February 17, 2026

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Lee Zeldin, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Environmental Protection Agency, Proposed Rule: "Updating the Water Quality Certification Regulations," 91 Fed. Reg. 2008 (Jan. 15, 2026) Docket ID No. EPA-HQ-OW-2025-2929.

Dear Administrator Zeldin,

On behalf of Waterkeeper Alliance and the undersigned U.S. Waterkeeper groups, and all of our respective members and supporters (collectively, "Commenters"), we respectfully submit these comments in response to EPA's Proposed Rule, signed on January 12 and published in the Federal Register on January 15, 2026, entitled "Updating the Water Quality Certification Regulations."[1]

As we explain herein, the Proposed Rule would harm public health, water quality, and wildlife, and would constitute arbitrary and capricious agency action, an abuse of discretion, and otherwise be unlawful. It would exceed EPA's statutory authority, would violate the plain, unambiguous requirements of the Federal Clean Water Act ("CWA"), the Administrative Procedure Act ("APA") and the Endangered Species Act ("ESA"), and would be inconsistent with decades of Supreme Court and myriad other judicial precedents. The Proposed Rule would irresponsibly and dangerously impede the ability of States, Tribes, the public, and even of other Federal agencies and EPA itself, to protect waters and ecosystems and people who rely on, use and enjoy them across the country. EPA must withdraw, and must never finalize, the Proposed Rule.

[1] 91 Fed. Reg. 2008 (January 15, 2026) ("Proposed Rule").

I. INTERESTS OF THE COMMENTERS

Waterkeeper Alliance is a not-for-profit environmental organization and a global movement dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable, and swimmable. We are composed of more than 300 community-based Waterkeeper groups that patrol and protect nearly six million miles of rivers, lakes, and coastlines in the Americas, Europe, Australia, Asia, and Africa. In the United States, Waterkeeper Alliance represents the interests of more than 150 U.S. Waterkeeper groups, as well as the interests of our more than one million collective members and supporters that live, work, and recreate in or near waterways across the country—many of which are severely impaired by pollution.

The CWA is the bedrock of our collective work in the United States to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of all of our members and supporters, as well as to protect people and communities that depend on clean water for drinking, sustenance fishing, recreation, their livelihoods and their survival. Our work – in which we have answered Congress' call for "private attorneys general" to enforce and defend the CWA when governmental entities lack the willingness or resources to do so themselves – requires us to develop and maintain scientific, technical and legal expertise on a broad range of water quality issues.

We understand, and have seen firsthand, the importance of robust State[2] and Tribal authority to review the potential impacts of proposed activities that require federal approvals, and to deny or condition water quality certifications where such projects or activities will violate State water quality standards or otherwise have unacceptable adverse impacts on State water quality and aquatic ecosystems. Preserving robust and undiluted State authority under Clean Water Act Section 401,[3] as it has been interpreted for decades by courts and by EPA under longstanding regulations and guidance,[4] and consistent with the Act's plain meaning, objective,

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[2] As used herein in relation to CWA § 401 authority, "States" is intended to include Tribes that have obtained section § 401 authority by obtaining Treatment As a State ("TAS") status. Dozens of Tribes currently maintain such TAS status. *See* EPA, *Tribes Approved for Treatment as a State (TAS)*, Dkt. ID No. EPA-HQ-OW-2025-2929-0012, available at: https://www.regulations.gov/document/EPA-HQ-OW-2025-2929-0012.

[3] 33 U.S.C. § 1341.

[4] *See* EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (2010) ("2010 Guidance") **(Attachment 1)**; EPA, *Wetlands and 401 Certification: Opportunities for States and Eligible Tribes* (1989) ("1989 Guidance") **(Attachment 2)**. We note that the 2010 Guidance was "withdrawn and rescinded" by EPA in 2019. EPA's withdrawn guidance is relevant to contrast EPA's Proposed Rule with its longstanding interpretations and previous administration of § 401

and intent, is critical to our collective work to protect public health and the nation's waterways and wildlife from dangerous pollution.

As discussed in more detail below, Commenters and their members have substantial interests in clean water for drinking, recreation, fishing, economic growth, food production, and other beneficial uses, and have participated and engaged for decades in a plethora of public processes involving Section 401 certification requests to protect our watersheds and communities from pollution.[5] These interests will be severely injured if the agencies finalize the Proposed Rule, which would dramatically weaken the authority directly granted by Congress to the States. As explained below, finalizing the proposed changes to the Section 401 regulations would: (1) be irrational, arbitrary, capricious, an abuse of discretion, and contrary to law, (2) unlawfully reduce and diminish the ability of States, Tribes, and the public to protect their water resources contrary to the CWA and in excess of the agency's statutory authority, and (3) violate the APA and the ESA.

II. SECTION 401 OF THE CLEAN WATER ACT

After decades of widespread and serious water pollution and public health problems across the nation, Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[6] To achieve this objective, the Act explicitly prohibits the "discharge of any pollutant by any person,"[7] and defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."[8] Since 1972, EPA has had Federal responsibility for advancing the Act's objective, as well as its national goal "of eliminating all discharges of pollutants into navigable waters by 1985," and the "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 . . . by 1983."[9]

While Congress clearly intended when it passed the CWA in 1972 to establish "an all-encompassing program of water pollution regulation," and to "occup[y] the field through the

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from 1972 through 2019, when the first Trump administration undertook the first effort in the history of the CWA to weaken Section 401 to advance the President's "Energy Dominance Agenda."

[5] For specific examples of longstanding reliance on CWA Section 401 and engagement in Section 401 proceedings and litigation by many of the Commenters, *see infra* Section VI.

[6] 33 U.S.C. § 1251(a).

[7] *Id.* § 1311(a).

[8] *Id.* § 1362(12).

[9] *Id*. § 1251(a).

establishment of a comprehensive regulatory program supervised by an expert administrative agency,"[10] the Act was not intended by Congress to eliminate the role of States in water pollution control, regulation, and enforcement in the United States. Rather, the Act incorporates a cooperative federalism framework such that, despite the creation of new Federal regulatory, permitting, and enforcement regimes to establish minimum standards and provide a "floor" to protect and preserve all of the nation's waters, *i.e.*, the "waters of the United States," the States would continue to have a "primary responsibility" "to prevent, reduce, and eliminate pollution"[11] utilizing those regimes, standards, and more stringent state laws within their borders.[12]

Perhaps the most explicit and concrete step that Congress took to respect the continuing "primary" role of the States when it passed the CWA in 1972 was to include Section 401, which codified into Federal law and directly granted very specific authority that would continue[13] to be held by the States through a mandatory water quality certification process that is legally binding upon the Federal government, including EPA:

> "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, 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. … If the State ... 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. ***No license or permit shall be granted until the certification required by this section has been obtained or has been waived*** as provided in the preceding sentence. ***No license or permit shall be granted if certification has been denied by the State***…."[14]

[10] *Milwaukee v. Illinois*, 451 U.S. 304, 317-18 (1981).

[11] 33 U.S.C. § 1251(b).

[12] *See* 33 U.S.C. §§ 1251(b), 1311(b)(1)(c), 1370.

[13] State water quality certification authority pre-existed the CWA under the Water Quality Improvement Act of 1970, § 103. *See S.D. Warren v. Maine Bd. of Envt'l Protection*, 547 U.S. 370, 374 (2006) ("*S.D. Warren*") .

[14] 33 U.S.C. § 1341(a) (emphasis added). The cited CWA provisions include a State's effluent limitations, 33 U.S.C. §§ 1311, 1312; water quality standards and implementation plans, *id*. § 1313; national standards of performance, *id*. § 1316; and toxic and pretreatment standards, *id*. § 1317.

In addition to delegating directly to the States powerful Federal statutory authority to determine whether to grant or deny a request for a Section 401 water quality certification that would bind Federal agencies, Congress also granted States extremely broad authority to issue certifications that require satisfaction by applicants of specific conditions to protect water resources. The language that Congress chose plainly and unambiguously demonstrates that such conditioned certificates are entirely within the purview of the States, and that conditions required by a State in a water quality certification "shall" become binding requirements in the related 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, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, ***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."[15]

These powerful delegations of authority by Congress directly to the States in Sections 401(a) and (d) could not be more direct or plain. As a unanimous Supreme Court explained in *S.D. Warren v. Maine Bd. of Envt'l Protection*:[16]

> "State certifications under § 401 ***are essential in the scheme to preserve state authority to address the broad range of pollution***, as Senator Muskie explained on the floor when what is now Section 401 was first proposed:
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> > 'No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments ***in facilities*** under a Federal license or permit ***without providing assurance that the facility will comply*** with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.' 116 Cong. Rec. 8984 (1970).

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[15] 33 U.S.C. § 1341(d) (emphasis added).

[16] 547 U.S. 370 (2006). All of the Justices joined the entirety of the *S.D. Warren* opinion with the exception of Justice Scalia, who joined as to all except Part III-C.

> ***These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law***," 33 U.S.C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge, *ibid*."[17]

As discussed in greater detail below, *S.D. Warren* is just one of many rulings by the Supreme Court and other Federal and State courts that have considered the extent of State Section 401 authority and decisions and consistently held that such authority to deny or condition water quality certifications belongs exclusively to the States and Tribes and is extremely broad. Generally, as long as Section 401 certification denials and conditions are rationally connected to protecting water resources, including enforcing State water quality standards, antidegradation policies, and maintenance of designated uses, or impose other State law-based water quality considerations such as mitigation requirements, they have been upheld by courts across the United States as appropriate and valid exercises of the States' and Tribes' exclusive federal statutory authority.[18]

Notwithstanding the above-quoted unambiguously expressed intent of Congress that the authority to make Section 401 decisions is held by the States alone – not by the President, EPA, or other federal executive agencies – and myriad court cases holding that Section 401 provides the States with exclusive authority to "veto"[19] federal approvals of projects when States

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[17] *Id*. at 386 (emphasis added) (citations omitted).

[18] *See, e.g.*, *S.D. Warren*, 547 U.S. 370, 385-86 (2006) (discussing the importance Congress identified in the CWA of respecting the States' concerns, and unanimously upholding State authority to require minimum stream flows and migratory fish passage); *P.U.D. No 1 of Jefferson Cty v. Wa. Dep't of Ecology*, 511 U.S. 700, 715 (1994) (hereafter "*P.U.D.*") (upholding State authority to include conditions in a 401 certification that the State determined were necessary to protect and comply with water quality standards "or any other 'appropriate requirement of State law,'" and explaining that "under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 645-49 (4th Cir. 2018) (hereafter "*Sierra Club*"); *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 731-34 (4th Cir. 2009).

[19] *See, e.g.*, *Constitution Pipeline Co. v. N.Y. Dep't of Envt'l Conserv.*, 868 F.3d 87, 101 (2d Cir. 2017) ("Thus, we have indeed referred to § 401 as 'a statutory scheme whereby a single state agency ***effectively vetoes*** an energy pipeline that has secured approval from a host of other federal and state agencies.'") (citing cases) (emphasis in original); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (explaining that through Section 401, Congress intended that the states would retain power to "***block, for environmental reasons***, local water projects that might otherwise win federal approval") (emphasis added); *U.S. v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989) ("*Marathon Dev.*") ("The legislative history of section 401 of the Act ("Certification") confirms that ***Congress intended to give the***

rationally determine that the proposed activities may unacceptably affect state water resources, EPA now attempts, for all intents and purposes, to rewrite the statute and upend decades of precedent. EPA attempts to defend its effort to weaken States' and Tribes' authority to protect their water resources by claiming that it is merely seeking to "better align its regulations with the text and legislative history of the CWA, increase transparency, efficiency, and predictability for certifying authorities and the regulated community, and to ensure States and authorized Tribes understand and adhere to their section 401 role."[20] EPA remarkably, but not surprisingly, fails to mention any effort to more effectively achieve the CWA's objective through this rulemaking. Indeed, EPA has made clear in public statements what it is actually trying to accomplish through this deregulatory effort to constrain States' and Tribes' statutory authority to protect their waters, *i.e.*, ***"to support energy, critical mineral, and infrastructure projects that are key to economic growth and Power the Great American Comeback."***[21] These intentions clearly driving this rulemaking are wholly improper in light of EPA's mission "to protect human health and the environment,"[22] and the objective of the CWA "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[23]

EPA also argues that it seeks to provide "transparency, efficiency, and predictability for certifying authorities and the regulated community,"[24] but the overlapping, draconian changes that EPA now proposes to the interpretation and administration of Section 401 would reverse and overrule decades of consistent interpretations of plain and unambiguous statutory requirements, and would dramatically weaken State and Tribal authority under the Act, contrary to law. EPA wholly lacks statutory authority to misappropriate State powers by adopting far-fetched interpretations of the Clean Water Act that are contrary to its plain statutory language, as well as to longstanding Supreme Court and other judicial precedent.

States and Tribes rely every day on CWA Section 401 to protect their waters, the public, and wildlife from dangerous water pollution. While fossil fuel energy infrastructure projects have

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states veto power over the grant of federal permit authority for activities potentially affecting a state's water quality.") (emphasis added).

[20] Proposed Rule, 91 Fed. Reg. at 2016.

[21] *See* EPA, *EPA Reinforces Alignment of Clean Water Act Section 401 with "Powering the Great American Comeback" Initiative* (May 22, 2025), available at https://www.epa.gov/newsreleases/epa-reinforces-alignment-clean-water-act-section-401-powering-great-american-comeback (emphasis added). **(Attachment 3)**

[22] EPA, *Our Mission and What We Do*, available at https://www.epa.gov/aboutepa/our-mission-and-what-we-do.

[23] 33 U.S.C. § 1251(a).

[24] Proposed Rule, 91 Fed. Reg. at 2008-09.

become politically controversial in recent years and have been referenced in the past by President Trump and EPA as the impetus for efforts to weaken Section 401 authority,[25] many other types of projects and activities also require Federal licenses or permits and have the potential to discharge. As such, weakening Section 401 authority would not be limited to energy infrastructure projects. Some examples of activities and projects that generally require Section 401 certifications, listed here with typically corresponding Federal licensing agencies, include without limitation:

- Interstate gas pipelines – FERC, Army Corps of Engineers
- Hydroelectric dams/facilities – FERC
- Other dams and diversions (water storage and supply, etc.) – Department of Interior, Army Corps of Engineers, Fish and Wildlife Service
- Data centers – Army Corps of Engineers, FERC, EPA (in some states)
- Nuclear power plant licensing/relicensing – Nuclear Regulatory Commission
- Bridge/highway construction – Federal Highway Administration, Army Corps of Engineers, Coast Guard
- CWA discharges of pollutants - All NPDES permits (POTWs, power plants, industrial discharges, etc. – EPA (in non-NPDES-delegated states)
- Commercial and housing developments - Army Corps of Engineers
- Coal and other federally regulated mining projects - Department of Interior, Army Corps of Engineers

The major changes to Federal law that EPA now proposes in the Proposed Rule would dramatically curtail State and Tribal authority to review and address impacts to waters from all of the above activities, and many others.[26]

As EPA has itself noted, the Section 401 certification process is often the only opportunity for States and Tribes to ensure compliance with water quality standards and other water quality requirements for federally approved projects.[27] This is particularly true for licensing matters before Federal commissions, in which the commissions control virtually every

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[25] *See* Executive Order 13868, Promoting Energy Infrastructure and Economic Growth, 84 Fed. Reg. 15495, 15495-96 (April 10, 2019) (Directing EPA to review and revise the Section 401 regulations to "advance the policy of the United States to promote private investment in the Nation's energy infrastructure."). **(Attachment 4)**

[26] For numerous other examples of activities that may discharge and require federal licenses or permits, and thus are likely to trigger the § 401 certification requirement, *see* Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 Ecology L. Q. 201, 219-29 (1996) (hereafter "*Untapped Power*"). **(Attachment 5)**

[27] *See, e.g.*, 2010 Guidance, Ex. 1 at 2.

aspect of, *e.g.*, the hydroelectric, interstate gas pipeline, and nuclear power plant licensing and environmental review processes pursuant to regulatory authority respectively granted under the National Power Act (FERC), the Natural Gas Act (FERC), and the Atomic Energy Act (NRC).[28]

Because Congressional intent behind Section 401 is so obvious and straightforward, and its requirements have been so clearly understood by regulators and stakeholders, Federal, State, and Tribal governments, project proponents, and the public have worked for decades through licensing and permitting processes to generally ensure robust compliance with Section 401. For the vast majority of applications and projects, the Section 401 certification process has not been controversial, and most requests are granted by the States within a matter of weeks to a few months. However, applicants for large energy, infrastructure, and other larger projects occasionally propose to conduct activities with potential to have enormous adverse effects on State and Tribal water resources.

For example, constructing an interstate gas pipeline typically requires crossing hundreds of rivers, streams and wetlands, often including States' highest-quality waters, such as drinking water sources and native trout spawning streams. These waterbody crossings are often accomplished by damming and ditching directly through river and stream banks and beds. Such ditching and other construction impacts can be extraordinarily destructive to watersheds and communities and often have immeasurable long-term public health and ecological consequences. Pipeline construction also requires that enormous rights-of-way be clear-cut, often through undeveloped greenfield areas, virgin forests and steep slope areas along a pipeline route. Tens of thousands of trees are often felled, removed, and never replaced. New access roads are built to bring in heavy construction equipment. All of these activities can result in massive damage to invaluable State water resources, and not only degrade them, but in some cases destroy them permanently.

The compelling State, Tribal, and public interest in protecting such water resources is self-evident. In passing Section 401, Congress implicitly recognized that Federal agencies often lack sufficient interest and/or expertise about specific State and local ecosystems and their conditions, sensitivities, and potential impairments. Congress therefore plainly intended to empower the States to consider such potentially polluting activities and their impacts, and to decide what conditions must be imposed before a damaging activity is conducted to ensure that it will not cause significant adverse impacts to water resources. Very rarely, a State or Tribe's technical analysis may reveal that resulting water quality impacts will be so severe that they cannot be mitigated to an acceptable level even with a conditioned Section 401 certificate, and an application may have to be denied by a State or Tribe. When those circumstances exist, Congress

[28] *Id*.

could not have been more clear that denial of the certification and of the Federal license is precisely what was intended when it passed the statute:

> ***No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State*** ….[29]

It is entirely inconsistent with the statute for EPA to now attempt to weaken and dilute the authority that Congress expressly granted to the States and Tribes. EPA should instead be actively encouraging and assisting certifying authorities to fully utilize their Section 401 authority to advance and achieve the plainly-stated objective and goals of the Act.[30]

In sum, Congress' language and intent in Section 401 is plain and unambiguous, and EPA lacks the interpretive authority it claims in the Proposed Rule to so dramatically shift the balance of statutory power mandated by Congress. The Proposed Rule is an *ultra vires* Federal power grab, and EPA's policymakers should be ashamed of their attempt to subvert the plain intent of Congress at the expense of all 50 States, dozens of Tribes, and the public health and environment that EPA is charged by its mission and by the CWA to protect. EPA should immediately withdraw and abandon the Proposed Rule, and cease its perverse and illegitimate effort to misappropriate statutory authority from the States in a bald-faced effort to benefit polluting industries.

III. THE PROPOSED RULE WOULD VIOLATE THE CLEAN WATER ACT.

We note initially that EPA has no legitimate regulatory purpose – *i.e.*, an acceptable and rational basis for its actions that is consistent with the objective and goals of the CWA – for its decision to so dramatically reinterpret and weaken Section 401. In the Proposed Rule, EPA does not even attempt to rationally explain how its proposal to weaken and/or deprive the States and Tribes of their statutory Section 401 authority is in any way consistent with advancing EPA's mission of protecting human health and the environment or the objective and goals of the Act.

EPA states on the first page of the Proposed Rule that it is seeking to address areas of "regulatory uncertainty" and "implementation challenges," and points to purported challenges "associated with the 2023 Rule after stakeholders raised questions about application of the 2023

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[29] 33 U.S.C. § 1341(a) (emphasis added).

[30] 33 U.S.C. § 1251(a).

Rule's scope of certification."[31] To support this assertion, EPA cites the testimony of two witnesses at a 2025 House of Representatives subcommittee hearing, but neither of these witnesses even testified about any actual challenges they or their employers had faced when implementing the 2023 Section 401 rule.[32] For example, most of the testimony of Noah Hanners, the Executive Vice President of Nucor Corporation, related to CWA Section 404 permitting issues he claims the company had faced that had nothing whatsoever to do with Section 401. The entirety of Mr. Hanners's testimony about CWA Section 401 could not have been more vague, and did not even reference the 2023 rule:

> "Promoting federalism in the administration of the CWA should not be permission for states to go outside the bounds of statutory authority, however. It is important to focus state responsibility pursuant to Section 401 of the CWA on project impacts to water quality specifically. Unfortunately, some states have recently used this authority to block important interstate projects critical for dependable energy use."[33]

EPA also cites the testimony of Robert Singletary, who testified on behalf of the Oklahoma Department of Environmental Quality ("ODEQ"). While this testimony about Section 401 was slightly more detailed, he similarly did not identify any specific challenges his agency had faced implementing the 2023 Rule. In fact, he acknowledged that the challenges he was generally concerned about – Section 401 being applied to address non-water quality issues – were speculative and "are not directly an issue with the current rule."[34] EPA also neglected to mention and/or minimized the fact that most of the States that provided input to EPA during the agency's federalism consultations were satisfied that the current Section 401 regulations were working well, while only one or two respondents repeatedly shared concerns about the current rule in the federalism consultation summary.[35] That EPA cites these testimonies and consultations on the

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[31] Proposed Rule, 91 Fed. Reg. at 2008.

[32] *Id.* at 2008 n.1.

[33] America Builds: Clean Water Permitting and Project Delivery Hearing before Subcommittee on Water Resources and Environment, 119th Cong. (2025), *Statement of Noah Hanners, Executive Vice President, Nucor Corporation, on behalf of the National Association of Manufacturers* at 7. **(Attachment 6)**

[34] Id., *Statement of Robert D. Singletary, Executive Director, Oklahoma Dep't of Envt'l Qual.* at 1. **(Attachment 7)**

[35] *See Summary Report of Federalism on the U.S. EPA: "Implementation Challenges Associated with the Clean Water Act Section 401*" (discussing several State respondents repeatedly expressing satisfaction with the current regulations and concern about the possibility that EPA might revise the regulations, while on many issues only one or two respondents expressed concerns about the implementability of the current regulations), Docket ID No. EPA-HQ-2025-2929-0008, att. 3, available at: https://www.regulations.gov/document/EPA-HQ-OW-2025-2929-0008.

very first page of the Proposed Rule as primary examples of purported implementation challenges the agency is seeking to remedy demonstrates that the Proposed Rule is the epitome of a "solution in search of a problem," and that purported implementation challenges with the current regulations are utter pretext.

The reality is that EPA is not promulgating the Proposed Rule for valid purposes, but rather to fulfill the deregulatory directives of the President and his administration that fall far outside of EPA's jurisdiction and authority, and the President has been very clear that one of his priorities is to stop States from in any way hindering the development of fossil fuel infrastructure.[36] These circumstances cast grave doubt on EPA's purported "legal" analysis, which the facts surrounding this rulemaking suggest is driven not by a good-faith desire to accurately determine Congressional intent to more effectively carry out EPA's legislative directives, but rather simply to appease the President and advance his administration's "energy dominance" agenda.[37] EPA's apparent expectation that long-established and well-understood federal statutory requirements can be so easily cast aside by agency fiat to achieve the administration's policy goals that are directly contrary to EPA's mission and the objective and goals of the CWA obviously fails to provide a sufficient or lawful basis for the Proposed Rule.

The Proposed Rule would revise numerous provisions of the current Section 401 regulations, and given EPA's true motivations, it should not be a surprise that each and every proposed change would have the effect of weakening and/or limiting State and Tribal authority and discretion to protect water quality within their borders. Specifically, EPA proposes to amend the current regulations and upend longstanding EPA policy to, among other changes:

- Dramatically narrow the scope of State's and Tribes' Section 401 certification reviews of impacts caused by any proposed project "activities" to only impacts caused by specific point source discharges to waters of the United States;[38]
- Severely reduce the scope of impacted waters that can be considered, from the current ability to review impacts to <u>all</u> State and Tribal water resources (e.g., rivers, streams,

[36] *See, e.g.,* Executive Order 14260, *Protecting American Energy From State Overreach*, 90 Fed. Reg. 15513 (April 8, 2025); *see also, e.g.*, Executive Order 14156, *Declaring a National Energy Emergency*, 90 Fed. Reg. 8433 (Jan. 29, 2025); Executive Order 14154, *Unleashing American Energy*, 90 Fed. Reg. 8353 (Jan. 29, 2025).

[37] *See, e.g.,* Executive Order 14213, *Establishing the National Energy Dominance Council*, 90 Fed. Reg. 9945 (Feb. 20, 2025); Proclamation, *National Energy Dominance Month, 2025*, 90 Fed. Reg 48479 (Oct. 22, 2025) (recommitting to Federal policy as "defined by three simple words: 'Drill, baby, drill'").

[38] *See infra* § III.A.1.

lakes, ponds, wetlands) to only impacts to Federally regulated waters of the United States;[39]

- Redefine "water quality requirements" to restrict States and Tribes to only considering their own water quality-related regulatory requirements "for discharges" in their Section 401 reviews;[40]
- Place unreasonable prohibitions and requirements on States and Tribes relating to their certification procedures and make it more difficult to avoid waivers of Section 401 authority, including:
    - Seeking to micromanage States' and Tribes' communications with applicants;[41]
    - Eliminating the ability of States and Tribes to unilaterally extend the "reasonable period of time" to act on a certification request and avoid a waiver, even if more time is necessary to comply with, e.g., public notice requirements or address force majeure events;[42]
    - Dictating a one-size-fits-all list of application materials that, when submitted with a written request for certification, start the waiver "clock" to act on a request regardless of State and Tribal substantive law and procedures, the size and complexity of the project, and whether the materials are sufficient to evaluate the impacts;[43]
- Replace the descriptor "project proponent" with "applicant" in the Section 401 regulations to lay the groundwork for a finding that Federal actors often won't need to obtain Section 401 certifications from States and Tribes, such as when issuing general permits or when the Army Corps performs civil works projects, since in those circumstances there is technically no "applicant";[44]
- Inequitably remove "Treatment as a State" status for Indian Tribes under CWA Section 401 unless a Tribe has been separately approved to administer its own water quality standards program.[45]
- Establish categorical "may affect" determinations to discharge EPA's obligations under CWA Section 401(a)(2) instead of making required project- and fact-specific evaluations

[39] *See infra* § III.A.2.

[40] *See infra* § III.B.

[41] *See infra* § III.C.1.

[42] *See infra* § III.C.2.

[43] *See infra* § III.C.3.

[44] *See infra* § III.D.

[45] *See infra* § III.E.

regarding whether an activity in one state may affect the quality of waters in a neighboring state.[46]

Below, we first address each of these significant proposed changes to the CWA Section 401 regulations and why they would be inconsistent with the CWA, arbitrary, capricious, an abuse of discretion, and unlawful. Following this discussion, we will address how the Proposed Rule, if finalized, would also violate the APA and the ESA.

A. The Proposed Rule Would Unlawfully Limit the Scope of State and Tribal CWA Section 401 Certification Authority.

EPA proposes, despite decades of its own longstanding statutory interpretations, guidance, and a plethora of Supreme Court and other judicial authority to the contrary, to dramatically curtail the scope of State and Tribal Section 401 reviews. EPA asserts in the Proposed Rule, directly contrary to controlling Supreme Court precedent, that when certifying authorities review Section 401 certification requests, they may only consider the impacts *caused by* point source discharges to waters of the United States and may not consider any other aspects of the proposed activity.[47] EPA further proposes to limit States and Tribes to reviewing only *impacts to* waters of the United States, and that certifying authorities may not consider impacts to any other State or Tribal water resources.[48] Neither of these new proposed "scope" limitations, which are utterly untethered from the statute and would decimate State and Tribal authority to protect their waters from pollution and destruction, holds water.

EPA attempts to anchor much of its legal rationale for the Proposed Rule to a bizarre and erroneous proposition that there is a bright-line distinction in the CWA between the "regulatory" and "non-regulatory" sections of the statute, and argues that any section of the statute that EPA deems to be regulatory should automatically be assumed to be limited to regulating only point source discharges to waters of the United States, even if the language of such sections do not in any way support such an interpretation.[49] EPA also manufactures a nonsensical distinction between "the nation's waters" and "waters of the United States."[50] EPA's assertions are disingenuously contrived bases for the deregulatory actions the agency is attempting and are demonstrably false. EPA's reliance on them to justify the dramatic changes it is proposing to the

[46] *See infra* § III.F.

[47] Proposed Rule, 91 Fed. Reg. at 2023-27.

[48] *Id.* at 2028.

[49] Proposed Rule, 91 Fed. Reg. at 2011-12, 2028.

[50] *Id.* at 2012 n.12.

CWA Section 401 certification process infects the entire Proposed Rule with legal error and renders it unlawful.[51]

1. EPA's Proposal to Limit State and Tribal Review to Only Impacts From Point Source Discharges to WOTUS, Rather than Impacts from all Project Activities, is Unlawful.

EPA essentially asserts that States, Tribes, courts, the public, and even EPA itself, have all been getting Section 401 wrong for more than five decades, and that certifying authorities may only consider the impacts from point source discharges to waters of the United States rather than the impacts from the project proponent's entire activities. However, the U.S. Supreme Court in *P.U.D.*, when it examined this precise issue, *i.e.*, whether Section 401 certification reviews may consider only impacts from "discharges," or more broadly, impacts from any "activities," held:

> "Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth 'any effluent limitations and other limitations ... necessary to assure that ***any applicant***' will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). The language of this subsection ***contradicts petitioner's claim that the State may only impose water quality limitations specifically tied to a "discharge." The text refers to the compliance of the applicant, not the discharge. Section 401(d) 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.'***"[52]

Obviously aware that its Proposed Rule runs headlong into this and other binding judicial precedent discussed below, EPA attempts to reconcile *P.U.D.* with its newly-contrived and utterly inconsistent position by claiming that the Court in *P.U.D.* merely deferred to EPA's then-current

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[51] Commenters recently addressed these identical fallacious arguments in detailed comments submitted in opposition to EPA and the Army Corps' most recent proposal to narrow the WOTUS definition, and we incorporate those arguments into these comments by reference. *See* Comments of Waterkeeper Alliance, et al., Updated Definition of Waters of the United States, Docket ID EPA-HQ-OW-2025-0322-0856 at 42-46 (Jan. 5, 2026), available at https://downloads.regulations.gov/EPA-HQ-OW-2025-0322-0856/attachment_1.pdf. **(Attachment 8)**

[52] *P.U.D.*, 511 U.S. at 711-12 (emphasis added).

interpretation articulated in its regulations and guidance.[53] EPA is wrong. Nowhere in *P.U.D.* did the Court conclude that the statute is ambiguous, as would have been required under *Chevron* "step 1." While the Court did note that its interpretation of the statute happened to be consistent with EPA's regulations, and referenced *Chevron* in passing,[54] it only did so in *dicta after* it had performed its own statutory analysis in which it expressly concluded that Section 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."[55] The Supreme Court's "most reasonably read" language in *P.U.D.* is nearly identical to the "best reading" standard articulated by the Supreme Court in 2024 in *Loper Bright*,[56] wherein the Court overruled *Chevron's* highly deferential standard of review to agency interpretations and held that under the APA, it is the responsibility of the courts, not agencies, to decide what the law means.[57]

Even if the Court in *P.U.D.* had more explicitly deferred to EPA's longstanding statutory interpretation of Section 401 pursuant to Chevron instead of performing its own statutory analysis and interpretation, this would not mean that the Proposed Rule would meet with similar success in the courts, since, as the *Loper Bright* majority clearly explained:

> "By [overruling *Chevron*], however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." That is not enough to justify overruling a statutory precedent."[58]

EPA's new proposed interpretation of the statute does not pass legal muster regardless of whether under the *Chevron* or *Loper Bright* standards of review. As a unanimous Supreme Court explained in *S.D. Warren*, Congressional awareness of the States' legitimate concerns about the impacts of any "activities" that may affect water quality "are the very reasons that Congress provided the States with power to enforce 'any other appropriate requirement of State law,' 33

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[53] *See* Proposed Rule, 91 Fed. Reg. at 2023-26.

[54] *P.U.D.*, 511 U.S. at 711-12 (emphasis added).

[55] *Id.* (emphasis added)

[56] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) ("*Loper Bright*")

[57] *Id.* at 392.

[58] *Id.* at 411-12 (citations omitted).

U.S.C. § 1341(d)***,*** by imposing conditions on federal licenses for activities that may result in a discharge."[59] However hard it may try, EPA simply cannot excise by regulatory fiat the language that Congress chose in the statute or the Supreme Court's interpretations of that language.

In addition to the above-referenced judicial interpretations that foreclose EPA's Proposed Rule, EPA has also not rationally explained why its new conclusions and interpretations on this issue differ so markedly from its own longstanding interpretations that it consistently and repeatedly articulated for decades. For example, in its current regulations and its regulations governing State certifications that were in effect from 1971 through 2019, EPA consistently interpreted Section 401 to make clear that the entire proposed "activities" are subject to certification review. In its 2010 Guidance, EPA correctly explained that once the trigger, or as the *P.U.D.* Court referred to it, the "threshold condition,"[60] for a required Section 401 certification has been crossed, *i.e.*, a proposed activity that requires federal approval and may result in a discharge, "the conditions and limitations included in the certification ***may address the permitted activity as a whole. Certification may address concerns related to the integrity of the aquatic resource and need not be specifically tied to a discharge.***"[61]

Any response from EPA that it was merely repeating the holding from *P.U.D. No. 1* in its 2010 guidance would fall far short of a legitimate explanation, since several years prior to that case, in its 1989 guidance, EPA reached similar conclusions about the breadth of State authority when they conduct Section 401 reviews:

> "In 401(d), the Congress has given the States the authority to place ***any conditions*** on a water quality certification that are necessary to assure that ***the applicant*** will comply with effluent limitations, water quality standards, ... ***with any State law provisions or regulations more stringent than those sections, and with "any other appropriate requirements of State law***.
>
> The legislative history of the subsection indicates that the ***Congress meant for the States to impose whatever conditions on the certification are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns***."[62]

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[59] 547 U.S. at 386 (emphasis added). *See also* [cite additional supporting case law]

[60] *P.U.D.*, 511 U.S. at 712.

[61] 2010 Guidance, Att. 1 at 23 (citing *P.U.D. No. 1*) (emphasis added).

[62] 1989 Guidance, Att. 2 at 23, 25-26 (emphasis added).

Nowhere in EPA's longstanding Section 401 regulations that were in effect from 1971 through 2019, the current regulations that took effect in 2023, or the 1989 or 2010 guidance documents is there even a hint that Congress intended the scope of impacts States may consider under Section 401 might be limited only to impacts from point source discharges to waters of the United States, as opposed to the full breadth of impacts from a project proponent's proposed "activities."[63] And again, the Supreme Court in *P.U.D.* explicitly rejected that notion.[64] As Justice Stevens succinctly noted in his *P.U.D.* concurrence:

> "While I agree fully with the thorough analysis in the Court's opinion, I add this comment for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. ***Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards.*** *See, e.g.*, § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C)."[65]

In sum, EPA has cut from whole cloth a draconian new deregulatory "scope" limitation it wishes to place on Congressionally-mandated State authority to appease the President and polluting industries. EPA's purported "interpretation" of Section 401 is devoid of statutory and/or judicial support, would seriously interfere with State and Tribal rights to protect their waters from pollution and destruction, and if finalized, will not withstand judicial review.

2. EPA Lacks Authority to Narrow the Scope of Impacts to Water Resources that can be Considered by States and Tribes.

In addition to attempting to limit the scope of review to impacts only *from* point source discharges to WOTUS discussed above, EPA's separate proposal to limit Section 401 certification authority to *impacts to* only waters of the United States[66] is also unlawful and contrary to the statute's text, structure, and purpose. Absolutely nothing in Section 401 suggests

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[63] The only exception to this consistent interpretation was the first Trump administration's short-lived CWA Section 401 Rule, in which EPA imposed a similar erroneous interpretation. That rule was intermittently in effect for approximately 30 months between October 2020 and November 2023. EPA acknowledged that it had erred by imposing such an unlawful limitation on State and Tribal authority when it issued the 2023 final rule that remains in effect.

[64] *P.U.D.*, 511 U.S. at 711-12.

[65] *Id*. at 723 (Stevens, J., concurring) (emphasis added).

[66] Proposed Rule, 91 Fed. Reg. at 2028.

that Congress intended to limit States consideration under Section 401 to only effects on waters that fall within the Federal definition of WOTUS. To the contrary, Congress deliberately framed Section 401 to preserve States' and Tribes' independent authority to protect the quality of *all* water resources within their borders, including waters of States or Tribes that fall outside the (ever-shrinking) Federal WOTUS definition.

While Section 401(a)(1)'s requirements are ***triggered*** whenever a federally licensed or permitted activity "may result in any discharge into the navigable waters," that clause only pertains to the trigger itself and has no bearing upon the scope of the certification inquiry. Such scope is prescribed by Section 401(d), which authorizes States and Tribes to impose conditions necessary to ensure compliance with "any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306, or prohibition, effluent standard, or pretreatment standard under section 307, ***and with any other appropriate requirement of State law***."[67] The statute thus expressly incorporates State and Tribal water quality requirements that may extend well beyond federal minimums, including protections for non-WOTUS waters such as headwater streams, intrastate wetlands, and groundwater. EPA's attempt to curb Section 401 authority to impacts only to WOTUS impermissibly reads this language out of the statute.

As discussed above, the Supreme Court has repeatedly confirmed that section 401 is not limited to regulating the discharge itself or to Federally defined waters, but instead authorizes States and Tribes to evaluate and address the broader water quality impacts of the permitted activity. In *P.U.D.*, the Court held that Section 401 allows states to impose conditions necessary to protect designated uses of waters affected by a project, even where those conditions regulate the overall activity rather than the discharge alone.[68] Similarly, in *S.D. Warren*, the Court emphasized that section 401 reflects Congress's intent to preserve state authority to protect water quality comprehensively, not to subordinate it to Federal permitting categories.[69] EPA's proposed impacts-to-WOTUS-only limitation is irreconcilable with these holdings.

EPA's approach also conflicts with the CWA's cooperative federalism framework. While federal permitting programs may be limited to WOTUS, Section 401 ensures that Federally authorized activities do not undermine State and Tribal water quality protections for waters the Federal government may not regulate directly. By attempting to collapse section 401 authority into the narrower bounds of Federal jurisdiction, EPA improperly elevates Federal definitions

[67] 33 U.S.C. § 1341(d) (emphasis added).

[68] 511 U.S. at 711–12 (1994).

[69] 547 U.S. at 386–87 (2006).

and regulatory limitations over State and Tribal law and disrupts the careful balance that Congress struck.

EPA also offers no reasoned explanation for excluding impacts to non-WOTUS waters from section 401 review. The proposal would perversely require certifying authorities to ignore known and foreseeable impacts to State and Tribal waters simply because they manifest in waters that fall outside Federal jurisdiction. Nothing in the Clean Water Act compels such a ridiculous result and the CWA demands the exact opposite![70] EPA's effort to limit the authority of States and Tribes in this manner is plainly arbitrary, capricious, and contrary to law.

B. EPA Lacks Authority to Adopt its Extremely Narrow Definition of "Water Quality Requirements."

EPA also wrongly proposes that States may only consider what it terms "water quality requirements," which under the Proposed Rule would be limited to only ''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***."[71] Once again, EPA lacks authority to rewrite Section 401 and to manufacture from whole cloth such a restrictive limitation that would directly impede the authority Congress granted directly to the States and interfere with the ability of States and Tribes to protect their water resources. EPA's proposal would also introduce significant confusion and ambiguity into the Section 401 review process as it is far from clear how EPA, the States, and the courts will interpret "regulatory requirements for discharges" as opposed to those that are not "for discharges."

Congress clearly understood that Federally-authorized activities had great potential to result in pollution and impairment of State waters, and also knew that, in the absence of Congressional direction, principles of federal preemption might well exempt many Federally licensed activities from State environmental regulation.[72] Congress accordingly adopted Section 401 to ensure that Federally licensed activities would not escape State regulation. Section 401 expressly enables a State to apply its own water-pollution-control program to such activities without interference from EPA or other Federal actors.[73] As EPA made clear nearly four decades ago, "the legislative history of [Section 401(d)] indicates that the ***Congress meant for the States***

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[70] 33 U.S.C. §§ 1311(b)(1)(C), 1341(d), 1344(t), 1370.

[71] Proposed Rule, 91 Fed. Reg. at 2026 (emphasis added).

[72] *See California v. FERC*, 495 U.S. 490, 506-07 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 175-76 (1946).

[73] *See Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 292-293 (D.C. Cir. 2003); *American Rivers, Inc. v. FERC,* 129 F.3d 99, 111 (2d Cir. 1997).

to impose whatever conditions on the certification are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns."[74] Respecting the powerful authority granted to the States by Congress, EPA has historically taken a very broad view of the types of conditions that States may impose in Section 401 certifications, many of which have gone well beyond enforcing "applicable provisions of §§ 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***."[75]

As repeatedly noted in these comments, Congress granted Section 401 water quality certification authority directly ***to the States***, and specifically authorized the States to review requests for certifications and to condition such certifications not only to assure compliance with the referenced statutory provisions, but also to meet "any other appropriate requirement of State law."[76] Section 401 certification determinations are generally limited to impacts to water resources and water quality – which may include regulatory requirements that do not pertain directly to discharges, such as, without limitation, compliance with State antidegradation policies, maintenance of best uses of waters set forth in State regulations, ecological requirements that fall outside of EPA-approved water quality standards, and/or mitigation measures that may be required to account for damage caused to waters of the State or Tribe. The Proposed Rule defines "water quality requirements" far too narrowly and ambiguously, disrespecting plain statutory language, judicial precedent and longstanding EPA interpretations.

Among numerous other defects in the Proposed Rule, there is one common theme that repeatedly recurs: EPA's unauthorized overreach in its attempt to micromanage and control State regulatory processes based on its assertion of authority to promulgate the Proposed Rule pursuant to CWA Section 501(a).[77] But Section 501(a)'s plain meaning authorizes the Administrator only to "prescribe such regulations as are necessary to carry out ***his functions*** under this Act."[78] Nothing in Section 401 confers authority for EPA to control how States or Tribes carry out ***their own independent statutory functions***, nor does it empower EPA to dictate State and Tribal administrative procedures, communications, or decisionmaking processes as EPA attempts in the Proposed Rule.

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[74] 1989 Guidance, Att. 2 at 23, 25-26 (emphasis added).

[75] Proposed Rule, 91 Fed. Reg. at 2026; for numerous such examples, see *Untapped Power*, Att. 5 at 256-58; 1989 Guidance, Att. 2 at 23-27 & App. D.

[76] 33 U.S.C. § 1341(d).

[77] *See* Proposed Rule, 91 Fed. Reg. at 2009.

[78] 33 U.S.C. § 1361(a) (emphasis added).

The CWA draws a deliberate and repeated distinction between Federal and State roles. Where Congress intended EPA to oversee or displace State action, it said so expressly and with specificity. Section 401 contains no such delegation. To the contrary, Section 401 plainly reflects Congress's decision to vest States and Tribes with ***independent authority*** to certify, condition, or deny federally licensed activities based on the States' and Tribes' own water quality requirements. Other than when EPA is charged with a direct role in the certification process, such as where EPA is itself acting as the certifying authority,[79] EPA's Section 401 role is limited to recognizing the legal consequences of State and Tribal action or inaction—not supervising or micromanaging how States and Tribes structure or administer their own laws and water quality certification processes.

The structure of the Clean Water Act further confirms this limitation. Together, CWA Sections 301(b)(1)(C), 313(a), 401(a) and (d), 404(t), and 510 expressly preserve State authority to adopt and implement requirements more stringent than federal law and confirm that any such requirements are binding on the Federal government, underscoring that certifying authorities retain primary control over how water quality protections are administered within their borders.[80] EPA's effort to dictate State and Tribal Section 401 certification processes and limitations as it does in the Proposed Rule would nullify this design and turn the Act's cooperative federalism framework on its head. As the Supreme Court has cautioned, statutes should not be construed to upset the federal–state balance absent a clear and manifest congressional intent.[81] Nothing in CWA Section 501(a) clearly authorizes EPA to intrude into State or Tribal administrative law, monitor or regulate State–project proponent communications, or impose procedural mandates on State and Tribal certification authorities. Absent such a clear statement, EPA's efforts to do so in the Proposed Rule cannot stand.

If Congress intended to severely limit the realm of State authority to protect their water resources as EPA now argues it did in the Proposed Rule, it could and would have said so. Instead, it said the opposite, as the Act expressly allows States to impose "standard[s] or limitation[s] respecting" ***not only "discharges of pollutants," but also "abatement of pollution,"*** that are ***more stringent than, or in addition to***, those federal standards set out under the Act.[82] Evidence of Congress' actual intent regarding continuing and unlimited State authority

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[79] *See, e.g.*, 33 U.S.C. § 1341(a) ("In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator.").

[80] *See* 33 U.S.C. §§ 1311(b)(1)(C), 1323(a), 1341(a) and (d), 1344(t), 1370.

[81] *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

[82] *See* 33 U.S.C. § 1370 (emphasis added).

to protect waters is also found in CWA Section 301, which contains what EPA labels the "key regulatory mechanism" for the purported "regulatory" sections of the Act,[83] which states:

> "In order to carry out the objective of this chapter there shall be achieved . . . ***any more stringent limitation***, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to ***any State law or regulations*** (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement ***any*** applicable water quality standard established pursuant to this chapter."[84]

Clearly, the CWA's preservation of State authority to regulate water quality within their borders is not limited to only "regulatory requirements for discharges," eviscerating EPA's purported basis for its proposal to so limit State authority under Section 401.

In sum, through Section 401, Congress explicitly granted authority to the States to ensure that their water pollution laws and policies would continue to be respected and upheld after passage of the Act. EPA has no statutory authority whatsoever to attempt to narrowly construe or limit State authority in the Proposed Rule, and its attempt to do so is an *ultra vires* insult to federalism principles and flies in the face of the plain terms of the statute and myriad binding judicial decisions.[85]

C. EPA Lacks Authority to Adopt its Proposals Involving Limitations on the Reasonable Period of Time and Waiver of Section 401 Authority by States and Tribes.

EPA proposes several unnecessary and intrusive changes to the Section 401 regulations that would limit States' and Tribes' rights, time, and procedures to make Section 401 decisions

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[83] Proposed Rule, 91 Fed. Reg. at 2011.

[84] 33 U.S.C. § 1311(b)(1)(C) (emphasis added).

[85] *See, e.g.*, *S.D. Warren*, 547 U.S. at 386-87 (2006) (unanimously upholding State authority to require minimum stream flows and migratory fish passage); *P.U.D.*, 511 U.S. at 715 (upholding State authority to include conditions in a 401 certification that the State determined were necessary to protect and comply with water quality standards "or any other 'appropriate requirement of State law"); *Keating*, 927 F.2d at 622-23 (State certification decisions turn "on questions of substantive state environmental law—an area that ***Congress expressly intended to reserve to the states and concerning which federal agencies have little competence***. It is for these reasons that a number of courts have held that disputes over such matters, at least so long as they precede the issuance of any federal license or permit, ***are properly left to the states themselves***.") (emphasis added) .

and increase the potential for certifying authorities to later be found to have inadvertently waived their authority. As discussed below, these proposals are arbitrary, capricious, and unlawful.

1. EPA Must Abandon its Proposal to Micromanage Section 401 Certification Processes By Attempting to Control the Content of States' and Tribes' Communications With Project Proponents.

In addition to granting, granting with conditions, or denying certification requests, Section 401 makes clear that States may also waive their certification authority if they take too long to "act" on a request:

> If the State ... ***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 . . .[86]

Through this waiver clause, Congress intended that when States receive a valid request to exercise their Section Section 401 water quality certification authority, they do so in an efficient manner that does not create unbreakable "logjams" and/or cause unreasonable delays in federal licensing processes:

> In imposing a one-year time limit on States to "act," Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request. This is clear from the plain text. Moreover, the Conference Report on Section 401 states that the time limitation was meant to ensure that "***sheer inactivity*** by the State ... will not frustrate the Federal application." H.R. Rep. 91–940, at 56 (1970), reprinted in 1970 U.S.C.C.A.N. 2691, 2741. Such frustration would occur if the State's inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding.[87]

However, EPA's proposal to prohibit States and Tribes from engaging in particular discussions with applicants, including merely suggesting that an applicant may wish to voluntarily withdraw a pending Section 401 certification request to avoid an otherwise unavoidable denial, represents

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[86] 33 U.S.C. § 1341(a) (emphasis added).

[87] *Alcoa Power Generating Inc.*, 643 F.3d at 972.

a fundamental overreach of the Agency's statutory authority and misapplies the D.C. Circuit's 2019 opinion in *Hoopa Valley Tribe v. FERC*.[88]

Hoopa Valley arose from an extraordinary factual record that bears little resemblance to ordinary CWA Section 401 practice. There, the license applicant and the States of California and Oregon had entered a written agreement, renewed annually for ***more than a decade***, under which the applicant would repeatedly withdraw and resubmit an unchanged certification request solely to prevent the statutory one-year review period from expiring while the parties separately pursued settlement negotiations.[89] The *Hoopa Valley* court emphasized that no substantive review was occurring over the extended period and that the arrangement "indefinitely delayed" any action on the request by design. In other words, the *Hoopa Valley* court addressed a coordinated, long-term effort to evade the statute's deadline altogether, not routine information exchanges, incomplete applications, or ordinary permitting timelines.[90] Subsequent decisions – including by the D.C. Circuit itself – have made clear that *Hoopa Valley's* holding is limited to extreme and unusual circumstances such as were present in that case and does not prohibit good-faith communications between a project proponent and a certifying authority in the course of legitimate review of a request.[91] In sum, *Hoopa Valley* was a fact-bound ruling addressing an extreme attempt to completely nullify Section 401's timeline, not a broad prohibition on a State's reasonable procedural management of Section 401 certification requests.

Section 401 clearly states that a state waives its certification authority only if it "fails or refuses to act on a request for certification, within a reasonable time period (which shall not exceed one year) after receipt of such request."[92] Nothing in this language suggests that a state is required to act on a request for certification that is no longer pending because it has been withdrawn by the applicant for whatever reason. Nor is it reasonable to ascribe to States or

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[88] Proposed Rule, 91 Fed. Reg. at 2022-23; *see Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) ("*Hoopa Valley*").

[89] *Id.* at 1101-02.

[90] *Id.* at 1103-05.

[91] *See, e.g., Vill. of Morrisville v. FERC*, 136 F.4th 1117, 1127 (D.C. Cir. 2025) (explaining that *Hoopa Valley* was "a very narrow decision flowing from a fairly egregious set of facts … First, *Hoopa Valley* involved a written agreement between two States and an applicant with the express intent of 'circumvent[ing]' section 401's one-year limitations period . . . Second, pursuant to this agreement, the applicant there withdrew and resubmitted the same certification request '*for more than a decade'* to reset the statutory period.") (emphasis in original, citations omitted); *Cal. State Water Res. Ctrl. Bd. v. FERC*, 43 F.4th 920, 930-36 (9th Cir. 2022) (distinguishing *Hoopa Valley* and vacating FERC's findings of waivers of State authority); *N.C. Dep't of Envt'l Qual. v. FERC*, 3 F.4th 655, 669-76 (4th Cir. 2021) (same).

[92] 33 U.S.C. § 1341(a)(1).

Tribes a project proponent's decision to withdraw a certification request. In such a situation, it is the action of the applicant – the very party that the time limitation is intended to protect – that results in a delay of water quality certification, not a failure or refusal to act by the State or Tribe. Nothing in the text of the statute prohibits an applicant from submitting and then withdrawing its request for certification before the reasonable period for "acting" expires.[93] Nor does anything in the text of the statute support the premise that a resubmission intended by the applicant to be a new request should not be considered a new request for certification. Under the plain text of Section 401, the period for review commences upon "receipt of ***such*** request," which refers back to the statutory language "a request for certification."[94] There is no textual support for the proposition that a resubmittal of a similar or even identical request is not "a request for certification" that triggers a new reasonable period of time for certifying authorities to act. And there is no language in Section 401 to support the bizarre proposition that an applicant cannot choose to withdraw its own application and voluntarily render that application a nullity. Under Section 401 and well-understood principles of administrative law, there would no longer be a pending "request" upon which a State could "act" even if it wished to do so.

Congress provided a clear waiver framework in section 401(a)(1): a certification is waived only if the certifying authority "fails or refuses to act" within the reasonable period of time established for review. That statutory trigger turns on whether the State has taken final action on a particular request, not on the content of state–applicant communications or the strategic choices made by applicants in response to those communications. By attempting to prohibit communications regarding withdrawal and resubmittal of requests, EPA seeks to improperly transform a narrow statutory waiver provision into a tool for Federal micromanagement and supervision of State permitting processes—an outcome the CWA neither contemplates nor permits.

EPA's approach is also incompatible with principles of cooperative federalism. States (and Federal agencies such as FERC prior to the *Hoopa Valley* decision) have routinely allowed applicants to withdraw and resubmit permit applications in order to cure deficiencies, provide necessary information, and perhaps most importantly, to avoid application denial while the process is underway. These practices reflect State administrative law and long-established permitting norms, and should not be assumed to be efforts to evade statutory deadlines. EPA has no authority to displace those State procedures through regulation.

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[93] *See, e.g., Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010) (court "must enforce plain and unambiguous statutory language according to its terms").

[94] 33 U.S.C. § 1341(a)(1) (emphasis added); *see also King v. Burwell*, 576 U.S. 473, 487 (2015) (noting that '"such" refers to "that or those; having just been mentioned").

The proposed prohibition would also inject substantial ambiguity and confusion into Section 401 administration and implementation. The Proposed Rule contemplates Federal scrutiny of State intent and communications with applicants, creating uncertainty as to what conduct might later be characterized or mischaracterized as an impermissible "request" to withdraw. For example, if a State informs an applicant that failure to provide requested information will require denial of the certification before the "reasonable period of time" expires, and the applicant independently elects to withdraw and resubmit its request to avoid that outcome, the Proposed Rule offers no clear standard for determining whether the State might later be alleged to have implicitly violated EPA's proposed prohibition.

The risk that ordinary, good-faith communications between certifying authorities and applicants could be second-guessed by EPA, federal licensing agencies, or courts and later be found to have been prohibited implied "suggestions" to withdraw and resubmit certification requests is likely to chill transparent dialogue and undermine efficient permitting. Rather than promoting clarity or certainty, EPA's attempt to micromanage the practices of certifying authorities as they navigate certification procedures with project proponents threatens to destabilize established certification processes, expose States and Tribes to unfounded waiver claims, and encourage defensive permitting behavior and more litigation. Section 401 does not authorize EPA to referee State–applicant interactions, and the Agency's effort to do so via regulation is unlawful, impractical, and arbitrary and capricious.

2. EPA's Proposal to Eliminate Reasonable Automatic Extensions of Time Misreads Section 401 and Improperly Relies on *Hoopa Valley*.

EPA's proposal to prohibit certifying authorities from extending the reasonable period of time – so long as the total period does not exceed one year – similarly rests on an overreading and misapplication of *Hoopa Valley*[95] and conflicts with the text of section 401 and subsequent judicial authority. CWA Section 401(a) provides that a certifying authority must act within a "reasonable period of time (which shall not exceed one year)" after receipt of a certification request.[96] Congress thus established a maximum outer boundary of one year to "act" on each "request," but did not prohibit reasonable adjustments of an initially-set deadline within that period to ensure informed decisionmaking and compliance with State and Tribal procedural rules or force majeure events.

As noted above, in *Hoopa Valley*, the D.C. Circuit held that states had waived certification authority where they had entered into a written agreement with the applicant to

[95] 913 F.3d 1099 (D.C. Cir. 2019)

[96] 33 U.S.C. § 1341(a).

withdraw and resubmit certification requests annually over a period exceeding a decade, thereby deliberately evading the statutory one-year cap.[97] The court emphasized that the statute does not permit states and applicants to engage in a "coordinated withdrawal-and-resubmission scheme" to indefinitely delay action beyond one year.[98] Critically, however, *Hoopa Valley* did not hold that certifying authorities lack discretion to manage the reasonable period of time within a single one-year review window. Nor did it prohibit extensions, clarifications, or timeline adjustments that remain within the statutory maximum.

EPA's proposal collapses this distinction. By eliminating the ability of certifying authorities to extend the review period—even where the total time does not exceed one year—EPA transforms *Hoopa Valley* from a decision enforcing the statutory ceiling into a mandate for inflexible federal micromanagement. Nothing in *Hoopa Valley* suggests that Congress intended to prohibit certifying authorities from determining what constitutes a "reasonable period of time" within the one-year limit. To the contrary, the statute's use of the term "reasonable" inherently contemplates discretion and case-specific judgment.[99]

Eliminating reasonable extensions within the statutory cap undermines the very purposes section 401 serves. Certifying authorities must determine whether a project will comply with effluent limitations, water quality standards, antidegradation policies, and "any other appropriate requirement of State law."[100] For complex infrastructure projects – such as an interstate gas pipeline project that might cross hundreds of waterbodies and wetlands over hundreds of miles – gathering, reviewing, and analyzing technical information may reasonably require adjustments to internal timelines. Prohibiting such flexibility risks forcing premature decisions, defensive denials, or increased litigation – outcomes that frustrate both environmental protection and permitting certainty.

EPA also fails to provide a reasoned explanation for why flexibility within the one-year maximum is inconsistent with section 401. An agency acts arbitrarily and capriciously when it relies on an overbroad reading of precedent and fails to grapple with statutory text.[101] Here, EPA does not explain how prohibiting reasonable extensions within the statutory ceiling advances the CWA's objectives, nor does it identify evidence that such extensions have resulted in systemic abuse. *Hoopa Valley* enforced Congress's one-year limit. It did not authorize EPA to eliminate

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[97] 913 F.3d at 1103–05.

[98] *Id.* at 1104–05.

[99] *See, e.g., P.U.D.*, 511 U.S. at 712 (recognizing the breadth of state authority under section 401 consistent with statutory language).

[100] 33 U.S.C. § 1341(d).

[101] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

state discretion within that limit. By converting a decision that prohibits intentional multi-year contractual evasion schemes into a rule mandating procedural rigidity, EPA exceeds its authority and undermines the cooperative federalism framework Congress enacted. The Agency should withdraw this aspect of the proposal and preserve the ability of certifying authorities to manage review timelines reasonably, so long as the total review period on each request does not exceed one year.

3. EPA Lacks Authority to Prescribe for Every State and Tribe a Uniform List of Materials that EPA Deems Sufficient for a Request for Certification to be Considered Complete and Start the Timeline for Review.

In the Proposed Rule, EPA proposes to impose upon States and Tribes a requirement that the "reasonable period of time" waiver clock begins to run when a project proponent submits a request for certification with a finite list of materials specified not by the certifying authority, which has direct statutory responsibility to consider the proposed activity and determine whether it can certify compliance with federal and state water quality laws, but by EPA itself.[102] Once again EPA oversteps its Section 401 role. EPA's proposal to specify, by regulation, a uniform list of materials that a project proponent must submit in order to trigger the start of the "reasonable period of time" for section 401 review is unlawful, arbitrary and capricious, and inconsistent with the Clean Water Act's allocation of authority. Section 401 does not authorize EPA to determine what information a State or Tribal certifying authority requires before it can meaningfully evaluate whether a proposed activity will comply with applicable water quality standards and other requirements. That determination lies squarely with the certifying authority, which Congress entrusted with the responsibility – and discretion – to apply not only Federal law, but also State and/or Tribal law, when they make certification decisions.

The Clean Water Act reflects Congress's recognition that water quality regulation is inherently place-specific. States and Tribes adopt distinct water quality standards, designated uses, antidegradation policies, and implementation procedures tailored to local hydrology, ecology, and legal requirements. As a result, the information necessary to assess a project's consistency with State or Tribal law necessarily varies across jurisdictions and project types. EPA's unfortunate proposal to claw back State and Tribal discretion and impose a one-size-fits-all federal checklist ignores this statutory reality and seeks to substitute EPA's judgment for that of the entities Congress specifically designated as the primary arbiters of water quality protection within their borders.

[102] Proposed Rule, 91 Fed. Reg. at 2017-21.

Nothing in section 401 conditions the start of the reasonable period of time on the submission of federally prescribed materials. The statute instead leaves it to the certifying authority to act—or not act—within a reasonable period, implicitly recognizing that States and Tribes must have the ability to determine when they have sufficient information to commence a review that will ultimately allow them to render a legally and technically defensible certification decision. By attempting to preemptively declare that certain materials are sufficient to commence the review clock regardless of State or Tribal laws, regulations, policies, the scope and complexity of the subject activity, and the certifying authority's informational needs, EPA unlawfully constrains the exercise of authority directly granted to State and Tribes by Congress.

The proposal is also arbitrary and capricious because EPA fails to explain how a federally defined submission list can ensure that certifying authorities have adequate information to evaluate compliance with diverse and often more protective State and Tribal requirements. EPA nowhere analyzes whether the proposed materials would allow states to assess impacts to non-WOTUS waters, groundwater, designated uses, or antidegradation requirements that are central to many certification decisions. Nor does EPA grapple with the foreseeable consequence that States and Tribes will be forced to either deny certifications prematurely or risk waiver based on incomplete records—outcomes that undermine both environmental protection and permitting certainty.

Finally, EPA's approach reflects a broader and improper effort to elevate Federal authority above that of States and Tribes in a context where Congress clearly chose the opposite allocation. Section 401 was designed to ensure that Federally permitted activities do not override State and Tribal water quality protections. Allowing EPA to dictate when the review period begins, based on EPA's own view of what information is "enough," completely inverts Congress's design and converts Section 401 from a State-protective safeguard into a Federally-controlled trap. The Clean Water Act does not authorize such a result, and EPA's attempt to impose it through regulation exceeds the Agency's authority and must be withdrawn.

D. EPA Must Abandon its Dangerous Proposal to Replace "Project Proponent" with "Applicant" in the Section 401 Regulations.

EPA's proposal to amend the Section 401 regulations by removing the definition of "project proponent" at 40 C.F.R. 212.1(h) and substituting the descriptor "applicant" should not be finalized.[103] EPA frames its proposal as a clarifying or simplifying change, but then explicitly recognizes that its proposed language substitution may carry significant potential legal consequences that could improperly narrow the scope of Section 401 and risk exempting certain

[103] Proposed Rule, 91 Fed. Reg. at 2020-21.

actors from certification requirements that Congress has imposed and States have relied upon for more than five decades. In connection with its proposal to substitute "applicant" for "project proponent," EPA "requests comment on whether the best reading of the statute supports extending the CWA section 401 certification requirement to general permits, even in the absence of an 'applicant.'"[104] EPA similarly references Army Corps of Engineers' civil works projects wherein discharges of dredge and fill materials routinely occur, but there is technically no "applicant" because "the Corps does not issue itself a CWA permit to authorize Corps discharges of dredged material or fill material into U.S. waters."[105]

EPA's suggestion that Federal actors might be excused from Section 401 compliance grossly misreads Section 401 and other provisions of the CWA. Section 401 requirements apply whenever a "Federal license or permit" is required for an activity that may result in a discharge to navigable waters." Section 401(a) explicitly states that "***No license or permit shall be granted until the certification required by this section has been obtained or has been waived*** . . . ***No license or permit shall be granted if certification has been denied by the State*** …."[106] The statute plainly does not limit Section 401 certification obligations only to non-Federal applicants seeking Federal approvals.

In numerous contexts, Federal actors authorize discharges, or themselves engage in activities that result in discharges, even though there is no traditional "applicant." Examples include Federal agencies issuing general permits, authorizing nationwide activities, or undertaking civil works projects through the U.S. Army Corps of Engineers. Replacing "project proponent" with "applicant" in the Section 401 regulations could create an irrational regulatory gap and could be wrongly argued to eliminate the certification requirement altogether despite the potential for, or certainty of, a discharge, simply because no person or entity formally "applies" for such federal authorization. Such a result would put form over substance and be contrary to the text, structure, and purpose of Section 401. Congress enacted section 401 to ensure that States and Tribes would retain authority to protect their waters whenever federally authorized activities may affect water quality, regardless of the identity of the actor. That authority has long been understood to apply to Federal projects and Federal permitting actions alike, and States

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[104] *Id.* at 2020.

[105] *Id.* at 2021.

[106] 33 U.S.C. § 1341(a) (emphasis added); *see also Marathon Dev.*, 867 F.2d at 100 ("Neither the language nor the history of section 404(e) of the Clean Water Act ("General permits [for dredged or fill material] on State, regional, or nationwide basis"), 33 U.S.C. § 1344(e), suggests that states have any less authority in respect to general permits than they have in respect to individual permits. . . . When sections 401 and 404 are read together, their plain terms provide that the state certification requirement of section 401 applies to section 404(e) nationwide permits in the same way that it applies to any other section 404 permit.").

have consistently exercised certification authority in these contexts. EPA may not, through bad faith definitional revisions that frankly do not pass the "smell test," attempt to reverse this settled understanding and deprive States and Tribes of their vital role that Congress deliberately preserved.

EPA's proposal and request for comment is also extremely troubling when read in conjunction with CWA Sections 313(a) and 404(t). Section 313(a) explicitly subjects all federal actors and facilities to state water quality standards and other requirements "in the same manner, and to the same extent as any nongovernmental entity," and unambiguously applies "to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever)":

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) ***engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants***, and each officer, agent, or employee thereof in the performance of his official duties, ***shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity*** including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, ***any requirement respecting permits and any other requirement, whatsoever***) . . . ."[107]

And CWA Section 404(t) explicitly preserves State authority over discharges of dredge or fill materials within State borders, including by Federal agencies such as civil works projects by the Army Corps of Engineers:

> "Nothing in this section shall preclude or deny the right of any State or interstate agency 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, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements***.[108]

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[107] 33 U.S.C. § 1323(a) (emphasis added).

[108] 33 U.S.C. § 1344(t) (emphasis added).

These statutory provisions leave no room whatsoever for EPA's suggestion that Federal actors may be relieved of compliance with Section 401's requirements in situations where there is technically not an "applicant."[109] Section 401 certification by States and Tribes is often the principal – if not the only – mechanism by which states can ensure that Federal actors and Federally conducted projects such as Army Corps civil works projects comply with those standards before discharges occur. Interpreting the regulations to eliminate certification obligations whenever a Federal actor is not technically an "applicant" – *i.e.*, authorizing future discharges by third parties such as when issuing general permits or directly conducting activities that discharge such as Army Corps civil works projects – would effectively nullify sections 401, 313 and 404(t)'s clear mandates and leave States and Tribes without a meaningful enforcement mechanism to address pollution and destruction authorized or directly caused by Federal actors. It should be obvious that such a result would be unacceptable and unlawful.

EPA offers no reasoned explanation for why this language substitution is necessary, nor does it acknowledge the obvious disruption it could cause to a Section 401 certification regime that has functioned with common compliance understandings for more than fifty years. The Agency also fails to grapple with the federalism implications of potentially exempting Federal actors from a process that Congress expressly designed to preserve State authority over water quality. EPA must better explain how the benefits of its proposed terminology change outweigh the significant risks discussed above, and how it can possibly justify intentionally creating a loophole that could allow Federal actors to attempt to authorize or conduct discharging activities without State or Tribal certification. Any change to the regulations that could create an exemption from Section 401's requirements for Federal actors would be arbitrary, capricious, and contrary to law.

E. EPA's Proposal to Eliminate Independent Tribal "Treatment as a State" Status Under Section 401 is Inequitable and Contrary to the Clean Water Act.

EPA's proposal to remove TAS status for Indian Tribes under CWA Section 401 – unless a Tribe has been separately approved to administer a water quality standards program – must not be finalized.[110] This change would arbitrarily and capriciously narrow Tribal authority Congress expressly recognized, disrespects Tribal sovereignty, and unfairly penalizes Tribes for structural and resource barriers that Congress and EPA have long acknowledged.

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[109] Proposed Rule, 91 Fed. Reg. at 2020-21.

[110] *See id.* at 2035-37.

Nothing in section 401 conditions Tribal certification authority on prior approval to administer a WQS program. To the contrary, Congress addressed Tribal eligibility and authority in CWA Section 518, which authorizes EPA to treat eligible Tribes "in the same manner as a State" for purposes of specified CWA programs, including Section 401.[111] Nothing in the statute requires that a Tribe first administer a WQS program in order to exercise certification authority. EPA's proposal improperly grafts an additional eligibility requirement onto the statute that Congress did not impose.

EPA's approach is also inconsistent with longstanding practice recognizing that Section 401 certification authority is distinct from, and not dependent upon, water quality standards program administration. Certification under Section 401 requires a Tribe to evaluate whether a federally authorized activity will comply with applicable water quality requirements under Tribal law. That determination does not require full assumption of a water quality standards program, nor does the statute suggest that Congress intended to force Tribes to adopt and administer comprehensive regulatory programs as a prerequisite to exercising certification authority.

The proposal is particularly unfair because it would rescind or foreclose authority that EPA has already recognized, even if Tribes have been slow to exercise that authority for whatever reasons, which may include limited resources, staffing constraints, or the complexity of federal approval processes. Courts have repeatedly cautioned that agencies may not withdraw previously conferred authority or benefits without a reasoned explanation that accounts for reliance interests.[112] Here, EPA fails to acknowledge that Tribes may have reasonably relied on their recognized Section 401 authority, and may be in the process of investing resources to develop it, even if they have not yet had the opportunity or capacity to deploy it fully.

Moreover, punishing Tribes for delayed utilization of Section 401 authority ignores the unique Federal trust responsibility owed to Tribal governments. Unlike states, Tribes often face systemic barriers to program development, including chronic underfunding, jurisdictional uncertainty, and the need to navigate Federal approval processes that EPA itself administers. EPA's proposal perversely turns those barriers into a justification for stripping Tribal authority—an outcome that is incompatible with both the trust responsibility and the CWA's cooperative federalism framework.

EPA also fails to explain how eliminating independent Tribal Section 401 authority advances the objectives of the CWA. To the contrary, the proposal would reduce water quality protections in Indian country by excluding Tribes from certification decisions affecting their

[111] 33 U.S.C. § 1377(a).

[112] *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) ("*Fox*").

waters unless they have cleared a separate and resource-intensive regulatory threshold. Nothing in the Act supports such a result, and EPA's failure to grapple with its consequences renders the proposal arbitrary and capricious.

Section 401 was designed by Congress to ensure that Federally authorized activities do not override State and Tribal authority to protect water quality. EPA's proposal to condition Tribal participation in the certification process on water quality standards program approval undermines that design, unlawfully narrows Tribal authority, and disregards Congress's clear intent to respect Tribal sovereignty. The Agency should withdraw this proposal and reaffirm that eligible Tribes may exercise Section 401 certification authority independent of water quality standards program administration approval.

F. CWA Section 401(a)(2) Requires Project- and Watershed-Specific "May Affect" Determinations.

Section 401(a)(2) of the CWA imposes a mandatory duty on EPA to notify a downstream state when a discharge originating in another jurisdiction "may affect" the quality of its waters.[113] The statute contemplates a factual, project-specific inquiry. In the Proposed Rule, however, EPA asserts authority to resolve these "may affect" determinations categorically rather than on a case-by-case basis. Nothing in the Clean Water Act authorizes such an approach, and EPA has failed to articulate a reasoned explanation for this departure.

Section 401(a)(2) directs EPA to evaluate whether a particular discharge "may affect" another State's waters—a formulation that requires an individualized assessment of the discharge at issue. Courts interpreting Section 401 have recognized that the provision requires EPA "to make a discrete factual determination,"[114] not to adopt broad presumptions untethered to the specifics of a proposed activity. Where Congress intends to authorize categorical determinations, it does so expressly. The absence of such language here confirms that EPA's role is adjudicatory and fact-bound. By transforming that obligation into a rule-based shortcut, EPA exceeds the authority Congress conferred.

EPA's own explanation underscores the impropriety of categorical determinations. The Agency acknowledges that "may affect" decisions turn on site-specific considerations, including

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[113] 33 U.S.C. § 1341(a)(2).

[114] *See, e.g., Fond Du Lac Band of Lake Superior Chippewa v. Wheeler*, 519 F. Supp. 3d 549, 563-64 (D. Minn. 2021) (describing EPA's "duty to make a discrete factual determination (whether a discharge in one state may affect the quality of the waters in another) within a specific timeframe (30 days) and based on an application and certification that EPA is already required to review.").

attenuation, hydrologic connectivity, and other localized factors. Additional variables necessarily include the nature of the receiving waters, applicable water quality standards in affected jurisdictions, the type of pollutants discharged, seasonal flow conditions, and geographic proximity. The environmental consequences of very similar activities or discharges can differ dramatically depending on location. EPA cannot credibly recognize the importance of site-specific analysis while simultaneously claiming authority to dispense with it through categorical determinations.

Administrative convenience does not authorize categorical rulemaking that supplants the statute's requirement of a factual inquiry. Because Section 401(a)(2) requires EPA to evaluate whether a particular discharge "may affect" another state's waters, EPA's attempt to convert that obligation into a categorical determination is inconsistent with the Clean Water Act and arbitrary and capricious under the APA.

IV. THE PROPOSED RULE WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT AND OTHER LEGAL REQUIREMENTS.

To pass legal muster, the Proposed Rule must be consistent with relevant legal precedent, the objective of the CWA, and the text and legislative history of the Act.[115] The object of EPA's rulemaking must be "to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve."[116] EPA's proposed revisions to the Section 401 regulations must maintain that consistency considering evidence of the specific impacts of the proposed amendments on the physical, chemical, and biological integrity of the nation's waters and the Clean Water Act's statutory goals, requirements, and programs.[117]

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[115] *See, e.g.*, *County of Maui v. Hawaii Wildlife Fund,* 590 U.S. 165, 183 (2020) (interpreting the Clean Water Act "in light of the statute's language, structure, and purposes . . . . ").

[116] Cf., *id*. at 184 (Finding that the EPA must ensure consistency "with the statute's language, the statutory purposes that Congress sought to achieve" when making functional equivalent determinations under the Clean Water Act.").

[117] *See, e.g.*, *State Farm*, 463 U.S. at 43 ("Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (citations omitted); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962) ('The Commission must exercise its discretion under s 207(a) within the bounds expressed by the standard of [the statute] . . . And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence.") (citations omitted).

EPA is also required to demonstrate in the Proposed Rule that its revisions to the CWA Section 401 regulations will be consistent with the "single, best" meaning of the Clean Water Act and that it has engaged in "reasoned decision making."[118] Additionally, EPA must act within the scope of its statutory authority, avoid arbitrary and capricious decision making, fully consider all important aspects of its actions, and eschew pursuit of policy objectives that are counter to the objective, goals, and text of the CWA.[119] EPA must give adequate reasons for its decisions and, after examining the relevant data, it must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[120] Where, as here, EPA is attempting to completely reverse course, dramatically alter the scope of State and Tribal authority under the CWA, and disregard its own longstanding findings and interpretations in a rule of national significance, the APA requires it to "show that there are good reasons" for revising its regulations in the manner proposed and to provide a "reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by" EPA's prior determinations.[121]

As detailed throughout these comments, EPA has utterly failed to meet these requirements in the Proposed Rule, most fundamentally, by advancing unsupportable interpretations of the Clean Water Act and impermissible policies as support, but also by failing to adequately explain how its new legal theories and policies relate to or support the choices EPA made to weaken State and Tribal Section 401 authority. EPA's failure to carefully evaluate and follow the text of the CWA, all relevant legal precedent, and legislative history in the development of the Proposed Rule is contrary to law. EPA does not possess unbridled discretion to pick and choose the portions of the law it prefers in furtherance of its policy choices and other irrelevant factors, and completely ignore the parts of the law that don't suit its purposes (including shrugging off the bedrock "objective" of the Act), as it attempts to do here. EPA has also proposed a host of potential, vaguely described alternative amendments to the Section 401 regulations on which it "seeks comment," but has not specified how they might be articulated in the regulations, provided meaningful legal or factual bases supporting and explaining them,

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[118] *See Loper Bright*, 603 U.S. at 371, 400 ("Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning.").

[119] *See, e.g.*, *State Farm*, 463 U.S. at 43-44, 46, 59 ("Normally, an agency rule would be arbitrary and capricious if the agency has 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.").

[120] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *State Farm*, 462 U.S. at 43).

[121] *See Fox*, 556 U.S. at 516; *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981–82 (2005).

demonstrated that they are consistent with the Clean Water Act, or assessed their impacts, costs, or benefits.

EPA's failure to meaningfully consider how the Proposed Rule would impact the nation's waters – i.e., whether it will restore and maintain or degrade and destroy the nation's waters, and to what extent – amounts to a failure to ensure that the definition is consistent with the text of the Clean Water Act and will carry out Congress' overall objective for the Act. EPA did not generate and examine relevant data about the impacts of the Proposed Rule; provide a rational connection between the available evidence, the facts found by EPA, and the choices made in the Proposed Rule; provide a reasoned explanation for the Proposed Rule; and/or demonstrate that there are good reasons for rewriting the Section 401 regulations in the manner it has proposed.

If it is finalized, the Proposed Rule will have significant impacts on the public, the States, Tribal people and governments, dischargers, and the broader regulated community because it represents an extreme departure from EPA's, the courts', the States' and Tribes', and the public's longstanding understanding of the scope of State and Tribal Section 401 authority under the CWA as described throughout this comment letter. For these reasons, and those discussed below, the Proposed Rule falls far short of what the APA requires for a change in the law of this magnitude, and must be withdrawn.

A. EPA's Economic Analysis is Woefully Insufficient.

The Proposed Rule's preamble asserts that the Economic Analysis for the Proposed Rule is consistent with Executive Orders 12866 and 13563 and is designed to "inform the public of potential effects associated with this proposed rulemaking."[122] EPA also claims that the Economic Analysis "is consistent with the EPA's *Guidelines for Preparing Economic Analyses* (U.S. EPA, 2024) and the Office of Management and Budget (OMB) Circular A-4 (U.S. Office of Management and Budget, 2003)."[123] However, the qualitative Economic Analysis for the Proposed Rule does not comply with the Executive Orders, EPA Guidelines,[124] or OMB Circular

[122] Proposed Rule, 91 Fed. Reg. at 2037.

[123] EPA, Economic Analysis for the Proposed Updating the Water Quality Certification Regulations, Dkt. ID. No. EPA-HQ-OW-2025-2929-0009, at 1-2 ("Proposed Rule EA") (emphasis in original).

[124] EPA, Guidelines for Preparing Economic Analyses, EPA-240-R-24-001 (Dec. 2024), Dkt. ID No. EPA-HQ-OW-2025-0322-0100 ("*EPA Guidelines for Preparing Economic Analyses*"), available at: https://www.epa.gov/system/files/documents/2024-12/guidelines-for-preparing-economic-analyses_final_508-compliant_compressed.pdf. **(Attachment 9)**

A-4[125] requirements, and it is wholly inadequate to evaluate and inform States, Tribes, and the general public about the deregulatory impacts of the Proposed Rule.

Executive Order 12866 directs agencies to "assess ***all*** costs and benefits of available regulatory alternatives, including the alternative of not regulating," including "both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."[126] It further requires that "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."[127]

To be consistent with the requirements of statutes and Executive Orders, Economic Analyses require the use of sound scientific, technical, and economic data to inform agency decision making and develop sound environmental policies and provide "the public with data-driven information needed to systematically assess the consequences of various actions or options."[128] According to OMB Circular A-4, "[a] good regulatory analysis is designed to inform the public and other parts of the Government (as well as the agency conducting the analysis) of the effects of alternative actions,"[129] and it should include: "(1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis."[130] For a major rulemaking like this one, the agency's action should be supported by both benefit-cost analysis (BCA) and cost-effectiveness analysis (CEA).[131]

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[125] Office of Management and Budget Circular A-4, Regulatory Analysis (Sept. 27, 2003), available at: https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4 ("*OMB Circular A-4*"). **(Attachment 10)**

[126] Executive Order 12866 – Regulatory Planning and Review, 58 Fed. Reg. 51735, § 1(a) (October 4, 1993) (emphasis added).

[127] *Id*.

[128] EPA Guidelines for Preparing Economic Analyses, at 1-1; *see also*, OMB Circular A-4, Transparency and Reproducibility of Results ("You should provide documentation that the analysis is based on the best reasonably obtainable scientific, technical, and economic information available. To achieve this, you should rely on peer-reviewed literature, where available, and provide the source for all original information.").

[129] *Id.* at The Need for Analysis of Proposed Regulatory Actions.

[130] *Id.* at Key Elements of a Regulatory Analysis.

[131] *Id.* at Analytical Approaches.

In contrast to these requirements, the Economic Analysis for the Proposed Rule, among other problems, does not (1) adequately explain the need for the Proposed Rule, (2) use an appropriate baseline, (3) examine any alternative approaches, or (4) meaningfully evaluate the benefits and costs of the Proposed Rule or any alternatives.[132] In fact, the Economic Analysis contains very little data or information about the consequences of the Proposed Rule, and primarily provides the public with speculation from the agency about how the Proposed Rule's weakening of State and Tribal authority to protect water quality may reduce unquantified expenses for permit applicants and certifying authorities.[133]

Claiming that the agency lacks sufficient data to quantify the costs and benefits of the proposed rule, EPA simply evaluated "the number of certification decisions received by the U.S. Army Corps of Engineers (Corps) since the 2023 Rule went into effect," and posited without meaningful support that the agency "anticipates the proposed rule would result in more predictable, efficient decision-making by certifying authorities which would result in a cost decrease and reduction in burden to certifying authorities and applicants."[134] The supporting analysis is purely speculative, is not adequately supported by evidence, and commonly relies on vague language qualifying EPA's assertions such as "expects," "anticipates," "believes," "would likely," and "could."[135] For example, with regard to the proposed changes to the scope of certification, the Economic Analysis asserts without any factual support that "the proposed rule would likely reduce the time and labor costs spent requesting out of scope information from the applicants and reviewing out-of-scope information or data. This could also reduce the number of certifications granted with conditions."[136]

Additionally, as illustrated by the preceding sentence, the Economic Analysis improperly fails to consider the costs and forgone benefits that would result from constraining State and Tribal authority to protect their water resources, and the analysis is not "based on the best reasonably obtainable scientific, technical, and economic information."[137] Although EPA found via a detailed, 100-page Economic Analysis that significant environmental benefits would result

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[132] *See* EPA Guidelines for Preparing Economic Analyses, at 1-5 Text Box 1.1 Additionally, the Economic Analysis for the Proposed Rule does not analyze any alternatives, including those that achieve additional benefits or costs less, or explain why the planned regulatory action is preferable to any alternatives.

[133] *See, e.g.,*, Proposed Rule EA at 29 ("Overall, the proposed rule is expected to result in net cost savings to certifying authorities and applicants, represented as negative costs.").

[134] Proposed Rule EA at 2; Proposed Rule, 91 Fed. Reg. at 2037-38.

[135] *See, e.g.*, Proposed Rule EA at 15, 17, 18-25.

[136] Proposed Rule EA at 15.

[137] EPA Guidelines for Preparing Economic Analyses at 1-5 Text Box 1.1.

from the 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule,[138] the agency's Economic Analysis for this Proposed Rule does not contain an adequate evaluation of environmental costs or benefits. In place of any meaningful assessment of the environmental impacts of the Proposed Rule, EPA summarily states that "[a]s for impacts to the environment, typically what the EPA analyzes as benefits, ***most of the changes in this proposal are expected to have no impact on environmental benefits***."[139]

For example, EPA previously determined that the scope of certification in the current 2023 rule "has significant potential to generate noticeable water quality benefits" and that, by preventing consideration of the full range of possible water quality impacts, the 2020 Rule's limitations "increased the likelihood that projects not beneficial to society due to water quality impacts (negative net benefits) were approved."[140] The Proposed Rule's Economic Analysis notes that the Proposed Rule would "eliminate non-discharge related" State and Tribal water quality requirements from 401 certifications, but EPA makes no attempt whatsoever to evaluate the environmental effects of that change.[141] To the contrary, in discussing the potential effects of this change in Section 4.1.3, only the potential reduction of implementation and enforcement costs to the Federal agencies and compliance costs for permit applicants is included.[142] Although the Economic Analysis later acknowledges that this change "could have negative environmental impacts relative to baseline," the agency does not assess those impacts and, based on speculation regarding what could happen in a court challenge if the Proposed Rule is adopted, ultimately concludes that "EPA anticipates that the proposed rule would have no environmental impacts."[143] Under no reading of the word can this fairly be described as "analysis."

Because the Proposed Rule would eliminate or alter many of the current rule provisions that EPA previously determined would generate environmental benefits, the agency's failure to assess the impact of those changes and resulting unsupported assumption that the benefits "may be essentially zero," the costs "may be essentially negative," and the "net benefits may be positive," is utterly unreasonable, arbitrary, capricious, and inconsistent with the applicable

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[138] EPA, Economic Analysis for the Final Clean Water Act Section 401 Water Quality Certification Improvement Rule at 57-62 (2023) ("2023 Economic Analysis"), available at https://www.regulations.gov/document/EPA-HQ-OW-2022-0128-0436. **(Attachment 11)**

[139] Proposed Rule EA at 28 (emphasis added).

[140] 2023 Economic Analysis at 39-40.

[141] Proposed Rule EA at 15.

[142] *Id*.

[143] *Id.* at 28-29.

requirements of Economic Analyses.[144] The reduction or elimination of environmental benefits imposes use and non-use costs on the public that EPA is required to evaluate, including all available quantitative information, a description of unquantified effects (such as impacts to quality of life, property values, recreational activities, aesthetics, and human health), and "detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs."[145]

Further, the Economic Analysis did not use an appropriate baseline that represents "the best assessment of the way the world would look absent the proposed action."[146] In this instance, EPA should select two baselines for comparison with the Proposed Rule due to the uncertainty associated with litigation over the current rule:[147] (1) the 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule and (2) the May 1971 Rule, which governed 401 Water Quality Certifications until EPA adopted the 2020 Clean Water Act section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020).[148] The Proposed Rule substantially diverges from longstanding interpretations of the CWA reflected in both the 2023 and 1971 Rules, and the consequences of the divergences must be fully assessed in the Economic Analysis.

Additionally, EPA's brief "analysis" and vague conclusions are riddled with a wide range of acknowledged data limitations and uncertainties.[149] When, like here, an agency's uncertainty has significant effects on the final conclusion about net benefits of a proposed rule, according to OMB Circular A-4, the agency "should consider additional research prior to rulemaking. The costs of being wrong may outweigh the benefits of a faster decision. This is true especially for cases with irreversible or large upfront investments . . . For example, when the uncertainty is due to a lack of data, [the agency] might consider deferring the decision, as an explicit regulatory alternative, pending further study to obtain sufficient data."[150]

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[144] Proposed Rule EA at 29.

[145] OMB Circular A-4, Methods for Treating Non-Monetized Benefits and Costs.

[146] *Id*. at General Issues, 2. Developing a Baseline.

[147] *See, e.g.*, Proposed Rule, 91 Fed. Reg. at 2015, n. 26 ("the 2023 Rule has been in effect for less than two years and subject to litigation for most of that time. *Louisiana, et al., v. EPA*, No. 2:23–cv–01714 (W.D. La.)").

[148] *See, e.g.*, 2023 Economic Analysis at 7 (Comparing 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule to (1) a 1971 baseline and (2) and 2020 Rule baseline due to "regulatory uncertainty surrounding the 2020 Rule, which has been challenged in Federal district court."

[149] Proposed Rule EA at 30.

[150] OMB Circular A-4, Treatment of Uncertainty.

For all of these reasons, the Proposed Rule's Economic Analysis is woefully insufficient to meet EPA's obligations under the CWA, the APA, and OMB policy.

B. The Unsupported Conclusion that the Proposed Rule is Not Subject to EPA's Children's Health Policy is Erroneous, Arbitrary, and Capricious.

EPA states that the Proposed Rule "is not subject to the EPA's Children's Health Policy because EPA does not believe the action has considerations for human health."[151] This fallacious conclusion rests solely on the agency's stated, but obviously erroneous, "belief," rather than on any analysis, evidence, or reasoned explanation. An agency may not satisfy its obligations under the APA by substituting bald assumptions for analysis, and that is particularly true in a situation like this where the Proposed Rule would dramatically restrict State and Tribal authority to prevent water quality degradation.[152] Because water quality is a fundamental determinant of public health – and because children are uniquely vulnerable to waterborne contaminants – EPA's conclusory assertion is erroneous on its face and arbitrary and capricious.

Section 401 operates as a critical public health safeguard by allowing States and Tribes to prevent federally authorized activities from degrading waters used for drinking, recreation, fishing, and subsistence. The Proposed Rule would narrow the scope of certification review, constrain the conditions that may be imposed, and increase the likelihood that water quality impacts will go unaddressed. Yet EPA simply declines to evaluate whether these changes could increase exposures to pollutants such as, without limitation, nutrients (and resulting toxic algal blooms), sediment, toxic metals, PFAS, and pathogens, nor does it consider downstream impacts on communities dependent on affected waters. These omissions are especially troubling given EPA's longstanding recognition that children face heightened risks from contaminated water due to higher intake rates per body weight and critical developmental windows.[153]

EPA's failure to meaningfully consider children's health also conflicts with established Federal policy. Executive Order 13045 directs Federal agencies to identify and assess

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[151] Proposed Rule, 91 Fed. Reg. at 2037-38 (citation omitted).

[152] *See, e.g., Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (explaining that where an agency "has failed to provide even that minimal level of analysis, its action is arbitrary and capricious…") (citations omitted); *Natural Resources Defense Council v. EPA*, 31 F.4th 1203, 1207 (9th Cir. 2022) (explaining that "unsubstantiated" or "bare assumptions" by an agency will not be credited) (citations omitted).

[153] *See* EPA, *America's Children and the Environment* (last updated in 2025) (documenting the disproportionate vulnerability of children to environmental contaminants, including water pollutants), available at https://www.epa.gov/americaschildrenenvironment.

environmental health and safety risks that may disproportionately affect children and to explain why a planned regulation is preferable to alternatives when such risks may be present.[154] EPA routinely acknowledges that regulatory actions affecting water quality can implicate children's health, including through drinking water exposure, recreational contact, and consumption of contaminated fish.[155] EPA's bare assertion that the proposed rule does not raise such considerations – without any analysis whatsoever – falls far short of satisfying the requirements of reasoned decisionmaking.

Courts have consistently held that agencies act arbitrarily and capriciously when they fail to consider an important aspect of the problem or rely on unsupported assumptions.[156] Here, EPA neither analyzes whether weakening Section 401 protections could adversely affect public or children's health, nor explains how such impacts can be categorically ruled out. An unexplained "belief" is not a substitute for analysis under the APA.

EPA's conclusion is also inconsistent with the Clean Water Act's central objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[157] Congress enacted the Act in large part to protect public health through water quality protection, and EPA has repeatedly recognized the inseparability of clean water and human health – particularly for children. By disclaiming any health implications without analysis, EPA divorces its rulemaking from one of the statute's core purposes.

Because EPA's assertion regarding children's health and public health is unsupported by evidence, fails to consider an important aspect of the problem, and conflicts with both EPA's own guidance and the Clean Water Act's objectives, the Agency's conclusion is arbitrary and capricious and cannot support finalization of the Proposed Rule.

C. EPA Has Failed to Comply with Public Notice and Comment Requirements.

EPA's decision to provide only a 30-day public comment period for this sweeping proposal violates both the CWA and the APA because it deprives the public of a meaningful

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[154] Executive Order No. 13045, 62 Fed. Reg. 19,885 (Apr. 21, 1997).

[155] *See, e.g.*, EPA, Guidance on Selecting Age Groups for Monitoring and Assessing Childhood Exposures to Environmental Contaminants; EPA, Framework for Cumulative Risk Assessment (2005), available at https://www.epa.gov/sites/default/files/2013-09/documents/agegroups.pdf. **(Attachment 12)**

[156] *State Farm*, 463 U.S. at 43.

[157] 33 U.S.C. § 1251(a).

opportunity to comment on a complex and consequential rulemaking. Courts at all levels have stressed the importance of public participation in rulemaking, and as the D.C. Circuit has stated, notice and comment works: "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[158] These considerations are especially pressing for a significant regulatory action such as gutting State and Tribal CWA authority as EPA has proposed here, yet as described in more detail below, EPA has utterly failed to provide the public with a meaningful opportunity for comment.

In the Proposed Rule, EPA unsuccessfully attempts to create the appearance of a record of extensive opportunity for public input and consultation with state, tribal, and local governments. In reality, EPA (1) provided sparse, vague information to public and governmental stakeholders at the pre-proposal "listening session" stage; (2) arbitrarily constrained the issues on which it sought stakeholder feedback and consultation; (3) has provided only sparse, vague information explaining the basis for, implementation of, and impacts of the Proposed Rule; and (4) provided woefully inadequate time for comment on the Proposed Rule. EPA's wide-ranging failures to engage the public, conduct mandatory consultations,[159] and provide the public with adequate notice and meaningful opportunity for commenting, violate both the CWA and the APA.

EPA relies on defective "stakeholder engagement" and "federalism consultations" to create the misimpression that the public and state, tribal, and local governments have had a meaningful opportunity for input that has been considered by the agencies, and to justify the draconian and unreasonably short 30-day comment period for the Proposed Rule. This is not how the APA and EPA's own public participation process is required to function.[160] To significantly change the law, as is proposed here, EPA must engage in substantive evaluation and careful analysis of its action, provide a reasoned explanation for it, and engage in formal rulemaking based on this information while providing the public with ***meaningful*** opportunities and

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[158] *International Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

[159] *See* Executive Order 13132 (64 Fed. Reg. 43255, August 10, 1999).

[160] EPA's approach to this rulemaking is inconsistent with its own regulations. *See, e.g.*, 40 C.F.R. §25.3 ("Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ***ample opportunity*** for interested and affected parties to communicate their views. Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official.").

adequate time to fully understand the proposal and provide substantive input, which should include a comment period of ***at least 60 days***.[161] With this proposed rule, the unreasonably short timeline for comment, lack of meaningful pre-proposal input opportunities,[162] and failure to provide any adequate legal or factual bases for the Proposed Rule, all demonstrate the capriciousness and illegality of the EPA's action.

1. The 30-Day Public Comment Period Is Inconsistent with the Clean Water Act's Public Participation Mandate.

The Clean Water Act places extraordinary emphasis on public participation. Congress declared that "public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted."[163] This mandate is not precatory; it reflects Congress's intent that rulemakings affecting water quality be subject to robust public engagement.

EPA's proposal would significantly alter the scope of State and Tribal authority under CWA Section 401 as discussed above, reshape certification procedures, affect federal permitting programs nationwide, and curtail long-standing water quality protections. These are foundational components of the cooperative federalism framework that Congress enacted. Providing only 30 days for public review of a proposal of this breadth obviously does not "encourage" or "assist" public participation; it restricts and discourages it. It should not come as a surprise then, that Commenters have identified at least one dozen written requests to EPA to extend the comment period, and not only from individuals and environmental organizations, but also from States and

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[161] *See, e.g.*, Executive Order 12866, 58 Fed. Reg. at 51740 (emphasis added) ("Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a ***comment period of not less than 60 days***.") (emphasis added); *see also* Executive Order 13563, 76 Fed. Reg. at 3821-22, § 2(b) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a ***comment period that should generally be at least 60 days***.") (emphasis added).

[162] *Id.*; 40 C.F.R. § 25.3.

[163] 33 U.S.C. § 1251(e) (emphasis added).

numerous Tribes as well. Links to a small sampling of these requests are provided below.[164] It appears that EPA simply ignored these requests.

Moreover, affected stakeholders—including States, Tribes, small municipalities, public interest organizations, and community groups—must review lengthy regulatory text, evaluate complex legal and technical implications, consult experts, and coordinate internal decisionmaking processes. A truncated comment period effectively excludes meaningful participation by many of the very entities Congress sought to empower under CWA Section 1251(e).

Courts have recognized that the adequacy of a comment period must be evaluated in light of the complexity and significance of the rulemaking.[165] For a rule that restructures a core CWA program and implicates Federal, State, and Tribal authority nationwide, a 30-day window was plainly inadequate.

2. The 30-Day Comment Period Also Violates the APA's Requirement of a Meaningful Opportunity to Comment.

The APA requires agencies to provide "notice of proposed rule making" and to "give interested persons an opportunity to participate through submission of written data, views, or arguments."[166] While the APA does not prescribe a minimum comment period, courts have

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[164] *See, e.g.*, Comment by National Tribal Water Council, available at https://downloads.regulations.gov/EPA-HQ-OW-2025-2929-0035/attachment_1.pdf; Comment by Waterkeeper Alliance, available at https://downloads.regulations.gov/EPA-HQ-OW-2025-2929-0032/attachment_2.pdf; Comment by American Sustainable Business Network, available at https://downloads.regulations.gov/EPA-HQ-OW-2025-2929-0028/attachment_2.pdf; Comment by National Association of Wetland Managers, available at https://downloads.regulations.gov/EPA-HQ-OW-2025-2929-0019/attachment_1.pdf; Comment by the Association of Clean Water Administrators, available at https://downloads.regulations.gov/EPA-HQ-OW-2025-2929-0017/attachment_1.pdf; Comment by Natural Resources Defense Council and more than 50 other groups, available at https://downloads.regulations.gov/EPA-HQ-OW-2025-2929-0021/attachment_1.pdf.

[165] *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 453–54 (3d Cir. 2011) (holding that agencies must provide a meaningful opportunity for public comment and that announcing public hearings 10 days before they occurred and providing a 28-day comment period – similar to EPA's public notices here – undermined that requirement); *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (vacating rule where agency failed to provide adequate opportunity for meaningful public comment).

[166] 5 U.S.C. § 553(b), (c).

consistently held that the opportunity to comment must be meaningful, which depends on the nature and complexity of the rule.[167]

A 30-day comment period is plainly not adequate for a proposal that:

- Alters the scope of State and Tribal certification authority in numerous ways;
- Revises multiple definitions and interpretations central to the operation of Section 401;
- Reallocates authority among Federal and State actors; and
- Has substantial implications for infrastructure permitting, water quality protection, and Tribal sovereignty nationwide.

Courts have vacated rules where compressed comment periods prevented meaningful participation in complex rulemakings.[168] Where an agency "restrict[s] meaningful comment" through an unreasonably short timeline, the rule cannot stand.[169]

EPA has not provided a reasoned explanation for why disregarded the above-cited federal policy that specifies at least 60-day notice-and-comment periods for major federal rules and deemed only 30 days sufficient for such a broad and complex proposal. The absence of any demonstrated urgency, statutory deadline, or emergency underscores the capriciousness of the compressed timeframe. An agency acts arbitrarily and capriciously when it fails to consider important aspects of the problem[170] – including the practical challenges and potential inability of affected parties to meaningfully participate in the rulemaking process as a result of the agency's own procedural choices, which we can only assume were designed to discourage and dissuade affected parties from participating and/or make it more difficult for members of the public to submit high quality comments.

V. THE PROPOSED RULE WOULD VIOLATE THE ENDANGERED SPECIES ACT.

EPA was required to consult under Section 7(a)(2) of the Endangered Species Act ("ESA") with the Fish and Wildlife Service ("FWS") and/or National Oceanic and Atmospheric

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[167] *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (notice-and-comment must provide a "meaningful opportunity" to comment); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103–04 (4th Cir. 1985).

[168] *See Prometheus Radio Project*, 652 F.3d at 453–54; *NRDC v. EPA*, 279 F.3d at 1186.

[169] *Home Box Office*, 567 F.2d at 35.

[170] *State Farm*, 463 U.S. at 43.

Administration ("NOAA") to assess whether its proposed regulatory action may jeopardize the continued existence of listed species or adversely modify critical habitat; the extent to which the action may incidentally take listed species; and the specific measures EPA must carry out to minimize and mitigate those adverse effects.[171] Before EPA takes any action that "may affect" species listed as threatened or endangered under the ESA, or modify their critical habitat, the agency must first consult with the FWS and/or NOAA pursuant to Section 7 of the ESA.[172] The duty to consult applies to discretionary agency actions, including rulemakings, that may affect listed species.[173]

The Proposed Rule would narrow and constrain State and Tribal authority to deny or condition certifications protecting water quality, including protections for small streams, wetlands, and other aquatic resources that provide habitat for countless listed species. Because Section 401 certifications frequently serve as a primary mechanism for preventing degradation of aquatic habitat from federally licensed or permitted discharges, weakening that authority may increase pollutant loads, hydrologic alteration, and habitat fragmentation affecting ESA-listed species and their critical habitat. At minimum, these reasonably foreseeable effects trigger EPA's obligation to initiate consultation with the FWS and/or NOAA Fisheries. EPA cannot avoid its Section 7 obligations by characterizing this rule as purely procedural where its legal and practical consequences may substantially influence water quality protections and affect listed species.[174] EPA's Failure to consult renders the Proposed Rule procedurally unlawful.

VI. WATERKEEPER ALLIANCE AND WATERKEEPER GROUPS REGULARLY RELY ON SECTION 401 TO PROTECT THEIR WATERS AND COMMUNITIES FROM POLLUTION.

Members of the public, including non-profit, public interest organizations such as Waterkeeper Alliance and its member groups, rely upon Section 401 as a vital tool to address water pollution impacts from activities that require federal approvals. Waterkeeper groups rely on States and Tribes to place protective conditions in certifications and to deny certifications when necessary, and they have often advocated for States to implement measures to protect water quality utilizing their Section 401 authorities in matters involving, among many others, proposed pipelines, export facilities, nuclear facilities, pumped storage, dredging and filling of

[171] *See* 16 U.S.C. § 1536.

[172] 16 U.S.C. § 1536(a)(2).

[173] 50 C.F.R. § 402.14(a); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020–21 (9th Cir. 2012) (en banc).

[174] *See Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1085–86 (9th Cir. 2015).

waters, highways and bridge construction, and new and existing power plants and hydroelectric dams. Through Section 401, Waterkeeper groups have provided States with technical analyses and shared their and their communities' concerns about water impacts with their State environmental agencies. Many States have taken such public input into account when they have made Section 401 certification decisions, as the Act requires:

> "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."[175]

The Proposed Rule would adversely impact the ability of Waterkeeper groups and other members of the public to share their concerns about water impacts with the States, and drastically limit the ability of States to take action to address these concerns in their Section 401 certification decisions.

The following examples represent only a small percentage of the myriad matters in which Waterkeeper Alliance and Waterkeeper groups have frequently relied on CWA Section 401 to protect their watersheds and communities, demonstrating our collective interest in maintaining EPA's current Section 401 regulations.

1. Waterkeeper Groups Have Utilized Section 401 Notice and Comment Processes and Legal Action in Preventing or Mitigating Extensive Impacts from Proposed Pipelines.

Several Waterkeeper groups have advocated during Section 401 notice and comment periods and in court to address concerns about pipeline impacts. For example, in written comments and in a public hearing, Gunpowder Riverkeeper raised concerns about a 21.1 mile long natural gas pipeline impacting lands and waterways with a temporary construction right-of-way of at least 75 feet and resulting in a permanent right-of-way across the Gunpowder River watershed in Baltimore and Harford counties, Maryland.[176] Many of the impacted waterways are designated as public water supplies and/or recreational trout waters and, at one point, the project would have also crossed the Gunpowder Falls River that provides drinking

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[175] 33 U.S.C. § 1251(e).

[176] *See, e.g., Bosley, et al. v. Maryland Dep't of the Environment*, Case Nos.: 03-C-14-5417, 03-C-14-10780, 03-C-14-7760, 03-C-14-7759, 03-C-14-10741, 03-C-14-5428, at 1-2, 13 (April 30, 2015) (Memorandum Opinion remanding permit and Section 401 Water Quality certification to Maryland Department of the Environmental to comply with State water quality regulations, the Clean Water Act, the Maryland Historic Trust Act, and the public notice and comment procedures.). **(Attachment 13)**

water for 1.5 million Baltimore-Metro area residents.[177] In challenging the state permit and Section 401 certification issued by the Maryland Department of the Environment, Gunpowder Riverkeeper successfully argued that that the permit, which incorporated the certification, was not supported by substantial evidence that the project would not cause or contribute to the degradation of surface waters because it improperly relied on industry manuals instead of requiring compliance with water quality standards and did not require adequate monitoring, resulting in a remand of the permit.[178]

Buffalo Niagara Waterkeeper raised concerns with the New York Department of Environmental Conservation about the water impacts of National Fuel Gas Supply Corporation's proposed Northern Access Pipeline, which would cross 192 streams on its 97-mile route through New York State.[179] The New York Department of Environmental Conservation ultimately declined to issue a Section 401 certification for the project. The agency based its decision on the National Fuel Gas Supply Corporation's failure to demonstrate that the project would comply with New York water quality standards due to the impacts that construction would have on streams, wetlands, and important trout habitat.[180]

In 2018, Waterkeeper Alliance, Rogue Riverkeeper, Columbia Riverkeeper, and partners raised concerns with the Oregon Department of Environmental Quality ("ODEQ") about the water impacts of the Pacific Connector Pipeline and related Jordan Cove LNG Export Facility. Over 43,000 comments were submitted during the Section 401 comment period, many from

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[177] *See, e.g.*, Letter from Barbara Rudnick, NEPA Team Leader, EPA to Kimberly Bose, Secretary Federal Energy Regulatory Commission, *Environmental Assessment (EA) for the Proposed Line MB Extension Project, Baltimore and Harford Counties, Maryland; Columbia Gas Transmission, LLC (Columbia), FERC Docket No. CP13-008*, (May 22, 2013).

[178] *Id*. at 34-37 (The court found that "[t]here is insufficient information within the Permit for this Court to determine if the Permit complies with the State's water quality standards, and as such, this Court must remand for future proceedings to ensure that the Permit complies with Maryland state water quality regulations.") Although the Court did not directly address the merits of Gunpowder Riverkeeper's challenge to the 401 certification in this case, the court addressed the Riverkeeper's water quality concerns in the permit challenge. *Id*. at 17, n. 103.

[179] Buffalo Niagara Riverkeeper, *Comments on the Proposed Northern Access 2016 Projec*t (Feb. 22, 2017); Buffalo Niagara Riverkeeper, *Statement Northern Access Pipeline Permit Denial,* (2017) available at: https://bnwaterkeeper.org/wp-content/uploads/2017/04/BNR-Statement-NA-Pipeline-Denial.pdf. **(Attachment 14)**

[180] New York Department of Environmental Conservation, Notice of Denial to National Fuel Gas Supply Corporation (April 7, 2017) **(Attachment 15)**; *New York State Dep't of Env't Conservation v. FERC,* 991 F.3d 439, 444 n. 4 (2d Cir. 2021) ("The DEC issued a revised denial on August 8, 2019.").

members of Waterkeeper Alliance and Waterkeeper groups.[181] In 2019, agreeing with many of our concerns, ODEQ denied a Section 401 certification for the project without prejudice, citing insufficient information to assure that water quality standards would be met and because the available information shows that some standards were more likely than not to be violated.[182] On December 2, 2021, the company withdrew its Federal Energy Regulatory Commission permit application for the project after more than 50,000 Oregonians filed comments with state agencies, tens of thousands attended public hearings in opposition, the company withdrew its state removal-fill permit, the U.S. Department of Commerce upheld Oregon's objection to the project under the federal Coastal Zone Management Act, and the Federal Energy Regulatory Commission determined that Oregon had not waived its authority to deny the Section 401 certification[183]

For more than two years, Haw Riverkeeper raised concerns with the North Carolina Department of Environmental Quality ("NCDEQ") about the potential water quality impacts of the proposed Mountain Valley Pipeline ("MVP") Southgate Project. On August 11, 2020, NCDEQ denied the Section 401 certification for the pipeline "[d]ue to uncertainty surrounding the completion of the MVP Mainline project" and a finding that "it is inappropriate to unnecessarily risk impacting high-quality waters and critical drinking water supplies of North Carolinians."[184] After the Fourth Circuit upheld NCDEQ's denial as being "consistent with the State's regulations and the Clean Water Act,"[185] but remanded the certification for additional

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[181] Juliet Grable, Water Watchdogs Keep Up Fight Against Oregon LNG Terminal, Earth Island Journal (Nov. 28, 2018), available at http://www.earthisland.org/journal/index.php/articles/entry/water-watchdogs-fight-oregon-liquified-natural-gas-lng-terminal/. **(Attachment 16)**

[182] Letter from Oregon Department of Environmental Quality to Derek Vowels, Jordan Cove LNG, LLC, et al., (May 6, 2019), available at: https://www.oregon.gov/deq/FilterDocs/jcdecletter.pdf; Oregon Department of Environmental Quality, Jordan Cove Energy Project: Current Actions, https://www.oregon.gov/deq/programs/pages/jordan-cove.aspx (last accessed Feb. 15, 2026) **(Attachment 17)**

[183] Waterkeeper Alliance, *After Years of Community Organizing, Jordan Cove LNG Export Terminal and Fracked Gas Pipeline Project is Dead,* (Dec. 2, 2021), available at: https://waterkeeper.org/news/after-years-of-community-organizing-jordan-cove-lng-export-terminal-and-fracked-gas-pipeline-project-is-dead/. **(Attachment 18)**

[184] North Carolina Department of Environmental Quality, *State Denies Water Quality Certification for MVP Southgate Pipeline*, (Aug. 11, 2020), available at: https://www.deq.nc.gov/news/press-releases/2020/08/11/state-denies-water-quality-certification-mvp-southgate-pipeline. **(Attachment 19)**

[185] *See Mountain Valley Pipeline, LLC v. NCDEQ, No. 20-1971* (4th Cir. Mar. 11, 2021) (*Slip Op*.) (Haw Riverkeeper intervened in this case in support of NCDEQ).

explanation, NCDEQ issued a revised denial with additional supporting information and reasoning.[186] The applicant is now seeking to construct a shorter segment of the MVP Southgate pipeline in a location that does not include the Haw River watershed, but does include another watershed protected by Dan Riverkeeper as discussed below.

West Virginia Headwaters Waterkeeper[187] joined with partners on a series of actions to address water quality concerns associated with the MVP project in West Virginia, including filing written comments and litigation relating to water quality certifications issued by the West Virginia Department of Environmental Protection ("WVDEP") for the project.[188] For example, after West Virginia Headwaters Waterkeeper and its partners pointed out in their comments and in court that the MVP's application lacked adequate information for the State to be able to certify that state water quality standards would be met, WVDEP notified the 4th Circuit Court of Appeals that it was withdrawing the Section 401 certification for the project after reviewing the judicial filings and determining that "the information used to issue the Section 401 Certification need to be further evaluated and possibly enhanced," including compliance with state water quality standards and reconsidering its antidegradation review.[189] Similarly, at the conclusion of a subsequent public comment period resulting in issuance of another Section 401 certification for the MVP project in December 2021, West Virginia Headwaters Waterkeeper and partners' filed a legal challenge to the certification identifying numerous water quality related shortcomings.[190] On April 3, 2024, the Fourth Circuit Court of Appeals ruled in favor of the groups and vacated the Section 401 certification finding that WVDEP's conclusion that MVP's in-stream construction would be conducted in a manner which will not violate state water standards was

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[186] North Carolina Department of Environmental Quality, *Reissuance of DENIAL of 401 Water Quality Certification and Jordan Lake Riparian Buffer Authorization Application with Supplement MVP Southgate Project* (April 29, 2021), available at: https://www.deq.nc.gov/pipelines/2018-1638v3-mvp-southgate-04292021/download; North Carolina Department of Environmental Quality, *State Reissues Denial of Water Quality Certification for MVP Southgate Pipeline* (April 29, 2021), available at: https://www.deq.nc.gov/news/press-releases/2021/04/29/state-reissues-denial-water-quality-certification-mvp-southgate-pipeline. **(Attachment 20)**

[187] West Virginia Headwaters Waterkeeper's parent organization is the West Virginia Rivers Coalition.

[188] *See, e.g.*, West Virginia Rivers, *WVDEP Moves to Withdraw Approval of the Mountain Valley Pipeline*, available at: https://wvrivers.org/2017/09/breaking-news-wvdep-withdraws-major-pipeline-permit-for-further-review/. **(Attachment 21)**

[189] *Sierra Club, et al., v. West Virginia Dep't of Env't Prot.* Case No. 17-1714, Consent Motion for Voluntary Remand with Vacatur by Respondents West Virginia Department of Environmental Protection and Austin Caperton, Dkt. ID No. 41 (Sept. 13, 2017). **(Attachment 22)**

[190] *Sierra Club v. West Virginia Dep't of Env't Prot.*, 64 F.4th 487, 501 (4th Cir. 2023).

arbitrary and capricious because "[i]t did not (1) sufficiently address MVP's violation history, (2) include conditions requiring compliance with the O&G CGP [Oil & Gas Construction General Permit] and SWPPP [stormwater pollution prevention plans], (3) provide a reasoned basis for relying on EPA's upland CGP [Construction General Permit], or (4) articulate an adequate explanation for forgoing location-specific antidegradation review.[191]

2. Waterkeeper Groups Have Utilized § 401 Notice and Comment Processes to Assist States in Mitigating or Stopping Water Quality Impacts of Existing Power Plants and Hydroelectric Dams.

In 2010, Hudson Riverkeeper submitted to the New York Department of Environmental Conservation Section 401 comments outlining the impacts that the Indian Point Energy Center has on the Hudson River and groundwater under and near the plant.[192] Riverkeeper noted the significant impact of the cooling water system at the plant on fisheries in the Hudson River, including endangered species, as well as the continuing leaks of radioactive waste from the power plant into the groundwater and the Hudson River. The Department of Environmental Conservation ultimately declined to issue a Section 401 certification for the plant, citing the impacts raised by Riverkeeper.[193]

In October 2025, after years of regulatory engagement and litigation,[194] Waterkeepers Chesapeake and the Lower Susquehanna Riverkeeper Association helped secure a settlement with Constellation Energy and the Maryland Department of the Environment that culminated in Maryland issuing a revised Section 401 certification for the Conowingo Dam.[195] This outcome

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[191] *Id*. at 509.

[192] Riverkeeper, *Riverkeeper Hails New York's Decision to Deny Critical Water Quality Certificate for Indian Point*, available at: https://www.riverkeeper.org/news-and-events/news-and-updates/riverkeeper-hails-new-yorks-decision-to-deny-critical-water-quality-certificate-for-indian-point (April 3, 2010). **(Attachment 23)**

[193] New York Department of Environmental Conservation Notice of Denial of Joint Application for CWA § 401 Water Quality Certification NRC License Renewal – Entergy Nuclear Indian Point Units 2 and 3 (April 2, 2010), *available at* https://www.scenichudson.org/sites/default/files/IP_WQC_denial_4.2.10.pdf (hereafter "*Indian Point Denial*"). **(Attachment 24)**

[194] Lower Susquehanna Riverkeeper, *Conowingo Dam*, available at: https://www.lowersusquehannariverkeeper.org/advocacy/hydro-dams/conowingo-dam (last accessed Feb. 15, 2026). **(Attachment 25)**

[195] Press Release, Governor Moore Announces Historic Conowingo Dam Agreement to Promote Landmark Chesapeake Bay Restoration Efforts and Supercharge $3.2 Billion Bay Economy, (Oct. 2, 2025), available at: https://governor.maryland.gov/news/press/pages/governor-moore-announces-historic-conowingo-dam-agreement-promote-landmark-chesapeake-bay-restoration-efforts-supercharge-d.aspx; Press Release, CLA

was explicitly designed to ensure Maryland's water quality standards are not adversely impacted by the dam's operations, backed by enforceable, long-term commitments for operational improvements and environmental projects valued at over $340 million and addressing sediment and nutrient pollution, trash and debris, aquatic life passage, freshwater mussel restoration, dredging, and invasive species management.[196] This win, celebrated as well by the energy company that owns the dam, was predicated on Section 401 functioning as a meaningful state certification backstop for major hydropower relicensing: it gave the State the leverage, and gave impacted communities and environmental organizations a seat at the table, to translate water-quality concerns into binding certification conditions tied to real operational and ecosystem outcomes.[197] EPA's 2026 proposed rule, by redefining the scope of Section 401 as only a point source discharge into waters of the United States and asserting certifying authorities cannot consider impacts beyond the discharge itself, risks dramatically and unpredictably narrowing the scope of this critical Clean Water Act protection. If this rule change were in place, it would have fundamentally altered the nature of Maryland's efforts to secure protections for the Lower Susquehanna River and Chesapeake Bay, risking substantially more pollution for the Bay, more litigation, or both.

South Yuba River Citizens League ("SYRCL"), the parent organization of Yuba River Waterkeeper, has a long history of engagement in hydropower relicensing and watershed protection that demonstrates a sustained and substantial reliance on Section 401 certifications as the key legal mechanism through which California ensures federally licensed projects comply with state water quality standards and protect beneficial uses of the South Yuba and larger Yuba River watershed. For example, during the relicensing of the Yuba-Bear Project (and related proceedings), SYRCL actively participated to ensure that project operations complied with California water quality standards under CWA Section 401.[198] Additionally, for more than a decade, SYRCL, State and Federal agencies, Tribes, and local stakeholders have worked with the project Owner/Operator to update the project's operations and, together, they developed a set of

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and Waterkeepers Secure Historic Settlement for the Chesapeake Bay at Conowingo Dam, (Oct. 2, 2025), available at: https://www.chesapeakelegal.org/news/cla-and-waterkeepers-secure-historic-settlement-for-the-chesapeake-bay-at-conowingo-dam. **(Attachment 26)**

[196] *Id*.

[197] *Id*.

[198] *See, e.g.*, *California State Water Res. Control Bd. v. FERC*, 43 F.4th 920, 936 (9th Cir. 2022) (SYRCL joined with the California Water Resources Control Board and others in a successful challenge to FERC orders that determined the Board waived its authority under the CWA to impose conditions on federal licenses, resulting in the court vacating FERC's orders on the basis that they were not supported by substantial evidence.)

Protection, Mitigation, and Enhancement measures that will restore healthier flows, improve habitat, and support recreation while maintaining reliable power and water supply.[199] SYRCL also submitted comments, engaged in technical review of flow and water quality issues, and advocated for strong Section 401 certification conditions addressing temperature, aquatic habitat, and instream flow protections.[200] SYRCL relied on the State Water Board's Section 401 authority to ensure that state water quality standards, monitoring requirements, and protective operational measures were considered and incorporated into project oversight.

3. Waterkeeper Groups Have Utilized Section 401 Notice and Comment Processes to Assist States in Mitigating Water Quality Impacts of Many Other Proposed Projects, including Bridge Construction and Dredging.

Hudson Riverkeeper submitted comments to the New York Department of Environmental Conservation on the Section 401 certification for the construction of a new bridge crossing the Hudson River. Riverkeeper's concerns focused on impacts of construction on endangered Atlantic and shortnose sturgeon and on increased turbidity near the construction site. In 2013, after challenging the state's Section 401 certification, Riverkeeper and the Department of Environmental Conservation entered into a settlement agreement that put in place conditions on construction to minimize the impacts on the river ecosystem and fish.[201]

Tualatin Riverkeepers and Willamette Riverkeeper recently submitted comments requesting that the Oregon Department of Environmental Quality deny Section 401 certification for two data centers proposed to be constructed on open farmland and wetlands, permanently destroying three wetlands adjacent to drainage systems that discharge to the Tualatin River and replacing permeable natural environment with almost 30 acres of impervious surfaces.[202] The

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[199] South Yuba River Citizens League, *Power and the River: The Yuba-Bear Hydroelectric Project and a Once-in-a-Lifetime Opportunity*, available at: https://yubariver.org/posts/power-and-the-river-the-yuba-bear-hydroelectric-project-and-a-once-in-a-lifetime-opportunity/ (Oct 15, 2025). **(Attachment 27)**

[200] South Yuba River Citizens League, *Protecting our Lifeline: Why the Clean Water Act is Essential for the Yuba River,* available at: https://hydroreform.org/2025/07/protecting-our-lifeline-why-the-clean-water-act-is-essential-for-the-yuba-river/ (July 23, 2025). **(Attachment 28)**

[201] Riverkeeper, *Riverkeeper Reaches Settlement Agreement with NY State on Tappan Zee Bridge Project* (March 27, 2013), *available at* https://www.riverkeeper.org/news-events/news/preserve-river-ecology/settlement-with-ny-state-on-tappan-zee-bridge/. **(Attachment 29)**

[202] Letter from Kelsey J. Shaw Nakama, Policy & Advocacy Director, Tualatin Riverkeepers and Lindsey Hutchison, Staff Attorney, Willamette Riverkeeper to Shelley Tattam Oregon Department of Environmental Quality, *TRK and WRK Comments on DEQ 401 WQC, 2023-301, Crane Forest Grove*

comments identify numerous problems with the application including a significantly incomplete application, the cumulative impacts of the project and at least 30 other active data centers in Washington County alone, water use and pollutant discharges such as PFAS, inadequate mitigation of impacts, and impacts associated with conversion of wetlands to impervious surfaces.[203]

Humboldt Baykeeper engaged with the California Northcoast Regional Water Quality Control Board, the California Coastal Commission, and the City of Eureka on a Section 401 certification for the City's Clark Slough Maintenance Project, involving dredging in a tidal slough in the Humboldt Bay watershed. The proposed dredging location was within and drained a heavily contaminated former rail yard, and sampling conducted by Humboldt Baykeeper in 2007 found elevated levels of numerous contaminants that could be detrimental to aquatic resources in the area.[204] Humboldt Baykeeper informed the Northcoast Regional Water Quality Control Board that the City of Eureka had not adequately characterized the site for the proposed project, shared the results of the 2007 sampling, and expressed concern that the dredging could mobilize contaminants, including pentachlorophenol, dioxins, PCBs, arsenic, lead, copper, and other pollutants.[205] Because the City of Eureka approved a Coastal Development Permit without public notice and asserted a categorical exemption from the California Environmental Quality Act, but had not conducted sampling of the area, the Section 401 process was the only available opportunity for public comment and review wherein Humboldt Baykeeper could address these concerns and request that sampling occur prior to initiation of the project and issuance of the Section 401 certification.[206] In response, the Northcoast Regional Water Quality Control Board indicated it would condition the permit so that sampling and analysis would be conducted before the initiation of dredging to both inform reuse and disposal options and to prevent exposing contaminated sediments that could wash into Humboldt Bay.[207] Shortly thereafter, sampling was

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Data Center (Aug. 15, 2025), available at: https://tualatinriverkeepers.org/assets/files/trk-and-wrk-comment-on-fg-data-center_8.15.25.pdf. **(Attachment 30)**

[203] *Id*.

[204] Table 6(b), Analytical Results Summary - Sediments, CEA No. 07040 (July 30, 2007). **(Attachment 31)**

[205] Emails between Jennifer Kalt, Director, Humboldt Baykeeper and Brandon Stevens, Environmental Scientist, Northcoast Regional Water Quality Control Board, *et al.*, at 8, 11, 15 (Aug. 2018). **(Attachment 32)**

[206] *Id*. at 8.

[207] *Id*. at 13.

conducted by the City of Eureka and detected the presence of dioxin in the project area and, ultimately, the city did not proceed with the project.[208]

4. 401 Water Quality Certifications are an Essential Tool for Protection of Waterkeeper Groups' Watersheds.

The watersheds protected by Waterkeeper groups across the country are endangered by numerous deregulatory and dangerous expedited actions currently being undertaken, and expected in the near future, by federal agencies, including massive power projects, oil and gas operations and pipelines, hydropower projects, large-scale development, data centers, and mines. Ensuring that state and tribal governments retain their CWA authorities and properly review and certify federally licensed projects given this reality is essential to protecting the chemical, physical and biological integrity of these Waterkeeper group watersheds. Many of the most damaging impacts to rivers do not come from a single pipe or outlet, but from the overall operation and footprint of a project. Section 401 allows States and Tribes to address the full range of water quality impacts, including cumulative impacts, that are likely being ignored, or inadequately considered and addressed, by federal agencies that are focused on pursuit of deregulation and expediting the issuance of permits.

For example, on January 29 2025, President Trump issued Executive Order 14156—Declaring a National Energy Emergency[209] that, among other things, directed that:

> Within 30 days from the date of this order, the heads of all agencies, as well as the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works shall: (i) identify planned or potential actions to facilitate the Nation's energy supply that may be subject to emergency treatment pursuant to the regulations and nationwide permits promulgated by the Corps, or jointly by the Corps and EPA, pursuant to section 404 of the Clean Water Act, 33 U.S.C. 1344, section 10 of the Rivers and Harbors Act of March 3, 1899, 33 U.S.C. 403, and section 103 of the Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. 1413 (collectively, the "emergency Army Corps permitting provisions");") and (ii) shall provide a summary report, listing such actions" . . . Agencies are directed to use, **to the fullest extent possible** and consistent with

[208] City of Eureka, Clark Slough Dioxin Testing (Sept. 2018). **(Attachment 33)**

[209] Exec. Order No. 14156, Declaring a National Energy Emergency, 90 Fed. Reg. 8433, 8434 (Jan. 29, 2025) ("The heads of executive departments and agencies ("agencies") shall identify and exercise any lawful emergency authorities available to them, as well as all other lawful authorities they may possess, to facilitate the identification, leasing, siting, production, transportation, refining, and generation of domestic energy resources, including, but not limited to, on Federal lands.")

applicable law, the emergency Army Corps permitting provisions to facilitate the Nation's energy supply." [210]

In response, on February 13, 2025, the Army Corps quickly identified roughly 688 permit applications for fast-tracked emergency review,[211] including oil and gas pipelines through "fragile wetlands in Louisiana and Texas, the hotly-contested Enbridge Line 5 oil pipeline under Lake Michigan, transmission lines and methane-fueled power plants," "a gold mine in a national forest in Idaho," and a "housing subdivision proposed by Chevron on environmentally sensitive lands in southern California."[212] The use of emergency permitting means that there will be an extremely abbreviated period for federal agency review of the project's environmental impacts and public comment, elevating the importance of thorough State and/or Tribal review and certification, along with public comment, under CWA Section 401 in order to protect critical water resources. Multiple projects on the Army Corp's February 2025 list involved projects that will impact waters within watersheds protected by Waterkeeper groups, including, without limitation, the following:

- **Atchafalaya Basinkeeper -** A natural gas pipeline in the Atchafalaya River Basin, Louisiana
- **Baltimore Harbor Waterkeeper -** An electrical substation in the watershed of Baltimore Harbor, Maryland
- **Bayou City Waterkeeper** -
    - Shoreline stabilization for an oil storage terminal in the watershed of Galveston Bay, Texas

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[210] *Id.* at 8344-45 (emphasis added).

[211] Environmental Integrity Project, *List of ACOE Energy Emergency Permit Applications* (Feb. 17, 2025) ("This data was downloaded from the public version of the US Army Corps of Engineers (USACE) ORM permit database (https://permits.ops.usace.army.mil/orm-public) on February 13, 2025 . . . Environmental assessment (EA) data was taken from the "NEPA EA" table in the database and matched to projects using DA numbers . . . Environmental impacts data are from USACE public notices."), available at: https://environmentalintegrity.org/wp-content/uploads/2025/09/List-of-ACOE-Energy-Emergency-wetlands-permits-2.17.25.xlsx. **(Attachment 34)**

[212] *See, e.g.*, Environmental Integrity Project, *Trump Orders Hundreds of "Energy Emergency" Permit Reviews for Projects that Could Damage Wetlands and Waterways*, (Feb. 19, 2025), available at: https://environmentalintegrity.org/news/trump-orders-hundreds-of-energy-emergency-permit-reviews-for-projects-that-could-damage-wetlands-and-waterways/. **(Attachment 35)**

- ○ Onshore and offshore components of an oil terminal project in the watershed of Galveston Bay and the Gulf of Mexico, Texas
- ○ Construction of a liquefied natural gas facility with multiple impacts to the Galveston Bay watershed and Galveston Bay, Texas. Bayou City Waterkeeper submitted comments on this project to address serious concerns about the Section 404 Permit and anticipated request for a Section 401 certification, such as discharge of sediments and pollutants into waters that are already listed on the CWA Section 303(d) list for impairments due to PCBs, dioxins, bacteria, and pH imbalance and the project's dredging activities inevitable resuspension of contaminated sediments and toxic pollutants.[213]
- ○ Construction of at least two oil and gas well pads with impacts to Galveston Bay, Texas

- **Columbia Riverkeeper** -
  - ○ Burial of high-voltage electrical cable in the bottom of the Columbia River and Willamette River, as well as other waters in Oregon and Washington. Columbia Riverkeeper is working to ensure that federal and state decision makers are fully transparent about this project and that robust environmental processes address all impacts including, among other things, impacts to salmon and other aquatic species, such as lamprey, eulachon, and sturgeon; the river and sediment habitats; and water quality such as heat pollution, water cloudiness from construction, and electromagnetic impacts to fish.[214]
  - ○ A renewable diesel refinery in the watershed of the Lower Columbia River, Oregon, a project that Columbia Riverkeeper, farmers, and community members oppose due to its potential for significant environmental and other impacts,[215]

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[213] Bayou City Waterkeeper, Comments to SWG-2024-00043 (Galveston LNG Bunker Port Project, Texas City Ship Channel) (Oct. 2, 2024). **(Attachment 36)**

[214] Columbia Riverkeeper, No Underwater Power Line, https://www.columbiariverkeeper.org/campaigns/transmission-cable-under-the-columbia/ (last accessed Feb. 13, 2026); *see also* Columbia Riverkeeper *et al*., Comments on Cable under the Columbia CWA Section 404 Permit Application, No. NWP-2022-126-2 (Sept. 27, 2024), available at: https://www.columbiariverkeeper.org/wp-content/uploads/2025/05/2024.09.27_FINAL-SUBMITTED-CRK_FOTCG-Cable-USACE-404-Application-Comment.pdf. **(Attachment 37)**

[215] Columbia Riverkeeper, *NEXT Energy Refinery,* https://www.columbiariverkeeper.org/campaigns/nxt-energy-refinery/ (last accessed Feb. 13, 2026). While this project is believed to have been on the Army Corps' initial list, it is not listed on EIP's spreadsheet linked in n. 216 *supra*.

including water quality impacts to the Columbia River, McLean Slough, Clatskanie River, Bradbury Slough, Beaver Slough, and smaller waterways within and near the project site. Numerous water quality impacts associated with this project are described in Columbia Riverkeeper's 2024 Comments on the facilities application for a CWA Section 401 certification.[216]

- **Cook Inletkeeper** - Expansion of an area associated with current and future oil and natural gas development operations in the watershed of Cook Inlet, Alaska
- **Delaware Riverkeeper** - An electric transmission project in New Jersey and the watershed of the Delaware River, Delaware
- **Riverkeeper** - A 178-mile long electric transmission line that would run through multiple watersheds in New York
- **Indian Riverkeeper** - Construction of a gated community in the Indian River watershed, Florida
- **Louisiana Bayoukeeper** -
  - A dredging project in Bayou Barataria, Louisiana
  - Construction of an electrical transmission line associated with multiple waterways within the vicinity of the westbank of the Mississippi River, including Bayou Goula, Bayou Tigre, Bayou Sigur/Rocky Canal, Bayou Lafourche, Bayou Napoleon, St. James Canal, Dredge Boat Canal, Bayou Becnel, Moll Canal, Bayou Fortier, St. Charles Canal, Rolete Canal, Providence Canal, Paradis Canal, Grand Bayou, Cousin Canal, Bayou Cypriere Longue, Bayou Bois Piquant, Bayou des Saules, Lake Salvador, Bayou Gaudin, Bayou Verret, and the Inner and Outer Cataouatche Canals, and multiple un-named drainage conveyances, Louisiana
- **Lower Savannah River Alliance, A Savannah Riverkeeper Affiliate** - A dredging operation in Savannah Harbor, Georgia
- **Miami Waterkeeper** - An electric transmission line in the watershed of the North New River Canal, Florida

[216] Columbia Riverkeeper *et al*., Comments on NEXT Renewable Fuels Oregon, LLC's Application for Clean Water Act § 401 Certification, U.S. Army Corps of Engineers No. NWP-2020-393, Oregon Department of State Lands No. 63036 (Oct. 25, 2024), available at: https://www.columbiariverkeeper.org/wp-content/uploads/2024/10/NEDC-and-CRK-Comments-on-NEXT-Draft-401-10.25.24.pdf. **(Attachment 38)**

- **Middle Susquehanna Riverkeeper** -
    - A sand and gravel mining operation in the watershed of the West Branch of the Susquehanna River, Pennsylvania
    - Expansion of existing coal refuse storage capacity at a coal processing plant in the watershed of Bennet Branch Sinnemahoning Creek, Pennsylvania
- **Mobile Baykeeper** - Upgrading and maintaining an existing electrical transmission line in the watershed of Mobile Bay, Alabama
- **Orange County Coastkeeper** - Construction of a residential and mixed-use subdivision, approximately 510-acre in size, in a watershed protected by Orange County Coastkeeper, California
- **St. Johns Riverkeeper** -
    - A project to increase clearance for electricity transmission lines over the St. Johns River, Florida
    - A renewable energy project impacting waters within the St. Johns River watershed, Florida
- **St. Marys Riverkeeper** - A renewable energy project impacting waters within the St Marys River watershed, Florida
- **Tennessee Riverkeeper** - Construction of a natural gas pipeline and associated facilities impacting multiple streams, rivers, wetlands, and open waters, including some waters within the area protected by Tennessee Riverkeeper in Tennessee
- **Wabash Riverkeeper** - Expansion of a surface mining operation for carbon recovery impacting waters within the area protected by Wabash Riverkeeper in Illinois
- **West Virginia Headwaters Waterkeeper** -
    - Construction of a new natural gas turbine power generation facility impacting waters in the Ohio River watershed, West Virginia
    - Construction, operation, and reclamation of a surface mine impacting waters within the Kanawha River watershed, West Virginia
    - A hydroelectric lock and dam project on the Ohio River, West Virginia

- **Youghiogheny Riverkeeper** - Construction of a three-pit surface coal mine impacting waters located in the watershed protected by Youghiogheny Riverkeeper, Pennsylvania

In addition to many other emergency notices published by the Army Corps after publication of that initial list in February 2025, the agency has published at least fifteen CWA Section 404 public notices for emergency authorizations under Executive Order 14156 since September of 2025, all with very short comment periods ranging from seven (7) to thirty (30) days long.[217] Five of these Executive Order 14156 emergency authorizations are for projects located in watersheds protected by Waterkeeper groups, including:

- **Emerald Coastkeeper** - A project for improvement of an electrical transmission line that would impact aquatic resources associated with palustrine non-vegetated wetlands in the area of Miramar Beach and Santa Rosa Beach, Walton County, Florida. The notice provided 17 days for public comment on a project spanning eight miles and provided minimal information about project impacts to waters and multiple ESA threatened species. The notice indicates that consultation under Section 7 of the ESA had not yet occurred and may not occur.[218]

- **Dan Riverkeeper** - A project for construction of a portion of the MVP natural gas pipeline affecting waters, including wetlands, associated with the Dan River and its tributaries and Snow Creek in Virginia and North Carolina. The notice provided 15 days for public comment on a project 31.3 miles long and provided minimal information on the project's activities and impacts. The notice indicates that consultation under Section 7 of the ESA had not yet occurred, and may not occur, and that a CWA Section 401 "may" be required.[219]

- **Puget Soundkeeper** - Construction of a diversion for hydropower generation in the Puyallup River near Graham, Pierce County, Washington. The notice provided 30 days for public comment and provided minimal information on the project's activities and impacts. The notice indicates that consultation under Section 7 of the ESA is required "[i]f the Corps determines the project may affect a species listed (or proposed for listing)

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[217] *See* Emergency Authorizations, Sept. 2025 to Feb. 2026. **(Attachment 39)**

[218] Florida Power & Light, SAJ-2025-01143-JRP, (Sept. 12, 2025), available at: https://publibrary.sec.usace.army.mil/api/download?id=8e5d4dea-5bfc-48d2-de6c-618dc74eaf6a&filename=20250912-SAJ-2025-01143-Walton%20County-0929-JRP.pdf&token=&preview=true. **(Attachment 40)**

[219] Mountain Valley Pipeline, LLC, NAO-2018-1574, (Nov. 13, 2015), available at: https://www.nao.usace.army.mil/Media/Public-Notices/Article/4330728/nao-2018-1574-mountain-valley-pipeline-southgate-amendment-project-pittsylvania/. **(Attachment 41)**

under the ESA as threatened or endangered or any designated critical habitat" and that "[t]he Corps cannot make a final permit decision until Ecology determines the activity would not result in a discharge, grants certification (with or without conditions), waives certification, or fails to act within the reasonable period of time."[220]

- **Lake Erie Waterkeeper** - A project to construct, operate, maintain, and connect a High-Voltage Direct Current (HVDC) transmission line across the U.S.-Canada border. The HVDC line would extend south from the U.S.-Canada international border buried under the bottom of Lake Erie for approximately 35.4 miles, then continue via Horizontal Directional Drilling (HDD) for approximately seven miles along or in existing roads to the proposed 6 acre Erie Converter Station [DC to Alternating Current (AC)] where an approximately 0.4 mile High Voltage Alternating Current (HVAC) line would connect to the existing Penelec Erie West Substation in Erie County Pennsylvania. The project impacts the waters of Lake Erie and Crooked Creek. The notice provided seven days for public comment and provided minimal information on the project's activities and impacts, including impacts to two endangered species. The notice indicates that consultation under Section 7 of the ESA had not yet occurred, and may not occur, and that a CWA Section 401 certification "may" be required, indicating that no certification had been obtained at the time of the notice.[221]

- **Lake Champlain Lakekeeper** - A project to replace or modify existing trash racks with 1-inch clear spaced racks for fish protection and to improve the intake and related structures at High Falls hydropower dam on the Saranac River, approximately 25 river miles upstream of Lake Champlain. The notice provided 15 days for public comment and provided minimal information on the project's activities and impacts. It states that "[t]he Corps is coordinating with FERC to obtain their determination on this project pursuant to Section 7 of the Endangered Species Act (16 U.S.C. §1531)" and indicates that "the applicant will obtain a water quality certificate or waiver from the appropriate state agency in accordance with Section 401 of the Clean Water Act prior to a permit decision."[222]

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[220] Electron Hydro, LLC, NWS-2016-350, (Dec. 17, 2025), (excluding diagrams and images), complete version available at: https://www.nws.usace.army.mil/Portals/27/docs/regulatory2/Public%20Notices/2025/NWS-2016-350-PN.pdf?ver=lQaaCEWvDxqmPFSLMDcfRQ%3d%3d. **(Attachment 42)**

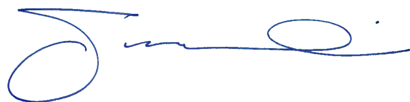
[221] Lake Erie Connector Transmission, LLC, LRP-2013-01434, (Feb. 2, 2026), available at: https://publibrary.sec.usace.army.mil/resource?title=Public%20Notice%20LRP-2013-01434&documentId=a15744e0-578c-4fd9-b21b-aa3b3728641b. **(Attachment 43)**

[222] New York State Electric & Gas, NAN-2024-00151-UDO, (Feb. 6, 2026), available at: https://www.nan.usace.army.mil/Portals/37/docs/regulatory/publicnotices/2026/Feb26/NAN-2024-0151-UDO.pdf?ver=WmPa7lFz28s4ZlbbWc0kMQ%3d%3d. **(Attachment 44)**

VII. CONCLUSION

For all of the foregoing reasons, EPA must withdraw and abandon the Proposed Rule.

Respectfully submitted,



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Riverside, California

Bruce Reznik
Los Angeles Waterkeeper
Los Angeles, California

Garry Brown
Orange County Coastkeeper
Costa Mesa, California

Jaime Neary
Russian Riverkeeper
Healdsburg, California

Phillip Musegaas
San Diego Coastkeeper
San Diego, California

Aaron Zettler-Mann
Yuba River Waterkeeper
Nevada City, California

Bill Lucey
Long Island Soundkeeper
New Haven, Connecticut

Trey Sherard
Anacostia Riverkeeper
Washington, District of Columbia

Betsy Nicholas
Potomac Riverkeeper Network
Washington, District of Columbia

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Calusa Waterkeeper
Fort Myers, Florida

James Moir
Indian Riverkeeper
Stuart, Florida

John Capece
Kissimmee Waterkeeper
Orlando, Florida

Jen Lomberk
Matanzas Riverkeeper
St. Augustine, Florida

Justin Tramble
Tampa Bay Waterkeeper
St. Petersburg, Florida

Maggie Van Cantfort
Altamaha Coastkeeper
Brunswick, Georgia

Fletcher Sams
Altamaha Riverkeeper
Brunswick, Georgia

Stephanie Stutts
Chattahoochee Riverkeeper
Smyrna, Georgia

Damon Mullis
Ogeechee Riverkeeper
Savannah, Georgia

Shannon Gregory
Satilla Riverkeeper
Waycross, Georgia

Tonya Bonitatibus
Savannah Riverkeeper
Augusta, Georgia

Emily Floore
St. Marys Riverkeeper
Kingsland, Georgia

Buck Ryan
Snake River Waterkeeper
Boise, Idaho

Dawn Buehler
Kansas Riverkeeper
Lawrence, Kansas

Ivy L. Frignoca
Casco Baykeeper
Portland, Maine

Alice Volpitta
Baltimore Harbor Waterkeeper
Baltimore, Maryland

Theaux M. Le Gardeur
Gunpowder Riverkeeper
Sparks, Maryland

Robin Broder
Waterkeepers Chesapeake
Silver Spring, Maryland

Christine Crissman
Grand Traverse Bay Waterkeeper
Traverse City, Michigan

Jesse Demonbreun-Chapman
Upper Coosa Riverkeeper
Rome, Georgia

Rae Schnapp
Wabash Riverkeeper
Lafayette, Indiana

Dean Wilson
Atchafalaya Basinkeeper
Plaquemine, Louisiana

Pete Nichols
Penobscot Bay Waterkeeper
Belfast, Maine

Annie Richards
Chester Riverkeeper
Chestertown, Maryland

Elle Bassett
South & West/Rhode Riverkeeper
Edgewater, Maryland

Robert Burns
Detroit Riverkeeper
Taylor, Michigan

Rochelle Dale
Yellow Dog Riverkeeper
Big Bay, Michigan

Guy Alsentzer
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Hackensack, New Jersey

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NY/NJ Baykeeper
Hazlet, New Jersey

Bill Schultz
Raritan Riverkeeper
Keasbey, New Jersey

Jill Jedlicka
Buffalo Niagara Waterkeeper
Buffalo, New York

Drew Gamils
Hudson Riverkeeper
Ossining, New York

Chris Navitsky
Lake George Waterkeeper
Lake George, New York

Andrew Mirchel
Long Island South Shore Waterkeeper
Babylon, New York

Pete Topping
Peconic Baykeeper
Hamptons, New York

Joseph Campbell
Seneca Lake Guardian,
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Cape Fear Riverkeeper
Wilmington, North Carolina

Brandon Jones
Catawba Riverkeeper
Cramerton, North Carolina

Emily Sutton
Haw Riverkeeper
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Samantha Krop
Neuse Riverkeeper
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Frances Oyung
Rogue Riverkeeper
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Kelsey Shaw Nakama
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Three Rivers Waterkeeper
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Eric Harder
Youghiogheny Riverkeeper
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Kate McPherson
Narragansett Bay Riverkeeper
Providence, Rhode Island

Erin Donmoyer
Black-Sampit Riverkeeper
Conway, South Carolina

Andrew Wunderley
Charleston Waterkeeper
Charleston, South Carolina

Bill Stangler
Congaree Riverkeeper
Columbia, South Carolina

Usman Mahmood
Bayou City Waterkeeper
Houston, Texas

Diane Wilson
San Antonio Bay Estuarine Waterkeeper
Seadrift, Texas

Kirsten McDade
North Sound Waterkeeper
Bellingham, Washington

Sean Dixon
Puget Soundkeeper
Seattle, Washington

Katelyn Scott
Spokane Riverkeeper
Spokane, Washington

Eleanor Hines
Twin Harbors Waterkeeper
Rochester, Washington

Autumn Crowe
West Virginia Headwaters Waterkeeper
Charleston, West Virginia

Cheryl Nenn
Milwaukee Riverkeeper
Milwaukee, Wisconsin