

February 17, 2026

Via Email and Federal eRulemaking Portal

Lauren Kasparek
Environmental Protection Agency
Oceans, Wetlands, and Communities Division
Office of Water
1200 Pennsylvania Avenue NW
Washington, DC 20460
OW-Docket@epa.gov
cwa401@epa.gov

Re: Comments on Proposed Clean Water Act Section 401 Rule, Docket No. EPA-HQ-OW-2025-2929

Dear Ms. Kasparek:

For nearly fifty years, environmental authorities implemented Section 401 of the Clean Water Act as Congress intended. To be sure, parties sometimes sought judicial recourse over project-specific applications of Section 401 but overall, the regulatory system in place from 1971–2020 worked—water quality improved, and the economy grew. Now, the Environmental Protection Agency (“EPA”) is embarking on its third rulemaking in six years—a 2020 Rule that upended decades of regulatory stability, a 2023 Rule that restored important aspects of the prior regime, and now a 2026 proposed rule (the “Proposed Rule”)¹ that reinstates portions of the 2020 Rule. At the outset, we want to be clear about what the Proposed Rule will and will not do.

The Proposed Rule *will not* change project approval timelines; it leaves in place the existing time period to act on Section 401 certification requests. The Proposed Rule will not change the number of projects that trigger Section 401’s requirements. The Proposed Rule will not result in fewer certification denials—only 0.8% of projects have been denied Section 401 certification under the 2023 Rule. In fact, the Proposed Rule risks *increasing* the number of denials as certifying authorities are left with fewer options to address pollution from proposed federally licensed and permitted projects. The Proposed Rule does not provide regulatory certainty; if anything, revising these rules yet again further undermines regulatory stability. The Proposed Rule does not respond to public concerns. In 2025, EPA sought feedback on

¹ U.S. EPA, Updating the Water Quality Certification Regulations, 91 Fed. Reg. 2,008 (proposed Jan. 15, 2026) (to be codified at 40 C.F.R. pt. 121).

implementation of its 2023 Rule.² The vast majority of commenters asked EPA to keep the 2023 Rule in place; even industry groups supporting the Proposed Rule were unable to point to serious on-the-ground problems under the 2023 Rule. Finally, the Proposed Rule will not—and cannot—shut the door to any perceived abuses of Section 401 in individual projects. Recourse for project-specific misuse of Section 401 remains in the courts, not the Code of Federal Regulations.

On the other hand, the Proposed Rule *will* take power from states and tribes, arrogating authority in the hands of agency officials in Washington, D.C. and making it much harder to ensure that federally permitted or licensed projects do not pollute rivers, lakes, and streams important to American communities, families, and wildlife. EPA’s best available data shows that of the more than 95% of projects evaluated by states and tribes under the 2023 Rule that were issued certification,³ almost 70% of those were approved with conditions added to protect water quality. The crux of the Proposed Rule is that it will make it harder or impossible for states and tribes to incorporate those conditions in the future. The result will be poorer water quality, poorer fish and wildlife habitat, and poorer health for Americans.

These harms are compounded by EPA’s parallel effort to reduce the geographic scope of the Clean Water Act by redefining—yet again—Waters of the United States.⁴ The combined effect will be that as fewer waterbodies are protected at all under the Clean Water Act, in turn, fewer projects will trigger the Clean Water Act’s Section 401 certification requirements and, for those that do, states and tribes will have markedly reduced ability to ensure those projects do not pollute our water.

So why propose this new Section 401 rule? Because EPA expects the Proposed Rule “to result in net cost savings” for project developers that need federal licenses or permits.⁵ Indeed, EPA concedes the “benefits [of the Proposed Rule] may be essentially zero” except for “cost savings.”⁶

This rulemaking is a waste of agency resources and public taxpayer dollars. It is an ideological solution in search of a problem. EPA nowhere points to problems with the 2023 Rule that justify this rulemaking. Worse, the rulemaking violates the Clean Water Act, Administrative Procedure Act, and binding Supreme Court precedent. By enabling increased unchecked

² U.S. EPA, Hearings, Meetings, Proceedings, etc.: Implementation Challenges Associated with Clean Water Act Section 401, Docket ID No. EPA-HQ-OW-2025-0272-0001 (July 7, 2025), <https://www.regulations.gov/document/EPA-HQ-OW-2025-0272-0001>.

³ As stated above, less than 1% were denied, with certification waived in the remainder.

⁴ See U.S. EPA, Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52,498 (proposed Nov. 20, 2025).

⁵ U.S. EPA, Economic Analysis for the Proposed Updating the Water Quality Certification Regulations 29 (Jan. 2026) (“Proposed Rule Economic Analysis”).

⁶ *Id.*

pollution of our streams, rivers, lakes, and wetlands, it will ultimately increase the costs borne by ordinary Americans and their communities, businesses, and local and state governments, while damaging economically, culturally, and recreationally important resources. On behalf of SELC and the following 99 groups, we respectfully ask EPA to abandon the Proposed Rule:

Alabama Rivers Alliance	Friends of the Reedy River
Altamaha Riverkeeper	Friends of the Rivers of Virginia
American Whitewater	Georgia Interfaith Power and Light
Amigos Bravos	Georgia Rivers
Bayou City Waterkeeper	Good Stewards of Rockingham
Birds Georgia	Great Egg Harbor Watershed Association
Black Warrior Riverkeeper	Harpeth Conservancy
Black-Sampit Riverkeeper	Haw River Assembly
Blue Water Baltimore	Inland Empire Waterkeeper
Buffalo River Watershed Alliance	Izaak Walton League of America
California Sportfishing Protection Alliance	Kentucky Resources Council, Inc.
Cape Fear River Watch	Lake Watch of Lake Martin
Carolina Wetlands Association	Lower Susquehanna Riverkeeper Association
Catawba Riverkeeper Foundation	Lynnhaven River NOW (LRNow)
Center for Biological Diversity	Michigan Lakes and Streams Association
Center for Food Safety	Mill Creek Alliance
Charles River Watershed Association	Mobile Baykeeper
Charleston Waterkeeper	MountainTrue
Chattahoochee Riverkeeper	NAACP - North Carolina State Conference
Chesapeake Bay Foundation	Nature Adventures, LLC
Choctawhatchee Riverkeeper	Nature Forward
Clean Water Action	New Jersey Conservation Foundation
Cleo Stubbs	North Carolina Conservation Network
Coastal Carolina Riverwatch	North Carolina League of Conservation Voters
Coastal Plain Conservation Group	North Carolina Wildlife Federation
Congaree Riverkeeper	Northern Virginia Bird Alliance
Connecticut River Conservancy	NY/NJ Baykeeper
Conservation Council for Hawai'i	Ogeechee Riverkeeper
Conservation Law Foundation	One Hundred Miles
Coosa River Basin Initiative	Orange County Coastkeeper
Coosa Riverkeeper	Pasa Sustainable Agriculture
Dan River Basin Association	Pee Dee-Lynches Riverkeeper
Defenders of Wildlife	Protect Our Aquifer
Endangered Habitats League	
Flint Riverkeeper, Inc.	
Food & Water Watch	
Freshwater Future	

Public Employees for Environmental
Responsibility
River Guardian Foundation
Satilla Riverkeeper
Savannah Riverkeeper
Save Our Saluda
Save the Sound
Science for Georgia, Inc
Snake River Waterkeeper
Sound Rivers
South Carolina Coastal Conservation
League
South Carolina Environmental Law
Project
South Carolina Native Plant Society
SouthWings
Suncoast Waterkeeper

Surfrider Foundation
Tennessee Citizens for Wilderness
Planning
Tennessee Environmental Council
Tennessee Riverkeeper
Tennessee Scenic River Association
The Clinch Coalition
Upstate Forever
Vermont Natural Resources Council
Virginia Conservation Network
Waccamaw Riverkeeper
Waterkeepers Chesapeake
Wetlands Watch
Wild Virginia
Winyah Rivers Alliance
Yadkin Riverkeeper

I. Background

A. The Clean Water Act

Before the Clean Water Act, Congress regulated water pollution through two primary mechanisms. First, the Rivers and Harbors Act of 1899 prohibited the “discharge” of “any refuse matter of any kind or description whatever . . . into any navigable water of the United States.”⁷ Second, in 1948 Congress enacted the Federal Water Pollution Control Act⁸ which it amended in 1956, 1961, and eventually 1965 to require states to promulgate and implement water quality standards.⁹ Water quality standards were intended to “protect the public health or welfare, enhance the quality of water and serve the purposes of [the Federal Water Pollution Control Act],”¹⁰ which included “enhanc[ing] the quality and value of our water resources and [] establish[ing] a national policy for the prevention, control, and abatement of water pollution.”¹¹

Unfortunately, Congress’s mandate to implement water quality standards quickly ran into the “strange and embarrassing” problem that the federal government itself was sometimes “a culprit with considerable responsibility” for pollution that compromised state water quality

⁷ 33 U.S.C. § 407.

⁸ P.L. 80-845, 62 Stat. 1155 (June 30, 1948), attached as Exhibit 1.

⁹ P.L. 89-234, 79 Stat. 903 (Oct. 2, 1965), attached as Exhibit 2.

¹⁰ *Id.* at 908.

¹¹ *Id.* at 903.

requirements.¹² The problem was caused by federal agencies who were issuing licenses and permits “without any assurance that [water quality] standards [would] be met or even considered.”¹³ This pushed states, industry and conservation groups, and the public to “question[] the justification for requiring compliance with water quality standards” if federal agencies ignored them.¹⁴

Congress responded in 1970 by enacting Section 21(b) of the Federal Water Pollution Control Act, which required 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 . . . [to obtain] a certification from the State in which the discharge originates or will originate . . . that there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards.”¹⁵ The next year, EPA promulgated regulations implementing that requirement.¹⁶ Those regulations required authorities to certify that a federally permitted or licensed “activity . . . will not violate applicable water quality standards.”¹⁷ Importantly for purposes of Section 401, the scope of Section 21(b) and its implementing regulations was the licensed or permitted activity as a whole.

Despite a sustained effort to arrest the country’s water quality problems—enacting legislation in 1948, 1956, 1961, 1965, and 1970—Congress remained dissatisfied until 1972 when it passed the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁸ Critically, the Clean Water Act did not abandon Congress’s earlier efforts to control water pollution but instead built upon its prior approaches under the Rivers and Harbors Act and Federal Water Pollution Control Act.¹⁹

Expanding upon the existing water quality standard requirements, Congress established in the Clean Water Act a “national goal that wherever attainable an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.”²⁰ The requirement to promulgate

¹² See 115 Cong. Rec. 9011, 9030 (Apr. 15, 1969), attached as Exhibit 3.

¹³ S. Rep. No. 91–351, at 3 (Aug. 7, 1969), attached as Exhibit 4.

¹⁴ *Id.* at 7.

¹⁵ P.L. 91-224, 84 Stat. 91 (Apr. 3, 1970), attached as Exhibit 5.

¹⁶ See U.S. EPA, Water Quality Certification Rule, 36 Fed. Reg. 8,545, 8,563 (May 8, 1971), attached as Exhibit 6.

¹⁷ See 36 Fed. Reg. at 22,488 (Nov. 25, 1971) (labeled § 115.21) (codified at 40 C.F.R. § 121.2(a)(3)) (1971), attached as Exhibit 7.

¹⁸ P.L. 92-500, 86 Stat. 816 (Oct. 18, 1972) (codified at 33 U.S.C. § 1251(a)), attached as Exhibit 8.

¹⁹ See, e.g., *S.D. Warren Co. v. Maine Bd. of Env’t Prot.*, 547 U.S. 370, 380 (2006) (noting that the 1972 Clean Water Act was “enacted to consolidate and ease the administration of some predecessor regulatory schemes”).

²⁰ P.L. 92-500, 86 Stat. 816 (Oct. 18, 1972) (codified at 33 U.S.C. § 1251(a)(2)).

and implement state water quality standards was moved to Section 303 of the Clean Water Act where it remains today.²¹

Congress also determined that “the Federal Water Pollution Control Act and the permit program initiated by the Corps of Engineers under the authority of the [Rivers and Harbors] Act . . . needed to be consolidated.”²² Congress’s solution was to make unlawful “the discharge of any pollutant” without a permit²³ and to establish a separate “national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.”²⁴ Congress limited this permitting program to discharges from “point source[s].”²⁵ Thus, the Clean Water Act included baseline protections implemented through water quality standards and separately prohibited the unpermitted discharge of pollutants from point sources.²⁶ Both regulatory approaches, in addition to other requirements under the Clean Water Act, worked toward “restor[ing] and maintain[ing] . . . the Nation’s waters.”²⁷

Congress also incorporated Section 21(b) of the Federal Water Pollution Control Act into the Clean Water Act. Recodified as Section 401, it is “substantially section 21(b) of the [Federal Water Pollution Control Act] amended to assure that it conforms and is consistent with the new requirements.”²⁸ Section 401 requires any “applicant for a Federal license or permit to conduct any activity[,] . . . which may result in any discharge into the navigable waters, [to] 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 [the Clean Water Act].”²⁹ Certifying authorities must act on any request for certification “within a reasonable period of time.”³⁰ Ultimately, any “certification provided . . . 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, standard of performance under section 1316 of this title, or prohibition, effluent standard, or

²¹ See 33 U.S.C. § 1313; see also H.R. Rep. No. 92-911, at 104 (Mar. 11, 1972) (explaining that “Section 303 continues the use of water quality standards”), attached as Exhibit 9.

²² H.R. Rep. No. 92-911, at 124 (Mar. 11, 1972); see also *Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356, 358 (5th Cir. 2012) (“The [Section 404] permit framework largely preserves the Corps’ historical responsibilities for the navigable waters of the United States” under the Rivers and Harbors Act).

²³ P.L. 92-500, 86 Stat. 816 (Oct. 18, 1972) (codified at 33 U.S.C. § 1311(a)).

²⁴ *Id.* (codified at 33 U.S.C. § 1251(a)(1)).

²⁵ *Id.* (codified at 33 U.S.C. § 1362(12)).

²⁶ See *Env’t Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976) (noting that the 1972 Clean Water Act focused on point source limitations “as well as achieving acceptable water quality standards”).

²⁷ 33 U.S.C. § 1251(a).

²⁸ H.R. Rep. No. 92-911, at 121 (Mar. 11, 1972).

²⁹ 33 U.S.C. § 1341(a)(1).

³⁰ *Id.*

pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification.”³¹ If a State or Tribe denies a Section 401 certification, the federal permit or license may not issue in its proposed form.³²

As noted above, Section 401 was implemented successfully for nearly fifty years under this statutory language and EPA’s 1971 regulations, making significant progress toward maintaining and restoring the Nation’s waters and securing important benefits for the public and wildlife. Examples of implementation of Section 401 as a tool to maintain and restore the Nation’s waters include:

- Within the Chesapeake Bay watershed, Section 401 provides States with a critical tool in their efforts as part of the federal-state partnership working to restore and protect the Bay and its tributaries. In 2025, the seven Chesapeake Bay jurisdictions and EPA recommitted to the Chesapeake Bay Watershed Agreement, including its goal to “[r]educe pollutants entering the Bay and its rivers to achieve the water quality necessary to support aquatic life and wildlife, and support human health.”³³ States issue Section 401 certifications every year conditioning permits in support of these goals, whether for general permits, like Maryland’s certification of the Chesapeake Bay Total Maximum Daily Load Regional General Permit for “activities that provide nutrient and sediment reductions,”³⁴ or for individual projects, exemplifying the importance of states’ activity-as-a-whole review and conditioning of significant projects.³⁵ The Chesapeake Bay states, in collaboration with EPA, have invested significant resources to reduce pollution runoff and address water quality problems in the Chesapeake Bay watershed.³⁶ While these investments have led to notable progress on many Bay Agreement goals, the 2025 pollution-reduction deadlines were not met, meaning efforts to reduce pollution in the

³¹ *Id.* § 1341(d).

³² *Id.* § 1341(a).

³³ Chesapeake Bay Program, Chesapeake Bay Watershed Agreement (2025), *available at* <https://www.chesapeakebay.net/files/documents/CBWA-2025-IV-Final-Facing.pdf>, attached as Exhibit 10.

³⁴ Maryland Dep’t of the Env’t, Water Quality Certification & Coastal Zone Consistency Determination, Chesapeake Bay Total Maximum Daily Load Regional General Permit Reissuance, NAB-2019-00527 (July 1, 2020), *available at* https://mde.maryland.gov/programs/water/WetlandsandWaterways/Documents/WQC/FINAL_WQCRGP_July.pdf, attached as Exhibit 11.

³⁵ *See, e.g.*, Atlantic Coast Pipeline, LLC, Section 401 Water Quality Certification No. 17-002, Va. Dep’t of Env’t Quality 4-9 (Dec. 20, 2017) (supplemental 401 certification developed by Virginia DEQ to address water quality impacts from the “upland” activities associated with construction of the proposed Atlantic Coast Pipeline), attached as Exhibit 12.

³⁶ *See, e.g.*, *Funding*, Chesapeake Progress, <https://www.chesapeakeprogress.com/funding> (outlining “state and federal funding reported through the Office of Management and Budget as part of the Chesapeake Bay Accountability and Recovery Act” and linking to report that “state and federal partners budgeted approximately \$2 billion for watershed restoration in fiscal 2024”).

watershed are ongoing.³⁷ Robust Section 401 review with the ability to condition permits is a critical tool for Chesapeake Bay states to address and mitigate pollution, including both point and nonpoint source pollution, from projects that would otherwise threaten to undermine progress toward Chesapeake Bay restoration.

- North Carolina, Virginia, and Georgia have all relied on Section 401 certification to protect riparian buffers, preserving vegetation bordering waterbodies to protect them from pollution and other threats.³⁸
- Georgia and South Carolina used their authority under Section 401 to add conditions to the expansion and deepening of the Savannah Harbor navigation channel for access by supersized ships. The harbor is sixteen miles upriver from the Atlantic Ocean and directly adjacent to the Savannah National Wildlife Refuge. The conditions include requirements to monitor saltwater intrusion into the drinking water aquifer; prevent disruption of striped bass spawning, an economically important game species, and require construction of a fish ladder; mitigate dissolved oxygen reductions; and mitigate harm to wetlands and marshes.³⁹
- Lake Murray Dam (also known as the Dreher Shoals or Saluda Dam) on South Carolina's Saluda River provides hydropower generation and controls the vast majority of flow in the ten miles of the Lower Saluda River running from the dam to the Lower Saluda's confluence with the Broad and Congaree Rivers, a reach designated as a state scenic river.⁴⁰ In addition to Lake Murray's and the Lower Saluda River's popularity for boating, paddling, kayaking, tubing, paddle boarding, and swimming, the cold water released from the deep lake's bottom through the dam supports a popular and valuable trout fishery.⁴¹ In response to stocked trout dying by late summer due to low dissolved oxygen levels and elevated water temperatures, South Carolina included in its Section 401 certification for the Federal Energy Regulatory Commission's relicensing of the dam a condition requiring the dam operator to make modifications allowing it to meet South

³⁷ See, e.g., Chesapeake Bay Program, Chesapeake Bay Watershed Agreement at 13 (2025) (“Through 2030, signatories will continue to accelerate completion of all interim water quality planning targets through implementation of Chesapeake Bay Watershed Implementation Plans, two-year milestone commitments and other innovative strategies to achieve and maintain reduced levels of nitrogen, phosphorus, and sediment.”).

³⁸ U.S. EPA, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes at 18-19, 21 (2010), attached as Exhibit 13.

³⁹ See Letter from Heather Preston, S.C. Dep't of Health and Env't Control, to U.S. Army Corps of Eng'rs, Certification in Accordance with Section 401 of the Clean Water Act, as amended, at 16-24 (Nov. 15, 2011), attached as Exhibit 14; Letter from Allen Barnes, Ga. Dep't of Nat. Res., to Col. Jeffrey Hall, U.S. Army Corps of Eng'rs, Water Quality Certification, 1-9 (Feb. 16, 2011), attached as Exhibit 15.

⁴⁰ See *Lower Saluda River*, Congaree Riverkeeper, <http://www.congareeriverkeeper.org/lower-saluda-river> (last visited Feb. 11, 2026).

⁴¹ See *id.*

Carolina’s dissolved oxygen standards and minimum flow requirements,⁴² maintaining and enhancing a one-of-a-kind fishery: “. . . Spanish moss hangs in palmetto trees within sight of the river The lower Saluda is one of the few places in the entire Southeast where an angler can catch a rainbow trout and a striper on alternating casts.”⁴³

Over that fifty-year period, the Supreme Court twice clarified the contours of Section 401. In 1986, the State of Washington imposed under Section 401 a “minimum stream flow requirement” to mitigate harm to salmon in the Dosewallips River in connection with a proposal to construct a new dam.⁴⁴ Arguing that Section 401 only allowed states to impose conditions related to specific “discharges,” not the federally permitted or licensed activity overall, the proposed dam owner challenged the conditions as outside the scope of Section 401. The Supreme Court resolved the dispute in *PUD No. 1 of Jefferson Cnty. v. Washington Dep’t of Ecology*, 511 U.S. 700 (1994).

In *PUD No. 1*, the Court “first determine[d] the scope of the State’s authority under § 401.”⁴⁵ The Court found that Section 401(d)—which provides that any certification shall set forth limitations “necessary to assure that *any applicant*” will comply with water quality requirements—“contradicts [the argument made by petitioners] that the State may only impose water quality limitations specifically tied to a ‘discharge.’”⁴⁶ The Court held that Section 401 “is most reasonably read as authorizing additional conditions and limitations on the activity as a whole.”⁴⁷ Notably, this matched the “scope” of authority under Section 21(b) of the Federal Water Pollution Control Act which Congress moved “substantially” to Section 401. The Supreme Court upheld the minimum stream flow requirement at issue in *PUD No. 1* as within this scope.⁴⁸

PUD No. 1 was discussed favorably in the Supreme Court’s second Section 401 case—*S.D. Warren Co. v. Maine Bd. of Env’t Prot.*, 547 U.S. 370 (2006). That case held that “discharge” as used in Section 401(a) was not limited to the discharge of pollutants from a point source and therefore water flowing out of a dam qualified as a Section 401(a) discharge.⁴⁹ The Court affirmed that the purpose of Section 401 was to ensure that a federally permitted or licensed “facility will comply with water quality standards”—not just a discharge.⁵⁰

⁴² S.C. Dep’t of Health and Env’t Control, Notice of Department Decision – Water Quality Certification, Continued Operation of the Saluda Hydroelectric Project (Sep. 27, 2010), attached as Exhibit 16.

⁴³ Richard Bernabe, “*Sub-Tropical*” Trout, CAROLINA SPORTSMAN (Aug. 2007), <https://www.carolinasportsman.com/content/sub-tropical-trout/> (last visited Feb. 11, 2026).

⁴⁴ *PUD No. 1 of Jefferson Cnty. v. Washington Dep’t of Ecology*, 511 U.S. 700, 709 (1994).

⁴⁵ *Id.* at 710.

⁴⁶ *Id.* at 711.

⁴⁷ *Id.* at 712.

⁴⁸ *Id.*

⁴⁹ *S.D. Warren Co. v. Maine Bd. of Env’t Prot.*, 547 U.S. 370, 375 (2006).

⁵⁰ *Id.* at 386.

In 2020, EPA for the first time revised its Section 401 regulations in response to Executive Order 13,868, which was issued to “encourage greater investment in energy infrastructure.”⁵¹ The 2020 Rule was an effort to, among other things, effectively overturn *PUD No. 1* by agency rulemaking fiat, abandoning the “activity as a whole” approach identified by the Supreme Court as the “most reasonabl[e] read[ing]” of Section 401 in favor of the “discharge-only” approach favored by the dissent in that case.⁵² The 2020 Rule was short lived. In 2021, a federal court found that the 2020 Rule reflected a “lack of reasoned decisionmaking,” including “apparent errors in the rule’s scope of certification,” and “indications that the rule contravene[d] the structure and purpose of the Clean Water Act.”⁵³

EPA issued a new Section 401 Rule in 2023 which reinstated important portions of the pre-2020 regulatory scheme including again aligning the scope of Section 401 with the majority opinion in *PUD No. 1*.⁵⁴ EPA is currently defending the 2023 Rule in federal district court in Louisiana.⁵⁵ Plaintiffs there concede that binding precedent forecloses their arguments regarding the scope of Section 401 but maintain that the “Supreme Court should repudiate . . . *PUD No. 1* at the first opportunity.”⁵⁶

In response to “feedback” from some of these same plaintiffs, EPA is now once again engaging in rulemaking under Section 401. A primary objective of the Proposed Rule is, once again, to reverse EPA’s longstanding practice and the reasoning of *PUD No. 1* by limiting the scope of Section 401 to “discharge only” rather than the “activity as a whole.”

B. The Administrative Procedure Act

Agency rulemakings like this are governed by the Administrative Procedure Act (“APA”).⁵⁷ “One of the basic procedural requirements [under the APA] is that an agency must give adequate reasons for its decisions.”⁵⁸ This requires agencies to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the

⁵¹ 91 Fed. Reg. at 2,014–15.

⁵² See U.S. EPA, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210, 42,231 (July 13, 2020), attached as Exhibit 17.

⁵³ *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013, 1026–27 (N.D. Cal. 2021), *rev’d and remanded*, 60 F.4th 583 (9th Cir. 2023).

⁵⁴ See generally U.S. EPA, Clean Water Act Section 401 Certification Rule, 88 Fed. Reg. 66,558 (Sept. 27, 2023), attached as Exhibit 18.

⁵⁵ *Louisiana v. U.S. EPA*, No. 23-CV-01714 (W.D. La.).

⁵⁶ *Louisiana v. U.S. EPA*, No. 23-CV-01714, Pls.’ Mem. Supp. Mot. Summ. J. at 5 (W.D. La. May 30, 2024), ECF No. 116-1.

⁵⁷ *Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (citation omitted) (“*State Farm*”).

⁵⁸ *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

facts found and the choice made.”⁵⁹ An agency has failed to meet that requirement if it “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁶⁰

To meet these standards, it is not enough for an agency to point to public comments in support of its decision without “explain[ing] what (if anything) it found persuasive in those comments.”⁶¹ It is also insufficient to simply implement a regulated entity’s preference.⁶²

Agencies may change policies, but they must “show that there are good reasons for the new policy.”⁶³ And when a “new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests” an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”⁶⁴

II. EPA’s attempt to limit the scope of Section 401 to “discharge only” violates the Clean Water Act and the APA.

At the core of EPA’s rulemaking is an effort to limit the scope of Section 401 to the “discharge only” as opposed to the “activity as a whole.” As explained below, the plain wording of the Clean Water Act, its legislative history, and binding Supreme Court precedent prevent EPA from embracing that interpretation. EPA’s effort to do so also violates the APA.

A. The plain wording of the Clean Water Act allows certifying authorities to impose conditions on an “activity as a whole.”

We start with the plain wording of the Clean Water Act which provides that, once the requirement for a Section 401 certification has been triggered by the potential for a discharge, certifying authorities may utilize the certification process to add conditions “to assure that any *applicant* for a Federal license or permit will comply with any applicable effluent limitations and other limitations [under the Clean Water Act] . . . and with any other appropriate requirement of State law.”⁶⁵ EPA asserts that “[t]he plain language of CWA section 401(a) directs States to certify that any discharge resulting from the proposed Federally licensed or permitted activity

⁵⁹ *State Farm*, 462 U.S. at 43 (cleaned up).

⁶⁰ *Id.*

⁶¹ *Encino Motorcars*, 579 U.S. at 223–24.

⁶² *See State Farm*, 463 U.S. at 49.

⁶³ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“*Fox Television*”).

⁶⁴ *Id.*

⁶⁵ 33 U.S.C. § 1341(d) (emphasis added).

will comply with the enumerated provisions of the CWA[,]”⁶⁶ but in truth the Clean Water Act requires a Section 401 certification only when an activity “*may* result in any discharge.”⁶⁷ It would be nonsensical to limit conditions to “discharges” when there is no requirement that a discharge must occur to trigger the section 401 certification requirement; instead, Section 401 is triggered when federally licensed or permitted projects pose the potential for a discharge, with Section 401 certification allowing states or tribes to condition the project overall to comply with water quality-related laws.

Congress’s use of different terms to describe (1) when a Section 401 certification is required and (2) the scope of conditions that can be imposed on a project once the need for certification has been established indicates that “discharge,” as used in Section 401(a)(1), means something different from “applicant,” as used in Section 401(d).⁶⁸ Contrary to EPA’s characterizations of the statutory language, Congress chose to allow certifying authorities to add conditions to “assure that any applicant”—not just any “discharge”—will comply with water quality-related laws, and EPA does not have authority to overrule that choice in its rulemaking.

B. Barring certifying authorities from imposing conditions on an “activity as a whole” is inconsistent with the purpose, structure, and legislative history of the Clean Water Act.

Next, EPA incorrectly asserts in its proposal that “the subject of the entire CWA section 401 process . . . is focused on discharges, not the broader activity,” and that “[t]he 1972 amendments to the CWA and related legislative history provide additional support” for this interpretation.⁶⁹ To the contrary, the series of laws passed by Congress, culminating in the 1972 Clean Water Act, indicate clearly that certifying authorities may impose conditions on the “activity as a whole.”

As explained above, Section 21(b) of the Federal Water Pollution Control Act—the 1970 precursor to today’s Section 401—required that any “applicant for a Federal license or permit . . . 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.”⁷⁰ To underscore, this requirement applied to the “activity,” not a discharge.

⁶⁶ 91 Fed. Reg. at 2,023.

⁶⁷ 33 U.S.C. § 1341(a)(1) (emphasis added).

⁶⁸ Compare 33 U.S.C. § 1341(a)(1) with § 1341(d); see *Transbrasil S.A. Linhas Aereas v. U.S. Dep’t of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986) (“[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings.” (quoting *Wilson v. Turnage*, 750 F.2d 1086, 1091 (D.C. Cir. 1984))).

⁶⁹ See 91 Fed. Reg. at 2,024.

⁷⁰ P.L. 92-224, § 21(b)(1), 84 Stat. 91, 108 (1970).

Two years later, in 1972, Congress enacted the Clean Water Act to protect the “chemical, physical, and biological integrity” of the Nation’s waters,⁷¹ and to advance that objective, it carried forward the 1970 certification requirement with “minor changes”⁷²—reorganized as Section 401—affirming states’ authority to condition and veto local projects that might otherwise obtain federal licensing, should the state find that the project would violate state laws related to water quality.⁷³ In so doing, Section 401 embodies the central purpose of the Clean Water Act, by ensuring that federal projects will not jeopardize the joint federal-state effort “to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”⁷⁴ In this way, Section 401 is a “primary mechanism[] through which states may exercise” their statutory role “as the prime bulwark in the effort to abate water pollution” from federally approved projects.⁷⁵

Within this structure, Section 401 serves “to assure that Federal licensing or permitting agencies cannot override state water quality requirements,”⁷⁶ and specifically to ensure “that a federally licensed or permitted *activity* . . . [is] certified to comply with State water quality standards” before its construction or operation.⁷⁷ That objective can never be fulfilled if states and tribes may not regulate the water quality effects of projects as a whole, and any other approach renders the text, structure, purpose, and legislative history of the Clean Water Act insensible as written.

C. The United States Supreme Court has decided the scope of certification under Section 401 and articulated its “best reading.”

In addition to the plain wording of the Clean Water Act and its legislative history, the U.S. Supreme Court has also confirmed that certifying authorities may impose conditions on the “activity as a whole.” In *PUD No. 1*, the Court held that the language of Section 401

⁷¹ 33 U.S.C. § 1251(a). Like its statutory predecessors, the Clean Water Act continues to authorize states to enact their own water quality standards, even if stricter than those required under federal law, 33 U.S.C. §§ 1313, 1311(b)(1)(C), 1370, and mandates that those standards be sufficient “to protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act]. Such standards shall be established taking into consideration [a waterway’s] use and value for public water supplies, propagation of fish and wildlife, recreation[] . . . and other purposes” *Id.* § 1313(c)(2)(A).

⁷² S. Deb. on S.2770 (Nov. 2, 1971), attached as Exhibit 19.

⁷³ *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

⁷⁴ 33 U.S.C. § 1251(a); *see also* *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (explaining that the Clean Water Act “anticipates a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” (quoting 33 U.S.C. § 1251(a))).

⁷⁵ *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 393–94 (D.C. Cir. 2017).

⁷⁶ S. Rep. No. 92-414, at 69 (1971), attached as Exhibit 20.

⁷⁷ H.R. Rep. No. 95-830, at 96 (1977) (emphasis added), attached as Exhibit 21.

“contradicts” the proposition “that [a] State may only impose water quality limitations specifically tied to a ‘discharge.’”⁷⁸

To restate, *PUD No. 1* considered whether stream flow requirements could be imposed under Section 401 even if those requirements were not connected to the “discharge” that triggered the need for a Section 401 certification. The Court employed a textualist approach to statutory interpretation and found that “§ 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”⁷⁹

While EPA characterizes the holding in *PUD No. 1* as a matter of “step two” *Chevron* deference,⁸⁰ the holding in that case did not turn on *Chevron*.⁸¹ To the contrary, the Court provided its “view of the statute,” not EPA’s regulations.⁸² Explained differently, the Court did not merely find EPA’s regulations, requiring that activities (as opposed to discharges alone) must comply with state water quality standards, to be a reasonable interpretation of the statute; rather, the Court interpreted the statute and held that because the language of Section 401(d) “refers to the compliance of the applicant, not the discharge[,]” that section “thus allows the State to impose ‘other limitations’ on the project in general to assure compliance with various provisions of the Clean Water Act and with ‘any other appropriate requirement of State law.’”⁸³ The Court “determine[d] the scope of the State’s authority under § 401”—full stop.⁸⁴ That scope is “the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”⁸⁵

EPA’s assertion that it is “not preclude[d] . . . from adopting a different interpretation” is correct only to the extent that any “different interpretation” it proffers is consistent with this binding precedent.⁸⁶ Unfortunately for EPA, that prohibits it from expressly adopting the

⁷⁸ *PUD No. 1*, 511 U.S. at 711.

⁷⁹ *Id.* at 712.

⁸⁰ See 91 Fed. Reg. at 2,025; *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

⁸¹ EPA admitted as much in its brief in support of its motion for summary judgment in defending the 2023 Rule: “. . . *PUD No. 1*’s holding did not depend on the deference framework of [*Chevron*, 467 U.S. 837 (1984)]” *Louisiana v. U.S. EPA*, No. 23-CV-01714, Defs.’ Mem. Supp. Cross-Mot. Summ. J. & Opp’n Pls.’ Mot. Summ. J. at 13 n.4 (W.D. La. July 30, 2024), ECF No. 128-1, attached as Ex. 22. Notably, EPA was not even a party to *PUD No. 1* and “[did] not seek deference for the EPA’s regulation in th[e] case.” *PUD No. 1*, 511 U.S. at 728-29 (Thomas, J. dissenting).

⁸² *PUD No. 1*, 511 U.S. at 712.

⁸³ *Id.* at 711.

⁸⁴ *Id.* at 710.

⁸⁵ *Id.* at 711.

⁸⁶ 91 Fed. Reg. at 2,025.

“discharge-only” position of the *dissent* in *PUD No. 1*.⁸⁷ “[I]t is axiomatic that Supreme Court dissents do not state controlling law.”⁸⁸

Nevertheless, EPA claims *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) gives it authority to embrace the discharge-only reasoning of the dissent in *PUD No. 1* as long as EPA claims that this is now the “best reading” of the statute, even if the Supreme Court previously disagreed.⁸⁹ EPA goes on to say that “[n]othing in *Loper Bright* changed the proposition that agencies may update their interpretations of the statutes that they implement, even interpretations previously upheld by a court as reasonable under *Chevron*, particularly to align the agency’s interpretation with the best reading of the statute.”⁹⁰ But as explained above, in *PUD No. 1* the Supreme Court interpreted the plain language of the Clean Water Act in reaching its holding that Section 401 authorizes states and tribes to review the entire activity, not just the triggering discharges. And critically, the Supreme Court held that “§ 401(d) is *most reasonably read* as authorizing additional conditions and limitations on the activity as a whole.”⁹¹ The most reasonable reading of a statute is “the best reading.” Thus, the Supreme Court has already provided the best reading of the scope of Section 401. Further, EPA *itself* has previously cited *Loper Bright* to argue that allowing the certifying authority to “review the entire activity to ensure that it will comply with the relevant water quality requirements” is “*the best reading* of the statutory text [and] is the reading the Supreme Court explicitly adopted.”⁹²

This unquestionably cannot be what the Supreme Court intended when it decided *Loper Bright*—that an agency could flip-flop between two diametrically opposed interpretations of the same statutory language so long as it uses the magic words “best reading” to justify its preference. EPA has already confirmed that *PUD No. 1* provides the “best reading” of Section 401 as required by *Loper Bright*. Its invocation of *Loper Bright* here carries no weight.

D. EPA’s policy change does not meet APA requirements.

Even if EPA’s discharge-only interpretation was allowable under the Clean Water Act (it is not), its rulemaking effort fails to comply with the APA for numerous reasons.

⁸⁷ See *id.*, n.37.; (citing *PUD No. 1*, 511 U.S. at 726-27 (Thomas, J., dissenting)).

⁸⁸ *Harrington v. United States*, 689 F.3d 124, 136 n.7 (2d Cir. 2012).

⁸⁹ 91 Fed. Reg. at 2,025 (citing *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024)).

⁹⁰ *Id.* (citations omitted).

⁹¹ *PUD No. 1*, 511 U.S. at 712 (emphasis added).

⁹² *Louisiana v. U.S. EPA*, No. 23-CV-01714, Defs.’ Mem. Supp. Cross-Mot. Summ. J. & Opp’n Pls.’ Mot. Summ. J. at 13 (W.D. La. July 30, 2024), ECF No. 128-1 (emphasis added), attached as Exhibit 22; see also *Louisiana v. U.S. EPA*, No. 23-CV-01714, Defs.’ Reply Supp. Cross-Mot. Summ. J. & Opp’n Pls.’ Mot. Summ. J. at 4–12 (W.D. La. October 30, 2024), ECF No. 146, attached as Exhibit 23

To start, EPA has not provided adequate reasons for its Proposed Rule.⁹³ The *only* reason EPA has provided is that *Loper Bright* “presents the Agency with a compelling reason to update its interpretation” because, according to EPA, its interpretation of Section 401 from 1971–2020 and 2023–2025 was not the “best reading” of the statute.⁹⁴ But as explained above, the Supreme Court has already confirmed the “most reasonabl[e] read[ing]” of the scope of Section 401—consistent with EPA’s longstanding interpretation.⁹⁵ And the most reasonable reading of Section 401 is the best reading. EPA cannot seriously argue otherwise.

Neither has EPA “examine[d] the relevant data and articulated . . . a rational connection between the facts found and the choice made.”⁹⁶ In fact, EPA has examined no facts. EPA has provided no examples of problematic application of the 2023 Rule that might justify this rulemaking. It has not even provided a basis to conclude that certifying authorities are not applying Section 401 in a way that EPA *would not* find objectionable. EPA has pointed to no problem on the ground that this rulemaking would address. Accordingly, EPA concludes that “the benefits [of the Proposed Rule] may be essentially zero.”⁹⁷

EPA has also “entirely failed to consider an important aspect of the problem”⁹⁸ in that its interpretation will enable water pollution, not “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁹⁹ On this point, EPA’s assertion that the Proposed Rule will “have no impact on environmental benefits” fails the straight-face test.¹⁰⁰ EPA makes two unconvincing attempts to justify this conclusion. First, it argues that its Proposed Rule will have “no appreciable impact” so long as states do not change their “water quality standards.”¹⁰¹ This makes no sense and is contradicted by other portions of the Proposed Rule, including EPA’s assertion that if water quality standards “address[] nonpoint source discharges . . . the State may [not] consider [those requirements] when acting on certification requests.”¹⁰² Thus, even if state water quality standards remain the same, EPA’s Proposed Rule is attempting to limit the factors that states or tribes may consider when assessing compliance with those standards. This will have an appreciably negative impact on water quality.¹⁰³

⁹³ *Encino Motorcars*, 579 U.S. at 221.

⁹⁴ 91 Fed. Reg. at 2,023.

⁹⁵ *PUD No. 1*, 511 U.S. at 712.

⁹⁶ *State Farm*, 462 U.S. at 43 (cleaned up).

⁹⁷ Proposed Rule Economic Analysis at 29.

⁹⁸ *State Farm*, 462 U.S. at 43 (cleaned up).

⁹⁹ P.L. 92-500, 86 Stat. 816 (Oct. 18, 1972) (codified at 33 U.S.C. § 1251(a)).

¹⁰⁰ Proposed Rule Economic Analysis at 28.

¹⁰¹ *Id.*

¹⁰² 91 Fed. Reg. at 2,027.

¹⁰³ *Compare* U.S. EPA, Economic Analysis for the Final Clean Water Act Section 401 Water Quality Certification Improvement Rule 59 (2023) (finding that the 2023 Rule “is anticipated to have positive environmental benefits, particularly incremental water quality improvements . . . relative to the 2020 Rule[.]”) (“2023 Rule Economic Analysis”), attached as Exhibit 24.

Reaching even further, EPA next argues that its Proposed Rule has no environmental impacts because “if courts were to have found that the EPA overstepped its authority in the 2023 Rule, then any supposed or perceived lower level of environmental quality [under the Proposed Rule] would in fact be illusory.”¹⁰⁴ Needless to say, no court found that. The hypothetical is the antithesis of reasoned decisionmaking.

Notably, EPA’s “no environmental impact” finding differs substantially from its finding that the 2023 Rule will have “noticeable water quality benefits” specifically because it abandoned the 2020 Rule’s discharge-only approach.¹⁰⁵ Because the Proposed Rule “rests upon factual findings that contradict those which underlay [the 2023 Rule],” EPA must “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”¹⁰⁶ The same is true when an agency’s “prior policy has engendered serious reliance interests”—as has EPA’s “activity as a whole” interpretation of the scope of Section 401 for all but three of the last fifty-five years.¹⁰⁷ EPA has not come close to meeting these requirements.

III. For similar reasons, EPA’s effort to redefine “water quality requirements” violates the Clean Water Act and APA.

As part of its effort to limit the scope of Section 401, EPA proposes defining “water quality requirements” as the “applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and applicable and appropriate state or tribal water quality related regulatory requirements for discharges.”¹⁰⁸ As explained by EPA, “water quality requirements . . . interprets the statutory phrase ‘other appropriate requirement of State law’ in . . . section 401(d).”¹⁰⁹ As compared to the 2023 Rule, this confines “other appropriate requirement[s] of state law” to only those laws that apply to “point source discharges.”¹¹⁰ EPA’s new definition violates the Clean Water Act for the same reasons discussed above regarding the “activity as a whole.” It also falls short for three additional reasons.

First, EPA’s position in the proposed rule is not supported by the plain wording of the Clean Water Act which allows states to impose conditions in Section 401 certifications to ensure compliance “with *any* other appropriate requirement of State law.”¹¹¹ The word “any” is best read as meaning what it says—“any.” The word “other” refers to requirements aside from the statutory provisions listed in the preceding list in Section 401(d). Nothing in this phrasing hints

¹⁰⁴ Proposed Rule Environmental Analysis at 29.

¹⁰⁵ See, e.g., 2023 Rule Economic Analysis at 40.

¹⁰⁶ *Fox Television*, 556 U.S. at 515.

¹⁰⁷ *Id.*

¹⁰⁸ 91 Fed. Reg. at 2,026.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2,027.

¹¹¹ 33 U.S.C. § 1341(d) (emphasis added).

that Congress intended to limit “appropriate requirement of State law” to only those requirements related to point source discharges.

Other provisions of Section 401(d) as applied by the Supreme Court confirm that subsection is not limited to point sources. Specifically, Section 401(d) allows certifying authorities to ensure compliance “with any applicable effluent limitations and other limitations, under section [301].”¹¹² “Section 301 in turn incorporates [Section] 303 by reference” and “at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to [Section] 303 are ‘appropriate’ requirements of state law.”¹¹³ Stated differently, “state water quality standards adopted pursuant to [Section] 303 are among the ‘other limitations’ with which a State may ensure compliance through the [Section] 401 certification process.”¹¹⁴

State water quality requirements adopted pursuant to Section 303 are not limited to point source discharges.¹¹⁵ Thus, Section 401(d) allows certifying authorities to impose conditions based on state law to protect water quality regardless of whether those conditions, or state water quality requirements, are related to point source discharges. State water quality requirements also frequently apply to waters that are not otherwise Waters of the United States,¹¹⁶ which can similarly be protected under Section 401.

EPA invokes the interpretive principle *ejusdem generis* to defend its new definition¹¹⁷ but EPA has previously explained that “[a]pplication of the maxim *ejusdem generis* . . . to limit ‘appropriate requirement of State law’ to only those state law provisions that impose discharge-

¹¹² *Id.*

¹¹³ *PUD No. 1*, 511 U.S. at 713.

¹¹⁴ *Id.*

¹¹⁵ See, e.g., *Pronsolino v. Nastri*, 291 F.3d 1123, 1132 (9th Cir. 2002) (finding that Section 303 water quality standards apply “to waters impaired by both point and nonpoint source pollution”); *Am. Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir. 2001) (explaining that nonpoint source pollution is addressed through Section 303 water quality standards); *Am. Farm Bureau Fed’n v. U.S. EPA*, 792 F.3d 281, 289 (3d Cir. 2015) (acknowledging states must go beyond “point-source pollution limitations . . . to make the water meet the applicable quality standard”); see also 88 Fed. Reg. at 66,603 n.68 (“Establishment of water quality standards is required for waters regardless of whether they receive point source discharges.”).

¹¹⁶ Many states have definitions of “state waters” or “waters of the state”—which state water quality standards apply to—broader than the federal definition of “waters of the United States.” See, e.g., Va. Code Ann. § 62.1-44.3 (“‘State waters’ means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.”); see also 9 Va. Admin. Code § 25-210-50(A) (“Except in compliance with a [Virginia Water Protection Permit] . . . no person shall . . . alter the physical, chemical, or biological properties of state waters . . . and make them detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses . . .”); Va. Code Ann. § 62.1-44.15:20(D) (“Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act . . .”).

¹¹⁷ 91 Fed. Reg. at 2,027.

related or point source-related restrictions is misplaced.”¹¹⁸ That is because the “list of [Clean Water Act] provisions referenced in sections 401(a)(1) and 401(d) includes section 303, which is *not* limited to regulating point-source discharges.”¹¹⁹ Consequently, “using *eiusdem generis* to interpret ‘any other appropriate requirement of State law’ to only apply to point sources is not consistent with congressional intent as expressed through the statutory text.”¹²⁰ *Eiusdem generis* is not a get-out-of-jail-free card and, frankly, EPA’s invocation of it here—after previously explaining that it does not apply—makes a mockery of interpretive principles. *Eiusdem generis* provides no reasoned basis for EPA’s decision.

Second, legislative history also does not support EPA’s interpretation. In addition to the legislative history discussed above, Congress explained that the “purpose of the [Section 401] certification mechanism . . . is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.”¹²¹ As explained throughout, those water quality requirements are not limited to point source discharges and in fact predate the primary limitations on point source discharges imposed in 1972.

Third, EPA’s effort to limit “appropriate requirements of State law” to requirements applicable to point source discharges fails because it is in excess of EPA’s rulemaking authority. EPA’s Clean Water Act rulemaking authority is limited to “prescrib[ing] such regulations as are necessary to carry out [EPA’s] functions under this chapter.”¹²² Section 401 is a grant of authority to states and tribes to ensure that federal projects do not compromise state or tribal water quality requirements. Indeed, the entire reason Section 401 was promulgated was because federally approved projects were violating state water quality standards. In Section 401, Congress decided to let states and tribes determine what was necessary to protect water quality under their jurisdiction, not EPA or other federal agencies. Because defining state law requirements is not a legitimate function of EPA under Section 401, it lacks rulemaking authority in this regard.

EPA asks for feedback on three additional issues related to the definition of “water quality requirements.” First, EPA asks “whether it should limit ‘water quality requirements’ to only numeric water quality criteria.”¹²³ It cannot do so. As explained above, Section 401 allows states to enforce water quality standards promulgated under Section 303 of the Clean Water Act. Water quality standards “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.”¹²⁴ Thus water quality standards are not limited to “numeric criteria.” Even the term “criteria” is not limited to “numeric criteria” but

¹¹⁸ 88 Fed. Reg. at 66,603.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ S. Rep. 92-414, at 69 (1971).

¹²² 33 U.S.C. § 1361(a).

¹²³ 91 Fed. Reg. at 2,027.

¹²⁴ 33 U.S.C. § 1313(c)(2)(A).

instead encompasses “constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.”¹²⁵ Notably, in *PUD No. 1* the Supreme Court considered and rejected the argument that “under [Section] 303 the State may only require that the project comply with specific numerical ‘criteria.’”¹²⁶ The Court found that interpretation “unreasonable.”¹²⁷

Second, EPA asks whether “other appropriate requirement of state law” should be limited to “State and Tribal regulatory requirements that implement the enumerated provisions of the [Clean Water Act] that appear in section 401(d).”¹²⁸ This would read “other” completely out of Section 401(d). If Congress intended “requirement of state law” to be limited to the provisions previously enumerated in Section 401(d), it could have done so. It didn’t. That means EPA can’t either.

Third, EPA asks whether “other appropriate requirement of state law” should be limited to “‘monitoring requirements’ for specific enumerated provisions of the [Clean Water Act]” in Section 301(d).¹²⁹ As explained by EPA, this “interpretation would rely principally on the placement of a comma after the phrase ‘effluent limitations and other limitations’ and before the phrase ‘and monitoring requirements’ in . . . section 401(d).”¹³⁰ This would appear to allow certifying authorities to ensure compliance with “[1] any effluent limitations and [2] other limitations, and [3] monitoring requirements.”¹³¹ Under this interpretation, there are no limiting principles for “other limitations.” Presumably, certifying authorities could impose the same conditions they are imposing today—and more—as “other limitations.” Given the other aims of the Proposed Rule, we doubt this is EPA’s intention, but it illustrates the flaws in its interpretation. Section 401(d) has never been interpreted this way and there is no basis—textual or otherwise—to start doing so now.

IV. EPA may not limit the contents of Section 401 certification requests.

Under the current Section 401 regulations, states and tribes have authority to define the contents of certification requests so long as those requirements are publicly identified before a request for certification is made.¹³² This makes good sense because those states and tribes must evaluate whether a proposed project complies with “appropriate requirement[s] of State law.”¹³³

¹²⁵ 40 C.F.R. § 131.3(b).

¹²⁶ *PUD No. 1*, 511 U.S. at 714.

¹²⁷ *Id.* at 717.

¹²⁸ 91 Fed. Reg. at 2,027.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See* 33 U.S.C. § 1341(d).

¹³² 40 C.F.R. § 121.5(c).

¹³³ 33 U.S.C. § 1341(d).

States and tribes are best positioned to know what information they need to implement that requirement. Nevertheless, the proposed rule takes away this authority and consolidates in EPA all authority to define the contents of certification requests. This power grab is unlawful as explained below.

At the most basic level, the proposed change is unlawful because, here too, EPA does not have rulemaking authority to prevent states and tribes from requiring that certain information be included in certification requests.¹³⁴ That is because defining for states and tribes the information *they need* included in certification requests is not one of *EPA's functions* under Section 401. To be sure, EPA can define the contents of certification requests *when EPA is the certifying authority*, but Congress has not given the agency authority to determine the information that states and tribes need to fulfill their separate obligations under Section 401. Thus, EPA's proposed change is outside the scope of its regulatory authority.

EPA provides several justifications for this change but none hold water. First, it argues the change is necessary to clarify when the “reasonable period of time” begins.¹³⁵ In support of this argument, it cites *New York State Dep't of Env't Conservation v. FERC*, which held that the reasonable period of time begins when a certifying authority receives a request for water quality certification, not when the certifying authority “deems” that request complete.¹³⁶ But as EPA elsewhere concedes, this case “did not address the separate question of whether EPA . . . [has] the authority to establish a list of required contents for a request in advance of the request.”¹³⁷ Nor does EPA's decision to prevent states and tribes from defining in advance the contents of certification requests address the issue *New York State Dep't of Env't Conservation* was most concerned about—allowing certifying authorities to subjectively determine when a request is complete. Ironically, certifying authorities may have more incentive under the Proposed Rule to subjectively determine that a project applicant has not, for example, provided “[a]ny readily available water quality-related materials”—which is required under proposed 40 C.F.R. § 121.5(b)—to buy time to obtain information that should have been provided with the certification request in the first place. In other words, EPA's proposed rule is likely to make subjective evaluation of certification requests worse, not better.

Next, EPA asserts that “[a]fter considering stakeholder input, the Agency has determined that EPA, and not certifying authorities, has the authority to establish a list of contents for a request for certification.”¹³⁸ We reviewed the publicly available “stakeholder input” and could only find one instance of a stakeholder raising this issue. Edison Electric Institute complained

¹³⁴ *Id.* § 1361(a).

¹³⁵ 91 Fed. Reg. at 2,017.

¹³⁶ 884 F.3d 450, 455 (2d Cir. 2018).

¹³⁷ 91 Fed. Reg. at 2,019.

¹³⁸ *Id.*

that the approach under the 2023 Rule of allowing “states and authorized Tribes . . . to define what must be included in a request for certification in their jurisdictions . . . has resulted in different certification requirements across states and authorized Tribes, eliminating uniformity, certainty, and predictability . . . for projects that cross multiple state and Tribal lines, such as critical energy linear infrastructure like transmission lines and pipelines.”¹³⁹ Edison Electric Institute favors only having “to file one unified application instead of multiple separate certifications with different requirements across several jurisdictions.”¹⁴⁰

Despite Edison Electric Institute’s preference, this comment provides no basis for EPA’s “determination” that it alone has authority to establish the contents of certification requests. Nor does this provide “a rational connection between the facts found” and EPA’s choice to prevent states and tribes from defining the contents of certification requests.¹⁴¹ This lack of reasoned decision making violates the APA.

Practically, we suspect what is most likely to happen under EPA’s proposed change is that certifying authorities will not have the information they need to process certification requests when the reasonable period of time starts. Even EPA concedes that its list of required contents “may not necessarily represent the totality of information a certifying authority may need to act on a request.”¹⁴² To be sure, certifying authorities can request that information from project applicants but those applicants will not have the same incentive to respond quickly and fully because the reasonable period of time would have already commenced. Stated differently, project applicants are incentivized to provide necessary information in order to start the reasonable period of time, less so if it has already begun. Ultimately, the change makes it more likely that certifying authorities will have to act on incomplete information—including potentially through certification denial—instead of getting the information they need to efficiently process requests upfront. In addition to the unlawfulness of EPA’s action, this makes little practical sense. EPA should abandon this change.

V. Section 401 applies to Section 404 general permits.

EPA requests comment on whether Section 401 is best read to apply to Section 404 general permits.¹⁴³ General permits do not have “applicants,” so says EPA, so they may not trigger Section 401 because Section 401(a) uses the word “applicant.”¹⁴⁴ This argument is wrong for at least six reasons.

¹³⁹ Letter from Patrick McGuire, Edison Electric Institute, to Lauren Kasparek, U.S. EPA 7 (Aug. 6, 2025).

¹⁴⁰ *Id.* at 8.

¹⁴¹ *State Farm*, 462 U.S. at 43 (cleaned up).

¹⁴² 91 Fed. Reg. at 2,018.

¹⁴³ *Id.* at 2,020-21.

¹⁴⁴ *Id.*

First, EPA’s interpretation does not track the language of Section 401. Section 401 is triggered when there is a “Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters.”¹⁴⁵ The word “applicant” describes who “shall provide the licensing or permitting agency a certification.”¹⁴⁶ “Applicant” is not a limitation on when Section 401 applies.

Second, it is incorrect that general permits categorically do not involve “applicants.” An “applicant” is someone “who requests something.”¹⁴⁷ In many cases, general permittees must “request” coverage under the permit before using it.¹⁴⁸ Accordingly, the Army Corps’ general permit regulations explain that in certain circumstances, the Corps “shall instruct the prospective permittee to *apply* for a . . . general permit.”¹⁴⁹ The Corps’ Section 404 nationwide general permits similarly recognize—repeatedly—that permittees are “applicants.”¹⁵⁰ And multiple cases have likewise recognized that general permits involve applicants.¹⁵¹ EPA cannot wordsmith around the fact that entities must often apply to receive coverage under a general permit.

Third, EPA’s argument cannot be squared with the legislative history of the Clean Water Act. When Congress authorized Section 404 general permits in 1977, it left Section 401 untouched.¹⁵² There is zero indication Congress believed it was creating a massive Section 401 loophole by authorizing the Section 404 general permit program. To the contrary, Congress concurrently enacted language stating “[n]othing in [Section 404] shall preclude or deny the right of any State . . . to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency.”¹⁵³ Courts reviewing this legislative history have confirmed that “[w]hen sections 401 and 404 are read together, their plain terms provide that the state certification requirement of

¹⁴⁵ 33 U.S.C. § 1341(a)(1).

¹⁴⁶ *Id.*

¹⁴⁷ *Applicant*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/applicant> (last visited Feb. 12, 2026).

¹⁴⁸ 33 C.F.R. § 330.6(a)(1).

¹⁴⁹ *Id.* § 330.1(d) (emphasis added).

¹⁵⁰ See generally U.S. Army Corps of Eng’rs, Reissuance and Modification of Nationwide Permits, 91 Fed. Reg. 768 (Jan. 8, 2026) (referring dozens of times to general permit “applicants”), attached as Exhibit 25.

¹⁵¹ See, e.g., *Sierra Club v. United States Army Corps of Eng’rs*, 909 F.3d 635, 640 (4th Cir. 2018) (referring to an entity seeking coverage under a general permit as “an applicant”); *Crutchfield v. Cnty. of Hanover, Virginia*, 325 F.3d 211, 213 (4th Cir. 2003) (same); *Sierra Club v. U.S. Army Corps of Eng’rs*, 464 F. Supp. 2d 1171, 1185 (M.D. Fla. 2006), *aff’d*, 508 F.3d 1332 (11th Cir. 2007) (same); *Sierra Club v. U.S. Army Corps of Eng’rs*, 935 F. Supp. 1556, 1582 (S.D. Ala. 1996) (same); *Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng’rs*, No. C10-1108-JCC, 2011 WL 1215605, at *4 (W.D. Wash. Mar. 30, 2011), *aff’d*, 683 F.3d 1155 (9th Cir. 2012) (same).

¹⁵² P.L. 95–217, 91 Stat. 1566 (Dec. 27, 1977), attached as Exhibit 26.

¹⁵³ *Id.*

section 401 applies to section 404(e) nationwide [general] permits in the same way that it applies to any other section 404 permit.”¹⁵⁴

Fourth, EPA’s reinterpretation of Section 401’s application to general permits violates the interpretive principle that “exceptions to a general proposition should be construed narrowly.”¹⁵⁵ Section 401’s general proposition is that a certification is required for any project involving a “[f]ederal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters.”¹⁵⁶ EPA’s interpretation creates an exception to that requirement for activities authorized under general permits. But over 94% of activities that require Army Corps permits each year are authorized using general permits.¹⁵⁷ Thus EPA’s interpretation would nearly eliminate Section 401 for Corps approvals. Because it “would swallow the rule” that Section 401 certifications are required for activities requiring Army Corps permits, the interpretation is invalid.¹⁵⁸

Fifth, there are significant unaddressed reliance interests regarding EPA’s prior application of Section 401 to general permits. For decades, EPA has applied Section 401 to general permits.¹⁵⁹ Certifying authorities, permittees, and the general public have all come to rely on that process to protect their interests. This is especially true where certifying authorities apply individual Section 401 certifications to Army Corps nationwide permits. As evidence of that reliance interest, groups frequently engage on Section 401 general certifications for Section 404 general permits¹⁶⁰ and litigate Section 401 certifications for general permits that they believe are unlawful.¹⁶¹ These “settled expectations should not be lightly disrupted” and EPA has provided no basis to do so here.¹⁶²

Sixth, and finally, because EPA has provided no substantive basis for excluding general permits from Section 401, it has not complied with basic requirements of APA rulemaking.¹⁶³ If

¹⁵⁴ *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 100 (1st Cir. 1989).

¹⁵⁵ *In re Woods*, 743 F.3d 689, 699 (10th Cir. 2014) (citing *Comm’r v. Clark*, 489 U.S. 726, 739 (1989)).

¹⁵⁶ 33 U.S.C. § 1341(a).

¹⁵⁷ See Proposed Rule Economic Analysis at 11.

¹⁵⁸ *Cuomo v. Clearing House Ass’n, LLC*, 557 U.S. 519, 530 (2009) (advising against statutory interpretations of exceptions that would “swallow the rule”).

¹⁵⁹ See, e.g., 91 Fed. Reg. at 2,012 (noting a prior agency assertion that “both case law and prior Agency rulemakings and guidance recognize that general Federal licenses or permits are subject to section 401 certification.”).

¹⁶⁰ See Letter from Patrick Hunter et al., Southern Environmental Law Center, to Paul Wojoski, N.C. Dep’t of Env’t Quality (Oct. 9, 2025), attached as Exhibit 27.

¹⁶¹ See, e.g., *Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018) (challenging Section 401 certification issued for nationwide permit).

¹⁶² *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

¹⁶³ See *Encino Motorcars*, 579 U.S. at 221; *State Farm*, 462 U.S. at 43 (cleaned up).

the agency proposes to move forward with this proposal—a serious mistake practically and legally—it must provide some reason for its decision and seek further public comment.

VI. EPA should not require certifying authorities and federal agencies to spend time and resources negotiating extensions to the reasonable period of time necessitated by force majeure events.

EPA’s proposed rule eliminates automatic extensions to the reasonable period of time necessitated by force majeure events.¹⁶⁴ Instead, certifying authorities will have to spend time, resources, and paperwork, negotiating any necessary extensions of time with the relevant federal agency. EPA has provided no reasoned basis for this change which, like its attempt to prevent certifying authorities from identifying the necessary contents of certification requests, appears mostly intended to limit certifying authorities’ ability to accomplish their responsibilities under Section 401.

EPA’s only attempt at justifying this change is to explain that it is responsive to a request from “*one industry stakeholder*” who argued that “certifying authorities should not be allowed to extend the reasonable period of time” despite “several State, Tribal, and public stakeholders support[] [for] extensions of the [reasonable period of time].”¹⁶⁵ Notably, we have been unable to find anything in the rulemaking record making a request related to force majeure events. More importantly, EPA suggests that any necessary extensions of time can be worked out between the certifying authority and federal agency “as necessary to address unforeseen events like . . . force majeure events.”¹⁶⁶ This appears to assume that the reasonable period of time will continue to be extended due to force majeure events. If that is correct, this change does nothing but generate unnecessary work between the certifying authority and federal agency. In other words, if a force majeure event will result in, for example, a 21-day extension to the reasonable period of time under the Proposed Rule and the 2023 Rule, then this change accomplishes nothing other than generate paperwork. However, what this change would enable is a federal agency to deny a request for an extension of time due to a force majeure event that would have automatically extended that timeline under the 2023 Rule. Thus, the practical outcome of this change is that it makes it less likely that certifying authorities will be able to fulfill their obligations under Section 401. The change is unnecessary and unjustified.¹⁶⁷

¹⁶⁴ See 91 Fed. Reg. at 2,021.

¹⁶⁵ *Id.* (emphasis added)

¹⁶⁶ *Id.*

¹⁶⁷ We also question whether EPA has rulemaking authority related to setting the reasonable period of time. Congress has authorized a reasonable period of time of up to one year. 33 U.S.C. § 1341(a)(1). Further limiting that period is not one of EPA’s “functions” under Section 401 and therefore it lacks rulemaking authority in that regard. See 33 U.S.C. § 1361(a). Certifying authorities can agree to shorter reasonable periods of time but EPA cannot force on them shorter time periods than Congress has authorized.

VII. EPA should not allow project applicants to veto necessary modifications to Section 401 certifications.

EPA's Proposed Rule also gives project applicants veto power over modifications to Section 401 certifications. Specifically, certifications may not be modified unless the project applicant agrees on the language of the modification.¹⁶⁸ Nowhere does the Clean Water Act contemplate that project applicants would play this role. As a result, the change violates the APA.¹⁶⁹

To recap, Section 401 prevents a federal agency from issuing a license or permit until a State or Tribe provides a certification or waives its authority to do so.¹⁷⁰ “No license or permit shall be granted if certification has been denied by the [certifying authority].”¹⁷¹ Nowhere does this process give project applicants a role in making final decisions regarding certifications. To be clear, we agree that this process works best when it is “collaborative”¹⁷² but EPA's proposed rule change goes far beyond collaboration—it gives project applicants veto authority over modified conditions in Section 401 certifications. Congress did not give project applicants that role in Section 401 whether related to initial or modified certifications. EPA cannot do the same by rulemaking here.

None of EPA's justifications for this change hold up. First, EPA suggests the change will prevent certifying authorities from avoiding or extending the reasonable period of time through modifications.¹⁷³ EPA has provided no evidence that this is a problem or happening at all. Nevertheless, the concern can be avoided by requiring certifying authorities to connect modifications to changes in project design or other conditions that were not apparent until after the State or Tribe made its initial certification decision. Aspects of the certification process are inherently prospective, and states or tribes must evaluate whether a project will comply with water quality requirements based on what they expect to happen. If reasonable expectations prove unfounded—for example, if a project has more intense impacts than expected despite the use of mitigation techniques, which threaten violations of water quality standards—certifying authorities should be able to adjust to those situations through modifications. In that instance, a modification would not be a clever attempt to escape the reasonable period of time.

Second, EPA suggests that modifications may be unnecessary in situations in which a federal license or permit is modified to the extent that it “trigger[s] the requirement for a new

¹⁶⁸ See 40 C.F.R. § 121.10(a) (proposed).

¹⁶⁹ *State Farm*, 462 U.S. at 43 (cleaned up).

¹⁷⁰ 33 U.S.C. § 1341(a)(1).

¹⁷¹ *Id.*

¹⁷² 91 Fed. Reg. at 2,031.

¹⁷³ See *id.*

certification.”¹⁷⁴ We agree a modification may be unnecessary in that instance. But that does not give EPA license to prohibit modification absent the approval of the project applicant in other situations.

Finally, EPA says the change is necessary “to provide a direct role for the applicant in the modification process.”¹⁷⁵ Here again, EPA takes a reasonable concept a step too far. We also agree that project applicants should be involved in modification decisions (as should the public). But giving project applicants veto authority—by prohibiting any modification that they do not agree to—is more than just providing them a “direct role.” EPA can require consultation with project applicants regarding modifications without requiring their “agreement on the language of the modification.”¹⁷⁶ Ultimately, because the Clean Water Act does not give project applicant’s this role in the Section 401 process, it must be stricken from the Proposed Rule.

VIII. EPA may not make categorical “may affect” determinations under Section 401(a)(2).

When a discharge in one state “may affect . . . the quality of waters” of another state, EPA is obligated under Section 401 to notify the state that “may” be affected.¹⁷⁷ In the Proposed Rule, EPA purports to give itself authority to make these determinations categorically rather than case-by-case.¹⁷⁸ Like other aspects of the Proposed Rule, EPA has not provided a reasoned basis for this change.

First, Section 401(a)(2) does not give EPA authority to make these determinations on a categorical basis. Accordingly, courts have recognized that Section 401(a)(2) requires EPA “to make a discrete factual determination”—not a categorical one.¹⁷⁹ Congress has elsewhere provided agencies authority to make categorical determinations.¹⁸⁰ It didn’t here which means EPA lacks that authority.

Second, “may affect” determinations depend on site-specific factors. Even stakeholders supporting this change say as much, explaining that factors such as “site-specific attenuation” are relevant to “may affect” determinations.¹⁸¹ Other site-specific factors would include, as examples, applicable water quality requirements across jurisdictions or the type of pollutants discharged as opposed to the quantity. Certainly, the specific locations of projects matter. The

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See* 40 C.F.R. § 121.10(a) (proposed).

¹⁷⁷ *See* 33 U.S.C. § 1341(a)(2).

¹⁷⁸ 91 Fed. Reg. at 2,034.

¹⁷⁹ *Fond du Lac Band of Lake Superior Chippewa v. Wheeler*, 519 F. Supp. 3d 549, 564 (D. Minn. 2021).

¹⁸⁰ *See, e.g.*, 42 U.S.C. § 4336c.

¹⁸¹ 91 Fed. Reg. at 2,034.

exact same project would entail significantly different impacts in Arizona as opposed to south Florida. There is no rational way for EPA to make categorical determinations while applying site-specific factors which EPA concedes are relevant.

Related, EPA's use of the U.S. Virgin Islands as an example of when a categorical determination may be appropriate is unconvincing. According to EPA, because of the "U.S. Virgin Island's location to other States and prevailing ocean currents, it would not make a may affect determination because any discharges would not reach any other States."¹⁸² That may be true but it provides no basis for making categorical determinations under Section 401(a)(2) more generally. The reasoning is particularly suspect given that of the 7,503 certification decisions on Army Corps permits from November 2023–September 2025, only three—0.04%—were in the U.S. Virgin Islands.¹⁸³ EPA's experience 0.04% of the time does not provide "good reasons" for its new policy.¹⁸⁴

To be sure, EPA may be able to make Section 401(a)(2) determinations more efficiently by considering some of the factors discussed in its proposed rule—such as proximity to hydrologically connected jurisdictions, as might be relevant to discharges on the U.S. Virgin Islands—but that does not mean it can categorically make those determinations. EPA's resources would be better spent developing internal Section 401(a)(2) guidance to apply to specific projects. Here, its attempt to expand its authority by rule does not comply with the Clean Water Act or APA.

IX. EPA misstates the requirements for qualifying for treatment in a similar manner as a State for purposes of Section 401 only.

EPA's 2023 Rule allows Tribes to qualify for "treatment in a similar manner as a State" solely for Section 401 purposes.¹⁸⁵ EPA's proposed rule removes that authority and instead directs Tribes to utilize the processes for administering a Clean Water Act water quality standards program.¹⁸⁶ We respectfully defer to the preferences of Tribal Nations on this issue but want to underscore two concerns.

First, EPA notes that the relevant provisions of the 2023 Rule were supported by "Tribes and Tribal associations" but are being rescinded at the behest of "[o]ne industry stakeholder."¹⁸⁷ Candidly, we are appalled that EPA views this as a sufficient basis to revoke this authority particularly since it was apparently supported by those most directly affected—Tribes.

¹⁸² *Id.*

¹⁸³ Proposed Rule Economic Analysis at 43.

¹⁸⁴ *Fox Television*, 556 U.S. at 515.

¹⁸⁵ See 40 C.F.R. § 121.11.

¹⁸⁶ 91 Fed. Reg. at 2,035.

¹⁸⁷ *Id.* at 2,036.

Second, EPA uses sleight of hand to assert that there is no additional burden for Tribes to obtain treatment in a similar manner as a State for purposes of administering a water quality program, as opposed to the same designation for Section 401 only, because both processes apply similar factors to tribal applications.¹⁸⁸ To obtain authority under Section 401, a Tribe is required to show it is “reasonably expected to be capable . . . of carrying out the functions of an effective water quality certification program.”¹⁸⁹ To obtain authority to administer a water quality standards program, which includes Section 401, a Tribe is required to show it is “reasonably expected to be capable . . . of carrying out the functions of an effective water quality standards program.”¹⁹⁰ The words are similar but the burden is not. It is significantly more burdensome to show you can operate a “water quality standards program” than only a “water quality certification program.” That is the reason Tribes were given authority to seek treatment in a similar manner as a State for the limited purpose of Section 401 in the first place. EPA must address this inconsistency in any final rule.

X. EPA unnecessarily introduces ambiguity into withdrawal of certification requests.

Finally, to address “impermissible withdrawal-and-resubmission schemes” where certifying authorities and project applicants agree to withdraw a pending certification request to reset the “reasonable period of time,” EPA proposes language stating that the “certifying authority may not request the applicant to withdraw a request for certification and may not take any action to extend the reasonable period of time other than specified in § 121.6(d).”¹⁹¹ We understand the prohibition on “requesting” applicants to withdraw certification requests¹⁹² but the remainder of this rule—“may not take any action to extend the reasonable period of time”—is superfluous and unnecessarily ambiguous. Nowhere in its Proposed Rule does EPA explain what “any action” entails in this context. Would it count if a certifying authority informed a project applicant that it was going to deny its certification request due to incomplete information? We certainly hope not. But the point is there is no need to introduce this ambiguity. As evidenced by any lack of explanation by EPA, it adds nothing to the Proposed Rule. EPA should strike “and may not take any action to extend the reasonable period of time other than specified in § 121.6(d)” from this section.¹⁹³

¹⁸⁸ *See id.*

¹⁸⁹ 40 C.F.R. § 121.11(a)(4).

¹⁹⁰ *Id.* § 131.8(a)(4).

¹⁹¹ *See* 40 C.F.R. § 121.6(e) (proposed).

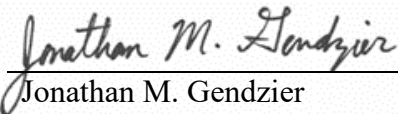
¹⁹² We do not understand this prohibition to apply to voluntary withdrawals.

¹⁹³ Here again, we question whether EPA has rulemaking authority to dictate what certifying authorities may or may not request of project applicants.

XI. Conclusion

Congress's iterative attempts to address the problem of unchecked pollution of the Nation's waters, including by federally licensed and permitted projects, culminated in the passage in 1972 of the Clean Water Act. Congress included Section 401 in the Clean Water Act to ensure states and tribes maintained their authority to require that project applicants comply with water quality standards and other state laws passed to protect water quality and water resources. States and tribes used Section 401 to do just that, for nearly fifty years, until the 2020 Rule stripped much of their lawful authority to review projects and include conditions in certifications to ensure water quality is protected. While the 2023 Rule restored key components of certifying authorities' ability to meaningfully utilize Section 401 for its congressionally intended purpose, the Proposed Rule follows in the footsteps of the ill-fated 2020 Rule. The Proposed Rule is contrary to the text of the Clean Water Act, contrary to Supreme Court precedent, and contrary to commonsense. We respectfully ask EPA to withdraw it.

Sincerely,



Jonathan M. Gendzier

Senior Attorney

SOUTHERN ENVIRONMENTAL LAW CENTER

120 Garrett Street, Suite 400

Charlottesville, VA 22902

Tel: (434) 977-4090

jgendzier@selc.org



Patrick Hunter

Senior Attorney

SOUTHERN ENVIRONMENTAL LAW CENTER

48 Patton Avenue, Suite 304

Asheville, NC 28801

Tel: (828) 258-2023

phunter@selc.org