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U.S. Environmental Protection Agency
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Re: Comments of the Environmental Law & Policy Center, Hoosier Environmental Council, Illinois Environmental Council, Iowa Environmental Council, Michigan Environmental Council, Minnesota Environmental Partnership, and Ohio Environmental Council,
Docket ID No. EPA-HQ-OW-2025-2929

To the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers:

The undersigned organizations 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) ("Proposed Rule").

The **Environmental Law & Policy Center (ELPC)** is an environmental nonprofit that works to protect the Great Lakes and other water resources of nine states in the Midwest. ELPC's members benefit from a robust use of section 401 authorities by states and tribes to protect the waters that support public health, recreation, and a strong economy throughout the Midwest, including the Great Lakes.

Hoosier Environmental Council's (HEC) vision is an Indiana where all residents have abundant access to clean water, natural lands, pure air, and affordable clean energy. Its mission is to lead and collaborate with diverse coalitions to achieve a healthy natural environment and thriving sustainable communities for all. Founded in 1983, HEC is Indiana's largest state based environmental nonprofit, and it brings deep connections with communities, advocates, and elected officials across the state. HEC advances its mission through education, advocacy, policy and accountability through legal action.

The **Illinois Environmental Council (IEC)** represents over 130 environmental organizations operating in Illinois. IEC carries out our mission to advance equitable public policies that create healthy environments across Illinois through collaboration, building power, and advocacy.

The **Iowa Environmental Council (IEC)** is a broad-based environmental policy organization with a mission to create a safe, healthy environment and sustainable future for all

Iowans. IEC is a coalition of 100 diverse member and cooperator organizations ranging from agricultural, conservation, and public health organizations, to educational institutions, business associations, and churches, along with hundreds of individual members that coordinate to support IEC's mission. IEC's work focuses on clean water, clean air, conservation, clean energy, and a safe climate.

The **Michigan Environmental Council (MEC)**, a 501(c)(3) nonprofit organization, was formed in 1980 and represents nearly 100 member organizations from across the State. MEC works to enact enduring and equitable policies in order to fulfill our mission of championing lasting protections for Michigan's air, water, and the places we love.

Minnesota Environmental Partnership (MEP) is a statewide coalition of more than 70 environmental and conservation nonprofits organizations - and other groups that align with MEP's mission and collaborative approach - that advocate together for clean energy, clean water, clean transportation and a healthy environment for all Minnesotans through policy initiatives, public education, and community events.

The **Ohio Environmental Council (OEC)** is a 56-year-old statewide advocacy organization based in Columbus, Ohio. The OEC pursues a clean, healthy Ohio where democracy empowers all communities to thrive in harmony with the environment. It achieves this goal through legal and policy advocacy, decision-maker accountability, and civic engagement.

Introduction

In the 53 years since the Clean Water Act's enactment and through federal administrations of both political parties, states and tribes have used the powers given to them by Congress under section 401 of the Clean Water Act ("CWA") to protect the nation's waters from damaging federally permitted activities. Communities and conservation groups have relied on and participated in section 401 certifications to ensure that federally licensed projects do not impair the waters on which people depend. Implementing section 401, states and tribes have responded to concerns expressed by local residents and communities by placing conditions in federal permits and licenses to protect clean water and state and local resources.

The process has worked as Congress intended to further the goals of the Clean Water Act through cooperative federalism by ensuring that states and tribes—those most familiar with their local waterways—decide whether a federally permitted project will impact the quality of those waters. Congress gave states and tribes—not federal agencies—the power to decide whether and how to certify projects. Federal agencies have no statutory authority to limit or second guess the conditions or denials that states or tribes may impose. Only courts can do so.

In its proposed regulation to further limit the "waters of the United States" protected by the Clean Water Act, EPA suggests that states and tribes step up to protect those waterways that

would no longer be covered by the Clean Water Act.¹ Yet, in this proposal EPA takes the opposite tack, claiming that despite Congress’s explicit empowerment of states and tribes in the Clean Water Act to review the impact of federally permitted activities on water quality, EPA can take away that authority. This departure from the statute’s text, Supreme Court precedent, and decades of successful implementation of section 401 by states and tribes is even more egregious given the drastic reduction in the waters now protected by the Clean Water Act under *Sackett v. EPA*, 598 U.S. 651 (2023), which EPA’s November 2025 proposal would unlawfully shrink even further. Nothing has changed between the time EPA finalized the current rule implementing section 401 and now, except that 80% or more of the waters that used to be protected by the Clean Water Act are no longer protected.² In light of that fact alone, EPA should be developing strategies for empowering states and tribes, not undercutting their authority to protect waterways.

The benefits the public has received from implementation of section 401 are plain. In response to public comments and concerns, certifying authorities have required that dams preserve stream flow necessary for aquatic life and provide fish passage for spawning; that pipeline projects control runoff and other water pollution; and that marsh and wetland destruction be avoided, minimized, and mitigated. These protections of water quality have been accomplished because Congress gave states and tribes fulsome powers under the Clean Water Act. These powers were intended to allow states and tribes to consider federally permitted projects holistically in terms of their likely impact to the chemical, physical, and biological integrity of the nation’s waters and to deny or condition such projects so that water quality is protected and enhanced. EPA now seeks to interfere with section 401’s cooperative federalism approach, an approach that has empowered states and tribes to use state and tribal authorities in addition to those available to EPA or the U.S. Army Corps of Engineers (“Army Corps”) to protect waterways from federal projects that would destroy or pollute waterways that the public uses for drinking water, irrigation, recreation, manufacturing, and much, much more.

Chicago recently experienced a compelling example of section 401 in action. ELPC and our local partners stopped the U.S. Army Corps of Engineers from building a 25-foot high, 43-acre toxic waste landfill along the Lake Michigan shoreline on Chicago’s Southeast Side, which has long been overburdened by pollution. In that case, the Illinois EPA denied or indicated that it would deny three required state water quality permits, including the section 401 certification, for the proposed toxic waste landfill. The landfill was known to contain arsenic, mercury, and polychlorinated biphenyls.³ In response to the Army Corps’ section 401 Application, Illinois EPA emphasized concerns about these dangerous pollutants leaching into Lake Michigan, including potential impact of mercury discharges that could affect wildlife and questions about

¹ U.S. Environmental Protection Agency and U.S. Army Corps of Engineers’ Proposed Rule entitled *Updated Definition of “Waters of the United States,”* EPA–HQ–OW–2025–0322, and published at 90 Fed. Reg. 52498 (Nov. 20, 2025).

² U.S. EPA & Dep’t of the Army, Proposed Regulatory Impact Analysis, Document ID EPA-HQ-OW-2025-0322-0120, Table 3-1 (Nov. 2025) (“2025 Updated WOTUS RIA”).

³ Brief of the Attorney General of Illinois as Amicus Curiae at 3-4, *Alliance of the Southeast v. U.S. Army Corps of Engineers*, No. 23-1524 (N.D. Ill. July 11, 2024) (ECF No. 65).

the effectiveness of the filter cells in removing mercury and PCBs.⁴ The State's authority under the Clean Water Act made a real difference in this case and in many other places across the nation. Because Illinois exercised its full section 401 authority to evaluate the water quality impacts of the project as a whole, Southside Chicagoans will get a new park along Lake Michigan, rather than a toxic waste dump in an area already overburdened by pollution.

Despite a history of positive examples like that one, EPA is now proposing to severely curtail states' and tribes' authority to review and take actions to limit the impact of federally permitted projects impacting their water resources. While EPA claims its Proposed Rule promotes cooperative federalism, the opposite is true. EPA's Proposed Rule violates the Clean Water Act in several respects, utterly fails to identify any problem with the current regulations that the proposal is designed to address, arrogates to itself and to private interests powers that were specifically given to states and tribes by Congress, and promotes an unworkable and illogical scheme that leaves waters more vulnerable to pollution and other harms. The proposal lacks support from states and tribes and from the people who benefit from state and tribal efforts to protect the public health, community, recreation, and other services that water bodies provide. EPA should withdraw the proposal immediately and focus its staff time and resources on implementing the existing rule to process section 401 water quality certification ("WQC") applications expeditiously and in accordance with the law so as to empower states and tribes to protect their waterways from damaging federally permitted projects.

CWA section 101(b) reflects Congress's clear intent in establishing a system of cooperative federalism that protects "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use [] of land and water resources."⁵ Section 401 of the Act, 33 U.S.C. § 1341, is a critical tool that has enabled states and tribes⁶ to ensure that activities associated with federally licensed and permitted discharges will not impair water quality in their respective states and tribal lands. As discussed in more

⁴ Exhibit 1 to Brief of Attorney General of Illinois as Amicus Curiae at 1 (IEPA Correspondence to US Corp. of Engineers, Apr. 6, 2023), *Alliance of the Southeast v. U.S. Army Corps of Engineers*, No. 23-1524 (N.D. Ill. July 11, 2024).

⁵ 33 U.S.C. § 1251(b); *see also id.* § 1370 (nothing in the statute shall "preclude or deny the right of any State...to adopt or enforce...any requirement respecting control or abatement of pollution..." as long as the requirements are not less stringent than federally established requirements and nothing in the CWA shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters...of such States."); *id.* § 1323(a) ("Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government ... and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.").

⁶ The Clean Water Act authorizes EPA to "treat an Indian tribe as a State" for purposes of section 401 in specified circumstances, 33 U.S.C. § 1377(e), which don't include the Indian tribe having an EPA-approved water quality standards program pursuant to section 303(e). *See infra* Part III.

detail below, the Supreme Court has twice upheld the broad authority given to states by Congress in making certification determinations under section 401. *Pub. Util. Dist. No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) (“*PUD No. 1*”); *S.D. Warren Co. v. Maine Bd. of Env't Prot.*, 547 U.S. 370 (2006).

EPA similarly tried to limit state and tribal authority under section 401 in a previous rulemaking by the first Trump administration. At that time, a number of state and local governmental associations, including Western Governors Association, National League of Cities, National Association of Counties, the U.S. Conference of Mayors, and the Western States Water Council, raised “numerous concerns about the substantial effects” the previous Trump administration’s proposed rule would have on “states’ authority and autonomy to manage and protect water resources”⁷ Those entities advised that “[a]dministratively curtailing states’ historic and well-established authority under CWA Section 401 would inflict serious harm to the cooperative federalism model established by Congress under the CWA and the fundamental constitutional authority of states over water resources within their boundaries.”⁸ After it had been finalized without addressing their concerns, nineteen states and the District of Columbia filed suit challenging the 2020 rule,⁹ alleging that it “upends fifty years of cooperative federalism by arbitrarily re-writing EPA’s existing water quality certification regulations to unlawfully curtail state authority under the Clean Water Act.”¹⁰

EPA’s current proposal similarly attempts to knock a hole through section 401 by placing limits on state and tribal authority nowhere found in the statutory scheme. To the extent that the process for making section 401 water quality certification determinations can be made more efficient or effective, by all means, EPA should provide more financial assistance to the state and tribal authorities charged to make these decisions and ensure that the federal agencies involved expeditiously provide all information needed by those authorities to protect water quality. A 2019 Guidance issued by EPA entitled, “Clean Water Act section 401 Guidance for Federal Agencies, States, and Authorized Tribes” (June 7, 2019) contains a host of ideas to smooth and expedite the section 401 process. But EPA should not contravene the intent of section 401 as recognized by the Supreme Court and by EPA itself in both regulatory preambles and guidance documents, which is to empower states and tribes to protect their waterways for the benefit of all those who use and enjoy them.

⁷ Letter of October 16, 2019 to Andrew Wheeler, Administrator, U.S. EPA, by Western Governors’ Association, National Conference of State Legislators, National Association of Counties, National League of Cities, The United States Conference of Mayors, The Council of State Governments, Western Interstate Region, Association of Clean Water Administrators, Association of State Floodplain Managers, Association of State Wetlands Managers, and Western States Water Council. (ELPC Ex. 1).

⁸ *Id.* at 2 (ELPC Ex. 1).

⁹ 85 Fed. Reg. 42,210 (July 13, 2020).

¹⁰ Complaint for Declaratory and Injunctive Relief at 2, *California v. Wheeler*, No. 20-04869 (N.D. Cal. July 21, 2020) (ECF No. 1). The case was subsequently remanded and dismissed as moot following EPA’s decision to revise the rule. (ELPC Ex. 2).

As detailed more fully in parts I-IX below, EPA's proposal suffers from at least the following flaws:

First, EPA impermissibly attempts to narrow the scope of state and tribal certification authority contrary to the text of the statute, Supreme Court precedent, and EPA's longstanding regulations. The Proposed Rule would (a) limit the scope of certification to "discharges," as opposed to the "activity" that is being licensed or permitted; (b) exclude state and tribal waters from the scope of section 401 certification; and (c) limit the water quality requirements states and tribes may apply to "applicable and appropriate" "regulatory requirements for discharges."

Second, EPA proposes to give EPA and the federal permitting agency veto authority over objections by neighboring states and tribes whose water quality may be affected by a federally permitted project.¹¹

Third, EPA would take away the right of tribes to certify impacts to waterways on tribal lands unless the tribe has an EPA-approved water quality standards program, which the vast majority of tribes do not have. The statute provides no authority for imposing a limit like this on tribal rights under section 401.

Fourth, EPA's proposal would limit the right of the certifying authority to ask for information that it needs to make a decision on an application for a certification. EPA's proposal would unlawfully limit states and tribes to analyzing information relevant solely to potential discharges, not to the overall activity or its relationship to water quality more generally.

Fifth, EPA proposes to radically curtail states' and tribes' "reasonable period of time" to make certification decisions before they are deemed waived. The proposal accomplishes this change by making six months, not the statutorily defined period of one year, the default reasonable period of time for review of a certification application; limiting extensions of that six month default period unless the applicant and federal agency agree to an extension; and denying certifying authorities the ability to work with project proponents to restart the clock when necessary for states or tribes to fully consider a certification request.

Sixth, the Proposed Rule would preclude the certifying authority from modifying the certification even if the certified activity changed, the legal context changed, or certification was otherwise no longer lawful or wise.

Seventh, EPA seeks comment on whether section 401 should continue to be applied to federal agency activities and general permits. The statute, its purposes and judicial precedent dictate that section 401 does apply to such activities and permits.

Eighth, all of EPA's proposals are a marked departure from controlling Supreme Court precedent and over 50 years of EPA practice. EPA fails to explain the need for upending

¹¹ 91 Fed. Reg. 2042.

Congress's carefully constructed scheme in any coherent way; therefore, it is arbitrary and capricious.

Lastly, as if those errors were not enough, EPA completely abdicates its responsibility to determine the cost to the public of the foregone public health, environmental or financial benefits of its proposed regulatory changes the waters adversely impacted by activities subject to section 401 certification.

I. The Proposed Rule unlawfully and unreasonably limits the scope of state and tribal certification authority.

EPA proposes to limit both the scope of certification under section 401(a) and the scope of certification conditions under sections 401(a) & (d). EPA's Proposed Rule would limit the scope of state and tribal authority in significant ways. First, the proposal would prevent states and tribes from considering the impact of the "activity" as a whole by limiting the certification decision to whether an activity's potential point source "discharges" comply with specified water quality related regulatory requirements. Second, the proposal would prohibit states and tribes from considering water quality impacts to waters beyond those waters of the U.S. where the triggering "discharge" occurs, which would exclude all state and tribal waters. Third, the Proposed Rule would limit the "water quality requirements" that a state or tribe may consider to only those specific federal Clean Water Act provisions enumerated in section 401 and exclude any other appropriate state water quality requirements. None of these proposed changes to the scope of section 401 is consistent with either the text of the statute or its purpose, which is to empower states and tribes to protect their waterways from water quality impacts of damaging federal projects. The proposed changes contravene Supreme Court precedent and decades of EPA practice. EPA acknowledges that the proposed revisions are contrary to the existing regulations, yet it fails to provide any non-arbitrary basis for changing EPA's longstanding approach.

A. Section 401 plainly requires "any applicant" to obtain a state or tribal certification for "any activity" requiring a federal license or permit that may result in a discharge into navigable waters.

Section 401(a) provides that "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate" 33 U.S.C. § 1341(a)(1) (emphasis added). Further, section 401(d) explains that the certification must include conditions necessary to insure that "any applicant" ... will comply with enumerated provisions of the act "and with any other appropriate requirement of State [or Tribal] law." *Id.* § 1341(d) (emphasis added). Read together, these provisions plainly require that an "applicant" for a federal license or permit must produce a certification from the state or tribe

where its “activity” may discharge that the activity complies with certain CWA requirements as well as “any other appropriate requirement of State [or Tribal] law.”¹²

In the Proposed Rule preamble, EPA seizes on the language of section 401(a)(1) referring to a “discharge,” erroneously concluding it means states and tribes are limited to considering only the “discharge” being permitted and not the impacts of the “activity” as a whole and, further, that this limitation applies to all of section 401.¹³ EPA claims that it reexamined the statute in light of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and has now determined that the provision means something other than what the Supreme Court, EPA, and the plain text says.¹⁴ EPA’s various rationales for this shift in position do not hold up.

1. EPA’s Proposed Rule conflicts with the Supreme Court’s interpretation of section 401’s plain text.

As EPA acknowledges, it is not writing on a clean slate. The Supreme Court has interpreted the statute and held that the statute clearly allows the certifying authority to look at the water quality impacts of the activity as a whole. The Supreme Court interpreted sections 401(a) and 401(d) more than 30 years ago in *PUD No. 1*, in which a 7-2 majority upheld Washington State’s imposition of minimum in-stream flow requirements on a hydroelectric dam. The Court held that section 401 applies to federally permitted activities involving discharges, and that it authorizes the certifying agency to consider the impact of the activity as a whole on state water resources, not solely the impacts of the discharge.¹⁵

Nothing in *Loper Bright*, 603 U.S. 369 (2024), authorizes or requires EPA to overrule this longstanding Supreme Court precedent on the meaning of section 401 and interpret the statute anew. The Supreme Court’s opinion in *Loper Bright* overturned *Chevron*, it had nothing to do with Clean Water Act section 401 and said nothing about *PUD No. 1*. In *Loper Bright*, the Supreme Court expressly stated that its opinion did not disturb prior court holdings interpreting other statutory provisions: “[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology.” *Loper Bright*, 603 U.S. at 412. Therefore, the Supreme Court’s holding in *PUD No. 1* regarding the proper scope of section 401 still stands.

Moreover, EPA incorrectly reads *PUD No. 1* as relying on the *Chevron* interpretive framework to defer to EPA’s interpretation of section 401 rather than interpreting the statute

¹² 33 U.S.C. §§ 1341(a), (d).

¹³ 91 Fed. Reg. 2017, 2023.

¹⁴ 91 Fed. Reg. 2023-24.

¹⁵ *PUD No. 1*, 511 U.S. at 711-12.

itself. The flaw in *Chevron*, according to *Loper Bright*, was that its interpretive framework required courts to defer to an agency interpretation of ambiguous statutory language. Under *Loper Bright*, courts “must exercise independent judgment in determining the meaning of statutory provisions,” applying traditional tools of statutory interpretation.¹⁶ That is exactly what the Supreme Court did in *PUD No. 1*. As the Court laid out in some detail, “section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges. And § 401(d) is *most reasonably read* as authorizing additional conditions and limitations *on the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied.”¹⁷ The Court announced its holding after a careful parsing of the text of section 401: “The text refers to the compliance of the applicant, not the discharge,” and “thus allows the State [or Tribe] 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.’”¹⁸

The Supreme Court in *PUD No. 1* went on to explain that its “view of the statute is consistent with EPA’s regulations implementing § 401.”¹⁹ However, the Supreme Court’s approval of the agency’s regulations came only after the Court engaged in its own thorough interpretation of the text. And in any case, the *PUD No. 1* Court’s approving citation of EPA’s longstanding regulation regarding the meaning of section 401 is entitled to weight under the interpretive framework of *Loper Bright*.²⁰ Accordingly, EPA’s assertion that *Loper Bright* authorizes or requires it to engage in a re-evaluation of the meaning of section 401 is simply incorrect.

2. EPA’s Proposed Rule is not the “best” interpretation of section 401 in light of the text, statutory structure, and overall purposes of the Act.

Moreover, contrary to EPA’s rationale in the Proposed Rule, 91 Fed. Reg. 2923-24, its flawed interpretation of section 401 is simply not the “best” interpretation. According to EPA, section 401(a)(1) and (a)(2) require that a discharge from any activity requiring a federal permit or license comply with enumerated provisions of the Act, namely sections 301, 302, 303, 306, and 307.²¹ That much is certainly true. Section 401 states, “[a]ny activity” requiring a federal license or permit, “which may result in any discharge into the navigable waters” or “whenever such a discharge may affect [] the quality of the waters of any other State [or Tribe]” must

¹⁶ *Loper Bright*, 603 U.S. at 394.

¹⁷ *PUD No. 1*, 511 U.S. at 711-712 (emphasis added).

¹⁸ 511 U.S. at 711 (emphasis added).

¹⁹ 511 U.S. at 712 (quoting 33 U.S.C. § 1341).

²⁰ 603 U.S. at 394 (“[Agency] interpretations ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance’ And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute’s meaning.”) (cleaned up).

²¹ 91 Fed. Reg. 2023.

comply with enumerated provisions of the Act.²² However, EPA’s assumption that the reference to the term “discharge” limits the *scope* of the certification that must be obtained by a project applicant misreads the use of that term in the context of section 401(a)(1) and section 401 as a whole. Therefore, EPA’s reading in the Proposed Rule must be rejected.²³

When interpreting a statute, courts and EPA “must give effect to every word and every provision in the statute so that none will needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”²⁴ While section 401(a) imposes a requirement on any applicant for a federal project to obtain a certification of compliance with certain CWA provisions limiting discharges, section 401(d) elaborates on that requirement by authorizing the state or tribal certifying authority to include in any certification “any effluent limitations *and other limitations*, and monitoring requirements, *necessary to assure*” compliance “with *any other appropriate requirement of State law*,” which “shall become a condition” on the applicant’s federal license or permit.²⁵ Section 401(d) thus makes plain that the *scope* of the certification includes more than mere compliance with specific discharge limitations in the enumerated CWA provisions in section (a)(1), but also includes any conditions necessary to comply with “any other appropriate requirement of State law.”²⁶

Looking to the text of section 401(a)(2), as well, makes clear that any license or permit that may affect waters of another State must contain conditions “*as may be necessary to insure compliance [by the applicant] with applicable water quality requirements*.”²⁷ The applicable water quality requirements in sections 401(d) and 401(a)(2) include state or tribal law requirements relating to “water quality” and not simply to discharges. *See infra* Part I.C. EPA’s attempt to constrain section 401 to “discharges” regulated by the enumerated CWA provisions fails to give meaning to the statutory provision as a whole and would render the express

²² 33 U.S.C. §§ 1341(a)(1), (a)(2).

²³ A statutory term—even one defined in the statute—“may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Environmental Defense v. Duke Energy*, 549 U.S. 561, 574 (2007).

²⁴ *Nielsen v. Preap*, 586 U.S. 392, 414 (2019) (cleaned up) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts* § 24, at 167 (2012)).

²⁵ 33 U.S.C. § 1341(d) (emphases added); *PUD No. 1*, 511 U.S. at 712 (quoting 33 U.S.C. § 1341(d)).

²⁶ “Subsection (d), which requires a certification to set forth effluent limitations, other limitations, and monitoring requirements necessary to ensure 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.” Comm. on Pub. Works, Committee Print 93rd Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 321 (1973) (emphasis added).

²⁷ *Id.* § 1341(a)(2) (emphasis added).

provisions providing for conditions based on state and tribal water quality requirements a nullity, violating a fundamental canon of statutory interpretation.²⁸

EPA's constrained interpretation also ignores section 401's place in the overall statutory scheme. Section 301 and enumerated CWA provisions prohibit the discharge of any pollutant, except as authorized by those enumerated provisions.²⁹ To interpret section 401 as merely restating the regulation of discharges under section 301 and those other CWA programs, as EPA suggests in the Proposed Rule, would make section 401 superfluous. Contrary to EPA's interpretation, section 401 serves the CWA's broader purpose to ensure that states and tribes are empowered to protect their water quality under their own laws in addition to playing a role in implementing the CWA's regulatory programs.³⁰

The Supreme Court recognized section 401's role in preserving state authority to implement the CWA's ambitious goals to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."³¹ Those ambitious goals could not be achieved, as the Court noted in *S.D. Warren Co.*, merely by controlling the "addition of pollutants" but by controlling "pollution" generally.³²

The Court went on to enumerate the types of harms beyond those from the addition of a pollutant that fall "within a State's legitimate legislative business," and the Clean Water Act's system as one that "respects the States' concerns."³³ Importantly, the Supreme Court pointed specifically to section 401 certifications as "essential in the scheme to preserve state authority to address *the broad range of pollution*."³⁴ To underscore Congress's intent, the Court quoted Senator Muskie's statements on predecessor provision to section 401:

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing

²⁸ *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 721 (2022) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

²⁹ 33 U.S.C. § 1311.

³⁰ 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources."); see also *infra* 12 (discussing 33 U.S.C. §§ 1370, 1323(c)).

³¹ *S.D. Warren Co.*, 547 U.S. at 385 (quoting 33 U.S.C. §§ 1251(a), (a)(2)).

³² *Id.* at 385-86 (quoting 33 U.S.C. §§ 1251(b); 1256(a); 1370).

³³ *Id.* at 386.

³⁴ *Id.* (emphasis added).

assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.³⁵

As the Court explained, interpreting “discharge” to give it “its common and ordinary meaning” preserves the state authority Congress intended by giving them the “power to enforce ‘any other appropriate requirement of State law’ in section 401(d).³⁶ EPA’s interpretation of “discharges” to encompass only those discharges covered by those CWA programs that regulate discharges of pollutants narrows the meaning of section 401 without any support in section 401 or as interpreted by the Supreme Court.

EPA’s interpretation contravenes additional foundational provisions of the CWA that enshrine states’ fundamental role in protecting their own waters that the Supreme Court and other courts have recognized as relevant to section 401’s broad scope. Section 510 provides that nothing in the statute shall “preclude or deny the right of any State ... to adopt or enforce ... any requirement respecting control or abatement of pollution ...” as long as the requirements are not less stringent than federally established requirements.³⁷ It also provides that nothing in the CWA shall “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters ... of such States.”³⁸ Thus states have the right to establish requirements, which include procedural and substantive standards, to control water pollution.³⁹ Additionally, section 313(a) waives sovereign immunity, making federal agencies subject to state authorities and permit requirements.⁴⁰ Taken together, these provisions further prove that section 401 should be read to give states broad authority to approve and condition federally approved activities such that they do not adversely affect state and tribal water quality. Against this backdrop, EPA’s purported rationale that Congress’s amendment of section 401 in 1972 was

³⁵ *Id.* (quoting 116 Cong. Rec. 8984 (1970)).

³⁶ *Id.* at 386-87 (quoting 33 U.S.C. § 1341(d)).

³⁷ 33 U.S.C. § 1370.

³⁸ *Id.*

³⁹ *See, e.g., S.D. Warren Co.*, 547 U.S. at 386; *United States v. Marathon Dev. Corp.*, 867 F.2d 96 (1st Cir. 1989) (“The ability of states to enforce their own more stringent water quality standards by denying certification for a nationwide permit is consistent with the legislative purpose and history of the Clean Water Act. In stating the overall goals of the Act, Congress declared its policy ‘to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.’”) (quoting 33 U.S.C. § 1251(b)); *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 453 F. Supp. 2d 116 (D.D.C. 2006) (“[T]he purpose of section 401 is to preserve the authority for the States to set standards that are more stringent than the level of protection afforded in a federal permit, and, therefore, *the purpose of this section is to supplement not supplant the requirements* for obtaining a federal permit. Section 401 ensures that state limitations and requirements, as related to water quality, will become part of the federal permit.”) (emphasis added).

⁴⁰ 33 U.S.C. § 1323(a).

intended to *limit* its reach to maintain the traditional state and federal balance of power makes no sense and turns the federalism canon on its head.⁴¹

For similar reasons, EPA’s misguided attempt to invoke the major questions doctrine also fails.⁴² The major questions doctrine is an interpretive tool that courts apply in only “extraordinary cases” of an agency asserting novel and transformative powers under ambiguous statutory text.⁴³ EPA’s interpretation of section 401 reflected in the current regulations represents over 50 years of agency and judicial affirmance of Congress’s broad and express grant of authority to states and tribes to protect their water quality whenever any activity requiring federal approval may result in a discharge. Thus, EPA’s current regulations implementing section 401 raise no major questions concerns; if anything, it is EPA’s current Proposed Rule that does so, since the agency is claiming “unheralded power” to constrain state and tribal authority in a manner that is unlike anything the agency has ever done and represents a “transformative expansion of [EPA’s] regulatory authority” vis-a-viz the states and tribes.⁴⁴

3. The proposed rule’s constraints on the scope of certification contravene Congress’s intent as expressed in the legislative history.

While EPA asserts that the legislative history of section 401 supports its cramped interpretation of the law, none of the legislative history suggests Congress intended to narrow section 401’s scope and alter the CWA’s cooperative federalism framework. Congress amended section 401’s predecessor, section 21(b), to assure consistency with the bill’s changed emphasis from water quality standards to effluent limitations by conditioning applications on compliance with sections 301, 302, 303, 306, and 307. However, Congress both assured consistency *and* maintained the breadth of section 21(b) by including section 401(d). Senators and regulated parties affirmed an activity-based scope in discussing the activities requiring state certification.

For example, EPA apparently failed to consider the views of the bill’s leading sponsor in the Senate. In response to questions about the purpose of section 401, Senator Muskie repeatedly and candidly referred to the provision as ensuring that federally permitted activities that may involve discharges would not harm water quality—and not just that the discharges themselves—would meet the same standards as other NPDES-permitted entities. For example, in responding to a proposed amendment that would have exempted dredging from section 401, Senator Muskie explained: “All we ask is that *activities that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State* for evaluation and a

⁴¹ *Contra* 91 Fed. Reg. 2026.

⁴² *Contra id.*

⁴³ *W. Virginia*, 597 U.S. at 716, 723-24; *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (“*UARG*”).

⁴⁴ *See W. Virginia*, 597 U.S. at 716, 723-24; *UARG*, 573 U.S. at 324.

recommendation before the Federal license or permit be granted.”⁴⁵ And he elaborated as follows: “May I say to the Senator that if the Senator means what he has just been saying, then he should vote against the bill, because what we are talking about is subjecting every *activity* in the private and public sector in the kind of place he is insisting for this dredging, whether we are talking about papermills, chemical mills, oil refineries, cotton mills, textile mills—they are all subject to this kind of scrutiny, and every other Federal activity is. So I can understand if the Senator says it goes too far and he will vote against the bill.”⁴⁶

Section 401 water quality certifications are particularly valuable because they can address the full range of water quality impacts of a federally permitted activity on a waterbody. Section 401(d) empowers states and tribes to condition such permits with any appropriate requirements needed to protect water quality. ELPC has seen this work for example, in protecting wetlands, aquatic vegetation, instream flow, habitat, and other aquatic features in federally permitted projects, such as gas pipelines. *See, e.g.*, Enbridge Line 5 Wisconsin Segment Relocation Project (letter from Benjamin Callan to Joe McGaver, Nov. 14, 2024) (ELPC Ex. 3). A waterbody is more than just chemistry as Congress recognized repeatedly throughout the CWA.⁴⁷ Section 401 empowers state and tribes to use section 401 certification conditions to ensure they continue to provide all the benefits that flow from clean, safe, healthy waterways.

ELPC and the undersigned organizations oppose EPA’s attempt to eviscerate the authority given to states and tribes to make certification decisions, including conditioning certifications as necessary to protect their waterways from activities that are likely to impair water quality and which may include a discharge into waters of the United States. This authority, which was granted to states and tribes by Congress, not EPA, has been recognized consistently

⁴⁵ Comm. on Pub. Works, Committee Print 93rd Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 1388 (1973) (emphasis added).

⁴⁶ Comm. on Pub. Works, Committee Print 93rd Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 1390 (1973).

⁴⁷ *See, e.g.*, section 304(a), describing factors to consider in developing water quality criteria “reflecting the latest scientific knowledge ... on the kind and extent of all identifiable effects on health and welfare.” 33 U.S.C. § 1314(a); and section 304’s legislative history. “Water quality is intended to refer to the biological, chemical and physical parameters of aquatic ecosystems, and is intended to include reference to key species, natural temperature and current flow patterns, and other characteristics which help describe ecosystem integrity.” Comm. on Pub. Works, Committee Print 93rd Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 1469 (1973).

by federal courts.⁴⁸ EPA cites no case law to the contrary.⁴⁹

4. The proposed rule’s erroneous interpretation of the scope of section 401 certification infects the entirety of the proposed rule, which should therefore be withdrawn.

EPA’s proposed erroneous interpretation of section 401 to limit the scope of certification goes beyond the proposed revisions to 40 C.F.R. § 121.3 and permeates other proposed amendments to part 121.⁵⁰ In particular, EPA’s unlawful interpretation of the scope of section 401 to apply to the water quality effects of only discharges and not the activity as a whole infects the following provisions:

- Proposed § 121.1(c), which interprets the proposed definition of “discharge” to mean certifying authorities cannot consider water quality impacts beyond waters of the United States, or impacts from outside the discharge itself;⁵¹
- Proposed § 121.1(f), which limits the definition of “water quality requirements” to requirements “for discharges”;
- Proposed § 121.5, which limits the contents of a Request for Certification to information relevant to discharges;
- Proposed § 121.7, which narrows the available justifications for certification decisions to those related to discharges; and
- Proposed §§ 121.11, 121.12, 121.13, 121.14, relating to effects on other states’ water quality, which refer only to effects of a discharge on water quality.⁵²

⁴⁸ See, e.g., *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 144 (2d. Cir. 2008) (upholding Connecticut Department of Environmental Protection’s denial of state certification where part of the certifying authority’s analysis included habitat loss from cables that would drag and cut into the seabed and disturb the sea floor); *Sierra Club v. Tennessee Dep’t of Env’t & Conservation*, 133 F.4th 661, 678 (6th Cir. 2025) (upholding Tennessee Department of Environment and Conservation’s grant of a state water quality certification for pipeline construction, which included analysis of rock removal methodology and downstream sedimentation).

⁴⁹ In footnote 43 of the preamble, 91 Fed. Reg. 2028, EPA asserts that section 304(h) of the Clean Water Act authorizes it to “promulgate factors which must be provided in any section 401 certification” and also authorized EPA to “identify[] the contents of certification decisions.” EPA is really stretching here. Section 304(h) authorizes EPA to promulgate “test procedures for the analysis of pollutants” to be used for purposes of section 401 and 402 and ensure that the test procedures “include the factors which must be provided” under those two subsections. In other words, it gives EPA authority to develop test methods.

⁵⁰ See 91 Fed. Reg. 4040-42.

⁵¹ *Id.* 2028.

⁵² *Id.* 2040-42.

The additional problems with these proposed revisions are elaborated below. Because EPA's proposed revisions to the scope of certification in § 121.3 and the above-enumerated provisions would unlawfully and arbitrarily curtail states' and tribes' full authority to protect their water quality as Congress intended, EPA should reject them and maintain part 121 in its current form.

B. EPA's interpretation of "discharge" in the Proposed Rule to limit the scope of waters that may be protected by section 401 is contrary to the statute and arbitrary and capricious.

The Proposed Rule would limit state and tribal authority to certify or condition federally approved projects under section 401 to point source discharges into waters of the United States.⁵³ In the preamble to the Proposed Rule, EPA explains that this means "*certifying authorities cannot consider water quality impacts to waters beyond waters of the United States, or impacts from outside the discharge itself.*"⁵⁴ Once again, EPA's interpretation is contrary to the CWA, Supreme Court precedent, and longstanding agency practice. Moreover, EPA cannot justify this intrusion into traditional state authority over water resources by citing cooperative federalism; indeed, EPA's current proposal flies in the face of Congress's stated policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "plan the development and use (including restoration, preservation, and enhancement) of land and water resources."⁵⁵

As discussed in detail in the 2020 complaint filed by nineteen states and the District of Columbia challenging EPA's similarly flawed 2020 rule, states have long used section 401 to review water quality impacts both upstream and downstream from proposed projects in accordance with the statute and Supreme Court and lower court opinions interpreting the statute.⁵⁶ States and tribes have used this authority to review impacts to waters of the United States and state and tribal waters as defined under state and tribal law from federally permitted projects.⁵⁷ Among the types of impacts to state and tribal waters mitigated by use of section 401 authority are turbidity from dams, aquatic habitat loss, contamination of groundwater supplies, impacts on stream flows, and hydrologic modifications and water quality degradation associated with stratification in new and expanded reservoirs.⁵⁸

⁵³ 91 Fed. Reg. 2028 & 2040 (proposed § 121.1(c)).

⁵⁴ *Id.* at 2028 (emphasis added).

⁵⁵ 33 U.S.C. § 1251(b).

⁵⁶ Complaint for Declaratory and Injunctive Relief at 21, *California v. Wheeler*, No. 20-04869 (N.D. Cal. July 21, 2020) (ECF No. 1) (ELPC Ex. 2).

⁵⁷ *Id.* (ELPC Ex. 2).

⁵⁸ *Id.* at 22.

EPA claims that because the trigger for section 401 certification is a potential discharge into navigable waters, “it is equally clear that the scope of the certification is likewise limited to waters of the United States.”⁵⁹ This statutory analysis is faulty for all the reasons already discussed opposing EPA’s proposal to limit the scope of certification to discharges and not the activity as a whole.⁶⁰ The best reading of section 401 “refers to the compliance of the applicant, not the discharge,” and “thus allows the State [or Tribe] 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.’***”⁶¹ This reading further gives meaning to section 401(a) and (d), read together, without rendering any provision as superfluous.⁶² In contrast, EPA’s reading of section 401 as a “Federal regulatory provision,” like sections 402 and 404, that applies only to point source discharges to a subset of waters, i.e. “waters of the United States,”⁶³ ignores other text in section 401, including “applicant” and “any other appropriate requirement of State law.”⁶⁴

At the same time, EPA adds words to the statute that are not there. Specifically, EPA misinterprets the term “discharge into the navigable waters” to have the same meaning as “discharge of a pollutant,” when that is not what the statute says. As the Supreme Court affirmed in *S.D. Warren Co.*, the term “discharge” as used in section 401 is meant to be broader than a “discharge of a pollutant.”⁶⁵ As the Court noted in explaining that sections 401 and 402 are not interchangeable, section 401’s “terms have a broad reach, requiring state approval any time a federally licensed activity ‘may’ result in a discharge (‘discharge’ of course being without any qualifiers here), 33 U.S.C. § 1341(a)(1), and its object comprehends maintaining state water quality standards.”⁶⁶

EPA also misapplies the federalism canon again.⁶⁷ Contrary to EPA’s argument, it is EPA’s Proposed Rule limiting the scope of waters subject to section 401 that would impinge on states’ traditional “regulation of land and water use” and therefore should be rejected absent an explicit statement from Congress. By requiring certification of compliance with “any other appropriate requirement of State law,” section 401 reflects Congress’s intent to recognize state

⁵⁹ 91 Fed. Reg. 2028.

⁶⁰ *See supra* at Part I.A.

⁶¹ *Supra* at 8, quoting *PUD No. 1*, 511 U.S. at 711 (emphasis added); *see also supra* 9.

⁶² *See supra* 9-10.

⁶³ 91 Fed. Reg. 2028.

⁶⁴ 33 U.S.C. § 1341(a)(1), (d); *see supra* at 9 & n.18.

⁶⁵ *S.D. Warren Co.*, 547 U.S. at 376-77.

⁶⁶ *Id.* at 380.

⁶⁷ 91 Fed. Reg. 2028.

authority over federally regulated discharges as well as states' authority over their own waters.⁶⁸ In contrast to EPA's current proposal, EPA's rationale in the 2023 rule to include state waters within a states' section 401 authority respects the proper balance of state and federal authority:

while a certifying authority is limited to considering impacts to “navigable waters” when certifying compliance with the enumerated provisions of the CWA, a certifying authority is not so limited when certifying compliance with requirements of state or Tribal law that otherwise apply to waters of the state or Tribe beyond navigable waters.... [T]his interpretation best reflects the text of section 401. EPA recognizes that some states regulate waters beyond CWA “navigable waters,” while other states do not. EPA's interpretation best supports principles of cooperative federalism by allowing those states that do have laws applicable beyond “navigable waters” to apply those laws to those state waters in the certification context, and by not requiring other states to do so.⁶⁹

For all the reasons discussed, EPA's proposal to narrow the categories of waters protected under section 401 to federal “waters of the United States” is contrary to the statute, the case law, and principles of cooperative federalism embodied in section 401.

Finally, applying section 401 in the broad manner that Congress intended is more necessary than ever to fulfill CWA objectives and remediate the nation's waters given the devastating narrowing of the CWA's protection for waterways by *Sackett* and EPA's attempt to further narrow that authority with its most recent proposal to redefine the scope of waters under federal protection.⁷⁰ Rather than eviscerate the protections states and tribes currently have to protect their waterways from pollution from federally permitted activities, EPA should provide as much authority as possible under federal law and supplement that authority with funding to increase state staff and expertise. Accordingly, EPA should withdraw its proposal to exclude state and tribal waters from section 401.

C. The Proposed Rule's definition of “water quality requirements” is contrary to the CWA and arbitrary and capricious.

EPA also proposes to further narrow the scope of section 401 by defining “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

⁶⁸ 33 U.S.C. § 1341(d); *see also* § 1341(a)(2) (requiring federal agencies to condition any federal license or permit “in such manner as may be necessary to insure compliance with applicable water quality requirements”).

⁶⁹ 88 Fed. Reg. 66558, 66604 (September 27, 2023).

⁷⁰ 90 Fed. Reg. 52498 (Nov. 20, 2025).

requirements for discharges.”⁷¹ The first part of EPA’s proposed definition repeats the statutory provisions identified in section 401(a), while the second narrowly interprets the statutory phrase “other appropriate requirement of State law” in section 401(d) to mean “applicable and appropriate water quality-related regulatory requirements for discharges.” EPA’s proposed definition blatantly grafts onto the statutory language limitations that are not there, contrary to Congress’s intent that section 401 certifications as “essential in the scheme to preserve state authority to address *the broad range of pollution*.”⁷² Because it is contrary to the text and arbitrary, EPA’s Proposed Rule should be rejected and the current regulatory language in 40 C.F.R. § 121(j)⁷³ should be retained.

As already discussed, section 401(d) expressly provides that states and tribes may condition certifications to assure compliance with “**any other appropriate requirement of State [or Tribal] law set forth in such certification**.”⁷⁴ The statute further provides that any State law requirement “set forth in such certification . . . **shall become a condition** on any Federal license or permit subject to the provisions of this section.”⁷⁵ EPA’s made-up definition of the term “water quality requirements” is not the “best” interpretation of section 401 and, indeed, contravenes the text and overall structure of section 401. There would be no need for Congress to have specified “any other appropriate requirement of State law,” if such requirements were limited to those authorized by the enumerated Clean Water Act provisions in section 401.⁷⁶ For this reason, EPA’s attempt to invoke the *ejusdem generis* principle misses the mark.⁷⁷ Therefore, EPA’s interpretation should be rejected.⁷⁸

EPA arrogates to itself the authority to determine what is an “applicable” and “appropriate” requirement.⁷⁹ However, the context and purpose of section 401 make clear that the certifying authority is best positioned to determine what requirements are “applicable and appropriate.” The term “appropriate” implies discretion, as EPA notes. But section 401’s text

⁷¹ 91 Fed. Reg. 2026, 2040 (Proposed Rule § 121.(f)).

⁷² *S.D. Warren Co.*, 547 U.S. at 386 (emphasis added).

⁷³ Those regulations define “water quality requirements” to include any limitation or standard or other requirement under enumerated provisions of the CWA, as well as “*any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law*.” 40 C.F.R. § 121(j) (emphasis added).

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

⁷⁵ *Id.*

⁷⁶ *S.D. Warren Co.*, 547 U.S. at 375, 386; *Republic of Sudan v. Harrison*, 587 U.S. 1, 12 (2019) (the Court hesitates “to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law”) (cleaned up).

⁷⁷ 91 Fed. Reg. 2027.

⁷⁸ *Loper Bright*, 603 U.S. at 400 (“In the business of statutory interpretation, if [an interpretation] is not the best, it is not permissible.”).

⁷⁹ See 91 Fed. Reg. 2026-27 (quoting *Loper Bright*).

expressly refers to any other requirement “identified in the certification,” making clear that the affected state or tribe is the sovereign entity Congress intended would exercise that discretion. Congress’s use of the term “any” to describe the “other appropriate requirement of State [or Tribal] law” further underscores it intended to the category to be broad, as recognized by the Supreme Court in *S.D. Warren Co.*,⁸⁰ and to extend beyond those requirements otherwise enumerated in section 401(d).

EPA’s proposed interpretation also runs afoul of long-established Supreme Court precedent interpreting section 401. The Supreme Court’s *PUD No. 1* opinion addressed the types of allowable certification conditions, holding that section 401 water quality certifications could be conditioned not only on numerical aspects of the water quality standards of the receiving water, but also narrative water quality criteria, designated uses, and antidegradation policies.⁸¹ In doing so, the Court decided that certifying authorities may use section 401 to impose conditions “to ensure that each activity—even if not foreseen by the [numerical] criteria—will be consistent with the specific uses and attributes of a particular body of water.”⁸² The Court also spoke favorably of a wide variety of approaches used by states to protect water resources, including “aesthetics.”⁸³

The Court later reaffirmed this reasoning in *S.D. Warren Co.*, where it considered at some length whether a section 401 water quality certification could be triggered by a discharge of water from a hydroelectric dam that did not necessarily involve a “discharge of pollutants,” as that term is defined by the Clean Water Act. Considering and rejecting several arguments to the contrary, the Court held that section 401 was not limited to “discharges of pollutants” under the NPDES-permitting framework but rather encompassed a broader definition, including the releases from hydroelectric dams.⁸⁴ In addition to a textual analysis, the Court relied upon the Clean Water Act’s broad purposes, including addressing “pollution” as well as the “addition of pollutants,” which Congress defined as “the man-made or man-induced alternation of the chemical, physical, biological, and radiological integrity of water.”⁸⁵ The Court also invoked the

⁸⁰ 547 U.S. at 386; *see also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (holding that, when read naturally, “any” has an expansive meaning). *See also Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 587 (1980); *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

⁸¹ 511 U.S. at 711-12, 714-16.

⁸² 511 U.S. at 717.

⁸³ 511 U.S. at 716.

⁸⁴ 547 U.S. at 377-78.

⁸⁵ 547 U.S. at 385 (quoting 33 U.S.C. §§ 1251(a) and 1362(19)); *see id.* at 372 (quoting 33 U.S.C. § 1251(a)), the Court emphasized that the term “pollution” includes “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.”).

Act’s purpose to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”⁸⁶

In the nearly two decades since the *S.D. Warren Co.* case was decided, based on the language of 33 U.S.C. § 1341(a), courts have consistently upheld section 401 certifications that impose conditions not only on the discharges from such projects, but also aspects of their construction and long-term operation that affect water quality. These conditions frequently address a wide array of environmental concerns, including dredging plumes, construction dewatering, bank stabilization, fish passage infrastructure, leak detection systems, and emergency spill response planning.⁸⁷ Because EPA’s proposed definition of “water quality requirements” conflicts with the language of the statute and runs counter to these precedents, it should be rejected.

EPA’s proposed definition of “water quality requirements” also runs counter to the legislative history of the Clean Water Act and section 401. EPA incorrectly describes section 401 as a substantial revision of its predecessor, section 21(b).⁸⁸ In fact, Congress purposely added section 401(d) to preserve broad state discretion, reporting its addition of section 401(d) as an expansion beyond compliance with sections 301, 302, 306, and 307.⁸⁹ The drafters achieved this expansion by allowing the states to certify “any other applicable State requirement saved under section 510.”⁹⁰ Nothing in the legislative history of section 510 suggests a narrowing of Congress’s broad grant of authority to the states. Rather, the Committee repeatedly reiterated the right of any state or locality to adopt more restrictive standards.⁹¹

There are several additional problems with EPA’s definition in the Proposed Rule. The proposed definition fails to recognize the many federal, state, and tribal programs designed to protect water quality, such as the Wild and Scenic Rivers and Outstanding National Resources Waters programs, the critical habitat designations under the federal and state endangered species

⁸⁶ 547 U.S. at 385.

⁸⁷ See, e.g., *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 403-404 (4th Cir. 2018) (upholding Virginia’s imposition of erosion and sediment control conditions for upland activities with downstream water quality implications); *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 151 (2d Cir. 2008) (affirming Connecticut’s denial of certification to a proposed pipeline due to its adverse impact on shellfish habitat resulting in the loss of an existing or designated use).

⁸⁸ See 91 Fed. Reg. 2027.

⁸⁹ See Comm. on Pub. Works, Committee Print 93rd Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 321 (1973).

⁹⁰ See Comm. on Pub. Works, Committee Print 93rd Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 815 (1973).

⁹¹ See Comm. on Pub. Works, Committee Print 93rd Cong. 1st Sess., *A Legislative History of the Water Pollution Control Amendments of 1972* at 1503, 331 (1973).

laws, geographic programs, interstate and international compacts, and more.⁹² In so doing, the Proposed Rule also ignores EPA’s longstanding policies and practices to recognize the broad swath of state and tribal laws, regulations, and other requirements that protect water quality. EPA has long interpreted section 401 as enabling states and tribes to rely upon such water quality programs as a basis for denying or conditioning certifications under section 401.⁹³ Again, these state and tribal programs are all the more important due to the shrinking scope of “waters of the United States” covered by the CWA. Furthermore, even with respect to CWA programs, not all water quality issues have been translated into regulatory requirements for discharges. For example, states and tribes have not developed numeric nutrient criteria or even narrative standards for most waterways fouled by nutrient pollution.⁹⁴ And very few tribes even have obtained authority to set water quality standards for tribal waters.⁹⁵ This proposal may leave such tribes powerless to address federally permitted activities that pollute their drinking water sources, recreational waters and fish and shellfish.

EPA also complains that the certifying authorities are supposedly considering non-water quality related requirements in their certification decisions. EPA does not support that claim; in any event, the current regulations clearly limit certifying conditions to water quality-related requirements.⁹⁶ To the extent anyone thinks a particular certification decision exceeded that limit, they can challenge it in an appropriate court, as acknowledged by EPA and contemplated by

⁹² See, e.g., Comments from Robert W. Ferguson, Attorney General of Washington et al. on EPA Proposed Rule Updating Regulations on Water Quality Certifications, 84 Fed. Reg. 44080 (October 19, 2019), EPA-HQ-OW-2019-0405-0556, at 21-22 (ELPC Ex. 4) (explaining how state standards for erosion and sedimentation control, stormwater management, and endangered species protection all promote water quality, even if they are not expressly denominated as water quality regulations).

⁹³ U.S. EPA, *Wetlands and 401 Certification – Opportunities and Guidelines for States and Eligible Indian Tribes* (1989), at 23 (“[t]he legislative history of [section 401] indicates that Congress meant for the States to impose whatever conditions on [federally permitted projects] are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns.”), <https://perma.cc/E9CL-6CXB>; U.S. EPA, *Clean Water Act section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, at 10, 16 (2010), <https://perma.cc/3E4A-JTQ2>.

⁹⁴ U.S. EPA, *State Progress Toward Adopting Numeric Nutrient Water Quality Criteria for Nitrogen and Phosphorus*, <https://www.epa.gov/nutrientpollution/state-progress-toward-adopting-numeric-nutrient-water-quality-criteria-nitrogen#tb1> (last visited February 16, 2026).

⁹⁵ There are 53 federally tribes with approved water quality standards under section 303 of the CWA according to EPA’s website, <https://www.epa.gov/wqs-tech/state-specific-water-quality-standards-effective-under-clean-water-act-cwa>. There are 574 federally recognized tribes in the United States, <https://www.usa.gov/tribes>.

⁹⁶ 40 C.F.R. § 121.1(j).

the legislative history.⁹⁷ EPA should abandon its proposal to revise the definition of “water quality requirements,” which add requirements that unnecessarily limit the universe of protections that states and tribes rely on to certify and condition or, where necessary, deny certification for, federally approved projects, contrary to the statute, the Supreme Court, and EPA’s longstanding practice. For these same reasons, ELPC and the additional undersigned organizations oppose any attempt by EPA to limit water quality requirements to numeric water quality criteria, including to only those water quality criteria approved by EPA, and to only monitoring requirements, each of which are clearly contrary to the express statutory inclusion of “any other appropriate requirement of State [or Tribal] law set forth in such certification.”⁹⁸

II. The Proposed Rule unlawfully and unreasonably constrains the ability of other states and tribes (“neighboring jurisdictions”) to protect their water quality.

EPA proposes to put unlawful and arbitrary constraints on neighboring jurisdictions’ rights under CWA section 401(a)(2), 33 U.S.C. § 1341(a)(2), to object to or condition activities that may affect their water quality. Under section 401(a)(2), EPA “shall ... notify” a neighboring state or tribe whenever EPA determines that a proposed discharge “*may affect* ... the waters of any other State [or Tribe],” which the neighboring jurisdiction then has 60 days to object in writing and request a public hearing.⁹⁹ Based on the recommendations of the neighboring state or tribe, the Administrator, and any other evidence presented at the hearing, the licensing or permitting agency must impose conditions to ensure compliance with applicable water quality requirements or withhold a permit altogether.¹⁰⁰

Courts have recognized that this notification process is essential to ensuring neighboring jurisdictions can protect their water resources from federally permitted activities that may impact their water quality. For example, in *Fond du Lac Band of Lake Superior Chippewa v. Wheeler*, the court held that the EPA has an obligation to determine when a discharge may affect the water quality of a neighboring state, triggering the rights section 401(a)(2) guarantees.¹⁰¹ EPA must timely fulfill this legal duty to protect the rights of neighboring jurisdictions. As described below, EPA’s proposal would limit neighboring jurisdictions’ rights in this process and enable

⁹⁷ 91 Fed. Reg. 2030 (citing 116 Cong. rec. 8805, 8988 (1970)(Conf Rep) and HR Rep. No. 92-911 at 122 (1972)); *Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963, 971–972 (D.C. Cir. 2011) (citing 33 U.S.C. § 1341(a)(1)) (noting that validity of § 401 certification is a question of federal law); *Roosevelt Campobello Int’l Park Comm’n v. U.S. E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982) (citation omitted) (stating that state courts have jurisdiction to review § 401 certification when addressing “validity of requirements imposed under state law or in a state’s certification.”) (emphasis added).

⁹⁸ 33 U.S.C. § 1341(d).

⁹⁹ 33 U.S.C. § 1341(a)(2) (emphasis added).

¹⁰⁰ *Id.*

¹⁰¹ 519 F. Supp. 3d 549 (D. Minn. 2021).

federal agencies to overrule states and tribes whose water bodies will be affected by those federal agencies' licensing or permitting actions.

EPA's triggering of the review of a proposed section 401 water quality certification by a neighboring state is more than a procedural step, but rather the key mechanism by which states and tribes exercise their rights to ensure that activities subject to federal permitting in neighboring states do not adversely affect water quality of the water bodies in their own states. As such, it should be interpreted broadly to enable states and tribes to define and protect their own water quality—and to allow neighboring jurisdictions to evaluate, and if necessary, condition permits and licenses that threaten water quality. The integrity of section 401(a)(2) depends on EPA fulfilling its duty to ensure notice, participation, and enforceable protection for all affected jurisdictions.

EPA's proposal would short-circuit neighboring states and tribes' input in several ways. First, the Proposed Rule specifies that the federal agency with permitting or licensing authority is to determine whether conditions are necessary to ensure that a discharge will comply with the other state's water quality requirements.¹⁰² This proposed language is *not* consistent with section 401(a)(2). Under section 401, EPA first determines whether an activity "**may affect**" another state's or tribe's water quality¹⁰³ and, then, the potentially affected other state or tribe determines whether a proposed activity "**will affect**" its water quality and requires conditions.¹⁰⁴ The federal agency must hold a hearing and, based on EPA's recommendations and the other state's or tribe's recommendations and any other evidence introduced at the hearing, "**shall condition** [the] license or permit **in such manner as may be necessary to insure compliance with applicable water quality requirements.**"¹⁰⁵ Unlike EPA's Proposed Rule, the statute does not give the sponsoring federal agency authority to be the arbiter between EPA's recommendations and the neighboring state's or tribe's recommendations. By using the mandatory language "**shall condition** the license or permit," the text of section 401(a)(2) commands the federal agency to insure compliance with state or tribal water quality requirements whenever a neighboring jurisdiction determines that water quality "will be affected," and further directs that the federal agency "**shall not issue** such license or permit" if the "imposition of conditions cannot insure such compliance."¹⁰⁶

To interpret the statute as EPA does in the proposal ignores that Congress already made this determination in section 401(a)(2) by limiting EPA's role to determining whether the

¹⁰² 91 Fed. Reg. 2042.

¹⁰³ 33 U.S.C. § 1341(a)(2) (emphasis added).

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ *Id.* (emphasis added); *Alabama v. Bozeman*, 533 U.S. 146, 146 (2001) (the "word shall is ordinarily the language of command") (internal quotation marks omitted).

proposed activity “may affect” the other state’s water quality, while granting the potentially affected state (or tribe) the right to determine whether its water quality in fact “*will [be] affect[ed]*.”¹⁰⁷ In enacting section 401, Congress sought to ensure that all activities authorized by the federal government that may result in a discharge would comply with “State law” and that “Federal licensing or permitting agencies [could not] override State water quality requirements.”¹⁰⁸ The federal agency with approval authority for the activity is charged with including the conditions necessary to ensure the neighboring state or tribe’s water quality will be protected. The federal licensing or permitting agency is generally not the EPA and is not authorized to administer the CWA. Therefore, aside from being contrary to the statute and the legislative history, it makes no sense to read the statute to allow the federal agency to make the final decision on what conditions to impose to ensure that water quality will not be affected.

Another way the Proposed Rule would infringe on the proper state and tribal role under section 401 is the proposal to limit the information transmitted to EPA and the potentially affected neighboring state or tribe. EPA limits the information in the notification to a description of the potential discharge into the waters of the U.S.¹⁰⁹ There is no statutory basis for any of EPA’s assertions of authority, and EPA claims none.

Additionally, the Proposed Rule includes provisions that severely limit the other mechanism by which potentially affected states and tribes can obtain information about an activity. Under the current regulations, EPA (through the Regional Administrator) may request additional information from a federal agency and may enter into agreements with federal agencies regarding the manner of the notification process and provision of supplemental information.¹¹⁰ Under the Proposed Rule, the Regional Administrator no longer plays this role and there is no provision for agreements regarding the notification process and exchange of information.¹¹¹ Without agreements in place regarding the collection of additional information, neighboring jurisdictions may not be able to get the information necessary to make judgments about potential effects on their water quality in time to exercise their right to object and request a hearing. Given the 60-day deadline for neighboring states and tribes to raise an objection, the regulations should include procedures to ensure neighboring states and tribes have all the information necessary to analyze data about the activity and its effects, at the very beginning of the 60-day period.

¹⁰⁷ 33 U.S.C. § 1341(a)(2) (emphasis added).

¹⁰⁸ S. Rep. 92-313 at 69, reproduced in 2 Legislative History of the Water Pollution Control Amendments of 1972 at 1487 (1973).

¹⁰⁹ 91 Fed. Reg. 2032.

¹¹⁰ 40 C.F.R. § 121.12(b)-(c).

¹¹¹ 91 Fed. Reg. 2033.

In yet another attempt to eviscerate state and tribal authority, EPA requests data or information from stakeholders on “whether there are specific types of activities, geographic regions, types of waterbodies, or other circumstances that may support” the Agency establishing a categorical determination that the quality of no neighboring jurisdiction’s waters may be affected by discharge in such circumstances.¹¹² EPA’s proposal contravenes the text of section 401(a)(2) because it elides the distinction the statute makes between EPA’s determination and a state or tribe’s. As explained above, under section 401(a)(2), EPA must determine whether an activity “*may affect*” a state’s water quality.¹¹³ But Congress empowered the neighboring state or tribe to determine whether the activity “*will affect*” its water quality.¹¹⁴ If EPA is allowed to determine categories of activities do not affect state or tribal water quality, then a neighboring state or tribe will not be notified or permitted to concur or not in EPA’s determination with respect to such categories of activities.

EPA’s proposal to create categorical determinations to short-circuit its duty to notify neighboring states and tribes of potential impacts of federal action on the quality of their waters is also arbitrary and capricious. Categorical determinations inherently risk overlooking critical, site-specific science and impacts as well as differences in the neighboring jurisdiction’s standards protecting those water bodies. The concept of carving out categorical determinations from EPA’s obligation to inform neighboring jurisdictions of the potential impact of a federally permitted activity on that jurisdiction’s waterway is particularly inapposite because that determination by EPA provides the notice to the neighboring jurisdiction of the section 401 application and the opportunity to participate in it to protect that jurisdiction’s waterways. Any categorical determination would thus, by definition, deny the neighboring jurisdiction of that opportunity.

Because EPA’s Proposed Rule to implement section 401(a)(2) is contrary to the statute and arbitrary and capricious, it should be withdrawn.

III. EPA would take away rights of tribes to certify activities that may discharge into waterways on tribal lands unless the tribe has an EPA-approved water quality standards program, which the vast majority do not have.

EPA’s proposed regulatory changes relating to “Treatment in a Similar Manner as a State” or “TAS”—i.e., the regulatory provisions under which tribes can obtain authority to participate in section 401 processes in the same manner as states—are a misguided and damaging “solution” to a non-existent problem. *See* 91 Fed. Reg. 2036-37. EPA’s preamble summarizes the relevant statutory language in CWA section 518; describes its previous regulatory amendments in 2023 that offered tribes alternative avenues to obtain more limited participation

¹¹² 91 Fed. Reg. 2034.

¹¹³ 33 U.S.C. § 1341(a)(2).

¹¹⁴ 33 U.S.C. § 1341(a)(2) (emphasis added).

in section 401 processes without also establishing their eligibility to certify water quality standards under section 303(c); and then describes how the current proposal would reverse the 2023 amendments and eliminate those alternative avenues to tribal participation in decision-making. What EPA fails to do, however, is cogently explain why this rollback is at all necessary. It identifies no cost, burden, administrative complication or other cognizable reason for reversing the amendments it had just recently adopted relating to TAS, nor shows how curtailing Tribal participation in decision-making is consistent with the text and purpose of section 518. It is therefore arbitrary and capricious under the tests set by applicable Supreme Court authority.¹¹⁵

EPA’s proposal to require tribes to obtain EPA approval of their water quality standards program before they can exercise their rights under section 401 grafts onto section 518 a new requirement that is not found in the text of the statute or its legislative history. Section 518 sets forth three specific preconditions that tribes must meet to be treated “as a State” for purposes of implementing multiple CWA provisions, including section 401, “to the degree necessary to carry out the objectives of this section.” 33 U.S.C. § 1377(e)(1)-(3). EPA’s approval of a tribe’s section 303(c) water quality standards program is not one of those three specified preconditions. *See id.* Moreover, the limiting phrase “to the degree necessary to carry out the objectives of this section” plainly indicates Congress’ direction that a tribe may be treated “as a State” for purposes of *some* of the enumerated CWA provisions—such as section 401—even if it is *not* so treated with respect to others, such as section 303. Thus, there is no textual basis in the statute for EPA’s proposal to make approval of a tribe’s section 303 water quality standards program a necessary precondition to treating it “as a State” for purposes of exercising its rights under section 401.

EPA primarily explains its reversal by claiming that the 2023 regulatory amendments incorrectly relied on a determination that the CWA section 401 water quality certification role and the section 401(a)(2) “neighboring jurisdiction” role, respectively, each are inseverable from that of administering water quality standards under section 303(c). 91 Fed. Reg. 2036-37. But EPA’s rationale quickly falls apart under scrutiny. In 2023, EPA had correctly explained that states’ and tribes’ roles as certifying authorities and neighboring jurisdictions under section 401 constitute “related, but *distinct* functions” from their administration of section 303(c). 88 Fed. Reg. 66558, 66653 (September 27, 2023) (emphasis added). With respect to section 401 certification, for example, EPA noted in 2023 that its regulations defined “water quality requirements” broadly enough to include “any Federal and state or Tribal laws or regulations” implementing the CWA provisions enumerated in section 401(a)(1), “and any other water quality-related requirement of state or Tribal law regardless of whether they apply to point or nonpoint source discharges.” 88 Fed. Reg. 66653 (citing 40 C.F.R. § 121.1(j)). EPA explained that “authorized Tribes can base their section 401 certification decisions on compliance with

¹¹⁵ *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (“*State Farm*”) (“[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”); *Food & Drug Admin. v. Wages & White Lion Invs., L.L.C.*, 604 U.S. 542, 569-570 (2025) (stating that the Court’s “change-in-position doctrine” requires that an agency “display awareness that it *is* changing position,” “offer ‘good reasons for the new policy,’” and take into account any serious reliance interests “engendered by the prior policy”).

water quality requirements other than Tribal water quality standards approved under section 303(c),” such as “Tribal ordinances or other Tribal laws related to water quality.”¹¹⁶ Thus, EPA concluded that section 401 certification is not “limited to ensuring compliance with [CWA] section 303(c) water quality standards,” and it was therefore appropriate to establish a procedure for interested tribes to establish their section 401 certification eligibility without also seeking approval to administer section 303(c). *Id.*

EPA’s current proposal would narrow the regulatory definition of “water quality requirements” in 40 C.F.R. § 121.1(j) in a manner that unlawfully contradicts the statutory text of section 401, which the undersigned organizations oppose for this and other reasons discussed above. *Supra* at Part I.C. EPA’s new proposed definition would define “water quality requirements” to include, inter alia, “applicable and appropriate state or tribal water quality-related regulatory requirements for discharges.”¹¹⁷ While the newly-proposed limitation to “requirements for discharges” is unlawful and misguided for the reasons explained above, *supra* at Part I.C., even EPA acknowledges that this narrowed regulatory text still encompasses more than just EPA-approved “section 303(c) water quality standards” and more than just numeric water quality criteria.¹¹⁸ In other words, even if EPA finalizes its ill-advised changes to the regulatory definition of “water quality requirements,” it will still be the case that under EPA’s proposed new definition of the term, “water quality requirements” are not limited to just section 303(c) water quality standards, but also include other tribal water quality requirements.¹¹⁹ Therefore, EPA’s 2023 rationale for enabling tribes to engage in section 401 water quality certification without also obtaining section 303 programmatic approval remains valid, and EPA gives no “good reasons” for now proposing to do the opposite.¹²⁰

EPA in 2023 likewise explained how the “neighboring jurisdiction” role is distinct from that of administering section 303(c) water quality standards.¹²¹ If EPA determines that a discharge from a project may affect a neighboring jurisdiction’s water quality, section 401(a)(2) of the CWA “requires EPA to notify the neighboring jurisdiction, Federal agency, and the project proponent.”¹²² The neighboring jurisdiction then has 60 days after receipt of such notification to determine if the discharge “will affect the quality of its waters so as to violate any water quality requirements in its jurisdiction” and, if it so determines, to send written notice to the Administrator and the federal licensing or permitting agency objecting to the issuance of the license or permit and requesting a public hearing.¹²³ EPA emphasized that this neighboring

¹¹⁶ 88 Fed. Reg. 66653.

¹¹⁷ 91 Fed. Reg. 2040 (proposed § 121.(f)).

¹¹⁸ 91 Fed. Reg. 2026.

¹¹⁹ *Id.* EPA seeks comment on whether “water quality requirements” should be limited to solely standards approved by EPA or numeric water quality criteria. *Id.* As already discussed, such a regulatory revision would do violence to the statutory text. Why would Congress use the term “water quality requirements” at all, if it intended the term to be just a synonym for water quality standards under section 303(c).

¹²⁰ *FDA*, 604 U.S. at 570.

¹²¹ *See* 88 Fed. Reg. 66646-47, 66653.

¹²² 88 Fed. Reg. 66645 (citing 33 U.S.C. § 1341(a)(2)).

¹²³ 88 Fed. Reg. 66646-47; *see* 33 U.S.C. § 1341(a)(2).

jurisdiction role, while critical to the protection of water quality on tribal lands, importantly “does not involve any exercise of regulatory authority” over water quality or discharges to waters.¹²⁴ Thus, EPA correctly concluded that there was no reason to limit the neighboring jurisdiction role only to tribes that had demonstrated their eligibility to administer the water quality standards program under section 303(c).¹²⁵

EPA’s current proposal does not refute, but rather simply ignores its acknowledgement in 2023 that 401 water quality certification and the neighboring jurisdiction role are “related but distinct” roles in CWA implementation from that of administering the section 303(c) water quality standards program. Instead, EPA now claims that it acted incorrectly in 2023 by creating procedures for tribes to establish their eligibility for certification under section 401 or for the neighboring jurisdiction role because those functions are not “reasonably severable” from the section 303(c) water quality standards program.¹²⁶ Contrary to EPA’s current portrayal, however, its 2023 TAS regulations were not based on a finding of “severability,” and EPA fails to explain why that is an appropriate basis for reversing those regulations now.

The Proposed Rule also fails to fairly account for the adverse impact of its proposal on tribal interests and stakeholders. EPA notes that not many tribes in the short period since 2023 have taken advantage of then-new opportunities to establish limited eligibility for the section 401 water quality certification and/or section 401(a)(2) neighboring jurisdiction roles. But as EPA acknowledges, several tribes responding to its requests for information about stakeholders’ experience with the 2023 amendments “noted the lack of use was not indicative of a lack of effectiveness.”¹²⁷ Moreover, it stands to reason that more tribes may become interested in using the processes that were made available to them in response to the current federal Administration’s across-the-board weakening of federal regulation of water quality pollution, to protect their members against increasing threats to water quality and public health. EPA fails to even acknowledge this possibility, let alone explain why it is nonetheless appropriate to curtail tribal procedural rights and access to the decision-making processes under section 401 and section 401(a)(2).

EPA attempts to minimize the degree to which its proposal reverses tribal rights and limits tribal sovereignty within the CWA’s cooperative federalism regime by claiming that it merely restores the pre-2023 status quo ante. EPA emphasizes for example, that although its proposal would take away tribes’ current option to establish eligibility solely as a “neighboring jurisdiction” under section 401(a)(2), “Tribes may still obtain TAS for section 401(a)(2) by pursuing TAS for section 303(c) and section 401.”¹²⁸ But as shown above, EPA’s proposal forces tribes to make the more significant demonstration necessary for “full” TAS certification even where a tribe’s circumstances do not warrant or necessitate the exercise of *all* roles under section 303(c), 401, and/or 401(a)(2).

¹²⁴ 88 Fed. Reg. at 66653.

¹²⁵ *Id.*

¹²⁶ 91 Fed. Reg. 2037.

¹²⁷ 91 Fed. Reg. 2036.

¹²⁸ 91 Fed. Reg. 2037.

The fact that at least “a few Tribes” expressed support for TAS provisions that EPA promulgated in 2023 demonstrates that EPA’s current proposal to take them away will adversely impact some tribes.¹²⁹ But in fact, the impact will be much larger. There are 53 federally recognized tribes with approved water quality standards under section 303 of the CWA according to EPA’s website. <https://www.epa.gov/wqs-tech/state-specific-water-quality-standards-effective-under-clean-water-act-cwa>. Under EPA’s proposal, these are the *only* tribes (along with any others that may in the future demonstrate their eligibility to administer section 303(c) water quality standards) that would have any right to participate in water quality certification or whom EPA would be required to notify as “neighboring jurisdictions” of discharges that may affect their tribal water quality. These tribes are just small fraction of the 574 federally recognized tribes in the United States. <https://www.usa.gov/tribes>. Thus, what EPA now proposes is that more than 90% of all federally recognized tribes lose *any* opportunity under the Clean Water Act to either certify or object to certify federally permitted activities that impact their tribal waters, unless they first obtain federal approval of their water quality standards under section 303(c). This proposal would decimate tribes’ federal statutory rights to protect their waterways.

Moreover, other changes EPA proposes to make, as summarized elsewhere in these comments, would in fact limit the rights even of tribes that have or establish full TAS eligibility. *See supra* at Parts I-II and *infra* IV-VII. Thus, EPA’s TAS reversal in combination with these other changes constitutes a radical restructuring of the CWA’s cooperative federalism scheme with respect to tribes and tribal interests. Instead of sacrificing tribal rights on the altar of (supposed) procedural efficiency, EPA should abandon its proposed TAS reversal and allow the well-reasoned and perfectly functional 2023 TAS amendments to remain in effect going forward.

IV. EPA’s proposed rule arbitrarily burdens the rights of states and tribes to seek information necessary to make a decision on a request for certification.

EPA’s proposal would set forth a specific list of information that an applicant would need to submit to start the certification process.¹³⁰ EPA points to no statutory authority for its claim that Congress authorized it to establish such a list. Moreover, the proposal unnecessarily takes away the discretion of the certifying state or tribe thereafter to request any additional information other than that readily available information about the proposed discharges to tailor the certification process to obtain the information needed for a particular waterway of that state or tribe or a particular type of federally licensed or permitted project.¹³¹

EPA does not, and cannot, justify creating such an information vacuum.¹³² As shown above, states and tribes must decide if a project would threaten water quality and request conditions as necessary. They cannot exercise that authority and make informed decisions without being able to request and review all relevant information. And applicants may have extensive information beyond that required in the Proposed Rule’s list, even if the certification

¹²⁹ 91 Fed. Reg. 2036.

¹³⁰ 91 Fed. Reg. 2018.

¹³¹ *Id.* at 2018-19.

¹³² *Id.*

decision must be based on the impact of the discharges and not on the activity as a whole. Applicants may have information about water quality requirements, the context of the proposed activity, including other proposed activities in the same watershed, changes in the legal framework applicable to the proposed activity, information about the potential impact of the discharges on the flora or fauna in the impacted waterway, etc.

One size does not often fit all, especially given the variety of types of waterways that states and tribes are seeking to protect across the United States and the variety of types of projects that need section 401 certifications.¹³³ Heretofore, the section 401 water quality certification process has been administered by states and tribes, which are the ultimate decisionmakers, not the applicant and not the federal government. This proposal turns that process on its head by limiting the authority of states and tribes to ask for the information that they need to make an informed decision about whether to modify the project to protect water quality. This provision is therefore in contravention of the structure of the provision as set forth by Congress.

Furthermore, the data in the Economic Analysis fails to show that states or tribes are not now working with applicants to grant certifications for projects that do not adversely impact water quality. EPA's Economic Analysis shows that almost all permits issued by the Army Corps (which make up the overwhelming number of permits subject to section 401) are either granted (89.2%) or waived (8.4%). Only 0.6% are denied.¹³⁴ This aspect of the proposal is not only unlawful, but it is not supported by the record.

V. EPA proposed rule would radically curtail the “reasonable period of time” states and tribes are entitled to make certification decisions.

The statute defines a “reasonable period of time” for the certifying authority to act on a complete application as “up to one year.”¹³⁵ EPA's proposal attempts to curtail the certifying authority's right to use the full time period provided by statute as necessary to determine whether to grant, waive, or condition the certification. The proposal would set the default timeframe as six months rather than one year unless the federal agency and certifying authority agree to a longer timeframe, in direct contravention of the text of the statute.¹³⁶ Essentially, EPA proposes to rewrite the statute's definition of a “reasonable period of time.”

The Supreme Court has repeatedly made clear, however, that agencies cannot rewrite clear statutory language to suit their own administrative conveniences.¹³⁷ The Proposed Rule would further require that the certifying authority obtain the agreement of the federal agency to

¹³³ See Table A-1, pp. 40-41 of the Economic Analysis for the Proposed Updating [of] the Water Quality Certification Regulations for a chart of the types of projects requiring 401 certifications.

¹³⁴ U.S. EPA, *Economic Analysis for the Proposed Updating [of] the Water Quality Certification Regulations*, at 43 (Table A-2) (Jan. 2026).

¹³⁵ 33 U.S.C. § 1341(a)(1).

¹³⁶ 91 Fed. Reg. 2021.

¹³⁷ See, e.g., *Biden v. Nebraska*, 600 U.S. 477, 502 (2023) (rejecting the Secretary of Education's attempt to use limited “modification” authority to “rewrite the Education Act.”).

use the full year, essentially giving the federal agency unilateral power to veto the certifying authority's right to use the full one-year time period granted to it by statute. Again, the proposal is contrary to the text of the governing statute and directly undercuts the power given to states and tribes by the statute. The undersigned groups oppose it.¹³⁸

VI. EPA should not restrict the certifying authority's ability to modify its certification decision or impose additional conditions.

The Proposed Rule also improperly shifts power from states and tribes to the federal government and applicant by limiting the authority of states and tribes to modify a certification after it has been granted to address changed circumstances after a certification was initially granted (Proposed Rule § 121.10).¹³⁹ If this proposal is finalized, states and tribes (and even EPA when it is the certifying authority) will no longer be able to modify a certification unless the applicant and federal permitting authority agree to the modification, including the specific language of the modification.¹⁴⁰ There are no limits to this so irrespective of how the activity may have changed, the law may have changed, the status of the applicant may have changed, or the condition of the receiving water may have changed, the state and tribal authorities will be powerless to make necessary changes to the certification to ensure water quality requirements will be met without the applicant's and federal agency's agreement. The applicant would be given an effective veto over any post certification conditions that the state or tribe would otherwise impose to protect water quality. As with the rest of the Proposed Rule, this proposed revision would be contrary to the statute and should be rejected.¹⁴¹

VII. Any regulatory change that would exclude federal activities or general permits from section 401 Water Quality Certification would be unlawful and should be rejected.

EPA proposes to rewrite the regulations implementing section 401 related to federal activities and general permits. Specifically, EPA proposes to remove the definition of "project proponent" from 40 C.F.R. § 121.1(h)¹⁴² and replace it with "applicant."¹⁴³ EPA further seeks comment on whether, in light of this change, federal agencies should no longer have to obtain state and/or tribal 401 certification, and EPA and the U.S. Army Corps would no longer have to obtain state and/or tribal section 401 certification for federal general permits. EPA's only justification for this change is that "project proponent" is neither included in nor defined in

¹³⁸ EPA seeks comment on whether the comment period should be limited to 30 days when EPA is the certifying authority. This would obviously conflict with the one-year timeframe provided by section 401, and the undersigned groups oppose it as well.

¹³⁹ 91 Fed. Reg. 2030, 2041

¹⁴⁰ EPA seeks comment on whether the federal Agency should be involved in approving any modification to a certification, which EPA doesn't appear to realize that is what it has proposed. Compare text on 91 Fed. Reg. 2031 with 91 Fed. Reg. 2041.

¹⁴¹ *Contra* 33 U.S.C. § 1341(a)(3); *Biden v. Nebraska*, 600 U.S. at 502 (agencies cannot rewrite the statute).

¹⁴² "Project proponent means the applicant for a Federal license or permit, or the entity seeking certification." 40 C.F.R. § 121.1(h).

¹⁴³ 91 Fed. Reg. 2019-20.

section 401 and that such a change will more accurately align with the plain language of the statute. However, EPA’s proposal is inconsistent with the plain meaning of the Clean Water Act and is arbitrary and capricious.

First, EPA suggests that altering the language of 40 C.F.R. § 121.1(h) to remove “project proponent” and replace it with “applicant” leads to the conclusion that since there are no “applicants” for many federal agency activities or for general permits, that “the best reading” is that any such projects would not be required to obtain 401 certification.¹⁴⁴ This is a misreading of the CWA under 33 U.S.C. § 1341(a)(1),¹⁴⁵ and a perversion of clear Congressional intent. This same argument was dismissed by the First Circuit over 35 years ago in *United States v. Marathon Dev. Corp.*, 867 F.2d 96 (1st Cir. 1989). As court noted, the “last sentence of section 401(a)(1) provides, ‘No license or permit shall be granted if certification has been denied by the State,’” which would be “pure surplusage” and inconsistent with historical agency practice if it were read to exclude federal agency activities.¹⁴⁶

Second, the courts have been very clear that “[u]nder the Clean Water Act, all federal agencies must comply with state water quality standards”¹⁴⁷ and consequently recognize that the State and Tribal 401 certification process is “essential in the scheme to preserve state authority to address the broad range of pollution” that might affect water quality.”¹⁴⁸ Through section 401 certification, “Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.”¹⁴⁹ In fact, “[t]he act has been amended to indicate unequivocally that all Federal facilities *and*

¹⁴⁴ *Id.* at 2020.

¹⁴⁵ See generally *Loper Bright*, 603 U.S. 369 (2024) (holding that agency interpretation of law is due no deference).

¹⁴⁶ *Id.* (quoting 33 U.S.C. § 1341(a)(1)); see, e.g., *Bd. of Miss. Levee Comm'rs v. U.S. E.P.A.*, 785 F. Supp. 2d 592 (N.D. Miss. 2011), *aff'd sub nom. Bd. of Mississippi Levee Comm'rs v. U.S. E.P.A.*, 674 F.3d 409 (5th Cir. 2012) (Army Corps applied for and received a section 401 water quality certification from the State of Mississippi) (internal citations removed);

¹⁴⁷ *North Dakota v. U.S. Army Corps of Eng'rs*, 270 F. Supp. 2d 1115, 1120 (D.N.D. 2003) (citing the Ninth Circuit in *Oregon Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 852 (9th Cir. 1987) (quoting 33 U.S.C. § 1323(a)); see also *Alabama v. U.S. Army Corps of Eng'rs*, 704 F. Supp. 3d 20, 86 (D.D.C. 2023) (citing *Ctr. For Native Ecosystems v. Cables*, 509 F.3d 1310, 1332 (10th Cir. 2007) (“holding federal agencies to the same water pollution control requirements ‘as if they were private citizens’”)).

¹⁴⁸ *S.D. Warren Co.*, 547 U.S. at 371.

¹⁴⁹ *Keating v. F.E.R.C.*, 927 F.2d 616, 622 (D.C. Cir. 1991) (citing *Marathon Dev. Corp.*, 867 F.2d at 99-100; 2 W. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.2, at 26 (1986) (“Section 401 offers a veto power to states with water quality related concerns about licensing activities of the various federal agencies, including the Environmental Protection Agency, Federal Energy Regulatory Commission, Corps of Engineers, and the Nuclear Regulatory Commission.”)).

activities are subject to all of the provisions of State and local pollution laws.”¹⁵⁰ EPA has, in fact, articulated this position in its own general permits.¹⁵¹

Courts have held the same applies to the Army Corps of Engineers: “the Corps cannot issue a permit under section 404 without first obtaining state certification pursuant to section 401 from the state in which the activity is to take place.”¹⁵² The Army Corps must also obtain section 401 certification when conducting its own projects, including for dredge and fill.¹⁵³ While “the Corps does not issue section 404 permits to itself for dredge or fill activities that it implements, Corps projects must generally comply with EPA's regulatory requirements for dredge and fill permits.”¹⁵⁴

Finally, that Congress specifically intended for states and tribes to have this oversight on federal activities—including around dredging—is evidenced by the discrete carveouts in section 404, which provide the few exceptions when Congress did not intend for section 401 certification to apply.¹⁵⁵ Specifically,

¹⁵⁰ *Delaware Dep't of Nat. Res. & Env't Control v. U.S. Army Corps of Eng'rs*, 751 F. Supp. 2d 715, 722 (D. Del. 2010), *aff'd*, 685 F.3d 259 (3d Cir. 2012) (emphasis added); *Town of Arcadia Lakes v. S.C. Dep't of Health & Env't Control*, 404 S.C. 515, 522 (Ct. App. 2013). *See also* 33 U.S.C. § 1341(a)(1) (“No license or permit shall be granted if certification has been denied by the State.”); *Marathon Dev. Corp.*, 867 F.2d at 100 (quoting H.R.Conf.Rep. No. 940, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 2712, 2741, (“Denial of certification by a State...results in a complete prohibition against the issuance of the Federal license or permit.”)).

¹⁵¹ *Lake Carriers' Ass'n v. E.P.A.*, 652 F.3d 1, 5 (D.C. Cir. 2011) (citing response to comments on EPA's section 402 Vessel General Permit).

¹⁵² *See Keating*, 927 F.2d at 619 (citing 33 C.F.R. §§ 330.9(a), 336.1(b)(8) (1990); *Marathon Dev. Corp.*, 867 F.2d at 100 (“[T]he 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.”); *Friends of the Earth v. United States Navy*, 841 F.2d 927, 929–30 (9th Cir.1988)).

¹⁵³ *See Delaware Dep't of Nat. Res. & Env't Control v. U.S. Army Corps of Eng'rs*, 751 F. Supp. 2d 715, 722 (D. Del. 2010), *aff'd*, 685 F.3d 259 (3d Cir. 2012) (recognizing that despite the national interest in maintenance of waterway navigation, “Corps dredging activities, like any municipal or industrial discharge to the Nation's waters, or any private dredging activities, should be conducted in compliance with applicable State water quality standards.”) (emphasis in original).

¹⁵⁴ *Bd. of Miss. Levee Comm'rs v. U.S. E.P.A.*, 785 F. Supp. 2d 592, 594 (N.D. Miss. 2011), *aff'd sub nom. Bd. of Mississippi Levee Comm'rs v. U.S. E.P.A.*, 674 F.3d 409 (5th Cir. 2012) (detailing how the Corps applied for and received a section 401 water quality “certification from the State of Mississippi for construction of the Pump Project”) (internal citations removed).

¹⁵⁵ *See* 33 U.S.C.A. § 1344(r), (t) (allowing discharge of dredged or fill material as part of federal projects specially authorized by Congress in certain circumstances and protecting right to control discharge of dredged or fill material in any portion of the navigable waters *in compliance with State requirements except that* “[t]his section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.”).

[a]lthough Congress reviewed section 401 (“Certification”) when it authorized general permits in section 404 of the Clean Water Act of 1977, it did not amend section 401 so as to limit state authority over nationwide or other general permits. When sections 401 and 404 are read together, their plain terms provide that the state certification requirement of section 401 applies to section 404(e) nationwide permits in the same way that it applies to any other section 404 permit.¹⁵⁶

Third, it is equally clear that states and tribes have the same right to section 401 water quality certification of general permits as they do to certification of individual permits.¹⁵⁷ As noted by the court in *Marathon Development*, “[t]he ability of states to enforce their own more stringent water quality standards by denying certification for a nationwide [general] permit is consistent with the legislative purpose and history of the Clean Water Act.”¹⁵⁸ The court went on to explain that

[n]either the language nor the history of section 404(e) of the Clean Water Act ... suggests that states have any less authority in respect to general permits than they have in respect to individual permits. Indeed, at the same time that Congress authorized the Corps to issue general permits for dredged or fill material, it added a provision to section 404 which underlined the authority of states over dredge and fill activities.¹⁵⁹

States and tribes are also authorized to “impose express conditions upon the issuance of a particular certification.”¹⁶⁰ In fact, under 33 U.S.C. § 1341(d) states and tribes are empowered not only to establish effluent limitations and necessary monitoring requirements, but also “any other appropriate requirement of State law set forth in such certification, and shall become a

¹⁵⁶ *Marathon Dev. Corp.*, 867 F.2d at 100.

¹⁵⁷ The breadth of the general permits that the Corps has recently proposed for public comment, which clearly fail the test of minimal adverse impact individually and cumulatively, underscore the need for section 401 certification. NWP Multi-Group Comments, Docket Number COE-2025-0002 (July 18, 2025). See generally *Ohio Valley Env't Coal. v. Horinko*, 279 F. Supp. 2d 732 (S.D.W. Va. 2003).

¹⁵⁸ *Marathon Dev. Corp.*, 867 F.2d at 99 (quoting 33 U.S.C. § 1251(b)). See also *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 116, 134 (D.D.C. 2006) (“[T]he purpose of section 401 is to preserve the authority for the States to set standards that are more stringent than the level of protection afforded in a federal permit, and, therefore, the purpose of this section is to *supplement* not *supplant* the requirements for obtaining a federal permit. Section 401 ensures that state limitations and requirements, as related to water quality, will become part of the federal permit, ... and nothing in Section 401 implies that a State's limitations or requirements allows that permit seeker to avoid the NWP-specific requirements to obtain a permit, *id.*”) (citation omitted) (emphasis in original).

¹⁵⁹ *Marathon Dev. Corp.*, 867 F.2d at 100 (quoting 33 U.S.C. § 1344(t)).

¹⁶⁰ *Keating*, 927 F.2d at 623. See also *Roosevelt Campobello Int'l Park Comm'n*, 684 F.2d at 1057 (holding that conditions the state imposes in its certification must be included in any federal permit). See also 33 U.S.C. § 1341(d).

condition on any Federal license or permit.” *See infra* Part II.C. Courts have consistently upheld this right, including for general and/or nationwide permits.¹⁶¹

Fourth, there is no reasoned basis for EPA’s change in position. State and tribe 401 water quality certification of federal agency activities and general permits has been successfully implemented and maintained for roughly five decades, as evidenced by the growth in the U.S. Army Corps of Engineers’ nationwide permit program from 15 permits in 1977 to the 60 proposed in 2026,¹⁶² which from 2012 to 2015 “authorize[d] an average of 63,000 activities per year; 97% [of which] were authorized by nationwide and other general permits.”¹⁶³ In fact, EPA does not identify any problems with the current regulations or processes in this proposal and admits in its proposal that when EPA drafted 40 C.F.R. § 121.1(h) it used the term “project proponent” *because* it “sought for the regulation to include, as a categorical matter, general permits and other instances of non-applicants requesting certification.”¹⁶⁴ However, EPA provides no stronger a justification for changing its position now (the difference between “applicant” and “project proponent”), than an argument that the courts have already rejected.¹⁶⁵ Because the EPA has failed to provide adequate reasons for its decisions, fails to examine any relevant data, and offers no “rational connection between the facts found and the choice made,”¹⁶⁶ this proposed action is arbitrary and capricious as discussed *infra*, Part VIII. Finally, such attempts to unilaterally reinterpret the statute are beyond the purview of the Agency.¹⁶⁷

ELPC and the other undersigned organizations disagree with EPA’s proposed changes to 40 C.F.R. § 121.1(h) as they would unlawfully narrow the scope of state and tribe sovereignty and congressionally approved control over the water quality in their state or territory, contrary to the text of the statute, its purposes, agency practice, and judicial precedent.¹⁶⁸

¹⁶¹ *See, e.g., Lake Carriers' Ass'n v. E.P.A.*, 652 F.3d 1, 5 (D.C. Cir. 2011) (explaining how EPA had to include in its general permit approximately 100 state certification conditions for twenty-five states, two tribes, and one territory).

¹⁶² *See* Congressional Research Service, *The Army Corps of Engineers’ Nationwide Permits Program: Issues and Regulatory Developments* (Jan. 12, 2017) at 7, available at https://www.congress.gov/crs-product/97-223#_Toc528329714; U.S. Army Corps of Engineers, *Nationwide Permits* (last accessed Feb. 12, 2026), available at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

¹⁶³ U.S. Army Corps of Engineers, *Nationwide Permits* (last accessed Feb. 12, 2026), available at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

¹⁶⁴ 91 Fed. Reg. 2021.

¹⁶⁵ *Marathon Dev. Corp.*, 867 F.2d at 101 (“To this argument there is a simple and, we believe, conclusive answer. The last sentence of section 401(a)(1) provides, “*No license or permit shall be granted if certification has been denied by the State*”).

¹⁶⁶ *State Farm*, 463 U.S. at 43.

¹⁶⁷ *Loper Bright*, 603 U.S. at 371 (“[C]ourts, not agencies, will decide ‘all relevant questions of law’”).

¹⁶⁸ *S.D. Warren Co.*, 547 U.S. at 371; *Marathon Dev. Corp.*, 867 F.2d at 99 (quoting 33 U.S.C. § 1251(b)).

EPA should, therefore, withdraw this proposal and instead work with states and tribes to protect clean water resources in accordance with the Clean Water Act. Additionally, ELPC and the other undersigned organizations urge EPA to carefully consider how it issues general and/or nationwide permits to ensure that they can meet the “type of review called for . . . on a statewide or nationwide basis.”¹⁶⁹ For example, in *Ohio Valley Env’t Coal. v. Horinko*, 279 F. Supp. 2d 732 (S.D.W. Va. 2003), the court found EPA’s approval of a state-issued general permit to be arbitrary and capricious because it failed to explain how the state could adequately consider compliance with water quality requirements or ensure adequate public participation prior to the time of notification of specific discharges covered by the permit.¹⁷⁰ States and tribes should not only be able to certify and condition general permits when they are issued, but they should also be able to condition general permits to require case-by-case certification and verification, where necessary to protect water quality.¹⁷¹

VIII. The proposal is arbitrary and capricious because it fails to adequately explain its reasons for upending over 50 years of EPA practice.

Under section 706(2)(A) of the Administrative Procedure Act (“APA”), a reviewing court can “set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The Supreme Court has explained that agency action is arbitrary and capricious if the agency fails to give adequate reasons for its decisions, fails to examine the relevant data, or offers no “rational connection between the facts found and the choice made.”¹⁷² Further, agencies cannot “change course” when rescinding a rule without a “reasoned analysis for the change,” and, when an agency rescinds prior policy, its “reasoned analysis” must consider alternatives that are “within the ambit of the existing standard.”¹⁷³

Under its change-in-position doctrine, an agency is free to change its existing policy so long as it displays awareness of its changing position, offers good reasons for the new policy, and takes into account any serious reliance interests engendered by the prior policy.¹⁷⁴ Additionally, an “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”¹⁷⁵ EPA’s proposal is not mandated by any change in section 401 or the case law interpreting it, but instead is a change in policy that must comply with the APA so as not to be arbitrary and capricious, consistent with the framework discussed above.

¹⁶⁹ *Ohio Valley Env’t Coal.*, 279 F. Supp. 2d at 761.

¹⁷⁰ *Id.* at 761.

¹⁷¹ *See, e.g., Crutchfield v. County of Hanover, Va.*, 325 F.3d 211, 214 (4th Cir. 2003) (citing 33 U.S.C. § 1344(e); 33 C.F.R. §§ 320.1, 330.1(b)-(c)).

¹⁷² *State Farm*, 463 U.S. at 43.

¹⁷³ *Id.* at 31, 51.

¹⁷⁴ *Wages & White Lion Invs.*, 604 U.S. at 570.

¹⁷⁵ *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

EPA meets only the first prong of that test. It is aware that it is changing its existing regulations; however, nowhere in the proposal or the supporting material is any serious evaluation of how the existing rules are working to protect the nation's waters or any meaningful consideration of the alternative of retaining the current approach. As noted above, EPA has significant experience assessing the efficacy of the 2023 section 401 Water Quality Certification Improvement Rule.¹⁷⁶ But the record of this rulemaking contains no analysis of those on-the-ground decisions to assess whether the current policy is working well, whether the current approach is more consistent with Congress's objective in adopting the Clean Water Act than the proposal, or whether it will enable more pollution and destruction of the Nation's waters to go unremediated. Further, EPA gives no consideration to the reliance interests that states and tribes have in the standards and process laid out in the current rule as a principal means of protecting their waterways from damaging federally permitted activities.¹⁷⁷ In fact, EPA failed to analyze state and tribal consultations, "collectively urg[ing] the EPA not to proceed with a new rulemaking."¹⁷⁸ Will the new rulemaking make it easier or more difficult for states and tribes to protect their waters from destructive federal projects? Apparently not liking the answer to that question, EPA fails even to pose it.

An agency may not reasonably change existing policy without critically examining that policy and reliance interests.¹⁷⁹ Put differently, it is arbitrary and capricious to change regulations without any good reason to do so. That is precisely what EPA proposes in this rulemaking. Even if EPA had provided adequate reasons, it has not considered serious reliance interests of states and tribes that have relied on section 401 authorities to protect their waters from federally licensed or permitted activities.

IX. The Agency's failure to analyze costs to the public in addition to the costs avoided by regulated entities that would result from this widely impactful rule is arbitrary and capricious.

In addition to all the arguments outlined above as to why this proposed regulation is unlawful, the proposal and the accompanying material in the docket utterly fail to assess the impact of the Proposed Rule on the condition of the nation's waters, which is not only an important issue in any Clean Water Act rulemaking—it ought to be the overriding issue. As EPA explains in the preamble to the Proposed Rule, the economic analysis provides "an assessment of the potential impacts of the proposed rulemaking on applicants and certifying authorities."¹⁸⁰ What about the nation's waters and the cost of public health and welfare? Neither the proposed rule preamble nor the accompanying economic analysis contains any effort to estimate how

¹⁷⁶ 91 Fed. Reg. 2037; Economic Analysis, pp. 10-13.

¹⁷⁷ *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30-31 (2020) (an agency must consider serious reliance interests, even when the purported basis for the rescission is illegality); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹⁷⁸ Summary Report of Tribal Consultation on the U.S. EPA Implementation Challenges Associated with the Clean Water Act Section 401, 40 C.F.R. § 121 (Docket No. EPA-HQ-OW-2025-2059).

¹⁷⁹ *Regents*, 591 U.S. 1 at 30-31.

¹⁸⁰ 91 Fed. Reg. at 2037.

many of the thousands of certification decisions made each year would be affected by the new rules if EPA were to finalize them. Nor does EPA attempt to determine the impact on the nation's waters from fewer certifications, less comprehensive certifications, fewer conditions to protect water quality, or any of the other proposed changes outlined above.

Unfortunately, this approach of a one-sided, truncated cost-benefit analysis now appears to be the policy of this EPA. We have seen it in a number of other regulatory proposals under multiple environmental statutes.¹⁸¹ As with many other regulatory proposals by the Trump administration, the economic analysis for this rule does not attempt to quantify the loss of environmental benefits that will result from the finalization of this rule. It does attempt to quantify whether any of the changes will impose processing or paperwork costs on the applicants, certifying authority, or EPA, but it completely ignores the purpose of the statutory provision, which is to allow the certifying authority to protect its waterways from pollution.¹⁸² The restoration and maintenance of our nation's water quality is the sole "objective" of the Clean Water Act and therefore the most "important aspect of the problem" to be considered.¹⁸³ As EPA has previously stated, "§ 401 certification is an important (and, sometimes, the only) regulatory opportunity to address water quality in draft federal permits and licenses."¹⁸⁴ In this proposal, however, EPA boldly states, that this rulemaking "does not concern human health."¹⁸⁵

Agency action is arbitrary and capricious unless agencies consider "relevant factors" and "important aspect[s] of the problem" when promulgating a significant rulemaking.¹⁸⁶ While agencies have some discretion on how to evaluate costs absent specific Congressional direction, agencies may not only consider one side of the analysis, in fact, it must meaningfully evaluate *both* benefits and costs. The Supreme Court has clarified this important point by reasoning that "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the *advantages and the disadvantages* of agency decisions."¹⁸⁷ EPA must adhere to this standard before issuing a final rule. EPA's focus on cost savings to the applicants, certifying authorities, and EPA, while completely ignoring the foregone benefits toward achieving the driving purpose of the Act is facially arbitrary and capricious and contrary to

¹⁸¹ See, e.g., 40 C.F.R. pt. 60 (Jan. 15, 2026) (ignoring health-related monetary benefits and harms in promulgation of New Source Performance Standards).

¹⁸² In the Economic Analysis accompanying the Proposed Rule, the agencies include a list of potential cost savings that EPA says will accrue from the rule from reducing redundancies, limiting the scope of 401 water quality certifications, limiting consultant costs... (Economic Analysis at 2-3). EPA indicates that it does not expect the rule to increase the burden on certifying authorities (Economic Analysis at 2).

¹⁸³ *State Farm*, 463 U.S. at 43.

¹⁸⁴ U.S. EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, at 26 (Apr. 2010), https://19january2017snapshot.epa.gov/sites/production/files/2016-11/documents/cwa_401_handbook_2010.pdf.

¹⁸⁵ 91 Fed. Reg. 2038.

¹⁸⁶ *State Farm*, 463 U.S. at 43.

¹⁸⁷ *Id.*; *Michigan v. E.P.A.*, 576 U.S. 743, 753 (2015) (hereafter "*Michigan v. EPA*") (emphasis added).

Executive Order 12866’s requirement for an explanation that is consistent with the Clean Water Act’s mandate.

EPA claims to provide an economic analysis of this Proposed Rule pursuant to Executive Orders 12866, 13563, and 14192.¹⁸⁸ EPA says the purpose of conducting this economic analysis is “to inform the public of potential effects associated with this rulemaking.”¹⁸⁹ However, Executive Order 12866 and its predecessors require EPA to conduct “[a]n assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate”¹⁹⁰ Executive Order 12866 anticipates the issue that some costs and benefits will be more readily quantifiable than others. “In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.”¹⁹¹

In this proposal, unlike its Economic Analysis for the 2023 Clean Water Act section 401 Water Quality Certification Improvement Rule, EPA does not assert that the regulation will provide “[i]mproved water quality protection.”¹⁹² In that case, as in this one, EPA does not have perfect information on how the rule has been used or how it will improve “certifying authorities’ ability to protect water resources.”¹⁹³ However, EPA very clearly lays out the goal of improved water quality protection in the 2023 rule and eschews such a goal in this one. Furthermore, unlike EPA’s proposed rule to redefine the scope of “waters of the United States,” EPA’s Economic Analysis for this Proposed Rule doesn’t even concede that there are “forgone benefits over time, including habitat support, recreation, and aesthetic benefits” which will accrue as a result of the Proposed Rule.¹⁹⁴ Similar to its Economic Analysis of the proposal to redefine the “waters of the United States,” EPA claims not to have sufficient information “to perform a quantitative analysis of the impacts of the proposed rule.”¹⁹⁵ EPA’s failure to have complete information or be able to quantify precisely the environmental impacts of foregone environmental and public health benefits is not a sufficient justification for EPA not to analyze

¹⁸⁸ U.S. EPA, *Economic Analysis for the Proposed Updating [of] the Water Quality Certification Regulations*, at 1 (Jan. 2026).

¹⁸⁹ *Id.*

¹⁹⁰ Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (emphasis added).

¹⁹¹ *Id.*

¹⁹² U.S. EPA, *Economic Analysis for the Final Clean Water Act Section 401 Water Quality Certification Improvement Rule*, at 27, https://www.epa.gov/system/files/documents/2023-09/Economic%20Analysis%20for%20the%20Final%202023%20Clean%20Water%20Act%20Section%20401%20Water%20Quality%20Certification%20Improvement%20Rule_508.pdf (last visited February 17, 2026).

¹⁹³ *Id.*

¹⁹⁴ See 2025 Updated WOTUS RIA, at 5.

¹⁹⁵ Economic Analysis at 4. EPA says that it has been receiving copies of section 401 Water Quality Certification applications since 2020 but analyzes only those received by the Corps after 2023, and only for cost burden associated with the certification process itself.

the information it does have, including section 401 water quality certifications for section 404 permitting since 2023, and provide the best estimate it is able of the likely harmful environmental effects of finalizing this proposal.¹⁹⁶ Given that EPA makes no effort to analyze even qualitatively the foregone benefits of this Proposed Rule’s drastic narrowing of state’s and tribe’s water quality certification authority, its failure to do so quantitatively as well is just an additional reason for finding its cost and benefit analysis arbitrary and capricious. The agencies’ characterization of the costs and benefits completely misses the mark.

EPA determines that the Proposed Rule will not have *any* impacts to the environment, that is, no environmental benefit and also no foregone benefits, despite acknowledging that certification decisions would be based on a narrower scope (i.e., discharges versus activities). EPA writes off “any supposed or perceived lower level of environmental quality” as “illusory” because courts might find that EPA had exceeded its authority in promulgating the 2023 rule. EPA concludes its summary of incremental benefits with the following sentence: “Overall, the EPA anticipates that *the proposed rule would have no environmental impacts.*”¹⁹⁷

EPA claims that it is not fully able to analyze the costs and benefits of the Proposed Rule because it has information on only a subset of section 401 certifications made since the current rule was promulgated in 2023.¹⁹⁸ But for data that EPA does have, the Agency has no explanation for why its analysis completely omits water quality benefits or, as is more likely, water quality harm.¹⁹⁹ Such costs are, of course, important to consider in any rule that has to be administered by federal, state, and tribal authorities, but considering only implementation costs is wholly inadequate for implementing a statute designed to protect the nation’s waters. From the Economic Analysis accompanying the Proposed Rule, it does not appear that EPA has considered what kinds of certification decisions are particularly susceptible to being deemed outside the scope of certification (and therefore invalid) by federal permitting authorities or how narrowing the types of impacts to be considered and the condition to be placed on those permitted activities still covered by the regulations would likely impact water quality. Consequently, EPA has no idea what the real-world impacts on the nation’s waters will be of finalizing and implementing its new proposal.

The Rule’s impact on water quality is obvious—certifying authorities have used the section 401 certification process to protect rivers, streams, and wetlands in ways that are now prohibited. Without those safeguards, water quality will suffer. Yet EPA did not do any analysis of the harm to rivers, streams, wetlands, and other waters that have historically received these protections under section 401’s authority. Agencies may not simply ignore express statutory objectives and factors.²⁰⁰ Failure to consider the effects of these changes is, by itself, a fatal flaw

¹⁹⁶ *Id.* at 4.

¹⁹⁷ Economic Analysis at 28-29 (emphasis added).

¹⁹⁸ Economic Analysis at 2; 91 Fed. Reg. 2037

¹⁹⁹ *Id.*

²⁰⁰ Statutory factors take precedence over non-statutory factors: while the Supreme Court has held “it is not arbitrary or capricious to prioritize one statutorily identified objective over another, it is an entirely different matter to prioritize non-statutory objectives to the exclusion of

in the proposal, as any rulemaking under the Clean Water Act ought to consider how and to what extent it promotes the law’s objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁰¹ EPA’s failure to grapple with how the rule affects EPA’s statutory scientific mandate to safeguard the chemical, physical, and biological integrity of the nation’s waters constitutes a failure “to consider an important aspect of the problem,” rendering the proposal arbitrary and capricious under the Administrative Procedure Act.²⁰² Because EPA failed to address the Rule’s impact on water quality, the Rule is procedurally unlawful under the Administrative Procedure Act.

Conclusion

EPA must withdraw this unlawful, misguided, and unsupported proposal. It violates both the letter and the spirit of the Clean Water Act, is arbitrary and capricious under the Administrative Procedure Act, and undermines the cooperative federalism that has underpinned the Clean Water Act’s protection of the nation’s waters for more than 50 years.

For all these reasons, the Proposed Rule should be withdrawn.

Respectfully submitted,

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the statutory purpose.” *Gresham v. Azar*, 950 F.3d 93, 104 (D.C. Cir. 2020), *vacated & remanded sub nom. Becerra v. Gresham*, 142 S. Ct. 1665, 212 L. Ed. 2d 576 (2022).

²⁰¹ 33 U.S.C. § 1251(a).

²⁰² *State Farm*, 463 U.S. at 43.

EXHIBITS

| | |
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| Exhibit 1 | Letter of October 16, 2019 to Andrew Wheeler, Administrator, U.S. EPA, by Western Governors' Association, National Conference of State Legislators, National Association of Counties, National League of Cities, The United States Conference of Mayors, The Council of State Governments, Western Interstate Region, Association of Clean Water Administrators, Association of State Floodplain Managers, Association of State Wetlands Managers, and Western States Water Council. |
| Exhibit 2 | Complaint for Declaratory and Injunctive Relief at 2, California v. Wheeler, No. 20-04869 (N.D. Cal. July 21, 2020) (ECF No. 1). The case was subsequently remanded and dismissed as moot following EPA's decision to revise the rule. |
| Exhibit 3 | Enbridge Line 5 Wisconsin Segment Relocation Project (letter from Benjamin Callan to Joe McGaver, Nov. 14, 2024) |
| Exhibit 4 | Comments from Robert W. Ferguson, Attorney General of Washington et al. on EPA Proposed Rule Updating Regulations on Water Quality Certifications, 84 Fed. Reg. 44080 (October 19, 2019), EPA-HQ-OW-2019-0405-0556 |