ENVIRONMENTAL PROTECTION AGENCY

Docket No. EPA–HQ–OW–2025–2929

Tribal Comments on *Updating the Water Quality Certification Regulations*, 91 Fed. Reg. 2,008 (January 15, 2026)

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I. INTRODUCTION

Earthjustice and the Native American Rights Fund submit these comments to the United States Environmental Protection Agency ("EPA") on behalf of the undersigned Tribal Nations and Tribal Communities ("Tribes"), requesting that EPA reject the proposed changes to the Water Quality Certification Regulations. *Updating the Water Quality Certification Regulations*, 91 Fed. Reg. 2008 (January 15, 2026) ("Proposed Rule"). The undersigned Tribes come from all over the Nation and maintain government-to-government relationships with the United States. To ensure the health and welfare of their members and citizens, Tribes have the inherent duty and authority to regulate the waters of their reservations, tribal homelands, and other lands within their jurisdiction. Many Tribes have adopted water quality standards approved by the EPA, and others have enacted local water quality controls pursuant to Tribal law. The United States and its agencies must act in the best interests of Tribes pursuant to the federal trust responsibility, but the Proposed Rule is contrary to EPA's trust duties to protect and preserve tribal lands, waters, and sovereignty. EPA should reject the Proposed Rule because it would unlawfully limit the scope of waters covered by water quality certifications, degrade water quality, and diminish Tribes' valuable role in Clean Water Act ("CWA") administration.

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C § 1251. Congress chose many means to achieve this goal. Section 401 of the CWA empowers States and authorized Tribes to ensure that federal projects comply with their water quality laws and do not undermine the integrity of waters within their borders. *Id*. at § 1341. Section 401 requires that, before a federal agency can issue a license or permit involving a discharge to navigable waters, a State or Tribe has the ability to review whether that activity will comply with State or Tribal water quality requirements. *Id* at § 1341(a)(2). If a State or Tribe concludes that the activity as proposed does

not provide reasonable assurances of compliance with the applicable water quality requirements, it can place conditions on the license or permit, or must deny certification of the project altogether if the project cannot be brought into compliance. *Id*.

Maintaining water quality is important because clean water supports tribal sovereignty, treaty, aboriginal, and federally reserved usufructuary rights, subsistence activities, cultural and spiritual practices, and many more unique interests important to Tribes and their members, both on and off Tribal lands. Congress enacted section 518(e) of the CWA to allow Tribes to be treated as States for the purposes of CWA regulatory program implementation. The aim of this section was to improve water quality on Tribal lands by enhancing Tribes' role in CWA administration and processes. *Id* at § 1377(e). Through section 518(e), Congress acknowledged that Tribes have inherent authority to regulate waters on Tribal lands and recognized their right to participate in processes concerning discharges in adjacent State jurisdiction affecting tribal water quality. *See id*. at §§ 1251(b), 1377(a) ("Indian Tribes shall be treated as States for purposes of such section 1251(g) of this title."). For Tribes that do not have Tribal lands or authority to act as a State under section 518(e), it is vitally important that EPA not interfere with Tribal authority to maintain water quality for the benefit of their membership. The Proposed Rule is contrary to EPA's trust responsibility because retracting the authority of Tribes to participate in 401 processes and limiting the scope of 401 certifications will worsen water quality and harm Tribal interests.

In 1971, after the passage of section 401's substantially similar predecessor in 1970, EPA promulgated implementing regulations. 36 Fed. Reg. 8563 (May 8, 1971). Although the regulations predate the 1972 CWA amendments, EPA implemented these regulations for nearly fifty years due to the relative continuity of the statutory language. Under this regulatory regime,

certifying agencies reviewed thousands of applications every year across the country, granting the vast majority of them without incident. States and Tribes review widely varying projects under section 401, including small dredge and fill projects, emergency projects to address flooding, multi-decade licenses for massive hydroelectric dams, and fossil fuel pipelines that are hundreds of miles long.

In 2020, EPA finalized new section 401 regulations that completely rewrote the previous rules, reversed decades of consistent bipartisan interpretation, contradicted the text and purpose of the CWA, unlawfully aggrandized the role of federal agencies and EPA, and curtailed State and Tribal authority to protect their waters. *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42210 (July 13, 2020). In 2023, EPA amended those rules to restore the ability of States and Tribes to respond to local water quality concerns and enhance Tribal access to CWA programs. *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 88 Fed. Reg. 66558, 66664 (Sept. 27, 2023). Now, EPA again seeks to disrupt longstanding interpretations and practices with its Proposed Rule, relying on scant evidence to support its decision.

The Proposed Rule describes overreaching solutions to an illusory problem. The proposed changes are not supported by sufficient evidence, reasoned analysis, or a demonstrated need to change the current regulatory structure. Numerous proposed changes are also contrary to both the letter and spirit of the CWA. For the reasons that follow, EPA should reject the proposed changes to the 401-certification process and maintain the text of 40 C.F.R. § 121.1 *et seq* as written.

II. COMMENTS

A. EPA's Proposed Rule is Contrary to the CWA's Text, Structure, and Purpose.

Congress designed section 401 to ensure that federal projects would not violate the myriad and diverse requirements of State and Tribal water quality law. *See* 33 U.S.C. §§ 1323 1341, 1377; S. Rep. No. 91–351, at 3 (1969) ("In the past, these [Federal] licenses and permits have been granted without any assurance that the [water quality] standards will be met or even considered."); 115 Cong. Rec. 9011, 9030 (April 15, 1969) (Federal agencies were "sometimes . . . a culprit with considerable responsibility for the pollution problem which is present."). Rather than promote the goal of cooperative federalism, the Proposed Rule enlarges and centralizes the federal government's role at the expense of States and Tribes. Instead of "fill[ing] up the details" of the statute, EPA's Proposed Rule would unlawfully strip States and Tribes of their inherent and primary authority over environmental regulation as recognized in the CWA. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024). State and Tribal sovereignty, water quality, efficiency, and transparency all will suffer as a result.

In enacting section 401, Congress did not confer any power onto States or Tribes that they did not already have. 33 U.S.C. § 1251(b) ("[T]he 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 . . . of land and water resources."); *id*. at § 1370 ("[E]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States"); *id*. at § 1377(a).

In the Proposed Rule, EPA recognizes that States and Tribes have longstanding and inherent authority to regulate waters and address environmental challenges within their

jurisdictions. 91 Fed. Reg. at 2012 ("States and Tribes retain authority to protect and manage the use of those waters that are not waters of the United States under the CWA.") (citing 33 U.S.C. §§ 1251(b), 1251(g), 1370, 1377(a)). Tribes retain inherent authority to regulate member conduct and non-member conduct in certain instances, including when exercising inherent regulatory authority within the CWA's statutory framework established by Congress. *See U.S. v. Mazurie*, 419 U.S. 544 (1975) (discussing congressional actions recognizing Tribal authority to regulate non-member, non-Indian conduct); *Montana v. U.S.*, 450 U.S. 544 (1981) (discussing inherent authority of Tribes over nonmember, non-Indian conduct). Yet the Proposed Rule treats EPA's authority as primary, ignoring that section 401's text focuses on regulatory implementation by States and Tribes.

Through section 401, Congress imposed the requirement for the federal government to comply with State and Tribal water quality criteria. *See* 33 U.S.C. § 1341(a)(1)-(2) (subjecting federal licenses and permits to 401 certifications); *id*. at § 1323 (federal facilities must comply with State water quality standards). In doing so, Congress recognized that States and Tribes should retain the authority to deny or condition projects that might win federal approval but, nevertheless, would have detrimental effects on water quality. Water quality standards vary because geography and waters are diverse across the States and Indian Country. Preserving and enhancing the Nation's water quality cannot be accomplished through a simplistic one-size-fits-all approach. It is for this reason that section 401 is written broadly, encompasses the whole of project activities connected to a federal permit, and allows States and Tribes to impose all conditions necessary to implement their water quality standards. The entire point of section 401 is to provide States and Tribes with a way to hold the federal government and applicants to enforceable water quality requirements responsive to each State's or Tribe's needs.

Rejecting this structure, the text of the act, and its purpose, EPA's Proposed Rule attempts to inflate the federal government's role while pushing out States and Tribes from the decision-making process. The Proposed Rule will narrow the scope of review in certification decisions, impose unnecessary limitations on information sharing, and upend years of precedent that properly interprets the broad authority of States and Tribes over regulated activities under section 401.

B. EPA's Proposed Rule Is Not Supported by the Record or Reality.

EPA failed to examine relevant data and to articulate a reasoned analysis that rationally connects the facts found in the Agency record to the decision to modify the water quality certification rule. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983); 5 U.S.C. § 706(2)(A). EPA states that the Proposed Rule is justified because the current process is inefficient, nontransparent, unpredictable, expensive, and time-consuming for applicants and certifying agencies alike, but it provides no factual support for any of those claims.

EPA does not point to examples of a 401-certification process that demonstrates that any of these problems exist. The only "data" EPA invokes are certification *decisions* received by the U.S. Army Corps of Engineers ("Corps") over only a two-year period.[1] EPA admits that this sample is too small to support quantitative conclusions.[2] EPA, however, fails to acknowledge that data on whether certifications were granted or denied provide no evidence of problems with the processes used to arrive at those decisions.

[1] U.S. EPA, ECONOMIC ANALYSIS FOR THE PROPOSED UPDATING THE WATER QUALITY CERTIFICATION REGULATIONS 2 (Jan. 2026), https://www.epa.gov/system/files/documents/2026-01/cwa401_proposed-rule-economic-analysis_jan2026_508c.pdf ("Economic Analysis").

[2] *Id*.

EPA further concedes that it lacks much of the relevant data needed to assess the benefits or costs of the Proposed Rule, including having no information on:

- The average time spent on section 401 reviews;
- The changes certifying authorities made to implement the existing regulations;
- The number of certification requests that EPA proposes would start the review timeline, but that would fail to provide States and Tribes with the information needed to evaluate a project under section 401;
- The number of denials that have or would occur because of a lack of information.[3]

EPA largely blames this on the lack of a national-level dataset of section 401 reviews, but EPA could have done far more to assess whether or not any actual problems with the current 401 regime exist. For example, even in the absence of a dataset, EPA could have provided anecdotal evidence in the form of examples of problems. It did not. EPA could have requested data from the Corps and other federal agencies on how often States and Tribes seek or receive extensions of the default six-month review period under the current regulations. It did not. EPA could have requested data from federal permitting agencies on how frequently States and Tribes seek to extend their review period past the default or agreed-upon review period. It did not.

Indeed, the minimal information EPA presents strongly suggests that there are no problems with administering section 401 under existing regulations. The 95.5% approval rate for certificates that EPA quotes is not consistent with EPA's claim that States and Tribes are exceeding the lawful limits of their section 401 scope of review.[4] EPA's own data shows that only 3.8% of the decisions the Corps received were waivers, a number that should be much higher if the inefficiencies and delays EPA claims were real.[5] EPA also acknowledges that, far

[3] *See id*. at 30.
[4] *Id*. at 11.
[5] *Id*. at 12.

from streamlining the process, its drastic changes to the implementation of section 401 will lead to greater inefficiencies and more denials. The Agency states that "certifying agencies may deny certification if they do not receive additional information they assert is needed to make a determination," a reality that will undoubtedly be exacerbated by EPA's attempts to remove State and Tribal authority to get the information they need before their review period starts to run.[6]

EPA's conclusion that the benefits of the proposal outweigh its costs lacks evidence and rests on EPA's unsupported assertions. Without facts showing that problems with 401 processes actually exist, the benefits of EPA's Proposed Rule are illusory. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (Agency action is arbitrary and capricious if it "entirely fails to consider an important aspect of the problem."). Meanwhile, EPA ignores key costs, including the most important under the CWA: the costs to water quality. *Michigan v. EPA*, 576 U.S. 743 (2015) ("[H]arms that regulation might do to human health or the environment" are important costs to consider when implementing environmental statutes.).

Because of the Proposed Rule, especially in combination with EPA's proposed restrictive Waters of the United States rule, waterways that States and Tribes once could have protected under section 401 will be degraded by federally permitted projects. *See Updated Definition of "Waters of the United States,"* 90 Fed. Reg. 52498 (Nov. 20, 2025). States and Tribes rely on their local waterways for a wide array of uses, including for drinking water and a broad range of recreational and commercial activities, yet EPA's economic analysis of the Proposed Rule does not evaluate these costs. The Proposed Rule also does not address the regulatory burden that the EPA is imposing on State and Tribal authorities tasked with administering section 401 by yet

[6] *Id*.

again attempting to change the rules governing that process. These costs are significant for Tribes with limited resources that have invested time and effort into implementing previous rules.

The Proposed Rule cannot be authorized with the existing record. The handful of industry comments EPA references cannot substitute for the concrete factual information EPA lacks to justify its proposed changes. EPA's attempts to make any changes to the implementation of section 401 must be supported by facts and analysis, not unsupported conjecture.

C. EPA Has No Authority to Limit the Scope of Certification to Merely the "Discharge."

1. *PUD No. 1 and Loper Bright require that the scope of certification cover the activity as a whole.*

The Proposed Rule would unlawfully restrict the scope of review in section 401 certifications. 91 Fed. Reg. at 2023. Section 401(a) sets a "discharge" as "the threshold condition" triggering the need for a federal permit to obtain section 401 certification. *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 711–12 (1994) (citing 33 U.S.C. § 1341(a)); *see* 40 C.F.R. § 121.2. Once that threshold is met, States and Tribes may require "conditions and limitations on the activity as a whole" in their certifications. *Id.* at 712 (citing 33 U.S.C. § 1341(d)). The Proposed Rule impermissibly seeks to limit section 401 conditions to the discharge itself, even if the whole activity subject to the federal permit would violate applicable State and Tribal water quality requirements. 91 Fed. Reg. at 2040 (proposed amended 40 C.F.R. § 121.3). This would allow federal agencies to authorize projects that violate State and Tribal laws, over the objection of the affected States and Tribes, contrary to the intent of section 401 and principles of federalism. *See* 33 U.S.C. § 1251(b). The Proposed Rule achieves this result by misreading the statute, *PUD No. 1*, and *Loper Bright*.

EPA lacks authority to adopt any interpretation of section 401 other than that prescribed by the Supreme Court in *PUD No. 1*. The Court held that section 401 "is most reasonably read"

to grant States and Tribes authority to place conditions "on the activity as a whole." *PUD No. 1*, 511 U.S. at 712. In *Loper Bright*, the Court explained that a statute has "a single, best meaning," which "is fixed at the time of enactment," and held that it is the role of the courts to determine that best meaning. 603 U.S. at 400 (citations omitted). "[I]f it is not the best, it is not permissible." *Id.* Because the Supreme Court has already determined the best—i.e., "most reasonabl[e]"—interpretation, *PUD No. 1*, 511 U.S. at 712, it is "not permissible" for EPA to adopt a contrary rule. *Loper Bright*, 603 U.S. at 400.

The fact that *PUD No. 1* subsequently cited *Chevron* to bolster its interpretation does not open the statute to reinterpretation. That citation was a secondary rationale for the Court's holding. The Court began with a traditional textual analysis of section 401, from which it ascertained "the most reasonabl[e]" reading. *PUD No. 1*, 511 U.S. at 711–12. Only after doing so did the Court acknowledge EPA's consistent interpretation. *Id.* at 712. The Court then cited *Chevron* as the second case, following a "*See*, *e.g.*" signal, to support the statement that this interpretation was entitled to deference.

In short, the Court did not follow *Chevron*'s two-step approach. *See Loper Bright*, 603 U.S. at 396-97 (describing two-step approach). In *PUD No. 1*, the Court never identified whether it thought section 401 was ambiguous, but instead proceeded directly to ascertain the "most reasonabl[e]" interpretation using traditional textual analysis. 511 U.S. at 711–12; *cf. Loper Bright*, 603 U.S. at 396–97. It then bolstered its conclusion with EPA's interpretation, 511 U.S. at 712, but never "set aside the traditional interpretive tools" to defer to the Agency, as *Chevron* would have required. *Loper Bright*, 603 U.S. at 397. Indeed, the *PUD No. 1* dissent criticized the opinion for failing to follow the procedure of *Chevron*. 511 U.S. at 728.

That the *PUD No. 1* Court did not follow *Chevron* was part of a pattern the Court discussed in *Loper Bright*. The Court frequently declined to follow *Chevron* over time, which was one of the considerations that led the Court to overrule it. *Loper Bright*, 603 U.S. at 398 ("The Court did not at first treat it as the watershed decision it was fated to become; it was hardly cited in cases involving statutory questions of agency authority."), *id*. at 406 ("This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016."), *id*. at 410 ("[F]or decades, we have often declined to invoke *Chevron* even in those cases where it might appear to be applicable.").

What the Court did in *PUD No. 1*, instead of following *Chevron*, was exactly what *Loper Bright* ultimately held a court should do: exercise its "independent judgment" to interpret the statute, which may include consideration of the Agency's interpretation among other interpretive tools. *Id.* at 394. An agency's "interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA." *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). And that is what the Court continues to do in its cases decided after *Loper Bright*. *See Kennedy v. Braidwood Mgmt.*, 606 U.S. 748, 782–83 (2025) (holding that agency practice "buttresses" the Court's independent interpretation); *FCC v. Consumers' Research*, 606 U.S. 656, 682 (2025) (noting, after explicating the Court's interpretation, that the Agency viewed the statute the same way); *Bondi v. VanDerStock*, 604 U.S. 458, 480–81 (2025) (noting, after determining the best interpretation of the statute, that the Agency interpreted it the same way). The *PUD No. 1* Court did that very thing. It first interpreted the statute independently to find the "most reasonabl[e]" reading and then consulted EPA's longstanding interpretation for confirmation. *PUD No. 1*, 511 U.S. at

711–12. In short, *PUD No. 1* did not follow the *Chevron* two-step approach; instead, it took the exact approach later prescribed in *Loper Bright* and now consistently followed by the Court.

Further, it is clear from both *Loper Bright* and the Court's subsequent cases that what most impresses the Court in an agency's interpretation is not the logic of the Agency's reasoning, but its consistency over time. 603 U.S. at 386 ("the longstanding practice of the government—like any other interpretive aid—can inform a court's determination of what the law is" (citations modified)), *id*. at 394 ("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"); *Kennedy*, 606 U.S. at 782–83 (consistent 26-year agency practice buttressed Court's interpretation); *Consumers' Research*, 606 U.S. at 682 (finding support where the Agency "has long viewed the statute" as court interpreted it); *VanDerStock*, 604 U.S. at 480–81 (finding support where "for decades, the agency has consistently interpreted" it the same way and explaining that "the contemporary and consistent views of a coordinate branch of government can provide evidence of the law's meaning"). Indeed, one of the Court's reasons for overruling *Chevron* is that it led to a lack of consistency: "Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes . . .." *Loper Bright*, 603 U.S. at 410-11. The Court thus emphasized that "every statute's meaning is fixed at the time of enactment." *Id.* at 400 (quoting *Wis. Cent. Ltd. v. U.S.*, 585 U.S. 274, 284 (2018)).

The Court's repeated emphasis on longstanding consistency cuts strongly against EPA's attempt to reinterpret section 401 now. Before the now-repealed 2020 rule, EPA had consistently interpreted section 401 since its enactment to provide "that the scope of certification is the

activity subject to the Federal license or permit, not merely its potential point source discharges." 88 Fed. Reg. at 66592. The 2023 rule "realigns scope with accepted practice for the preceding 50 years." *Id.* It is that consistency and longevity, not the new meaning EPA found fifty years later, that will be most persuasive to the courts.

Even if *PUD No. 1* had followed the *Chevron* two-step interpretive methodology, that alone would not be enough to open the door to reinterpreting section 401. *Loper Bright*, 603 U.S. at 412 ("[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology."). In *PUD No. 1*, the Court *also* examined the text and independently determined the "most reasonabl[e]" reading. Where a court's holding is "grounded on a variety of interpretive methods," "the elimination of *Chevron* deference does not undermine the other bases for" the court's holding. *Garcia Pinach v. Bondi*, 147 F.4th 117, 134 (2d Cir. 2025). That is particularly true for section 401, where the Court explicitly found the "most reasonabl[e]" interpretation, exactly as *Loper Bright* now instructs courts to do.

2. *The Proposed Rule's effort to discredit PUD No. 1 must fail.*

In the Federal Register notice, EPA cites three cases ostensibly to support the contention that it may now reinterpret section 401 despite *PUD No. 1*. 91 Fed. Reg. at 2025. None of them do so. In *Lopez v. Garland*, 116 F.4th 1032, 1039, 1041 (9th Cir. 2024), as part of its independent interpretation, the court gave *Skidmore* "respect" to an agency's changed interpretation, but that was where no court had previously found a single best interpretation of the statute as *PUD No. 1* did for section 401. In *FDA v. Wages and White Lion Investments*, 604 U.S. 542, 571–72 (2025), the Court reviewed an agency's change in policy where the statute gave the Agency broad discretion, and no question of statutory interpretation was in dispute. And *Ozurumba v. Bondi*,

153 F.4th 396 (4th Cir. 2025), was another case like *Lopez* where no previous court had found the best interpretation of the disputed statute. In any event, the dispute there concerned only an alternative ground, which the court found unnecessary to resolve. *Id.* at 405–06. The court's argument for revisiting a *Chevron*-based interpretation quoted in the Federal Register was merely one side of the unresolved question. *See* 91 Fed. Reg. at 2025 (quoting *Ozurumba*, 153 F.4th at 406).

No court has questioned the Supreme Court's determination of the best reading of a statute, as in *PUD No. 1*, merely because the Court also cited *Chevron*. To do so would be an affront to the Court, in defiance of its constitutional authority and obligation "to say what the law is." *Loper Bright*, 603 U.S. at 385 (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). Thus, in litigation challenging the 2023 rule, EPA correctly recognized and argued that *PUD No. 1* and *Loper Bright* require that the scope of a certifying authority's review and of permissible conditions is the whole project. *See Louisiana v. EPA*, No. 23-CV-01714, Defs.' Mem. in Supp. of Cross-Mot. for Summ. J. and in Opp. to Pls.' Mot. for Summ. J., Dkt. No. 128-1, at 1118 (July 30, 2024), Defs.' Reply Mem. in Supp. of Cross-Mot. for Summ. J., Dkt. No. 146, at 4-10 (Oct. 30, 2024). EPA's Proposed Rule would thus not only reverse fifty years of agency practice regarding section 401, but would also reverse agency positions recently taken in litigation as to the meaning of *PUD No. 1* in light of *Loper Bright*—and it would do so in defiance of the Supreme Court's authority.

The Federal Register notice dismisses *PUD No. 1*, mistakenly, by noting that the 1971 regulation cited by the Court pre-dated the 1972 amendments containing the current version of section 401. 91 Fed. Reg. at 2025. It is true that the regulation pre-dated the current statute, but the regulation was not the only thing the Court cited. In the same citation, together with the

regulation, the Court quoted a 1989 EPA publication entitled "Wetlands and 401 Certification," which advanced the interpretation of section 401(d) that the Court also found "most reasonabl[e]." *PUD No. 1*, 511 U.S. at 712. Addressing the scope of review, the 1989 publication explained that "it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project."[7] By way of further explanation, EPA cited an example of a proper 401 review in which "[t]he impacts considered were not just from the discharge initiating the certification review, but water quality impacts from the entire project," including effects "both from construction and future operation . . . ."[8] EPA noted the fact that its regulations had been adopted under the prior statute "and thus, may have some anomalies . . .."[9] EPA thus viewed the regulations as applicable, even with some anomalies, despite the change in statutory language, and the 1989 publication explained in detail how EPA interpreted the statute. By citing both the regulation and the publication, the *PUD No. 1* Court reviewed the entirety of EPA's position, not just the regulatory language in isolation. Thus, even if *Chevron* deference to EPA had been the primary basis for the Court's holding rather than a secondary, bolstering rationale, EPA's longstanding interpretation would have substantial force enduring beyond *Chevron*.

The Federal Register notice next embraces arguments made by the dissent in *PUD No. 1*. 91 Fed. Reg. at 2025 & n.37. But to advance a dissenting opinion's view is "just an argument that the precedent was wrongly decided." *Loper Bright*, 603 U.S. at 412 (quoting *Halliburton*

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[7] U.S. EPA, WETLANDS AND 401 CERTIFICATION: OPPORTUNITES AND GUIDELINES FOR STATES AND ELIGIBLE INDIAN TRIBES 22 (Apr. 1989), https://www.regulations.gov/document/EPA-HQ-OW-2019-0405-1249 (attached as Attachment A).

[8] *Id.*

[9] *Id.* at 32 n.53.

Co. v. Ericas P. John Fund, Inc., 573 U.S. 258, 266 (2014)). And that, the Court explained, "is not enough to justify overturning a statutory precedent." *Id.*

3. *EPA misunderstands federalism.*

The Proposed Rule concludes its argument for narrowing the scope of certification, citing the "clear Statement" rule and the "major questions doctrine." 91 Fed. Reg. at 2026. These arguments reveal a breathtaking misunderstanding of federalism.

The purpose of the "clear language" rule is to ensure that Congress does not lightly intrude on the powers of States. *Sackett v. EPA*, 598 U.S. 651, 679–80 (2023). The Proposed Rule turns this on its head by portraying it as a concern that Congress has allowed the States to retain *too much* authority. 91 Fed. Reg. at 2026. In *Sackett*, the Supreme Court recognized that "[r]egulation of land and water use lies at the core of traditional State authority." 598 U.S. at 679. Tribes, too, possess this "inherent authority." *Wis. v. EPA*, 266 F.3d 741, 748 (7th Cir. 2001); *see Montana*, 450 U.S. at 566 (holding Tribes retain inherent power to regulate conduct on Tribal lands that "threatens or has some direct effect on . . . the health or welfare of the Tribe"); *Mazurie*, 419 U.S. at 557 ("Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"). "An overly broad interpretation of the CWA's reach would impinge on this authority." *Sackett*, 598 U.S. at 680. This is particularly true "given the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use." *Id.* (quoting 33 U.S.C. § 1251(b)).

Section 401 was written precisely to preserve this primary authority. Describing the many kinds of pollution that may result from a federally permitted project, in 2006, a unanimous Supreme Court recognized that "State certifications under [section] 401 are essential in the scheme to preserve State authority to address the broad range of pollution . . . ." *S.D. Warren Co.*

v. Me. Bd. of Env't Prot., 547 U.S. 370, 386 (2006); *see also id.* at 380 (describing broad purpose of section 401). Contrary to the misunderstanding expressed in the Proposed Rule, there is no reverse corollary to the "clear statement" rule that would create an extra burden on Congress merely to preserve the inherent powers of States and Tribes. Such a rule would be contrary to basic principles of federalism. If anything, the "clear statement" rule suggests that section 401 should be construed broadly to preserve the power of States and Tribes, as the Court held in *S.D. Warren*. *See also* 33 U.S.C. § 1370 (State authority).

The Federal Register notice displays a similar misunderstanding of federalism in its depiction of the major questions doctrine. 91 Fed. Reg. at 2026. That doctrine is a principle of statutory construction applicable "[w]here the statute at issue is one that confers authority upon *an administrative agency*." *W. Va. v. EPA*, 597 U.S. 697, 721 (2022) (emphasis added). It is intended to address a perceived problem of "*agencies* asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* at 724 (emphasis added). It requires that, where major policy decisions are involved, "[t]he *agency* . . . must point to clear congressional authorization for the power it claims." *Id.* at 723 (emphasis added; citation modified). It has no application to States. Indeed, it would make no sense applied to States, because there is nothing for Congress to delegate. States and Tribes possess the power to regulate land and water inherently: "Regulation of land and water use lies at the core of traditional State authority." *Sackett*, 598 U.S. at 679; *see Wis. v. EPA*, 266 F.3d at 748 (recognizing inherent Tribal authority). In fact, as held in *Sackett*, Congress must speak clearly if it wishes to *diminish* this power. 598 U.S. at 679-80.

The concern prompting EPA to seek to restrict State and Tribal rights contrary to principles of federalism appears to be that States and Tribes will have too much power "to decide

the fate of nationally important infrastructure projects, such as natural gas pipelines and hydropower dams, based on potentially speculative water quality impacts not linked to a point source discharge into waters of the United States." 91 Fed. Reg. at 2026. There are several flaws with this purported concern. First, there are no examples of it. It is purely hypothetical. Second, if a State or Tribe attempted to deny certification based on "speculative" impacts, judicial review should be sufficient to correct any such errors. Third, if an impact were "not linked to a point source discharge into waters of the United States," it would never be subject to section 401 certification in the first place, as it would not meet the "threshold" requirement identified in *PUD No. 1*, 511 U.S. at 712. Finally, there is no evidence that section 401, or anything else about the CWA, is holding back the energy infrastructure projects about which EPA expresses concern.

Since the adoption of section 401 in 1972, except for the interlude of the repealed rule between 2020 and 2023, EPA and the Supreme Court have continuously interpreted section 401 to allow States and Tribes to consider the impacts of the whole project when setting conditions for certification. This has not prevented the United States from surging in energy production throughout this time, reducing imports and increasing production to the point of becoming a net energy exporter.[10] The United States became the world's top oil producer in 2018 and has maintained its position for over seven years.[11] In fact, the United States is the world's largest oil

[10] *2024 was a record year for U.S. oil and natural gas exports*, AM. PETROLEUM INST.: ENERGY INSIGHTS, https://www.api.org/energy-insights/charts-analysis/2024-was-a-record-year-for-us (last accessed Feb. 13, 2026).

[11] *U.S. crude oil production established a new record in August 2024*, U.S. ENERGY INFO. ADMIN. (EIA) (Nov. 13, 2024) ("The United States became the world's top crude oil producer in 2018, a position it has maintained each year since."), https://www.eia.gov/todayinenergy/detail.php?id=63824; *2024: Another Banner Year for US Energy*, AM. ENTER. INST. (Mar. 4, 2025) ("For the 7th year in a row, the US set a new world record for oil output.") available at https://www.aei.org/foreign-and-defense-policy/2024-another-banner-year-for-us-energy/.

producer, with production of 13.5 million barrels per day.[12] EPA's claims that the section 401 process has slowed or hindered the expansion of energy production are unfounded.

In short, there is no need to change the longstanding interpretation of section 401. To do so would contradict the best interpretation of the statute, *see* 88 Fed. Reg. at 65594–96, a binding Supreme Court holding, and important principles of federalism, for reasons unsupported by facts or law.

D. EPA's Proposed Revisions to § 121.1(j) Would Prevent States and Tribes from Imposing Necessary Conditions to Implement State and Tribally Determined Water Quality Requirements.

EPA is proposing to revise the definition of "water quality requirements" at 40 C.F.R. § 121.1(j) from "any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the CWA, any Federal and State or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of State or Tribal law," to a new definition at § 121.1(f): "applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA, and applicable and appropriate State or Tribal water quality-related regulatory requirements for discharges." EPA is simultaneously proposing to define "discharge" at § 121.1(c) as "a discharge from a point source into waters of the United States." EPA also proposes to modify § 121.7(d) to require that certification decisions link any specific conditions to reasonably assure water quality directly to the "discharge" as newly defined.

The Agency acknowledges that these proposed changes will "return the definition of 'water quality requirements' to essentially what it was under the 2020 Rule." In particular, the proposed language significantly narrows the Agency's interpretation of the statutory phrase

[12] *Industry Explained*, AM. PETROLEUM INST.: ENERGY INSIGHTS, https://www.api.org/energy-insights/industry-explained (last accessed Feb. 13, 2026).

"other appropriate requirement of State law" in 33 U.S.C. § 1341(d) (section 401(d)) from all "water quality-related" requirements to only those regulations that directly regulate point source discharges into Waters of the United States. This is contrary to Congress's intent to give States and Tribes broad authority under section 401 and conflicts with the text of the CWA itself, the statute's legislative history, the Agency's longstanding interpretation of the law, and binding court cases defining the scope of section 401. 33 U.S.C. § 1377(e); *See also* 88 Fed. Reg. at 66602, 66604 (citing 2010 Handbook).

1. ***Applicable State and Tribal water quality requirements cannot be limited to only regulations of discharge from a point source.***

EPA's definition of water quality requirements is not in line with the CWA. Section 401(d) of the CWA provides:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law.

33 U.S.C. § 1341(d).

Under this statute, States and authorized Tribes have the authority to impose non-discharge-based limits necessary to protect section 303 water quality standards. Section 401(d) references section 301, which in turn references section 303, indicating certifications may implement any condition necessary to ensure the activity complies with water quality standards. *PUD No. 1*, 511 at 713; *see also* 91 Fed. Reg. at 2026 (this Proposed Rule's definition incorporating section 303). State and Tribal authority to impose water quality standards based limitations is independent of the catch-all authority to enforce "other appropriate requirements of State law." Section 401(d) permits States and Tribes to impose conditions on an applicant's non-

discharge activities that are unrelated to EPA's overly narrow definition of "discharge." *PUD No. 1*. 511 at 713.

States and Tribes must be able to implement water quality standards and other water quality-related requirements addressing impacts caused by activities other than point source discharges to waters within their jurisdiction. Although the Proposed Rule recognizes that applicable law may include provisions of State or Tribal law that are more stringent than federal law, the Agency States that "these more stringent provisions may not alter the scope of certification as provided." EPA's narrow interpretation of "other appropriate requirements of State law" at 40 C.F.R. § 121.1(c) is contrary to the statute's recognition of broad State and Tribal authority to regulate polluting activities as a whole once an applicant proposes a discharge to Waters of the United States. *PUD No. 1*, 511 at 713; *see Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 648 (4th Cir. 2018) ("Put simply, the State may prefer protecting the environment in one way to protecting it in another way. But in enacting section 1341(a)(1), Congress did not intend to allow federal agencies to 'override' such State policy determinations." (citing S. Rep. 92–414, at 69 (1971)).

Limiting State and Tribal authority to discharges to match the EPA's overly limited view of federal authority directly undermines the purpose of 401: to ensure federal projects do not authorize activities that would violate State or Tribal water quality standards or other water quality-related requirements. *See, e.g.,* S. Rep. 92–414, at 1487 (1971) ("The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements."); *see also N.C. Dep't of Env't Quality v. FERC*, 3 F.4th 655, 670 (4th Cir. 2021) ("[T]he purpose behind § 401 itself and its certification requirement is to assure that Federal licensing or permitting agencies cannot override State water

quality requirements." (internal quotations omitted)); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("Through [section 401], Congress intended that the States would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval."). EPA's interpretation limiting "other appropriate requirements of State law" to only EPA's narrow view of discharge is in direct conflict with binding precedent on the scope of the statutory text. *See Wash. State Dept. of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 383-85 (2003).

EPA concurrently proposes to modify § 121.7(d) to require that certification decisions relate directly to the water quality impacts of point source discharge into a water of the United States. The CWA makes clear that when determining whether to grant, deny, or impose conditions on a certification, a State or Tribe may consider the activity as a whole, impose conditions requiring compliance with water quality standards, and "any other appropriate requirement under State law," 33 U.S.C. § 1341(d). Congress chose not to adopt more stringent formulations of section 401(d), but "expanded" beyond those earlier proposals "to also require compliance with any other appropriate requirement of State law which is set forth in the certification." S. Rep. No. 92–1236, at 138 (1972) (Conf. Rep.). "Any" is a broad word that literally means "all." *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008); *Harrison v. PPG Indus.*, 446 U.S. 578 (1980). The word ''appropriate'' must be interpreted broadly in light of the statute's text and purpose. *Michigan*, 576 U.S. at 752 ("'appropriate' is 'the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors'" (quoting *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (opinion of Kavanaugh, J.))).

States and Tribes, therefore, must be able to review a wide range of water quality impacts, including a project's potential to affect designated uses, such as recreation, or alter the chemical, physical, and biological integrity of waterways, and must be able to review for compliance with State and Tribal standards that:

- Protect water quality from air emissions and other non-discharge project pollution;
- Enable access to waterways for cultural and recreational purposes;
- Maintain minimum flow rates needed to protect designated uses;
- Maintain conditions necessary to preserve habitats and protect aquatic life; including fish and shellfish relied upon for customary and traditional uses;
- Maintain conditions necessary to protect Tribal uses, such as cultural and traditional uses;
- Maintain waterway temperatures, including temperature changes due to hydroelectric dam operation, dewatering, or removal of tree cover;
- Control sediment runoff and erosion associated with vegetation removal, excavation, and similar activities;
- Add fish passage at barriers (e.g., dams, diversions, culverts, tide gates, etc.) to protect beneficial/designated uses.

Where a State or Tribe is a certifying authority, the Proposed Rule would actually hinder projects that meet or exceed local water quality requirements. Projects often need dual federal and State or Tribal authorizations. State and Tribal authorizations are independent requirements rooted in State or Tribal law. But if the State or Tribe is unable to condition a section 401 certification based on a proposed project's violations of its water quality requirements, then the State or Tribe would not be able issue any required parallel State or Tribal permits due to those violations. Instead of streamlining the permitting process or acknowledging and safeguarding the "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. § 1251(b), as the Proposed Rule claims to do in this and other sections, these suggested amendments unlawfully supersede State and Tribal water quality requirements and establish an

inefficient system. EPA's proposed changes will serve only to force the denial of more applications because the statute requires States and Tribes conclude that projects "will comply" with their water quality standards before issuing a certification. The parties involved in issuing a federal permit may, therefore, invest considerable time, effort, and personnel, only to have the project hindered due to the denial of permits by State or Tribal authorities. EPA's proposed changes, therefore, are not only inconsistent with the Act itself but also lack any rational basis.

EPA is also requesting comment on whether it should limit "water quality requirements" to only numeric water quality criteria. It should not. The Supreme Court rejected this very argument in *PUD No. 1*, 511 U.S. at 714–19 (upholding the State's application of narrative antidegradation rule to establish minimum stream flows as a condition to a section 401 certification). Such a requirement would disregard the existing narrative-based water quality standards currently in use and would effectively preclude the application of water quality-related protections to Tribal-designated uses that may be inherently narrative in nature. *City of Albuquerque v. Browner*, 97 F.3d 415, 429 (10th Cir. 1996) (upholding EPA's decision to deny a National Pollution Discharge Elimination System permit to the City of Albuquerque due to interferences with the Pueblo of Isleta's narrative water quality standards protecting cultural uses).

Finally, EPA proposes that one alternative way to read section 401(d) is to limit the application certification conditions based on State or Tribal law to "monitoring requirements" based on the placement of the comma in 33 U.S.C. § 1341(d). This is a plain misreading of the provision. The plain language of the provision acknowledges that other appropriate requirements of State law can be "set forth in such certification," and that monitoring requirements may be necessary to assure that the applicant complies with those requirements. *Id.*

2. *The Scope of Waters Subject to State and Tribal Certification Cannot Be Limited to Waters of the United States.*

Regarding the scope of review and conditions, section 401(d) authorizes certifying authorities to establish conditions needed to ensure that the applicant will comply with various provisions of the CWA and, importantly, "any other appropriate requirement of State [or Tribal] law...." 33 U.S.C. § 1341(d). Of course, the enumerated provisions of the Act apply only to those waters covered by the Act, *i.e.*, navigable waters. *See* 88 Fed. Reg. at 66604. Equally clearly, though, "any other appropriate requirement of State [or Tribal] law" applies to whatever waters the State or Tribal law covers. *Id.* at 66604–05. Some States and Tribes with Treatment as a State ("TAS") have laws protecting non-navigable waters, while others do not. *Id.* at 66605 ("About half of the States have State laws covering at least some surface waters beyond CWA navigable waters."). Thus, if a federal permit or license for a discharge to navigable waters also has impacts on non-navigable waters, and the certifying State or Tribe has laws protecting those non-navigable waters, the certification may include conditions needed to ensure compliance with the relevant State or Tribal law. *Id.* at 66604–05.

EPA's application of *Sackett* to support its argument restricting the scope of waters in which certifying authorities can consider water quality impacts is arbitrary and illogical. The Agency cites *Sackett* for the proposition that "[r]egulation of land and water use lies at the core of traditional State authority," and that Supreme Court precedent "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and State power and the power of the Government over private property." 598 U.S. at 679. However, despite recognizing that the specific application of waters beyond Waters of the United States under section 401 occurs only when "certifying authorities may consider waters beyond waters of the United States when certifying compliance with requirements of State or Tribal law that

otherwise apply to waters of the State or Tribe beyond waters of the United States," 91 Fed. Reg. 2028, EPA attempts to argue that there has been no clear Congressional Statement extending section 401 beyond Waters of the United States. This ignores the fact that *Sackett*'s focus was on the unlawful impingement of State authority, which is precisely what the Proposed Rule threatens to do. Relying on *Sackett* to restrict a provision of the CWA that respects and protects the right of States and Tribes to prevent, reduce, and eliminate pollution misreads the case and inverts its precedent.

E. Modifications to 40 C.F.R. §§ 121.5 and 121.6 Limiting Certifying Agencies' Ability to Acquire Information from the Applicant Would Confuse and Lengthen Permit Review.

EPA is proposing to narrow the information required in a request for certification. This proposal would result in improper permits, certification denials, and inefficient and nontransparent review.

EPA's proposal eliminates the following language from 40 C.F.R. § 121.5(c):

> Where a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has identified contents of a request for certification in addition to those identified in paragraph (a) of this section that are relevant to the water quality-related impacts from the activity, the project proponent shall include in the request for certification those additional contents identified prior to when the request for certification is made.

EPA's rationale for eliminating this language is to "standardize the contents of a request for certification to provide applicants, certifying authorities, and Federal agencies with clear regulatory text identifying when the statutory reasonable period of time begins." 91 Fed. Reg. at 2018. Under this rule, EPA would limit the information applicants must submit to trigger the "reasonable period of time (not to exceed one year)" within which a certifying agency can render a decision on an applicant's certification request. 33 U.S.C. § 1341(a)(1).

Defining a "request for certification" to narrowly include the permit application and "readily available water quality related materials" while eliminating several components of required information before the "reasonable period of time" begins is unreasonable. 91 Fed. Reg. at 2040. States and Tribes must be able to acquire the information necessary to make proper certification decisions under their own laws and to produce permit conditions protecting water quality that federal agencies are required to incorporate. 91 Fed. Reg. at 2037 (citing 33 U.S.C. § 1341(a)(1)). States and Tribes have diverse procedural and substantive review requirements to meet their obligations under Federal, State, and Tribal law. *See e.g.*, Wis. Admin. Code NR § 103 (requiring detailed wetland functional assessments). Many of these requirements demand specific information on water quality, wetland functions, and Project activities and discharges. *See e.g.*, *id*. at § 103(1)(b) (requiring maintenance of seasonal stream flow); Or. Admin. R. 340-041-0028 (OR temperature standards tailored to salmonid species); Ariz. Rev. Stat. Ann. § 49-221 (standards for agricultural water use in Arizona; standards for ephemeral streams in arid climates); Fla. Admin. Code Ann. r. 62-302.532 (Florida standards for estuaries) Minn. R. 7050.0224 (sulfate standards for wild rice). Each State or Tribe may have its own unique requirements. *See e.g.*, *Browner*, 97 F.3d at 429.

Starting the "reasonable period of time" once the applicant submits the bare minimum will force States to truncate review. For example, the assessment of baseline water quality conditions often requires months of data collection and analysis, the hiring of consultants, and the dedication of certifying agency staff time to review proposals.[13] Both applicants and

[13] *See e.g.*, Wash. State Dep't of Ecology, WATER QUALITY CERTIFICATIONS FOR EXISTING HYDROPOWER DAMS GUIDANCE MANUAL, PUB. NO. 04-10-022 (March 2005) (outlining State expectations for studies, analyses, and monitoring plans required for 401 certification); Wash. State Dep't of Ecology, Order No. 9007, Enloe Dam 401 Certification (July 13, 2012) (requiring

certifying agencies benefit from robust communication regarding the specific requirements of State or Tribal water quality law before a certification request is submitted, to ensure that the applicant has a reasonable time to gather this information before the applicable period of time ends.

If a certifying agency determines that additional or different water quality information is required after an applicant submits a request, but that information cannot be developed and reviewed within a reasonable period of time due to seasonality or other factors, it may result in certification denials. *See* Laura Gatz, Cong. Rsch. Serv., R46615, CWA section 401: Overview and Recent Developments, n.152 (2022) (noting that limitations on the one-year review period "could lead to an increase in certification denials in instances in which States may consider the information insufficient for making a decision"). Restricting States' and Tribes' ability to request complete information before the reasonable period of time begins will lock certifying agencies into approving certifications that do not protect water quality and are vulnerable to challenge, or denying certifications for lack of sufficient information. It also leaves the public in the dark about a project's potential local water quality impacts.

While the Agency contends that States and Tribes would be free to request and accept additional information once the one-year reasonable period of time is triggered, the rule change would require certifying agencies to make decisions based on incomplete information. 91 Fed. Reg. at 2018 ("Nothing in the proposed rule would preclude an applicant from submitting additional relevant information or preclude a certifying authority from requesting and evaluating additional information within the reasonable period of time."). Pre-request meetings without the

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Water Quality Management Plan, Construction Quality Assurance Project Plan, and Operation Quality Assurance Project Plan as appendices to certification).

ability to specify specific information needed would not be sufficient for many States and Tribes to communicate the full extent of their water quality standard requirements. *See id*. at 2042 (discussing prefiling meeting requests at § 121.6). The Proposed Rule limiting the information available to States and Tribes in a request for certification will reduce efficiency and transparency in processing such requests.

EPA's proposed changes to §§ 121.5 and 121.6 are not based on evidence that the current approach fails to implement the policies of section 401—to ensure that federal permits and licenses do not interfere with State and Tribal water quality standards—and must be abandoned.

F. *Hoopa Valley Tribe* and Subsequent Case Law Establishes the Limits on the Withdrawal and Resubmissions of Applications.

EPA's discussion of its regulation on withdrawal and resubmission of applications is confusing and will create, rather than alleviate, uncertainty around an issue that has been well-settled by federal courts. And to the extent that EPA seeks to expand upon the federal case law that already interprets the limits on States and Tribes extending the time to act under section 401, it is in excess of EPA's statutory authority.

EPA proposes to prohibit States and Tribes from requesting that the applicant withdraw its application or "take any action to extend the reasonable period of time," except for agreeing in writing with the relevant federal agency to extend the reasonable period of time up to one year. *Id*. at 2041. EPA claims that it is taking this action in response to requests for regulatory clarity regarding withdrawal and resubmission, *id*. at 2022, but no such lack of clarity exists. EPA confusingly claims that its proposed withdrawal and resubmission regulation is consistent with federal case law, *id*. at 2022, but that it also will cause additional denials.[14] If the law is already settled by federal courts, the ultimate arbiters of statutory ambiguity, *Loper Bright*, 603 U.S. at

[14] Economic Analysis at 18.

412–13, then there is no need for EPA to add this provision to its regulations, and doing so will cause no change in the number of denials issued. If EPA's finding about the potential increase of denials from its proposal is correct, then it suggests that EPA, in fact, is seeking to adopt a regulation that is broader than what federal courts have found the statute to prohibit, which EPA lacks the power to do.

In 2019, the D.C. Circuit issued a narrow holding in *Hoopa Valley* that the one-year clock under section 401 did not restart when States and an applicant entered into a written agreement to indefinitely withdraw and resubmit the same application while the States took no action to assess the project. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1103 (D.C. Cir. 2019). The D.C. Circuit was clear that its holding applied only to the "type of coordinated withdrawal-and-resubmission scheme" that was present in that case, *Hoopa Valley*, 913 F.3d at 1103, not to any and all instances in which an applicant might voluntarily withdraw and resubmit its application. The court also repeatedly noted that the delay caused by the written agreement in the *Hoopa Valley* case lasted for a "lengthy period of time," *id.* at 1105, of "more than a decade," *id.* at 1104–1105. During that delay period, the States "shelv[ed]" the water quality certification, *id.* at 1104, despite the fact that the application had "been complete and ready for review for more than a decade," *id.* at 1105.

To the extent that the holding in *Hoopa Valley* left any unanswered questions, several subsequent cases have clarified its scope: that a waiver only occurs if the certifying authority engages in a coordinated scheme to have the applicant withdraw and resubmit its application to buy the certifying agency more time than section 401 provides. In *N.C. DEQ*, the court held that the State did not waive its section 401 authority when an applicant inquired about withdrawing and resubmitting its application, and the State responded to those inquiries. 3 F.4th at 673. In

Cal. State Water Res. Control Bd. v. FERC, 43 F.4th 920, 932 (9th Cir. 2022), the court held that the State did not waive its section 401 authority when the State acquiesced to the applicant's own decision to withdraw and resubmit its applications rather than have them denied. And in *Village of Morrisville, Vt. v. FERC*, 136 F.4th 1117, 1128 (D.C. Cir. 2025), the court held that the State did not waive its authority under section 401 when it allowed an applicant to withdraw and resubmit its application, because the applicant needed more time to provide the State with information and the withdrawal and resubmission did not occur pursuant to an agreement with the State. The court expressly held that "[a]bsent evidence of the State's mutual agreement with the applicant to frustrate the statutory scheme, States' rights and responsibilities to ensure compliance with their own water-quality standards are too important to be so easily stripped away." *Id.* (internal quotations omitted).

As is discussed above, EPA does not have the authority to second-guess or change a court's clear interpretation of a statute. However, it is unclear whether EPA's proposal to prohibit "any action to extend the reasonable period of time" seeks to go beyond the holding in *Hoopa Valley* and its progeny and prevent more than a coordinated scheme by or mutual agreement between the certifying authority and the applicant to circumvent section 401's mandate to act within a reasonable period of time not to exceed one year. Given that lack of clarity and the settled nature of the case law, EPA should withdraw its confusing and unlawful proposal to add 40 C.F.R. § 121.6(e) to its regulations.

G. It is Unreasonable to Eliminate the Ability to Extend the Reasonable Period of Time to Allow States and Tribes to Comply with Public Notice Procedures.

EPA proposes to eliminate extensions of the reasonable period of time to accommodate States' and Tribes' public notice and hearing procedures. 91 Fed. Reg. at 2021. EPA also proposes to eliminate the requirement that States and Tribes certify compliance with the public

notice procedures established under the Act. *See* 40 C.F.R § 121.7(d). States and Tribes with EPA-approved water quality standards are required to provide public notice and hold a public hearing when a proposal to certify is submitted. These procedures are required for permits that often double as water quality certifications. *See e.g.*, Wis. Stat. § 281.36 (stating that approval of a wetland permit constitutes approval of wetland water quality standards certification and requiring extensive public notice and comment procedures).

The Proposed Rule discourages thorough notice and public participation. This is contrary to section 401, which requires States to adopt public notice procedures and provides that States may promulgate "procedures for public hearings in connection with specific applications" as appropriate. 33 U.S.C. § 1341(a)(1). There is no indication that compliance with required public notice procedures in a certification decision hinders or confuses the process. In contrast, the Proposed Rule creates less transparency and efficiency for the public. More, not less, public participation is encouraged under the CWA. 33 U.S.C. § 1251(e) ("Public participation. . . shall be provided for, encouraged, and assisted by the Administrator and the States."). For these reasons, extensions of the reasonable period of time are necessary accommodations to ensure thorough review and consideration of certification decisions. Eliminating necessary extensions to accommodate public participation is unreasonable. 40 C.F.R. § 121.6(d).

H. Section 121.10 Should Allow States or Tribes to Modify Permits Without Applicant Consent, and the Substance of the Modification Should be Determined by the State or Tribe Alone.

The CWA does not sanction EPA's attempt to give applicants veto power over modifications of existing certifications. The Act also does not grant the federal permitting agency a role in developing the substance of a modification to a granted certification. Authority to modify certifications rests with the certifying State or Tribe.

Section 401 does not provide any basis for giving the applicant a role in determining whether and how an existing certification should be modified. Section 401 reserves the right to determine if a certification no longer reasonably assures compliance solely to "the State, or if appropriate, the interstate agency or the Administrator." 33 U.S.C. § 1341(a)(3) ("[T]he State, or if appropriate, the interstate agency or the Administrator, notifies such agency within 60-days after receipt of such notice that there is no longer reasonable assurance that there will be compliance."). States, Tribes, and the Administrator also have the sole authority to review operations and suspend licenses. *Id*. at § 1341(a)(4)-(5). While the permittee has the opportunity to comment, the certifying authority makes the ultimate final decision. *Id*. at § 1341(a)(4) ("Prior to the initial operation of any federally licensed or permitted facility... the licensee or permittee shall provide an opportunity for such certifying State... to review the manner in which the facility or activity shall be operated... Upon notification by the certifying State... that the operation... will violate applicable effluent limitations... such Federal agency may, after public hearing, suspend such license or permit.").

Providing applicants with the ability to influence—and indeed, veto—modifications beyond providing input via comment would be contrary to the Act's purpose of protecting water quality. Modifications may be necessary as an applicant's construction plans change or extenuating circumstances emerge that eliminate reasonable assurances of compliance. Modifications may result from permittee conduct that causes a violation of an applicable water quality standard. Unlike States and Tribes, an applicant has no obligation to protect water quality and will be motivated by factors that are not permissible considerations when making decisions under the Act. The proposal to give applicants any role in determining which modifications are needed to keep a project in compliance with water quality standards, therefore, is unlawful.

EPA's proposal also ignores that modifications are often necessary to avoid suspension of a license or a permit. *See* 40 C.F.R § 121.10(b) (revocation of permits is a separate process). Under EPA's proposal, States and Tribes will be forced to suspend or revoke certifications where an applicant will not agree to modifications necessary to ensure compliance with water quality standards. This inefficient outcome is directly at odds with EPA's claim that its proposed changes are aimed at improving the 401 processes.

Commensurate with the text of the statute, the current regulation provides for written agreement between the federal permitting agency and the certifying agency to modify an authorization under section 401. *See* 40 C.F.R. § 121.10(a). While it is appropriate for the certifying agency and the permitting agency to jointly agree that a modification is necessary, the substance of the modification must be left to the State or the Tribe. 91 Fed. Reg. at 2031. As is discussed above, the CWA gives States and Tribes, not the federal government, the power to set the terms of the 401 certifications, and local authorities are in the best position to craft modification conditions that address any potential water quality concern. Section 121.10 must be left as it is written.

I. All Federal CWA Licenses and Permits are Subject to Section 401.

In the Proposed Rule, EPA eliminates the definition of "project proponent" at 40 C.F.R. § 121.1(h), *id*. at 2021, and would replace it with the term "applicant." *Id*. at 2009 n. 2. Section 401(a)(1) applies to "[a]ny applicant for a license or permit to conduct any activity including, but not limited to, the construction or operation of facilities" that may violate a State's or Tribe's approved water quality standards. EPA is seeking comment on whether the best reading of section 401 requires that certifications be obtained where there is no "applicant" such as where the Corps produces a general permit, such as nationwide and regional dredge and fill permits, or

undertakes a civil works project. *Id*. at 2021. EPA should not read applicant to exempt general permits and civil works projects from the section 401 certification process.

EPA expressly states that its longstanding position is that ‘‘both case law and prior Agency rulemakings and guidance recognize that general Federal licenses or permits are subject to section 401 certification.’’ *Id*. at 2021. There is no basis for EPA to depart from this long-held position; indeed, doing so would be at odds with the purpose and text of the CWA.

As the case EPA itself cites makes clear:

> Neither the language nor the history of section 404(e) of the Clean Water Act (“General permits [for dredged or fill material] on State, regional, or nationwide basis”), 33 U.S.C. § 1344(e), suggests that States have any less authority in respect to general permits than they have in respect to individual permits. 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.

U.S. v. Marathon Dev. Corp., 867 F.2d 96, 100 (1st Cir. 1989). Congress expressly adopted the provision of the CWA that allowed for the use of general permits with the caveat that allowing for general permits was not meant to “preclude or deny the right of any State…to control the discharge of dredged or fill materials in any portion of the navigable waters within the jurisdiction of such State.” 33 U.S.C. § 1344(t). In *Marathon Dev. Corp.*, the court thus concluded that “[w]hen 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.” 867 F.2d at 100. *Marathon Dev. Corp.* does not rely on *Chevron* deference to reach this conclusion. Subsequent cases have concurred. *See, e.g.*, *Keating*, 927 F.2d at 619. EPA’s request for comments on “reliance interests” on EPA’s previous Statements on the applicability of section 401 to projects without applicants misses the

point. *See* 91 Fed. Reg. at 2021. EPA lacks the authority to rewrite the CWA. EPA lacks any authority to attempt to exempt general permits from section 401.

EPA similarly lacks any authority to entertain exempting projects without applications, such as the Army Corps civil works projects, from section 401. The term "applicant" in section 401 must be read *in pari materia* with the section that it seeks to implement, section 303 concerning water quality standards. 33 U.S.C. § 1313. State and Tribal water quality standards approved under section 303 apply to all federal facilities under section 313. 33 U.S.C. § 1323. Congress passed this section in response to the Supreme Court rejecting certiorari on an Eighth Circuit decision that federal agencies are not required to obtain water quality certifications because they are not "applicants." *State of Minn. by Spannaus v. Hoffman*, 543 F.2d 1198, 1205 (8th Cir. 1976); *cert. denied*, 430 U.S. 977 (1977); *North Dakota v. U.S. Army Corps of Eng'rs*, 270 F. Supp. 2d 1115, 1121 (D.N.D. 2003) ("The Clean Water Act was amended in 1977 in response to an Eighth Circuit decision which held that the Corps of Engineers was exempt from sections 313 and 404 of the Clean Water Act when conducting dredging activities." (citing S.Rep. No. 95–370, at 68–69 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4393)). It would not make sense for Congress to exempt the Corps and other federal agencies from the requirement to obtain a certification while at the same time subjecting federal projects to State water quality standards. There is no other statutory mechanism for States and Tribes to ensure that federal projects are reasonably assured not to impact local water quality. A rule that exempts the Corps or any other federal agency from the requirement to obtain a State or Tribal water quality certification is contrary to the letter of the CWA.

Exempting general permits and civil works projects from section 401 would also be contrary to the CWA's basic purpose to improve and protect water quality. The proposal also runs

contrary to section 401's protection of State and Tribal power to ensure that federally permitted projects do not interfere with the Act's water quality goals. EPA lacks statutory power or any rational basis consistent with the Act's basic purpose to reverse its position that section 401 applies to general permits and civil works projects.

J. EPA's Proposed Changes to the Section 401(a)(2) Process are Not Based on Any Evidence and are Contrary to the Statute.

Section 401(a)(2) of the CWA provides States and Tribes with the means to address pollution in neighboring States that may interfere with local water quality standards. The purpose of this section is to ensure that the permitting actions in one State do not result in water quality violations in another jurisdiction. EPA proposes to change existing rules governing the 401(a)(2) process to deemphasize the role of Tribal governments, unnecessarily hasten review of water quality impacts, and create categorical exclusions where none are needed or authorized by the statute. EPA's proposed changes are not supported by evidence that the current process is cumbersome, inefficient, or nontransparent. Instead, the proposed changes confuse requirements and limit available information.

1. *The "neighboring jurisdiction" definition in 40 C.F.R. § 121.1(g) provides regulatory clarity and should not be amended.*

EPA proposes to delete the term and definition of "neighboring jurisdiction" including specific references to Tribes treated as States for the purposes of section 401(a)(2). 91 Fed. Reg. at 2032. EPA should not remove the definition of "neighboring jurisdiction" because the current definition enhances clarity and acknowledges the Tribes' statutory rights under section 401(a)(2). *See* 40 C.F.R. § 121.1(g). Section 518(e) of the CWA explicitly authorizes the EPA to "treat an Indian Tribe as a State." 33 U.S.C. § 1377(e). EPA's current definition of "neighboring jurisdiction," appropriately incorporates this statutory language. 40 C.F.R. § 121.1(g)

("Neighboring jurisdiction means any State, or Tribe with treatment in a similar manner as a State for Clean Water Act section 401 in its entirety or only for Clean Water Act section 401(a)(2), other than the jurisdiction in which the discharge originates or will originate."). The current regulation at 40 C.F.R. § 121.1(g) is helpful in that it specifies Tribes may have treatment as a State authorization only for section 401(a)(2). The current definition accurately reflects that the statute does not require Tribes to adopt all aspects of CWA administration to be treated in a similar manner as a State for purposes of 401(a)(2). Therefore, the definition should not be removed.

2. *Notification to a neighboring State should not be limited to impacts from EPA's new, narrow definition of discharge.*

Limiting the notification of the neighboring State solely to the discharge as defined in EPA's new, narrower, definition is not consistent with section 401. 91 Fed. Reg. 2032. As discussed at length *supra*, section 401 applies to the applicant's activities that may affect the water quality of a neighboring jurisdiction. This includes all activities connected to the regulated activity that may lead to water quality violations, not just the discharge itself. EPA's revision to narrow the scope of 401(a)(2) notifications ignores the reach of the certification process to any activity connected to a regulated discharge that may impact water quality.

Restricting the "may effect" notification to the inappropriately limited scope in EPA's Proposed Rule is also inconsistent with the protective purpose of the CWA, as it will lead to increased water quality violations within States and Tribal lands. Activities connected to a discharge have a wide range of impacts that could affect water quality in a downstream jurisdiction. Water quality standards vary widely across States and Tribes, and more information about the full range of impacts serves the goal of protecting water quality. Limiting the information to the discharge alone will leave neighboring States and Tribes in the dark and lead

to a higher likelihood of violations of State and Tribal water quality standards resulting from pollution originating in other jurisdictions.

3. *EPA provides no reason to modify the role of the Regional Administrator in § 121.1(a) and eliminate the authority to seek supplemental information in § 121.13(c).*

EPA proposes to eliminate the term "Regional Administrator" from the rules and replace it with a revised definition of administrator that includes an authorized designated representative. 91 Fed. Reg. 2032-33. Additionally, EPA proposes to eliminate the authority of a Regional Administrator to enter into agreements for the provision of supplemental information in the 401(a)(2) process. *Id*. EPA should reject both of these changes.

The Regional Administrator plays an important role in the 401(a)(2) process because that person is often in contact with affected entities, familiar with local water quality requirements, and can act quickly to address informational and substantive deficiencies in the 401(a)(2) review process.[15] By eliminating a direct role for the Regional Administrator, EPA is placing more control over the regulation of State and Tribal water quality standards in the hands of officials thousands of miles away who lack knowledge of local water quality standards or contacts with State and local officials. This is contrary to section 401's recognition of the important role played by regional and local decisionmakers in protecting water quality. While updates to the information technology systems available to applicants, certifying, and federal agencies may serve to improve aspects of the (a)(2) process, 91 Fed. Reg. at 2034, those changes do not substitute for the local expertise of the Regional Administrator. The level of centralization proposed by EPA is likely to reduce efficiency and increase delays. EPA should not eliminate or modify the role, responsibilities, and authority of the Regional Administrator in the final rule.

[15] *See e.g.*, *Region 5 Tribal Program*, U.S. EPA: ENVIRONMENTAL PROTECTION IN INDIAN COUNTRY https://www.epa.gov/tribal/region-5-tribal-program (last accessed Feb. 13, 2026).

4. *A deadline for a public hearing on a neighboring jurisdiction's objection is unnecessary, does not provide needed flexibility for agencies, applicants, and neighboring jurisdictions, and should not be codified at § 121.14.*

EPA proposes to create a deadline of 90-days for a permitting agency to hold a public hearing on an objection from a neighboring jurisdiction under the 401(a)(2) process. *Id*. at 2035. This deadline is not in the statute and does not promote reasoned, flexible, and careful decision-making. As EPA acknowledges in the rule, States, Tribes, and certifying agencies consider many projects with varying scopes and impacts.[16] *Id*. at 2018 (noting "the large number of requests for certification submitted each year"). While most projects can be authorized quickly, others require more careful analysis and development of a factual record before an applicant or certifying authority may properly characterize impacts. Eliminating flexibility for federal permitting agencies to review all available information and reach conclusions on a timeline that best suits the needs of a particular process is not reasonable.

EPA has not provided a reason or factual basis for the need to impose a deadline—let alone the particular deadline proposed—for a 401(a)(2) hearing beyond stating stakeholders commented seeking a deadline. But the Agency does not identify the stakeholders or the substance of their concerns. *Id*. at 2035 (stating only that "Stakeholders expressed concerns over delays associated with the lack of deadline" without providing data or evidence of actual problems). Rushing review is not in the interests of efficiency. Careful consideration of impacts to neighboring jurisdictions is needed to properly implement section 401(a)(2). *Id*. at 2009 (stating CWA § 401's purpose is to provide "States and authorized Tribes with an important tool to help protect the water quality of federally regulated waters"); *id*. at 2013 (describing § 401(a)(2) as providing neighboring jurisdictions opportunity to "raise objections to, and request a

[16] Economic Analysis at 11, Tbl. 1 (showing variety of permit types from 40 general permits to 45,725 CWA § 404 general permits annually).

hearing on, the relevant Federal license or permit before issuance" when water quality may be affected.).

Both the certifying authority and the federal agency seeking certification need time to arrange for the appropriate witnesses to appear and evidence to be submitted at a hearing, which can be difficult, particularly for Tribes with limited environmental program staff. The existing timelines in the regulations—30-days for the Regional Administrator to make a "may affect" determination (§ 121.13(a)), 60-days for a neighboring jurisdiction to make a will affect determination and request a hearing (§ 121.13(c)(3)), and 30-days for public notice of the hearing (§ 121.15(b)—set up a clear framework for the hearing process. The imposition of an arbitrary 90-day deadline for the federal permitting agency to hold a public hearing creates unnecessary limitations on all parties, including the applicant. There is no assertion that the 401(a)(2) hearing process in the current regulations, which is already used sparingly, has been abused or is inefficient. EPA should not impose a 90-day headline on permitting agencies on § 121.14.

5. *The section 401(a)(2) process is not required to be completed within a reasonable period of time, and codifying such a requirement in 40 C.F.R. § 121.11(a) is contrary to the statute.*

Congress required certifying agencies to render decisions on requests for certification within "a reasonable period of time (not to exceed one year)." 33 U.S.C. § 1341(a)(1). Congress did not include this text in 401(a)(2). Nevertheless, EPA now proposes to link the start of the 401(a)(2) process—and the deadlines it triggers for neighboring States and EPA—to the default regulatory time period of six months. 91 Fed. Reg. at 2035. EPA invents this extra-textual deadline out of whole cloth while Congress clearly demonstrated it can impose a deadline when it intends to do so in the very same section of the statute. Moreover, information on all water quality impacts is often unavailable six months from when a certification request is submitted,

and some projects require extensions. The lack of information in the six-month period is even more likely given EPA's changes to the requirements for requests for certification. *Id*. at 2018. Neighboring jurisdictions and federal agencies need complete information about a project's potential water quality impacts in the originating State before they can properly determine impacts in the neighboring jurisdiction. For this reason, linking the start of the 401(a)(2) process to the default time period in 40 C.F.R. § 121.11(a) is unwarranted.

6. *EPA does not have the authority to conduct "may affect" determinations on a categorical basis and should not modify 40 C.F.R. § 121.12(a).*

The EPA should not amend 40 C.F.R. § 121.12(a) to allow the Agency to make "may affect" determinations on a categorical basis. Categorical "may affect" determinations are impermissible for at least four reasons: (1) the statutory language of section 401(a)(2) does not provide EPA with the authority to establish categories of activities that can be exempted from the provision; (2) despite the Agency's assertion, categorical determinations are equivalent to categorical exclusions; (3) given the fact-specific nature of the "may affect" determination, there are extremely limited examples where EPA could establish criteria that could be consistently applied to projects and result in accurate "may affect" determinations; and (4) enabling categorical determinations without providing notice of the categories is contrary to the Administrative Procedure Act.

First, the language of section 401(a)(2) does not provide EPA with the discretion to make categorical determinations about types of projects that do not require notification of neighboring jurisdictions. Section 401(a)(2) requires EPA to notify a neighboring jurisdiction so long as the project "may affect" its water quality. While the statute leaves the "may affect" determination up to the discretion of the Administrator, it does not give EPA the power to exempt or make other determinations as to entire categories of activities. Congress has demonstrated how to authorize

categorical exclusions of environmental impacts from agency consideration. *See e.g.* 42 U.S.C. § 4336c. But EPA cannot invent an authorization where none exists. EPA, therefore, lacks the authority to exempt entire classes of activities from section 401(a)(2).

Second, the Agency's claim that categorical "may affect" determinations are distinct from categorical exclusions is not justified. Through notice and comment rulemaking, agencies designate categorical exclusions under the National Environmental Policy Act ("NEPA"), which are a "category of actions" for which the Agency is not required to produce an Environmental Assessment or an Environmental Impact Statement during the NEPA review process. 42 U.S.C. § 4336c, 40 C.F.R. § 6.200. Here, the Agency proposes to make a "'category' of discharge types, project types, and/or projects in specific locations" for which the Agency will determine that the project will not affect any neighboring jurisdictions.

The Agency claims that it will still evaluate projects on a case-by-case basis to determine whether it meets the categorical definition, but it plans to treat projects that meet certain criteria categorically, which will preclude a full analysis of the individual project's impacts on neighboring jurisdictions' waters. If the Agency makes decisions in a categorical manner, it creates a categorical exclusion that will exempt types of projects from the "may affect" determination. The CWA does not provide the Agency with statutory authority to make categorical determinations in the 401(a)(2) process.

Third, EPA has correctly recognized that "may affect" determinations are highly fact-specific and influenced by a variety of factors. 88 Fed. Reg. at 66645 ("[G]iven the range of Federal licenses or permits that are covered by section 401(a)(2) and EPA's discretion to examine various factors, EPA is not proposing to identify specific factors EPA must analyze in making a 'may affect' determination. The Agency acknowledges that some factors may carry greater

weight than others in certain circumstances, but no single factor alone dictates EPA's determination."). Similarly, EPA previously determined that adopting an exhaustive list of factors for making "may affect" determinations was inappropriate, given the need to consider the facts in each case. The fact-specific nature of may affect determinations is also at odds with a proposal to adopt any categorical exclusions. A project located upstream of Tribal land may have very different potential to affect the quality of downstream waters, as Tribes have distinct water quality needs based on their subsistence, cultural, spiritual, medicinal, and ceremonial uses. *Browner*, 97 F.3d at 429. Water quality standards also vary, sometimes greatly, between jurisdictions.

Similarly, the size of a project or the volume of pollutants is not always predictive of a project's impact. For example, smaller-scale mines can cause toxic discharges that last indefinitely.[17] A dredge-and-fill project with small acreage can have a significant impact if it destroys a critical waterway.[18] Local factors may also substantially determine whether a project has the potential to impact water quality. Those factors include the proximity of a project to the neighboring jurisdiction, the area's hydrogeological setting, and the water quality standards of the neighboring jurisdiction. It is difficult to compare the effects of a project in the Arizona desert to the same project built in the rainforest of Alaska. Therefore, even if EPA possessed the authority to craft a categorical approach to excluding entire classes of activities from section

[17] Bruce Finley, *Draining old mines foul Denver's watershed every day with contaminants*, THE DENVER POST (April 21, 2016), https://www.denverpost.com/2015/09/15/draining-old-mines-foul-denvers-watershed-every-day-with-contaminants/.

[18] *See, e.g.,* Ken Ward Jr., *Raese companies agree to $1.8 million EPA fine*, CHARLESTON GAZETTE-MAIL (Nov. 21, 2017), https://www.wvgazettemail.com/news/legal_affairs/raese-companies-agree-to-million-epafine/article_82ee40de-0b79-5335-9fd3-12287e660e40.html (Golf course owner responsible for illegal dredge-and fill operations "agreed to restore about 6,400 linear feet of stream at the golf course").

401(a)(2), there is no rational way to develop such an approach that would not also result in the impermissible exclusion of activities that might affect neighboring water quality.

Fourth, the proposed language improperly allows the Agency to make categorical determinations without providing notice of the criteria for those categories. The proposed 40 C.F.R. § 121.12(a) allows the Agency to make decisions on a categorical basis but does not list any categories. It is unclear how these categories will be determined or whether they will be made public. This deprives all interested parties of the opportunity to comment on any categorical method used by the Agency and is contrary to the notice-and-comment process required by the Administrative Procedure Act.

K. Section 401 TAS and Section 401(a)(2) TAS Regulations should not be Repealed.

EPA proposes to repeal the two regulations that provide Tribes with critical tools for preserving water quality on Tribal lands, while recognizing the administrative burdens on Tribal governments of CWA administration. 91 Fed. Reg. at 2035. Currently, the rules permit Tribes to obtain TAS solely for CWA section 401 certifications and for neighboring jurisdiction participation under section 401(a)(2). 40 C.F.R. § 121.11(a)-(c). Tribes adopt and implement water quality standards pursuant to their inherent authority. Similarly, the rules allow Tribes to obtain TAS for the limited purpose of participating as a neighboring jurisdiction under CWA section 401(a)(2). *Id*. at § 121.11(d). EPA proposes to repeal these TAS programs and to "appropriately direct Tribes to utilize the existing regulation at 40 C.F.R. § 131.8 [TAS for section 303(c) water quality standards] if they are interested in pursuing TAS for CWA section 401." 91 Fed. Reg. at 2035. This additional procedural barrier to Tribal administration of section 401 is a step backward, and waters on Tribal lands will suffer as a result.

EPA should not repeal rules authorizing Tribes to assume authority over section 401 generally and section 401(a)(2) specifically. EPA's Proposed Rule eliminates a critical pathway

for improving water quality and enhancing Tribal sovereignty, with no evidence that the 2023 rule changes are unworkable. Tribes have had very little time to even apply for the new programs before EPA proposes to reverse course yet again. EPA states that this Proposed Rule will address areas of regulatory uncertainty and implementation challenges, but repealing two TAS programs after only two years will only create further uncertainty.

1. *TAS for section 401 and section 401(a)(2) are more accessible than section 303(c) TAS.*

Applying for and administering the section 303(c) TAS program is a "time and resource-intensive process." *Federal Baseline Water Quality Standards for Indian Reservations*, 88 Fed. Reg. 29496, 29499 (May 5, 2023). Before 2023, Tribes needed to obtain section 303(c) TAS to participate in the section 401 water quality certification process. In 2023, EPA issued the *Water Quality Certification Improvement Rule*, which aimed to address these issues. *See Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 88 Fed. Reg. 66552 (Sept. 27, 2023). The 2023 rule created new TAS programs for section 401 as a whole and TAS for section 401(a)(2). Section 401 TAS allows Tribes to grant or deny certifications to projects that may result in a discharge into Waters of the United States and authorizes Tribes to participate in State water quality certification decisions as neighboring jurisdictions. Section 401(a)(2) TAS allows Tribes to participate in the certification decisions as a neighboring jurisdiction. When EPA adopted the 2023 rule, it understood that these rules made the section 401 process more accessible to Tribes. 88 Fed. Reg. 66652 ("These provisions provide more opportunities and clarity for Tribes interested in participating in the section 401 certification process."). EPA also understood that, while section 401 and section 303(c) processes are related, they are distinct. *Id*. at 66653 ("Decoupling section 401 TAS from section 303(c) recognizes that section 401 and section 303(c) administration are related, but distinct functions...").

As a federal agency, EPA has a trust responsibility to ensure that the waters of Tribal lands are not unduly impacted by activities in neighboring States. But if EPA adopts this rule, Tribes will be shut out of the 401(a)(2) process, unless they have the resources to apply for and administer the section 303(c) water quality standards program. Without the option to be treated as a State solely for purposes of 401, Tribes that have the capacity to administer water quality certifications, or those that seek to participate as a neighboring jurisdiction under section 401(a)(2), will be required to obtain section 303(c) TAS. To successfully obtain section 303(c) TAS, a Tribe must demonstrate in its application that it has the capacity to administer the section 303(c) water quality standards program. Tribes do not always have the resources to dedicate to scientific and administrative staff to develop water quality standards or update them over time. But these programs will no longer be available to Tribes without full implementation of a delegated 303(c) program. The waters of any Tribal lands are nevertheless central to Tribal health and welfare, which EPA has a trust-based duty to protect and preserve. Erecting new administrative barriers to Tribal water resource protection is not appropriate or reasonable.

Section 401 TAS is accessible to Tribes that do not have the capacity to administer a water quality standards program because, unlike section 303(c) TAS, section 401 TAS does not require a Tribe to develop EPA-approved water quality standards. A Tribe can certify permits and licenses under its existing water quality requirements, such as its Tribal water code. *Id*. at 66653 ("authorized Tribes can base their section 401 certification decisions on compliance with water quality requirements other than Tribal water quality standards approved under section 303(c). Examples include Tribal ordinances or other Tribal laws related to water quality..."). Section 303(c) would require a Tribe to develop a water quality department with full-time staff to administer the water quality standards program. Participating in occasional section 401

certification processes, however, is more manageable for Tribes with fewer employees and often beneficial and necessary for the restoration and enhancement of water quality.

Section 401(a)(2) TAS is even more accessible because it does not involve the exercise of regulatory authority by a Tribe but provides an opportunity to provide input regarding water quality impacts and to inform decision-making of the federal licensing or permitting agency. *Id*. at 66653–54. This provision is a good option for Tribes that want to exercise a greater role in decisions affecting their waters but lack the resources to develop and implement a full water resources program. In addition, this option may be used by Tribes with smaller land bases, who may not receive many requests for certification and for whom developing and maintaining the regulations and personnel to administer the program may be cost-prohibitive.

By repealing section 401 and section 401(a)(2) TAS, EPA would entrench an existing regulatory gap that leaves Tribal waters unprotected. Generally, a State's EPA-approved water quality standards do not apply in Indian country. 88 Fed. Reg. 29498. In the absence of federal water quality standards or EPA-approved Tribal water quality standards, there are no CWA-effective water quality standards in many waters within Indian Country. Where Tribes have not yet obtained TAS and established EPA-approved water quality standards, a regulatory gap exists. Small Tribes without significant development may not need to, or have the means to, develop a full-blown water quality standards program, but, through these section 401 TAS programs, these Tribes would have some way to protect waters on Tribal lands from activity that may impact their waters in neighboring states. *See id*. at 29498 (discussing the lack of water quality standards in Indian Country).

The 2023 rule created more accessible and flexible TAS options and conferred greater authority on Tribes over decisions affecting their water quality. The 2023 rule allowed Tribes to

obtain TAS for section 401 without the additional burden of administering a section 303(c) water quality standards program, and it allowed Tribes to obtain TAS for the sole purpose of participating as a neighboring jurisdiction under section 401(a)(2) without taking on the responsibility of a section 401 water quality certification program. EPA repeatedly emphasized the need for separate TAS programs for section 401 and 401(a)(2) to address the needs of Tribes that cannot dedicate resources to the more costly and time-intensive TAS programs. Now, EPA has gone back on this reasoning.

2. *TAS for section 401 and section 401(a)(2) are not redundant of section 303(c) TAS.*

EPA seeks to repeal section 401 TAS and section 401(a)(2) because they are considered redundant to section 303(c) TAS. This is incorrect. EPA created the additional TAS programs because section 401 as a whole and section 401(a)(2) are distinct from the section 303(c) water quality standards program. The three TAS programs provide Tribes with different opportunities to protect their water quality. EPA's rationale behind its Proposed Rule relies on a narrow reading of the CWA and its own regulations. This is contrary to Executive Order 13175, which directs federal agencies to "grant Indian Tribal governments the maximum administrative discretion possible." *Consultation and Coordination With Indian Tribal Governments*, 65 Fed. Reg. 67249, 67250 (Nov. 6, 2000) ("With respect to Federal statutes and regulations administered by Indian Tribal governments, the Federal Government shall grant Indian Tribal governments the maximum administrative discretion possible.").

First, EPA argues they are redundant because Tribes receive TAS for section 401 when they obtain TAS for section 303(c). This does not make TAS for section 401 redundant; it simply acknowledges that Tribes with the capacity to administer 303(c) will likely also administer 401 certification procedures. Nothing in section 518(e) links the promulgated 303 water quality

standards to assumption of 401 certification authority. 33 U.S.C. § 1377(e). Indeed, in the absence of water quality standards, EPA is required to promulgate and implement standards applicable to Tribal Lands or States that lack them. There is no reason that a Tribe should not be able to review compliance under section 401 in the absence of 303(c) TAS status and ensure that activities comply with applicable water quality standards.

Next, EPA argues that these programs are redundant because the applications are "virtually identical," so the burden for applying for section 303(c) is low. This is a mischaracterization. 91 Fed. Reg. at 2036. While the applications for TAS request the same four elements, a Tribe's application will differ based on the program. The TAS applications require the Tribe to demonstrate its ability to administer the specific program for which it applies. A Tribe's answer to this criterion will not be "virtually identical" for section 303(c) and section 404 TAS programs because what is required of a water quality standards program is different than what is required of a water quality certification program.

For instance, a Tribe's application for 303(c) needs to demonstrate that the Tribe has the resources to develop EPA-approved water quality standards. A Tribe's application for section 401 does not; the Tribe can rely on its existing water quality ordinance or code under Tribal law as applicable water quality requirements or standards for tribal waters promulgated by EPA. Additionally, these programs have different administrative burdens, which would affect the Tribe's application to each program. Thus, the scope and application of each TAS program differ fundamentally, and Tribes may adopt certain programs but not others for various reasons. In fact, this was one of the reasons for creating the separate section 401 TAS programs in the first place – so that Tribes could participate in section 401 or as a neighboring jurisdiction under section

401(a)(2) without the burden of demonstrating that they could also administer a water quality standards program. 88 Fed. Reg. at 66653.

Finally, EPA argues that section 401(a)(2) is not only redundant but not even severable from the statute's other water quality certification activities. Previously, EPA stated that section 401(a)(2) was severable from section 401 because "the certification process and the neighboring jurisdictions process are two distinct processes with distinct statutory text and legislative history." *Id*. at 66656. Now, EPA's position is that section 401(a)(2) is not severable because "[b]oth a neighboring jurisdiction and a certifying authority evaluate and determine whether a discharge will comply with applicable water quality requirements," "inform the Federal licensing or permitting process," and are "procedurally similar." 91 Fed. Reg. at 2037. The Proposed Rulemaking offers a simplistic characterization of the two roles. The role of a certifying authority is clearly distinct from the role of a neighboring jurisdiction. A certifying authority may impose conditions on, or deny, a federal license or permit, but participating as a neighboring jurisdiction does not confer regulatory authority; it only involves participation in the process. EPA recognized the limited responsibility of participating as a neighboring jurisdiction, which is why it created TAS for section 401(a)(2). 88 Fed. Reg. at 66653. EPA's previous stance on the severability of section 401(a)(2) was reasonable and correct.

3. *Two years is insufficient to determine that TAS for section 401 and section 401(a)(2) are not successful programs.*

This Proposed Rulemaking, even if it were reasonable, is premature. EPA's reason for eliminating these programs is that these programs are underutilized, and, thus, there is no demand or need for them. EPA noted that since 2023, no Tribe has applied for section 401 TAS, and only one Tribe has applied for section 401(a)(2) TAS. On the contrary, it is notable that a Tribe chose to apply for TAS for the sole purpose of participating as a neighboring jurisdiction,

rather than apply for section 401 TAS to obtain a water quality certifying authority. This demonstrates that some Tribes prefer to take on the less burdensome programs. Even if these programs were unsuccessful, two years is not a sufficient trial period, given the effort required for any TAS application. Tribes have not yet had enough time to learn about the new TAS opportunities, organize their materials, prepare their applications, and then submit those applications. Further, some Tribes are preparing section 401 TAS applications at this very moment. These Tribes have expended significant resources to compile section 401 TAS applications, in reliance on the fact that there would be a program to apply for. Eliminating these programs so suddenly would be unfair to these Tribes and would waste the resources they already dedicated to these applications.

In the short time the 2023 rule has been in place, there have been no implementation challenges that would warrant yet another rulemaking or agency guidance, and EPA has failed to point to a single concrete example, let alone a pattern across the thousands of applications processed under section 401 that would warrant yet another change to the rule. EPA has already conducted two comprehensive rulemakings on this topic in the last five years. The most recent was less than two years ago and reflects thorough consideration of all the issues identified in the current request for public comments and more. *Id*. at 66558. Further changes to the rules (or their interpretation) will only waste taxpayer resources and exacerbate, rather than alleviate, uncertainty. The best path is to let the rule work. Neither EPA's public notice nor the sources cited therein describe any specific problems with the implementation of the rule. They reflect generalized concerns or unsubstantiated allegations.

Rather than making repeated reversals and changes that merely create greater uncertainty, EPA should allow the existing rules to operate long enough to determine whether any genuine problems emerge.

L. EPA Cannot Revise Its 401 Regulations Without Complying with the Endangered Species Act.

Section 7 of the Endangered Species Act ("ESA"), requires each federal agency to consult with U.S. Fish and Wildlife Service ("USFWS") and with National Marine Fisheries Service ("NMFS") as to any action authorized, funded, or carried out by the Agency to ensure that such action is not likely to jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of a listed species critical habitat. 16 U.S.C. § 1536(a)(2). Further, for actions subject to consultation, the Agency shall not make any irreversible or irretrievable commitment of resources with respect to the proposed agency action that has the effect of foreclosing measures necessary to ensure that no jeopardy to listed species or destruction or adverse modification of critical habitat occurs. *Id.* § 1536(d).

Here, EPA has failed to consult with the USFWS and NMFS regarding the Proposed Rule to ensure that the rule will not jeopardize endangered or threatened species nor destroy or adversely modify critical habitat. States and Tribes currently impose conditions on section 401 certifications to protect endangered species and their habitat from a variety of nonpoint-source impacts, such as preserving instream flows or reducing sediment pollution from upland activity. If States are no longer able to impose these conditions, endangered or threatened species and their habitats will likely suffer.

These are just a handful of examples of the extensive and potentially seriously damaging results on federally listed species and their habitat from the Proposed Rule necessitating consultation under section 7 of the ESA. EPA made no attempt to comply with the ESA, yet it is

committing resources to the finalization and implementation of its substantial revisions to section 401. EPA is in violation of section 7 of the ESA.

M. EPA Failed to Follow its Tribal Consultation Policies.

Water quality is directly related to the health, welfare, and treaty, executive order, and other reserved and retained rights of Tribes, and the changes proposed by the Agency implicate the federal government's trust responsibility to Tribes to protect their rights recognized by federal law. The Agency's failure to fulfill its responsibility to Tribes conflicts with the EPA Policy on Consultation with Indian Tribes that it adopted in 2023.[19] It also conflicts with the EPA's Indian Policy, which was first adopted in 1984 and reaffirmed by Administrator Lee Zeldin in 2025.[20] EPA also has an obligation pursuant to Executive Order 13175 to consult with Tribes when formulating policies that have Tribal implications, as is the case with this Proposed Rule. 65 Fed. Reg. at 67250 (requiring that "[e]ach agency shall have an accountable process to ensure meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications").

The Agency's 30-day comment period is at odds with the promises made by these policies. The EPA Indian Policy promises to "give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands."[21] The EPA Policy

[19] U.S. EPA, EPA POLICY ON CONSULTATION WITH INDIAN TRIBES (Dec. 7, 2023), https://www.epa.gov/system/files/documents/2025-04/epa-policy-on-consultation-with-indian-tribes.pdf ("EPA Policy on Tribal Consultation"); *see also Consultation with Tribes*, EPA: ENVIRONMENTAL PROTECTION IN INDIAN COUNTRY, https://www.epa.gov/tribal/consultation-tribes (last accessed Feb. 13, 2026).

[20] U.S. EPA, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (Nov. 8, 1984), https://www.epa.gov/system/files/documents/2025-07/1984-epa-indian-policy.pdf ("EPA Indian Policy"); *EPA Administrator Zeldin Reaffirms EPA's Indian Policy, Hosts National Tribal Caucus Meeting in DC*, EPA PRESS OFFICE (July 17, 2025), https://www.epa.gov/newsreleases/epa-administrator-zeldin-reaffirms-epas-indian-policy-hosts-national-tribal-caucus.

[21] EPA Indian Policy at 1.

on Tribal Consultation makes a nearly identical promise. Thirty days is insufficient for many Tribes to adequately review a rule that is technical and directly impacts Tribal rights codified in statute. Forcing Tribes to rush through their review and internal government process for approval does not align with EPA's policy of ensuring "close involvement of Tribal Governments." EPA cannot adequately include and protect Tribal interests if it does not provide adequate time for Tribes to evaluate the Proposed Rule.

Additionally, the lack of meaningful consultation precludes the Agency from complying with its own policies. As the EPA Policy on Tribal Consultation recognizes, "[c]onsultation should occur early," and as "proposals and options are developed, consultation and coordination should be continued to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties."[22] The consultation efforts conducted by EPA before the Proposed Rule was issued were insufficient because Tribes had not yet received notice of the changes that would impact their rights and interests. Providing only thirty days to request and conduct government-to-government consultation after releasing the Proposed Rule does not equate to "continued" consultation in a meaningful way. EPA cannot ensure the "close involvement of Tribal Governments" while only providing a 30-day window to request and conduct consultation.

III. CONCLUSION

EPA's proposed changes to the 401-certification process represent another stark departure from CWA's requirements. What is worse is that EPA provides no reasonable justification, analysis, or evidence that the current regulations are ineffective. The Proposed Rule purports to solve an imaginary problem with solutions that do not make sense and are inconsistent with the

[22] EPA Policy on Tribal Consultation at 7.

text, structure, history, and purpose of the CWA and section 401. For these reasons, EPA should not adopt the proposed changes and should leave the 2023 water quality certification rule in place.

Respectfully submitted this 17th day of February 2026,

Gussie Lord
John Petoskey
Thomas S. Waldo
Moneen Nasmith
EARTHJUSTICE

Daniel Cordalis
Melissa Kay
Lily Cohen
Ashley Anderson
NATIVE AMERICAN RIGHTS FUND

Signatories:

Bad River Band of Lake Superior Chippewa

Bay Mills Indian Community

Confederated Tribes of the Colville Reservation

Little River Band of Ottawa Indians

Orutsararmiut Native Council

Port Gamble S'Klallam Tribe

Pueblo of Nambe

Quinault Indian Nation

Red Lake Nation

Sokaogon Chippewa Community

Walker River Paiute Tribe of the Walker River Reservation

White Earth Nation

Winnemem Wintu Tribe