August 6, 2025

VIA Federal eRulemaking Portal: https://www.regulations.gov.

Ms. Peggy Browne
Acting Assistant Administrator
Office of Water
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2025-0272
Hydropower Industry Comments on Regulatory Uncertainty and Implementation Challenges Associated with Clean Water Act Section 401

Assistant Administrator Browne:

The National Hydropower Association (NHA) and Northwest Hydroelectric Association (NWHA) appreciate the opportunity to comment on regulatory uncertainty and challenges associated with implementing Clean Water Act (CWA) Section 401.[1] To address these challenges and quickly restore regulatory certainty, NHA and NWHA urge the Environmental Protection Agency (EPA) to adopt an interim final rule that (1) repeals EPA's Section 401 rules adopted in 2023 (the 2023 Rule)[2] and (2) reinstates EPA's Section 401 rules adopted in 2020 (the 2020 Rule)[3] with the clarifications described below.

NHA is a national nonprofit association dedicated to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA's membership consists of over 330 organizations, including publicly owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and law firms. Hydropower is a

[1] 33 U.S.C. § 1341; *see* 90 Fed. Reg. 29,828-30 (July 7, 2025).

[2] 40 C.F.R. part 121; 88 Fed. Reg. 66,661 (Sept. 27, 2023).

[3] 85 Fed. Reg. 42,210-87 (July 13, 2020).

reliable, low-cost, and dispatchable energy source that is essential for meeting the demands of an expanding economy, including rapid growth in data centers and artificial intelligence.

NWHA is dedicated to the promotion of the Northwest Region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize our region. NWHA's membership represents all segments of the hydropower industry: public and private utilities; independent developers and energy producers; manufacturers and distributors; local, state and regional governments, including water and irrigation districts; consultants; and contractors.

NHA and NWHA members operate hydropower projects licensed by the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act (FPA). License applications are subject to the Section 401 certification requirement, and it is in this context that new and existing hydropower projects are most affected by Section 401.[4] Under the FPA, FERC has the exclusive authority to license nonfederal hydropower projects,[5] and it has comprehensive authority to condition its licenses to ensure the protection and enhancement of fish and wildlife, including their habitat, and to achieve other public and environmental benefits, such as flood control, water supply, and recreation.[6]

Through Section 401, Congress has provided states and other certifying authorities a limited role in ensuring that discharges from federally licensed and permitted activities, including hydropower projects licensed by FERC, comply with specified provisions of the CWA, including state regulations implementing those provisions. Over the more than 50 years since the enactment of Section 401, however, the issues that states have sought to address in their certification decisions have expanded far beyond the water quality concerns of Section 401. Not only is this expansion inconsistent with the statute, states have used it to undermine FERC's exclusive licensing authority by denying, delaying, and burdening hydropower and other energy projects for reasons having nothing to do with protecting water quality from the discharges associated with these projects.[7]

The 2020 Rule was a long overdue correction that returned the scope of Section 401 to the narrow focus on water quality that Congress intended. The rule also included provisions to better implement Section 401's requirement that states act on a certification request within a reasonable time and not to exceed one year. Unfortunately, the 2023 Rule largely undid these improvements

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[4] NHA and NWHA members must also often obtain other federal licenses and permits that are subject to the Section 401 certification requirement, including permits from the U.S. Army Corps of Engineers for the discharge of dredged or fill material into waters of the United States pursuant to CWA Section 404, 33 U.S.C. § 1344.

[5] *See* 16 U.S.C. §§ 797(e), 817(1); *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490 (1990); *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946).

[6] *See* 16 U.S.C. § 803(a).

[7] The many problems associated with the implementation of Section 401 are discussed at length in NHA's 2019 comments to EPA, which accompany these comments.

and created profound regulatory uncertainty for license and permit applicants, federal agencies, certifying authorities, and the public.

To provide the low-cost, reliable energy needed to support a growing and innovative economy; to make the scope and timing of certification decisions consistent with Section 401; and to end the ongoing regulatory uncertainty created by the 2023 Rule, EPA should adopt an interim final rule that repeals the 2023 Rule and replaces it with the 2020 Rule with the below clarifications.

I. Section 401's Role in the Licensing of Hydropower Projects

States have an important and entirely appropriate interest in ensuring the protection of water quality. Neither Section 401 nor any other provision of the CWA preempts states from adopting and enforcing more stringent water quality regulations than those required by the CWA.[8] Regardless of the scope and application of Section 401, states are generally free to regulate activities that may affect water quality and other public interests to whatever degree they believe is appropriate. Moreover, in the few instances in which some other federal law, such as the FPA, does preempt the application of state water quality laws, Congress has provided for robust protection of water quality, as well as state input into decisions affecting water quality.

When FERC issues a license for a hydropower project, the FPA requires FERC to "give equal consideration" to both the "power and development purposes for which licenses are issued" and the "purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."[9] In addition, federal agencies that manage certain types of federal land on which a project is located may prescribe license conditions for the protection and use of those lands, including conditions related to water quality and uses.[10] FERC must also specifically consider recommendations from the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), and state fish and wildlife agencies for the protection of fish and wildlife,[11] and the USFWS and NMFS may prescribe license conditions requiring the construction, maintenance, and operation of "fishways."[12]

Because FERC's hydropower licensing authority over water quality and other issues is comprehensive, an expansive interpretation of a state's certification authority under Section 401

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[8] *See* 33 U.S.C. § 1370.

[9] 16 U.S.C. § 797(e).

[10] *See* 16 U.S.C. § 797(e); *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 (1984).

[11] 16 U.S.C. § 803(j).

[12] 16 U.S.C. § 811. FERC's licensing decisions are also subject to a host of other federal laws, including the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-12; the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44; the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1466; and the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101-307108; *see also* 18 C.F.R. §§ 5.18(b)(3), 5.25.

would be a substantial intrusion on Congress's clearly expressed intention in the FPA that these issues are to be addressed exclusively by FERC or through the specific authorities that Congress has assigned to the USFWS and NMFS to prescribe "fishways" and to other federal agencies to prescribe license conditions to protect lands and resources under their management. Indeed, before the 2020 Rule and since then because of the regulatory uncertainty created by the development and adoption of the 2023 Rule, states have encroached upon FERC's and other federal agencies' exclusive licensing authority by imposing certification conditions for reasons that have little or nothing to do with the water quality effects of discharges from hydropower projects. These conditions have included, for example, requirements for recreational facilities, wildlife protection and enhancement measures, vegetation management plans, fish passage facilities, and minimum stream flows.[13] All these requirements are outside the scope of Section 401 but well within the exclusive FPA authority of FERC and other federal agencies.

In addition to exceeding the scope of Section 401, state certifying authorities often take far longer to make a final certification decision than the statutory maximum of one year from their receipt of a certification request[14]—sometimes more than a decade.[15] Various devices have been used to extend the time for making a decision, including deeming a certification request to be "incomplete" in order to prevent the one-year period from starting, threatening to deny certification unless the applicant withdraws and resubmits its request to start a new one-year period, and denying certification "without prejudice" to force the applicant to resubmit its request.[16]

These delays are attributable in part to state certifying authorities considering issues that are beyond the scope of Section 401. States that limit their certification decisions to issues within the scope of Section 401 should have no difficulty making those decisions within the statutory maximum of one year from receipt of the certification request.

This is especially true in the context of FERC hydropower licenses. FERC's rules ensure that states may actively participate in the licensing process, including developing the information needed to support a Section 401 certification. For example, under FERC's default "integrated licensing process," an applicant must consult with the certifying authority on information needs and procedures years before the applicant submits a request for certification.[17] The certifying authority may also submit comments to FERC that identify information and studies that the certifying authority believes are needed for its certification decision, and it may file a formal

[13] Additional examples of certification conditions that exceed the scope of Section 401 and that intrude upon FERC's and other federal agencies' licensing hydropower licensing authorities are described in NHA's accompanying 2019 comments.

[14] *See* 33 U.S.C. § 1341(a)(1).

[15] *See, e.g., Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (no decision on certification more than 12 years after the initial request for certification was received).

[16] The hydropower licensing delays associated with delays in taking final action on Section 401 certification requests are described further in NHA's accompanying 2019 comments.

[17] *See* 18 C.F.R. § 5.1(d).

notice of dispute with FERC if it believes that the applicant's proposed licensing studies, which FERC must approve, are deficient.[18] The applicant will typically then spend two years or more conducting studies and preparing its license application. Throughout this period, the certifying authority can review and comment on study results, advocate for additional studies and information, and comment on the applicant's licensing proposal.[19] Only after this years-long process—after extensive collaboration, environmental studies, and reviews—is the applicant required to submit its certification request. FERC's regulations require the request to be submitted 60 days after FERC has determined that the license application is complete and "ready for environmental analysis."[20]

By making the scope of certification consistent with Section 401, and by clarifying that certifying authorities must take final action on certification requests within no more than one year of receipt of a request, the 2020 Rule substantially increased the likelihood of timely certification decisions. The 2023 Rule, however, substantially undermined these improvements by unwarrantedly expanding the scope of certification and by allowing certifying authorities to define the information that must be included in a complete certification request.[21]

II. Responses to Issues on Which EPA Seeks Input

1. Section 401 limits the scope of certification and certification conditions to discharges that may result from a federally licensed or permitted activity; the 2020 Rule is consistent with this scope, but the 2023 Rule impermissibly expands the scope to the entire federally licensed or permitted activity.

Section 401 plainly limits the scope of certification to the discharge or discharges that may result from a federally licensed or permitted activity, not the activity as a whole:

> Any applicant for a Federal license or permit to conduct an activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . ***that any such discharge will comply*** with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title [CWA Sections 301, 302, 303, 306, and 307].[22]

There is no requirement or authority for the State to certify that the federally licensed or permitted *activity* will comply with the specified CWA sections, only that the *discharge* that may result from that activity will comply.

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[18] *See id.* §§ 5.9, 5.11-5.14.

[19] *See id.* §§ 5.15-5.16.

[20] *See id.* §§ 5.22, 5.23(b)(1).

[21] *See* 40 C.F.R. §§ 121.1(j), 121.3(a), 121.5(c), 121.6(a).

[22] 33 U.S.C. § 1341(a)(1) (emphasis added).

Subsection (d) of Section 401 also authorizes the certifying authority to place conditions on any certification, which become conditions on the federal license or permit:

> ***Any certification provided under this section*** shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that ***any applicant for a Federal license or permit will comply*** with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title [CWA Sections 301 and 302], standard of performance under section 1316 of this title [CWA Section 306], or prohibition, effluent standard, or pretreatment standard under section 1317 of this title [CWA Section 307], and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.[23]

Although Subsection (d) refers to conditions to assure that the "applicant" will comply, rather than that the "discharge" will comply, this does not create any greater scope for certification conditions than the certification itself. The reference to the "applicant" indicates only who must comply with certification conditions. It says nothing about which activities of the applicant are subject to certification. By its terms, the subsection applies to conditions for "[a]ny certification provided under this section," which under Paragraph 401(a)(1) is a certification that the "discharge" will comply with the specified sections of the CWA. In context, the reference to the applicant's compliance can only be a reference to the applicant's compliance with the requirements applicable to the applicant's discharges that are the subject of the certification.

Moreover, the CWA sections for which Subsection 401(d) requires compliance—CWA Sections 301, 302, 306, and 307—regulate only discharges. Section 301 prohibits "the discharge of any pollutant" without a CWA permit and establishes limits and other requirements for those discharges.[24] Section 302 requires EPA to establish discharge limits for "a point source or group of point sources" as necessary to ensure that water quality standards are met.[25] Section 306 provides for the establishment of "standards of performance" for the "discharge of pollutants" from certain new sources.[26] And Section 307 provides for effluent limitations for toxic pollutants for discharges from "a class or category of point sources," as well as limits on discharges into publicly owned sewage treatment plants.[27] Subsection 401(d) also authorizes

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[23] *Id.* § 1341(d) (emphasis added).

[24] *See id.* § 1311(a)-(b), (e) ("[e]ffluent limitations established pursuant to this section . . . shall be applied to all point sources of discharge of pollutants"), (f).

[25] *See id.* § 1312(a).

[26] *See id.* § 1316(a)-(b).

[27] *See id.* § 1317(a)-(c). Paragraph 401(a)(1) also requires certification that the discharge will comply with CWA Section 303, 33 U.S.C. § 1313, which is not listed in Subsection 401(d). Section 303 requires the establishment of instream water quality standards, but it does not itself require compliance with the standards. Section 301, however, requires point source discharges to comply with water quality standards established under Section 303.

conditions necessary to assure compliance "with any other appropriate requirement of State law," which is not defined in the CWA nor expressly limited to requirements applicable only to discharges. But because the certification requirement in Paragraph 401(a)(1) is expressly limited to discharges, and because the CWA sections listed in Subsection 401(d) regulate only discharges, there is no basis in the text to interpret "appropriate requirement of State law" to refer to any requirements other than those applicable to the discharge being certified.

Other elements of Section 401 are all consistently limited to discharges, rather than to the activity as a whole. In addition to Paragraph 401(a)(1), which requires certification of the "discharge," Paragraph 401(a)(2) allows neighboring states to object to the issuance of the federal license or permit if the "discharge will affect the quality of its waters."[28] Paragraph 401(a)(3) provides that a certification for the construction of a facility fulfills the certification requirement for federal licenses or permits for the operation of the facility unless "there is no longer reasonable assurance that there will be compliance with the applicable provisions of [CWA Sections 301, 302, 303, 306, and 307]." As discussed above, these CWA sections regulate only discharges. Similarly, Paragraphs 401(a)(4) and 401(a)(5) provide for the suspension or revocation of the federal license or permit if the facility is operated in violation of these same CWA sections.[29]

Most importantly, Congress's 1972 revisions to the certification requirement changed it from certification that the "activity will be conducted in a manner which will not violate applicable water quality standards" to certification that the "discharge will comply with the applicable provisions of [CWA Section 301, 302, 303, 306, and 307]."[30] Specifically, the certification language was revised as follows:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters ~~of the United States~~, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . ~~that there is reasonable assurance, as determined by the State . . . that such activity will be conducted in a manner which will not violate applicable water quality standards~~ that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

The revised certification language reflected the new emphasis in the CWA on controlling and, where feasible, eliminating point source discharges of pollutants, rather than the previously diffuse and ineffective efforts of the predecessor to the CWA to achieve water quality standards

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See 33 U.S.C. § 1311(b)(1)(C). Thus, certification conditions to ensure that discharges comply with Section 301 must necessarily ensure that the discharges comply with water quality standards established under Section 303.

[28] *See* 33 U.S.C. § 1341(a)(2) (emphasis added).

[29] *See id.,* § 1341(a)(3)-(5).

[30] *Contrast* Pub. L. No. 91-224, § 103, 84 Stat. 91, 109 (1970) *with* Pub. L. No. 92-500, § 2, 86 Stat. 816, 877 (1972) (emphases added).

directly.[31] Not only was the certification requirement limited to the "discharge," rather than the "activity," but the CWA sections for which certification of compliance was now required were sections that regulated only discharges. In the face of this express change in the certification requirement, it cannot reasonably be argued that the scope of certification extends beyond the discharge to the activity as a whole.

Finally, the U.S. Supreme Court's holding in *PUD No. 1 v. Washington Dept. of Ecology* that certification conditions may be applied to the "activity as a whole" can no longer be considered good law.[32] In reaching this conclusion, the Court relied on, and deferred to, EPA's 1971 certification rule (40 C.F.R. § 121.2(a)(3) (1993)) and guidance derived from that rule, which required certification that the "activity will be conducted in a manner which will not violate applicable water quality standards."[33] But both the Court majority and the dissent were apparently unaware that Congress had revised the statute in 1972 and that the EPA rule was based on the very different pre-1972 version of the statute. Furthermore, the U.S. Supreme Court has recently held that deference to agency statutory interpretations is not appropriate.[34] Even if the EPA interpretation that the Court in *PUD No. 1* relied on had not been based on a statute that was no longer in effect, there is no legal or factual basis for continuing to defer to that interpretation.

The 2023 Rule is inconsistent with Section 401 because it requires certification of the federally licensed or permitted "activity" and allows the certifying authority to place conditions on the "activity," rather than the discharge or discharges that may result from that activity. The rule provides: "(a) When a certifying authority reviews a request for certification, the certifying authority shall evaluate whether the *activity* will comply with applicable water quality requirements. . . . (b) Consistent with the scope of review identified in paragraph (a) of this section, a certifying authority shall include any conditions in a grant of certification necessary to assure that the *activity* will comply with applicable water quality requirements."[35] Similarly, the 2023 Rule improperly requires a grant of certification to include a "statement that the *activity* will comply with water quality requirements" and a denial of certification to include a "statement explaining why the certifying authority cannot certify that the *activity* will comply with water quality requirements."[36]

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[31] The regulatory heart of the CWA is Subsection 301(a), which provides, "Except as in compliance with this section [1311] and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title [the CWA], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

[32] 511 U.S. 700, 711-12 (1994).

[33] *Id.* at 712 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

[34] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (overruling *Chevron*).

[35] 40 C.F.R. § 121.3 (emphasis added).

[36] *Id.* § 121.7(c)(3), (e)(3) (emphasis added). Other 2023 Rule references to "activity" that are inappropriate because they exceed the scope of certification in Section 401 can be found in 40 C.F.R. § 121.5(c)-(d) (authorizing certifying authorities to require certification requests to include information "relevant to the water quality-related impacts from the activity"); § 121.7(d)(3) (requiring a "statement explaining why each of the included conditions

By contrast, the 2020 Rule's provisions related to the scope of certification and certification conditions were fully consistent with Section 401. Section 121.3 of the 2020 Rule provided that "[t]he scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements."[37] Consistently with this scope of certification, the 2020 Rule required that "[a]ny action by the certifying authority to grant, grant with conditions, or deny a certification request must be within the scope of certification"[38]; required that a grant of certification "shall include a statement that the discharge . . . will comply with water quality requirements"[39]; required that certification conditions be accompanied by a "statement explaining why the condition is necessary to assure that the discharge . . . will comply with water quality requirements"[40]; and required that a denial of certification explain why "the discharge will not comply with the identified water quality requirements."[41]

NHA and NWHA urge EPA to reinstate these and related provisions of the 2020 Rule to restore consistency with Section 401's limitation on the scope of certification and certification conditions to the discharge or discharges that triggered the requirement for certification.

2. The water quality requirements for which a discharge's compliance must be certified are limited to the applicable provisions of CWA Sections 301, 302, 303, 306, and 307 and applicable state and tribal regulatory requirements for point source discharges into waters of the United States.

Section 401 requires certification that the "discharge will comply with the applicable provisions of" CWA Sections 301, 302, 303, 306, and 307.[42] Section 401 also authorizes certification conditions "necessary to assure" compliance "with any applicable effluent limitations and other limitations, under [CWA Sections 301 or 302], standard of performance under [CWA Section 306], or prohibition effluent standard or pretreatment standard under [CWA Section 307], and with any other appropriate requirement of State law."[43] Consistently with these statutory

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is necessary to assure that the activity will comply with water quality requirements"); and § 121.7(g) (requiring certification to be granted if there are "no water quality requirements . . . applicable to the activity.").

[37] 85 Fed. Reg. 42,285 (July 13, 2020).

[38] Section 121.7(a); 85 Fed. Reg. 42,286 (July 13, 2020).

[39] Section 121.7(c); 85 Fed. Reg. 42,286 (July 13, 2020).

[40] Section 121.7(d)(1)(i); 85 Fed. Reg. 42,286 (July 13, 2020).

[41] Section 121.7(e)(1)(ii); 85 Fed. Reg. 42,286 (July 13, 2020).

[42] 33 U.S.C. § 1341(a)(1).

[43] *Id.* § 1341(d). Although Section 303 is not expressly listed in Subsection 401(d) as among the CWA sections on which a certification condition may be based, Section 301, which is listed, authorizes "any more stringent limitation . . . required to implement any applicable water quality standards established pursuant to this chapter," *i.e.*, pursuant to Section 303. *See id.* §§ 1311(b)(1)(C), 1313. In *City and County of San Francisco v. Environmental Protection Agency*, 604 U.S. ___, 145 S.Ct. 704, 710-11, 715-20 (2025), the U.S. Supreme Court

provisions, the 2020 Rule includes within the scope of certification the "applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state and tribal regulatory requirements for point source discharges into waters of the United States."[44]

By contrast, the 2023 Rule goes beyond the statutory text to include within the scope of certification not only the listed CWA sections, but also "any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law."[45] Further, the *Federal Register* preamble to the 2023 Rule states that, "[i]n the spirit of cooperative federalism, EPA defers to the relevant state and Tribe to define which of their state or Tribal provisions qualify as appropriate 'State law' or Tribal law for purposes of implementing section 401."[46] Thus, the scope of certification is largely left up to each state or tribe to determine for itself.

The only textual basis for the 2023 Rule's expansive interpretation of the scope of certification is Subsection 401(d)'s reference to "any other appropriate requirement of State law." The statute does not define "appropriate," but the best evidence of what Congress intended to include within the term is the other provisions listed in the subsection—CWA Sections 301, 302, 306, and 307. As discussed in the preceding section of these comments, these sections regulate only discharges to waters of the United States, and the certification requirement itself applies only to such discharges. Thus, the term "appropriate" can reasonably be read to include only those state and tribal water quality requirements for the discharges that are subject to certification. Indeed, the 2023 Rule's broad interpretation of "any other appropriate requirement of State law" to mean any state or tribal requirement that the state or tribe itself deems to be appropriate would effectively repeal the exclusive regulatory authority that Congress assigned to FERC in the FPA through a single phrase in an entirely separate environmental statute.

To restore consistency with Section 401, NHA and NWHA urge EPA to revise the definition of "water quality requirements" in 40 C.F.R. § 121.1(n) to that contained in the 2020 Rule: "*Water quality requirements* means applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States."

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held that the limitations on discharges authorized by Section 301 to implement water quality standards must "spell out" what the discharger "must do or refrain from doing" to implement standards; the section does not authorize "end-result" limitations that make the discharger responsible for the quality of water in the waterbody that receives the discharge.

[44] Sections 121.1(n), 121.3, 121.7(c), (d)(1)(i), (d)(2)(i), (e)(1)(i), (e)(2)(ii); 85 Fed. Reg. 42,285-86 (July 13, 2020).

[45] *See* 40 C.F.R. §§ 121.1(j), 121.3.

[46] 88 Fed. Reg. 66,604 (Sept. 27, 2023).

3. An EPA notice to a neighboring jurisdiction under CWA Paragraph 401(a)(2) that a discharge may affect the quality of the neighboring jurisdiction's waters should be provided only when EPA has determined that there is a reasonable potential for the discharge to violate water quality standards established pursuant to CWA Section 303 in waters of the United States within the neighboring jurisdiction.

When a federal licensing or permitting agency receives a certification, CWA Paragraph 401(a)(2) requires the federal agency to notify EPA. Based on this notice, if EPA determines that "a discharge may affect . . . the quality of the waters of any other State [*i.e.*, a state that is not a certifying authority]," EPA must notify the other, "neighboring jurisdiction," within 30 days of receipt of the notice from the federal agency.[47] EPA seeks information on how it "should consider whether a neighboring jurisdiction's water quality may be affected by discharge for purposes of 401(a)(2)."

Notice to a neighboring jurisdiction under Paragraph 401(a)(2) is intended to allow the jurisdiction to object to the issuance of a federal license or permit on the ground that the discharge will not comply with applicable water quality requirements.[48] In the context of a neighboring jurisdiction, which would be a jurisdiction in which the discharge is *not* located, the applicable water quality requirements for purposes of Section 401 would be limited to water quality standards established pursuant to CWA Section 303 for waters of the United States within the neighboring jurisdiction. Accordingly, EPA should notify the neighboring jurisdiction pursuant to Paragraph 401(a)(2) only when EPA determines, based on the information received from the federal agency, that the discharge has a reasonable potential to cause or contribute to an excursion above a water quality standard established pursuant to CWA Section 303 in waters of the United States within the neighboring jurisdiction.[49]

The 2023 Rule's neighboring jurisdiction provisions impose potentially burdensome information requirements on license and permit applicants and on federal licensing and permitting agencies. CWA Paragraph 401(a)(2) requires the federal agency only to "notify" EPA of a license or permit application and accompanying certification. The 2023 Rule requires the notice to include a copy of the certification (or waiver) and the license or permit application,[50] which is a reasonable interpretation of the statute. But the rule also goes well beyond the statute by requiring the notice from the federal agency to include substantial additional information, and by also authorizing EPA to require from the federal agency and the applicant any supplemental information that EPA deems necessary to determine neighboring jurisdiction effects.[51] These additional information

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[47] 33 U.S.C. § 1341(a)(2).

[48] *See id.*

[49] EPA uses "reasonable potential" in other CWA contexts to evaluate whether discharge restrictions are needed to protect water quality. *See, e.g.,* 40 C.F.R. § 122.44(d)(1) (water quality-based discharge limits for point source discharges).

[50] 40 C.F.R. § 121.12(a)(1).

[51] *See id.* § 121.12(a)(2), (b).

requirements on federal agencies and applicants are unwarranted and unauthorized by Section 401 and should be removed from the rule.

4. EPA should categorically determine that it is not required to provide notice to a neighboring jurisdiction pursuant to CWA Paragraph 401(a)(2) when (a) there are no waters of the United States in the neighboring jurisdiction that are downstream of the discharge or (b) the discharge does not add any pollutants to waters of the United States, but only passes pollutants unchanged from upstream to downstream.

EPA seeks information on "whether there are specific types of activities, geographic regions, types of waterbodies, or other types of circumstances, etc., which may support the Agency establishing a categorical determination that the quality of no neighboring jurisdiction's waters may be affected by discharge in such circumstances." For the reasons discussed in the immediately preceding section of these comments, and in addition to any other categorical determinations that may be warranted, a categorical determination that no EPA notice is required under CWA Paragraph 401(a)(2) when there are no waters of the United States in the neighboring jurisdiction downstream of the discharge. In those circumstances, the discharge cannot affect the quality of any such waters. Similarly, a discharge that does not add pollutants to waters of the United States, but merely passes them unchanged from upstream to downstream, does not affect the quality of any waters in a neighboring jurisdiction and can be categorically excluded from the EPA notice required by Paragraph 401(a)(2).

5 & 6. Additional comments.

EPA also seeks information on stakeholder experiences with the 2023 Rule and suggestions for improvements. Section III of these comments includes additional information and suggestions for improvements in EPA's Section 401 regulations.

III. Additional Information and Suggestions for Improvements in EPA's Section 401 Regulations

NHA's 2019 comments, which accompany these comments, describe at length the Section 401 difficulties and certifying authority overreach that hydropower facilities faced prior to the adoption of the 2020 Rule. This section summarizes those comments in light of the 2023 Rule and suggests clarifications to improve the 2020 Rule.

A. Implementation of the Scope of Certification

Sections II.1 and II.2 describe why EPA should restore the scope of certification reflected in the 2020 Rule. This section suggests improvements in the 2020 Rule that would provide greater regulatory certainty in implementing the proper scope of certification.

1. *Federal Agency Review of Certification Decisions*

To better implement the scope of Section 401, NHA and NWHA request that the reinstated 2020 Rule expressly allow the federal licensing or permitting agency to:

(1) determine that the certifying authority has waived certification if the denial of certification is for reasons outside the scope of certification and

(2) reject a certification condition that is based on reasons outside the scope of certification.

The 2020 Rule required the certifying authority to include in a denial of certification the "specific water quality requirements with which the discharge will not comply," a "statement explaining why the discharge will not comply with the identified water quality requirements," and, "[i]f the denial is due to insufficient information, . . . the specific water quality data or information, if any, that would be needed to assure that the discharge . . . will comply with water quality requirements."[52] Similarly, the 2020 Rule required certifications with conditions to include a "statement explaining why the condition is necessary to assure that the discharge . . . will comply with water quality requirements" and a "citation to federal, state, or tribal law that authorizes the condition."[53] The rule further authorized the federal licensing or permitting agency to determine that certification or a certification condition had been waived if these explanations were not included.[54] But, if the explanations were included, the 2020 Rule did not authorize the federal agency to determine that certification or certification conditions had been waived if the federal agency concluded that the denial or conditions were outside the scope of certification.

Federal licensing and permitting agencies have an obligation to verify that the requirements of Section 401 have been met.[55] The authority to reject certification denials and conditions that are outside the scope of certification is needed to prevent certifying authorities from simply asserting

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[52] Section 121.7(e)(1); 85 Fed. Reg. 42,286 (July 13, 2020).

[53] Section 121.7(d)(1); 85 Fed. Reg. 42,286 (July 13, 2020).

[54] Section 121.9(a)(2)(iii), (b); 85 Fed. Reg. 42,286 (July 13, 2020).

[55] *See, e.g., City of Tacoma v. FERC*, 460 F.3d 53, 67-69 (D.C. Cir. 2006) (holding that FERC was required to verify that a certification was issued following public notice and comment, as required by CWA Paragraph 401(a)(1)). Although the court in *American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997), held that federal agencies have no authority to reject a certification condition even if the condition is beyond the scope of Section 401, *see* 129 F.3d at 107-11, *American Rivers* did not sufficiently distinguish certification conditions that are beyond the scope of Section 401 from those with which the federal agency merely disagrees. In the analogous circumstance of FPA Subsection 4(e), 16 U.S.C. § 797(e), which authorizes federal agencies to prescribe license conditions to protect federal reservations that they manage, the U.S. Supreme Court has held that FERC has the authority to reject conditions that exceed the scope of Subsection 4(e), while holding that it has no authority to reject conditions that are within the scope of that subsection. *See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-84 (1984) (holding that the prescriptive conditioning authority under Subsection 4(e) does not extend to the protection of federal reservations on which a licensed project is not physically located). Similarly, federal agencies should have the authority to reject certification denials or conditions that are outside the scope of certification of Section 401.

that they have acted within the scope of certification, which would delay issuance of the federal license or permit by forcing the applicant to challenge the certification decision through the state's administrative or judicial appeals process. By allowing the federal agency to determine whether a denial of certification or certification condition is within the scope of certification, any dispute regarding that can be resolved through the federal licensing or permitting process, rather than through an additional and separate state appeal process.

2. *Clarification of the Scope of Certification*

Although the 2020 Rule appropriately describes the scope of certification under Section 401, there may still be uncertainty in applying the scope of certification to specific discharges, particularly those associated with hydropower projects. This is because, unlike discharges from manufacturing plants and wastewater treatment facilities, which add wastewater to a waterbody, the principal discharges from a hydropower project consist of water that is already in a waterbody and that flows through the project into the same or another waterbody downstream. The water flowing into a hydropower project may already be polluted, and this may create uncertainty regarding whether water quality problems downstream are properly attributable to discharges from the hydropower project. In addition, because hydropower projects are generally located at least in part within a waterbody, there may be uncertainty regarding what effects are attributable to a project's discharges and what effects are attributable to other elements of a project that are beyond the scope of Section 401. The following examples illustrate these potential uncertainties.

- Pollutants from upstream sources, such as agricultural runoff, flow into a hydropower project's reservoir, where they settle into the reservoir's sediments and eventually are discharged through the project's dam into the river downstream. The pollutants cause exceedances of water quality standards in both the reservoir and the river downstream. The certification from the certifying authority includes conditions requiring the project to remove the contaminated reservoir sediments and to treat the water flowing through the dam to remove the pollutants in the discharge.

These conditions should be beyond the scope of certification because the water quality problems that they address are not attributable to a discharge from the project but instead are attributable to upstream discharges. The water quality problems in the reservoir are not associated at all with a discharge from the project, and the project did not contribute the pollutants in either the reservoir sediments or the discharge.

- A certification condition requires a hydropower project to construct a fish ladder to enable fish to move upriver past the project. The certifying authority argues that, as a designated use of the waterbody, the fish are an element of the state's EPA-approved water quality standards, and fish passage is necessary to ensure that the project complies with the standards.

The condition should be beyond the scope of certification because it attempts to regulate the activity as a whole, *i.e.*, the existence of the dam in the stream, and not the discharge into waters of the United States from the dam. Whether the project must construct a fish ladder, however, is

well within FERC's licensing authority under the FPA, and FERC must specifically consider the recommendations of state and federal fish and wildlife agencies for such a requirement.[56] In addition, the USFWS and NMFS may prescribe license conditions requiring the construction, maintenance, and operation of fish ladders and other "fishways" under FPA Section 18.[57]

- A certification condition requires a hydropower project to maintain a specified minimum flow in the river within or downstream of the project in order to provide or maintain physical habitat for fish. The certifying authority argues that: discharges from the project control the flow in the river downstream; as a designated use of the waterbody, the fish are an element of the state's EPA-approved water quality standards; and the condition is necessary to ensure that discharges from the project comply with the standards by providing sufficient habitat for fish.

The condition should be beyond the scope of certification because lower flows in the river within and downstream of the project are not attributable to discharges from the project, but instead to diversions or impoundments of the river by the project.[58] Put another way, addressing the effects of hydromodification on a stream is not within the scope of Section 401. Such a "minimum flow" condition, however, would be well within FERC's licensing authority under the FPA.[59]

- A certification includes conditions that require a hydropower project to address elevated temperatures and low dissolved oxygen concentrations in the project's reservoir that are attributable to a combination of heat, nutrients, and other pollutants entering the reservoir and the project's impoundment of water to create the reservoir.

These conditions should be beyond the scope of certification because they are not attributable to discharges from the project, but to other elements of the project and upstream pollutants flowing into the project. Again, however, these issues are well within FERC's hydropower licensing authority under the FPA.[60]

On the other hand, certification conditions that are addressed to the quality of the water discharged by a hydropower project, where that quality is attributable to the discharge, should generally be within the scope of certification. For example, if a hydropower project's turbines create concentrations of dissolved gas in the discharge that do not meet water quality standards established pursuant to CWA Section 303 in the river downstream, a certification condition

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[56] *See* 16 U.S.C. § 803(a), (j).

[57] *See* 16 U.S.C. § 811. A fish ladder is also not a point source effluent limitation under the CWA, including CWA Sections 301, 302, 303, 306, or 307. *See* 33 U.S.C. § 1362(11) (an "effluent limitation" is "any restriction established by a State or [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources").

[58] *Cf. North Carolina v. FERC*, 112 F.3d 1175, 1185-89 (D.C. Cir. 1997) (a license amendment that results in a reduced discharge is not subject to Section 401).

[59] *See* 16 U.S.C. § 797(e).

[60] *See id.*

requiring the project to address the elevated concentrations of dissolved gas should generally be within the scope of certification.

To further clarify the scope of certification in these and other circumstances, NHA and NWHA request that Section 121.3 of the 2020 Rule be reinstated with the following clarifications, so that the section would read as follows:

> The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements. Effects that are not within the scope of certification include, but are not limited to:
>
> (a) Effects caused by the presence of pollutants in a discharge that are not attributable to the discharge from the Federally licensed or permitted activity;
>
> (b) Effects attributable to features of the Federally licensed or permitted activity other than the discharge; or
>
> (c) Effects caused by the absence or reduction of a discharge, including effects attributable to the diversion or impoundment of water.

B. Timely Certification Decisions

Section 401 requires certifying authorities to act promptly on requests for certification: "If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."[61] Several elements of the 2020 Rule ensured timely certification decisions, including: a simple and objective definition of a "certification request" to prevent certifying authorities from delaying the start of the reasonable period for acting on a request by deeming the request to be "incomplete"[62]; provisions for the federal licensing or permitting agency to establish the reasonable period of time, either categorically or case-by-case[63]; and provisions requiring the certifying authority to deny, grant, grant with conditions, or waive certification within the reasonable period of time.[64] NHA and NWHA support the reinstatement of these provisions.

The 2023 Rule is particularly troubling with respect to timely certification decisions because it requires a request for certification to include a broad range of subjectively defined information, as well as any other information "relevant to water quality-related impacts from the activity" that

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[61] 33 U.S.C. § 1341(a)(1).

[62] Section 121.5; 85 Fed. Reg. 42,285 (July 13, 2020).

[63] Section 121.6; 85 Fed. Reg. 42,285-86 (July 13, 2020).

[64] Sections 121.7, 121.9; 85 Fed. Reg. 42,286 (July 13, 2020).

the certifying authority identifies prior to the request for certification being made.[65] In addition to requiring information in the request that is beyond the scope of certification, the broad and subjective information requirements provide the certifying authority with an opportunity to indefinitely delay certification decisions by deeming requests to be incomplete. Section 401, however, does not require that any information be included in a request beyond the request itself. As described by the United States Court of Appeals for the Second Circuit:

> The plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification "shall not exceed one year" after "receipt of such request." It does not specify that this time limit applies only for "complete" applications. If the statute required "complete" applications, states could blur this bright-line rule into a subjective standard, dictating that applications are "complete" only when state agencies decide that they have all the information they need.[66]

The 2023 Rule also omits the 2020 Rule's prohibition on the certifying authority requesting the applicant to withdraw and resubmit a certification request as a means of extending the period for acting on a certification request beyond the statutorily allowed "reasonable period."[67] In addition to reinstating this provision of the 2020 Rule, EPA should also expressly ban the practice of some certifying authorities of denying certification "without prejudice" in order to force the applicant to resubmit its certification request. To the extent that a denial without prejudice is intended to be anything other than a final, appealable decision to deny certification for a reason within the scope of certification, it is inconsistent with Section 401's requirement to act on a request for certification within a reasonable period not to exceed one year and should be expressly prohibited.

C. Post-Certification Actions

1. *Modification of Certification Decisions or Conditions*

The 2020 Rule does not expressly address modifications of certification decisions or conditions. The 2023 Rule authorizes the certifying authority to modify a grant of certification (with or without conditions) if the federal licensing or permitting agency agrees in writing "upon [the] portions of the certification" that may be modified.[68] The certifying authority, however, "is not required to obtain the Federal agency's agreement on the language of the modification."[69]

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[65] *See* 40 C.F.R. § 121.5(b), (c).

[66] *N.Y. State Dep't of Env't Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018).

[67] Section 121.6(e); 85 Fed. Reg. 42,286 (July 13, 2020).

[68] 40 C.F.R. § 121.10(a).

[69] *Id.*

Furthermore, the 2023 Rule prohibits a certifying authority from revoking a grant of certification or changing a grant of certification into a denial or waiver of certification.[70]

EPA should revise the 2023 Rule's modification provisions to allow a modification to certification conditions (including adding certification conditions) only if the federal licensing or permitting agency agrees with the specific language of the modification by modifying the federal license or permit to incorporate the revised language through the federal agency's license or permit modification process. Any other modification of the certification or certification conditions would be inconsistent with Section 401's requirement that certifying authorities act on a request for certification within a reasonable time and not to exceed one year from the request for certification.

For similar reasons, EPA should expressly prohibit "reopener" and similar certification conditions that purport to authorize the certifying authority to modify its certification decision or certification conditions. Again, such conditions are inconsistent with Section 401's requirement that certifying authorities act on a request for certification within a reasonable time and not to exceed one year from the request for certification.

2. *Enforcement of Certification Conditions*

The 2020 Rule states, "The Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit."[71] The 2023 Rule does not include this statement or any other reference to the enforcement of certification conditions.

There is no authority under Section 401 or elsewhere in the CWA for any entity except the federal licensing or permitting agency to enforce certification conditions. Section 401 provides that certification conditions "shall become a condition on any Federal license or permit" that is subject to Section 401,[72] and thereby provides for their enforcement by the federal agency through the federal license or permit in the same manner and to the same extent as other license or permit conditions.

Some certifying authorities and third parties, however, assert that they also have the authority under the CWA to enforce certification conditions. To clarify the enforcement authority for certification conditions, EPA should expressly provide in its Section 401 rules that certification conditions may not be independently enforced pursuant to the CWA. Rather, the conditions may be enforced only after they are incorporated into the federal license or permit and only in the same manner as the other conditions of the federal license or permit. For example, certification conditions that are incorporated into a FERC license may be enforced pursuant to the FPA in the same manner as any other license conditions. But there is no authority *under the CWA* to enforce

[70] *Id.* § 121.10(b).

[71] Section 121.11(c); 85 Fed Reg. 42,287 (July 13, 2020).

[72] 33 U.S.C. § 1341(d).

certification conditions, either before or after they are incorporated into a federal license or permit.[73]

If certification conditions were enforceable under the CWA independently of the federal license or permit into which they are incorporated, there would have been no need for Congress to direct, in Subsection 401(d), that such conditions "shall become" conditions of the federal license or permit. The conditions could simply be enforced directly. Section 401, however, makes no provision for enforcing certification conditions apart from their incorporation into the federal license or permit. Nor does any other provision of the CWA authorize enforcement of certification conditions. The CWA's principal enforcement provision, Section 309, authorizes state, EPA, and U.S. Army Corps of Engineers enforcement of specific provisions of the CWA, but it makes no mention of Section 401.[74] The CWA's citizen suit provision, Section 505, authorizes a citizen suit to enforce the *requirement* for a certification, but it does not authorize a citizen suit to enforce certification *conditions*.[75]

The enforcement of certification conditions independently of their incorporation into a federal license or permit would also raise many legal and practical difficulties. For example, certification conditions could be enforced even before they were incorporated into a federal license or permit.[76] Moreover, the certifying authority could add or modify conditions after the issuance of the federal license or permit and then enforce the added or modified conditions regardless of whether they were incorporated into the federal license or permit. Not only would this result in separate and potentially inconsistent conditions, it would allow certifying authorities to circumvent Section 401's deadline for issuing certification decisions. And even if independently enforceable conditions were limited to those incorporated into the federal license or permit,

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[73] *But see Deschutes River Alliance v. Portland General Elec. Co.*, 249 F. Supp. 3d 1182 (D. Or. 2017) (holding that certification conditions may be enforced through the CWA's citizen suit provision, 33 U.S.C. § 1365) (order denying motion to dismiss). For the reasons discussed in the text and following footnotes, NHA and NWHA respectfully disagree with this decision.

[74] *See* 33 U.S.C. § 1319.

[75] *See* 33 U.S.C. § 1365(a)(1), (f)(5). CWA Paragraph 505(a)(1) authorizes a citizen suit "against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under [the CWA]." *Id.*, §1365(a)(1). For purposes of a citizen suit, the CWA defines an "effluent standard or limitation" to include "certification under section 1341 of this title [CWA Section 401]." *Id.*, § 1365(f)(5). Although this provision authorizes enforcement of the requirement for "certification under section [401]," *see, e.g.*, *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998) (holding that a citizen suit could be used to challenge the U.S. Forest Service's issuance of a permit without an allegedly required Section 401 certification), it makes no reference to the enforcement of certification *conditions*. *But see Deschutes River Alliance*, 249 F. Supp. 3d at 1193. By contrast, the citizen suit provision authorizes enforcement of "a permit *or condition thereof* issued under [CWA] section [402]." 33 U.S.C. § 1365(f)(6) (emphasis added). This demonstrates that, had Congress intended to authorize citizen enforcement of both the certification requirement and the conditions of a certification, it would have expressly referred to the enforcement of certification conditions.

[76] In at least one recent instance, a certifying authority has sought to enforce certification conditions during the period before they were incorporated into a federal license. *See* Feb. 11, 2025, Letter from Andrea Claros, FERC, to Randal Dorman, Brookfield Renewable, Regarding Response to January 10, 2025, Inquiry Regarding New Hampshire Water Quality Certification Effective Date (Errol Hydroelectric Project; FERC Project No. 3133-033).

inconsistent enforcement and interpretation of the conditions could still result, thereby undermining and interfering with the authority of the federal agency to enforce the conditions of its own licenses and permits. It is essential, then, that EPA's Section 401 rules unequivocally provide that certification conditions may only be enforced after they are incorporated into the federal license or permit and only in the same manner and to the same extent as the other conditions of the federal license or permit.

IV. CONCLUSION

NHA and NWHA greatly appreciate EPA's solicitation and consideration of these comments and its continuing efforts to address the unique aspects of the application of Section 401 to the licensing of hydropower facilities under the FPA. For consistency with Section 401 and to ensure regulatory certainty for the hydropower industry, which provides the low-cost, reliable energy needed to support a growing and innovative economy, NHA and NWHA urge EPA to quickly adopt an interim final rule that repeals the 2023 Rule and replaces it with the 2020 Rule with the clarifications described above.

Sincerely,

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