting with §101(b). Therefore, any action taken by the federal government to either expand or contract the scope of federal protection under the CWA will have direct and significant impacts on the states. While these comments have been prepared with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations. Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,



Marla J. Stelk
Executive Director

CC: ASWM Board of Directors

COMMENTS OF THE ASSOCIATION OF STATE WETLAND MANAGERS TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY IN RESPONSE TO THE APRIL 10, 2019 EXECUTIVE ORDER ON PROMOTING ENERGY INFRASTRUCTURE AND ECONOMIC GROWTH

The Association of State Wetland Managers (ASWM) is a nonprofit professional organization that supports integrated application of sound science, law, and policy in development and implementation of state and tribal wetland programs. ASWM has prepared these comments in response to the request by the U.S. Environmental Protection Agency (EPA) for recommendations related to the review of existing regulations and guidance, issuance of new guidance for federal permitting agencies and state and tribal authorities, and rulemaking to clarify Section 401 of the Clean Water Act (§401).

The Section 401 Water Quality Certification (WQC) process benefits all parties (federal and state regulatory agencies, permit applicants, and the communities served), serving as a successful model of cooperative federalism. The WQC process is known for providing efficient use of technical expertise at the state and federal level, flexibility, avoidance of duplication, and the potential for scalable growth at the state and tribal levels. Cooperative federalism is at the core of the Clean Water Act and requires that federal agencies and actions respect state authorities, ensuring that states maintain control over water quality within their respective state boundaries. For these reasons, ASWM does not support any revision of guidance or rulemaking that would reduce the role of states and their authority to conduct adequate review of §401 certification permits. ASWM also rejects the assertion that there is confusion and uncertainty around the §401 certification process and that it needs to be fixed in some manner. While there are complex elements of the process that could be improved, none of these improvements require a reduction in the authority of states to review permits and issue certifications.

To this end, ASWM recommends no changes to the scope of water quality review for §401 certifications and no restrictions on the types of conditions that states or tribes may judge to be reasonably appropriate to include in a certification. ASWM also rejects overly restrictive review times. If enacted, such policies will likely lead to the unintended consequence of an increase in denials, as states and tribes will lack the necessary information, time, and regulatory tools to balance development and resource protection. Section 401 certification process time restrictions should be based on the requirement of receiving a “complete application” and knowledge for the federal permit pathway (individual vs. general permits) before that review clock starts, with completeness defined (in advance) by the state or tribe.

To address the concerns raised by Executive Order 13868, ASWM instead encourages EPA to: 1) promote pre-application engagement, with early and frequent communication between federal permitting agencies, applicants, and states/tribes during project planning phases; 2) support states and tribes in developing and providing consistent, transparent, and accessible information about their respective §401 certification process steps (e.g., expectations, types of information or data required, mandatory or recommended best practices, information about critical water resources to be avoided, common conditions that the state/tribe requires); 3) continue to work with the U.S. Army Corps of Engineers (USACE) to reduce federal review delays; and 4) emphasize that avoidance and minimization of impacts to wetlands and waters (i.e., by remaining within impact thresholds for Nationwide Permit eligibility) is often the most rapid and reliable strategy for obtaining a §404 permit for many projects.

With these issues in mind, ASWM provides the following detailed comments for consideration:

Economic Impact, Federal Register Review and Comment Process

ASWM requests that EPA considers, and document its findings, as to whether or not any guidance making initiated by Executive Order 13868 may reasonably be anticipated to lead to an annual effect on the economy of \$100 million or more. If this threshold is met, EPA should follow all requirements found in section IV (1) of the *Final Bulletin for Agency Good Guidance Practices* for economically significant guidance documents, including but not limited to making a draft available for comment in the Federal Register. Avoiding this critical step could open the guidance document to legal challenges, further confusion and uncertainty around the §401 process and create an appearance that the Agency is unwilling to work in good faith to develop sound guidelines in collaboration with interested parties.

Extension of Timeline for State/Tribal Review and Consultation

If the economic significance threshold is not triggered, ASWM requests that EPA extend the timeline for state/tribal engagement to ensure adequate time for consultation and review. The timeline of 60 days for the development of new guidance and 120 days for the completion of rulemaking makes it almost impossible for states and tribes to provide meaningful input and for any recommendations to be taken into consideration or incorporated into guidance or rulemaking.

2010 EPA §401 Handbook Does Not Represent Formal Guidance

In terms of process, ASWM does not recognize the EPA Handbook as official “interim guidance” from EPA. The forward in the handbook states that the handbook “provides a wide-ranging description of §401 certification provisions and practices which may be helpful to states and tribes interested in using §401 as an effective water protection tool¹.” Although the final statement of the Handbook’s forward indicates that EPA may develop guidance in the future, it does not indicate that the current document is more than suggested best practices. While the document has served to assist states and tribes, it has never been addressed as a formal guidance directive. The document is not included on any EPA website that lists significant guidance² and has not heretofore been referred to as such. For this reason, the process of writing formal guidance should be considered as a new task, which may refer to information from the handbook, but not use it as such.

EPA Consultation of States and Tribes Does Not Meet the Consultation Litmus Test

Recent communications from EPA indicate that states and tribes have been engaged with EPA in a formal and/or substantive consultation process since Fall 2018. ASWM, the Association of Clean Water Administrators, Environmental Council of States, and others listed by EPA on their consultation timeline³ disagree that such consultation has taken place. While ASWM has participated in informal discussions with EPA staff around this topic, ASWM was never asked to engage in substantive consultation, and

¹ U.S. Environmental Protection Agency. (2010). *Clean Water Act Section 401 Water Quality Certification A Water Quality Protection Tool for States and Tribes*. Retrieved from https://www.epa.gov/sites/production/files/2016-11/documents/cwa_401_handbook_2010.pdf

² <https://www.epa.gov/laws-regulations/significant-guidance-documents-water>

³ See [EPA PowerPoint from Federal Consultation Webinar on April 17, 2019](#)

communications from EPA have not been characterized as such until April 2019. Statements that EPA outreach efforts qualify as official consultation (prior to April 2019) are wrong and any communications representing them as such are mischaracterizations. EPA's discussions with states and tribes has not followed the consultation process that EPA has used in its rulemaking actions and this lack of consultation prevents states and tribes from providing input into decision making as intended by the cooperative federalism goals of the Clean Water Act.

Breadth of Permits and Licenses that Impact Water Quality Included Under §401

EPA has requested input on what permits or licenses that impact water quality are included under §401. ASWM's understanding is that any federal permit or license which may result in a discharge to waters, including §404 and §402 (including ballast water), Section 10 of the Rivers and Harbors Act, FERC hydropower and energy pipeline licenses and authorizations, Department of Energy interstate pipelines, licenses issued by the Nuclear Regulatory Commission and Coast Guard permits for bridges all come under the purview of §401 certification. We note that that the activity or project requiring a license does have to have a direct discharge, but activities outside of the water, which may subsequently enter the water, are subject to §401 review by the state.

To address the five specific areas EPA is seeking recommendations regarding Executive Order 13868, ASWM provides the following comments:

(i) The Need to Promote Timely Federal-State Cooperation and Collaboration

§401 Certification is based on Cooperative Federalism: The Clean Water Act §101(b) states that it is “the policy of 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.” ASWM agrees that effective administration of the CWA requires the complex balancing of state and federal interests and responsibilities, and that a change in the definition of federal jurisdiction will alter this balance. However, we are also dedicated to achieving the stated objective of the Act – that being to restore and maintain the chemical, physical, and biological integrity of the Nation's waters” as stated in CWA §101(a). We believe that the coordinated efforts of state and federal agencies can further that goal, but that any shift in state-federal responsibilities which undermines it is not acceptable.

The §401 Certification Process is Not Broken: Through the 1977 amendments to the CWA, Congress more fully recognized and protected the rights and responsibilities of the states by ensuring a major role in the implementation of many CWA programs. In order to address dredge and fill activities, states have the option of assumption of the §404 dredge and fill permitting program, reliance on §401 water quality certification to incorporate state concerns, operation of independent state permitting programs, or a combination of the above. Other states operate only nonregulatory wetland programs. States have determined the appropriate balance of these choices for their respective states based in part on the scope of CWA jurisdiction. With §401 certification being a key element of CWA compliance, without adequate state/tribal review of §401 certifications, the goals of the CWA will not be met. Section 401 certification has long been identified as a successful model of cooperative federalism.

A recent concern about a small number of denials⁴ has led to an approach akin with “throwing the baby out with the bathwater.” Annually, states/tribes issue §401 certifications for infrastructure and other projects with no delay and in an efficient, effective manner – allowing for state review of federal permits and fulfilling the cooperative-federalism goal of shared protection of water resources. ASWM requests that EPA justify and document the claim that confusion and uncertainty around §401 guidance and regulations are hindering infrastructure development with evidence identifying the problems with the system and evidence of where those problems come from. Without this information, any attempt to insert new guidance will likely fail to address root causes of existing issues and may lead to new problems. Considering the lack of actual data used to support this claim, the risk of using outliers as a general example or trend could lead to serious misrepresentation of fact. Additionally, without this analysis, any restriction of a state/tribe’s ability to conduct §401 certifications could be seen as an arbitrary and capricious limitation of the cooperative federalism goals of the Clean Water Act.

Changes Must Take State and Tribal Laws and Regulations into Consideration: It is critical to create federal guidance and rules that are reconcilable with current state and tribal regulations. One area of specific concern is around the ability of states and tribes to comply with state/tribal public notice and comment requirements and state administrative procedures if elements of the §401 certification process (allowable review times, information that can be requested from applicants, types of conditions, etc.) are changed. A careful review of existing state and tribal regulations to identify where this could be an issue, and consultation on ways to address these issues, should be conducted before any final guidance or rule is promulgated. Any changes that are made must be enacted with the understanding that states and tribes may require additional time to reconcile their regulatory requirements with new federal requirements⁵.

Stimulate Greater Pre-application Engagement: One key area for improvement in the §401 certification process, identified through [ASWM research](#), is the need for earlier engagement and communication in ways that increase the likelihood of states and tribes receiving complete §401 certification applications from applicants. Incomplete applications often come in the form of missing data to support decision-making around the project route, planning approaches and construction techniques. Because this information is essential to state/tribal review, applicants should be provided with these expectations well in advance of submitting their application. For example, during FERC gas pipeline review, the §401 application process initiates only after the end of NEPA review and EIS/EA certifications are approved. Some applicants are not aware that the state/tribe may have additional water quality standards/considerations and do not know that these environmental review requirements differ from federal requirements. This may result in applicants being unprepared to provide the additional information, reports, or data, leading to delays when states/tribes require this information before issuing the state/tribal certification.

ASWM recommends that guidelines encourage federal agencies and applicants to bring states and tribes into the application process, focusing on meaningful engagement, as early as possible in the

⁴ See *Constitution Pipeline Co. v. N.Y.S. Dep't of Env'tl. Conservation*, 868 F.3d 87 (2d Cir. 2017) and *Lighthouse Res., Inc. v. Inslee*, CASE NO. 3:18-CV-05005-RJB (W.D. Wash. 2019)

⁵ Many states (e.g., Nebraska) have processes for Section 401 certification, such as a 365 day time limit for permit review, codified into statute. These laws cannot be changed or modified without legislative action by individual state legislatures. There is no indication that the states could achieve such changes within a reasonable timeline. There may also be issues of violation of Title X of the U.S. Constitution in this area.

pre-application process. Doing so has shown to increase predictability for the applicant, avoid duplication and increase the likelihood of a complete application at the time of submission.

(ii) The Appropriate Scope of Water Quality Reviews

The Clean Water Act was intentionally written with broad and flexible language to allow states the ability to use §401 as a tool to manage the challenges and conditions unique to the water resources of their state. Section 401 certification water quality reviews must ensure that discharges “comply with applicable effluent limitations, water quality standards, toxic and pretreatment effluent standards, as well as other appropriate provisions of state law⁶.” Compliance with state water quality standards is a central element of certification reviews. Discharge of a pollutant, when used without qualification, is defined as any addition of any pollutant or combination of pollutants to waters of the United States from any point source. Discharges are defined broadly and court decisions have established that the term “discharge” may include a wide array of contributors to water quality (e.g., bulldozers as point sources)⁷.

State water quality standards may include designated uses of the waterbody, water quality criteria to protect designated uses (e.g., recreation, water supply, aquatic life, agriculture), antidegradation policies to maintain and protect existing uses and high-quality waters, and/or general policies addressing implementation issues. Water quality standards may be numeric or narrative. Most states and some tribes have state water quality standards, although not all state/tribes have wetland-specific water quality standards. It is important to note that not all water quality standards are similar. Across the country, these standards include a range of metrics that impact water quality, such as activities that may impact streamflow (Great Basin v. BLM case upheld the use of streamflow requirements for state water quality standards⁸). In most states, the standards developed are reflective of specific regional or contextual considerations, including specific uses important to that state or the types of waters that are in that state.

While many of the standards reflect more commonly understood relationships between discharge and water quality, there are some standards that address impacts to water quality through the lens of wildlife, habitat or other considerations. For example, designated uses of waters in many states focus on the protection of wildlife (e.g., populations of recreationally valuable fish species). In Alaska, a designated use is fish propagation. In Delaware, there are designated uses for fish and wildlife habitat and minimum stream flows.

For these reasons, ASWM recommends that there be no change to the scope of water quality review.

(iii) The Types of Conditions that May be Appropriate to Include in a Certification

Under §401, states and authorized tribes may grant, grant with conditions, deny or waive (explicitly or through failure to act) a federal permit or license. This authority ensures that the activity will be

⁶ U.S. Environmental Protection Agency. (2010). *Clean Water Act Section 401 Water Quality Certification A Water Quality Protection Tool for States and Tribes*. Retrieved from https://www.epa.gov/sites/production/files/2016-11/documents/cwa_401_handbook_2010.pdf

⁷ *See Avoyelles Sportsman's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).

⁸ *See Great Basin Mine Watch v. Helen Hankins BLM*, 456 F.3d 955, 963 (9th Cir 2006)

consistent with any appropriate state/tribal requirements under §401(d). Conditioning permits is one of the primary tools available for states to protect state water quality and the *only* tool for 19 states, whose sole regulatory tool is §401 certification⁹.

The appropriateness of conditions is closely related to the region, resources and context of impacts from infrastructure and other activities. For example, appropriate practices and related conditions would differ for proposed activities in differing geological conditions where a §404 permit applicant may propose installing pipe for a shale gas project¹⁰. Inadequate testing and/or selection of an inappropriate technique for the specific geology can lead to equipment failure, negative environmental impacts, costs to remediate the impacts and delays. The focus of all §404 permit review is largely on avoidance and minimization of impacts, but where there are unavoidable impacts, to provide mitigation. Conditions can encompass a wide range of actions, ranging from erosion and sediment control and stormwater management on the site to requirements for baseline analysis, integration of construction best practices and restoration, monitoring and tracking requirements.

In order to make explicit and transparent expectations around the conditions that a state may select to apply to a project, ASWM research indicated that the §401 certification process may be improved by the establishment and dissemination of state-/tribal-specific best practices and conditions. ASWM has developed a [handbook to help states and tribes develop high quality best practice lists/manuals](#). The ability to share this information during the pre-application phase of review could be beneficial, by allowing the applicant the time to incorporate state expectations into their application before submitting it for §401 review.

Of paramount importance to state/tribal review as part of cooperative federalism is flexibility. Any changes to guidance or rules around §401 certification must also ensure states have the flexibility to meet their water quality review needs. Regardless of any minimum standard required at the federal level, states must be allowed to exert their own state water quality standards. Any restriction will result in a reduction in state rights, which is not acceptable.

ASWM emphasizes the importance of certification conditions as a critical tool for states to allow for development while protecting resources. ASWM recommends that instead of limiting the types of conditions a state can apply to a certification, changes and federal technical and financial support should encourage states and tribes to develop and make available to applicants best practice documents which will help increase regulatory certainty and promote efficient permitting processes.

(iv) Expectations for Reasonable Review Times for Various Types of Certification Requests

ASWM understands that the vast majority of applications are already completed within the 60-day period and within 90 days for most other, more complex applications. Any extensive delays have been due to either incomplete applications or very high levels of project complexity (in size and/or scope). Limiting a state/tribe to sixty days would prevent it from making informed decisions on federal projects

⁹ASWM Status and Trends Report on State Wetland Programs in the United States

https://www.aswm.org/pdf/lib/state_summaries/status_and_trends_report_on_state_wetland_programs_in_the_united_states_102015.pdf

¹⁰ ASWM Webinar: *Horizontal Directional Drilling: Understanding Context when Reviewing Oil and Gas Pipeline Permit Applications*. Download recording from: <https://www.aswm.org/aswm/aswm-webinarscalls/4142-past-energy-project-webinars-series#hdd1029>

that affect water quality. Only where a state/tribal agency has failed to act on a specific application within the one-year limit established by §401 or, based on the specific circumstances, failed to act in a “reasonable” period of time, may the Army Corps of Engineers (Corps) then determine that the state has waived its certification or authority¹¹.

Review times should take into consideration not only the state/tribal review times, but any time delays that come from federal review (e.g., the Corps) that are part of the overall review system. The formalization of shorter review times has several potential negative consequences. To address these shortcomings, ASWM recommends that EPA look at ways to:

- 1) **Reduce the Number of Incomplete Applications:** The vast majority of denials or delays in the §401 certification process derive from the applicants providing incomplete applications. Incomplete applications and a lack of necessary information does not allow states and tribes the opportunity to complete a defensible review, and thus certify that the discharge will not violate water quality standards. The Corps’ regulations state that the length of the waiver period must be measured from the date a state agency receives a request that is considered “valid” under state laws. For many states, such validity requires a complete application¹².” States and tribes that do not have enough information to proceed with their §401 certification review are in direct conflict with the regulatory requirement that the waiver period does not start until the receipt of a valid (i.e. complete) application. Reducing the time for permit review will likely increase the number of incomplete applications, unless the time clock starts after an application is deemed complete for making a decision on certification. Instead, ASWM recommends that EPA focus on supporting states’ efforts to create transparency in expectations around what comprises the application process and provide training on what a complete application looks like in a particular state, as not all states and tribes have this information formalized or regularly communicated. The state, not the Corps, should be the final say as to whether an application is complete or not and, consequently, when the review clock begins based on having received a complete application. A complete (valid) application should contain all accurate information needed for the state to make a decision.

- 2) **Allow Review Times that Facilitate Compliance with State/Tribal Public Notice and Comment Requirements for §401 certification:** Limiting a state to sixty days for review of §401 applications is incompatible with public notice and public hearing requirements of §401 and corresponding state laws. Inadequate time for public review would likely result in the unnecessary denial of many §401 certification applications, further delays in the administrative process and related litigation regarding these issues¹³. Additionally, allow review times that account for the realities of state funding and staffing for Section 401 programs. Federally imposed timelines that place undue fiscal hardship on states and tribes constitutes an unfunded mandate. Most state §401 programs remain consistently underfunded and understaffed,

¹¹ See *Lighthouse Res., Inc. v. Inslee*, CASE NO. 3:18-CV-05005-RJB (W.D. Wash. 2019)

¹² Regulatory Policy Directives Memorandum on Timeframe for Clean Water Act Section 401 Water Quality Certifications. (Letter submitted to the Honorable R.D. James by the Attorney Generals of NY, CA, CO, CT, ME, MD, MN, NJ, NC, RI, VT and WA.

¹³ Ibid.

especially those states that promote voluntary compliance by not charging a high fee, or no fee at all, for Section 401 certification. In considering this fiscal reality, most states are ill prepared to take on the substantial burden that fast track review timelines would demand.

- 3) **Provide Flexibility for the Review of Highly Complex Projects:** Highly complex projects may require more than 60 days to review, even with a complete application. While the vast majority of permit applications are able to be processed within a relatively short timeframe, some projects involve complex analysis of geology, techniques, water quality issues or other considerations. States and tribes may not be able to conduct their review without additional information or expertise. In order to ensure state water quality requirements are met and unnecessary denials are avoided, flexibility must be provided.
- 4) **Avoid the Unintended Consequence of Increased Denials:** When a state or tribe is not provided with adequate time to review a project, the result will likely be a greater number of denials due to a lack of time to request and review missing information. A denial is costly in terms of project planning and results in an inability to move forward with a project, rather than a delay.

ASWM recommends that the time clock for review only begin once the state verifies that it has received what the state/tribe defines as a “complete application.”

(v) The Nature and Scope of Information States and Authorized Tribes May Need in Order to Substantively Act on a Certification Request within a Prescribed Period of Time

As stated above, any new guidance and rulemaking should take into consideration that incomplete applications can lead to the denial of permits. One of the recommendations from ASWM’s research is to increase the level of formalization of checklists and best practices at the state/tribal-level. This information should list all major expectations for reporting and data to be analyzed for projects so that there is a higher likelihood of complete applications. Checklists can serve as a useful tool to stimulate dialogue around expectations, define the boundaries around what information is required and how that information should be collected and provided to the state/tribe.

Information that can be helpful to applicants include process maps for how the state/tribal §401 process fits into the larger review process and information about state/tribal best practices and common conditions. Checklist documents, however, must be dynamic documents – reviewed and updated on a periodic basis to ensure state/tribal requirements adapt to regulatory and environmental changes over time. Findings from ASWM’s recent work with §401 certification finds that states and tribes need flexibility to be able to accommodate future changes in technology, innovation, practices and environmental conditions. An example of this critical need can be seen in the increasing use of hydraulic directional drilling (HDD). This approach to drilling has been available for several decades; however, it has only become a more common practice in the last decade. States require flexibility to request information that clarifies the use of new and increasingly applied approaches. In the case of HDD, decisions that allow for the use of HDD in the wrong context (a potential result of inadequate testing and data for review) can result in major environmental impacts, large delays resulting from clean-ups and resulting costs (in terms of delays, remediation and penalties). In order to protect state/tribal water quality, states must have access to emerging research and data that demonstrates the appropriateness of key decisions around route, construction techniques and more.

As previously stated, the unintended consequence of incomplete information within permit applications is the potential for denial of permits that would otherwise have been withdrawn and resubmitted at a later date with the required information included.

ASWM recommends a broad interpretation of information required, allowing states/tribes to define and create transparent documentation of expected information for review. Documentation should be formal, but also remain dynamic to allow for updates. The Clean Water Act is intentionally written to address the broad needs of states and tribes. Any restriction in the scope of information required and/or considered by states would result in a restriction in state rights.

ASWM Conclusions and Recommendations

ASWM recognizes that the foundation of the CWA is cooperative federalism, preserving the essential role of states and tribes. Any efforts to change §401 regulations that result in a reduction of state/tribal roles works counter to the goals of the CWA. For this reason, ASWM asks EPA to focus on maintaining the balance of powers in the federal-state relationship during the development of guidance and rulemaking.

ASWM disagrees that the §401 certification process is broken, pointing to ample evidence that the system works with a high degree of success. Pointing to a few high-profile cases where concerns have been expressed about the scope of review and denials of permits does not constitute a “broken” system. We believe states have acted efficiently under this authorization, as required by the regulations related to §401, in certifying projects, establishing procedures, and providing primary responsibility to ensure that water quality standards are met and believe the problems identified by supporters of these efforts are exaggerated. Cases that were brought before the courts all demonstrated that the state executed their review and permitting rights within the law and were upheld.^{14, 15}

Not having had the opportunity to review draft guidance or understand planned changes to §401 rulemaking, ASWM’s makes the following initial recommendations to EPA:

1. Conduct an economic impact analysis to determine if rulemaking will result in more than \$100 million of economic impact annually. If the threshold is met, change the process of rulemaking to reflect federal requirements to post drafts of the economically significant documents to the Federal register for review and comment.
2. If this threshold is not triggered, extend the timeline for state/tribal engagement to ensure adequate time for consultation and review. The timeline of 60 days for the development of new

¹⁴ U.S. District Court in Tacoma ruled in favor of Ecology’s motion to dismiss the portions of the plaintiff’s case relating to the foreign Commerce Clause;

¹⁵ See *Lighthouse Res., Inc. v. Inslee*, CASE NO. 3:18-CV-05005-RJB (W.D. Wash. 2019) and *Constitution Pipeline Co. v. N.Y.S. Dep’t of Env’tl. Conservation*, 868 F.3d 87 (2d Cir. 2017)

guidance and 120 days for the completion of rulemaking makes it almost impossible for states and tribes to provide meaningful input and for any recommendations to be taken into consideration or incorporated into rulemaking.

3. Any new guidance and rulemaking should take into consideration that incomplete applications and complex projects can lead to the denial of permits. By shortening the timelines within which states and tribes are asked to review permits, the likelihood of having to deny permits due to missing information and/or the need to request additional information/provide clarifications is increased.
4. Instead of restricting the authority of states and tribes, the scope of water quality reviews, the types of conditions that can be required, the time they are allowed for review, and/or the nature or scope of information that they should collect, EPA should focus on increasing the use of pre-application communication and sharing of expectations, before the formal start of the §401 review process. When the federal lead is another agency, such as FERC, the review process should be evaluated and modified when appropriate to increase pre-application involvement by state agencies.

Any of the above-stated restrictions to state authority to conduct §401 certification review will serve as a restriction of state rights and work against the goals of the Clean Water Act. ASWM is pleased to have had the opportunity to provide recommendations on how to improve the current process through a greater focus on pre-application communication and state/tribal engagement, the use of process maps and other tools to share information about the permitting process and points of access, and the formal documentation of state/tribal best practices and conditions to make these application of these requirements more transparent, predictable and efficient.