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February 17, 2026

By U.S. Mail, E-mail, and Electronically
Attn: Environmental Protection Agency
EPA Docket Center, Water Docket
Mail Code 28221T
2100 Pennsylvania Ave. NW
Washington, D.C. 20460

RE: 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 and Assistant Administrator Kramer:

The undersigned Attorneys General (the States) submit these comments on the Environmental Protection Agency's (EPA) Proposed Rule, Updating the Water Quality Certification Regulations, 91 Fed. Reg. 2008 (Jan. 15, 2026), Docket ID No. EPA-HQ-OW-2025-2929 (Proposed Rule). The States, via authorized regulatory agencies, have for decades exercised authority under section 401 to issue or deny water quality certifications for activities that require a federal license or permit and may result in a discharge into waters of the United States. Throughout this time, and pursuant to the policy Congress expressed in the Clean Water Act to "recognize, preserve, and protect the primary responsibilities of States," 33 U.S.C. § 1251(b), states have successfully implemented section 401 in a manner that is consistent with the Clean Water Act, state laws, and the states' sovereign, proprietary, and other interests in water quality within their borders.

EPA's Proposed Rule is EPA's second attempt to unlawfully curtail states' rights to address the water quality impacts of federally licensed or permitted activities through the Clean Water Act's section 401. EPA's last attempt to accomplish this improper goal in 2020 was a failure. The 2020 Rule caused confusion and project delays around the country—the exact opposite of EPA's purported goals—while *decreasing* the protection of the Nation's waters. EPA's revision to the section 401 rule in 2023 restored section 401 practice to that which existed prior to 2020 and that had successfully governed section 401 certifications for nearly a half-century.

EPA now backtracks and repeats its most significant mistakes. First and foremost, the Proposed Rule unlawfully strips states of authority that Congress, in an abundantly clear statute and legislative record, plainly intended the states to retain. As Senator Muskie, the primary sponsor and architect of the Clean Water Act stated, the goals of section 401 are straightforward: "[a]ll we ask is that the *activities* that threaten to pollute the environment be subjected to the

examination of the environmental improvement agency of the State for an evaluation and recommendation before the federal license or permit be granted." Attach. 1, 117 Cong. Rec. 38854 (1971) (Nov. 2, 1971, House Debate on the Clean Water Act) (emphasis added).[1] EPA's Proposed Rule falls well short of this mark. EPA should abandon the Proposed Rule and should instead implement section 401 in a manner that is consistent with the Clean Water Act's text, legislative intent, and applicable caselaw.

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I. SECTION 401 BACKGROUND

A. Section 401 is a Cornerstone of Congress's Efforts to Preserve States' Traditional Authority Over Water Quality

The states' traditional authority in regulating water quality long precedes the Clean Water Act and is "preserved" through the Act, which is built upon recognizing the "rights of states to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). This clear commitment to recognize state sovereignty to protect water quality has roots at least as far back as the 1948 Water Pollution Control Act. Debate on that Act noted: "[t]here is not a single step that is taken under the pending bill that is not first authorized by some [s]tate agency, either by the public-health service of the [s]tate or some agency that may be designated by the [s]tate's public-health authority." Attach. 2, 80 Cong. Rec. 8199 (1948) (June 14, 1948, House Debate on the Water Pollution Control Act).[2]

Since at least 1948, Congress has repeatedly acted to preserve state sovereignty in matters related to water pollution within their borders. Most critical here, Congress added section 21(b) to the Water Pollution Control Act, allowing federal agencies to proceed with licensing and permitting activities that can potentially impact state waters *only* after the affected state has either granted or denied the project proponent's application for water quality certification or waived its authority to do so. Where a state denies certification, the proposed project cannot proceed.

Congress maintained this commitment to preserve state authority in the Clean Water Act by wholly incorporating section 21(b) into section 401—thereby fully maintaining states' guarantee that federal projects cannot override local water quality concerns. *See, e.g.*, *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 711–12 (1994) (*PUD No. 1*). Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, *as amended* Pub. L. No. 95-217, 91 Stat. 1566 (1977). Indeed, in EPA's own words: "Congress granted states [water quality] certification authority in response to Federal agencies' failure to

[2] Leaving no doubt, Section 5 of the Water Pollution Control Act also mandated that the Federal Works Administrator could only authorize funds for projects if a state's water pollution agency first approved the project's plan to comply with state water pollution control standards. Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948).

achieve Congress's previously stated goal of assuring that federally licensed or permitted activities comply with water quality standards." *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 88 Fed. Reg. 66558 (Sept. 27, 2023).

As with section 21(b), section 401 authority is absolute. Unless a state expressly waives certification authority, the Clean Water Act provides only a single avenue to unilaterally override state authority: certification may be constructively waived only where a state "fails or refuses to act on a request for certification" within a reasonable period of time. 33 U.S.C. § 1341(a)(1). Even then, the legislative history makes clear that Congress intended this provision—both in the 1970 Act and as carried forward into the Clean Water Act amendments—to guard only against "a situation where the [certifying state] … simply sits on its hands and does nothing," thus killing a proposal via "sheer inactivity." Attach. 3, 91 Cong. Rec. 9265 (1969) (Apr. 16, 1969, House debate on H.R. 4148) (statement of Congressman Chester Holifield).

Accordingly, Congress concluded that to effectuate the plain statutory language and the congressional intent to preserve states' fundamental rights to protect water quality, section 401 and its implementing regulations must be crafted and construed in favor of preserving—not reducing—state authority. *See* 33 U.S.C. § 1341(a)(1).

B. Courts Have Steadfastly Recognized Congress's Broad Preservation of State Authority Under Section 401 Specifically and the Clean Water Act Generally

The Supreme Court and Circuit Courts alike have long recognized the breadth of state authority under the Clean Water Act and, in particular, section 401. In *Keating v. FERC*, the D.C. Circuit observed:

> One of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act. . . . Through [section 401(a)(1)], Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.

927 F.2d 616, 622 (D.C. Cir. 1991). Just three years later, the Supreme Court confirmed this broad intent in *PUD No. 1*, 511 U.S. 700. There, proponents of a hydroelectric dam in the otherwise pristine waters flowing out of the Olympic National Park in Washington State objected to an instream flow requirement set out in Washington's section 401 certification. *PUD No. 1*, 511 U.S. at 709. Claiming the very thing EPA asserts in its Proposed Rule—i.e., that section 401 is limited to addressing only point-source discharges—the dam proponents challenged the flow condition as beyond the scope of section 401. *Id.* at 711.

The Supreme Court flatly rejected that argument. Relying on a plain language reading that harmonized the entire section, the Court found that section 401's reference to "discharge" identifies "the category of activities subject to certification—namely those with discharges" while the scope of review once that threshold event is triggered "is most reasonably read as authorizing additional conditions and limitations on the activity as a whole." *Id*. at 711–12. This conclusion was not based on deference to EPA's interpretation. The Court noted that its "view of

the statute is consistent with EPA's regulations implementing § 401," but the Court did not conduct a *Chevron* analysis of EPA's interpretation. *Id.* (noting both EPA's section 401 regulations that had not been modified following section 21(b)'s incorporation in the Clean Water Act, as well as EPA guidance broadly construing state section 401 authority). Thus, the Court crafted its holding based on the statutory text.

Over a decade after *PUD No. 1*, the Supreme Court again confirmed section 401's broad scope. In another case involving hydroelectric facilities, the Court was called upon to interpret the word "discharge" as used under section 401 in response to an argument that hydroelectric dams do not result in any discharge. *S.D. Warren Co. v. Maine Bd. of Envt'l Prot.*, 547 U.S. 370, 374–75 (2006) (*S.D. Warren*). In a unanimous decision rejecting the petitioner's arguments to narrowly construe section 401, the Court noted the argument "miss[ed] the forest for the trees." *Id.* at 384.

That "forest" is the express intent of Congress to preserve broad state authority under the Clean Water Act via section 401 of the Act particularly. As the Court noted, "[s]tate certifications under § 401 are essential to the scheme to preserve state authority to address a broad range of pollution." *Id.* at 386. The Court then referenced Senator Muskie, the driving force behind and primary author of the Clean Water Act, and his statement that: "[n]o 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."[3] *Id.* (citing 116 Cong. Rec. 8984 (1970)). The Court concluded by *affirming* the scope of section 401 as reflection of Congress's clear intent to provide "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." *Id.* (emphasis added).

C. EPA's Recent Attempts to Unlawfully Restrict Section 401 Authority Are an Anomaly

Until very recently, EPA has historically taken the same expansive view of state authority under section 401 that is counseled by a plain reading of the Act, its legislative history, and applicable case law. The Proposed Rule is a radical departure from EPA's prior, long-held interpretations.

As described in detail in Section IV.A.3 below, for over half a century EPA—as is, in fact, compelled by the Clean Water Act—interpreted section 401 authority broadly. That starts with the fact that EPA did not believe that it was even necessary to revise regulations it adopted with regard to section 21(b) as that section was pulled into the Clean Water Act. This is unsurprising given that EPA's then-Administrator noted what was plain on the face of the Act and evident in Congress's various statements that section 401 was "essentially the same" as section 21(b). Attach. 4, H.R. Rep. No. 92-911, at 165 (1972).

EPA affirmed the broad scope of section 401 on three separate occasions in the decades that followed. During the Reagan Administration, and based on a holistic view of the statutory text and its legislative history, EPA's Water Division concluded that "section 401 may reasonably be

[3] It is notable that this statement was made in reference to section 21(b). Contrary to EPA's recent assertions, there is nothing in the record indicating Congress's intent to narrow this powerful authority as it ported section 21(c) into section 401 of the Clean Water Act.

read as retaining its original scope, that is, allowing state certifications to address any water quality standard violation resulting from any activity for which certification is required, whether or not the violation is directly caused by a 'discharge' in the narrow sense." Attach. 5 at 4, Catherine Winer, Section 401 Certification of Marinas (Nov. 12, 1985) (Winer Memo).

EPA reaffirmed this reading during the George H.W. Bush Administration when it issued section 401 guidance recognizing section 401 grants to states "extremely broad authority to review proposed activities in and/or affecting State waters (including wetlands) and, in effect, to deny or place conditions on federal permits or licenses that authorize such activities." Attach. 6, EPA, Office of Wetlands Protection, *Wetlands And 401 Certification—Opportunities And Guidelines For States And Eligible Indian Tribes* at 22 (Apr. 1989) (1989 Guidance). And, during the Obama Administration, EPA guidance noted that "once § 401 is triggered, the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law." Attach. 7, EPA, Office of Wetlands, Oceans, and Watersheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (Apr. 2010) (rescinded) (2010 Guidance).

EPA's 2020 Rule and the Proposed Rule are aberrations from EPA's long-standing positions on section 401. The Proposed Rule is an outgrowth and renewal of this Administration's prior efforts to weaken section 401 authority kicked off by a 2019 Executive Order designed to "promot[e] energy infrastructure." 84 Fed. Reg. 15495, Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth" (Apr. 10, 2019). That executive order resulted in EPA's radical departure from long-held congressional, judicial, and its executive branch views on section 401 scope. *See* 85 Fed. Reg. 42210 (July 13, 2020) (2020 Rule).

A group of states, tribes, and environmental groups promptly challenged the 2020 Rule. In early 2021, EPA announced its intent to reconsider the 2020 Rule and requested that the district court remand the rule to it and dismiss the lawsuit. *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013, 1018 (N.D. Cal. 2021). In response, the court vacated the 2020 Rule after finding EPA's narrowing of section 401's scope "antithetical" to the law and the rule as a whole "unreasonable" given EPA's "apparent arbitrary and capricious changes to the rule's scope." *Id*. at 1025–26. While the district court's decision to vacate the rule prior to reaching the merits was later stayed and overturned by the Ninth Circuit, the district court's analysis of the 2020 Rule itself was never disturbed or even disputed by EPA. *See In re Clean Water Act Rulemaking*, 60 F.4th 583 (9th Cir. 2023).

EPA amended the 2020 Rule and reverted to its pre-2020 interpretation of section 401 in 2023. 88 Fed. Reg 66558 (Sept. 27, 2023) (2023 Rule). The 2023 Rule returned to a scope of certification that includes "the activity subject to the Federal license or permit, not merely its potential point source discharges," and affirmed that such a read was "consistent with not only the statutory language and congressional intent but also longstanding Agency guidance and decades of Supreme Court case law." 88 Fed. Reg. 66558, 66591–92. EPA further recognized that this read "realigns scope with accepted practice for the preceding 50 years." *Id.* at 66592. EPA also noted that, despite the Clean Water Act's clear directive that its provisions be broadly

construed in favor of protecting water quality, the driving force behind the 2020 Rule, Executive Order 13868, "did not direct [EPA] to consider the water quality consequences" of its directives. *Id*. at 66564.

Industry groups and a number of states challenged the 2023 Rule. Attach. 8, *Louisiana v. EPA*, No. 2:23-CV-01714 (W.D. La. Mar. 7, 2024) (order denying motion for preliminary injunction). The plaintiffs in that case sought a preliminary injunction of the 2023 Rule's applicability to pending certification requests submitted after the effective date of the 2020 Rule but prior to the effective date of the 2023 Rule. *Id*. at 1. The district court rejected the motion, specifically finding that plaintiffs were unlikely to prevail on their argument regarding alleged retroactive application of the 2023 Rule. And the court determined that plaintiffs failed to show that project proponents subject to the 2023 Rule—including its restoration of section 401's scope—would suffer any irreparable harm. *Id*. at 5–9. The case is currently stayed pending EPA's finalization of its current Proposed Rule. Attach. 9*, Louisiana v. EPA*¸ No. 23-CV-01714 (W.D. La. Dec. 1, 2025) (stay order).

II. REQUEST FOR CERTIFICATION

EPA's proposed changes to 40 C.F.R. § 121.5 regarding requests for certification provisions are not only unlawful under the Clean Water Act—they seek to address a problem that does not exist, and instead would *create* problems. Two overarching concerns seem to animate EPA's proposed changes. First, although EPA's changes purport to provide certainty for when an applicant's request for certification triggers the statutory timeline for review, the current rule already provides such certainty while more appropriately allowing for the states' input, as required by the Clean Water Act. Second, and relatedly, EPA seeks to strip states and other certifying authorities of their authority to list required contents of a certification request. EPA's assertion that it "has determined that EPA, and not certifying authorities, has the authority to establish a list of contents for a request for certification," 91 Fed. Reg. at 2019, is unlawful, contrary to the fundamental principles of cooperative federalism, and, if implemented, would only serve to counteract any goals of a streamlined, more efficient Clean Water Act 401 certification.

A. By Seeking To Dictate State Administrative Procedures, EPA Oversteps Its Authority, Undermines Cooperative Federalism, and Violates the Clean Water Act

EPA asserts that the Clean Water Act authorizes EPA, and not the certifying authorities, to establish a list of contents for a request for certification that begin the reasonable period of time. But EPA has it backward. To the extent EPA intends the Proposed Rule to establish an exclusive list, neither the Clean Water Act, in general, nor section 401, specifically, authorizes EPA to require states to follow a particular procedure in reviewing requests for certification, other than requiring states to establish procedures for public notice and, in appropriate cases, public hearings on certification requests. *See* 33 U.S.C. §§ 1341(a)(1), 1361(a). Instead, courts have consistently recognized that states reviewing section 401 requests may apply their own administrative procedures. *See, e.g.*, *Berkshire Envt'l Action Team, Inc. v. Tennessee Gas*, 851 F.3d 105, 113 (1st Cir. 2017) (finding "no indication" in section 401 that Congress "intended to

dictate how" a state agency "conducts its internal decision-making before finally acting"); *Delaware Riverkeeper Network v. Secretary of Penn. Dep't of Envt'l Prot.*, 833 F.3d 360, 368 (3d Cir. 2016) ("[T]he Water Quality Certification is by default a state permit, and the issuance and review of a Water Quality Certification is typically left to the states."); *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007) (quoting 33 U.S.C. § 1251(b) ("In the [Clean Water Act], Congress expressed its respect for States' role through a scheme of cooperative federalism that enables states to 'implement . . . permit programs'")). This is in accord with the Clean Water Act's preservation of states' broad authority to protect the quality of their own waters. *See* 33 U.S.C. § 1251(b); Section I.B, *supra*.

Further, nowhere in the statute does the Clean Water Act grant EPA the authority for "developing a common regulatory framework," 91 Fed. Reg. at 2010, for certifying authorities. On the contrary, EPA has limited authority under the Clean Water Act to "prescribe such regulations as are necessary to carry out [the Administrator's] functions under the [CWA]." 33 U.S.C. § 1361(a). And the undefined nature of terms like "receipt" and "request for certification" do not implicitly give EPA the authority to "fill up the details" of what is required in a state permit application.[4] Under the Clean Water Act's cooperative federalism approach, it is states that may apply their own administrative procedures. Doing so is also in the interest of efficiency. As discussed in further detail below, from the standpoint of "clarity and transparency," 91 Fed. Reg. at 2008, one of EPA's express goals, it makes little sense to restrict states from telling project proponents—up front—what materials are needed to ensure that processing of the application will not be delayed by a back-and-forth process of requesting additional information.

The Proposed Rule's attempt to dictate the contents of state certification applications would relegate the sovereign right of states to protect and maintain their water quality to secondary status. This is contrary to the Clean Water Act and conflicts with the Administration's purported support for cooperative federalism.

B. The Current Regulation's Requirements for a Request for Certification Are an Effective, Bright-Line Rule That Is a Better Reading of the States' Roles Under the Clean Water Act

Notwithstanding EPA's statements to the contrary, the current regulations already provide a bright-line rule for the minimum information that must be included in a request for certification. And for decades prior to the 2020 Rule, EPA consistently interpreted section 401 as allowing states to have input into "what is considered a receipt of a complete application." *See* Section I.C, *supra*. The Proposed Rule seeks to strip states of their right to such input, for the purported benefits of transparent, bright-line rules. Read generously, EPA's conflation of a uniform,

[4] In enacting section 401 of the Clean Water Act Congress granted states the authority to conduct an independent review of the water-quality impacts of projects that require a federal permit and ensure that those projects do not violate state water quality laws. The best reading, *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 400 (2024), of section 401 of the Clean Water Act would prohibit EPA from upending Congress's chosen power balance between the states and the federal government in water quality regulation. *See* Section IV, *infra*.

national standard with a bright-line rule is irrational. Read less so, EPA's proposal comes across as a pretextual attempt to curtail states' rights and shift longstanding, congressionally mandated balances of power under the Clean Water Act.

EPA expresses further concern that the current approach "could introduce uncertainty and delays where certifying authorities fail to transparently and objectively convey the additional required contents of a request." 91 Fed. Reg. at 2019. These fears are unfounded. EPA provides no examples of this happening under the 2023 Rule, and it would be hard pressed to do so. Under the current rule, prior to submitting its application an applicant already knows the information that a certifying authority requires be included in a request for certification. A certifying authority can require its own additional contents of a request for certification, but only if they have done so "prior to when the request for certification is made." 40 C.F.R. § 121.5(c). If the certifying authority has not requested any information—via its regulations, statutes, or in a pre-meeting with applicant—prior to a request for certification, then state requirements cannot be included as part of the request for purposes of triggering the reasonable period of time, and instead the applicant must submit according to a list of requirements in 40 C.F.R. § 121.5(b). The current regulation, thus, already fulfills EPA's alleged "need for certainty regarding the required contents of a request for certification." 91 Fed. Reg. at 2020.

Under the current rule applicants must take an extra step at the beginning to assess whether their requests for certification must also include state or certifying authority requirements. But this makes sense: the applicant is applying for a state certification under a provision of the Clean Water Act that is meant to provide states with additional strong authority to protect their own waters. Providing this information at the beginning of the process is more likely to establish coordination and cooperation and lead to a more efficient, streamlined application review and a quicker decision. Creating a "nationally consistent definition," 91 Fed. Reg. at 2018, for what must be in each state certification application request is contrary to the Clean Water Act but also contrary to common sense. It is the states that are most familiar with their waters, industries, and permitting practices, and who are in the best position to tailor their application requirements to meet state-specific needs.

EPA professes to believe that its proposed regulation provides the necessary components to provide certifying authorities with a sufficient baseline of information to begin their review. 91 Fed. Reg. at 2018. But certifying authorities are far better placed to decide what constitutes a sufficient baseline of information. States have their own internal procedures for how they must review permit applications. *See, e.g.*, Cal. Code of Regs., tit. 23, § 3856; 5 Colo. Code Regs. 1002-82; 314 Code Mass. Regs. § 9.05; Minn. R. 7001.1400–.1470; N.J.A.C. 7:7-23.2, 7:7A-16.2; 6 NYCRR §§ 608.9 and 621.3; Vt. Admin. Code 16-3-301:13-11. The 2023 Rule acknowledges that and strikes a balance. If states have rules in place requiring certain information prior to an application, or request additional information at a pre-meeting, based on their localized knowledge and expertise, applicants must include it. If not, they do not.

The States agree with EPA that the information included in an initial application need not be "the totality of information a certifying authority may need to act on a request," 91 Fed. Reg. at 2018, and that nothing in this rule precludes a certifying authority from requesting and evaluating

additional information. For larger, more complicated projects, a period of additional information-sharing is almost always necessary to understand the true scope and effects of a project. That certifying authorities can request documents at a later point during a narrow window of time is not a good reason for shutting out states and other certifying authorities from the application process at the outset.

C. In Practice, EPA's Truncated Proposed List Will Lead to Less Efficient Decisionmaking on Section 401 Certifications

EPA's proposed changes to the request for certification provisions are one of several aspects of the Proposed Rule that aim to divest states of decisionmaking power. These changes further shorten states' timeframes for making what are often highly technical permitting decisions on significant and far-reaching projects. Other parts of the Proposed Rule, discussed *infra*, aim to further curtail certifying authorities' time for making a decision. These changes will pressure states to make quicker decisions based on less information.

EPA acknowledges that this tight timeframe can be problematic and proposes its own solution, recommending that "the applicant and the certifying authority work in good faith, consistent with CWA section 401, and have early and sustained coordination and communication to streamline the overall certification process." 91 Fed. Reg. at 2020. While the States agree this is good advice for all parties, the 2023 Rule already incentivizes such cooperation in ways that EPA's proposed changes will not. Requiring an applicant to take time at the beginning to understand a state's requirement for an application, and then to submit such information, would naturally engender early and sustained coordination and be more likely to streamline the overall process. Cutting states entirely out of the application process would not. Certifying authorities know best what information they need to determine whether the project will comply with water quality standards; not getting it at the beginning will only serve to slow down an already time-burdened process.

The Proposed Rule seeks to shift burdens from the applicant to the certifying authority. But if adopted, and if courts continue to give credence to states' roles in the Clean Water Act, this policy shift will likely have the opposite of EPA's intended effect, especially for more complicated, larger infrastructure projects such as pipelines, hydropower facilities, water storage and supply projects, and nuclear power plants. If certifying authorities have not been provided enough information to determine whether a project will comply with water quality standards, they can deny an application (with or without prejudice). Courts have routinely upheld such denials, and several appellate courts have affirmed that this is a viable approach for certifying authorities. *New York State Dep't of Envt'l Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018) (*NYSDEC*); *Village of Morrisville v. FERC*, 136 F. 4th 1117, 1128 (D.C. Cir. 2025) ("[T]he record amply supports FERC's conclusion that the State permitted Morrisville's withdrawal and resubmission as an alternative to either denying its request for certification without prejudice or granting it subject to conditions that Morrisville hoped to avoid."). By arbitrarily shortening timelines by artificially limiting the amount of information necessary to start the reasonable period of time, the Proposed Rule hamstrings states and makes it more likely

that projects will take longer to achieve approval and that more projects are likely to face denials—a perverse outcome of a rule supposedly meant to increase the efficiency of such approval processes.

Further, a threat to states lingers implicitly within EPA's collective proposed changes. According to EPA, a certifying authority's "burden" is "to evaluate the request for certification in good faith and to request information, documents, and materials that are within the scope of section 401 as provided in this proposed rule *and that can be produced and evaluated within the reasonable period of time*." 91 Fed. Reg. at 2020 (emphasis added). EPA's statement hints at its disagreement with *NYSDEC* and *Village of Morrisville*: that a certifying agency's scope of inquiry is limited by the reasonable period of time, rather than by its assurance of whether a project will comply with water quality standards. Under the Clean Water Act, the certifying authority is compelled to assess a project for whether it complies with water quality standards. Additionally, under circuit court precedent, if the applicant does not provide sufficient information for the state to arrive at a decision within a reasonable time period, the certifying authority can deny the permit without prejudice.

D. CWA Section 401 Certification Requirements Clearly Apply to Nationwide Permits and Other Agency-Led Projects

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.'" 91 Fed. Reg. at 2020. Or again: "[t]he Agency requests comment on whether the best reading of section 401 extends the certification requirement even to those situations where there are no 'applicants' but there nevertheless is a potential for a point source discharge from a Federally licensed or permitted activity…." *Id.* at 2021. EPA, citing to case law and prior Agency rulemaking and guidance, notes that its current position is that CWA section 401 certification is not limited to individual federal licenses and permits, but also extends to general licenses and permits such as general permits issued by the United States Army Corps of Engineers (Army Corps) pursuant to section 404 of the Clean Water Act. *Id.*

The States maintain that section 401 certifications must be required for nationwide permits and projects such as Army Corps' civil works. There is no basis in text, legislative history, or case law that remotely suggests section 401 certifications should not apply to this large swath of federal licenses and permits and any interpretation otherwise would not constitute a permissible read of the statute, much less the best read. *See, e.g.*, *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 100 (1st Cir. 1989) ("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."). This is particularly true of nationwide permits issued by the Army Corps. If states are prohibited from certifying the nationwide permits themselves, states *must* issue individual certifications on each project proposal authorized under a nationwide permit. That outcome would undermine the efficiencies that are at the core of programmatic permits and could bring the Nation's Clean Water Act section 404 permitting (among others) to a disastrous halt.

III. TIMEFRAME FOR CERTIFICATION ANALYSIS AND DECISION

A. EPA's Proposed Changes to the "Reasonable Period" of Time for Rendering Certification Decisions Are Contrary to Law and Arbitrary and Capricious

Section 401 provides that the certification requirement is waived if the certifying authority fails to act on a certification request "within a reasonable period of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(1). The current section 401 rule sets a default "reasonable period of time" as six months and allows for automatic extensions of the reasonable period to comply with state public notice requirements and *force majeure* events. EPA proposes to remove these automatic extensions and give federal agencies control over defining the reasonable period of time, stating that the federal agency and certifying authority should "jointly set and extend the reasonable period of time." 91 Fed. Reg. at 2021.

For decades prior to the 2020 Rule, states and federal agencies worked collaboratively to fairly, efficiently, and timely process certification requests. States have established a wide range of efficient and fair administrative procedures, which share certain features designed to enable the thorough review contemplated by section 401. States and federal agencies have also entered into many memoranda of agreement to establish alternative reasonable periods. This precedent and collaboration have worked well, as states process the vast majority of certification requests within the default reasonable period of time.

In certain rarer cases, especially for particularly complex projects, states require additional time beyond the default periods to render certification decisions. These circumstances are not always within the reviewing agency's control. For example, applicants sometimes fail to provide necessary materials for the state's review, or reviewing agencies must await completion of federal and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications. The 2023 Rule and existing practice appropriately account for these circumstances. The 2023 Rule provides for automatic extensions in certain situations, and under existing practice, states communicate with the federal agency to provide notice when additional review time is required and collaborate to ensure an efficient process and timely decision. Courts have intervened in extreme (and extremely rare) cases to prohibit certain practices that undermine the statutory one-year deadline. *See, e.g.*, *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) ("*Hoopa Valley*").

The Proposed Rule would upend this well-functioning existing policy and practice by removing automatic extensions and inserting the federal agency on an equal footing to the state when deciding what is a reasonable period of time. EPA's proposal is contrary to the Clean Water Act and arbitrary and capricious. As discussed in Section IV.A below, section 401 of the Clean Water Act centers states as retaining control over certification decisions. Congress enshrined this control in the plain text of section 401, which provides only that states must act "within a reasonable period of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(1). As the legislative history of this provision and its predecessor plainly sets out, the scope of this limit is narrow, designed only to prevent states from blocking projects through "sheer inactivity."

Attach. 10, H.R. Rep. No. 91-940, at 55 (1970) (Conf. Rep.); *see also Village of Morrisville,* 136 F.4th at 1121 (describing the purpose of section 401's timeline as preventing sheer inactivity).

Short of that, the federal government—by the plain language of the statute—has no role in defining the amount of time states require to process section 401 certifications. And this is for good reason: states—not the federal agencies—are the experts in their own varying processes and requirements. States are accordingly best positioned to understand how long applications will take to process, including when particularly unique or complex applications require more than the standard amount of time. To ensure decisions are timely made, Congress provided one year as the backstop for a decision, and also allowed for court interpretation of the "reasonable period of time" in litigation when necessary.

While the six-month default reasonable period of time under the 2023 Rule—which EPA proposes to retain—has proved functional, the Proposed Rule's requirement that the certifying authority and federal agency "jointly agree" on alternative reasonable periods and expectation that federal agencies and certifying authorities "negotiate" reasonable periods is contrary to the text and history of section 401, which give states the authority to define the reasonable period of time. Indeed, nothing in the text or legislative history of section 401 gives EPA or other federal agencies authority to establish federal oversight of deadlines for state action.

EPA's proposal to remove the automatic extension provisions and give the federal agency equal authority to define the reasonable period of time is also arbitrary and capricious. EPA avers that the proposed approach would "provide clarity and added predictability" and that the automatic extension provisions are "unnecessary." 91 Fed. Reg. at 2021. However, these explanations do not reasonably justify the rule, fail to consider an important aspect of the problem, run counter to the evidence before the agency, and do not adequately explain EPA's change in position. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"); *Fed. Trade Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox Television Stations*").

At the outset, EPA has not provided any evidence to substantiate its contentions that the current rule fails to provide clarity or predictability, or that the automatic extension provisions are inefficient. The proposal is therefore arbitrary and capricious because it is not reasonably explained. *See Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

Replacing automatic extensions and state discretion over reasonable periods with state-federal agency "joint agree[ments]" and "negotiat[ions]" would impose additional process, federal agency involvement, and red tape in certification decisions. Rather than allowing states to focus on rendering timely and efficient certification decisions, the Proposed Rule would divert state resources away for case-by-case discussions with federal agencies. Even though broader memoranda of agreement are encouraged, individual circumstances occasionally demand deviation from standard timetables, and it is in these particular circumstances where state attention is most needed on the complex project or unique situation, not on separately working with the federal agency to define the reasonable period. The uncertain outcome of state-federal

agency discussions would reduce clarity and predictability, not guarantee it. Instead, allowing states to communicate their process and reasonable timeframes with applicants and federal agencies would maximize efficiency, clarity, and predictability.

Moreover, where federal agencies under the Proposed Rule impose definitions of the "reasonable period of time" that states cannot meet, the rule could present states with a Hobson's choice of, for instance, approving applications without proper assurances that state water quality standards will be met or denying certification altogether. *See Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1184 (D.C. Cir. 2022); *see also Village of Morrisville,* 136 F.4th at 1122. In all likelihood, many states faced with this choice will simply deny certification requests where they would not but for the Proposed Rule, resulting in, *at best*, slower process and less predictability and, at worst, protracted litigation. These outcomes run counter to EPA's stated goals.

EPA's prioritization of industry stakeholder input over competing feedback from certifying authorities also over-relies on factors Congress did not intend for EPA to consider. *See Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987) ("In exercising her decisionmaking authority, the Secretary is certainly free to consider factors that are not mentioned explicitly in the governing statute, yet she is not free to substitute new goals in place of the statutory objectives without explaining how these actions are consistent with her authority under the statute."). As discussed above, Congress intended section 401 to preserve state authority to protect water quality, including state control over certification decisions, subject to the statutory limit that states act within a reasonable period of time, not to exceed one year. Here, EPA reports that industry stakeholders opposed automatic extensions of the reasonable period and that feedback from "several State, Tribal, and public stakeholders supported extensions of the six-month default period where necessary." 91 Fed. Reg. at 2021. While EPA is entitled to consider efficiency, clarity, and predictability for applicants, it cannot substitute these goals for the statutory objectives Congress declared for section 401, especially to the extent these goals conflict with those statutory objectives.[5] *Independent U.S. Tanker Owners Comm.*, 809 F.2d at 854. Moreover, EPA has not explained how its substitution of these goals is consistent with its authority under the Clean Water Act. By placing applicant convenience ahead of state authority to protect water quality, EPA over-relies on non-statutory factors and undermines the purpose of the Clean Water Act. The Proposed Rule is therefore arbitrary and capricious.

Finally, EPA's proposal to remove automatic extensions for *force majeure* events is unworkable. *Force majeure* events are by definition exigent circumstances that warrant extensions. Individualized negotiation of extensions in these circumstances is not practical. For example, one *force majeure* event is a government closure, but EPA does not explain how states and federal agencies can agree to an extension if the government is shut down. Other *force majeure* events

[5] As explained above, the undersigned States believe that EPA's stated goals of furthering clarity and predictability for applicants would be best met by maintaining the default six-month reasonable period, automatic extensions, and state authority to define the reasonable period in extraordinary circumstances.

like disasters present similar challenges. States should not have to risk waiver in these circumstances, and applicants should not have to worry that a *force majeure* event will result in a denial due to state concern about waiver.

The final rule should remove any authority for federal agencies to dictate to states the reasonable amount of time in favor of letting the plain language of the statute govern. In the alternative, EPA should retain the six-month default reasonable period and automatic extensions of the reasonable period for *force majeure* events, leaving definition of the reasonable period of time to the certifying authority, subject to the one-year statutory time limit.

B. The Proposed Rule's Ban on Requests for Withdrawal of Certification Applications Is Contrary to Law and Arbitrary and Capricious

Unlike the existing section 401 regulations, the Proposed Rule seeks to categorically prohibit state certifying authorities from requesting applicants to withdraw and resubmit certification requests in all circumstances, including in situations where the applicant has failed to provide the certifying agency with all information necessary to evaluate the request. 91 Fed. Reg. at 2022–23. This change, if adopted, will fail to meet the requirements of the federal Administrative Procedure Act (APA) because it is arbitrary and capricious and not in accordance with law.

Historically, "withdrawal and resubmission" of section 401 certification requests involved an applicant's withdrawal of a pending request and submission of a new request in order to avoid a denial by the state certifying authority. *See NYSDEC*, 884 F.3d at 456. Applicants used this approach for many years without controversy. *See, e.g., Islander East Pipeline Co., LLC v. Conn. Dep't of Envt'l Prot.*, 482 F.3d 79, 87 (2d Cir. 2006).

EPA's proposed ban on state requests for withdrawal of certification applications in all circumstances is ostensibly based on the need for regulatory clarity. 91 Fed. Reg. at 2022. But EPA does not provide any evidence supporting its claims that the current rule fails to provide that clarity and predictability. Because the agency has not provided a reasoned explanation for its rulemaking, it has acted arbitrarily and capriciously in violation of the APA. *See Prometheus Radio Project*, 592 U.S. at 423.

EPA's assertions that the proposed rule is consistent with the Clean Water Act and the caselaw also fail. The proposed rule admits that "section 401(a)(1) does not address withdrawal and resubmission," 91 Fed. Reg. at 2022, and instead relies heavily on the D.C. Circuit's decision in *Hoopa Valley*, 913 F.3d at 1103–04, as a justification for the outright ban on any requests for withdrawal. However, *Hoopa Valley* is limited to "the specific factual scenario presented in this case, i.e., an applicant agreeing with the reviewing states to exploit the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time." *Id.* at 1105.

Thus, *Hoopa Valley* did not announce a categorical rule forbidding state certifying authorities from requesting withdrawal of section 401 certification requests for any reason. Rather, *Hoopa Valley* rejected a contractual arrangement between an applicant and state agencies to use the withdrawal-and-resubmittal process to indefinitely suspend review of a water quality

certification request. *Id.* at 1103–04. But the D.C. Circuit made clear that its decision was limited to the "coordinated withdrawal-and-resubmission scheme" before it, and that it was not "resolv[ing] the legitimacy" of other arrangements. *Id.* at 1103–04. Thus, *Hoopa Valley* announced its own limitations.

Several more recent decisions have recognized the limited applicability and narrow nature of *Hoopa Valley*. In *North Carolina Department of Environmental Quality v. FERC*, the Fourth Circuit recognized that "*Hoopa Valley* is a very narrow decision flowing from a fairly egregious set of facts." 3 F.4th 655, 669 (4th Cir. 2021). The Fourth Circuit declined to extend *Hoopa Valley* to a situation in which the project applicant "twice withdrew and then immediately resubmitted its certification requests," where there was "no idleness" on the part of the state agency. *Id.* More recently, the D.C. Circuit acknowledged *Hoopa Valley*'s limited scope and declined to extend it to a situation in which the water quality agencies denied certification without prejudice. *Turlock Irrigation Dist.,* 36 F.4th at 1183 (quoting *NCDEQ*, 3 F.4th at 669). In so holding, the court cited favorably the Fourth Circuit's categorization of *Hoopa Valley* as a case in which "the state agencies and the license applicant entered into a written agreement that obligated the state agencies, year after year, to take no action at all on the applicant's § 401 certification request." And the Ninth Circuit rejected FERC's conclusion that the California State Water Resources Control Board had waived its section 401 authority over several hydroelectric dams, where the applicants had withdrawn and resubmitted their section 401 requests. *California State Water Res. Control Bd. v. FERC*, 43 F.4th 920 (9th Cir. 2022). Indeed, just last year, the D.C. Circuit reaffirmed its characterization of *Hoopa Valley* as "a very narrow decision" and rejected a claim of waiver where the applicant unilaterally withdrew and resubmitted its application. *Village of Morrisville*, 136 F.4th at 1127. The Court rejected the applicant's claim that a state suggestion to the applicant on how to continue a discussion the applicant wanted to have with the state somehow constituted a coordinated effort to extend the one-year time period. *Id.* at 1128–29.

Nothing in section 401 or the applicable case law contemplates that the one-year reasonable review period and waiver provisions were intended to prevent a state from requiring an applicant to provide necessary information so that the state can make an informed decision on a certification request. Moreover, and as discussed in Section IX.B, *infra*, EPA lacks the rulemaking authority to limit states from making section 401 certification decisions via regulation. Courts have the authority to interpret section 401's language, and as the Proposed Rule illustrates, the jurisprudence around withdrawal and resubmission has been evolving over the last several years, but has settled *in favor* of state authority on this issue. EPA's attempt to inject itself into this process and impose additional limitations on state certifying authority's ability to request that an applicant unilaterally withdraw its application to provide time to collect additional information from project applicants is arbitrary and capricious, contrary to law, and fails to consider relevant statutory factors.

Further, EPA's proposed ban on states' requests for withdrawal of certification applications places it in conflict with the Clean Water Act's objective to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and its policy to recognize, preserve, and

protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution. 33 U.S.C. § 1251(a), (b). Notably, EPA fails to provide any explanation whatsoever of the anticipated impact this ban will have on the Act's objective and policy.

While EPA claims that its approach is a "clear, bright-line limitation on certifying authorities," addresses stakeholder concerns "regarding the lack of clarity" related to "the circumstances under which withdrawal and resubmission is impermissible" and will provide "regulatory certainty," 91 Fed. Reg. at 2022–23, the agency cannot prioritize consideration of these factors over the statute's objective and policy. *See Independent U.S. Tanker Owners Comm.*, 809 F.2d at 854. EPA can consider clarity and regulatory certainty in its rulemakings (where it has authority). However, these considerations cannot override the statutory goals and policies. *Independent U.S. Tanker Owners Comm.*, 809 F.2d at 854. Moreover, EPA's proposal fails to provide that clarity. For example, while the Proposed Rule preamble recognizes the multiple valid and legally permissible reasons that the certification process can be temporarily paused, 91 Fed. Reg. at 2022, EPA's proposed text precludes states from taking "any action to extend the reasonable period of time." 91 Fed. Reg. at 2041. This arguably could include states informing project proponents that certifications will be denied without prejudice—something the case law clearly allows and that EPA's preamble recognizes. 91 Fed. Reg. at 2022. For these reasons, EPA's proposed ban on state certifying authority's request for withdrawal in all circumstances is arbitrary and capricious.

Lastly, the proposed ban on requests for withdrawal likely will result in delays and additional litigation. States timely issue the vast majority of certifications. In complex cases where the certification decision takes more time, the federal agencies involved regularly require more than a year to decide other aspects of the federal application in any case. Rather than speed project implementation, the Proposed Rule will, in fact, lead to unnecessary denials of certification applications and an overall increase in uncertainty for projects where section 401 certification is required.

EPA should abandon its proposal to ban all requests for withdrawal of certification applications.

IV. APPROPRIATE SCOPE OF CERTIFICATION

EPA claims to have taken a "best reading" analysis of section 401's plain text and concluded, as it did for the first and only other time in its history in 2020, that section 401 is actually a limitation on—not a preservation of—state primacy under the Clean Water Act.[6] With a myopic focus on the solitary word "discharge" in section 401(a)(1) and (2), EPA deviates from the best reading of the statute, fails to appropriately harmonize the text of section 401 as a whole, ignores legislative history clearly indicating contrary congressional intent, and fails to address or explain its own decades-long interpretation of the statute. Because these failings render EPA's re-

[6] EPA claims it has interpreted section 401 only four times previously. 91 Fed. Reg. at 2023. As set out below, this is incorrect. EPA has—both informally and formally—interpreted the scope of section 401 no fewer than seven times across *ten* presidential administrations. In all cases save the 2020 Rule (which this rule by the same administration simply resurrects), EPA has correctly determined that the proper scope of section 401 looks at *all* of the potential water quality-related impacts from the project as a whole, including operation. *See* Section IV.A.3.

definition arbitrary, capricious, and contrary to law, EPA should retain the scope of section 401 as embodied in the 2023 Rule and *decades* of EPA's prior understanding of proper section 401 review scope.

A. EPA's Proposed Limitations on the Scope of Section 401 Certification Is Contrary to the Plain Language, Legislative History, and EPA's Own Interpretations of the Statute

1. Plain language

EPA's construction of section 401's text is flawed on multiple levels, requiring EPA to course-correct in the final rule. First, and as set out in detail in Section B below, EPA's reliance on *Loper Bright* is grossly misplaced. EPA has no basis to ignore section 401's plain text or the Supreme Court's prior—and binding—confirmation of that plain language. EPA's refusal to even reference other relevant Supreme Court case law further renders EPA's analysis of section 401's scope unlawful and unsupportable.

But, even standing alone, EPA's interpretation of the statute fails the most basic analysis. It is bedrock law that, in interpreting a statute, it is not enough to "look merely to a particular clause." *Helvering v. New York Trust Co.*, 292 U.S. 455, 464 (1934). Instead, proper construction requires an analysis of the "whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning." *Id.* (citation modified).

EPA's Proposed Rule makes no effort to harmonize the various provisions and subsections of section 401 itself, much less the Clean Water Act's overarching goal of cooperative federalism and preservation of states' rights to protect water quality. Most glaringly, section 401 certification expressly encompasses non-point source impacts via its reference to ensuring compliance with section 303.[7] 33 U.S.C. § 1341(a)(1), (d). This alone renders EPA's construction untenable. Water quality standards are designed, among other things, to protect the level of water quality necessary to support toe designated uses of a water body—e.g., recreational uses, habitat, etc. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.10(a). Yet it would be impossible for a state to certify that the non-point source aspects of its federally approved Water Quality Standards under section 303 are satisfied—as expressly required by section 401—if the state is limited to assessing impacts from *point source* discharges.

This is a fatal shortcoming. To be sure, designated uses can be adversely impacted by point source discharges. But they can also be destroyed or impaired by numerous impacts that are not directly caused by point source discharges. For example, if a proposed project reduced river flows in a way that would increase water temperatures or decrease quantity to the point where aquatic life could not survive, that would affect a fish and wildlife designated use just as if the

[7] As set out below, this includes conditions imposed pursuant to section 401(d). *See, e.g.*, *PUD No. 1*, 511 U.S. at 712–13, citing H.R. Conf. Rep. No. 95–830, at 96 (1977), *reproduced in* 1977 U.S.C.C.A.N 4326, 4471 (noting that "Section 303 is always included by reference where section 301 is listed").

project had rendered the water body uninhabitable because of point source pollution. But EPA's proposed interpretation casts doubt on states' abilities to require the federal government to include conditions addressing minimum flow or temperature, even if the state had water quality standards under section 303 protecting fishery uses. That outcome makes a mockery of Congress's declaration that "nothing in [the Clean Water Act] shall … be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to [their] waters." 33 U.S.C. § 1370.

Next, EPA's citation to section 401(a)(2) and its reference to "discharge" are misplaced. Section 401(a)(2) involves cross-border contamination whereby downstream states impacted by a project in an upstream state may be given the opportunity to review and certify the upstream project. In those circumstances, section 401(a)(2)'s reference to "discharge" makes sense because a discharge to waters of the United States is a *threshold* requirement for triggering the need for section 401 certification. *PUD No. 1*, 511 U.S. at 711–12. The reference to discharge here, as in section 401(a)(1), is most reasonably read as making clear that section 401(a)(2)'s threshold requirement triggering the need for neighboring state certification is no different in scope than the threshold requirement applicable to wholly in-state impacts. *See* 33 U.S.C. § 1341(a)(1), (2).

Additionally, EPA largely ignores relevant language in section 401(a)(3) through (5) that is impossible to reconcile with its strained reading of section 401's scope. Section 401(a)(3) allows a certification for "construction" of a facility to satisfy section 401 obligations with regard to the facility's operation, except where the certifying authority determines there is "no longer reasonable assurance that there will be compliance" with water quality standards. 33 U.S.C. § 1341(a)(3). This is confirmation that section 401 applies far more broadly than just any "discharge." Another phrase that encompasses something like the "construction" and "operation" of a "facility" is, as the Supreme Court has confirmed: "the activity as a whole." *See PUD No. 1*, 511 U.S. at 711.

Similarly, section 401(a)(4) provides that "[p]rior to the initial operation" of a permitted "facility or activity," the certifying authority must be given the opportunity "to review the manner in which the facility or activity shall be operated or conducted" in order to confirm that "applicable water quality requirements will not be violated." 33 U.S.C. § 1341(a)(4). If the licensed "facility or activity"—*not discharge*—will violate water quality requirements, the license or permit must be suspended until the certifying authority receives "reasonable assurance that such facility or activity" will comply. *Id*. Section 401(a)(5) echoes this by allowing the federal licensing or permitting agency to suspend or revoke any "facility or activity," again not discharge, that has been operated in violation of water quality requirements. 33 U.S.C. § 1341(a)(5). EPA's proposal fails to even reference section 401(a)(5), much less attempt to harmonize any of these provisions with the remainder of the statutory text.

Finally, in a rule proposal that seeks to significantly curtail state authority under the Clean Water Act, it is astonishing that EPA makes only a solitary reference to section 510 of the Act.[8] As

[8] Even then, EPA's proposal ignores section 510's expansive language and proceeds with its dismantling of state authority under the Act—the very thing section 510 directs EPA not to do.

noted above, that section sets out—in no uncertain terms—the expansive nature with which Congress viewed state authority to regulate above and beyond federal standards under the Clean Water Act. There, Congress expressly stated that nothing in the Act "shall (1) preclude or deny the right of any State … to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution [at least as stringent as the Clean Water Act … or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. EPA's proposal to handcuff the states' abilities to protect their waters—contrary to well over 50 years of section 401 practice and decades of the courts and EPA's own interpretations of the Act—simply cannot be reconciled with this clear congressional intent.

EPA's proposal regarding the scope of section 401 certifications does not pass muster against the plain language of the statute. The Proposed Rule as written will result in *worse* outcomes for the Nation's waters in the form of fewer protections, more pollution, and the destruction of beneficial uses.

2. Legislative history

The plain language of the statute is clear. And the legislative history of section 401 flatly refutes EPA's proposed limitation on the scope of section 401 certification.

To begin with, the Proposed Rule fails to acknowledge—let alone implement—the broad remedial purpose of the Act. The purpose of the Clean Water Act was as broad as it was ambitious, vastly expanding the tools available to states and the federal government in dealing with entrenched water pollution. In presenting the conference report, Senator Muskie laid out the urgency of the task in no uncertain terms:

> Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.

Attach. 11, 118 Cong. Rec. 33692 (1972) (statement of Sen. Edmund Muskie). As to the Act's intention to "restore and maintain the chemical, physical and biological integrity of the nation's waters[,]" Senator Muskie proclaimed these objectives as "not merely the pious declarations that Congress so often makes in passing its laws; on the contrary, this is literally a life or death proposition for the Nation." *Id*. at 33693.

State authority was always a critical component of this goal. Congress adopted section 510 to ensure "that States, political subdivisions, and interstate agencies retain the right to set more restrictive standards and limitations than those imposed" by the federal government. *Illinois, ex rel. Scott v. City of Milwaukee*, 366 F. Supp. 298, 301 n.3 (N.D. Ill. 1973); *cf. United States v. Bass,* 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). Along with section 510, section 401 is an equally important recognition of state authority that gave more teeth to

Congress' intent to preserve states' power to protect water quality above and beyond the foundational protections of the Clean Water Act. It did so by explicitly ensuring that the federal government itself could not stand in the way of more restrictive state standards, even when it came to federal permitting and licensing decisions.

As noted, Congress first adopted the state review requirement, now in section 401, as section 21(b) of the Water Quality Improvement Act of 1970. Congress's goals for this section were expansive. As noted in the House Report, section 21(b) was created to require state certification of "any activity of any kind or nature which may result in discharges into the navigable waters." Attach. 10 at 51. The House Report went on to declare that federally permitted activities or operations frequently impacted water quality and that state water quality certifications were intended "to provide reasonable assurance . . . that no license or permit will be issued by a Federal agency for an activity that . . . could in fact become a source of pollution." Attach. 12, H.R. Rep. No. 91-127, at 7 (1969) (Conf. Rep.). In considering the need for the same provision, the Senate Report decried that "[i]n the past, these licenses and permits have been granted without any assurance that [state] standards will be met or even considered." Attach. 13, S. Rep. No. 91-351, at 3 (1969).

As with section 21(b), the certification requirement in section 401 was thus designed to ensure that all activities authorized by federal permits and impacting water quality would fully comply with state law and that "Federal licensing or permitting agencies [could not] override State water quality requirements." Attach. 14, S. Rep. 92-414, at 69 (1971). There is no mistaking this intent: Congress mandated water quality certifications to ensure that the federal government could not override *any* state water quality standard or hinder state authority to ensure that federally approved projects would not become sources of pollution.

EPA asserts, 91 Fed. Reg. at 2024, that Congress in 1972 intended to destroy this broad reservation of states' primacy over water quality within their borders as section 21(b) was incorporated into the Clean Water Act. EPA bases this on modification of a single word in the statutory text. But, while section 401 now provides that states may certify "that any such discharge will comply," rather than certify "that such activity will not violate water quality standards," the legislative history shows no such tectonic shift and that the goals of section 21(b) of the 1970 Act were fully carried forward into section 401. Congress repeatedly described the changes to section 21(b) as carried into section 401 as "minor."[9] *See, e.g.,* Attach. 14 at 121 (describing that "Section 401 is substantially section 21(b) of the existing law"); Attach. 15, 92 Cong. Rec. 38857 (1971) (Senator Baker remarking that "Section 21(b), with minor changes, appears as section 401 of the pending bill"). EPA's then-Administrator testified that section 401 was "essentially the same" as section 21(b). Attach. 4 at 165.

[9] EPA acknowledges Congress's understanding that section 401 was "substantially section 21(b)," but asserts that this reflects an intent to "assure consistency with the 1972 Act's changed emphasis of controlling discharges." 91 Fed. Reg. at 2024 (citation modified). There were indeed modifications to section 21(b) to assure consistency with the Act's focus on effluent limitations—by making clear that section 401 review *also* includes any violations of those standards. Congress's modifications to section 401 are, thus, a recognition of authority, not a limitation. It is absurd for EPA to claim that vastly limiting section 21(b)'s previous scope is consistent with Congress's understanding that section 401 was "substantially" the same.

The "minor" nature of the changes is confirmed by multiple other sources. The House Report stated "[i]t should be clearly noted that the certifications required by section 401 are *for activities* which may result in any discharge into navigable waters." *Id*. at 124 (emphasis added). And, to hammer the point home, Senator Muskie—again the primary author of and driving force behind the Clean Water Act—stated that "[a]ll we ask is that the *activities* that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State for an evaluation and recommendation before the federal license or permit be granted." Attach. 1 at 38854 (emphasis added). The activity focus of section 401 was persistent even five years later. During 1977 Clean Water Act amendments that made other minor changes to section 401, the Conference Report described section 401 as requiring that a "federally licensed or permitted *activity* . . . must be certified to comply with State water quality standards[,]" echoing the original language. Attach. 16, H.R. Rep. No. 95-830, at 96 (1977) (Conf. Rep.) (emphasis added).

Had Congress intended to radically shift the balance of federal and state power under section 401, such a significant change would appear somewhere in the congressional record. It does not. All of this defeats EPA's suggestion that what Congress clearly viewed as a "minor" modification fundamentally changed section 401's scope and purpose. Where "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("[the] plain statement rule … acknowledge[s] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere"). There is no such "unmistakably clear" pronouncement here. *See Will*, 491 U.S. at 65.

3. EPA's proposal conflicts with its longstanding interpretation of the scope of state authority under section 401

EPA's proposed narrowing of the scope of section 401 certification represents a drastic departure from past practice. Indeed, prior to 2019, EPA's regulations and all of its guidance documents—issued over the course of nearly five decades and spanning multiple administrations—recognized states' expansive authority under section 401. EPA now attempts to minimize this history, suggesting that it has had just four occasions to interpret section 401, first in 1971 when it issued the regulations that governed for nearly 50 years, then again in 2020 and 2023 when it finalized new rules, and now in its Proposed Rule. In doing so, EPA omits and mischaracterizes multiple instances, as set forth below, where it interpreted the scope of section 401 as broadly empowering states to evaluate an activity's compliance with applicable water quality requirements. The interpretation EPA adopted for 50 years, interrupted only by EPA's failed attempt in 2020 to change course, is entitled to respect, and EPA's refusal to even acknowledge this longstanding interpretation renders EPA's proposal unlawful.

EPA first interpreted section 401 through the 1971 Rule, which extended the scope of state certification to the entire "activity" at issue in a federal license or permit. As noted above, the 1971 Rule, promulgated pursuant to section 21(b) of the Water Quality Improvement Act of

1970, did not change after the passage of the Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act. *See* 36 Fed. Reg. 22369, 22487 (Nov. 25, 1971). While EPA now implies that the 1971 Rule was improperly based on outdated statutory language, *see* 91 Fed. Reg. at 2023, EPA repeatedly affirmed the scope of section 401 following the 1972 amendments.

In 1985, in a memorandum issued by Catherine A. Winer, an attorney with EPA's Water Division, and confronting precisely the textual issue EPA now cites as justification to narrow section 401's scope, EPA relied on the Act's legislative history and purpose to conclude that "section 401 may reasonably be read as retaining its original scope, that is, allowing state certifications to address any water quality standard violation resulting from an activity for which a certification is required, whether or not the violation is directly caused by a 'discharge' in the narrow sense." Attach. 5 at 3–4. EPA acknowledged that "Congress made wording changes in the [401] section in 1972 which raise a question of whether it intended to restrict review to violations caused by dischargers[,]" but ultimately determined that "the legislative history . . . indicates that such a change in meaning was not in fact intended[,]" and that "no significance attached to the differences in wording that occurred in 1972." *Id.* EPA relied on section 401's "overall purpose . . . 'to assure that Federal licensing or permitting agencies cannot override State water quality requirements'" to support its finding that the 1972 amendments did not alter section 401's scope. *Id.* at 4 (quoting 1972 Senate Report, 2 Leg. Hist. 1487). EPA thus reaffirmed its conclusion that section 401 was intended to provide broad certification authority to states to consider all water quality impacts from a proposed activity, not just from a point source discharge.

EPA confirmed this interpretation in 1989 during the George H.W. Bush Administration, when it issued a section 401 certification guidance document entitled *Wetlands And 401 Certification—Opportunities And Guidelines For States And Eligible Indian Tribes*. *See* Attach. 6 at 22. Intended to assist states and tribes in applying section 401 to projects with potential wetlands impacts, the 1989 Guidance began by noting the breadth of section 401 review, recognizing that "[i]t gives States extremely broad authority to review proposed activities in and/or affecting State waters (including wetlands) and, in effect, to deny or place conditions on federal permits or licenses that authorize such activities." *Id.* at 5.

The 1989 Guidance then acknowledged that section 401 "is written very broadly with respect to the activity it covers," such that "'[a]ny activity, including, but not limited to, the construction or operation of facilities, which *may* result in *any discharge*' requires water quality certification." *Id.* at 20 (emphasis in original). The 1989 Guidance further emphasized the "imperative" need for a state certification to review "all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation[.]" *Id.* at 22–23. To guide states and tribes in their section 401 reviews, the 1989 Guidance provided a number of example conditions imposed by states on 401 certifications, including gradient and sediment control plans, stormwater runoff controls, protections for threatened species, and noxious weed controls. *Id.* at 23–24, 54–55. EPA noted that all these conditions were "valid," even though "few . . . are based directly on traditional water quality

standards," and some "are clearly requirements of State or local law related to water quality other than those promulgated pursuant to the [Clean Water Act] sections enumerated in Section 401(a)(1)." *Id.* at 24.

In 2010, EPA issued updated section 401 guidance, entitled "Clean Water Act 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes," which once again affirmed EPA's expansive interpretation of states' 401 certification authority. *See* Attach. 7. EPA reaffirmed that Congress intended for states to apply their section 401 certification authority broadly, observing that "[a]s incorporated into the 1972 CWA, [section] 401 water quality certification was intended to ensure that no federal license or permits would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate CWA provisions." *Id.* at 16. EPA specifically noted that the statute calls for states or Tribes to base their certification on a consideration of whether the permit or license would be consistent with a list of CWA authorities, including water quality standards and effluent limitations, as well as 'any other appropriate requirement of State [or tribal] law set forth in such certification.'" *Id.* (quoting 33 U.S.C. § 1341(d)).

In emphasizing the breadth of "the scope of analysis and potential conditions" under 401, the 2010 Guidance also relied on the Supreme Court's *PUD No. 1* holding that "once § 401 is triggered, the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law." *Id.* at 18. The 2010 Guidance remained in effect for nearly a decade until 2019, when EPA withdrew and replaced it with a terse new guidance document as a precursor to the 2020 Rule. *See* EPA, *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes* (2019) (2019 Guidance).

Prior to EPA's Proposed Rule, the 2019 Guidance and the 2020 Rule represented EPA's only deviation from its long-standing, unwavering interpretation of section 401's scope. The 2020 Rule's substantial narrowing of the scope of a certifying authority's review, like EPA's current proposal, failed to cite any support in EPA's past interpretations for its novel approach. The 2023 Rule rejected this interpretation, returning to a scope of certification that includes "the activity subject to the Federal license or permit, not merely its potential point source discharges," and affirmed that such a read was "consistent with not only the statutory language and congressional intent but also longstanding Agency guidance and decades of Supreme Court case law." 88 Fed. Reg. 66558, 66591–92 (Sept. 27, 2023). EPA further recognized that this read "realigns scope with accepted practice for the preceding 50 years." *Id.* at 66592.

Contrary to EPA's reframing of its history, EPA consistently affirmed the broad scope of states' 401 certification authority for approximately 50 years. EPA now attempts to write off its historical interpretation of section 401's scope, both by ignoring many of the instances when it interpreted 401 broadly and incorrectly ignoring Supreme Court precedent as being decided under *Chevron* deference. 91 Fed. Reg. at 2023. But the Supreme Court, in overruling *Chevron*, reaffirmed the principle that "the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect" and is "especially warranted when an Executive Branch interpretation was issued

roughly contemporaneously with enactment of the statute and remained consistent over time." *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 386 (2024) (citing cases). Thus, while courts are no longer required to afford deference to EPA's interpretation, "the longstanding practice of the government—like any other interpretive aid—can inform a court's determination of what the law is." *Id.* (alterations adopted) (internal quotation marks and citations omitted). EPA's consistent and unwavering interpretation of states' extensive review authority under section 401—which EPA adopted contemporaneously with the enactment of the Clean Water Act and which spanned five decades—is therefore entitled to great respect.

EPA's failure to provide a reasoned explanation for its abandonment of its longstanding interpretation of section 401, along with its failure to consider and take into account the reliance interests impacted by this change, renders its proposal arbitrary and capricious under the APA. Where an agency changes its policy, it bears the burden to "show that there are good reasons for the new policy." *Fox Television Stations,* 556 U.S. at 515. And where an agency changes course, its reasoned analysis must consider any "serious reliance interests" engendered by the existing policy and "alternatives that are within the ambit of the existing policy." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (citation modified). EPA's Proposed Rule fails to even acknowledge that it represents a radical departure from EPA's historical interpretation and practice—memorialized in guidance and reaffirmed repeatedly over the course of 50 years—much less provide a reason for it.

EPA concedes that the proposal constitutes a "fundamental change in overall scope of review" from the 2023 Rule, *see* 91 Fed. Reg. at 2023, yet at no point does EPA acknowledge the 50 years of guidance affirming that scope. Similarly, EPA fails to acknowledge, much less consider, the serious reliance interests engendered by EPA's longstanding interpretation of the scope of state authority under section 401. States that reasonably based their own implementation of section 401 on the existing section 401 regulations and guidance will be negatively impacted by EPA's changed position. The APA simply does not permit EPA's proposal to ignore its longstanding interpretation of section 401 or the states' significant reliance interests.

B. EPA's Attempts to Bypass the Supreme Court's Prior Interpretations of Section 401's Scope Render EPA's Proposal Contrary to Law

As it did in 2020, EPA concedes that its proposed limitation on the scope of a section 401 certification is inconsistent with Supreme Court precedent. EPA instead asserts that the Supreme Court's decision in *Loper Bright* renders the most significant of these cases, *PUD No. 1*, no longer good law. *See* 91 Fed. Reg. at 2025. EPA simply ignores other cases altogether, including *S.D. Warren*. EPA's blatant mischaracterization of the Supreme Court's holding in *PUD No. 1*, together with its attempt to sidestep binding case law, renders the Proposed Rule contrary to law under the APA.

First, EPA is incorrect that it can disregard the holding of *PUD No. 1* because, in EPA's view, it was decided "under *Chevron*." 91 Fed. Reg. at 2025. As noted above, in *PUD No. 1* hydroelectric project proponents challenged the State of Washington's authority to impose a minimum stream flow requirement with regard to a 1.2 mile "bypass reach" of the Dosewallips

River that would be left virtually dry after construction of the hydroelectric facility. *PUD No. 1*, 511 U.S. at 708–09. Because the only specific discharges associated with the project were the release of dredged and fill material during project construction and the discharge of water over the trailrace of the dam once complete, the project proponents argued that Washington lacked authority to condition its section 401 certification on maintaining minimum instream flow requirements necessary to satisfy antidegradation requirements under Washington's water quality standards. *Id*. 710–11.

The Supreme Court disagreed and, critically, did not apply *Chevron* deference in doing so. In fact, the *PUD No. 1* court performed precisely the same "best reading" of the statute analysis that EPA claims is now required.

The Court first started with the plain language of the statute and found section 401(d)'s text to directly "contradict[] petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge.'" *Id*. at 711. This is because the plain text "refers to the compliance of the applicant, not the discharge." *Id*. As a result, the Court found it clear on the face of the statute that section 401 "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.'" *Id*. (quoting 33 U.S.C. § 1341(d)).

The Court found no contradiction between the authority set out in section 401(d) and section 401(a)(1)'s reference to "discharge." Rather, using traditional tools of statutory construction in harmonizing the subsections, the Court found that the "most reasonable[]" interpretation of the statute—i.e., the *best* read—is that "[s]ection 401(a)(1) identifies the category of activities subject to certification—namely those with discharges." *Id*. at 711–12.

As noted, the Court did not rely on *Chevron* deference in reaching these conclusions. *Nowhere* in this plain language analysis did the Court conclude that section 401 is ambiguous, a step that is required had the Court intended a *Chevron* analysis. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 842–43 (1984). Nor did EPA seek deference or even assert an interpretation to which deference would be owed. *PUD No. 1*, 511 U.S. at 728–29 (Thomas, J., dissenting). Rather, the Court's reference to EPA's interpretation of section 401 came as an additional basis to reject the petitioners' construction of the statute, not anything that compelled the plain language construction the Court had conducted in the preceding paragraphs. *See PUD No. 1*, 511 U.S. at 713 (noting that EPA's longstanding interpretation that section 401 allows certifying authorities to evaluate the water quality impacts from the activity as a whole was "consistent" with "[the Court's] view of the statute"). *Id*.

The Court's statement that EPA's reasonable interpretation was entitled to deference and its citation to *Chevron* was not determinative, and was only provided as additional support for the Court's own "view of the statute." *Id.* The Court's treatment of EPA's interpretation was, in fact, no different from the state of affairs following *Loper Bright*. *See id.* As the Court stated in *Loper Bright*, "the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect" and is "especially warranted when an Executive Branch interpretation was issued roughly

contemporaneously with enactment of the statute and remained consistent over time." *Loper Bright*, 603 U.S. at 385–86 (citation modified). This is because "the longstanding practice of the government—like any other interpretive aid—can inform a court's determination of what the law is." *Id*. (citation modified). Under this standard, EPA's prior interpretation—an interpretation that, as described above, stretches back until at least 1985 and remained static across multiple decades and administrations—is entitled to far more deference than EPA's recent backtracking. *See id*.; *see also* Attach. 5.

Nor do the "clear statement rule" or "major questions doctrine" justify the Proposed Rule's failure to comply with *PUD No. 1*. Citing *Sackett v. EPA*, 598 U.S. 651 (2023), EPA criticizes the *PUD No. 1* majority's construction of the term "applicant" by asserting that Congress must use clear language if it "wishes to significantly alter the balance between federal and state power." 91 Fed. Reg. at 2026. But EPA fundamentally misconstrues this aspect of *Sackett*. The *Sackett* Court invoked the "clear statement" maxim as a caution to *preserve* states' "primary authority" over water quality under the Clean Water Act, not as a basis to weaken that authority. *Sackett*, 598 U.S. at 679–80, 683. EPA, thus, has the lesson precisely backward. It is unquestionably EPA that is seeking in this proposal—as it did in 2020—to "significantly alter the balance of federal and state power" under the Act. *Id.* at 679. The fact that it does so despite binding case law and overwhelming evidence Congress had no such intent, *see* Section IV.A, finds no support in *Sackett*.

EPA next cites to *West Virginia v. EPA*, 597 U.S. 697 (2022), as a basis to criticize the 2023 Rule's restoration of section 401's scope. 91 Fed. Reg. at 2026. Claiming "vast economic and political significance" attached to section 401, EPA asserts that the 2023 Rule lacked "clear congressional authorization." *Id.* (citing *West Virginia*, 597 U.S. at 723). But EPA mis-reads *West Virginia*, and, if anything, *West Virginia* cuts against EPA. For one, the 2023 Rule restored *state* authority and did not involve any assertion of federal authority like in *West Virginia*. Thus, *West Virginia*'s concerns with "[e]xtraordinary grants" of regulatory authority to federal agencies are absent here. *See West Virginia*, 597 U.S. at 722–23. Second, EPA did not claim any new regulatory authority in the 2023 Rule. As noted, section 401's scope went undisturbed for five decades before the 2020 Rule, and the 2023 Rule reinstated that prior longstanding interpretation of section 401. EPA's textual argument in the Proposed Rule regarding section 401's scope, based on a flimsy analysis that fails to account for the whole statutory text and ignores plain congressional intent, is precisely the type of "radical or fundamental change to a statutory scheme" the Supreme Court cautioned against. *See id*. at 723 (citation modified).

In short, the States agree: "Congress does not hide elephants in mouseholes." 91 Fed. Reg. at 2026. But the actual elephant here is not the unremarkable and long-established fact that section 401 preserves states' expansive authority to protect their own waters. The elephant is EPA's radical and fundamental change to the cooperative federalism of the Clean Water Act based on a single word. Despite EPA's claims to the contrary, *PUD No. 1* is still good law, there is no basis in the Supreme Court's jurisprudence to disregard its holdings, and EPA's refusal to follow it is both unreasoned—and thus arbitrary and capricious—and unlawful.

Second, EPA's Proposed Rule fails to even engage with other binding case law, most significantly the Supreme Court's decision in *S.D. Warren*. As with *PUD No. 1*, *S.D. Warren* again saw the Supreme Court upholding states' broad authority under section 401 in the context of a hydropower facility, this time with regard to the question of whether the discharge of a pollutant is necessary to trigger section 401 certification. *S.D. Warren*, 547 U.S. at 373. The Court found that a dam's alteration of a river flow by itself fell within Congress's understanding of "pollution" under the Clean Water Act. *Id.* at 385–86.

Critical here, the Court did so in a way that directly refutes the Proposed Rule's claim that section 401's scope is limited only to specific point-source discharges. In finding that alteration of a river flow is "pollution" even without the addition of pollutants, the Court cited a number of impacts resulting from operating the dam, including causing "long stretches of the natural river bed to be essentially dry and thus unavailable as habitat," blocking fish passage, eliminating fishing opportunities, and preventing "recreational access to and use of the river." *Id*. The Court went on to note that limiting river flow by itself is a pollution risk and that even the dam operator had to concede that dams "can cause changes in the movement, flow, and circulation of a river . . . causing a river to absorb less oxygen and be less passable to boaters and fish." *Id.* at 385 (citation modified).

None of these types of impacts are caused by any point-source discharge. Yet the Court found "[c]hanges in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns." *Id.* at 386. Namely, "[s]tate certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution" crated by federally authorized projects. *Id.*

This holding is especially problematic for EPA's Proposed Rule and its reliance on *Loper Bright* as a basis to disregard Supreme Court precedent. The Court's determination that impacts not caused by point source discharges are both pollution and "within a State's legitimate legislative business" under section 401, was not based on any deference to EPA. *Id.* As with *PUD No. 1*, the Court mentioned *Chevron* only once, and even then solely to reference the fact that, because EPA (and FERC) had not "formally settled the definition [of pollution], or even set out agency reasoning," prior expressions from EPA did "not command deference from this Court." *Id*. at 377–78.

As it did in 2020, EPA again clearly desires for *PUD No. 1* to be overturned and simply pretends *S.D. Warren* does not exist. But these cases remain good law, and the Court's decision in *Loper Bright* provides no basis for EPA to ignore either decision. EPA's Proposed Rule openly breaking with binding case law, thus, violates the APA.

Finally, as a general matter, EPA also ignores that the circuit courts have long recognized the breadth of state authority under the Clean Water Act and, in particular, section 401. In *Keating v. FERC*, the D.C. Circuit observed:

> One of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act . . . Through [section 401(a)(1)], Congress intended that the state would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.

927 F.2d at 622. While the crux of the case addresses a state's compliance with section 401(a)(3) to revoke a prior certification, the Court contrasts those statutory constraints with a state's "freedom . . . to impose their own substantive policies in reaching initial certification decisions." *Id.* at 623; *see also id.* at 624 ("It is true that the state, *alone*, decides whether to certify under section 401(a)(1).") (emphasis added).

And once a certification decision has been made, the federal licensing agency's role is largely limited to ensuring procedural compliance. In fact, circuit courts have universally held that the use of "shall" in section 401(d) *requires* any state conditions to become conditions on the Federal license or permit being sought. *See, e.g., Sierra Club v. U.S. Army Corp. of Engineers*, 909 F.3d 635, 645–46 (4th Cir. 2018); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997); *cf. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 775 (1984) (rejecting a federal agency's attempt to overcome similar plain statutory language related to mandatory conditions).

EPA's Proposed Rule is counter to this long line of cases upholding states' broad regulatory authority embodied in the plain language of the Clean Water Act. EPA should revise its proposal and retain the existing scope of section 401 as interpreted by the Supreme Court and embodied both in the 2023 Rule and in over 50 years of EPA's own interpretation prior to the 2020 Rule.

C. EPA's Proposed Limitations on State Law Applicable to Water Quality Certifications Are Wholly Unsupported

EPA's Proposed Rule purports to re-define "water quality requirements" as "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*." 91 Fed. Reg. at 2026 (emphasis added). EPA claims re-definition is necessary to align with its narrowing of section 401 scope to "applicable State or Tribal water quality-related regulatory requirements for point source discharges into waters of the United States." 91 Fed. Reg. at 2027. This proposed re-definition, and EPA's requests for feedback on other potential limitations, are contrary to the plain language of section 401, as well as multiple binding court decisions interpreting that plain language.

First, EPA's proposal to limit state law to only those laws associated with point source discharges is nonsensical when viewed in conjunction with the plain language of section 401 and the Act as a whole. Section 401(a)(1) requires that certifying authorities assure compliance with "applicable provisions of sections [301], [302], [303], [306], and [307]" of the Clean Water Act. 33 U.S.C. § 1341(a)(1). Section 401(d) further provides that section 401 certifications are to assure that "any applicant . . . will comply with any applicable effluent limitations and other limitations, under section [301] or [302] of this title, standard of performance under section [306] of this title, or prohibition, effluent standard, or pretreatment standard under section [307] of this

title, and with any other appropriate requirement of State law[.]" 33 U.S.C. § 1341(d). As with the express reference in section 401(a)(1), section 401(d) also requires compliance with the water quality standards and implementation plans states must adopt under section 303 of the Act. *See, e.g., PUD No. 1*, 511 U.S. at 712–13; *see also* Attach. 16 at 96 (noting that "[s]ection 303 is always included by reference where section 301 is listed").

Nothing in this language remotely supports limiting applicable state law under section 401 to only those laws addressing point source discharges. As noted in Section IV.A.1 above, section 401's reference—expressly and via incorporation—of water quality standards adopted pursuant to section 303 directly contradicts any claim that Congress intended to limit states' section 401 certification decisions to only point source discharges.[10]

As the Supreme Court explained in *S.D. Warren*, section 401 is designed to address a host of water quality impacts that are not caused by point source discharges, including blocked fish passage, minimum flow requirements, elimination of recreational opportunities, and habitat loss. *S.D. Warren*, 547 U.S. at 385–86. This "does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally," including Congress's intent to broadly address any "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id*. at 385, citing 33 U.S.C. §§ 1251(b), 1362(19); *see also PUD No. 1*, 511 U.S. at 713 ("at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law"). Indeed, application of state law addressing these very impacts via section 401 is "essential" to Congress's effort to preserve state authority to address pollution, and is "the very reason[] that Congress provided the States with power to enforce 'any other appropriate requirement of State law.'" *S.D. Warren,* 547 U.S. at 386.

This renders EPA's claim that the enumerated sections of the Clean Water Act referenced in section 401(d) "all relate to point source discharges," 91 Fed. Reg. at 2025, demonstrably wrong. EPA itself implicitly recognizes this by correctly noting that the scope of section 401(d) conditions is coextensive with the basis of a denial pursuant to section 401(a)(1). *See* 91 Fed. Reg. at 2026. Even putting aside EPA's improper effort to confine state section 401 review to identified discharges, the applicable law that water quality impacts are to be viewed against—*on*

[10] Section 303, which requires lists of waters that do not attain water quality standards as well as total maximum daily loads to bring such waters into compliance with those standards is one of the Act's primary ways of dealing with nonpoint source pollution. In *Pronsolino v. Nastri,* the EPA argued that "if the use of effluent limitations will not implement applicable water quality standards, the water falls within § 303(d)(1)(A) regardless of whether it is point or nonpoint sources, or a combination of the two, that continue to pollute the water." *Pronsolino v. Nastri*, 291 F.3d 1123, 1135 (9th Cir. 2002). The Ninth Circuit agreed with EPA's point that Section 303 was meant to address nonpoint source pollution, holding "The list required by § 303(d)(1)(A) requires that waters be listed if they are impaired by a combination of point sources and nonpoint sources; the language admits of no other reading. Section 303(d)(1)(C), in turn, directs that TMDLs shall be established at a level necessary *to implement* the applicable water quality standards. So, at least in blended waters, TMDLs must be calculated with regard to nonpoint sources of pollution; otherwise, it would be impossible to implement the applicable water quality standards, which do not differentiate sources of pollution." *Id.* at 1139. EPA still holds this view, as the agency defines a Total Maximum Daily Load as the sum of wasteload allocations (for point sources) plus the sum of load allocations (for nonpoint sources and background) plus a margin of safety. 40 C.F.R. § 130.7. Thus the Act, the caselaw, the regulations, and EPA itself, all agree that Section 303, and thus section 401, are not in any way limited to point source pollution.

the face of the statute—includes state water quality standards whose achievement requires both point source and non-point source discharge controls. *See* 33 U.S.C. § 1341(a)(1), (d).

As a result, and as is made clear in section 401(d), "any other appropriate requirement of State law" is, to use EPA's phrasing, "of the same general kind or class" *only* when also inclusive of water quality impacts that do not result from point source discharges. 91 Fed. Reg. at 2027. In other words, EPA again has the analysis completely backward. Given section 404(d)'s inclusion of section 303 by reference, and under *ejusdem generis*, the use of "appropriate" in section 401(d) indicates that Congress intended the reference to state law, as informed by the enumerated sections of the Clean Water Act that expressly include provisions related to non-point impacts, to be inclusive of state laws also addressing non-point water quality impacts. *See Wash. Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 383–85 (2003); *see also* 33 U.S.C. § 1341(d).

Second, EPA's request for comment, 91 Fed. Reg. at 2027, as to whether EPA should attempt to additionally limit section 401(d) to only the enumerated sections of the Clean Water Act (i.e., only EPA-approved water quality standards) is even further afield. For one, it would clearly render Congress's reference to "other" sources of state law superfluous. It is also directly contradicted by the legislative history that confirms this additional language was intended to expand water quality compliance conditions that may be added to certifications beyond federally approved water quality standards and implementation plans.

Specifically, the Conference Report noted that the conference version of section 401 was largely the same as the version passed by the House, except that "Subsection (d), which requires a certification to set forth effluent limitations, other limitations, and monitoring requirements necessary to insure compliance with sections 301, 302, 306, and 307, of this Act, *has been expanded to also require compliance* with any other appropriate requirement of State law which is set forth in the certification." Attach. 17, Legislative History of the Clean Water Act, Vol. 1, S. Conf. Rep. 92-1236, at 321 (emphasis added). Section 401(d) cannot possibly be "expanded" to include other state law if it is limited to states applying only their federally-approved water quality standards under the enumerated sections of the Act. *See id*.

Limiting state review to only federally approved standards also clashes with Congress' explicit, long-standing desire for the Clean Water Act to preserve more stringent state law:

> "[N]othing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that . . . such State . . . may not adopt or enforce any [limitation] which is less stringent than the [limitation] under this chapter . . . ."

33 U.S.C. § 1370. This savings clause is broad—applying not only to discharges of pollutants, but also any pollution control or abatement requirement—and nothing in the clause excludes conditions imposed under section 401. As numerous courts have held, Sections 401 and 510 evince Congress' clear intent not to preempt but to "supplement and amplify" state authority.

See, e.g., *Illinois, ex rel. Scott,* 366 F. Supp. At 301–02 (citing *United States v. Bushey*, 363 F. Supp. 110 (D. Vt. 1973)). And federal statutes are presumed to supplement rather than displace state law, especially where federal law invades core state functions or otherwise disrupts an area of traditional state regulation. *See, e.g.*, *BFP v. Resol. Trust Corp*., 511 U.S. 531, 544 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'").

Finally, EPA's request for comment as to whether section 401(d) should be read to only include state laws related to "monitoring requirements" hardly merits a response. This involves the question, 91 Fed. Reg. at 2027, of whether placement of a single comma effectively obliterates section 401(d)'s express inclusion of "*any* other" state water quality requirements. 33 U.S.C. § 1341(d) (emphasis added). This is, as the Supreme Court might say, "a lawyer's argument." *S.D. Warren*, 547 U.S. at 383. And it is not a good one.

For one, there is clear evidence, cited above, that Congress intended section 401 as one of the keystones of its efforts to retain state primacy over matters of water quality. It is, therefore, entirely unclear what part of "nothing in this chapter shall preclude" states' rights to "enforce . . . any standard or limitation respecting discharges of pollutants" is satisfied by a proposal to limit those standards to "monitoring requirements." *See, e.g.,* 33 U.S.C. §§ 1341(d); 1370.

Moreover, to arrive at a contrary conclusion requires almost willful disregard for the grammatical construction of section 401(d). That language plainly sets out what certifications "shall" set forth. One, they must include "any effluent limitations *and other limitations*." 33 U.S.C. § 1341(d) (emphasis added). Two, they must include "monitoring requirements" necessary to ensure the applicant complies with those limitations. *Id.* And three, "effluent limitations and other limitations" are then expressly defined as those under section 301, 302, 306, and 307 of the Act, *and* "any other appropriate requirement of State law." *Id*. The comma before "and monitoring requirements" is simply a recognition that, in addition to the "effluent limitations and other limitations" expressly inclusive of "other" state law, states are also to include any monitoring requirements necessary to ensure the applicant's compliance with those limitations. The answer to EPA's question of "how this proposed approach could be implemented" is: not legally. 91 Fed. Reg. at 2027.

As with the scope of certification, EPA should retain the scope of water quality requirements adopted in the 2023 Rule and in decades of EPA's prior interpretations of the Act aside from the 2020 Rule. 33 USC 1341(d)'s "any other appropriate requirements of State law" is just that: any water quality-related law that a certifying authority identifies as relevant to the water quality impacts from the project as a whole, including non-point source discharge impacts.

D. Limiting the Water Quality Impacts a Certifying Authority Can Review to "Waters of the United States" is Contrary to Law

EPA also proposes to backtrack on the 2023 Rule and its own longstanding interpretation of section 401 and proposes to limit the review of waters impacted by federally licensed or

permitted facilities to "waters of the United States." 91 Fed. Reg. at 2028. Such a limitation is antithetical to the plain language and purpose of section 401, as well as the cooperative federalism embodied in the Clean Water Act.

EPA's proposed interpretation is an unreasonable construction of section 401(d). There is nothing in section 401—or anywhere in the Clean Water Act—indicating that Congress intended to limit section 401(d) to only those state laws that apply to jurisdictional waters. EPA is correct that the *potential* for a discharge to waters of the United States is a threshold requirement for triggering the need for a section 401 certification. 33 U.S.C. § 1341(a)(1); *PUD No. 1*, 511 U.S. at 711–12. But that is far from where the scope of certification ends. Section 401(d) expressly defines the "effluent limitations and other limitations" relevant to section 401 certification as inclusive of "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). As EPA explained in 2023, this is expansive language. The word "any" is capacious in scope, literally meaning "all" state law requirements, not just those limited to impacts to jurisdictional waters. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588–89 (1980). And the reference to "other" laws *must* mean something additional to what precedes it, i.e., the enumerated sections of the Clean Water Act that *are* limited to waters of the United States. *See, e.g., Harbison v. Bell*, 556 U.S. 180, 186–87 (2009) (use of the word "other" following reference to federal authority must mean Congress intended to include state authority).

A broad interpretation makes sense in light of the inherent differences between federal authority and state authority when it comes to state waters. Federal authority is limited by the Commerce Clause and other enumerated powers granted under the Constitution. States, however, possess a general police power under the Tenth Amendment inclusive of all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, which "are reserved to the States respectively, or to the people." *See Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) ("The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community . . . [including] prohibit[ing] acts or things reasonably thought to bring evil or harm to its people."). A state's "other appropriate requirement[s] of State law" are not limited by the Commerce Clause. A state could, and many states do, regulate waters that are not waters of the United States under the Clean Water Act, and such regulation would be an "appropriate requirement of State law." 33 USC 1341(d). Section 401 leverages this authority, allowing states to continue to exercise that authority reserved to them by the Constitution. EPA's proposal upends this constitutional and statutory scheme.

EPA's interpretation would also all but guarantee that a range of water quality impacts from federally licensed or permitted activities would go completely unaddressed for certain projects. While it is indeed true that states remain largely free to apply state law outside of the section 401 certification process, that is not always the case. For example, most local regulation of certain projects under the Federal Power Act, including hydroelectric facilities, is preempted. *California v. FERC*, 495 U.S. 490, 498–99 (1990). In such circumstances, section 401 remains the sole safeguard ensuring Congress's guarantee "that the activities that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State for an evaluation and recommendation before the federal license or permit be granted." Attach. 1 at 38854.

EPA's formulation runs exactly opposite to that guarantee. Under EPA's proposal, project proponents of activities that require 401 certification because the project may result in a discharge to waters of the United States and where states are preempted from separately applying state law against water quality impacts to state waters would be free to pollute those state waters—even via point source discharges. States attempting to force those conditions outside of the section 401 context would undoubtedly face legal challenges with uncertain outcomes. Authority intended to *preserve* states' authorities over their waters cannot possibly be reasonably read to allow the preemption of protections that safeguard state waters.

E. Scope of Conditions

Although the States vehemently disagree with how EPA defines scope of review under section 401, the States agree that there is no basis to determine that the scope of conditions applied to federally licensed and approved projects pursuant to section 401(d) is different from the bases for denial under section 401(a)(1). Indeed, as EPA points out, 91 Fed. Reg. at 2026, it makes little sense to construe the statute as setting out different standards for conditions and denials. If certification conditions are insufficient to ensure compliance with water quality standards, a project *must* be denied. 33 U.S.C. § 1341(a)(1); *PUD No. 1*, 511 U.S. at 712.

The States do not support any modifications to 40 C.F.R. § 121.3, including any re-definition of the scope of certification or the removal of subsection 121.3(b).

V. CONTENTS OF A CERTIFICATION DECISION

EPA proposes amendments to 40 C.F.R. § 121.7 that would alter the requirements applicable to the contents of a state's certification decision. The Proposed Rule would require states that deny certification or grant certification with conditions to issue a written decision identifying the specific water quality requirements that would be violated if the certification were fully granted. *See* 91 Fed. Reg. at 2028. Combined with EPA's proposed redefinition of "water quality requirements," 91 Fed. Reg. at 2023, this proposal would allow EPA to dictate the contents of a state's certification decision, limiting States' decisionmaking authority in section 401 water quality certifications. The Proposed Rule is beyond EPA's authority, would subvert the purpose of the Clean Water Act, encroaches upon state law that governs certification decisions, and would impose an undue burden on certifying states.

EPA's proposed changes far exceed its statutory authority. Federal courts have long held that under the plain language of the Clean Water Act, EPA has no authority over state decisions on section 401 certifications. *See e.g., Am. Rivers,* 129 F.3d at 107–11 (finding that FERC does not have "the authority to decide which conditions are within the confines of § 401(d) and which are not"); *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 11 (D.C. Cir. 2011) ("EPA was correct in its assertion that it lacked authority to alter or reject [section 401] certification conditions"); *Sierra Club,* 909 F.3d at 647 (Congress "carefully prescribed allocation of authority between federal and state agencies in the Clean Water Act" leaving the Army Corps with no statutory authority to change or reject conditions imposed by a state on a section 401 certification). Instead, section 401 contemplates that the states will establish procedures governing their review of section 401 applications, including the contents of a decision. EPA's Proposed Rule intrudes upon the "responsibilities and rights" Congress expressly reserved to the states. *See* 33 U.S.C. § 1251(b). The Clean Water Act sought to "preserve" the states' primary authority over state water quality

decisions, 33 U.S.C. § 1251(b), and courts have consistently held that states may follow their own administrative procedures when reviewing section 401 requests. *See, e.g., Berkshire Envt'l Action Team*, 851 F.3d at 113. The certification decision itself is a matter of state law. *See Keating*, 927 F.2d at 622. EPA does not have the statutory authority to promulgate regulations that infringe upon the province of state law, as the Proposed Rule would.

The Proposed Rule runs afoul of both the Clean Water Act's intent and the principles of cooperative federalism. Congress intended to give the states substantial power in the section 401 certification process. *See Marathon Dev. Corp*., 867 F.2d at 99–100 ("The legislative history of section 401 of the Act ('Certification') confirms that Congress intended to give the states veto power over the grant of federal permit authority for activities potentially affecting a state's water quality."). The cooperative federalism structure of the Act is key to fulfilling Congress's intent for the states to have a significant role in water quality regulation. *See* Attach. 8 at 2. ("Section 401 is a cornerstone of the 'cooperative federalism' framework of the CWA, providing an important role for States to participate in an otherwise exclusively federal licensing or permitting process."). The Proposed Rule seeks override this authority, contradicting the purpose of the Act and undermining the cooperative federalism structure of water quality regulation.

EPA claims it is merely "filling up the details" unstated in section 401, providing a list of requirements for the contents of a certification decision where the Act does not. *See* 91 Fed. Reg. at 2028. However, the Proposed Rule goes far beyond "filling up the details." EPA seeks to upend the power balance between states and the federal government in water quality regulation, going far beyond its statutory authority. EPA's general rulemaking authority under the Clean Water Act only authorizes the Administrator "to prescribe such regulations as are necessary to carry out [the Administrator's] functions." 33 U.S.C. § 1361(a). But EPA has not identified why establishing new certification decision standards, which may conflict with state administrative procedures, is necessary to carry out any of EPA's functions under the Clean Water Act. In the absence of any clear statutory authority, EPA may not take such drastic actions that would diminish the states' role in the certification process and override states' own administrative procedures. *See, e.g., BFP,* 511 U.S. at 544 ("To displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest'").

Further, the content requirements proposed by EPA would place an undue burden on the certifying state. Adding new requirements to a state's certification obligations necessarily increases the bureaucratic workload for each state's certifying agency. The state must undertake additional steps to ensure compliance with the new requirements, decreasing the efficiency of certification request processing, and potentially may need to amend state rules governing the issuance of certifications. While EPA proposes that this rule would provide more transparency for applicants, it would more likely cause confusion. Applicants used to working with a state's procedures will now have to understand the new federal requirements and decipher the new form of certification decisions. Including additional explanatory text in certification decisions could create confusion for applicants who are accustomed to a state's succinct, clear decision. An applicant who is not satisfied with the explanation provided by a state could always challenge the decision in state court. There is no reason to impose new federal requirements that will delay certifications and confuse applicants.

Prior to the 2020 Rule, EPA did not require states to include any particular sets of information when issuing a certification decision. This state of affairs prior to 2020 did not cause significant issues with the transparency of decisions. These new requirements would not increase transparency and efficiency. Instead, they would create additional disputes over whether a certifying state adequately complied with EPA-issued requirements and whether state or federal law should govern certain aspects of the certification process. Imposing federal restrictions on the contents of a certification decision risks conflicting with applicable state law, causing more confusion for both states and applicants which will further delay the certification process.

The 2023 Rule, which only recommended that states include certain details in their decisions, properly balanced burden, transparency, and efficiency concerns. Allowing states flexibility in determining the contents of their certification decisions decreases the burden on states while still providing the minimal transparency benefits of the additional information. It is also the more sensible approach, considering the wide array of projects that undergo the section 401 certification process. These projects range from minor, routine dredge and fill permits to massive infrastructure projects. It does not make sense for EPA to impose "one-size-fits-all" administrative procedures on state review of section 401 requests when the circumstances of each project vary so widely. The 2023 Rule understood this, giving states the flexibility to apply the right approach on a project-by-project basis. EPA's approach here is the wrong one. Combined with the tightened timeframe that could result from EPA's proposed changes to 40 C.F.R. § 121.6, *see* 91 Fed. Reg. at 2041, EPA's proposal would unduly burden states, requiring even more of them while giving them less time.

To be sure, the states work diligently to make their certification decisions clear and detailed. The states are committed to issuing decisions that adequately explain their reasoning and allow applicants to understand why the decision was made. However, states' own procedures and water quality standards govern the contents of a certification decision, not EPA.

The proposed changes to 40 C.F.R. § 121.7, alongside the proposed changes to the definition of water quality requirements, *see* 91 Fed. Reg. at 2040, deprive the states of their right to impose conditions upon a certification or deny certification for reasons outside the set pre-approved by EPA. EPA lacks authority to implement this new scheme, which runs afoul of the Clean Water Act, threatens to violate state law, and would unduly burden states. For these reasons, the States urge EPA to withdraw the Proposed Rule.

VI. MODIFICATIONS

EPA proposes that both the federal agency and an applicant would need to agree to any modification of a section 401 certification. Under the Proposed Rule, the federal agency, state, and the applicant will all have to agree before the state can modify an existing certification. 91 Fed. Reg. at 2031. Further, the Proposed Rule would continue to prohibit states from unilaterally modifying a certification and prevent them from including certification conditions that would reopen the certification. *Id.*

The Proposed Rule's usurpation of state authority is contrary to the Clean Water Act's text and objectives. Section 401's text expressly contemplates modification of section 401 certifications by the certifying authority. Specifically, section 401 allows modifications of certification

conditions attached to a federal permit to construct a facility as those conditions are carried over to a license or permit to operate the facility. 33 U.S.C. § 1341(a)(3). A certifying authority may revoke or modify a section 401 certification previously issued for construction of the facility where changes have occurred due to (A) the construction or operation of a facility, (B) the characteristics of the impacted waters, (C) the water quality requirements of those waters, or (D) applicable effluent limits or "other requirements." *Id*.

As evidenced by section 401(a)(3), Congress intended for certifying authorities to have the ability to modify permit and license conditions as circumstances on the ground evolve, whether due to actions by the project proponent, regulatory changes within the state, or physical changes to the protected resource. *See id*. Nowhere in section 401 does Congress signal any intent to limit this flexibility to only construction certifications. Rather, section 401 demonstrates that Congress acknowledged the necessity for states to have an efficient process to modify certifications as conditions inevitably transform throughout the section 401 process, particularly for projects where operational impacts occur over many decades. The 2023 Rule, by requiring only agreement between the federal agency and certifying authority on any modifications, provided for at least some flexibility.

The Proposed Rule also contravenes section 401's purpose and objectives, rendering it contrary to law and arbitrary and capricious. Section 401 seeks to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and preserve the States' role under the Clean Water Act as "the prime bulwark in the effort to abate water pollution," *California State Water Res. Control Bd.,* 43 F.4th at 923–24; 33 U.S.C. § 1251(b). "State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution" so that "[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]." *S.D. Warren,* 547 U.S. at 386. "The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements." *Id*. quoting 116 Cong. Rec. 8984 (1970). But EPA, reaching for authority the Act denies, would provide the applicant a veto over modifying section 401 certifications. EPA is wrong: a state's ability to protect water quality by responding to changing circumstances and impacts related to a project is paramount. As discussed in Section IX.B below, EPA cannot limit state authority under section 401 by regulation, and it certainly cannot empower industry applicants to supplant that authority.

EPA admits that "CWA section 401 does not expressly authorize or prohibit modifications of certifications." 91 Fed. Reg. at 2031. And as discussed in these comments, EPA clearly cannot limit state authority under section 401, and even more clearly cannot give applicants veto powers over state certification decisions. A state, in its sovereign authority, may modify a certification, especially where doing so is the most efficient means to achieve the Act's goals. Under section 401, whether a state can modify a certification is properly decided by state regulations, subject to judicial review; whether a state should modify a certification is within the state's discretion. 33 U.S.C. § 1341(a)(3). Despite the directive of section 401, EPA also seeks to continue to bar states from including terms within a certification that would allow the reopening of a certification decision upon some triggering circumstance. EPA lacks the power under the Act to

limit the contents of a certification and should not attempt to do so where a condition provides for reopening of a certification. The Proposed Rule is therefore contrary to law and amounts to an impermissible delegation of authority to applicants.

EPA's proposal to give industry applicants veto power over certification modifications also contradicts EPA's own longstanding policies and regulations. The original section 401 regulations expressly permitted certifying authorities to "modify the certification in such a manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator." *See* Attach. 18, former 40 C.F.R. § 121.2(b). EPA's 2010 Guidance also explained the importance of modifications and reopening provisions for adapting to changed conditions related to long-term projects, such as pipelines and dams. The 2010 Guidance recognized the likelihood that a section 401 certification may eventually need to be reopened for a necessary modification in the event that water quality standards change. Attach. 7 at 27. "For example, in response to a 401 certification adaptive management condition, FERC may require in a license a minimum flow between 100 and 500 cubic feet per second to protect a particular resource and within that range of flow the licensee and certifying agency make flow decisions on a reoccurring basis depending on the conditions occurring at the time." *Id.*

EPA has failed to adequately explain this departure from its longstanding practice, and the proposed rule runs counter to the evidence before the agency. *See Fox Television Stations,* 556 U.S. at 515. EPA attempts to justify this change in regulation based on a contrived interpretation of section 401. 91 Fed. Reg. at 2031. According to EPA, section 401 does not allow states to change their certification decisions outside the reasonable period. *Id.* EPA fails to acknowledge that a state is not changing its certification decision when it modifies conditions to adapt to changed impacts, regulations, and project circumstances. Rather, a state is simply updating the certification to reflect evolving circumstances, which, as stated above, is explicitly supported by the plain text of section 401. *See* section 401(a)(3). Further, EPA's proposal to prevent states from reopening a certification would incentivize a state to preemptively issue certifications with conditions, even where it would normally issue unconditional certification to preserve its future ability to adapt to changing circumstances. Finally, EPA contends that because applicants have "an important role in implementing any conditions of a grant of certification," they should therefore be included in the process. 91 Fed. Reg. at 2031. Still, EPA fails to adequately explain why applicant feedback should override the expertise of the certifying agency, such that the language of a modification is contingent upon the applicant's agreement. *Id.* EPA thusly fails to provide an adequate explanation for the proposed rule that is supported by the evidence before it. EPA's proposed applicant veto is therefore arbitrary and capricious.

In addition, the proposed rule is arbitrary and capricious because EPA failed to consider states' long-standing, significant reliance interests. *Fox Television Stations,* 556 U.S. at 515; *Regents of Univ. of Cal.*, 591 U.S. at 30 (longstanding policies may engender serious reliance interests that must be considered). States have long relied on modification provisions where changes in water quality standards or other considerations are anticipated over the lifespan of a section 401 certification. Reopener conditions also allow states to adapt to situations quickly or otherwise respond to changes in circumstances or changes in project proposals. For example, in California, a certification that will be in effect for an extended period will often include provisions allowing modifications, after appropriate notice and an opportunity to be heard, including: (1) to incorporate changes in technology, sampling, or methodologies; (2) where monitoring results

indicate that Project activities could violate water quality objectives or impair beneficial uses; (3) to implement any new or revised water quality standards and implementation plans adopted or approved pursuant to California's water quality laws or section 303 of the Clean Water Act; and (4) when a violation is threatened, to require additional monitoring and/or other measures, as needed, to ensure that Project activities meet water quality objectives and protect beneficial uses. Many other states have long used similar terms. Despite states' reliance interests, EPA failed to consider the necessity for states to modify and reopen certifications, and the Proposed Rule is therefore arbitrary and capricious.

Moreover, EPA's continued prioritization of industry interests over that of states' violates the APA. By prioritizing industry interests over the reliance interests of certifying authorities, EPA over-relies on factors Congress did not intend for EPA to consider. See *Independent US Tanker Owners Committee,* 809 F.2d at 854. As explained above, Congress intended for section 401 to preserve the states' role under the Clean Water Act as "the prime bulwark in the effort to abate water pollution," with state certifications serving a critical function—essential to the states' role under section 401 is the ability of certifying authorities to modify and reopen certification to ensure conditions reflect evolving certifications—especially for long-term projects like pipelines and dams. *California State Water Res. Control Bd.,* 43 F.4th at 924. Instead, EPA seeks to make the section 401 certification process oversimplified in ways that will lead to worse outcomes, both for water quality and, ultimately, project proponents. EPA proposes to reintroduce "a modification provision with restrictions to protect applicant and Federal agency reliance interests," 91 Fed. Reg. at 2031, but these parties' interests are not among the objectives, goals or policies of the Act enumerated in section 101. EPA's failure to prioritize the objectives that Congress announced in the Act rather than the convenience of industry is arbitrary and capricious.

At a minimum, the final rule should retain the modification provisions as provided in the 2023 Rule, such that modifications require agreement between the federal agency and the state.

VII. CROSS-BORDER CONTAMINATION PROCESS

EPA has proposed changes related to its duty to carry out section 401(a)(2) with regard to cross-border contamination. Because EPA's proposed changes reflect a general lack of consistency with the plain meaning and legislative history of the statute, including EPA's obligations under section 401(a)(2), the States urge EPA to not finalize these proposed amendments and retain the existing regulations regarding section 401(a)(2).

As a threshold matter, EPA proposes to limit the scope of a 401(a)(2) determination to specific point source discharges. 91 Fed. Reg. at 2023. The States reiterate and incorporate the comments related to scope outlined in Section IV above. There is no rational or legal basis justifying limiting the scope of activity relevant to a section 401 review—whether as a neighboring jurisdiction or as the primary certifying authority—to only those water quality impacts resulting from individual discharges rather than the activity as a whole.

The States also object to other proposed changes to practice and procedure under section 401(a)(2). First, EPA proposes to eliminate the definition of "neighboring jurisdiction" in favor of "other state." 91 Fed. Reg. at 2032. EPA itself acknowledges that the more descriptive and

more accurate term "neighboring jurisdiction" has already "been incorporated into stakeholder vernacular" and that EPA "will continue to use the term 'neighboring jurisdiction' interchangeably with 'other state' … with the section 401(a)(2) process throughout this preamble and any subsequent materials." *Id*. The States are, thus, left with the question of "then why make this change?" EPA should retain the definition of "neighboring jurisdiction."

Second, EPA proposes to limit its own ability to request additional information from federal agencies that may be necessary for EPA to make a "may affect" determination under section 401(a)(2). 91 Fed. Reg. at 2032–33. The current regulations allow EPA to request this information and enter into agreements with other federal agencies to "refine the notification and supplemental information process." *Id*. at 2032. EPA proposes to jettison this important tool in favor of a new and largely untested "online notification portal." *Id.* at 2033. Using a website in place of firm requirements regarding EPA's authority to request needed information is insufficient for EPA to execute on its section 401(a)(2) obligations, and the States urge EPA to retain the existing language in 40 C.F.R. § 121.12(b)–(c).

Third, EPA proposes to grant itself authority to make decisions regarding whether a project impacts a neighboring jurisdiction "categorically." 91 Fed. Reg. at 2032–34. The States disagree with EPA's assertion that such categorical decisions are not the functional equivalent to a "categorical exclusion" that is not authorized under section 401(a)(2). For example, if EPA makes a categorical "may effect" determination that discharges to the ocean will not reach neighboring jurisdictions, it is difficult to understand how EPA will then—looking solely at "the project's location and lack of hydrological connectivity"—properly evaluate whether downstream impacts would fail to result. 91 Fed. Reg. at 2034. This is precisely the kind of cursory review that section 401(a)(2) seeks to prevent by requiring what is clearly set out in statute to be a case-by-case review. *See* 33 U.S.C. § 1341(a)(2). Moreover, EPA's proposal is not to adopt categorical "determinations" via rulemaking but rather acknowledging "the development of categorical determinations in regulatory text." 91 Fed. Reg. at 2034. In addition to the entire concept of categorical section 401(a)(2) determinations being contrary to the statutory text, adopting the actual categorical determinations via informal guidance would certainly violate the APA. EPA should refrain from granting itself the authority to make categorical section 401(a)(2) determinations.

Fourth, the States disagree with EPA's proposal that a neighboring jurisdiction's objection under section 401(a)(2) must include citation to the water quality requirements that will be violated on the same basis set out in Section V above.

Finally, EPA should not adopt provisions limiting federal agency consideration of neighboring jurisdiction "will violate" objections to a maximum of 90 days. It is unreasonable to impose an across-the-board temporal limitation. While some determinations on objections may be fairly straightforward, placing arbitrary limits on all such determinations is unsupported by the statute or by common sense. EPA should leave it to the federal agencies to determine the appropriate period of time necessary to fully evaluate objections.

VIII. TREATMENT AS A STATE

The 2023 Rule decoupled tribes' ability to seek treatment in a manner similar to a state ("TAS") under section 401 from section 303(c), establishing new regulatory processes that allowed tribes to obtain TAS solely for section 401, or for the limited purpose of participating as a neighboring jurisdiction under section 401(a)(2). EPA now proposes to repeal both regulatory processes and rely exclusively on the TAS process established for tribal administration of a water quality standards program. This proposal would further wither already lamentably insufficient opportunities for tribal input to be considered and implemented, at a time when tribes already feel that their input is, or will be, ignored.[11] The States recognize the importance of allowing tribes to protect their water resources under section 401 and urge EPA to retain the approach established by the 2023 Rule.

Section 518(e) of the Clean Water Act authorizes EPA to treat eligible tribes in a manner similar to states "for purposes of subchapter II of this chapter and sections . . . 1341, . . . of this title to the degree necessary to carry out the objectives of this section." 33 U.S.C. 1377(e). Although the Clean Water Act clearly allows tribes to obtain TAS solely for the purpose of carrying out the section 401 certification process, EPA's regulations previously treated TAS for section 401 "as an adjunct to TAS for the CWA section 303(c) program for water quality standards." *See* 88 Fed. Reg. 66558, 66652 (Sep. 27, 2023). EPA now proposes to return to this approach, ignoring the benefits identified by the 2023 Rule of providing "an alternate path for Tribes wishing to obtain TAS status only for section 401 and not also for section 303(c)." *See id.* As EPA noted in the 2023 Rule, this alternate path "recognizes that section 401 and section 303(c) administration are related, but distinct functions and is responsive to tribal stakeholders who have expressed an interest in participating in the section 401 certification process." *Id.* at 66653. The 2023 Rule also created an opportunity for Tribes to participate in the 401 certification process without exercising regulatory authority by allowing eligible tribes to apply for TAS solely for section 401(a)(2) and participate as a neighboring jurisdiction. *Id.*

The States agree with EPA's prior assessment of the value of creating a stand-alone TAS section 401 certification process and urge EPA to return to this approach. As EPA recognized, section 401 and section 303(c) serve related but separate purposes. Section 401 allows authorized tribes to independently review the water quality impacts of projects that may result in a discharge and that require a federal license or permit to ensure that such projects do not violate tribal water quality laws and regulations, while section 303(c) empowers authorized tribes to set their own water quality standards that define their water quality goals and serve as a basis for limits on pollutant discharges into waters on reservation lands. Under section 401, an authorized tribe may review the water quality impacts of projects implicating *all* tribal water quality laws, even if it

[11] EPA's own summary of tribal feedback indicates unanimous support for the 2023 Rule amongst those tribes that participated, and that tribes articulated concerns that their input was doomed to be ignored; a fear that appears well-founded considering EPA's Proposed Rule. *See* Summary Report of Tribal Consultation on the U.S. EPA: Implementation Challenges Associated with the Clean Water Act Section 401, Docket ID No. EPA-HQ-OW-2025-2929 ("Additionally, several Tribes voiced concern the EPA has already decided to revise the 2023 Rule and is relying on input received through the July 2025 Federal Register to justify a rulemaking. Collectively, these Tribes urged the EPA to retain the 2023 Rule.").

lacks EPA-approved water quality standards. The States also recognize the value of allowing Tribes to participate as neighboring jurisdictions under section 401(a)(2), regardless of whether a tribe has assumed regulatory authority under section 401 or 303. As EPA recognized, participating as a neighboring jurisdiction under section 401(a)(2) does not involve the exercise of regulatory authority by a tribe but provides an opportunity for a tribe to contribute to the decision-making of a federal licensing or permitting authority by providing input regarding impacts on their water quality. *See* 88 Fed. Reg. at 66653. This approach allows tribes with limited resources to develop and implement a water quality standards program to protect their water quality resources, consistent with tribes' inherent sovereignty and reserved rights as dicted by treaties, federal statutes, and executive orders.

IX. IF ADOPTED, EPA'S PROPOSED RULE WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT

Agency rulemaking that is arbitrary and capricious, an abuse of discretion, without statutory authority, not in accordance with law, or not supported by substantial evidence is unlawful and must be vacated and set aside. *See* 5 U.S.C. § 706(2). EPA's Proposed Rule fails to satisfy these standards.

As noted above, the Proposed Rule is unlawful. EPA's attempt to limit the scope of state authority under section 401 goes against the plain language and legislative history of the statute and—by EPA's own admission—is contrary to Supreme Court precedent. The Proposed Rule will also violate the APA by failing to: (1) consider and analyze relevant issues, including the Clean Water Act's overarching objective to restore and maintain water quality; and (2) provide a reasoned explanation or rational basis for EPA's decision to repeal the existing section 401 regulations, which reaffirmed decades of prior section 401 practice, without consideration of the states' significant reliance on the existing regulations.

A. The Proposed Rule Is Not in Accordance with Law

The Proposed Rule seeks to again overturn and disrupt long-established section 401 practice, as restored by EPA in 2023, and to limit state authority in direct conflict with the text and intent of the Clean Water Act and applicable case law. Among other defects, as set out in detail above, the Proposed Rule will: (1) unlawfully restrict the scope of section 401 certification, the waters states can protect, and the state laws that can be applied; (2) limit the information a state can request up front from an applicant, resulting in delays and denials; (3) create unclear and unnecessary requirements for states to provide written explanations for section 401 decisions; and (4) place undue burdens on federal and state officials' abilities to make necessary modifications to certifications. As a result, the Proposed Rule is not in accordance with law and, if promulgated, will violate the APA. 5 U.S.C. § 706(2)(A).

B. EPA Lacks Statutory Authority to Promulgate the Proposed Rule

An agency rule adopted in excess of or without statutory authority is unlawful and must be vacated and set aside. 5 U.S.C. § 706(2)(C). "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). In issuing the Proposed Rule, EPA relies on sections 304(h), 401, and 501(a) of the Clean Water Act. 91 Fed. Reg. at 2009. None of these sections provide rulemaking authority.

Section 301(h) only permits EPA to promulgate "guidelines" regarding the factors that must be provided in a section 401 certification. 33 U.S.C. § 1314(h). Even then, this provision is most reasonably read as relating to factors EPA considers when it is acting as the certifying authority. *See id*.; § 1341. Nor does section 401 contain any rulemaking authority with regard to state certifications. *See* 33 U.S.C. § 1341. And, under section 501(a) of the Clean Water Act, EPA is limited to prescribing "such regulations as are necessary to carry out [the Administrator's] functions under [the Act]." 33 U.S.C § 1361.

Indeed, federal courts have long held that under the plain language of the Clean Water Act, EPA has no authority over state decisions on section 401 certifications. *See e.g., Am. Rivers,* 129 F.3d at 111–12 (FERC has no authority to reject state conditions on section 401 certifications); *U.S. Dept. of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates."); *Sierra Club,* 909 F.3d at 647 (Congress "carefully prescribed allocation of authority between federal and state agencies in the Clean Water Act" leaving the Army Corps with no statutory authority to change or reject conditions imposed by a state on a section 401 certification). EPA's Proposed Rule goes well beyond the congressional authorization to EPA to adopt regulations necessary to carry out the agency's duties and responsibilities under the Clean Water Act and instead intrudes on the "responsibilities and rights" left by Congress to the states. 33 U.S.C. §§ 1251(b), 1341, 1361.

As discussed in detail above, the EPA's proposal seeks to, among other things, dictate to the states what sources of state law can be applied pursuant to state certifications, the types of information required to initiate state review, and the substantive scope of discharges states can analyze in terms of water quality impacts. EPA's attempt to regulate and usurp state administrative decisionmaking directly contradicts the Clean Water Act and section 401, which specifically contemplates that the *states* will establish administrative procedures governing their review of section 401 applications. *See* 33 U.S.C. 1341(a)(1) (requiring the appropriate "State or interstate agency" to "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications"). Accordingly, EPA is not authorized to promulgate the Proposed Rule under sections 401 or 501 of the Act. *See Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (citation omitted) ("EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area."). Accordingly, the Proposed Rule is *ultra vires* and must be withdrawn. *Iowa League of Cities v. EPA*, 711 F.3d 844, 877–78 (8th Cir. 2013) (EPA legislative rules promulgated without valid statutory authority are *ultra vires* and violate the APA).

C. The Proposed Rule Is Arbitrary and Capricious and an Abuse of Discretion

A regulation is 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." *State Farm,* 463 U.S. at 43. EPA's Proposed Rule fails under this standard.

1. **EPA failed to consider the relevant factors related to implementing section 401 and did not provide a rational basis for the Proposed Rule**

To pass muster under the APA's arbitrary and capricious standard, agency rulemaking must be "based on a consideration of the relevant factors." *State Farm*, 463 U.S. at 43. An 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." *Id.* Particularly relevant here, when EPA adopts Clean Water Act regulations, it cannot "ignore the directive given to it by Congress . . . which is to protect water quality." *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009).

EPA's Proposed Rule falls well short of this requirement because it lacks any analysis of water quality impacts and fails to consider whether the Proposed Rule, if adopted, will ensure the Clean Water Act's overarching goal of protecting water quality is met. *See id.* at 939–40 (a rule interpreting the Act to exclude prohibitions against discharges of certain pesticides was invalid because, among other reasons, EPA ignored the rule's water quality impacts). The water quality impacts of the Proposed Rule could be severe if state agencies lose their broad authority to protect the quality of state waters. For example, by limiting states' power to review and impose conditions under section 401 only to point source discharges into navigable waters, EPA is stripping states of their authority to address other impacts associated with an activity reviewable under section 401. Similarly, the Proposed Rule would preclude states from mitigating impacts to non-navigable state waters. When combined with EPA's recent proposal to further narrow the definition of "navigable waters," 90 Fed. Reg. 52498 (Nov. 20, 2025), the Proposed Rule could leave a huge number of streams impacted by federal projects beyond state authority under section 401. This could create massive regulatory gaps by removing water quality impacts from federal or state oversight, especially in cases where federal law preempts state water quality regulations. EPA's failure to consider these potential impacts at all renders its action arbitrary and capricious.

EPA also wholly failed to evaluate the impact of the Proposed Rule on existing state regulations related to section 401 implementation. This is especially problematic in light of section 401's clear directive that states must establish procedures for public notice and may promulgate rules on public hearings related to certification applications. 33 U.S.C. § 1341(a)(1). Rather than consider and analyze the impact of the Proposed Rule on existing state regulations adopted pursuant to section 401, EPA simply purports to override state regulations pertaining to the information needed to efficiently and effectively process a section 401 request. 91 Fed. Reg. at 2017–2021. By its refusal to evaluate the Proposed Rule's impact on state section 401 regulations, EPA "failed to consider an important aspect of the problem" and acted arbitrarily and capriciously. *See State Farm*, 463 U.S. at 43.

Finally, EPA repeatedly asserts that the key reason for the Proposed Rule is to increase predictability and timeliness in the section 401 certification process. *See, e.g.,* 91 Fed. Reg. at 2008. But EPA does not provide any analysis demonstrating that existing section 401 regulations do not and cannot ensure predictability and timeliness in section 401 review. Nor does EPA explain how the Proposed Rule will, in fact, provide increased predictability in comparison. EPA fails to document—in any respect—that there is a current problem with how states and other certifying authorities currently execute on their section 401 responsibilities. And, despite vague and unsubstantiated references to the 2023 Rule blocking critical projects in EPA's Fact Sheet for the Proposed Rule, EPA fails to identify a single project that has been delayed or otherwise unlawfully conditioned or denied under the 2023 Rule.

This is likely because *actual* problems with section 401 certification were virtually non-existent prior to the 2020 Rule and under the 2023 Rule. For example, Washinton State issued 280 section 401 certification decisions from the effective date of the 2023 Rule until present, all of which were issued well within the agreed upon reasonable period of time. During that same time period, it issued zero substantive denials. Other states report similar statistics. For example, just in the last year Massachusetts issued 182 water quality certifications under section 401 with no denials. Maryland also has issued no denials during the past five years. In fact, EPA's own Economic Analysis for the Proposed Rule backs this up. For Army Corps-related section 401 certifications between the effective date of the 2023 Rule and September 2025, EPA itself documents a nationwide average approval rate of 99.2 percent. EPA, *Economic Analysis for the Proposed Updated the Water Quality Certification Regulations* (January 2026) (Economic Analysis) at 42–43.[12]

Given the sweeping changes the Proposed Rule seeks to implement, and the numerous gaps left in it by EPA, it is just as likely that the Proposed Rule will cause more confusion, unpredictability, and delay in section 401 review than the 2023 Rule, which restored the well-established section 401 practice that existed for decades prior to the 2020 and 2023 rules. For these reasons, EPA has failed to provide rational basis and reasonable explanation for the Proposed Rule.

2. EPA failed to provide a reasoned explanation for the change in its position on section 401 implementation

Additional requirements apply to rulemaking when an agency changes its position. *Fox Television Stations,* 556 U.S. 502. While an agency is free to change its regulations, it "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC. v. Navarro*, 579 U.S. 211, 221–22 (2016) (citing *Fox Television Stations*). Moreover, "[i]n explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Id.* "In such cases it is not that further justification is demanded by the mere

[12] Available at: https://www.epa.gov/system/files/documents/2026-01/cwa401_proposed-rule-economic-analysis_jan2026_508c.pdf.

fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 515–516.

EPA's preamble to the Proposed Rule couches its current effort as addressing concerns expressed by regulated entities over the 2023 Rule. *See, e.g.,* 91 Fed. Reg. at 2015. Indeed, throughout the document, and despite the fact that the 2023 Rule simply restored section 401 practice to what existed prior to the 2020 Rule, EPA ignores the decades of that practice preceding adoption of the 2020 Rule. Aside from noting the 2023 Rule preamble's references to prior practice, EPA does not mention any of its own prior interpretations and guidance documents construing section 401 stretching as far back as the Reagan administration and well before the Supreme Court weighed in on section 401's scope.

Given this history, EPA fails to provide any analysis regarding the states' significant reliance on the agency's existing regulations or any evaluation of the impacts the proposed regulatory change will have on state interests. EPA's existing section 401 regulations—and the 50 years preceding the 2020 Rule—have provided a stable section 401 framework for decades. In reliance on that framework, the states have based their own implementation of section 401 on the existing certification regulations and guidance and will be significantly impacted by EPA's abrupt policy reversals.[13] EPA's refusal to acknowledge and analyze the states' reliance interests affected by the Proposed Rule demonstrates that the agency has failed to provide a reasoned explanation for its changed position. An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 981 (2005).

Nor does EPA provide a reasoned explanation for the need to again attempt to radically shift the balance of state and federal authority under the Clean Water Act. EPA only vaguely references unspecified and wholly unsupported allegations of "confusion" and "uncertainty" under the existing rule. 91 Fed. Reg. at 2008, 2026. But, notably, nowhere does EPA's Proposed Rule say anything about preventing water pollution or the detrimental impact that the Proposed Rule will have on water quality. Nor does EPA, as noted above, point to any actual instances of project proponents experiencing alleged confusion or uncertainty or any projects allegedly impacted by so-called abuses of section 401 authority. In fact, New York's Department of Environmental Conservation recently approved the 401 certification for the Northeast Supply Enhancement pipeline, a priority project for the current Administration.[14]

The lack of explanation is because EPA's goals with the Proposed Rule are purely policy-driven, as was the 2020 Rule, which was based on an executive order by the current President to "encourage greater investment in energy infrastructure." 91 Fed. Reg. at 2014–2015. But these

[13] This issue is particularly acute in that subset of states lacking primacy over Section 402 National Pollutant Discharge Elimination System (NPDES) permitting because such states (and tribes) rely wholly on section 401 to address the water quality impacts from federally-permitted facilities. Creating those authorized programs now will require years for such states to authorize, fund, and staff.

[14] *See* http://dec.ny.gov/sites/default/files/2023-11/nesepermitcoverletter20251107.pdf.

policy goals, undoubtedly carried forward by this same Administration, are insufficient to authorize EPA to contradict or undermine the plain language and congressional intent of the Clean Water Act—particularly section 401—to restore the Nation's waters and preserve state authority to protect water quality. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952) (President cannot use Executive Order to promote policy goals in absence of statutory or constitutional authority); *id.* at 637–38 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb"); *In re Aiken Cnty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) ("[T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections.").

3. The Proposed Rule does not consider and analyze alternatives

An agency must also consider alternatives to its proposed action, particularly when it proposes to reverse its own policy. *State Farm*, 463 U.S. at 46–48 (rescission of automobile passive restraint requirements found arbitrary and capricious for agency failure to consider alternatives); *Ctr. For Science in the Pub. Interest v. Dep't of Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986) (agency analysis reversing position "should include an explanation for the reversal which is supported by the record and a discussion of what alternatives were considered and why they were rejected"). The Proposed Rule is a significant departure from both the current rule and EPA's longstanding (before 2020) position on section 401 implementation. The Proposed Rule seeks to dramatically curtail state authority to review projects subject to federal permits under section 401 and, if adopted, will limit states' ability to ensure protection of state water resources. Yet, EPA has entirely failed to mention, let alone consider, a single alternative to its Proposed Rule. This failure demonstrates that the agency is acting in a manner that is arbitrary and capricious and in violation of the APA.

4. EPA's failure to actually evaluate environmental impacts, including impacts to children, and its use of outdated economic practices are fundamentally flawed

Executive Order 12866 requires executive agencies to prepare "[a]n assessment, including the underlying analysis," of the benefits and costs associated with any proposed or final regulation that is expected to have significant economic impacts. 58 Fed. Reg. 51735, 51741 (Oct. 4, 1993). EPA's economic analysis falls short in several key respects and should be redone.

First, EPA fails to adequately account for the environmental impacts from the Proposed Rule. EPA acknowledges the potential for negative environmental impacts from drastically reducing the scope of section 401 certifications compared to the 2023 Rule and the system in place for half-a-century prior to the 2020 Rule. Economic Analysis at 28–29. Yet, EPA dismisses those impacts because it asserts that "certification decisions reflective of the narrower scope would be less likely to face legal challenges." *Id*. at 29. EPA further claims that, if the 2023 Rule were overturned, "any supposed or perceived lower level of environmental quality would in fact be illusory." *Id*.

These assumptions do not support EPA's failure to incorporate environmental impacts into its cost-benefit analysis. EPA provides nothing to justify its bald claim that section 401 certifications might be challenged *more* under the 2023 rule. To the States' knowledge, that is far from the case. EPA also fails to acknowledge that certifications reflecting a narrower scope are just as—if not *more*—likely to be challenged by environmental groups as directly contradictory to the plain language of the Clean Water Act as interpreted by the Supreme Court. In fact, a Washington State section 401 certification made under the 2020 Rule is currently facing that very challenge. EPA's refusal to analyze environmental impacts based on what litigants or courts *might* do, including the currently unknowable question of whether the Supreme Court would overturn its own decisions in *PUD No. 1* and *S.D. Warren* is unsupportable.

EPA also fails to follow its own policies with regard to impacts to children. *See* EPA's Children's Health Policy.[15] With a hand-wave, EPA boldly claims no need to follow its Children's Health Policy because "EPA does not believe the action has considerations for human health." 91 Fed. Reg. at 2037–38. This statement—void of any analysis or support—flies in the face of logic given that EPA proposes to drastically curtail the scope of water quality impacts states can review and condition under section 401. These water quality protections are designed to protect the quality of water for recreation, fish consumption, drinking, and a host of other designated uses that are related to or crucial for protecting human health.

Moreover, under the Regulatory Right-to-Know Act, the Office of Management and Budget (OMB) is required to issue guidelines to agencies in order to "standardize" calculation of these impacts. Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 624(c)(1). OMB first issued these guidelines in 2003 in Circular A-4. The guidelines were revised and significantly updated in 2023 via a process that was subject to public comment and independent peer review.[16] On January 31, 2025, the President issued Executive Order 14192, directing OMB to rescind the 2023 revision to Circular A-4 and reinstate the 2003 version. 90 Fed. Reg. 9065 (Feb. 6, 2025). As a result, EPA's Economic Analysis was conducted under the 2003 Circular A-4. *See* Economic Analysis at 1–2, 38.

Executive Order 12866 states that agencies must "propose or adopt a regulation upon a reasoned determination that the benefits of the intended regulation justify its costs." 58 Fed. Reg. at 51736. Moreover, "when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (citation modified). For example, an agency that fails to "examine the relevant data" or that offers "an explanation for its decision that runs counter to the evidence" engages in arbitrary action. *State Farm*, 463 U.S. at 43; *see also City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (courts will not "tolerate rules based on arbitrary and capricious cost-benefit analyses"). EPA's reliance on outdated and obsolete economic practices further undermines EPA's economic analysis.

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[15] Available at: https://www.epa.gov/children/childrens-health-policy-and-plan.
[16] ICF Int'l, *Individual Peer Reviewer Comments on Proposed OMB Circular No. A-4, "Regulatory Analysis"* (Aug. 3, 2023), https://perma.cc/UWV4-QR46.

X. CONCLUSION

For the foregoing reasons, EPA should abandon and withdraw the Proposed Rule.

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2. 80 Cong Rec. (1948)*
3. 91 Cong. Rec. (1969)*
4. H.R. Rep. No. 92-911 (1972)*
5. Catherine Winer, Section 401 Certification of Marinas (Nov. 12, 1985)
6. EPA, Office of Wetlands Protection, *Wetlands And 401 Certification—Opportunities And Guidelines For States And Eligible Indian Tribes* at 22 (Apr. 1989)
7. EPA, Office of Wetlands, Oceans, and Watersheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (Apr. 2010)
8. *Louisiana v. EPA*, 2024 WL 994651 (W.D. La. 2024) (order denying motion for preliminary injunction)
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10. H.R. Rep. No. 91-940 (1970)
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17. Legislative History of the Clean Water Act, Vol. 1*
18. Former 40 C.F.R. § 121.2(b)
19. State Request for Comment Period Extension (January 23, 2026)

* Over maximum file upload size. Sent via thumb drive per U.S. EPA direction provided via email on February 11, 2026.