February 17, 2026

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U.S. Environmental Protection Agency
EPA Docket Center
Water Docket, Mail Code 28221T
1200 Pennsylvania Ave, N.W.
Washington, D.C. 20460

Re: Comments from the American Petroleum Institute, the American Fuel & Petrochemical Manufacturers, and the Independent Petroleum Association of America in Support of the U.S. Environmental Protection Agency's Proposed Revisions to its Clean Water Act Section 401 Certification Regulations (EPA-HQ-OW-2025-2929) 91 Fed. Reg. 2,008 (Jan. 15, 2026)

To the U.S. Environmental Protection Agency:

The American Petroleum Institute ("API"), American Fuel & Petrochemical Manufacturers ("AFPM"), American Petroleum Exploration & Production Council ("AXPC"), GPA Midstream Association, and Independent Petroleum Association of America ("IPAA"), and (collectively, "the Associations") are pleased to submit these comments in support of the U.S. Environmental Protection Agency's ("EPA's" or "the Agency's") proposed rule ("Proposed Rule") to update and clarify several substantive and procedural requirements for water quality certifications under Clean Water Act ("CWA" or "the Act") section 401.[1] Because of the significant extent to which our members rely on federal permits and authorizations that are subject to CWA section 401, the Associations strongly supported the Agency's 2020 rule clarifying the role of states and other certifying authorities under section 401 ("2020 Rule").[2]

The clarifications furnished in the 2020 Rule were also necessary to address some states' misuse of section 401 certification procedures in pursuit of policy goals wholly distinct from considerations of potential water quality impacts. Indeed, the 2020 Rule was also key in incorporating a growing body of caselaw interpreting section 401 of the Act consistent with Congress's intent to preserve for states and tribes a highly circumscribed role in evaluating a proposed project's potential impacts on certain enumerated CWA provisions.

For these reasons, the Associations submitted comments strongly opposing EPA's 2023 Water Quality Certification Improvement Rule ("2023 Rule").[3] The Agency's 2023 Rule eliminated much of the clarity and consistency that the 2020 Rule afforded applicants and certifying authorities, while needlessly enabling certain certifying authorities to delay nationally important

[1] 91 Fed. Reg. 2,008 (Jan. 15, 2026/EPA-HQ-OW-2025-2929.
[2] 85 Fed. Reg. 42,210 (July 13, 2020).
[3] 88 Fed. Reg. 66,558 (Sept. 27, 2023).

projects and critical infrastructure necessary to utilize our nation's vast energy resources and grow our domestic manufacturing base.

The Associations therefore welcome and support EPA's Proposed Rule to rescind multiple aspects of the 2023 Rule that were unnecessary, unclear, or inconsistent with the CWA. By reinstating and updating key provisions of the EPA's 2020 Rule, this Proposed Rule will better align the Agency's implementing regulations with the text and intended scope of the Act, while "increas[ing] transparency, efficiency, and predictability for certifying authorities and the regulated community, and . . . ensur[ing] that States and authorized Tribes understand and adhere to their section 401 role."[4]

I. SUMMARY

The Associations appreciate and support EPA's Proposed Rule because we believe it will provide necessary clarity on the role of states and other certifying authorities under section CWA 401. It is important to the Associations and our members that section 401 certification proceedings are efficient, reasonably predictable, and appropriately focused on potential water quality impacts. Our members are on the forefront of a transformational era of increased domestic oil and natural gas production. The growth of domestic oil and natural gas production and our ability to responsibly develop these resources in new areas of the country have created the need for more infrastructure to safely bring these resources to consumers, refineries, and processing facilities.

As discussed in Section III of these comments, Congress intended section 401 to provide states and authorized tribes with an important but limited role: certifying that point source discharges associated with federally permitted or licensed projects comply with enumerated water quality requirements. The highly circumscribed role of section 401 reviews is plainly evident from the statutory text but the necessity of this limited role is best understood in the context of statutes like the Natural Gas Act of 1938 ("NGA") that preserve for the federal government exclusive jurisdiction over certain type of nationally important projects like natural gas pipelines that could not be feasibly permitted and constructed if subjected to the parochial interests of a single state or other certifying authority.

That is why reasonable limits on the section 401 certification process are in furtherance of and not inconsistent with principles of cooperative federalism. Without reasonable limits to prevent states and other certifying authorities from misusing section 401 to block nationally important projects, the interests of many states would be subjugated to parochial whims of a single state and the cooperative balance Congress sought to establish in enacting section 401 would be upended.

The 2023 Rule departed from this framework by expanding the scope of certification review, introducing procedural ambiguity, and enabling misuse of section 401 to delay or block projects of national importance—particularly energy and infrastructure projects. The Associations strongly support the Proposed Rule because it will realign EPA's regulations with the text, structure, and purpose of the CWA, as well as relevant judicial precedent.

Thus, in Section IV of these comments, the Associations discuss how each of the Proposed Rule's seven categories of section 401 regulatory revisions align with the text, structure, and intent of section 401 and are necessary to address problematic aspects of the 2023 Rule as well as certain

[4] 91 Fed. Reg. at 2,008-2,009.

states' misuse of section 401 certification processes. Our specific comments on each of EPA's categories of proposed revisions are as follows:

- Although EPA is proposing "to remove the definition of 'project proponent' . . . to use the statutory term 'applicant,'"[5] the Associations support EPA's intent to maintain its longstanding interpretation "that CWA section 401 certification 'is not limited to individual Federal licenses or permits, but also extends to general licenses and permits such as CWA section 404 general permits . . . and CWA section 402 general permits'"[6]
- The Associations support EPA's proposal to establish a uniform, nationally applicable set of requirements for a certification request. This change would provide a clear, objective trigger for the statutory review period and prevent certifying authorities from expanding the duration of their reviews by subjectively redefining completeness or receipt. The Proposed Rule also appropriately reinforces statutory time limits by eliminating automatic extensions and prohibiting withdrawal-and-resubmittal tactics used to circumvent the one-year deadline mandated by Congress.
- The Associations support EPA's proposal to clarify that section 401 review and conditions must be limited to point source discharges into waters of the United States ("WOTUS") and compliance with enumerated water quality requirements. By rejecting the activity-wide approach adopted in the 2023 Rule, the proposed revisions will prevent overreach into areas over which Congress assigned exclusive jurisdiction to federal agencies and help ensure section 401 remains focused on water quality impacts, consistent with congressional intent and recent Supreme Court guidance.
- For similar reasons, the Associations also support EPA's proposal to define the components that certifying authorities must include "in any action by the certifying authority to grant, grant with conditions, deny, or explicitly waive a request for certification."[7] In particular, we support those proposed changes to the required content of all certification decisions reflecting that the scope of section 401 certification reviews, decisions, and conditions must be limited to point source discharges to WOTUS from the federally licensed or permitted activity—not the activity as a whole.[8] We also support EPA's proposal to require that certifying authorities provide citations for each water quality requirement on which they base their certification decision.[9]
- The Associations support the Proposed Rule's provision prohibiting certifying authorities from modifying grants of certification unless the applicant expressly agrees to the modification as well as the precise language of the modification.[10] Under the 2023 Rule, applicants were afforded no role in decisions over whether or how to modify existing grants of certification, and therefore had no basis on which to ascertain when or how their certification conditions and compliance requirements might change.[11] This open-ended modification authority is impermissible under the Act.
- The Associations support the Proposed Rule's multiple reforms and clarifications to the Agency's section 401(a)(2) regulatory procedures for determining whether a federally

[5] 91 Fed. Reg. at 2,020.
[6] 91 Fed. Reg. at 2,020-21 (quoting 88 Fed. Reg. 66,570).
[7] 91 Fed. Reg. at 2,028.
[8] 91 Fed. Reg. at 2,029.
[9] 91 Fed. Reg. at 2,029.
[10] 91 Fed. Reg. at 2,030.
[11] 40 C.F.R. § 121.10(a).

licensed or permitted activity has the potential to result in a discharge that "may affect" water quality in neighboring jurisdictions.[12] In particular, we support those proposed provisions that would help further confirm and clarify that the scope of section 401(a)(2), like every other provision of section 401, is limited to the anticipated water quality impacts of potential discharges from federally permitted projects and not the activity as a whole. We also support those aspects of the Agency's proposed revisions to its implementing regulations that help streamline the section 401(a)(2) process and ensure that section 401(a)(2)'s procedural requirements can be accomplished within the congressionally mandated time limits for certification reviews.

- Finally, the Associations support EPA's proposal to rescind the section 401-specific "treatment as a state" ("TAS") regulations and instead allow tribes to obtain TAS under EPA's broad-based regulations implementing section 518 of the CWA.[13]

II. THE ASSOCIATIONS AND THEIR INTERESTS

API is a nationwide, non-profit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 member companies include large integrated companies, as well as exploration and production, refining, marketing, pipeline and marine businesses, and service and supply firms. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability. API and its members are committed to the safe transportation of natural gas, crude oil and petroleum products, and support sound science and risk-based regulations, legislation, and industry practices that have demonstrated safety benefits. API members engage in exploration, production, and construction projects that routinely involve both state and federal water permitting and are, and will continue to be, affected by CWA Section 401.

AFPM is a national trade association representing most U.S. refining and petrochemical manufacturing capacity. AFPM members strengthen economic and national security while supporting more than 3 million jobs nationwide. AFPM's member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make the millions of products that make modern life possible. To produce these essential goods, AFPM members depend on all modes of transportation to move their products to and from refineries and petrochemical facilities and have made significant infrastructure investments to support and improve the safety and efficiency of the transportation system. AFPM member companies depend upon an uninterrupted, affordable supply of crude oil and natural gas as feedstocks for the transportation fuels and petrochemicals they manufacture. Pipelines are the primary mode for transporting crude oil and natural gas to refiners and petrochemical facilities and refined products from those same facilities to distribution terminals serving consumer markets. Pipelines provide a safe, reliable, efficient, and cost-effective way to move bulk liquids, particularly over long distances. AFPM member companies own, operate, and rely on pipeline infrastructure as part of their daily operations. AFPM member companies also are leaders in human safety and environmental responsibility. AFPM supports robust analyses of infrastructure projects to ensure that environmental impacts are appropriately considered.

[12] 91 Fed. Reg. at 2,031–32.
[13] 40 C.F.R. § 131.8.

AXPC is a national trade association representing leading independent oil and natural gas exploration and production companies in the United States. AXPC companies support millions of Americans in high-paying jobs and invest a wealth of resources in our communities. Dedicated to safety, stewardship, and technological advancement, our members strive to deliver affordable, reliable energy to consumers while positively impacting the economy and the communities in which we live and operate. Our association works with regulators and policymakers to help them understand our operations so that they will be able to create sound, fact-based public policies that result in the safe and responsible exploration and production of America's vast oil and natural gas resources. Our goal is to provide technical and regulatory knowledge, making AXPC a rich repository of resources on the industry and the science behind our operations.

GPA Midstream is composed of approximately 50 corporate members that directly employ over 57,000 employees that are engaged in the gathering, transportation, processing, treating, storage and marketing of natural gas, natural gas liquids, crude oil, and refined products, commonly referred to in the industry as "midstream activities." In 2024, GPA Midstream members operated more than 500,000 miles of pipelines, gathered nearly 91 Bcf/d of natural gas, and operated more than 340 natural gas processing facilities. Our members are an invisible link between raw natural gas and crude oil produced at the wellhead and the distribution of products to consumers for heating, electricity production, transportation, steelmaking, fertilizer production, plastics, high-tech devices, cosmetics, pharmaceuticals, and much more.

IPAA is a national upstream trade association representing thousands of independent oil and natural gas producers and service companies across the United States. Independent producers operate 95 percent of the nation's oil and natural gas wells and are responsible for 85 percent of US oil production and 90 percent of natural gas production onshore.

Our members are on the forefront of a transformational era of increased domestic oil and natural gas production. Given the significant extent to which our members rely on federal permits and authorizations that are subject to CWA section 401, it is important to the Associations and their members that section 401 certification proceedings be efficient, reasonably predictable, and appropriately focused on potential water quality impacts.

As this Administration has repeatedly recognized, the responsible production and distribution of our domestic natural gas and oil resources is key to maintaining global stability, addressing supply shortages and inflation, promoting economic growth, and supporting the growth of our domestic manufacturing base. Safely developing and bringing these critical resources to consumers, refineries, processing plants, and export facilities requires infrastructure investment and policies to ensure that nationally important projects can be efficiently vetted and approved.

The Associations therefore welcome EPA's efforts to streamline and remove unnecessary roadblocks to safely and responsibly achieving domestic energy dominance.[14] Expanding and updating America's energy infrastructure is a prudent investment for the safe and environmentally responsible movement of these critically important resources. Unfortunately, some states and other certifying authorities have misused the section 401 certification process to delay, constrain, or altogether kill nationally important energy projects.

[14] *See* Executive Order 14154 on Unleashing American Energy (90 Fed. Reg. 8,353 (Jan. 29, 2025)).

But Congress did not intend for CWA section 401 to allow a single state to wield disproportionate power over projects of national importance. Rather, Congress enacted section 401 to provide states and tribes an important but highly circumscribed role in evaluating proposed projects' potential impacts on certain enumerated CWA provisions.

The use of section 401 certification authority to impose one-state vetoes of nationally important energy projects is not only inconsistent with the cooperative federalism framework Congress utilized in the CWA, but also one of the primary reasons for energy constraints in many parts of the country, and particularly in the Northeast. The United States is facing a potential energy reliability crisis from growing energy demand driven by artificial intelligence and the rapid build-out of data centers and the barriers to timely construct the infrastructure necessary to meet this growing demand.

The Associations therefore appreciate and support this Proposed Rule. While the vast majority of states and tribes appropriately exercise their certification and conditioning authority under section 401, it is well documented that a handful of states have misused their authority to stop, delay, or otherwise constrain projects that they do not support and would have prohibited if those states had authority to do so.[15] And because these instances of misuse have disproportionately focused on energy projects, the Associations have been deeply engaged in and submitted extensive comments in each previous comment opportunity EPA provided with respect to section 401 implementation.[16]

As with each of our previous comments on the Agency's section 401 rules, these comments reflect the Associations' profound interest in ensuring that EPA's regulations adhere to congressional intent, conform to relevant court decisions, and restrain misuse of section 401 certification procedures. And we further urge the Agency to recognize that the imposition of reasonable limits on the misuse of section 401 certification authority is consistent with the Act and its principles of cooperative federalism.

III. THE ROLE OF CWA SECTION 401

Under section 401 of the CWA, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters" must seek "a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions" of the CWA.[17] Section 401 further provides that "[n]o license or permit shall be granted if certification has been *denied* by the State," but, if a state "*fails or refuses to act*

[15] In a 2017 example, New York used its authority under section 401 to block the construction of a natural gas pipeline from Pennsylvania's shale fields. Mary Esch, *Court Rules New York had power to deny key pipeline permit*, ASSOCIATED PRESS (Aug. 18, 2017), https://apnews.com/general-news-222bca0705894e2ab4b8e96aac882bf9.

[16] *See* August 6, 2025 comments on EPA's July 7, 2025 Request for Information on Section 401 Implementation and challenges (90 Fed. Reg. 29,828); October 21, 2019 comments on EPA's August 22, 2019 Proposed CWA Section 401 Certification Rule (84 Fed. Reg. 44,080); August 2, 2021 comments on EPA's June 2, 2021 Request for Comment on Reconsidering and Revising the 2020 CWA Section 401 Certification Rule (86 Fed. Reg. 29,541); August 8, 2022 comments on EPA's June 9, 2022 Proposed CWA Section 401 Water Quality Certification Improvement Rule (87 Fed. Reg. 35,318).

[17] 33 U.S.C. § 1341(a)(1).

on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived."[18]

The limited scope and authority of states and other certifying authorities under section 401 is therefore evident from the text of section 401 itself. However, when state certification authority under CWA section 401 is read in the context of the exclusive jurisdiction preserved for the federal government in issuing certain permits and licenses, the narrow role of certifying authorities under the CWA section 401 program becomes even more apparent.

For instance, natural gas pipeline permitting under the NGA is one of several types of federal approvals that can trigger state certification requirements under section 401. Although it is only one of several types of federal approvals that can trigger section 401 state certification requirements,[19] the NGA is an example of a statute that preserves exclusive jurisdiction for the federal government, and it is relevant to many of the Associations' members. Indeed, the NGA illustrates that section 401 review is intended to be a substantively and temporally limited component in a much larger, and more complex, interstate approval process that is inherently federal in nature but allows for state participation as a cooperating agency.

a. Section 401 Certification Authority and the Natural Gas Act of 1938 (NGA)

Companies seeking to build interstate natural gas pipelines must first obtain federal approval. The NGA provides the statutory framework for this process.[20] Congress passed the NGA to ensure patch-work state-by-state regulatory regimes would not impede interstate commerce. Specifically, under Section 7(c) of the NGA, "a natural gas company must obtain from the Federal Energy Regulatory Commission ("FERC") a 'certificate of public convenience and necessity' before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce."[21] This review is thorough, and a project will receive its certificate to proceed only if it is in the public interest.

In assessing "public convenience and necessity," FERC considers "all factors bearing on the public interest,"[22] including potential environmental impacts.[23] "FERC will grant the certificate only if it finds the company able and willing to undertake the project in compliance with the rules and regulations of the federal regulatory scheme."[24]

FERC's authority under the NGA is exclusive: "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce."[25] "FERC's exclusive purview" includes regulating "facilities [that] are a critical part of the transportation of natural gas

[18] 33 U.S.C. § 1341(a)(1) (emphasis added).
[19] The Associations' members are also routinely subject to Section 401 reviews in the context of Section 404 permitting and in permitting oil pipelines.
[20] 15 U.S.C. § 717.
[21] *Schneidewind v. ANR Pipeline Co.("Schneidewind")*, 485 U.S. 293, 302 (1988); *see also* 15 U.S.C. § 717f(c)(1)(A).
[22] *See Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1146 (D.C. Cir. 1980).
[23] *See, e.g., Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967–68 (D.C. Cir. 2000).
[24] *Schneidewind*, 485 U.S. at 302.
[25] *Schneidewind*, 485 U.S. at 305.

and sale for resale in interstate commerce."[26] In this "exclusively federal domain," states may not regulate.[27]

Pipeline routing is the definitive example of an issue committed to FERC's exclusive authority.[28] Nor could it be otherwise. Determining an interstate pipeline's route—including which states it will cross, where it will do so, and how far it will travel within their borders—is a task that must be completed by a centralized body with the entire nation's public interest in mind, not by local "agencies with only local constituencies."[29] Otherwise, each state could say, "not in my backyard," thereby depriving other states and the nation of the pipeline's benefits and undermining the NGA's purpose of "ensur[ing] that natural gas consumers have access to an adequate supply of natural gas at 'just and reasonable rates.'"[30]

Thus, the NGA vests FERC with exclusive authority over all salient aspects of the natural gas pipeline permitting process to facilitate the nation's collective interest in promoting the safe movement of natural gas in interstate commerce. And while the NGA is necessarily limited to natural gas pipeline permitting, we believe it demonstrates why EPA must implement CWA section 401 to prevent a single state or other certifying authority from using its section 401 certification authority to commandeer the exclusive jurisdiction that Congress provided to the federal government for projects of national importance.

The NGA also illustrates the important but highly circumscribed role of section 401 reviews in light of the far more comprehensive federal environmental review process. Indeed, FERC has primary authority to consider a pipeline construction project's potential environmental impacts, which includes considering routes that could reduce environmental impacts.

Under the NGA, FERC is "the lead agency . . . for the purposes of complying with" the National Environmental Policy Act ("NEPA").[31] Thus, "FERC undertakes its own environmental analysis pursuant to the requirements of" NEPA, "which . . . FERC considers in reaching its ultimate routing determination."[32] As part of the NEPA process, an applicant is typically required to supply FERC with a thorough analysis of the project's impact on water bodies and quality. Applicants also often propose mitigation measures in their applications to minimize project impacts. These proposals allow FERC to consider impacts and authorize mitigation conditions in certificates to

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[26] *Schneidewind*, 485 U.S. at 308.

[27] *Schneidewind*, 485 U.S. at 305; *see also N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 819–20, 822–24 (8th Cir. 2004) (NGA preempted state-law environmental provisions); *E. End Prop. Co. No. 1, LLC* v. *Kessel*, 851 N.Y.S.2d 565, 571 (N.Y. App. Div. 2007); *No Tanks Inc*. v. *Pub. Utils. Comm'n*, 697 A.2d 1313, 1315 (Me. 1997).

[28] *See Wash. Gas Light Co*. v. *Prince George's Cty. Council*, 711 F.3d 412, 423 (4th Cir. 2013) ("the NGA gives FERC jurisdiction over the siting of natural gas facilities"); *Guardian Pipeline, LLC v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 975 (N.D. Ill. 2002) (where "FERC has approved the route … [a]ny objections to the condemnation of public land for the construction of a natural gas pipeline [are] preempted"); *Skyview Acres Co-op., Inc. v. Pub. Serv. Comm'n*, 558 N.Y.S.2d 972, 975 (N.Y. App. Div. 1990) (State's "authority [was] preempted … to the extent that it purported to approve the route of an interstate gas pipeline"); *No Tanks*, 697 A.2d at 1315 ("[State] review of safety and environmental issues surrounding the siting of the [natural gas] tank would be an attempt to regulate matters within FERC's exclusive jurisdiction").

[29] *Schneidewind*, 485 U.S. at 316.

[30] *Wash. Gas*, 711 F.3d at 422–23.

[31] 15 U.S.C. § 717n(b)(1).

[32] *Skyview Acres*, 558 N.Y.S.2d at 975.

reduce project impacts on water quality. Like the authority to issue certificates of public convenience and necessity, the authority to conduct this broader environmental analysis, and to make routing and numerous other decisions based on that analysis, is exclusively within FERC's purview, except as to the narrow question of water-quality compliance under section 401.[33] With few exceptions, courts have correctly construed this limited delegation as "[r]elinquish[ing] only one element of the otherwise exclusive jurisdiction granted" to FERC.[34]

Nonetheless, despite the robust and inclusive review process through which FERC finds projects are in the public's interest, a minority of states have used their section 401 authority to obstruct interstate gas pipeline projects. These states have sought to operate outside the FERC-led NEPA process described above and used their section 401 authority as a one-state veto of multi-state projects critically needed to provide affordable and reliable natural gas to American families and businesses.

Notwithstanding FERC's grant of a certificate of public convenience and necessity or the extensive analysis on which FERC determines that a project is in the public interest, all too often a project is unable to proceed because all too often a project is unable to proceed because a single state has unreasonably delayed getting a section 401 certification or has withheld a section 401 certification for reasons outside of their authority.

"Congress did not empower the States to reconsider matters unrelated to their water quality standards, which [FERC] has within its exclusive jurisdiction …."[35] Such second-guessing would "countermand the carefully worded authority of section 401(a)(1)" and "usurp the authority that Congress reserved for FERC."[36]

States exercising authority under CWA section 401 must do so in a way that is reasonable and adequately explained.[37] When deciding whether or not to issue a certification, a state must examine "the relevant data and articulate a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made.'"[38] Therefore, when a state endeavors to use section 401 "to hold federal licensing hostage,"[39] or otherwise base its certification decision on policy considerations that cannot realistically be construed as credible concerns over water quality impacts, that determination is impermissible under the CWA and several other statutes through which Congress tasked federal agencies with decision-making authority.

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[33] 15 U.S.C. § 717b(d)(3). The NGA also preserves States' authority under the Coastal Zone Management Act and the Clean Air Act, 15 U.S.C. § 717b(d)(1) - (2), which are not at issue here.
[34] *Niagara Mohawk Power Corp*. v. *DEC*, 624 N.E.2d 146, 149 (N.Y. 1993).
[35] *Power Auth*. v. *Williams*, 60 N.Y.2d 315, 325 (N.Y. 1983).
[36] *Niagara Mohawk*, 624 N.E.2d at 150.
[37] *National Fuel Gas Supply Corporation v. New York State Dep't. of Envtl. Conservation*, 761 F. Appx. 68, 72 (2d Cir. Feb 5, 2019).
[38] *Appalachian Voices v. State Water Control Bd*., No. 18-1079, (4th Cir. 2019) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).
[39] *Hoopa Valley Tribe* v. *FERC ("Hoopa Valley")*, 913 F. 3d 1099, 1104 (D.C. Cir. 2019).

b. Section 401 Certification Authority in the Context of Other Federal Licensing Processes

Natural gas pipeline permitting under the NGA is one of the areas in which a handful of states have most often sought to misuse their section 401 certification and conditioning authority, but it is not the only licensing process to be misused by some states as a lever to pursue policy objectives unrelated to water quality. In fact, U.S. Army Corps of Engineers' ("Army Corps'") CWA section 404 permits are perhaps the most common trigger for section 401 reviews among the Associations' members, all other sectors of the energy industry, and a wide variety of other industries as well.[40] Other federal permitting authorities that trigger section 401 certification requirements include Army Corps permits issued under sections 9 and 10 of the Rivers and Harbors Act ("RHA"), U.S. Coast Guard permits for bridges and causeways under section 9 of the RHA, hydroelectric projects requiring FERC licenses, and nuclear power plants licensed by the Nuclear Regulatory Commission.

Notably, before issuing these types of permits and other authorizations, the relevant federal agencies will assess the potential environmental impacts of their actions and provide states, tribes, and the public more broadly engagement opportunities pursuant to their governing statutes as well as under statutes such as NEPA,[41] the Endangered Species Act,[42] the National Historic Preservation Act,[43] and the Coastal Zone Management Act.[44] Each of these statutes provide states and other certifying authorities multiple opportunities to have their voices heard in federal agencies' more comprehensive project reviews. For instance, under NEPA, states can participate as cooperating agencies, participating agencies, or through the public comment process. While not required, state cooperation in the NEPA process is encouraged to streamline the permitting process for projects such as interstate pipelines and to improve efficiency of all resource agencies involved in review of a project.

It is from this comprehensive analytical framework that CWA section 401 carves out and preserves for a certifying authority the highly circumscribed role of evaluating a proposed project's potential impacts on certain enumerated CWA provisions. CWA section 401 does not empower a state or other certifying authority to deny a certification request based on generalized objections about oil and gas development, or concerns about the continued role of fossil fuels in product manufacturing and power generation. Nor does CWA section 401 allow states to deny or condition certification based on potential environmental impacts of the proposed project other than potential point source discharges to waters of the United States that can result in possible violations of water quality standards.[45]

The text, structure, and history of section 401 reflect Congress's recognition that certain projects of national importance could not be subjected to the parochial interests of a single state or other certifying authority. And yet, as acknowledged by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), "it is now commonplace for states to use Section

[40] Economic Analysis for the Proposed Updating the Water Quality Certification Regulations ("Economic Analysis"); EPA (Jan. 2026); table 1 at p. 40.
[41] 15 U.S.C. § 717n(b)(1).
[42] 16 U.S.C. § 1531 *et seq.*
[43] 16 U.S.C. § 470 *et seq.*
[44] 16 U.S.C. § 1451 *et seq.*
[45] 40 C.F.R. § 121.2(a)(3).

401 to hold federal licensing hostage."[46] Using section 401 "to hold federal licensing hostage,"[47] or basing certification decisions on policy considerations that cannot realistically be construed as credible concerns over water quality impacts is impermissible under the CWA and conflicts with several other statutes through which Congress tasked federal agencies with decision-making authority.

c. Reasonable Limits on the Section 401 Certification Process are Consistent with Principles of Cooperative Federalism

While the Associations agree that the CWA is grounded on principles of cooperative federalism[48] and generally oppose federal intrusion in those areas where Congress preserved state primacy, we also recognize that section 401 represents one of those circumstances in which Congress deemed it necessary to rest primary decision-making authority with federal agencies and/or more closely circumscribe the otherwise broad authority of states.

In section 401, Congress prescriptively delineated a narrow and focused role for certifying authorities so that the exercise of section 401 certification authority could not overwhelm or subsume the federal government's ability to issue licenses and permits for projects of national importance. The seemingly diverse types of projects or actions described in the preceding subsections require federal permits and/or licenses because Congress expressly and purposely committed these licensing/permitting decisions to the federal government. It did so for these very specific types of projects because of the profound impacts they have on the nation as a whole. These are the types of projects that protect and promote interstate commerce, trade, and national security. Federal decisions made in accordance with these statutory authorities are intended to facilitate policies and goals deemed important to the entire nation.

Congress certainly understood that projects authorized pursuant to these statutes would have localized impacts, but it viewed it as inappropriate to allow these projects to be principally steered by parochial interests. Congress uniquely provided these boundaries in section 401 because, unlike other provisions of the Act, like sections 402 and 404, that direct federal agencies to cede authority to states and other certifying authorities when certain conditions of delegation are satisfied, Congress recognized that for certain federal projects, federal agencies must share their authority with, rather than cede their authority to, the states and other certifying authorities.

Congress's intent to reasonably limit the scope and duration of section 401 certifications is consistent with cooperative federalism. States that have misused section 401 certification authority can wield a disproportionate level of decision-making authority over a wide variety of essential interstate projects or other projects of national importance such as transportation infrastructure, nuclear and hydroelectric power generation facilities, energy distribution infrastructure, and projects requiring dredge-and-fill permits under section 404. Misapplying section 401 to allow any state or other certifying authority unilateral veto authority over these projects has adverse impacts, not only on project proponents and federal licensing and permitting authorities, but other states with interests in the project.

[46] *Hoopa Valley*, 913 F. 3d. at 1104.
[47] *Hoopa Valley*, 913 F. 3d. at 1104.
[48] 87 Fed. Reg. at 35,321.

This was certainly the case with Washington State's denial of the Millennium Bulk Terminals – Longview LLC project.[49] The project proponents intended the terminal to receive rail cars of coal mined principally in Montana and Wyoming so that the coal could be exported to overseas markets. Washington State employed various regulatory strategies to extend their certification review over five years before denying the certification request based on grounds having nothing to do with water quality.[50] Having minimal financial interest in facilitating the export of a product that was not produced in the state and policy objections to coal-fired power generation, Washington State used its section 401 certification authority to deny Montana and Wyoming access to foreign markets. Thus, the exercise of expansive authority under section 401 by one state harms, rather than serves, other states' rights.

Similar dynamics underlie many instances of state misuse of section 401 certification authority in pipeline projects. "[B]etween 2013 and 2024, natural gas demand increased by 49%, while pipeline capacity grew only 26%, and storage capacity rose an incremental 2% from 2013 to 2023."[51] As the NPC concluded in its 2025 Report, one of the causes for this growing divergence between infrastructure capacity and demand is that "[t]he Clean Water Act Section 401 process has become a permitting chokepoint – not due to a change in statutory intent, but because of its vulnerability to shifting regulatory interpretations and procedural manipulation."[52]

The lack of adequate infrastructure presents significant challenges to energy reliability and affordability, as natural gas demand has outpaced supply. This issue is especially prevalent in resource-constrained areas of the country, including the Northeast and Mid-Atlantic, where energy infrastructure remains insufficient to meet demand.

For instance, with the onset of winter weather that has occurred in the course of this comment period, natural gas prices in the pipeline-constrained Northeast have increased up to sixteen times higher than natural gas prices in the Northeast Pennsylvania Gas Supply Area, which does not have the same natural gas pipeline constraints.[53] On January 27, 2026, when natural gas prices at the TGP Z4 Marcellus Hub (serving the Northeast Pennsylvania Gas Supply Area) were $12/MMBtu, prices at the Iroquois Z2 Hub (serving New York and Connecticut) were $194/MMBtu (1,500% than in Northeast Pennsylvania).[54] Constrained natural gas pipeline capacity in New England led to similarly steep price increases ($85-$130 MMBtu, which was 604%-973% higher than in Northeast Pennsylvania).[55]

In sum, the principles of cooperative federalism do not dictate that EPA's regulations must provide states as much authority and autonomy as possible. Doing so would subjugate the interests of one state to the parochial whims of another. Cooperative federalism in the context of section 401

[49] WDEC, In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals-Longview, LLC, Order # 15417 (Sept. 26, 2017).
[50] *See* Subsection IV.c.2.
[51] National Petroleum Council ("NPC"); "Bottleneck to Breakthrough: A Permitting Blueprint to Build a Report of the National Petroleum Council Committee on Oil and Natural Gas Infrastructure Permitting" (Dec. 3, 2025) ("2025 NPC Report") at 10.
[52] 2025 NPC Report, Finding 3-4 at p. 108.
[53] Platts Gas Daily.
[54] Platts Gas Daily.
[55] Platts Gas Daily.

requires a balanced approach that conforms as closely as possible to the balance Congress itself struck when enacting section 401.

For this reason, the Associations support EPA's Proposed Rule. We believe that the Agency's proposal offers a regulatory approach that preserves the important role of certifying authorities under section 401, but which prevents certain states from misusing the certification process to unlawfully elevate their own interests over the interests of other states or the nation as a whole.

IV. DETAILED COMMENTS ON THE PROPOSED RULE'S SEVEN CATEGORIES OF REVISIONS

EPA's Proposed Rule includes seven categories of proposed revisions,[56] which the Associations discuss and support in the subsections that follow. As applicable to these seven categories of proposed revisions, EPA has also proposed "to remove the definition of 'project proponent' at 40 C.F.R. § 121.1(h) and revise corresponding regulatory language throughout 40 C.F.R. part 121 to use the statutory term 'applicant.'"[57] EPA proposed this change to align its regulations with the terminology used in the CWA and "improve the clarity and administrability of the regulatory provisions intended to implement the statute" but maintains that the Agency has not changed its longstanding interpretation "that CWA section 401 certification 'is not limited to individual Federal licenses or permits, but also extends to general licenses and permits such as CWA section 404 general permits . . . and CWA section 402 general permits'"[58]

The Associations agree that "both case law and prior Agency rulemakings and guidance recognize that general Federal licenses or permits are subject to section 401 certification."[59] While "the issuance of nationwide and regional general permits" "do not involve an 'applicant'"[60] in the same way an individual permit or license involves an applicant, the best reading of the CWA is that federally issued general permits are subject to section 401.

The text and legislative history of the CWA reflects that Congress's intended section 401 to provide states important but time-limited and highly circumscribed certification authority over federally authorized projects with anticipated point source discharges to waters of the United States ("WOTUS"). Congress's focus was on the authorizations that could result in point source discharges to WOTUS; not on whether the authorization would be granted in response to an application for an individual permit or through a nationwide or regional general permit. What mattered was that states be afforded an opportunity to certify – individually or programmatically – whether point source discharges from federally authorized activities comply with enumerated water quality requirements.

Similarly, the language and the history of CWA section 404(e), which authorizes EPA to "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material" shows that section 401 applies to general permits and individual permits alike. Indeed, Congress's 1977 amendments to the CWA, which first

[56] 91 Fed. Reg. at 2,016.
[57] 91 Fed. Reg. at 2,020.
[58] 91 Fed. Reg. at 2,020-21 (quoting 88 Fed. Reg. 66,570).
[59] 91 Fed. Reg. at 2,021 (quoting 88 Fed. Reg. 66,571); see also *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 100 (1st Cir. 1989).
[60] 91 Fed. Reg. at 2,020.

authorized the issuance of general permits, expressly state that "[n]othing in [section 404] shall preclude or deny the right of any State . . . to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State."[61] "Although Congress reviewed section 401 . . . when it authorized general permits in section 404 of the Clean Water Act of 1977, it did not amend section 401 so as to limit state authority over nationwide or other general permits."[62] Thus, interpreting section 401 as encompassing nationwide and regional general permits reflects the "single, best meaning" of the scope of section 401 that was "fixed at the time of enactment."[63]

In addition to being statutorily supported, this interpretation is also essential as a practical matter. General licenses and permits are vital to the effective operation of several federal programs such as the CWA section 402 and section 404 programs, producing efficiencies that save time and money for project proponents and regulators. General licenses and permits provide streamlined procedures for project proponents by authorizing categories of discharges or simplified review procedures when the discharges comply with specified requirements. "Under the CWA section 404 permit program, for example, general permits are for activities that are similar in nature, cause only minimal adverse environmental impacts when performed separately, and have only minimal cumulative environmental impacts."[64]

"If an applicant uses a general license or permit that has already obtained certification (*i.e.*, certification on the issuance of the general license or permit), then the applicant does not need to seek certification prior to authorization."[65] "However, if the general license or permit requires a project-specific certification prior to authorization or if the project requires an individual license or permit, the applicant will be required to seek certification" from each state in which there may be a point source discharge.[66] Herein lies the irrationality of interpreting section 401 to exclude general permits.

EPA estimates that the Corps annually issues 53,325 general permits under CWA section 404 and section 10 of the RHA and only 3,289 individual permits under these same authorities.[67] Multiple states already bemoan their inability to conduct certification reviews within section 401's prescribed time frame. If section 401 were interpreted to exclude general permits and all currently generally permitted activities were subject to individual certification reviews, states and other certifying authorities would simply have no ability to conduct meaningful certification reviews in accordance with Congress's expressly stated deadlines.

The obvious impracticality of increasing state permitting reviews by over 1,500% certainly reflects that significant "reliance interests exist for" interpreting section 401 to encompass general permits. But it also shows that this is the best interpretation of the CWA. And conversely, any interpretation of the Act that renders section 401 impossible to implement as a practical matter is unreasonable and therefore impermissible. Therefore, the Associations support EPA's longstanding

[61] 33 U.S.C. § 1344(t).
[62] *United States v. Marathon Dev. Corp.*, 867 F.2d at 100.
[63] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024).
[64] EPA Response to Comments for 2020 Rule (May 28, 2020) ("2020 RTC") at 80.
[65] Economic Analysis at p. 32.
[66] Economic Analysis at p. 32.
[67] Economic Analysis; table 1 at p. 40.

interpretation "that CWA section 401 certification 'is not limited to individual Federal licenses or permits, but also extends to general licenses and permits such as CWA section 404 general permits . . . and CWA section 402 general permits'"[68]

a. Specifying the Contents of a Request for Certification

The Associations support the Agency's proposed promulgation of "a singular enumerated list of documents and information that must be included in a request for certification" in order for a request for certification to start the statutory timeline for review.[69] EPA adopted a similar provision in the 2020 Rule to curb widely recognized instances wherein a few certifying authorities sought to toll the start date of their review period by refusing to construe applicants' submissions as certification requests and manipulating the concept of "receipt."[70] Unfortunately, despite the Associations' comments urging otherwise, the Agency's 2023 Rule added a provision allowing each certifying authority "to define additional contents in a request for certification."[71]

1. EPA Should Not Allow Certifying Authorities to Subjectively Determine What Constitutes a "Request for Certification" or When Their Statutory Review Time Limit Starts

While the Associations recognize that certifying authorities may reasonably need information from applicants that is in addition to or different from the "singular enumerated list of documents and information" that EPA has proposed, this provision of the Proposed Rule in no way impedes certifying authorities from requesting this information from applicants. Instead, by establishing one nationally consistent and standardized "list of components for all requests for certification," EPA can "provide applicants, certifying authorities, and Federal agencies with clear regulatory text identifying when the statutory reasonable period of time begins."[72]

Unfortunately, although the vast majority of certifying authorities comply with the CWA's statutorily mandated time limits, some states have sought to circumvent section 401's deadlines by subjectively determining that applicants' submissions were not requests for certification, were incomplete, or were otherwise insufficient to start the statutory clock for their section 401 reviews. As explained by the Second Circuit:

> [t]he plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request.' It does not specify that this time limit applies only for 'complete' applications. If the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state

[68] 91 Fed. Reg. at 2,020-21 (quoting 88 Fed. Reg. 66,570).
[69] 91 Fed. Reg. at 2,017.
[70] 85 Fed. Reg. at 42,235–36.
[71] 91 Fed. Reg. at 2,017 (citing 40 C.F.R. § 121.5(c)).
[72] 91 Fed. Reg. at 2,018.

> agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.[73]

EPA's Proposed Rule would provide this bright line rule so that all parties are clear about when the review has commenced. Identification of the specific elements of a "certification request" eliminates any confusion about whether the applicant has, in fact, requested a certification and, at the same time, ensures that the certifying authority has the core information needed to initiate their review. This proposed approach also helps certifying authorities by prohibiting applicants from attempting to prematurely start the statutory clock by submitting requests that lack the basic information necessary for review.

The Associations recognize that, in most instances, when a certifying authority requests additional information, it is in furtherance of a legitimate review, and not a delay tactic. For instance, it is likely that some highly complex projects may warrant the submittal of additional information after the original certification request, but the Agency's proposal accommodates these types of project-specific requests. Under the Proposed Rule, certifying authorities remain free to request information relevant to a project's potential water quality effects after the original submittal of the certification request, but doing so does not render the original certification request incomplete or provide a basis to restart the clock on the section 401 review.

While certifying authorities should be able to request information relevant to a project's potential water quality effects after the original submittal of the certification request, the Associations believe that certifying authorities should be required to provide all request for additional information within 30-45 days of receipt of certification request. Reasonable time limits on certifying authorities' additional information requests are important because they prohibit a certifying authority from withholding certification based on the absence of information that was not requested until the eleventh hour and could not be provided and/or reviewed within the time limits Congress prescribed for 401 certification reviews.

As FERC cautioned more than 30 years ago, "failing to find waiver due to information requests from state agencies could encourage the states to ask applicants to provide additional data in order to give themselves more time to process certification requests, in contravention of Congress' intent."[74] This concern is no less relevant today. This Proposed Rule reflects EPA's awareness that a handful of certifying authorities have subjectively defined the required contents of certification requests to prolong their section 401 review, and further reflects the Agency's recognition that absent minimal guidelines and oversight, certain certifying authorities will continue to misuse their authority. As the agency charged with implementing the CWA,[75] EPA

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[73] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 455-56.

[74] *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 at P 38, n.44 (2019) (emphasis added). The U.S. Court of Appeals for the Ninth Circuit upheld the FERC's Order No. 464, finding that "the rulemaking was fully consistent with the letter and intent of 401(a)(1) of the CWA . . .." *State ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1554 (9th Cir. 1992).

[75] *See* 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter."); 33 U.S.C. § 1361(a); *Mayo Found. for Medical Educ. and Res. v. United States*, 562 U.S. 44, 45 (2011); *Hoopa* Valley, 913 F.3d at 1104; *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296–97 (D.C. Cir. 2003); *Cal. Trout v. FERC*, 313 F.3d 1131, 1133 (9th Cir. 2002); *Am. Rivers, Inc. v. FERC*, 129 F. 3d 99, 107 (2d Cir. 1997).

must ensure that its implementing regulations are sufficient to ensure compliance with section 401's congressionally mandated deadlines.

2. The Associations Broadly Support EPA's Proposed "Certification Request" Components

The Associations broadly support EPA's proposed revisions to the components of an applicant's submission that are required in order for the submission to be considered a complete certification request triggering the certification review time period. We agree that the components identified in the Proposed Rule, including "a copy of the Federal license or permit application or draft license or permit" and "any readily available water quality-related materials on any potential discharges from the Federally licensed or permitted activity that informed the development of the application or draft license or permit" would "provide a certifying authority with clear notice that a request has been submitted and a sufficient baseline of information for the certifying authority to begin its review."[76]

Continuing to allow applicants to submit either their draft federal licenses/permits or their permit applications is critical for permitting efficiency because draft permit often do not become available until the end of the federal permit or licensing process. As relevant to many of the Associations' members, for interstate natural gas pipelines seeking a certificate of public convenience and necessity under the NGA, a section 401 certification request is typically filed within 30 days of filing a certificate application with the FERC, which is itself compiling resource reports containing extensive analysis of water quality impacts and other impacts.[77]

The Associations also appreciate the efficiency of requiring that certification requests include "only readily available water quality-related materials on any potential point source discharges from the Federally licensed or permitted activity that informed the development of the application or draft license or permit." We are concerned; however, that ambiguous phrases and terms like "readily available," "water quality-related," and "informed" may invite a certifying authority to subjectively determine that an applicant submission is not a "request for certification" that initiates the authority's' review period. Indeed, given the extent to which some state certifying authorities have previously tried to circumvent section 401 time limits, it is entirely plausible that certain states will expansively construe what data may be "readily available" or "water quality-related." As such, we urge EPA to consider revising this proposed component so that it is limited to water quality-related materials on any potential point source discharges that were actually included in the draft license/permit or application.

The Associations also support EPA's proposal to require "additional project information," such as a description of the proposed activity, discharge locations, maps or diagrams, documentation of current site conditions, and pre-filing meeting request documentation, only if such information is not already provided as part of the permit/application and "water quality-related materials" discussed above.[78] This proposed approach provides certifying authorities "sufficient information

[76] 91 Fed. Reg. at 2,018.
[77] *See, e.g.*, 18 C.F.R. § 380.12 (Environmental reports for NGA applications).
[78] 91 Fed. Reg. at 2,018.

to start the reasonable period of time" while helping ensure that applicants are not needlessly burdened with redundant documentation requirements.[79]

Finally, the Associations support the Proposed Rule's multiple textual changes to 40 C.F.R. § 121.5 clarifying that the contents of a certification request are focused on potential discharges from federally permitted projects and not the activity as a whole. As we discuss in more detail in Subsection IV.c., this focus is consistent with the "single, best meaning" of the scope of section 401 that was "fixed at the time of enactment."[80]

b. Provisions Necessary to Implement the CWA's Statutory Time Limits on Certification Reviews and Decisions

The Associations support EPA's proposed rescission of the 2023 Rule's provision allowing for automatic extensions "to the reasonable period of time if a longer period of time was necessary to accommodate the certifying authority's public notice procedures or force majeure events."[81] We also support the Agency's proposed inclusion of "regulatory text to bar certifying authorities from requesting applicants to withdraw a request for certification to avoid exceeding the reasonable period of time."[82] Both of these proposed revisions are critical to ensuring that EPA faithfully implements CWA section 401 as Congress intended.

Section 401 of the CWA stipulates that, in all cases, the requirement that certifying authorities complete their review within a "reasonable period of time" means that certification review can never take longer than one year following receipt of a request for certification.[83] This deadline is explicit, unambiguous, and binding.

The express text of section 401 plainly states that a certifying authority waives its certification authority over a federal license or permit if the certifying authority "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." [84] Additionally, as explained by the D.C. Circuit, "while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year."[85]

"[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401."[86] Given the clarity of the CWA with respect to the one-year deadline and the lack of ambiguity about

[79] 91 Fed. Reg. at 2,018.
[80] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024).
[81] 91 Fed. Reg. at 2,022.
[82] 91 Fed. Reg. at 2,022.
[83] 33 U.S.C. § 1341(a)(1) ("If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.")
[84] 33 U.S.C. § 1341(a)(1).
[85] *Hoopa Valley*, 913 F. 3d at 1104.
[86] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

the intended purpose of this language, the text of the CWA leaves EPA no room to interpret section 401 as allowing certifying authorities any amount of time in excess of one year.[87]

Notwithstanding the strict and unambiguous time limits Congress imposed on certification reviews under section 401, the Agency's 2023 Rule added provisions that failed to address and arguably facilitated the well-known and fully documented tactics that some certifying authorities have employed to impermissibly protract their section 401 certification reviews and "indefinitely delay[] federal licensing proceeding[s]."[88] This was not a permissible exercise of the statutory authority Congress conferred to EPA. As the agency charged with implementing the CWA,[89] EPA must ensure that its implementing regulations meaningfully address and reasonably preclude certification tactics that are plainly intended to evade, rather than comply with, section 401's congressionally mandated deadlines.

The Associations therefore welcome the Agency's renewed recognition that its regulations must, at a minimum, preclude those deadline circumvention tactics that are well-known to the Agency and/or already held to be improper by courts. The Proposed Rule's rescission of automatic deadline extensions and prohibition on "withdrawal-and-resubmittal" delay tactics represent important steps in furtherance of this recognition.

1. Recission of Automatic Deadline Extensions

Under 40 C.F.R. § 121.6(b), the federal agency and certifying authority may jointly agree in writing to a reasonable period of time for the certifying authority to act on the request for certification, provided that the reasonable period of time does not exceed one year from receipt. If the federal agency and the certifying authority do not agree on the length of a reasonable period of time, the regulations dictate that "the reasonable period of time shall be six months.[90]

The Associations do not believe that a six-month review is a reasonable default time limit because, while highly complex reviews can require up to a year, certification authorities often review many simpler projects in 30 days or less. Although we view the current six-month default review period as excessive for most types of certification reviews, the 2023 Rule effectively nullified this default review period by allowing a certifying authority to unilaterally extend the reasonable period of time up to the full one-year statutory limit by simply notifying the federal agency that an extension is necessary.[91] The 2023 Rule's prerequisites for claiming an extension (*e.g.*, public notice requirements or force majeure events) do not clearly limit a certifying authority's exercise of this unilateral extension authority because many certifying authorities have discretion to create new

[87] Consistent with our comments in Subsections IV.a, the Associations believe that Congress's establishment of one-year as the outermost limit for Section 401 certifications reveals that Congress understood and expected Section 401 reviews to be narrowly focused on discharges from the federal project, rather than broader or more tangentially related impacts.
[88] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).
[89] *See* 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter."); 33 U.S.C. § 1361(a); *Mayo Found. for Medical Educ. and Res. v. United States*, 562 U.S. 44, 45 (2011); *Hoopa* Valley, 913 F.3d at 1104; *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296–97 (D.C. Cir. 2003); *Cal. Trout v. FERC*, 313 F.3d 1131, 1133 (9th Cir. 2002); *Am. Rivers, Inc. v. FERC*, 129 F. 3d 99, 107 (2d Cir. 1997).
[90] 40 C.F.R. § 121.6(c).
[91] 40 C.F.R. § 121.6(d).

public notice requirements and even if that were not the case, the 2023 Rule did not include any mechanism for EPA or the federal agency to oversee or overrule a certifying authority's extension notice even when the notice is plainly spurious.

From the time EPA first promulgated section 401 implementing regulations in 1971 until the 2023 Rule took effect, the obligation to establish a "reasonable period of time" within the statutory one-year period limit has fallen within the exclusive purview of federal licensing and permitting agencies.[92] So too has the determination of when a certifying authority waives its review authority.[93] Federal agencies have therefore long demonstrated their understanding of the review times necessary for certain types of projects and their ability to establish appropriate and reasonable review timeframes for certifying authorities. Indeed, while the Associations' members may not have agreed with each federal agencies' assessment of the reasonable period of time necessary for review over the past several decades, we are not aware of, nor did the 2023 Rule identify, any instance in which a federal agency's determination of the reasonable period of time for review caused the certifying authority to certify a project without sufficient review.

Nonetheless, by allowing certifying authorities to set their own review deadlines (within the one-year statutory limit), the 2023 Rule unnecessarily complicated multi-jurisdictional reviews by allowing each certifying authority to establish their review deadline within the one-year statutory limit. This has made section 401 certification requirements far less clear and consistent. As one example, a pipeline that is proposed to cross multiple jurisdictions could be subject to vastly different review deadlines for exactly the same activity (*e.g.*, water crossing or authorization to discharge fill) based on the differing views of certifying authorities in each jurisdiction. And even if every other certifying authority timely completes their review, under the 2023 Rule, critically important multi-jurisdictional projects can be forced to wait for the single certifying authority that construes its reasonable period of time most expansively.

For these reasons, the Associations fully support EPA's proposal to rescind the 2023 Rule's provision allowing certifying authorities to unilaterally extend agreed-upon review periods (within the one-year statutory limit). While we support requiring federal agencies to agree to extensions of review periods, we do not believe that "[t]he Federal agency and certifying authority may . . . extend the reasonable period of time *for any reason*."[94]

The federal agency and certifying authority's reasons for extending the reasonable period of time should be disclosed and adequately explained. And importantly, they should be reasonable and germane to the scope of review being conducted. At minimum, this means that the federal agency and certifying authority's reasons must directly relate to an assessment of the potential discharges from the federally permitted project and not the activity as a whole. As such, the Associations respectfully request that, in addition to the revisions already proposed, EPA also more precisely

[92] *See* Army Corps regulations at 33 CFR § 325.1(b)(ii) (51 Fed. Reg. 41,236) (Nov. 13, 1986)); s*ee also* FERC Rules at 18 §5.23(b)(1) (68 Fed. Reg. 61,743)(Oct. 30, 2003)); *Constitution Pipeline Company, LLC*, 164 FERC P 61029, 2018 WL 3498274 (2018) ("[T]o the extent that Congress left it to federal licensing and permitting agencies, here the Commission, to determine the reasonable period of time for action by a state certifying agency, bounded on the outside at one year, we have concluded that a period up to one year is reasonable.").

[93] *See Millennium Pipeline Company, L.L.C.*, 860 F.3d at 700–01 (acknowledging that a project proponent can ask the federal agency to determine whether a waiver has occurred).

[94] 40 C.F.R. § 121.6(e) (emphasis added).

define and limit the factors that would permissibly allow for an extension of the reasonable period of time. Doing so would help ensure that the additional time is necessary for a review that is within the scope of section 401 and would also "provide clarity and added predictability to the certification timeline."[95]

2. Prohibition on Requiring that Applicants Withdraw and Resubmit Applications to Circumvent Review Deadlines

The Associations support EPA's proposal to add a regulatory provision in 40 C.F.R. § 121.6(e) that would expressly prohibit a certifying authority from requesting that an applicant withdraw a request for certification "or take any action to extend the reasonable period of time other than" the more limited extension procedures in proposed 40 C.F.R. § 121.6(d), which is discussed in Subsection IV.b.2. above.[96] EPA promulgated a similar prohibition in the 2020 Rule and, in spite of the Associations' strong opposition, the 2023 Rule unfortunately rescinded the 2020 Rule's prohibition on compelling applicants to withdraw and resubmit certification requests.

This Proposed Rule would appropriately reverse the 2023 Rule's impermissible rescission of the reasonable restrictions the 2020 Rule employed to prevent a widely recognized tactic that has been used by some certifying authorities and deemed impermissible by courts. The CWA does not allow certifying authorities to stop and restart their review to artificially extend section 401's statutorily prescribed deadlines. And as the agency charged with implementing section 401 of the Act, EPA's regulations must incorporate enforceable procedures that prohibit this manner of evading section 401's statutory deadlines.

As with multiple aspects of this Proposed Rule, the need for these restrictions is made evident by the actions of a handful of states that have plainly relied on a "withdrawal and resubmittal" tactic to circumvent statutory deadlines. Indeed, the D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC* ("*Hoopa Valley*") demonstrates the need for EPA to enforce regulations to compel compliance with the express section 401 deadlines.[97]

In *Hoopa Valley*, the D.C. Circuit considered whether California and Oregon could lawfully rely on a "withdrawal-and-resubmission scheme" to avoid the section 401 deadline for certifying the relicensing of the Klamath Hydroelectric Project.[98] The project proponent had originally submitted its certification requests to the states in 2006, and pursuant to the states' demand, withdrew and resubmitted the same certification requests annually for more than a decade. When the D.C. Circuit drafted its decision "*more than a decade later*, the states still ha[d] not rendered certification decisions."[99] The court bemoaned that:

> it is now commonplace for states to use Section 401 to hold federal licensing hostage. At the time of briefing, twenty-seven of the forty-three licensing

[95] 91 Fed. Reg. at 2,021–22.
[96] 91 Fed. Reg. at 2,022.
[97] 913 F. 3d 1099 (D.C. Cir. 2019).
[98] *Hoopa Valley*, 913 F. 3d at 1103.
[99] *Hoopa Valley*, 913 F. 3d at 1104 (emphasis in original).

> applications before FERC were awaiting a state's water quality certification, and four of those had been pending for more than a decade.[100]

While the problem identified by the D.C. Circuit was pernicious, its resolution was remarkably straight-forward. According to the court, "[d]etermining the effectiveness of such a withdrawal-and-resubmission scheme is an undemanding inquiry because Section 401's text is clear."[101]

> While the statute does not define 'failure to act' or 'refusal to act,' the states' efforts . . . constitute such failure and refusal within the plain meaning of these phrases. Section 401 requires state action within a reasonable period of time, not to exceed one year. California and Oregon's deliberate and contractual idleness defies this requirement. By shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters.[102]

The court explained that "Congress intended section 401 to curb a state's 'dalliance or unreasonable delay.' This Court has repeatedly recognized that the waiver provision was created 'to prevent a State from indefinitely delaying a federal licensing proceeding.'"[103] Therefore, the court "conclude[d] that California and Oregon have waived their Section 401 authority with regard to the Project."[104]

As the D.C. Circuit correctly concluded, by subjecting section 401 certification reviews to express time limits, "Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request."[105] Given the express and purposeful time limit on certification reviews that Congress imposed in section 401, certifying authorities are plainly precluded from expanding those deadlines through "withdrawal-and-resubmittal" tactics. But as this Proposed Rule and multiple courts have also recognized, section 401 does not altogether preclude an applicant from withdrawing and resubmitting its certification request even if that withdrawal and resubmittal has the effect of expanding the total duration of the certification review.

For instance, the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") rejected a FERC determination that North Carolina waived its section 401 authority because the state took longer than one year to review a project proponent's initial certification application and two subsequent applications that were resubmitted after the initial application was withdrawn.[106] The court held that FERC did not have a sufficient basis to conclude that North Carolina had colluded with the project proponent on the withdrawal and resubmittal of the certification applications to artificially extend the time. Instead, the court found that the decision to withdraw and resubmit the initial and

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[100] *Hoopa Valley*, 913 F. 3d at 1104 (emphasis in original).
[101] *Hoopa Valley*, 913 F. 3d at 1103.
[102] *Hoopa Valley*, 913 F. 3d at 1105.
[103] *Hoopa Valley*, 913 F. 3d at 1105–6 (internal citations omitted).
[104] *Hoopa Valley*, 913 F. 3d at 1105.
[105] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972, (D.C. Cir. 2011).
[106] *North Carolina Dep't of Envtl Quality v. FERC*, 2021 WL 2763265 (4th Cir. July 2, 2021).

subsequent applications was made by the project proponent alone and without the direction of, or coordination with, the state.[107]

More recently, the D.C. Circuit also distinguished applicant-initiated withdrawals from the impermissible withdrawal-and-resubmission tactics underlying the court's prior decision in *Hoopa Valley*.[108] According to the court, "where a party unilaterally withdraws and resubmits its certification application, those actions outside of the State's control do not waive its statutory authority."[109]

In recognition of this nuanced body of case law, this Proposed Rule strikes a balanced approach that preserves applicants' ability to withdraw and resubmit certification requests but meaningfully restrains certifying authorities' ability to compel or coerce applicants to cooperate in schemes to circumvent section 401's binding time limits. As such, the Associations support EPA's proposed regulatory provision prohibiting a certifying authority from requesting that an applicant withdraw a request for certification "or take any action to extend the reasonable period of time other than" the more limited extension procedures in proposed 40 C.F.R. § 121.6(d).[110]

c. The Proper Scope of Section 401 Reviews and Certification Conditions

The Associations support EPA's proposal to:

> narrow the current regulation's broad 'activity'-based scope of certifying authority review to what Congress clearly intended: an assessment of whether a facility's point source discharges into waters of the United States will comply with specified water quality requirements.[111]

This proposed change mirrors the interpretation of the scope of section 401 that guided the Agency's promulgation of the 2020 Rule. Unfortunately, in spite of the Associations' comments urging otherwise, EPA's 2023 Rule abandoned the 2020 Rule's reasonable and statutorily supported interpretation and instead expansively construed the scope of certifying authorities' section 401 certification and conditioning authority by relaying on an interpretation of section 401 that in no way reflected the "single, best meaning" of the statute.[112] This Proposed Rule is therefore critically necessary to realign EPA's regulations with the scope of certification and conditioning authority Congress intended to afford states and other certifying authorities under CWA section 401.

1. The Proposed Rule Properly Interprets CWA Section 401 as Applying to Point Source Discharges; Not the Activity as a Whole

The 2020 Rule provided that "[t]he scope of a . . . section 401 certification is limited to assuring that a discharge . . . will comply with water quality requirements."[113] Thus, under the 2020 Rule,

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[107] *North Carolina Dep't of Envtl Quality v. FERC*, 2021 WL 2763265.
[108] *Vill. of Morrisville v. FERC*, 136 F.4th 1117 (D.C. Cir. 2025).
[109] *Vill. of Morrisville v. FERC*, 136 F.4th at 1127.
[110] 91 Fed. Reg. at 2,022.
[111] 91 Fed. Reg. at 2,023 (internal citations omitted).
[112] *Loper Bright* 144 S. Ct. at 2266 (citing *Wisconsin Central Ltd. v. U.S.*, 585 U. S. 274, 284 (2018)).
[113] 40 C.F.R. § 121.3 (2020).

a state or tribe could only "certify that the discharge resulting from the proposed federally licensed or permitted project will comply with the CWA" and may not impose "certification conditions that address water quality impacts from any aspect of the construction or operation of the activity as a whole."[114] The 2020 Rule's focus on the "discharge," rather than the "activity," was intended to prevent an "expan[sion]" of "section 401 regulatory authority,"[115] by prohibiting states from asserting the authority to issue a "certification [that] broadly cover[s] impacts from the entire activity."[116]

The 2020 Rule also defined "discharge" to mean "a discharge from a point source into a water of the United States," as opposed to a nonpoint source.[117] As such, under the 2020 Rule, a certifying authority's review was limited to the effects of a discharge from a "discrete" or "discernable" conveyance, meaning that a section 401 applicant was not required to address other potential discharges unconnected to a "discrete conveyance."[118]

The 2023 Rule significantly expanded the scope of authority states and other certification authorities wield in the course of their section 401 reviews to "the activity subject to the Federal license or permit, not merely its potential point source discharges."[119] Specifically, the 2023 Rule requires the certifying authority to evaluate whether the *activity* will comply with the applicable water quality requirements, whereas the prior 2020 Rule required the certifying authority's evaluation to be "limited to assuring that a *discharge* . . . will comply with water quality requirements."[120] Thus, the 2023 Rule expanded the regulatory scope of section 401 certifications and conditions to any "activity subject to the Federal license or permit, not merely its potential point source discharges."[121]

This return to interpreting CWA section 401 as allowing states and other certification authorities to consider and condition a certification to address water quality effects of an entire project or activity "as a whole," rather than limiting their certification and conditioning authority to the point source discharges that trigger the federal permit or license, resurrects the same vague and problematic 1971-era regulatory approach that had facilitated certain states' misuse of their limited section 401 authority to address issues unrelated to water quality.

The 2023 Rule also created significant confusion and inconsistency. While the regulatory text that EPA promulgated through the 2023 Rule seemingly limited the scope of certification review to impacts to water quality stemming from the activity subject to certification, the 2023 Rule's preamble discusses the authority of states and tribes to assess "water quality" impacts far more broadly to include "the activity as a whole."[122] In particular, the preamble to the 2023 Rule appears to allow or even encourage states and other certifying authorities to base certification decisions and conditions on "any aspect of the project activity with the potential to affect water

[114] 85 Fed. Reg. at 42,232.
[115] 85 Fed. Reg. at 42,232.
[116] 85 Fed. Reg. at 42,230.
[117] 40 C.F.R. § 121.1(f) (2020).
[118] See 85 Fed. Reg. at 42,234–35.
[119] 88 Fed. Reg. at 66,592.
[120] 40 C.F.R. § 121.3 (2020) (emphasis added).
[121] 88 Fed. Reg. at 66,592.
[122] 88 Fed. Reg. at 66,592.

quality,"[123] including any "direct and indirect, short and long term, upstream and downstream, construction and operation" aspects of a project that could in any way affect water quality.[124] As this Proposed Rule now recognizes, this aspect of the 2023 Rule is inconsistent with the text, structure, and history of the CWA.[125]

"Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges into the navigable waters."[126] Although this provision of the Act plainly demonstrates that Congress intended section 401 certification to apply only when a federally licensed or permitted activity has the potential to result in a discharge from a point source into a WOTUS, the 2023 Rule was based on the implausible assertion that section 401(a)(1) merely describes the prerequisites for, but not the scope of, the section 401 certification process.[127]

Under section 401(a)(1), a certifying authority's decision to grant or deny certification must be based on whether the discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the Act:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any *discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the *discharge* originates . . . that any *such discharge* will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title.[128]

Thus, section 401(a)(1) explicitly requires that a federal permit/license be withheld unless the applicant provides a state certification that the "*discharge*" will comply with specified water quality requirements. Indeed, "[t]he use of the phrase 'such discharge' in the very sentence that identifies what a State must certify is strong textual support for EPA's proposed interpretation" that "[t]he best reading of the text of CWA section 401 limits scope of certification to 'discharges' and not to the 'activity.'"[129]

Although Congress used the term "activity" in section 401(a)(1), it did not do so "in reference to the scope of certification."[130] On the contrary, Congress used the term "activity" in section 401(a)(1) to describe the type of federal authorizations that trigger section 401 certification (*i.e.*, a "Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters.") Congress's use of the phrase "such discharge," on the other hand, sets for the statutorily limited scope of a section 401 certification. The preamble to the Proposed Rule helpfully distilled this statutory

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[123] 88 Fed. Reg. at 66,599.
[124] 88 Fed. Reg. at 66,563 (internal quotations omitted).
[125] 91 Fed. Reg. at 2,024.
[126] *PUD No. 1*, 511 U.S. 700, 711–12.
[127] 88 Fed. Reg. 66,659.
[128] 33 U.S.C. § 1341(a)(1) (emphasis added).
[129] 91 Fed. Reg. at 2,023 (citing *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."); *see also PG&E v. FERC*, 113 F.4th 943, 948 (D.C. Cir. 2024) (explaining that, "when 'addressing a question of statutory interpretation, we begin with the text'") (quoting *City of Clarksville v. FERC*, 888 F.3d 477, 482 (D.C. Cir. 2018)).
[130] 91 Fed. Reg. at 2,024.

construction as follows: "[I]f a Federal license or permit to conduct an activity may result in a discharge, then the certifying authority would certify that 'any such discharge' will comply with the enumerated provisions of the CWA."[131]

In contrast, the preamble to the 2023 Rule tried to explain its divergence from the statutory text by invoking section 401(d), which authorizes certifying authorities to include appropriate conditions in the certification described in section 401(a)(1). Unlike section 401(a)(1)'s directive limiting the scope of a certification review to the "*discharge's*" compliance with water quality requirements, section 401(d) describes the conditions necessary to assure the "*applicant*" will comply with the specified water quality requirements. Section 401(d)'s requirement that the certification "set forth" conditions and requirements for the *applicant*, and not the *discharge*, makes sense because the certification is not some abstraction; it is a document that a certifying authority gives to a person or entity, and it describes what that person or entity must do to ensure that its discharges comply with water quality requirements. This is consistent with the 1972 Amendments' "total restructuring" and "complete rewriting" of the CWA.[132] That 1972 restructuring of the Act generally, and section 401 in particular, transformed the Act's regulatory regime away from the prior focus indirectly regulating activities through ambient standards toward direct regulation of discharges.

Indeed, it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[133] Thus, viewed holistically, the authority to condition a certification under section 401(d) supports the certifying authority's section 401(a)(1) right to grant or deny a certification request. Together, the certification and any conditions form an integrated whole, the overarching purpose of which is to assure point source *discharges* from a federally licensed or permitted project will not violate water quality requirements.

The 2023 Rule ignored this reasonable and well-supported interpretation and instead asserted that section 401 affords states and tribes certification and conditioning authority that extends to the project as a whole based on the Agency's determination that: (1) section 401 is sufficiently ambiguous so as to not preclude EPA's interpretation; and, (2) that the interpretation is consistent with the Supreme Court's 1994 decision in *PUD No. 1*.[134] While the Associations believed these determinations to be erroneous at the time, these rationales certainly do not pass legal muster in the wake of the Court's decision in *Loper Bright Enterprises v. Raimondo*.[135]

In its June 28, 2024, *Loper Bright* decision, the Supreme Court overturned its long-standing "*Chevron* Doctrine," which required courts to afford special deference to a federal administrative agency's interpretation of applicable law within its enforcement purview on the theory that an agency specializing in, say, environmental regulation, has a special expertise in the environmental laws it enforces. While the *Loper Bright* decision allows courts to afford "respect" to agencies'

[131] 91 Fed. Reg. at 2,024.
[132] *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (quoting legislative history of 1972 amendments).
[133] *Deal v. United States*, 508 U.S. 129, 132 (1993).
[134] 88 Fed. Reg. at 66,594.
[135] 603 U.S. 369 (2024).

factual and technical determinations, it requires courts to consider questions of law *de novo* and exercise independent judgement to determine the "single, best meaning" of a statutory provision.[136]

This doctrinal change means that courts will no longer defer to agency interpretations simply because they are permissible constructions of a statute. Instead, when courts have cases challenging agencies' interpretations of their governing statutes, they must now set aside any agency rule, policy or other directive that is based on an interpretation that does not reflect the "single, best meaning" of a statute.

As relevant here, the *Loper Bright* decision means that Supreme Court's decision in *PUD No. 1* does not compel the Agency to expansively interpret the scope of state and tribal certification and conditioning authority because the key holding on the scope of section 401 certification authority in PUD *No. 1* was based on the Court extending EPA's interpretation ample "*Chevron*" deference that the superseding *Loper Bright* decision now prohibits.[137] It is also significant that the regulations to which the majority deferred in *PUD No. 1* were not based on the statutory text before the Court. Instead "[t]he Court relied on EPA regulations that predated the 1972 CWA amendments and therefore contained outdated statutory terminology, most importantly 'activity' rather than 'discharge' in CWA section 401(a)(1)."[138]

Even if the Supreme Court's key holdings in *PUD No. 1* were not called into question by the *Loper Bright* decision, it is important to note that the *PUD No. 1* decision focused on the permissibility of one type of certification condition in a highly fact-specific circumstance.[139] It is also significant that Supreme Court majority in *PUD No. 1* expressly stated that section 401 certification authority "is not unbounded."[140] The Court then determined that a state requirement imposed to "ensure compliance with the state water quality standards adopted pursuant to § 303 of the Clean Water Act" was an "appropriate requirement," but declined to "speculate on what additional state laws, if any, might be incorporated by this language."[141]

As Justices Thomas and Scalia cautioned in their dissent in *PUD 1*, "conditions that have little relation to water quality," if allowed, would significantly "disrupt[] the careful balance between state and federal interests" established under other statutory regimes.[142] In fact, outside the specific context at issue in the Supreme Court's *PUD No. 1* decision, use of section 401(d) to regulate "the activity as a whole" is statutorily prohibited in many key respects.

Recall that section 401 provides states and tribes a narrow and temporally limited exemption from the otherwise exclusive jurisdiction that Congress bestowed on the federal government over certain types of projects of national importance such as power generation, energy distribution, and interstate transportation infrastructure. For instance, FERC's authority under the NGA is

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[136] *Loper Bright* 144 S. Ct. at 2266 (citing *Wisconsin Central Ltd. v. U.S.*, 585 U. S. 274, 284 (2018)).
[137] *PUD No. 1*, 511 U.S. 700, 712 ("EPA's conclusion that *activities* —not merely discharges—must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference. See, *e. g., Arkansas* v. *Oklahoma*, 503 U. S. 91, 110 (1992); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984)").
[138] 91 Fed. Reg. at 2,025.
[139] *PUD No. 1*, 511 U.S. 700, 712.
[140] *PUD No. 1*, 511 U.S. 700, 712.
[141] *PUD No. 1*, 511 U.S. 700, 712.
[142] *PUD No. 1*, 511 U.S. 700, 732–33.

exclusive: "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce."[143] "FERC's exclusive purview" includes the regulation of "facilities [that] are a critical part of the transportation of natural gas and sale for resale in interstate commerce."[144] In this "exclusively federal domain," states may not regulate.[145]

The Supreme Court's fact-specific construal of section 401(d) to allow states and tribes to regulate "the activity as a whole" cannot undo, and therefore must yield to, these larger statutorily mandated fields of preemption. Whatever additional leeway the Supreme Court may have provided certifying authorities in the *PUD No. 1* decision, it did not and cannot overcome Congress' express directive that certain decisions are exclusively committed to the federal government.

Therefore, the Associations support EPA's proposed interpretation that "[t]he scope of a . . . section 401 certification is limited to assuring that a discharge . . . will comply with water quality requirements."[146]

2. The Proposed Rule Reasonably Defines the "Water Quality Requirements" with which Certifying Authorities Certify Compliance

EPA's Proposed Rule specifies which "water quality requirements" certifying authorities may consider in "review[ing] the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated."[147] And similar to the 2020 Rule, EPA is proposing to define "water quality requirements" at 40 C.F.R. § 121.1(f) as "applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and applicable and appropriate state or tribal water quality-related regulatory requirements for discharges."[148]

The Associations support these proposed changes as necessary to preclude certain unlawful abuses of section 401 authority in which states would withhold certification or impose certification conditions that had nothing to do with the water quality effects of the project's discharges and sometimes nothing to do with the effects of the project at all. While EPA promulgated similar revisions in the 2020 Rule, those reforms were undone by the 2023 Rule.

As such, EPA's current regulations implementing CWA section 401 allow for impermissibly expansive section 401 certification reviews and conditions by defining "water quality requirements," as "any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal

[143] *Schneidewind* at 305.
[144] *Schneidewind* at 308.
[145] *Schneidewind* at 305; *see, e.g.*, *N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 819–20, 822–24 (8th Cir. 2004) (NGA preempted state-law environmental provisions); *E. End Prop. Co. No. 1, LLC* v. *Kessel*, 851 N.Y.S.2d 565, 571 (N.Y. App. Div. 2007) (similar); *No Tanks Inc.* v. *Pub. Utils. Comm'n*, 697 A.2d 1313, 1315 (Me. 1997) (similar).
[146] 40 C.F.R. § 121.3 (2020).
[147] 33 U.S.C. § 1341(a)(4).
[148] 91 Fed. Reg. at 2,026.

law,"[149] "regardless of whether they apply to point or nonpoint source discharges."[150] As acknowledged in the preamble to the 2023 Rule, these revisions reopened the door to certifying authorities to condition certifications and impose broad "certification conditions" beyond those directly applying to water quality, including allowing them to impose "conditions that could include building or maintaining fish passage or habitat restoration related to water quality protection," or monitor "non-discharge-related water quality impacts of the activity, such as temperature, flow, riparian buffer conditions, and species impacts."[151]

This regulatory definition of "water quality requirements" impermissibly expanded the scope of water quality requirements well beyond what Congress intended. While the phrase "water quality requirements," which appears throughout section 401, is not defined in the statute, it has a readily ascertainable meaning that is far more limited than the definition EPA promulgated in its 2023 Rule. Under section 401(a)(1), a certifying authority's decision to grant or deny certification must be based on whether the discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the Act:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title.[152]

Thus, although the phrase "water quality requirements" is undefined, the enumerated provisions of the CWA (*i.e.*, sections 301, 302, 303, 306, and 307) *are* specified within section 401 and the requirements of those sections are a prerequisite to, and therefore delineate the scope of, the section 401 certification. As this Proposed Rule recognizes, undefined or not, the meaning of "water quality requirements" is clear. "Water quality requirements" refer to the federal, state, or tribal requirements adopted pursuant to authority under sections 301, 302, 303, 306, and 307. While this Proposed Rule could have construed "water quality requirements" more narrowly, EPA now acknowledges that it is plainly precluded from defining the term such that its scope is more comprehensive than the limited scope of the section 401 review.[153]

EPA's proposed definition of "water quality requirements" reflects that the phrase "any other appropriate requirement" in section 401(d) does not change section 401's statutorily mandated limits on the scope of certification.[154] For one, section 401(a)(1) delineates the scope of the section 401 certification review; not section 401(d). Further, while the CWA does not define what constitutes "any other appropriate requirement of state law," the Agency's proposed interpretation of the phrase heeds the Supreme Court's admonition in *PUD No. 1* that, "[a]lthough § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded."[155] The Court went on to determine that a state requirement imposed to "ensure

[149] 40 C.F.R. § 121.1(j).
[150] 88 Fed. Reg. at 66,602.
[151] 88 Fed. Reg. at 66,598.
[152] 33 U.S.C. § 1341(a)(1).
[153] 91 Fed. Reg. at 2,027.
[154] 91 Fed. Reg. at 2,027.
[155] *PUD No. 1*, 511 U.S. 700, 712.

compliance with the state water quality standards adopted pursuant to § 303 of the Clean Water Act" was one such "appropriate requirement," but declined to "speculate on what additional state laws, if any, might be incorporated by this language."[156]

EPA therefore appropriately discerned the scope Congress intended through use of the phrase "any other appropriate requirement" by looking to the specific provisions of the CWA that Congress expressly identified in section 401.[157] Specifically, the Agency applied the *ejusdem generis* canon of interpretation,[158] which states that where general words follow an enumeration of two or more things, they apply only to things of the same general kind or class specifically mentioned.[159] This canon also informed Justice Thomas's dissent in *PUD No. 1,* therefore mirrors Justices Thomas and Scalia's conclusion that "the general reference to 'appropriate' requirements of state law is most reasonably construed to extend only to provisions that, like other provisions in the list, impose discharge-related restrictions."[160]

This interpretation also accords with the legislative history of the 1977 Amendments that added section 303, which governs state water quality standards and implementation plans, to section 401's enumerated list of CWA provisions. According to the Conference Report for the 1977 Amendments:

> The inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303. The inclusion of section 303 is intended to clarify the requirement of section 401. It is understood that section 303 is required by the provisions of section 301.[161]

As relevant here, section 303 is the provision through which EPA approves state standards - standards which, like those promulgated under section 301, do "not . . . regulate nonpoint source pollution'' and therefore, do "not sweep nonpoint sources into the scope of [section 401]." [162]

Although EPA did not reference its use in the preamble to the Proposed Rule, the Associations believe that the Agency would also have reached this same lawful interpretation "[u]nder the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'"[163] "While 'not an inescapable rule,' this canon 'is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.'"[164]

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[156] *PUD No. 1*, 511 U.S. 700, 712.
[157] 91 Fed. Reg. at 2,027.
[158] 91 Fed. Reg. at 2,027.
[159] *See Wash. State Dept. of Social and Health Services v. Keffeler*, 537 U.S. 371, 383–85 (2003).
[160] *PUD No. 1,* 511 U.S. at 728 (Thomas, J., dissenting).
[161] H. Rep. No. 95-380 (95th Cong. 1st Sess. (1977).
[162] *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1093–94 (9th Cir. 1998).
[163] *McDonnell v. United States ("McDonnell")*, 136 S. Ct. 2355 at 2368 (2015) (quoting *Jarecki v. G.D. Searle & Co. ("Jarecki")*, 367 U.S. 303, 307 (1961).
[164] *McDonnell*, 136 S. Ct. 2355 at 2368-69 (quoting *Jarecki.*, 367 U.S. at 307.

For example, in *Gustafson v. Alloyd Co.*, the Supreme Court considered a statute that defined the word "prospectus" as a "prospectus, notice, circular, advertisement, letter, or communication."[165] The Court held that although the word "communication" could in the abstract mean any type of communication, "it is apparent that the list refers to documents of wide dissemination," inclusion "of the term 'communication' in that list suggests that it too refers to a public communication."[166]

Without question, the phrase "any other appropriate requirement" is capable of many different meanings in the abstract, and some states have latched onto this phrase in attempts to greatly expand the conditions they can extract through the section 401 certification process. The conditions Maryland sought to impose on the license for Exelon Generation Co., LLC's Conowingo dam and hydroelectric project presents another particularly egregious example of this practice.[167] Even though the project does not discharge phosphorus or nitrogen, "[a]s the cost of such a federal license, Maryland insists that the Conowingo Project remove the phosphorus and nitrogen that flow downriver from New York, Pennsylvania, and Maryland. In lieu of cleaning the Susquehanna, Maryland would accept $172 million from Exelon each year for the next 50 years."[168]

In context, when employing the traditional tools of statutory interpretation, such requirements are clearly unlawful. Like the *ejusdem generis* canon of interpretation, the interpretive canon *noscitur a sociis* shows that the CWA cannot reasonably be interpreted to make allowance for such requirements. The phrase "any other appropriate requirement" "follows an enumeration of four specific sections of the CWA that are all focused on the protection of water quality from point source discharges to waters of the United States."[169] Indeed, section 401 in its entirety is replete with references to requirements deemed necessary to ensure compliance with "applicable effluent limitations" and "water quality requirements." Given the overall focus of section 401, the Agency is correct that the phrase "any other appropriate requirement" must be interpreted to include only those EPA-approved provisions of state or tribal law that implement the section 402 and 404 permit programs or otherwise control point source discharges to WOTUS.

While the text, structure, and history of section 401 plainly requires the Agency to interpret section 401(d) and the phrase "any other appropriate requirement" to include only those EPA-approved provisions of state or tribal law that implement the section 402 and 404 permit programs or otherwise control point source discharges to WOTUS, it is important to note the practical importance of such an interpretation. As noted throughout these comments, a handful of states have attempted to expand their section 401 authority to block or constrain projects for reasons that have nothing to do with the protection of water quality. By broadly construing the scope of their certification authority beyond what Congress allowed in CWA section 401, some states improperly demand project proponents develop and/or submit documentation wholly unrelated to water quality, such as environmental assessments of impacts to other environmental media, demonstrations of the need for the project, alternative route analyses, and analyses of air impacts, traffic impacts, and other reviews already undertaken by FERC or other federal agencies pursuant

[165] *Gustafson v. Alloyd Co.*, 513 U.S. 561, 573-574 (1995).
[166] *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575.
[167] *Exelon Generation Co. v. Grumbles*, 380 F. Supp. 3.d 1 (D.D.C. 2019).
[168] *Exelon Generation Co. v. Grumbles*, 380 F. Supp. 3.d at 3.
[169] Sections 301, 302, and 306 impose effluent limits on new and existing sources, Section 303 governs water quality standards and implementation plans, and Section 307 addresses pretreatment standards for effluents.

to the NEPA, the ESA, the NGA, and other statutes.[170] Indeed, the State of New York has routinely denied water quality certifications on grounds outside of water quality, expressing concern for the potential climate change impacts of projects and purported lack of assessment of such impacts.[171]

This implausibly broad construction of the scope of state review is perhaps most clearly exemplified in the Millennium Bulk Terminals – Longview LLC project in Washington State.[172] In the course of Washington State's 5-year review of the project, the state compiled an environmental impact statement ("EIS") under NEPA that expressly concluded that the terminal would not result in significant adverse effects on water quality, aquatic life, or designated uses; and that any potential water quality impacts could be fully mitigated. And yet, even after concluding that the project would not adversely impact water quality, Washington State denied the certification request based on concerns about capacity of the interstate rail system, the impact of trains operating anywhere in that system, and impacts of the project on the overall capacity of the Federal Columbia River Navigation Channel to accommodate additional vessels at state ports.

To state the obvious, no aspect of the CWA's text, structure, or purpose can be construed to suggest that Congress envisioned section 401 to authorize certifications based on impacts wholly unrelated to water quality. In many cases, Congress required that these impacts be assessed under different statutes.[173] Further, while section 401 provided states and other certifying authorities a limited role in reviewing the prospective impacts of proposed federally licensed or permitted projects, states and other certifying authorities may have other authority to regulate the operation of those projects. For instance, states can, and often are, delegated permitting and enforcement authority under CWA sections 402 and 404, under the Clean Air Act, and through other federal statutes as well. The more limited role for states and other certifying authorities under section 401 does not diminish states' jurisdiction under these statutory provisions. On the contrary, these other statutory provisions demonstrate that certification reviews are not the proper mechanism for addressing the potential environmental impacts that some states have misconstrued section 401 to encompass.

As such, the Associations strongly support EPA's proposed rescission of the 2023 Rule's definition of "water quality requirements" in order to define this term consistent with the 2020 Rule and congressional intent in enacting CWA section 401.

3. The Proposed Rule Lawfully Defines "Discharge" and the Scope of Waters Subject to Section 401

The Associations support EPA's proposal to define "discharge" for purposes of CWA section 401 as "a discharge from a point source into waters of the United States."[174] If finalized, this aspect of the Proposed Rule would prohibit certifying authorities from considering "water quality impacts

[170] *Hoopa Valley*, 913 F.3d 1099, 1103-04; *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017).
[171] N.Y. State Dep't of Env. Conservation,, Notice of Decision 3-3399-00071/00001 (Aug. 30, 2017), available at https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14670874.
[172] WDEC, In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals-Longview, LLC, Order # 15417 (Sept. 26, 2017).
[173] For example, NEPA requires review of multi-media effects, while other statures address impacts to air (Clean Air Act), land (Resource Conservation and Recovery Act), wildlife (Endangered Species Act), and cultural resources (National Historic Preservation Act).
[174] 91 Fed. Reg. at 2,028.

to waters beyond waters of the United States, or impacts from outside the discharge itself."[175] As with the Agency's proposed rescission of the 2023 Rule's "activity-based" approach and expansive interpretation of "water quality requirements," this proposed definition of "discharge" is necessary to realign EPA's regulations with the text, structure, and purpose of CWA section 401.

As amended by the 2023 Rule, EPA's current regulations allow certifying authorities to evaluate whether, and base certification decisions and conditions on, a proposed project's point source *or nonpoint* source releases *to non-WOTUS state and tribal waterbodies* will *comply with state and tribal laws* that were not promulgated pursuant to the CWA.[176] Allowing certifying authorities to review nonpoint source releases to state/tribal waters and base certification decisions and conditions on state/tribal requirements applicable only state/tribal waters far exceeds the scope of authority Congress conveyed in enacting CWA section 401 enables some states to engage in the same type of abuses of their section 401 certification authority that the 2020 Rule sought to prevent. We therefore agree with EPA's proposed determination that "this approach was misguided and exceeded the Agency's authority under the CWA."[177]

CWA section 401 states that an applicant must seek a section 401 certification for any activity requiring a federal license or permit "which may result in any discharge into the navigable waters." "Thus, the text is clear that the trigger for CWA section 401 certification is a potential discharge into 'navigable waters,' also known as waters of the United States."[178] In fact, EPA has always recognized (including in both the 2020 Rule and 2023 Rule) that the trigger for certification involves a discharge into WOTUS.

According to the 2023 Rule, however, even though section 401 certification is only triggered based on point source discharges to WOTUS, once certification is triggered, certifying authorities are "not so limited when certifying compliance with requirements of state or Tribal law that otherwise apply to waters of the State or Tribe beyond navigable waters."[179] The 2023 Rule therefore asserted that "[t]he best reading of section 401 is that is authorizes a state or Tribe to apply state law or Tribal law to all impacted state or Tribal waters, rather than limiting states and Tribes to considering only a subset of impacted waters."[180]

For many of the reasons described in the preceding two subsections, EPA now proposes to correctly conclude that the CWA's express statutory trigger for a section 401 certification (*i.e.*, point source discharge to WOTUS) also delineates the scope of certification and conditioning authority states and tribes may wield once their role is triggered. As discussed in Subsection IV.c.2. above, under CWA section 401(a)(1), a certifying authority certifies that any "such discharge" will comply with water quality requirements, and "such discharge" is a clear reference back to the triggering discharge.

In addition to the ample support described in the preceding subsections, this proposed conclusion is also supported by the structure and history of the CWA. Indeed, the same 1972 Amendments

[175] 91 Fed. Reg. at 2,028.
[176] 88 Fed. Reg. at 66,604.
[177] 91 Fed. Reg. at 2,028.
[178] 91 Fed. Reg. at 2,028 (citing 33 U.S.C. § 1362(7)).
[179] 88 Fed. Reg. at 66,604.
[180] 88 Fed. Reg. at 66,605.

through which section 401 was enacted also shifted the Act's regulatory focus away from ambient standards and toward a prohibition and permitting framework for "the discharge of any pollutant by any person . . ."[181] The 1972 Amendments thus defined the phrase "discharge of any pollutant"[182] as "any addition of any pollutant to *navigable waters from any point source*."[183]

Congress then also further defined "navigable waters" as "the waters of the United States ["WOTUS"], including the territorial seas."[184] While the precise contours of this definition have been the subject of a great deal of debate, Congress clearly intended the definition of WOTUS, and therefore "navigable waters," to refer to a subset of surface waterbodies within the United States. Like the permit requirements in sections 402 and 404, the trigger for and scope of section 401 is limited to discharges to WOTUS—not potential releases to groundwater, soil, isolated waterbodies, ephemeral flows, or any of the many other categories of waters that are outside of the definition of WOTUS.

While the scope of waters subject to section 401 are encompassed with the statutory definition of "navigable waters," a section 401 certification is only triggered by and is plainly limited to the potential "discharge" into those waters. As the Supreme Court noted in *S.D. Warren Co. v. Maine Board of Environmental Protection*, the CWA only defines the phrase "discharge of a pollutant,"[185] but for the term "discharge" that is used in section 401, Congress only noted that it "includes a discharge of a pollutant, and a discharge of pollutants."[186] The Court therefore interpreted the term "discharge" according to its common usage as "flowing or issuing out," and held that water releases from a dam constituted "discharges" for purposes of triggering section 401 even if the releases contained no pollutants.[187]

Interpreting "discharge" as "from any point source" accords with *S.D. Warren*, and provides the best reading of that decision. The CWA defines "point source" as "any discernible, confined and discrete conveyance . . ."[188] The tailrace that discharged effluent from the dam at issue in *S.D. Warren* is clearly encompassed within this definition of "point source." Moreover, by defining "discharge" as "flowing or issuing out," the Court strongly implied the need for a "discernible, confined and discrete conveyance."[189]

Defining "discharge" as effluent "flowing or issuing out" of a "point source" is also consistent with the text, structure, and legislative history of the Act. "Discharge" was first defined (albeit sparsely) in the same 1972 Amendments that created section 401 and "overhauled the regulation of water quality," such that, according to the Ninth Circuit in *Oregon Natural Desert Association v. Dombeck*, "[d]irect federal regulation now focuses on reducing the level of effluent that flows

[181] 33 U.S.C. § 1311(a).
[182] 33 U.S.C. § 1311(a).
[183] 33 U.S.C. § 1362(12) (emphasis added).
[184] 33 U.S.C. § 1362(7).
[185] "Discharge of a pollutant" means "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12).
[186] 547 U.S. 370 (2006) ("*S.D. Warren*") (quoting 33 U.S.C. § 1362(16)).
[187] *S.D. Warren*, 547 US at 378.
[188] 33 U.S.C. § 1362(14).
[189] 33 U.S.C. § 1362(14).

from point sources."[190] Thus, wherever it is used in the CWA, the term "discharge" refers to the release of effluent from a point source.[191] And, as applicable here, section 401 certification authority is not triggered by and cannot encompass nonpoint source effluent releases from a federally permitted or licensed project or activity.[192]

Importantly, the Ninth Circuit revisited the holding in *Dombeck* after the *S.D. Warren* decision and held that the Supreme Court's decision in *S.D. Warren* supported its prior holding.[193] The court held that distinguishing point source discharges and nonpoint source pollution is an "organizational paradigm of the Act."[194] Point source discharges "tended to be more notorious and more easily targeted"[195] and were therefore subjected to the CWA's broad prohibition against "the discharge of any pollutant."[196] Consequently, the CWA does not regulate nonpoint source pollution through the NPDES permitting program.[197] The Supreme Court has also recognized the CWA's disparate treatment of these types of pollution.[198]

"Virtually all water, polluted or not, eventually makes its way to navigable water."[199] But Congress did not structure the CWA to require permits or extend state or tribal section 401 certification authority over any action that could cause a release into a WOTUS. Rather, the legislative history of the 1972 Amendments shows that Congress intended that these provisions be triggered by and limited to discharges from point sources. Congress enacted section 401 "to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants [which by definition applies only to point sources]."[200]

This organizational paradigm is also revealed in Congress's 1977 addition of section 303 (state water quality standards) to the list of provisions requiring section 401 certifications ("1977 Amendment"). The legislative history surrounding the 1977 Amendment cannot be read as expanding the scope of the potential pollution sources subject to the certification requirement under section 401. Rather, the history confirms that section 401 was intended to reach only those sources covered by section 301 of the CWA.

> The inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303. The inclusion of section 303 is intended to

[190] *Oregon Natural Desert Association v. Dombeck ("Dombeck")*, 172 F.3d 1092 (9th Cir. 1998).
[191] *Dombeck*, 172 F.3d at 1098.
[192] *Dombeck*, 172 F.3d at 1099.
[193] *Or. Natural Desert Ass'n v. U.S. Forest Service ("ONDR")*, 550 F.3d 778 (9th Cir. 2008).
[194] *Or. Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008).
[195] *Or. Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008).
[196] 33 U.S.C. § 1311(a).
[197] *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 n.4 (10th Cir. 2005).
[198] *County of Maui v. Hawaii Wildlife Fund ("Maui")*, 140 S. Ct. 1462, 1470 (2020).
[199] *Maui*, 140 S. Ct. at 1470.
[200] S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971).

> clarify the requirement of section 401. It is understood that section 303 is required by the provisions of section 301.[201]

Thus, the Associations support the Agency's proposal to define "discharge" for purposes of CWA section 401 as "a discharge from a point source into waters of the United States."[202]

d. Necessary Components of a Certification Decision

The Associations support EPA's proposal to define the components that certifying authorities must include "in any action by the certifying authority to grant, grant with conditions, deny, or explicitly waive a request for certification."[203] This proposed action represents a return to the Agency's longstanding practice of defining in its section 401 implementing regulations the required contents for certification decisions.[204] "In a change from past practice, in 2023 the Agency defined recommended contents for all certification decisions in the current regulations, but did not require certifying authorities to include these contents in their decisions."[205]

The Associations also support the Agency's modest but important proposed revisions to the components that this Proposed Rule will require be included in all certification decisions. These proposed revisions include textual changes reflecting (as discussed in Subsection IV.c. of these comments) that the scope of section 401 certification reviews, decisions, and conditions is limited to point source discharges to WOTUS from the federally licensed or permitted activity—not the activity as a whole.[206]

Consistent with our support for the 2020 Rule's approach to certification decisions and our opposition to the 2023 Rule's changes to that approach, the Associations also support the Agency's proposal to resume requiring that certifying authorities provide citations for each water quality requirement on which they base their certification decision.[207] For instance, if the certifying authority grants certification with conditions, the Proposed Rule will require the certifying authority to cite "each water quality requirement upon which each condition is based."[208] Similarly, under the Proposed Rule, a certifying authority that denies certification will be required to cite the "specific water quality requirements that may be violated, or if the denial is based on insufficient information, a description of any missing water quality-related information."[209]

Although the 2023 Rule's changes to the substance and mandatory nature of the 2020 Rule's certification decision components were based on a claimed interest in decreasing certifying authorities' informational burdens, in reality, these modest documentation requirements are and

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[201] Conference Report on the 1977 CWA, H. Rep. No. 95-380 (95th Cong. 1st Sess. At 208 (1977). As previously noted, section 301 applies only to 'discharges' from "point sources" of pollution.
[202] 91 Fed. Reg. at 2,028.
[203] 91 Fed. Reg. at 2,028.
[204] See 40 C.F.R. § 121.2(a); § 121.16 (2019).
[205] 91 Fed. Reg. at 2,029 (citing 40 C.F.R. § 121.7(c)–(f)).
[206] 91 Fed. Reg. at 2,029.
[207] 91 Fed. Reg. at 2,029.
[208] 91 Fed. Reg. at 2,041.
[209] 91 Fed. Reg. at 2,041.

always have been completely reasonable, hardly burdensome, and fully justified by certain certifying authorities' misuse of section 401 procedures.

For instance, it is hardly unreasonable to require a certifying authority to identify the basis for denying a certification request. Like the 2020 Rule, EPA's Proposed Rule would merely require the certifying authority to identify and cite to the water quality requirements that the proposed project will violate, and explain why the certifying authority believes that this violation will occur.[210] A certifying authority that has denied a certification request will surely have this information readily available, and the most minimal standards of governance and administrative procedure affirms that when the government issues a decision of this type, it should provide some reasoned explanation of why it made that decision.

Similarly, if the certifying authority denies a certification request because the applicant failed to include information that the certifying authority deemed important, EPA's Proposed Rule will require the certifying authority to merely identify what necessary water quality-related information was omitted.[211] Unless the certifying authority's denial is based on the applicant's failure to provide information wholly unrelated to the proposed project's discharge or potential impacts to water quality requirements,[212] this proposed documentation requirement presents no burden at all.

EPA's modest proposed documentation standards for certification conditions are quite reasonable as well. Certifying authorities that impose conditions on a certification need only explain why the conditions are necessary to assure that discharges from the project comply with a specifically cited water quality requirement.[213] The Associations cannot envision an instance wherein a certifying authority required adherence to a certification condition that is properly within the statutory scope of a section 401 review, but was unable to readily cite the water quality requirement on which that condition was based. Here again, to the extent this basic documentation requirement is burdensome at all, it is only in relation to those certifying authorities that misuse their section 401 certification authority to impose conditions wholly unrelated to discharges or water quality requirements.[214]

In sum, EPA's modest proposed revisions to the components of certification decisions are imminently reasonable, hardly burdensome, and completely necessary to prevent widely recognized instances of improper certification decisions. On the contrary, these proposed revisions appropriately provide each applicant the ability to understand the reasons for a certifying authority's decision and, if the certifying authority's rationales are inconsistent with CWA section 401 or EPA's implementing regulations, a basis on which to challenge the decision. The Associations therefore urge EPA to finalize these revisions.

[210] 40 C.F.R. § 121.7; 91 Fed. Reg. at 2,041.
[211] 91 Fed. Reg. at 2,029.
[212] *See e.g.*, *N. Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455–56 (2nd Cir. 2018).
[213] 40 C.F.R. § 121.7(d)(1); 40 C.F.R. § 121.7(d)(2).
[214] *See e.g.*, *Exelon Generation Co. v. Grumbles*, 380 F. Supp. 3.d 1 (D.D.C. 2019).

e. Reasonable Limits on Certifying Authorities' Discretion to Modify Grants of Certification

The Associations support the Proposed Rule's provision prohibiting certifying authorities from modifying grants of certification unless the applicant expressly agrees to the modification as well as the precise language of the modification.[215] Under the 2023 Rule, a certifying authority only needs the approval of the federal agency to modify a final certification to impose new conditions or amend existing conditions at any point in the future.[216] Applicants were afforded no role in decisions over whether or how to modify existing grants of certification, and therefore had no basis on which to ascertain when or how their certification conditions and compliance requirements might change. This open-ended modification authority is wholly inconsistent with, and therefore impermissible under, the Act.

Congress drafted section 401 to provide certifying authorities only two narrow and time-limited mechanisms for amending or rescinding previously issued certifications. Under section 401(a)(3), a certification that a state or other authority grants for the construction of a facility is deemed to fulfill the certification requirements for the licensing or permitting necessary for subsequent operation of the facility unless, within 60 days of receiving an application for an operating license or permit, the certifying agency notifies the federal agency "that there is no longer reasonable assurance that there will be compliance with the applicable provisions of" the CWA "because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters, or (D) applicable effluent limitations or other requirements."[217]

Under section 401(a)(4), "[p]rior to the initial operation of any federally licensed or permitted facility or activity" certifying authorities are authorized to "review the manner in which the facility or activity shall be operated . . ." for purposes of assuring that water quality requirements will not be violated.[218] If the certifying authority finds that "such federally licensed or permitted facility or activity will violate . . . water quality requirements such Federal agency may, after public hearing, suspend such license or permit."[219]

These two provisions of section 401 represent the full extent of certifying authorities' ability to modify or add conditions to previously granted certifications. No other provisions of section 401 reference the potential addition or modification of certifying conditions or even mention any role for certifying authorities' post-certification. Although the 2023 Rule claimed this statutory silence provided EPA authority to allow certifying authorities to modify existing certifications without applicants' consent, in reality, it creates a "negative implication" that modification measures unmentioned in section 401 are precluded.[220] Indeed, given the express and proscriptive provisions for post-certification authority that Congress provided in sections 401(a)(3) and 401(a)(4), there is

[215] 91 Fed. Reg. at 2,030.
[216] 40 C.F.R. § 121.10(a).
[217] 33 U.S.C. § 1341(a)(3).
[218] 33 U.S.C. § 1341(a)(4).
[219] 33 U.S.C. § 1341(a)(4).
[220] *Shook v. D.C. Fin. Resp. & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) ("the mention of one thing implies the exclusion of another") (*quoting Halverson v. Slater*, 129 F.3d 180, 185 (D.C.Cir.1997)).

simply no reason "to believe that Congress, by any remaining ambiguity, intended to undertake the regulation" of a subject "never mentioned in the statute," such as an additional authorization for certifying authorities to modify certifications for any reason or any timeframe.[221]

The impermissibility of the 2023 Rule's approach to certification modifications is also clear in light of section 401's express and unambiguous time limits for certification reviews, and the highly circumscribed role of section 401 certifying authorities within a much broader licensing or permitting process. Because the section 401 certification process is only part of a more comprehensive and protracted federal licensing or permitting process, timely issuance of certifications can be integral to the overall viability of essential energy and infrastructure projects. Depending on the extent of a delay in obtaining the requisite certifications and authorizations or the level of uncertainty about the schedule or outcome for those processes, many important projects can be cancelled altogether.

Congress clearly understood the significant adverse impacts that delay and uncertainty could have on nationally important energy and infrastructure projects, such that it required states' exercise of section 401 certification authority to be highly circumscribed and completed within "a reasonable period of time (which shall not exceed one year) . . ."[222] Thus, although Congress afforded certifying authorities an opportunity to review the potential water quality impacts of federally licensed and permitted projects, it crafted section 401 to ensure that this carve-out from areas otherwise exclusively committed to the federal government was well-defined and precisely time-limited.

Allowing a certifying authority to revisit and modify an existing certification without the consent of applicants would render meaningless the express time limits Congress imposed in Section 401(a)(1). Only Congress can change the time limits in section 401(a)(1). EPA has no discretion to extend these limits in any way, and neither do federal licensing and permitting agencies or certifying authorities. In this respect, Congress was explicit and clear—the certification review processes cannot extend beyond one year.

While the Associations recognize that some state certifying authorities wish to indefinitely retain authority to regulate federally licensed and permitted projects through the ongoing addition and modification of section 401 conditions, that is not the authority Congress provided in section 401. Nor is it an authority that EPA can lawfully confer through its regulations implementing section 401. As such, the Associations support EPA's proposed provision prohibiting certifying authorities from modifying grants of certification unless the applicant expressly agrees to the modification as well as the precise language of the modification.[223]

f. Revisions Necessary to Align EPA's Regulations with the Section 401(a)(2) Process Required by the Act

The Associations support the Proposed Rule's multiple reforms and clarifications to the Agency's section 401(a)(2) regulatory procedures for determining whether a federally licensed or permitted activity has the potential to result in a discharge that "may affect" water quality in neighboring

[221] *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005).
[222] 33 U.S.C. § 1341(a)(1).
[223] 91 Fed. Reg. at 2,030.

jurisdictions.[224] In particular, we support those proposed provisions that would help further confirm and clarify that the scope of section 401(a)(2), like every other provision of section 401, is limited to the anticipated water quality impacts of potential discharges from federally permitted projects and not the activity as a whole. We also support those aspects of the Agency's proposed revisions to its implementing regulations that help streamline the section 401(a)(2) process and ensure that section 401(a)(2)'s procedural requirements can be accomplished within the congressionally mandated time limits for certification reviews.

The proposed provisions that help clarify that the scope of section 401(a)(2) is limited to the anticipated water quality impacts of potential discharges from federally permitted projects include a modest revision to the contents of the notification that federal agencies must provide to EPA so that the Agency to conduct its "may effect" analysis.[225] EPA's regulations currently require that the notification:

> include a copy of the certification or notice of waiver, and the Federal license or permit application, a general description of the proposed project, including but not limited to the Federal license or permit identifier, project location information, a project summary including the nature of any discharge into waters of the United States, and whether the Federal agency is aware of any neighboring jurisdiction providing comment on the project along with a copy of any such comments.[226]

"The Agency is proposing a minor revision to the text at 40 CFR 121.12(a)(2) to clarify that the project summary must be relevant to the discharge."[227] The Associations agree that this provision is helpful to ensure that the section 401(a)(2) process better aligns with Congress's intent that section 401 focus on the anticipated water quality impacts of potential discharges from federally permitted projects.

Similarly, we support the Proposed Rule's minor revisions to the contents of the objections that neighboring states must provide to EPA within 60 days of receipt of EPA's notification that a discharge in another state "may effect" the neighboring state's water quality.[228] Under the Proposed Rule, if a neighboring jurisdiction objects to certification because the discharge will violate a water quality standard, that neighboring jurisdiction must provide a citation to the "specific State or Tribal statute or regulation or the specific CWA provision" that the discharge would violate.[229] As with EPA's proposed revisions to the content of certification decisions (discussed in Subsection IV.d.), this proposed provision make clear that neighboring jurisdictions' objections and certifying authorities 'certification decisions cannot be based on the activity as a whole or any other consideration unrelated to the anticipated water quality impacts of potential discharges from federally permitted projects. This proposed provision is necessary, imminently reasonable, and if the neighboring jurisdiction is exercising its objection authority section 401(a)(2), not burdensome at all.

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[224] 91 Fed. Reg. at 2,031–32.
[225] 91 Fed. Reg. at 2,032.
[226] 91 Fed. Reg. at 2,032 (citing 40 C.F.R. §121.12(a)(2)).
[227] 91 Fed. Reg. at 2,032.
[228] 91 Fed. Reg. at 2,034.
[229] 91 Fed. Reg. at 2,034.

Those provisions of the Proposed Rule that the Associations believe will help ensure that section 401(a)(2)'s procedural requirements are properly streamlined and can be accomplished within the congressionally mandated time limits for certification reviews include: (1) standardizing the notification process and limiting EPA's need to request supplemental information from federal agencies; (2) adding regulatory text acknowledging that the Agency may conduct "may affect" determinations on a categorical or case-by-case basis; and, (3) providing "Federal agencies with 90 days to hold a public hearing on State's objection and make a determination on the objection."[230]

Section 401 of the CWA stipulates that, in all cases, the requirement that certifying authorities complete their review within a "reasonable period of time" means that certification review can never take longer than one year following receipt of a request for certification.[231] This deadline is explicit, unambiguous, and binding. Therefore, while the section 401(a)(2) process provides neighboring jurisdictions a critical mechanism for engagement, that process must yield to the explicit and binding certification review timeframes imposed by Congress. These provisions of the Proposed Rule are thus necessary to ensure that section 401(a)(2) processes are aligned with Congress's intent that section 401 certification processes not unduly delay nationally important projects.

In addition to these proposed streamlining provisions and in the interest or promoting greater clarity and consistency, the Associations urge EPA to consider developing a list of factors that the Agency will consider in making "may affect" determinations. EPA's determination of whether a discharge "may affect" the water quality of another jurisdiction involves some discretion, but the Agency's discretion is not unbounded.[232] Section 401 provides a "meaningful standard against which to judge the agency's exercise of discretion."[233] Under section 401(a)(2), EPA renders a determination about the likelihood that a potential upstream discharge will violate a water quality standard in a downstream jurisdiction.

Although section 401 provides judicially manageable standards that prescribe the considerations that must inform the Agency's "may affect" determination, the Associations believe it makes sense to include those considerations in EPA's proposed regulatory revisions,[234] and that those considerations be drawn directly from the text, structure, and history of section 401. As such, the Agency's rules should explain that the potential "discharge" under section 401(a)(2) refers to effluent flowing or issuing from a point source to a WOTUS. Additionally, the phrase "the quality of the waters of any other State"[235] must be interpreted consistent with the Proposed Rule's definition of "water quality requirements" so that the Agency's "may affect" determination is based on the likelihood that a discharge will cause a downstream violation of federal, state, or tribal requirements adopted pursuant to authority under sections 301, 302, 303, 306, and 307. Further, because Congress's authority to enact the CWA, and section 401(a)(2) in particular,

[230] 91 Fed. Reg. at 2,032.
[231] 33 U.S.C. § 1341(a)(1) ("If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.")
[232] *See Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.("Weyerhaeuser")*, 139 S. Ct. 361, (2018).
[233] *Weyerhaeuser Co.*, 139 S. Ct. at 370 (citation and quotation marks omitted).
[234] *See* request for comment at 87 Fed. Reg. at 35,364.
[235] 33 U.S.C. § 1341(a)(2).

derives from its power to regulate the "channels of interstate commerce" under the Commerce Clause,[236] the downstream "waters" that EPA must analyze must be limited to WOTUS, properly construed.

EPA's regulations should also include additional considerations that reflect the multi-jurisdictional nature of the section 401(a)(2) "may affect" determination. For instance, the Agency's regulations for the "may effect" determination, federal agency review, and the hearing process should all reflect enhanced considerations of the volumes of effluent, the size, flow, and current water quality of the WOTUS, the distance between the potential discharge and the neighboring jurisdiction, and the impacts of other existing and anticipated discharges to the WOTUS. These additional considerations will help avoid triggering the section 401(a)(2) notification and coordination procedures based on more speculative assertions of downstream impacts, and will help ensure that the ultimate federal agency decision under section 401(a)(2) likewise remains focused on non-speculative water quality impacts from upstream point source discharges to WOTUS.

g. Providing Tribes a Single Unified Approach for Obtaining Treatment in a Similar Manner as a State

The Associations agree that EPA should facilitate the participation of tribes in CWA decisions, and that the Agency's implementing regulations should provide tribes a reasonable pathway for obtaining "treatment as a state" ("TAS") for various programs under the Act. We did not agree, however, with the 2023 Rule's adoption of streamlined procedures for tribes to obtain TAS status for the sole purpose of serving as certification authority under section 401(a)(1) or to participate as a neighboring jurisdiction under section 401(a)(2).[237] We therefore support EPA's proposal to rescind the section 401-specific TAS regulations and instead allow tribes to obtain TAS under EPA's broad-based regulations implementing section 518 of the CWA.[238]

Under the Proposed Rule and consistent with EPA's regulations prior to the 2023 Rule, tribes may participate as certifying authorities under section 401(a)(1) or neighboring jurisdictions under section 401(a)(2) if they have obtained TAS status for the section 303(c) program under which states and tribes with TAS status may develop, and EPA may approve, water quality standards under section 303(c) of the CWA.[239] This approach is logical as it provides section 401 authority to those tribes that have developed water quality standards relevant to the certification process.

On the other hand, the 2023 Rule's adoption of a new provision providing section 401 TAS status to tribes that have no federally approved water quality standards and have not even initiated the process to obtain federal approval made little sense. Congress provided section 401 as a highly circumscribed mechanism for states and tribes to ensure that discharges federally licensed or

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[236] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *see also United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (describing the "channels of interstate commerce" as one of three areas of congressional authority under the Commerce Clause); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 168 n.3, 172 (2001) (the term "navigable" indicates "what Congress had in mind as its authority for enacting the Clean Water Act: Its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." Nothing in the legislative history of the Act provides any indication that "Congress intended to exert anything more than its commerce power over navigation.")

[237] 40 C.F.R. § 121.11.

[238] 40 C.F.R. § 131.8.

[239] *See* 40 C.F.R. Part 131; TAS provision as 40 C.F.R. § 131.8.

permitted projects adequately protect their water quality. At minimum, it is reasonable for EPA to resume providing section 401 TAS status only on those tribes that have established criteria based on appropriate technical scientific data and analyses, designated water uses and requirements consistent with the CWA and sound scientific rationales, and adopted plans and compliance schedules to achieve water quality goals.[240] As such, the Associations support this proposed revision.

V. CONCLUSION

The Associations appreciate the opportunity to provide these comments in support of the Agency's Proposed Rule. The revisions proposed by EPA will provide needed clarity and certainty regarding the role of states and other certifying authorities under section 401. The reforms and regulatory updates included in this Proposed Rule are important, and given the misuse of section 401 certification procedures by some states, quite necessary.

This proposal is appropriately tailored to address those aspects of Section 401 that are most often misconstrued and/or misused by states and other certification authorities while respectfully adhering to the principles of cooperative federalism that Congress required in the CWA and other statutes. The Associations therefore appreciate and support the Agency's Proposed Rule.

Thank you for your consideration of our comments. Please do not hesitate to reach out to us if we can be of further assistance on this important issue.

Robin Rorick
Vice President, Midstream
American Petroleum Institute

Jeff Gunnulfsen
Assistant Vice President
Security & Risk Management Issues
American Fuel & Petrochemical Manufacturers

Wendy Kirchoff
Vice President, Regulatory Policy
American Exploration & Production Council

Andrew Mooney
Director of Federal Affairs
GPA Midstream Association

Daniel Naatz
IPAA

[240] *See* 40 C.F.R. § 131.5(a)(1)–(5).