Comment on Updating the Water Quality Certification Regulations
Docket ID No. EPA-HQ-OW-2025-2929-0001

Comment submitted by:
Institute for Energy Research
1155 15th St NW Suite 525
Washington, DC 20005

Kenneth Stein, Vice President for Policy
February 17, 2026

In February of 2025, the Institute for Energy Research submitted a petition for rescission and reconsideration of the final rule entitled Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66,558 (Sept. 27, 2023) ("2023 Rule"), and to initiate notice-and-comment rulemaking to rescind the Rule's preamble and amend the requirements for Section 401 certifications and related provisions at 40 C.F.R. Parts 121, 122, and 124. IER supports EPA undertaking this rulemaking to amend the 2023 rule.

IER notes that several sections of the proposed rule closely align with the recommendations in our petition and we support the finalization of those proposed elements. In other respects, the proposed rule does not adopt or does not address our recommended regulatory actions. IER urges EPA to modify the proposed rulemaking as recommended in this comment.

INTRODUCTION

Section 401 of the Clean Water Act provides that federal agencies may not permit or license projects "which may result in any discharge into the navigable waters" until the relevant State or authorized Tribe certifies that "any such discharge will comply with" applicable water quality requirements, or waives the opportunity to certify. 33 U.S.C. § 1341(a)(1). This certification provision helps to ensure that projects licensed by

federal agencies comply with regulations established by EPA or adopted by States and approved by EPA pursuant to the CWA.[1]

In enacting Section 401 in the 1972 CWA amendments, Congress tailored the certification program to the statute's overall strategy of improving water quality by regulating point-source discharges into federally regulated waters. *See Train v. City of New York*, 420 U.S. 35, 37 (1975). By its plain terms, the statute limits the scope of certification to determining whether a "discharge" into the navigable waters "will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317" of the CWA. 33 U.S.C. § 1341(a)(1). To enforce these provisions, the statute allows States granting certification to include conditions that become part of the federal license—but limits such conditions to "effluent limitations and other limitations, and monitoring requirements" that are "necessary" to assure compliance with the CWA. *Id.* § 1341(d). And to promote efficiency and avoid delays, the statute provides that States waive certification if they fail to issue a decision "within a reasonable period of time," which cannot "exceed one year" from receipt of the request. *Id.* § 1341(a)(1).

Congress vested EPA with authority to superintend Section 401 as part of its responsibility to "administer" the CWA. 33 U.S.C. § 1251(d). Section 501(a) authorizes EPA to "prescribe such regulations as are necessary to carry out [its] functions under this chapter," including EPA's functions under Section 401. *Id.* § 1361(a); *see id.* §§ 1341(a)(1) (requiring EPA to act as the certifying authority when a State cannot), 1341(a)(2) (requiring EPA to coordinate with neighboring States regarding cross-border impacts), 1341(b) (requiring EPA to provide technical assistance upon request). Moreover, Section 304(h) specifically instructs EPA to "promulgate guidelines" that "shall include the factors which must be provided in any certification pursuant to section 1341." *Id.* § 1314(h). This oversight responsibility is essential to "the Act's purpose of authorizing the EPA to create and manage a uniform system of interstate water pollution regulation." *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992).

Notwithstanding the 1972 CWA's express command to implement Section 401, EPA relied for fifty years on a 1971 regulation issued under a repealed certification provision in the Federal Water Pollution Control Act ("FWPCA"). Unlike the CWA, the FWPCA relied on a system of water quality standards that did not control the sources of pollution that affect water quality. The 1971 regulation reflected the FWPCA's text and structure by requiring States to certify that an "activity" will comply with "applicable water quality requirements." Because EPA retained the 1971 regulation long after the statutory language on which it relied was repealed, the case law and practices developed

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[1] For ease of reference, this comment uses "State" to refer to the certifying function performed by the relevant States, Territories, and authorized Tribes. *See* 33 U.S.C. §§ 1362 (defining "State" to include the District of Columbia and other federal Territories), 1377(e) (providing that Tribes may be treated as States under certain conditions, including for purposes of Section 401).

under this regime diverged from the CWA's distinct approach. The Supreme Court followed EPA's lead in this respect by affording the 1971 regulation *Chevron* deference without wrestling with this statutory history. *See PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994) (citing *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)).

EPA sought to rectify this inaction in 2020 by adopting an implementing regulation for Section 401. *See Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) ("2020 Rule"). Relying in part on *Chevron* deference, the 2020 Rule sought to clarify the scope of certification, the limits on certification conditions, and the timeline for certification decisions. First, the 2020 Rule confirmed that Section 401(a)(1) limits certification to water quality impacts from a point-source discharge into the navigable waters. *Id.* at 42,232, 42,234. Next, the 2020 Rule interpreted Section 401(d) as limiting certification conditions to restrictions that are "necessary" to assure compliance with a CWA requirement "that applies to point source discharges into waters of the United States." *Id.* at 42,253, 42,256. In addition, the 2020 Rule established a number of procedural guiderails for the certification program, including a process for federal licensing agencies to define a "reasonable period of time" of less than one year, rules for the minimum content of State certification decisions, and a process for federal licensing agencies to verify State compliance with procedural requirements. *Id.* at 42,258, 42,267, 42,286.

Following a change in administration, however, EPA reversed course by adopting a new rule that returned to practice under the 1971 regulation. *See Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 88 Fed. Reg. 66,558 (Sept. 27, 2023) ("2023 Rule"). Again relying on *Chevron* deference, the 2023 Rule greatly expanded the scope of certification and certification conditions and largely abdicated EPA's supervisory role. Under the 2023 Rule, States evaluate the "activity" as a whole—including water quality impacts from non-point sources and impacts on purely intrastate waters—so long as the project may involve one point-source discharge into the navigable waters, as required by Section 401(a)(1). *Id.* at 66,592–601. The 2023 Rule also interpreted the phrase "any other appropriate requirement of State law" in Section 401(d) as inviting States to impose *any* water quality-related conditions, including State requirements unrelated to the CWA. *Id.* at 66,602–06. Finally, the 2023 Rule removed virtually every guardrail set out in the 2020 Rule, reasoning that Section 401 is a substantive grant of authority to States that requires EPA to defer to State prerogatives. *Id.* at 66,616–24.

Further rulemaking is required to adhere EPA's regulations to Section 401. Both the 2020 Rule and 2023 Rule relied on *Chevron* deference to assert "reasonable" readings of the statute. *See* 88 Fed. Reg. at 66,594–96; 85 Fed. Reg. at 42,251–52. But *Chevron* is no longer good law. As the Supreme Court held in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024), statutes "have a single, best meaning" that must be given effect, and EPA has an independent obligation to conform its actions to that meaning.

Read in light of "the traditional tools of statutory construction," *id.*, Section 401's text, structure, and history compel reconsideration of the 2023 Rule for three principal reasons.

First, Section 401(a)(1) expressly limits certification to water quality impacts from any "discharge" into the navigable waters. The provision specifies both the trigger for certification—a project that "may result in any discharge into the navigable waters"—and the scope of certification—that "such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of [the CWA]." 33 U.S.C. § 1341(a)(1). This interpretation is supported by the remainder of Section 401, which repeatedly links the certification program to assuring compliance with the same list of CWA provisions, *id.* § 1341(a)(1), (a)(3), (a)(4), (a)(5), and by the CWA's regulatory scheme of reducing water pollution through restrictions on point-source discharges, *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).

The 2023 Rule instead relied on the term "applicant" and the phrase "any other appropriate requirement of State law" in Section 401(d). But Section 401(d) must be read together with the express terms of Section 401(a)(1), and even on its own terms, Section 401(d) cabins the meaning of "applicant" and "State law" in important ways. 33 U.S.C. § 1341(d). Nor does the Supreme Court's decision in *PUD No. 1* require adherence to the 2023 Rule's flawed interpretation. As the 2023 Rule acknowledged, the Court did not identify an unambiguous meaning of the relevant statutory terms and instead deferred to the 1971 regulation as "reasonable." 88 Fed. Reg. at 66,594.

Second, Section 401(d) is best read as allowing States to grant certification by including conditions necessary to enforce compliance with the CWA, including State law requirements adopted pursuant to the CWA. Section 401(d) refers to compliance with "section[s] 1311," "1312," "1316," and "1317 of this title," all of which impose federal restrictions on discharges enforced by EPA or the States. 33 U.S.C. § 1341(d). Noticeably absent from this list is Section 303, *id.* § 1313, which appears in the other lists of CWA provisions in Section 401. Instead, the list in Section 401(d) concludes with the phrase "any other appropriate requirement of State law." *Id.* § 1341(d). In context, this language is best read as describing Section 303, which requires States to adopt State law water quality standards that comply with the CWA. This interpretation accounts for the internal structure of Section 401(d) and the CWA's overall jurisdictional reach, which extends only to "the navigable waters" constituting "the waters of the United States." *See* 33 U.S.C. § 1341(d); *id.* § 1362(7).

The 2020 Rule agreed that this reading "most closely aligns with the text of the statute." 85 Fed. Reg. at 42,253. But the 2023 Rule construed Section 401(d)'s reference to "any other appropriate requirement of State law" as an open invitation for States to condition certification on compliance with virtually any requirement, whether related to the CWA or not. 88 Fed. Reg. at 66,602–06. Because that construction ignores the structure of Section 401(d) and conflicts with the rest of Section 401, the 2023 Rule violates the best reading of the statute.

Third, the CWA vests EPA with the general authority and specific duty to supervise the Section 401 certification program. Section 501(a) grants EPA sufficient authority to prescribe regulations governing the scope, minimum content, and procedures for certification decisions. 33 U.S.C. § 1361(a). That basic regulatory framework is "necessary" to carry out EPA's duty to administer the CWA, *id.* § 1251(d), and the functions set out in Section 401, *id.* § 1341(a)(1), (a)(2), (b). Section 304(h) removes any doubt by specifically instructing EPA to promulgate "factors which must be provided in any certification pursuant to section 1341." *Id.* § 1314(h).

The 2023 Rule misconstrued EPA's authorities and responsibilities in removing almost every guardrail established by the 2020 Rule. Section 401 promotes compliance with the CWA by enlisting States to identify and condition federally licensed projects that would violate the statute. It is not, as the 2023 Rule asserted, a substantive grant of authority to the States—nor could it be, since Congress cannot grant powers that exceed its authority to regulate interstate commerce, and the Tenth Amendment already reserves water and land use regulation to the States. Consistent with the CWA's other cooperative federalism provisions, Section 401 invites State participation in a federal program subject to EPA supervision. Because guardrails on the certification program are necessary to implement the program in an effective, efficient, and transparent manner, EPA should reconsider its position and reinstate timing, minimum content, and oversight rules.

The best reading of the CWA provides clear instructions on the scope of certification, permissible certification conditions, and EPA's authority to oversee Section 401.

BACKGROUND

This section reviews the history of the CWA and the textual underpinnings that limit the scope of Section 401 certification to ensure that point-source discharges into the navigable waters will comply with the CWA. It next summarizes EPA's decades-long failure to adopt a regulatory framework for Section 401 and the agency's effort to rectify that failure in the 2020 Rule. Finally, it reviews EPA's return to a passive approach in the 2023 Rule and summarizes current regulations.

I. The Clean Water Act and Section 401 Certification

In 1972, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through a suite of planning and pollution-control programs. 33 U.S.C. § 1251(a). Prior to 1972, responsibility for controlling and redressing water pollution in federally regulated waters largely fell to the U.S. Army Corps of Engineers under the Rivers and Harbors Act of 1899 and a patchwork of federal agencies under the FWPCA. As amended, these CWA precursors encouraged States to develop water quality standards and authorized the federal government to bring

enforcement actions to abate pollution. But under these statutes, federal regulators lacked the ability to determine which sources of pollution were responsible for polluted water or to regulate pollution at its source. *See EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976).

Congress determined that these statutes were inadequate to address the decline in the nation's water quality, and in 1972 it performed a "total restructuring" of the existing statutory framework. *City of Milwaukee v. Illinois*, 451 U.S. 304, 310, 317 (1981). To meet the objective of restoring the nation's waters, Congress created a new federal regulatory scheme designed to address the discharge of pollutants into "the navigable waters," which it defined as "the waters of the United States." 33 U.S.C. § 1362(7). The core of the CWA's regulatory scheme is a powerful prohibition on point-source discharges into the navigable waters except in compliance with the detailed requirements set out in the remainder of the CWA. *See id.* § 1311(a); *Cnty. of Maui*, 140 S. Ct. at 1468.

Although the CWA expanded federal authority, Congress also invited the States to participate through several robust implementation roles. For instance, the States can assume authority for issuing National Pollutant Discharge Elimination System ("NPDES") permits under Section 402 and dredged and fill material permits under Section 404, subject to approval and supervision by EPA. 33 U.S.C. §§ 1342(b), 1344(g). States are also responsible for developing water quality standards for navigable waters within their borders in the first instance, subject to EPA approval and the imposition of federal standards when State standards do not meet the requirements of the CWA. *Id.* §§ 1313, 1315. States must also develop total maximum daily loads ("TMDLs") for impaired waters and submit those TMDLs for EPA approval. *Id.* § 1313(d).

In Section 401, Congress provided another role for the States in helping to ensure compliance with the CWA's pollution-control provisions. Under Section 401, a federal agency may not issue a license for a project that may result in "any discharge into the navigable waters" unless the relevant State certifies that "such discharge" will comply with specified provisions of the CWA, or waives certification. 33 U.S.C. § 1341(a)(1). This certification program allows States to confirm that CWA requirements applicable to their waters will not be violated by federally licensed projects, including when a State's authority is otherwise preempted by federal law.

Congress based much of the language in Section 401 on an earlier certification provision in Section 21(b) of the FWPCA. However, this predecessor statute used different language for the scope of certification, requiring States to certify that "*such activity* will be conducted in a manner which will not violate applicable *water quality standards*." Pub. L. No. 91-224, § 21(b), 84 Stat. 91, 108 (1970) (emphases added). Section 401, in contrast, reflects the CWA's distinct regulatory scheme by specifying that when a federally licensed project "may result in *any discharge* into the navigable waters," the relevant State must certify that "*such discharge* will comply with" applicable provisions of the CWA. 33 U.S.C. § 1341(a)(1) (emphases added).

Congress also added a new Section 401(d), which allows States to grant certification for projects that would otherwise require the certification denial by including "effluent limitations and other limitations, and monitoring requirements necessary to assure" that the "applicant" will comply with enumerated CWA provisions and with "any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d). Unlike Section 21(b) of the FWPCA, which lacked a comparable provision, Section 401(d) gives States the option to grant certification so long as they include conditions that enable compliance with applicable CWA requirements.

II. Regulatory Actions Prior to 2019

As the agency charged with administering the CWA, EPA is responsible for developing a regulatory framework for Section 401. 33 U.S.C. §§ 1251(d), 1361(a). The 1972 CWA amendments instructed EPA to "promulgate guidelines" that "shall include the factors which must be provided in any certification" under Section 401 within 180 days of the statute's enactment. 33 U.S.C. § 1314(h). Nevertheless, nearly fifty years passed before EPA updated its certification regulation to reflect the material revisions enacted as part of the comprehensive overhaul of the CWA.

a. EPA issued a regulation governing certification under Section 21(b) of the FWPCA shortly before Congress enacted the CWA. *See State Certification of Activities Requiring a Federal License or Permit*, 36 Fed. Reg. 22,487 (Nov. 25, 1971). The 1971 regulation reflected the language of the FWPCA and was part of an omnibus rule issued in EPA's first year of existence. *See Reorg. Plan No. 3 of 1970*, 35 Fed. Reg. 15,623, 15,623 (Oct. 6, 1970) (effective Dec. 2, 1970).

The 1971 regulation required States to certify "reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 36 Fed. Reg. at 22,488. It further provided that federal licensing agencies determined the "reasonable period of time" for reaching a certification decision, which otherwise defaulted to six months from receipt of the request. *Id.* Although Section 21(b) of the FWPCA did not provide for such certification conditions, the 1971 regulation permitted States to include "any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity," and other information that the certifying authority deemed appropriate. *Id.*

b. Over the next fifty years, EPA issued several guidance documents addressing Section 401 without revising the 1971 regulation. Most of this guidance did not address the scope of certification as set out in Section 401, and none contained a holistic examination of the text, structure, or legislative history of the 1972 CWA. As a result, these documents included little to no explanation for EPA's retention of the 1971 regulation and did not set out an authoritative position on Section 401.

For instance, an EPA guidance document from 1989 asserted that Section 401 certifications could address "all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream,

construction and operation." EPA, *Wetlands and 401 Certification* 23 (April 1989). But the document's only supporting rationale was a reference to Section 401(a)(3), which provides that a certification for a construction permit may also be used for an operating permit otherwise subject to certification. The document did not provide analysis to support its assertion that certification could address all potential impacts from the "activity" as opposed to being limited to the impacts of the "discharge."

In 2010, EPA issued an interim handbook that included recommendations on the scope and timeline of Section 401 certifications that also omitted any robust supporting rationale. EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (May 2010). Like the 1989 guidance document, the 2010 interim handbook reviewed the 1971 regulation without acknowledging that the regulation had not been updated to reflect the 1972 CWA.

III. 2019 Guidance and 2020 Rulemaking

In April 2019, President Donald Trump issued an Executive Order directing EPA to update outdated guidance and regulations pertaining to federally licensed infrastructure projects, including the 1971 regulation. *See* Exec. Order No. 13,868, 84 Fed. Reg. 15,496 (Apr. 10, 2019). EPA responded by issuing interim guidance and, the following year, promulgated its first implementing regulation for Section 401.

a. EPA's interim guidance clarified the Section 401 certification process in the interest of promoting efficiency and transparency. *See* EPA, *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes* (June 7, 2019) ("2019 Guidance"). In the interim guidance, EPA explained that Section 401 limits the scope of certification to determining whether a point-source discharge will comply with the CWA provisions enumerated in the statutory text. EPA also noted that Section 401 sets an absolute deadline of one year for certification decisions but requires decisions to be made within "a reasonable period of time," meaning States were not entitled to a full year before inaction can trigger constructive waiver.

The interim guidance also recommended that federal licensing agencies, States, and authorized Tribes coordinate early on to improve the efficiency of the Section 401 certification process. That direction aligned with the "One Federal Decision" policy for federally licensed project established by President Trump in 2017 to streamline overlapping federal approval regimes. *See* Exec Order No. 13,807, 82 Fed. Reg. 40,462 (Aug. 15, 2017) (instructing federal agencies to use a single, coordinated process for compliance with environmental review requirements).

b. In 2020, EPA promulgated a final rule for Section 401 certification that superseded the 2019 interim guidance. 85 Fed. Reg. 42,210. In addition to clarifying the certification process and promoting efficiency, predictability, and transparency, the new rule aligned the scope of certification with the CWA's clear textual direction.

The 2020 Rule analyzed the text, structure, and history of Section 401 to conclude that certification is limited to determining whether any "discharge" into the navigable

waters will comply with enumerated provisions of the CWA. In this way, the 2020 Rule corrected for the 1971 regulation's retention of the "activity" approach to certification based on the long-repealed language of Section 21(b) of the FWPCA. 85 Fed. Reg. at 42,232. As the 2020 Rule explained, Section 401(a)(1) provides that "the State in which the discharge originates or will originate" must certify that "any such *discharge* will comply with the applicable provisions of sections 1311, 1312, 1313, 1316 and 1317 of this title." 33 U.S.C. § 1341(a)(1) (emphasis added). That materially different statutory language directs States to certify that the *discharge*, rather than the activity, will comply with the CWA. 85 Fed. Reg. at 42,232.

As for Section 401(d), the 2020 Rule found that the statute's use of the term "applicant" in connection with conditions that must ensure compliance with water quality requirements was ambiguous in certain respects. 85 Fed. Reg. at 42,232. Invoking the *Chevron* framework, the 2020 Rule concluded that "applicant" is more reasonably read as referring to the person or entity responsible for complying with certification and rejected the alternative reading that "applicant" broadened the scope of certification beyond the "such discharge" language in Section 401(a)(1). *Id.*

The 2020 Rule also established a new definition of "water quality requirements" to clarify that certification does not encompass compliance with State law requirements unrelated to the CWA. 85 Fed. Reg. at 42,253. As defined in the 2020 Rule, the term "water quality requirements" included applicable effluent limitations for new and existing sources (Sections 301, 302, and 306), water quality standards (Section 303), toxic pretreatment effluent standards (Section 307), and State or Tribal regulatory requirements for point-source discharges into the waters of the United States, including those more stringent than federal standards (Section 303). *Id.* In this way, the 2020 Rule limited States to imposing conditions on point-source discharges into the navigable waters. *Id.* States could not impose conditions related to non-point discharges or discharges into intrastate waters. *See id.*

Regarding the timeline for certification decisions, the 2020 Rule reiterated that Section 401 imposes a one-year deadline but also contemplates constructive waiver for the failure to reach a decision within a shorter "reasonable period of time." 85 Fed. Reg. at 42,235 (citing *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019)). The 2020 Rule implemented this language by authorizing federal licensing agencies to set the applicable "reasonable period of time" by regulation or on a case-by-case basis. *Id.* at 42,285–86. Significantly, the 2020 Rule prohibited States from using the withdrawal and resubmission of certification requests to restart the clock as a means to evade the statute's absolute one-year deadline. *Id.* at 42,626.

IV. 2023 Rulemaking

In 2021, President Biden ordered federal agencies to review and potentially repeal broad swaths of federal environmental actions completed during the Trump Administration, including the 2020 Rule. Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021). EPA complied with this directive by promulgating a final rule in 2023 that

reversed the agency's position on the scope of certification under Section 401, revised the definition of "water quality requirements," and rescinded most of the guardrails established by the 2020 Rule.

On the scope of certification, the 2023 Rule explicitly returned to prior practice under the 1971 regulation by requiring States to certify that the "activity" as a whole, and not just its "discharges," will comply with applicable water quality requirements. 88 Fed. Reg. at 66,592. In support of this reversal, the 2023 Rule relied on an exceptionally broad reading of the Supreme Court's decision in *PUD No. 1* to argue that the term "applicant" in Section 401(d) is most reasonably read as expanding the scope of certification beyond the express terms of Section 401(a)(1). *Id.* at 66,593.

The 2023 Rule also broadened the definition of "water quality requirements" to include *any* water quality-related State or Tribal rule, including those applied to non-point sources and impacts on intrastate waters beyond the CWA's jurisdiction. 88 Fed. Reg. at 66,602. To support this definition, the 2023 Rule asserted that the Section 401(d) phrase "any other appropriate requirement of State law" contains no limiting language and that certain of the enumerated CWA provisions in Section 401 apply beyond point-source discharges. *Id.* at 66,603.

As to the timeline for certification decisions, the 2023 Rule revoked federal licensing agencies' ability to set a default reasonable period of time and instead required case-by-case joint negotiations with certifying authorities to determine a reasonable timeline in each instance. 88 Fed. Reg. at 66,585. In the absence of agreement, the 2023 Rule provided a default timeline of six months. *Id.* Notably, the 2023 Rule also repealed the 2020 Rule's prohibition on using withdrawals and resubmissions to restart the clock and instead declined to "[take] a position on the legality of withdrawing and resubmitting a request for certification." *Id.* at 66,584.[2]

I. The 2023 Rule Was Substantially Ill-founded

A. The 2023 Rule Expanded the Scope Of Section 401 Certification Well Beyond The Best Reading Of The CWA.

The 2023 Rule relied almost exclusively on the term "applicant" and the phrase "any other appropriate requirement of State law" to expand the scope of certification from "discharges" to the "activity" as a whole, including impacts from non-point sources and on intrastate waters not regulated by the CWA. But Section 401(a)(1) specifies the

[2] Shortly after its promulgation, eleven States and a coalition of trade associations challenged the 2023 Rule in federal district court, arguing that the rule impermissibly expands State certification authority in violation of Section 401. That challenge is currently pending as *Louisiana v. EPA*, Case No. 23-CV-01714 (W.D. La.).

applicability and scope of certification in express terms, and those terms cannot be overridden by creating ambiguities elsewhere in the statute. Nor does Section 401(d) support such an expansive interpretation, particularly when read in light of the remainder of Section 401 and the CWA's broader regulatory scheme.

1. Section 401(a)(1) expressly limits the scope of certification to impacts from discharges into the navigable waters.

Section 401 begins by setting out the applicability and scope of the certification requirement for federally licensed projects. *See Sackett v. EPA*, 143 S. Ct. 1322, 1336 (2023) (interpretation starts "with the text of the CWA"). Section 401(a)(1) provides:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, *which may result in any discharge into the navigable waters*, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, *that any such discharge* will *comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title*.

33 U.S.C. § 1341(a)(1) (emphases added).

a. By the statute's plain terms, the certification requirement is triggered when a project "may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a)(1). The scope of certification is similarly express: States must certify that "any such discharge will comply with the applicable provisions" of the CWA before the federal license may issue. *Id.* In this way, Section 401(a)(1) sets out three express limitations on the scope of certification that control the remainder of Section 401.

First, certification is limited to any "discharge," which courts and EPA have long interpreted to mean point-source discharges. *See, e.g.*, *Or. Nat. Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998) (interpreting the "unqualified" term "discharge" as "limited to point sources"); *accord* 88 Fed. Reg. at 66,568 (2023 Rule); 85 Fed. Reg. at 42,234 (2020 Rule). The point-source limitation is also supported by the text of Section 401(a)(1), which specifies that the certifying authority is the State in which "the discharge *originates* or *will originate*" or the agency with jurisdiction "at *the point* where the discharge *originates* or *will originate*." 33 U.S.C. § 1341(a)(1) (emphases added). This language contemplates that the discharges at issue have a fixed geographic origin, which comports with the CWA's definition of "point source" as "any discernible, confined, and discrete conveyance." *Id.* § 1362(14).

Second, certification is limited to point-source discharges "into the navigable waters," meaning "the waters of the United States" subject to the CWA's jurisdiction and

not intrastate waters subject only to State law. *See* 33 U.S.C. § 1362(14). As the Supreme Court recently explained, federal jurisdiction over "the navigable waters" extends to "traditional interstate navigable waters" and "relatively permanent bod[ies] of water connected to traditional interstate navigable waters." *Sackett*, 143 S. Ct. at 1336–41 (quotations omitted). The inclusion of "into the navigable waters" next to "discharge" in Section 401(a)(1) is an important reminder that the Section 401 certification program does not extend beyond CWA jurisdiction, particularly because federal licensing agencies subject to the provision may operate under different statutes with distinct jurisdictional boundaries. The Federal Energy Regulatory Commission ("FERC"), for example, licenses power plants and pipelines regardless of whether they are located on or near waters subject to CWA jurisdiction. *See* 16 U.S.C.§ 797(e); 15 U.S.C. § 717f. Section 401 applies to projects that may discharge into "the navigable waters" because only those waters are subject to the CWA.[3]

Third, certification is limited to whether point-source discharges into the navigable waters "will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317" of the CWA. Section 301 prohibits the discharge of any pollutant except as authorized by the CWA, 33 U.S.C. § 1311; Section 302 establishes limitations for point-source discharges, *id.* § 1312; Section 303 requires States to establish water quality standards, subject to EPA review, and authorizes EPA to impose federal standards when necessary to meet the CWA's requirements, *id.* § 1313; Section 306 establishes national standards of performance for controlling discharges, *id.* § 1316; and Section 307 sets pretreatment standards for certain discharges, *id.* § 1317. Sections 301, 302, 306, and 307 govern discharges, and Section 303 water quality standards are generally enforced as conditions in NPDES permits. *See id.* § 1342(a)–(b). This enumerated list reflects Section 401's objective of ensuring that discharges from federally licensed projects will comply with the CWA's requirements, including discharge limitations and water quality standards that are generally enforced through discharge limitations.

b. Section 401 refers back to these limits on the scope of certification in multiple places. Section 401(a)(2) specifies that EPA must notify neighboring States if it finds that "such a discharge" may have cross-border effects and that the notified State may object if it determines that "such discharge" will violate water quality requirements. 33 U.S.C. § 1341(a)(2). Section 401(a)(3) twice repeats the list of enumerated CWA provisions in Section 401(a)(1), providing that certification may be revoked if changes to the project jeopardize compliance with "sections 1311, 1312, 1313, 1316, and 1317" of the CWA. *Id.* § 1341(a)(3). Section 401(a)(4) and Section 401(a)(5) also repeat this list of CWA provisions when defining the scope of compliance relevant to revocations and suspensions. *Id.* § 1341(a)(4), (a)(5).

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[3] In the 2023 Rule, EPA estimated that "[a]bout half the states have state laws covering at least some surface waters beyond CWA navigable waters." 88 Fed. Reg. at 66,605. Unless preempted by another federal law, those State laws would apply to waters outside the CWA's jurisdiction. *See generally Sackett*, 143 S. Ct. at 1344.

Notably, Section 401(a)(4) treats the phrase "water quality requirements" as synonymous with "the applicable provisions of section 1311, 1312, 1313, 1316, or 1317" of the CWA. 33 U.S.C. § 1341(a)(4). Under this subsection, licensees that have obtained certification must provide the State an opportunity to review whether aspects of the project not subject to federal licensing will violate "applicable water quality requirements." *Id.* If the State finds noncompliance and the federal licensing agency suspends the license, it cannot be reinstated until the State confirms that the project "will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317" of the CWA. Nothing in the statute suggests that Congress intended to require that States find noncompliance based on one set of requirements but confirm a return to compliance based on a *different* set of requirements. That means the "water quality requirements" referenced in the statute must be what the most natural reading of the phrase suggests—the CWA provisions listed throughout Section 401.

Several provisions of Section 401 provide a role for EPA that would be inappropriate if certification involved requirements unrelated to the CWA. Section 401(a)(2) requires EPA to assess whether a "discharge" certified by one State "may affect" the water quality of another State and to "submit [an] evaluation and recommendations with respect to any" objection by that State. 33 U.S.C. § 1341(a)(2). Because EPA administers the CWA, *id.* § 1251(d), these determinations are best understood as assessments of compliance with the CWA. Relatedly, Section 401(b) requires EPA to provide "any relevant information on applicable effluent limitations or other limitations, standards, regulations, or requirements, or water quality criteria" and to "comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria." *Id.* § 1341(b). EPA is only in the position to provide the required information if the referenced requirements are CWA requirements—and that is the most natural way to read this provision, since "effluent limitations" and "water quality criteria" are key terms used by the CWA.

2. Section 401(d) is an enforcement provision for certification grants that does not modify the scope of certification.

Section 401(d) allows a State to grant certification where denial may otherwise be required so long as the State includes conditions necessary to ensure compliance with applicable CWA requirements. Section 401(d) provides:

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

33 U.S.C. § 1341(d). Nothing in Section 401(d) suggests that Congress intended to alter the scope of certification set out in Section 401(a)(1). For at least three reasons, Section 401(d) is best read according to its plain terms as an additional enforcement provision for grants of certification in harmony with the remainder of Section 401.

a. Section 401(d) begins by clarifying that the provision takes the scope of certification set out in Section 401(a)(1) as a given—"[a]ny certification *provided* under this section" means that the text that follows does not apply until and unless the State begins the certification process and is inclined to grant, rather than deny or waive, certification. *Id.* (emphasis added). Section 401(a)(1) sets out the applicability and scope of the certification requirement, while Section 401(d) provides an additional requirement for grants of certification. Because States cannot evaluate their options without reference to the scope of certification, the opening words of Section 401(d) are sufficient to conclude that nothing that follows alters that scope.

b. Section 401(d)'s enumerated list of requirements is best interpreted as mirroring the list of CWA provisions that appears in Section 401(a)(1), (a)(3), (a)(4), and (a)(5). Section 401(d) recites the same list, pairing each enumerated provision with a brief description of the requirements imposed under that section of the CWA. The only difference is the absence of a corresponding reference to Section 303, which governs water quality requirements adopted by States subject to EPA review. Where a reference to Section 303 would typically appear, Section 401(d) instead refers to "any other appropriate requirement of State law." 33 U.S.C. § 1341(d).

In context, "any other appropriate requirement of State law" is best read as *describing* the water quality standards required by Section 303. Under Section 303, States must adopt "water quality standards" consisting of "designated uses" and "water quality criteria … for such uses." 33 U.S.C. § 1313(c)(3). These standards are statutes and regulations adopted by the State as a matter of State law that become effective for CWA compliance purposes once approved by EPA. *Id.* § 1313(c)(4). The phrase "any other appropriate requirement of State law" fits Section 303 standards hand-in-glove because water quality standards are State laws that are "appropriate" for inclusion in the certification program once approved by EPA.[4]

This interpretation adheres to principles of statutory interpretation by reading Section 401 "as a symmetrical and coherent regulatory scheme." *FDA v. Brown &*

[4] The approval process for water quality standards may explain why Congress omitted "under section 1311" in Section 401(d). State water quality standards are not effective as requirements "under section 1311" until approved by EPA. 33 U.S.C. § 1313(c)(4). EPA's review process takes time, and States may receive requests for certification while various aspects of new or revised standards are still under review. By using the phrase "any other appropriate requirement of State law," Congress left room for States to include conditions based on State standards pending approval that may become effective before the deadline for certification.

Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (quotation omitted). It accounts for Section 401(d)'s internal structure, which lists each provision together with the type of restrictions imposed. And it harmonizes Section 401(d) with the scope of certification set out in Section 401(a)(1) and the list of enumerated statutory provisions repeated throughout Section 401(a).[5]

Similarly, this reading is supported by the *ejusdem generis* canon of statutory interpretation, which reflects the "common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it." *Fischer v. United States*, 144 S. Ct. 2176, 2184 (2024). The phrase "any other appropriate requirement of State law" is "a general or collective term at the end of a list of specific items" that is "controlled and defined" by the "specific classes" that precede it. *Id.*; *see also Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071, 2083 (2024) (applying *ejusdem generis* to reject a reading of a general term that would confer a "radically different power" from the preceding provisions).

In contrast, reading Section 401(d) as modifying the scope of certification actually *restricts* the scope of certification by creating an inexplicable regulatory gap. By its terms, Section 401(d) does not include Section 303 water quality standards as a basis for imposing certification conditions. Because Section 401(d) conspicuously omits an express reference to Section 303, interpreting the provision as altering the scope of certification also requires inferring that the omission was intended to exclude Section 303. Even if Section 401(d)'s reference to "any other appropriate requirement of State law" includes State standards adopted under Section 303(c)(3), that language leaves no room for including federal standards promulgated by EPA under Section 303(c)(4). *See* 33 U.S.C. § 1313(c)(4)(A)–(B). This problem is avoided by reading Section 401(d) together with Section 401(a)(1), which captures both State and federal standards by requiring a compliance assessment for "the applicable provisions of sectio[n] … 1313." *Id.* § 1341(a)(1).

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[5] Notably, Section 401(a)(1) contains similar language that appears after the list of statutory provisions recited in connection with the scope of certification. This additional list shares the same descriptive structure as the list in Section 401(d) and also omits reference to Section 303:

> In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify.

33 U.S.C. § 1341(a)(1). Because Section 401(a)(1) earlier specifies that the scope of certification includes Section 303, this language suggests that Congress understood Section 303 to operate differently from the other enumerated CWA provisions. It also supports the conclusion that Section 401(a)(1) sets out the scope of certification.

c. Setting aside the context and structure of Section 401 and Section 401(d), the phrase "any other *appropriate* requirement of State law *set forth in such certification*" itself contains limitations that suggest a deliberate effort to cabin the scope of relevant "State law" to requirements related to the CWA. 33 U.S.C. § 1341(d) (emphases added).

First, the term "appropriate" requires interpreting the phrase by reference to the context in which it appears. *See Michigan v. EPA*, 576 U.S. 743, 752–53 (2015) (interpreting "appropriate and necessary" in context as incorporating the usual factors informing agency "regulations"); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 422 (1819) (Necessary and Proper Clause permits "an[y] appropriate mode of executing the powers of government" set out elsewhere in the Constitution). Because "any appropriate requirement of State law" follows a detailed list of CWA provisions that are also referenced in the preceding subsections of Section 401, an "appropriate" requirement is one related to the CWA. That context is the only language in Section 401 that informs the distinction between an "appropriate" and "inappropriate" requirement of State law for purposes of inclusion as a certification condition.

Second, the phrase also specifies requirements of State law "set forth in such certification," not standalone State law requirements. Because Section 401(d) only applies to "[a]ny certification *provided* under this section," any "requirement of State law set forth in *such certification*" presupposes that certification is being provided under a standard set forth elsewhere in the statute. 33 U.S.C. § 1341(d) (emphases added). The best way to understand this language is that State law requirements "set forth in such certification" are those relevant to certification based on Section 401(a)(1)'s scoping provision, including both Section 303 water quality standards and State laws and procedures adopted pursuant to other enumerated CWA provisions. *See, e.g.*, *id.* §§ 1316(c) (authorizing States to adopt and enforce "a procedure under State law for applying and enforcing standards of performance for new sources," subject to EPA approval), 1313(c)(3) (similar for water quality standards).

3. The CWA's structure and amendment history demonstrate that Section 401 was narrowly tailored to achieve CWA compliance.

The structure and history of the CWA confirm that Congress intended Section 401 to have a different scope than the FWPCA certification provision that informed practice under the 1971 regulation. *See Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258, 267 (1992) ("The key to the better interpretation lies in some statutory history."); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction … is a holistic endeavor."). The CWA transformed the FWPCA from a patchwork of water quality standards, instructions to federal agencies, and encouragement to States into a cohesive national scheme for regulating discharges. In largely returning to prior practice under the FWPCA, the 2023 Rule failed to account for the ways in which Congress departed from the FWPCA.

a. The FWPCA predated the establishment of EPA and reflected a corresponding lack of national cohesion and effective federal enforcement. *See Sackett*, 143 S. Ct. at 1330 (describing the FWPCA's regulatory framework as "tepid" and seldom used to abate pollution); *Reorg. Plan No. 3 of 1970*, 35 Fed. Reg. at 15,623. After 1965, the FWPCA authorized States to adopt water quality standards subject to federal approval and provided the Secretary of the Interior limited authority to adopt federal standards, subject to an objection procedure by the Governor of the relevant State. *See* Pub. L. No. 89-234, § 10(c), 79 Stat. 903 (1965). In 1970, Congress further amended the FWPCA to require federal agencies to "insure compliance with applicable water quality standards," Pub. L. No. 91-224, § 21(a), 84 Stat. at 107–08, and to obtain State water quality certifications before issuing certain licenses, *id.* § 21(b), 84 Stat. at 108.

At the time, Section 21(b) was a standalone enforcement mechanism for water quality standards because the FWPCA contained no framework or enforcement mechanisms for effluent limitations or standards governing the sources of pollution. The certification provision was an imperfect solution that applied only to federally licensed projects, and water quality standards remained largely aspirational. For other potential emissions sources, "pollution [was] permissible until its cumulative effect reduced the quality of a given body of water below the standards provided for in the Act." Frank J. Berry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act*, 68 Mich. L. Rev. 1103, 1122 (1970).

Section 21(b)(1), which set out the applicability and scope of the certification requirement, reflects the FWPCA's focus on water quality standards in the absence of restrictions on the sources of pollution:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that there is reasonable assurance, as determined by the State or interstate agency that *such activity* will be conducted in a manner which will not violate *applicable water quality standards*.

Pub. L. No. 91-224, § 21(b)(1), 84 Stat. at 108 (emphases added). Notably, the phrase "applicable water quality standards" referred back to the FWPCA's recently enacted program for State or federal water quality standards. *See also id.* § 21(b)(1)–(9), (c), 84 Stat. at 108–10 (repeating similar phrasing). And the phrase appeared in isolation rather than in a list of additional statutory provisions because the FWPCA lacked direct mechanisms for restricting sources of pollution.

Section 21(b)(9) contained a proviso that confirms the FWPCA's certification requirement covered only water quality standards adopted pursuant to the FWPCA, not State regulations generally: "In the case of any activity which will affect water quality but *for which there are no applicable water quality standards*, no certification shall be required under this subsection." Pub. L. No. 91-224, § 21(b)(9)(A), 84 Stat. at 110 (emphasis added); *see also id.* § 21(b)(9)(B), 84 Stat. at 110 (providing that a federal license must be suspended if the licensee is "notified of the adoption of water quality standards" and fails to comply for more than six months). This provision makes sense only if "applicable water quality standards" means standards adopted under the FWPCA, since State law generally includes any number of common-law, statutory, and regulatory restrictions applicable to actions that affect water quality.

b. The CWA inaugurated a fundamentally different scheme that regulates discharges through effluent limitations and performance standards that achieve water quality goals by reducing water pollution at its sources. Congress deliberately grafted the new regulatory scheme into Section 401, which differs materially from Section 21(b) of the FWPCA while retaining its focus on compliance with federal law.

Section 401(a)(1) borrows much of the language of FWPCA Section 21(b)(1) with surgical alterations that modify the scope of certification from "activity" to "discharge." Whereas Section 21(b)(1) requires certification that "*such activity* will be conducted in a manner which will not violate *applicable water quality standards*," Section 401(a)(1) provides requires certification that "*such discharge* will comply with the *applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title*." *Compare* Pub. L. No. 91-224, § 21(b)(1), 84 Stat. at 108 (emphases added), *with* 33 U.S.C. § 1341(a)(1) (emphases added). The change from "activity" to "discharge" reflects the CWA's laser focus on regulating sources of pollution to achieve water quality objectives. *See Cnty. of Maui*, 140 S. Ct. at 1468. And the specification of enumerated CWA provisions memorializes this change by pointing to the precise solutions that Congress adopted to address the FWPCA's failure to enforce those objectives. *See Sackett*, 143 S. Ct. at 1333.

Section 401(d), the only subsection of the certification provision without an obvious analogue in the predecessor statute, is an innovation that ameliorated the harsh consequences of FWPCA Section 21(b). Since the FWPCA did not authorize States to impose conditions on certification, their only choice upon finding a likely water quality standards violation was to deny certification and bring the project to a halt. *See generally* Pub. L. No. 91-224, § 21(b), 84 Stat. at 108. Section 401(d) provides an alternative, allowing States to certify so long as they include conditions necessary to bring the project into compliance with the CWA. *See* 33 U.S.C. § 1341(d). This history suggests that Section 401(d) was added to the statute to ease the certification process, not to expand it into purely State law requirements that were not within the scope of FWPCA Section 21(b).

* * *

The text, structure, and history of the CWA present an unambiguous answer to the interpretive questions the 2020 Rule and 2023 Rule ultimately failed to address: By its plain terms, Section 401(a)(1) provides that the scope of certification is limited to assurance that a point-source discharge into the navigable waters will comply with enumerated provisions of the CWA, including water quality standards. Section 401(d) provides an additional enforcement option for grants of certification without modifying the scope of certification.

B. The 2023 Rule's Contrary Reading Was Based On Untenable Grounds And Should Be Rescinded.

The 2023 Rule arrived at a different conclusion by creating ambiguities and setting aside the "traditional tools of statutory construction." *Loper Bright*, 144 S. Ct. at 2267. Despite relying heavily on the Supreme Court's opinion in *PUD No. 1*, the 2023 Rule ultimately acknowledged that the relevant statutory discussion set out in that opinion is not binding on EPA. On the merits, the interpretation of Section 401 that the 2023 Rule embraced plainly fails under the Supreme Court's more recent instructions on interpreting statutes. Nor can the 2023 Rule justify its conclusion by relying on legislative history, which here is vague, contradictory, and cannot override the plain meaning of the statute. Ultimately, the 2023 Rule's final redoubt—a desire to return to practice under the 1971 rule—virtually concedes that its interpretation fails to account for the operative text of the CWA. Because the 2023 Rule contradicts "the best reading of the statute," *Loper Bright*, 144 S. Ct. at 2266, EPA should, and indeed must, rescind it.

1. *PUD No. 1* does not require reading Section 401(d) to expand the scope of certification set out in Section 401(a)(1).

PUD No. 1 involved a dispute over a certification condition imposed by the State of Washington on a hydroelectric project. EPA was not a party to the case. Pursuant to its EPA-approved water quality standards, Washington had conditioned certification on a minimum stream flow requirement meant to protect local fisheries. 511 U.S. at 706–09. The Supreme Court held that "ensuring compliance with [Section] 303 is a proper function of the [Section] 401 certification" because Section 303 is "incorporate[d]" into the enumerated provisions of Section 401 and because "state water quality standards adopted pursuant to [Section] 303 are 'appropriate' requirements of state law." *Id.* at 713. Before reaching this holding, the Court stated that Section 401(d)'s use of the term "applicant" means that the language in Section 401(a)(1) requiring certification with respect to "such discharge" need not be taken literally. *Id.* at 711. The Court noted that this "view of the statute is consistent with EPA's regulations implementing [Section] 401," which it found to be "a reasonable interpretation of [Section] 401 [that] is entitled to deference." *Id.* at 712.

Setting aside aspects of its reasoning, *PUD No. 1*'s central holding is consistent with the interpretation of Section 401 set out above. As explained, Section 401(a)(1) expressly provides that compliance with Section 303 standards is within the scope of

certification, and State standards adopted pursuant to Section 303 are the "any other appropriate requirements of State law" described in Section 401(d). Moreover, the Supreme Court qualified its holding in important ways, explaining that the State's certification and conditioning authorities are "not unbounded" and that States "can only ensure that the project complies with" the CWA provisions enumerated in the text. 511 U.S. at 712. Critically, the State of Washington had taken the position "that the minimum stream flow requirement was imposed to ensure compliance with the state water quality standards adopted pursuant to [Section] 303 of the Clean Water Act," *id.*—and that was the position that the Court's holding affirmed.

The Supreme Court's discussion of the distinction between "discharge" and "activity" is not a binding determination of unambiguous meaning, as the 2023 Rule repeatedly acknowledged. *See* 88 Fed. Reg. at 66,594 ("EPA agrees that section 401 is ambiguous regarding the scope of certification and conditions."); *id.* at 66,596 ("Although the Supreme Court's assessment of the statute in *PUD No. 1* is the best reading of the text with regard to the proper scope of certification, the text is subject to more than one possible interpretation."). That follows from the Court's decision to defer to EPA's 1971 regulation as "reasonable," 511 U.S. at 712—and under the now-defunct *Chevron* framework, judicial affirmance of one reasonable interpretation does not prevent an agency from adopting another interpretation, *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2004). *Chevron* is no longer good law, but that feature of the *Chevron* framework helps to understand what the Court intended in *PUD No. 1*. By deferring to an EPA regulation as reasonable when the agency was not a party to the case and had not sought deference, the Court confirmed that its holding was not the final word on the statutory terms at issue.

Nor does isolated language in *PUD No. 1* excuse EPA from its obligation to apply the best reading of the CWA. "Stare decisis is not an inexorable command," *Loper Bright*, 144 S. Ct. at 2270 (quotation omitted), and adhering to language in an opinion decided under a defunct interpretive framework that itself does not purport to authoritatively interpret the statute only perpetuates serious error. To be clear, EPA need not disregard *PUD No. 1* to correct the errors introduced by the 2023 Rule. But in response to commenters inclined to overread *PUD No. 1* as mandating an "activity" reading of the scope of Section 401 certification, EPA should not shy away from insisting on compliance with the plain language of the CWA. As explained further below, the "activity" reading of Section 401 cannot be squared with the rules of statutory interpretation more recently embraced by the Supreme Court, does not reflect quality reasoning, and fails to provide a workable rule for ensuring that State certifications and conditions remain bounded within the CWA.

2. On the merits, the 2023 Rule's reading of Section 401 fails under ordinary principles of statutory interpretation.

The 2023 Rule seriously overread *PUD No. 1* and embraced additional flawed arguments to relegate Section 401(a)(1) to a "trigger" provision and conclude that Section 401(d) expands the scope of certification to impacts (a) from the activity as a whole, including point *and* non-point sources (b) on navigable waters *and* intrastate waters that (c) violate the CWA *or* any unrelated State law requirement that has some relation to water quality. Each step in this reasoning fails.

a. "Activity vs. Discharge." The 2023 Rule asserted that Section 401(d)'s use of the term "applicant" means that certification includes review of the licensed "activity" rather than its discharges. 88 Fed. Reg. at 66,594; *see* 33 U.S.C. § 1341(d) ("Any certification … shall set forth any [conditions] … necessary to assure that *any applicant* for a Federal license or permit *will comply with* [enumerated CWA provisions]." (emphases added)). That term cannot be read in isolation, and it does not support the weight the 2023 Rule wants it to bear.

Ordinary principles of interpretation, including the harmonious-reading canon discussed above, foreclose reading an isolated term with no obvious significance to override the specific language in Section 401(a)(1), which sets out both the trigger for the certification requirement ("may result in any discharge into the navigable waters") and the scope of certification ("that any such discharge will comply with [the CWA]"). 33 U.S.C. § 1341(a)(1). The "activity" reading requires inferring that Congress specified "discharge" in Section 401(a)(1) while, at the same time, expanding certification beyond discharges through cryptic use of the term "applicant" in Section 401(d). Given the importance of the scope of certification to the statutory scheme, that inference is a bridge too far. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress … does not alter the fundamental details of a regulatory scheme in vague terms.").

Tellingly, the term "applicant" also appears in Section 401(a)(1) shortly before the language specifying that certification is required for "such discharge." 33 U.S.C. § 1341(a)(1). That is because "applicant" simply refers to the project proponent, which is the party that is ultimately on the hook for compliance with any conditions in the federal license and other CWA requirements that apply in additional to pre-licensing certification under Section 401. It would have made little sense for Section 401(d) to specify "that such discharge" will "comply" because a "discharge" is not a regulated party subject to licensing requirements. Moreover, the enumerated provisions that follow include standards of performance and pretreatment standards that impact the discharge but are not inherent qualities of the discharge, *i.e.*, by reducing the quantity of discharge produced by certain manufacturing processes.

The critical language in Section 401(d) is "will comply with," not "applicant." 33 U.S.C. § 1341(d). Each of the enumerated provisions that the applicant must "comply with" references limits and standards *for discharges* or water quality standards that are enforced through restrictions *on discharges*. Even if Congress had used the term "activity" in place of "applicant," the compliance required would still be

discharge-related. The term used for the *subject* of compliance is irrelevant because the *objects* of compliance are the CWA's discharge-related provisions.

That feature of Section 401(d) dispatches the 2023 Rule's additional argument that Section 401's references to "construction" and "operation" imply a broader scope than "discharge" alone. 88 Fed. Reg. at 66,595. As explained, the same enumerated list of CWA provisions appears throughout Section 401, including in the subsections the 2023 Rule cited for this argument. Regardless of whether a discharge occurs during construction or operation, certification is limited to determining and ensuring that "such discharge" will comply with the applicable discharge controls of the CWA.

b. Navigable Waters vs. Intrastate Waters. The 2023 Rule broke new ground by concluding that, once certification is "triggered" by a discharge into the navigable waters as specifies in Section 401(a)(1), States must consider water quality impacts on *all* "waters of the [S]tate or Tribe *beyond* navigable waters." 88 Fed. Reg. at 66,604 (emphasis added). In support, the 2023 Rule asserted that the phrase "any other appropriate requirement of State law" in Section 401(d) is not modified by the jurisdictional phrase "navigable waters," *id.*, and that Section 401 "is a direct congressional grant of authority for [S]tates and authorized Tribes to protect their water resources from impacts caused by federally licensed or permitted projects," *id.* at 66,605. Neither rationale is sound.

First, this reasoning fundamentally misunderstands the constitutional roots of the division between State and federal authority. Congress cannot delegate authority it does not have, and the CWA's jurisdictional limitation to "the navigable waters" deliberately tracks the traditional bounds of Congress's authority to regulate interstate commerce. *See Sackett*, 143 S. Ct. at 1345 (Thomas, J., concurring). Nor do the States require a grant of authority from Congress to protect their water resources or intrastate waters, since the Tenth Amendment expressly reserves that authority to the States. *See id.* at 1344 ("States can and will continue to exercise their primary authority to combat water pollution" when the CWA does not apply). The Supreme Court has long enforced this division of authority by requiring "a clear statement from Congress" demonstrating an intent to alter it. *Id.* at 1342. Given the CWA's repeated use of the jurisdictional phrase "navigable waters" to set out the statute's outer reach—including in Section 401(a)(1) itself—the phrase "any other appropriate requirement of State law" in Section 401(d) does not clearly state an intent to exceed the jurisdictional limits that govern the remainder of the statute.

Section 401 is a program to promote compliance with the CWA, not a "grant of authority" to the States. As with the CWA's other cooperative federalism programs, Section 401 enlists the States for a particular function, subject to EPA supervision, in furtherance of federal policy goals. The CWA provides different means for States to assert their own interests, including by adopting water quality standards under Section 303 that may exceed EPA's minimum guidelines and, once approved, become part of the

Section 401 certification program. *See* 33 U.S.C. § 1370 (allowing States to exceed minimum guidelines). And States remain free to regulate land and water use when the CWA does not provide a controlling federal structure. *See id.* § 1251(b), (g). Any limitation on State authority to regulate water quality and water resources independently of the CWA arises from the federal licensing statutes that preempt State law in a variety of circumstances. *See* 88 Fed. Reg. at 66,602, 66,634 (acknowledging preemption concerns). The judgment by Congress that preemption is warranted for those purposes is irrelevant to the proper interpretation of Section 401, and EPA lacks authority to redress such concerns by expanding Section 401 into a "grant of authority" to States that it cannot and was not intended to be.[6]

Second, this reasoning ignores the text of Section 401 in multiple respects. Section 401(d) applies to "[a]ny certification provided under this section" for "any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d). "[T]his section" includes Section 401(a)(1), which expressly limits the certification requirement to the CWA jurisdictional phrase "navigable waters." *Id.* § 1341(a)(1). Moreover, Section 401(d) modifies its reference to State law by requiring that any State law requirements be "appropriate." *Id.* § 1341(d). In context, "appropriate" means requirements that fall within the bounds of CWA jurisdiction, if it is to mean anything at all. Given this strong evidence that Congress did not intend to depart from the CWA's general jurisdictional reach and the absence of any evidence of a contrary intent, Section 401 is best read as limiting certification to water quality impacts to "the navigable waters."

c. Relevant Law. The 2023 Rule also went beyond *PUD No. 1* by concluding that certification and certification conditions encompass *any* State law requirement that relates to "water quality." 88 Fed. Reg. at 66,601–03; *but see PUD No. 1*, 511 U.S. at 712 (declining to "speculate on what additional state laws, *if any*, might be incorporated" (emphasis added)). Because this interpretation fails to account for any language in Section 401 beyond Section 401(d)'s reference to "any other appropriate requirement of State law," it is untenable and should be rescinded.[7]

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[6] Congress has already responded to such concerns by amending certain federal licensing statutes to require federal licensing agencies to account for environmental factors. FERC, for example, must "give equal consideration" to "the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality" in deciding whether to issue hydropower licenses. 16 U.S.C. § 797(e).

[7] The 2023 Rule injected further uncertainty into its "any State law" interpretation by refusing to define "what constitutes a 'State law'" for purposes of the Section 401 certification program. 88 Fed. Reg. at 66,604 ("EPA defers to the relevant [S]tate and Tribe to define which of their [S]tate or Tribal provisions qualify as appropriate 'State law' or Tribal law"). EPA's refusal to provide any clarity on this critical question leaves

As explained above, the best reading of "any other appropriate requirement of State law" in Section 401(d) is as a description of State water quality standards adopted and approved under Section 303 of the CWA. *Accord* 85 Fed. Reg. at 42,253. This interpretation harmonizes Section 401(d) with the express directive on the scope of certification in Section 401(a)(1) and reads the statute as a harmonious whole by accounting for the enumerated CWA provisions in Section 401(a). At a minimum, the textual constraints in Section 401(d) itself—including the qualifier "appropriate" and the phrase "set forth in such certification"—foreclose reading the reference to "State law" as an open-ended invitation to go beyond the CWA.

The 2023 Rule swatted these structural considerations away, instead reading "any," "other," and "appropriate" as capacious terms and citing legislative history. No matter how "capacious" in isolation, 88 Fed. Reg. at 66,603, these terms necessarily take on meaning from context, *see Michigan v. EPA*, 576 U.S. at 752 (noting that "appropriate" is a general term but reading it to require EPA to consider typical factors relevant to rulemaking, including cost considerations). In context, virtually every other feature of Section 401 and Section 401(d) suggests that State law requirements relevant to certification must be related to the CWA.

Nor did the 2023 Rule offer a valid reason to disregard the ejusdem generis canon in reading Section 401(d). The 2023 Rule asserted that the list of enumerated provisions in Section 401(d) is too broad to be considered a list of related terms that inform the general catch-all because "[t]he list of CWA provisions referenced in [S]ections 401(a)(1) and 401(d) includes [S]ection 303, which is *not* limited to regulating point-source discharges." 88 Fed. Reg. at 66,603. Setting aside the fact that Section 303 is *not* referenced in Section 401(d) and that Section 303 water quality standards are generally enforced as *discharge limitations* in NPDES permits, the relevant question is whether the provisions in the enumerated list share the common feature of referring to CWA requirements. *Ejusdem generis* informs the meaning of "appropriate requirement of State law" because every item in the preceding list consists of federal CWA requirements, suggesting that an "appropriate requirement of State law" is one that implements the CWA.

* * *

The 2023 Rule adopted an expansive interpretation of the scope of Section 401 certification by interpreting isolated terms in Section 401(d) without reference to Section 401(a)(1) or the CWA more broadly. Because the best reading of the statute must take

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federal licensing agencies and project proponents in the dark as to which regulations, never mind informal documents and policy statements, States may invoke during the certification process. Nor does the lack of clarity necessarily benefit States, which could be subject to lawsuits by plaintiffs alleging an unlawful failure to enforce requirements that the certifying authority believed to be out of scope.

context and structure into account and construe the CWA as a cohesive regulatory scheme, the 2023 Rule should be rescinded.

C. The 2023 Rule Abdicated EPA's Responsibility To Supervise The Section 401 Certification Program In A Reasonable Manner.

In addition to expanding the scope of certification and permissible certification conditions, the 2023 Rule rescinded virtually every reasonable guardrail established by the 2020 Rule. *See* 88 Fed. Reg. at 66,585–86 (eliminating authorization for licensing agencies to set default periods of time), 66,576 (eliminating minimum content requirements), 66,616 (eliminating procedural review of certification decisions for minimum content). The underlying rationale for this abdication rests on two related errors about the division of authority under Section 401—first, that EPA generally lacks authority to establish procedural requirements incumbent on the States; and second, that Section 401 is a grant of authority to the States that EPA cannot meaningfully supervise. Both are wrong. The CWA not only authorizes, but requires, EPA to supervise the Section 401 certification program, which is a means to ensure compliance with the CWA.

1. The CWA grants EPA broad authority and responsibility to reasonably administer Section 401.

EPA's authority under Section 401 is both general and specific, and it mirrors its comparable authorities to superintend the CWA's other cooperative federalism provisions. As a general matter, Section 501(a) authorizes EPA to promulgate regulations "necessary to carry out [its] functions" under the CWA. 33 U.S.C. § 1361(a). These "functions" include those in Section 401, including EPA's duties to act as the certifying authority under certain conditions, to coordinate among States regarding cross-border impacts, and to provide technical and other assistance on request. *Id.* § 1341(a)(1), (a)(2), (b). More specifically, Section 304(h) instructs EPA to promulgate "factors which must be provided in any certification pursuant to section 1341." *Id.* § 1314(h). Together, these provisions vest EPA with broad authority to promulgate guardrails that shape State, federal licensing agency, and project proponent participation in the Section 401 certification process.

EPA's responsibility to promulgate "factors" that "must be provided in any certification" includes the power to establish substantive content requirements for certifications, including the minimum-content requirements established in the 2020 Rule. 33 U.S.C. § 1314(h). While the term "factors" often refers to non-binding considerations relevant to a decision, Congress provided otherwise by specifying that certifying authorities "*must*" include such "factors" in any certification. *Id.* (emphasis added).

Moreover, EPA's general rulemaking authority permits the agency to go beyond the content of a certification by providing guardrails for decision timelines, the role of federal licensing agencies, and other ancillary issues. Such rules are "necessary" to promote efficient administration of the CWA and relate to EPA's "functions" under

Section 304(h) (because "provided in any certification" implies a role in shaping how certifications are provided) and Section 401 (to facilitate EPA's coordination, assistance, and certification duties). 33 U.S.C. § 1361(a).

2. Further rulemaking is necessary to restore reasonable guardrails for the Section 401 certification process.

The 2023 Rule's ill-conceived revisions to the 2020 Rule resulted in a regulatory scheme that raises more questions than it answers. While a complete accounting and comprehensive proposal for reform is outside the scope of this comment, the flaws described below establish an urgent need for the reestablishment of clear rules that promote efficiency, predictability, and high-quality decision making.

a. "Reasonable Period of Time." Beyond providing that the State must act on a request for certification within "a reasonable period of time" not to exceed "one year," the CWA leaves timing considerations to EPA's sound discretion. 33 U.S.C. § 1341(a)(1). Under the 2023 Rule, the timeline for a certification decision is negotiated jointly on a case-by-case basis by the State and federal licensing agency and defaults to six months if no agreement is reached, with automatic extensions for State procedures that set longer timelines for public comment. 88 Fed. Reg. at 66,663.

Case-by-case negotiation of a critical threshold question like the timeline for decision is not an efficient use of resources and distracts from the substantive purpose Section 401 is intended to serve. Per the 2023 Rule, each certifying authority receives an average of 1,947 certification requests *per year*, 88 Fed. Reg. at 66,586 n.51, which suggests that federal licensing agencies handle an even greater number of requests. The joint-negotiation approach requires federal agencies to open each process by negotiating timeline, creating a substantial and unnecessary burden.

Tellingly, the 2023 Rule's joint-negotiation approach is a marked departure from the 2020 Rule, which authorized licensing agencies to set default timelines, 85 Fed. Reg. at 42,285, and from the 1971 regulation, under which "the reasonable period of time was determined solely by the federal agency," 88 Fed. Reg. at 66,585. Case-by-case agreement is always a possibility, and the burden of such negotiations would be lower if, as EPA initially proposed in an earlier draft of the 2023 Rule, the reasonable period of time defaulted to 60 days. *See* 87 Fed. Reg. 35,318, 35,378 (June 9, 2022).

EPA should reconsider and revise its rules governing the timeline for certification decisions. Neither the joint-negotiation approach nor the default six-month timeline are compelled by the CWA, and the obvious drawbacks of the 2023 Rule's novel approach far outweigh the illusory benefits of granting States greater flexibility to influence the decision schedule.

b. Deference to States on Requests, Timeline, and Relevant Law. In multiple respects, the 2023 Rule fails to define State law relevant to the certification process and

instead defers to the State's construction of its own requirements. Under the 2023 Rule, States determine for themselves what a project proponent must submit to constitute a "request" for certification, 88 Fed. Reg. at 66,662; the timeline for decision does not begin until the State "receives a request for certification … in accordance with [its] applicable submission procedures," *id.* at 66,662; and the State has sole authority to determine what constitutes a "State law" relevant to the certification, *id.* at 66,604.

This overly deferential approach is not compelled by the CWA, and it introduces substantial uncertainty into every stage of the certification process that undermines Section 401's core purpose of ensuring compliance with the CWA. Clear rules like those provided in the 2020 Rule are a far superior solution and well within EPA's authority to establish. Defining uniform content for certification requests, what constitutes receipt, and which State laws are relevant to certification does not require EPA to catalogue every nuance of local practice—EPA is well positioned to adopt streamlined rules similar to those established by the 2020 Rule and long in place for many of the CWA's other cooperative federalism programs.

EPA should reconsider and revise its rules governing the content of essential steps in the certification process that do not turn on States' construction of their own requirements.

c. Pre-Application Certification. The 2023 Rule also stripped States and project proponents of the ability to begin the certification process for an individual license or permit before the project proponent submits the application to the federal licensing agency. Under the existing regulation, project proponents must include in their certification requests "[a] copy of the Federal license or permit application submitted to the Federal agency" along with material that "informed the development of that application." 88 Fed. Reg. at 66,662; *see also id.* at 66,575. This choice needlessly delays the ultimate decision on a license or permit by disallowing this type of meaningful collaboration between States and project proponents in advance of an application's submission.

The CWA does not compel this result, either. Section 401(a)(1) places to burden on the "applicant" to "provide the licensing or permitting agency a certification" from the relevant State before the license may issue. 33 U.S.C. § 1341(a)(1). Nothing in that provision precludes requesting or obtaining certification before an application is submitted; the project proponent becomes an "applicant" when the application is submitted, and it can provide the certification to the federal licensing agency at or after the time of submission. Nor does this approach risk abuse of the reasonable period of time requirement. So long as a request for certification must specify the activity at issue and the applicable licensure requirement, the State has the information it needs to make a decision. Project proponents are not in a position to abuse the system by triggering the timeline for decision early because States may deny or condition certification if the request is submitted before a project is sufficiently developed to assure compliance with the CWA.

EPA should reconsider and revise its rules for certification requests to allow the certification process to begin before an application is submitted when appropriate.

d. Certification Review. The 2023 Rule removed the 2020 Rule's minimum content requirements for certification on the theory that federal agencies lack authority to review State certification decisions unless the CWA expressly provides otherwise. 88 Fed. Reg. at 66,663. That decision removed an important tool to ensure Section 401 compliance by States and federal licensing agencies, and its underlying rationale misapprehends EPA's statutory authority to administer Section 401.

Procedural review for compliance with minimum-content requirements was an important means to ensure that State decisions clearly communicate grants, conditions, waivers, and denials, as well as the water quality requirements on which conditions or denials are based. Federal licensing agencies cannot proceed with licensing unless and until they confirm that Section 401's requirements are met, and federal agencies and project proponents greatly benefit from understanding which of the many possible requirements was the basis for any denial or certification condition.

Such minimum content requirements are well within EPA's authority and responsibility to promulgate "factors" that "must be provided in any certification," 33 U.S.C. § 1314(h), and authorizing federal licensing agencies that receive the certifications to confirm whether the State included those "factors" falls within EPA's authority to promulgate necessary rules to carry out its functions, *id.* § 1361(a).

EPA should reconsider and revise its rules governing federal agency review and the minimum content of certification decisions to promote transparency, efficiency, and compliance with the Section 401 certification requirement.

II. Requested Actions

- Rescind the Preamble and Final Rule entitled *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 88 Fed. Reg. 66,558 (Sept. 27, 2023);

- Revise 40 C.F.R. § 121.1(j) to define "water quality requirements" consistent with the scope of certification urged in this comment;

- Revise 40 C.F.R. § 121.3 to clarify that the scope of certification is limited to water quality impacts from point-source discharges into the navigable waters;

- Revise 40 C.F.R. § 121.5 to clearly define the contents of a request for certification and clarify that a request may be made before an application for an individual permit or license is submitted;

- Revise 40 C.F.R. § 121.6 to provide that federal agencies may set the default reasonable period of time by rule and either eliminate the six-month default reasonable period of time or shorten the default to 60 days;

- Revise 40 C.F.R. § 121.7 to reinstate minimum content requirements for certification decisions;

- Revise 40 C.F.R. § 121.8 to reinstate federal agency review of procedural and minimum content requirements for certification decisions;

- Revise 40 C.F.R. Parts 122 and 124 to conform any related provisions to the revisions adopted above;

- and further revise 40 C.F.R. Parts 121, 122, and 124 in any other matter necessary and appropriate to implement the sound interpretation of the Clean Water Act urged in this comment.

Proposed regulatory text for each aspect of the rulemaking requested by this comment is set out in the attached Appendix.

APPENDIX

Proposed Amendments to 40 C.F.R. Parts 121, 122, and 124[8*]

KEY

Green = addition
~~Red~~ = deletion

I. Scope of Certification and Certification Conditions (Parts 121, 122, 124)

Part 121

40 C.F.R. § 121.1 – Definitions.

***

(j) ***Water quality requirements*** means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, including any Federal and state or Tribal laws or regulations implementing those sections~~;~~ and any water quality standards approved or adopted by the Administrator ~~other water quality-related requirement of state or Tribal law~~.

[8*] Proposed regulatory text is set out by subject matter to facilitate comprehensive review of all revisions necessary to address each problem identified in this comment.

40 C.F.R. § 121.3 – Scope of certification.

(a) When a certifying authority reviews a request for certification, the certifying authority shall evaluate whether any discharge into the navigable waters from the Federally licensed or permitted activity will comply with applicable water quality requirements of the Clean Water Act, including applicable water quality standards approved or adopted by the Administrator ~~the activity will comply with applicable water quality requirements. The certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation~~.

(b) Consistent with the scope of review identified in paragraph (a) of this section, a certifying authority shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements of the Clean Water Act, including applicable water quality standards approved or adopted by the Administrator ~~water quality requirements~~.

40 C.F.R. § 121.12 – Notification to the Regional Administrator.

(a) Within five days of the date that it has received both the application and either a certification or waiver for a Federal license or permit, the Federal agency shall provide written notification to the appropriate Regional Administrator.

(1) The notification shall include a copy of the certification or waiver and the application for the Federal license or permit.

(2) The notification shall also contain a general description of the proposed project, including but not limited to the Federal license or permit identifier, project location (e.g., latitude and longitude), a project summary including the nature of any discharge ~~and size or scope of activity,~~ and whether the Federal agency is aware of any neighboring jurisdiction providing comment about the project. If the Federal agency is aware that a neighboring jurisdiction provided comment about the project, it shall include a copy of those comments in the notification.

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40 C.F.R. § 121.13 – Determination of effects on neighboring jurisdictions.

***

(c) Notification from the Regional Administrator shall be in writing and shall include:

(1) A statement that the Regional Administrator has determined that a discharge from the project may affect the neighboring jurisdiction's water quality;

(2) A copy of the Federal license or permit application and related certification or waiver; and

(3) A statement that the neighboring jurisdiction has 60 days after such notification to notify the Regional Administrator and the Federal agency, in writing, if it has determined that the discharge will violate any ~~of its~~ applicable water quality requirements as defined in § 121.1(j) of this chapter, to object to the issuance of the Federal license or permit, and to request a public hearing from the Federal agency.

(d) A Federal license or permit shall not be issued pending the conclusion of the process described in this section, and §§ 121.14 and 121.15.

40 C.F.R. § 121.14 – Objection from notified neighboring jurisdiction and request for a public hearing.

(a) If a neighboring jurisdiction notified by the Regional Administrator pursuant to § 121.13(b) determines that a discharge from the project will violate any ~~of its~~ applicable water quality requirements as defined in § 121.1(j) of this chapter, it shall notify the Regional Administrator and the Federal agency in accordance with paragraph (b) of this section within 60 days after receiving such notice from the Regional Administrator.

(b) Notification from the notified neighboring jurisdiction shall be in writing and shall include:

(1) A statement that the notified neighboring jurisdiction objects to the issuance of the Federal license or permit;

(2) An explanation of the reasons supporting the notified neighboring jurisdiction's determination that the discharge from the project will violate ~~of its~~ applicable water quality requirements as defined in § 121.1(j) of this chapter, including but not limited to, an identification of those water quality requirements that will be violated; and

(3) A request for a public hearing from the Federal agency on the notified neighboring jurisdiction's objection.

(c) The notified neighboring jurisdiction may withdraw its objection prior to the public hearing. If the notified neighboring jurisdiction withdraws its objection, it shall notify the Regional Administrator and the Federal agency, in writing, of such withdrawal.

40 C.F.R. § 121.15 – Public hearing and Federal agency evaluation of objection.

(a) Upon a request for hearing from a notified neighboring jurisdiction in accordance with § 121.14(b), the Federal agency shall hold a public hearing on the

notified neighboring jurisdiction's objection to the Federal license or permit, unless the objection is withdrawn in accordance with § 121.14(c).

(b) The Federal agency shall provide public notice at least 30 days in advance of the hearing to interested parties, including but not limited to the notified neighboring jurisdiction, the certifying authority, the project proponent, and the Regional Administrator.

(c) At the hearing, the Regional Administrator shall submit to the Federal agency its evaluation and recommendation(s) concerning the objection.

(d) The Federal agency shall consider recommendations from the notified neighboring jurisdiction and the Regional Administrator, and any additional evidence presented to the Federal agency at the hearing, and determine whether additional Federal license or permit conditions may be necessary to ensure that any discharge from the project will comply with applicable water quality requirements, as defined in § 121.1(j) of this chapter, for the notified neighboring jurisdiction~~'s water quality requirements~~. If such conditions may be necessary, the Federal agency shall include them in the Federal license or permit.

(e) If additional Federal license or permit conditions cannot ensure that the discharge from the project will comply with applicable water quality requirements, as defined in § 121.1(j) of this chapter, for the notified neighboring jurisdiction~~'s water quality requirements~~, the Federal agency shall not issue the Federal license or permit.

Part 122

40 C.F.R. § 122.44 – Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

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(d) ***Water quality standards and State requirements***: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

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(3) Conform to the conditions in a State certification under section 401 of the CWA when EPA is the permitting authority;

(4) Conform to applicable water quality requirements, as defined in § 121.1(j) of this chapter, ~~under section 401(a)(2) of CWA~~ when the

discharge affects a State other than the certifying State under section 401(a)(2) of the CWA (See §§ 121.12–15);

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Part 124

40 C.F.R. § 124.53 – State certification.

(a) Under CWA section 401(a)(1), EPA may not issue a permit until a certification is granted or waived in accordance with that section by the State in which the discharge originates or will originate.

(b) Consistent with the requirements set forth in §§ 121.4 and 121.5 of this chapter, applications for individual permits may be forwarded by the Regional Administrator to the certifying State agency with a request to act on the request for certification consistent with § 121.7 of this chapter.

(c) If State certification has not been requested by the time the draft permit is prepared, the Regional Administrator shall send the certifying State agency a request for certification consistent with § 121.5 of this chapter and include a copy of the draft permit.

(d) State certification shall be granted or denied within the reasonable period of time as required under CWA section 401(a)(1) and defined in § 121.6 of this chapter. The State shall send a notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

(e) State certification on a draft permit may include a statement of the extent to which each condition of the draft permit can be made less stringent without violating applicable water quality requirements, as defined in § 121.1(j) of this chapter ~~the requirements of State law~~, including water quality standards approved or adopted by the Administrator.

II. Content of Certification Request (Part 121)

40 C.F.R. § 121.4 – Pre-filing meeting requests.

> The project proponent shall request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request for certification ~~in accordance with the certifying authority's applicable submission procedures~~ under § 121.5, unless the certifying authority waives or shortens the requirement for a pre-filing meeting request.

40 C.F.R. § 121.5 – Request for certification.

> (a) Where a project proponent is seeking certification for an individual Federal license or permit, the request for certification shall be in writing, signed, and dated and shall include the following minimum contents:
>
> ~~(1) If the request for certification is for an individual Federal license or permit, it shall be in writing, signed, and dated and shall include the following:~~
>
> (1~~i~~) A copy of the Federal license or permit application submitted to the Federal agency or, if the application has not yet been submitted, a statement identifying the project proponent and a point of contact, the proposed activity, and the applicable Federal license or permit; ~~and~~
>
> (2~~ii~~) Any readily available water quality-related materials that informed the development of the application or, if the application has not yet been submitted, a statement identifying the water-quality related materials that are informing or will inform the development of the application;~~.~~
>
> (3) A description of the type(s) of discharge(s) that may result from the activity;
>
> (4) A description of the location of any discharge(s) that may result from the activity and the location of the receiving waters;
>
> (5) The approximate date(s) when any discharge(s) may commence;
>
> (6) A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and
>
> (7) Documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request, unless the pre-filing meeting request requirement was waived.

~~(2) If the request for certification is for the issuance of a general Federal license or permit, it shall be in writing, signed, and dated and shall include the following:~~

~~(i) A copy of the draft Federal license or permit; and~~

~~(ii) Any readily available water quality-related materials that informed the development of the draft Federal license or permit.~~

(b) ~~Where a project proponent is seeking certification from the Regional Administrator, if not already included in the request for certification in accordance with paragraph (a) of this section, a request for certification shall also include the following, as applicable~~ Where a project proponent is seeking certification for a general Federal license or permit, the request for certification shall be in writing, signed, and dated and shall include the following minimum contents:

(1) A copy of the draft Federal license or permit;

(2) Any readily available water quality-related materials that informed the development of the draft Federal license or permit;

(3) An estimate of the number of discharges expected to be authorized by the proposed general Federal license or permit each year; and

(4) Documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request, unless the pre-filing meeting request requirement was waived.

~~(1) A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity;~~

~~(2) The specific location of any discharge(s) that may result from the proposed activity;~~

~~(3) A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways;~~

~~(4) A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;~~

~~(5) The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence;~~

~~(6) A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and~~

~~(7) Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing meeting request requirement was waived.~~

(c) Project proponents may, at their discretion, include any additional content in a request for certification relevant to the certification determination as defined in § 121.3~~ Where a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has identified contents of a request for certification in addition to those identified in paragraph (a) of this section that are relevant to the water quality-related impacts from the activity, the project proponent shall include in the request for certification those additional contents identified prior to when the request for certification is made~~.

(d) Requests for certification shall be deemed received by the certifying authority (i) on the date the project proponent delivers the request to the certifying authority electronically or through other means permitted by the certifying authority or (ii) three calendar days after the project proponent mails the request to the certifying authority, whichever is earlier.~~ Where a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has not identified contents of a request for certification in addition to those identified in paragraph (a) of this section that are relevant to the water quality-related impacts from the activity, the project proponent shall include in the request for certification those additional contents identified in paragraph (b) of this section.~~

40 C.F.R. § 121.6 – Reasonable period of time.

(a) The reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined in § 121.5(d)~~, in accordance with the certifying authority's applicable submission procedures~~. The certifying authority shall send written confirmation to the project proponent and Federal agency of the date that the request for certification was received. ***

III. Reasonable Period of Time (Part 121)

40 C.F.R. § 121.6 – Reasonable period of time.

***

(b) The Federal agency ~~and the certifying authority may jointly agree in writing to the reasonable period of time for the certifying authority to act on the request for certification, provided~~ shall establish the reasonable period of time either categorically or on a case-by-case basis. In establishing the reasonable period of time, the Federal agency shall consider:

(1) The number and complexity of the potential discharges from the proposed activity;

(2) The nature of any potential discharge; and

(3) The potential need for additional study or evaluation of water quality effects from the discharge relevant to the certification determination as defined in § 121.3.

In no event may the reasonable period of time ~~does not~~ exceed one year from the date that the request for certification was received. ~~Such written agreements may establish categorical reasonable periods of time.~~

[[(c) If the Federal agency ~~and the certifying authority do not agree in writing on~~ does not specify the length of the reasonable period of time, the reasonable period of time shall be 60 days ~~six months~~.**]]**

(d) If a longer period of time is necessary to accommodate the certifying authority's generally applicable public notice procedures or force majeure events (including, but not limited to, government closure or natural disasters), upon written notification by the certifying authority to the Federal agency prior to the end of the reasonable period of time, the reasonable period of time shall be extended by the period of time necessitated by such generally applicable public notice procedures or the force majeure event. In such written notification to the Federal agency, the certifying authority shall identify how much additional time is required and provide a justification for such extension. Such an extension shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.

(e) The Federal agency and certifying authority may agree in writing to extend the reasonable period of time for any reason, provided that the extension shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.

IV. Certification Decision Contents and Federal Agency Review (Part 121)

40 C.F.R. § 121.7 – Certification decisions.

(a) A certifying authority may act on a request for certification in one of four ways: grant certification, grant certification with conditions, deny certification, or expressly waive certification.

(b) A certifying authority shall act on a request for certification within the scope of certification and within the reasonable period of time.

(c) A grant of certification shall be in writing and should include the following:

(1) Identification of the decision as a grant of certification;

(2) Identification of the applicable Federal license or permit;

(3) A statement that the activity will comply with applicable water quality requirements as defined in this part; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(d) A grant of certification with conditions shall be in writing and should include the following:

(1) Identification of the decision as a grant of certification with conditions;

(2) Identification of the applicable Federal license or permit;

(3) A statement explaining why each of the included conditions is necessary to assure that the discharge(s) ~~activity~~ will comply with applicable water quality requirements as defined in this part, including the specific water quality requirements with which the discharge(s) will not otherwise comply; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(e) A denial of certification shall be in writing and should include the following:

(1) Identification of the decision as a denial of certification;

(2) Identification of the applicable Federal license or permit;

(3) A statement explaining why the certifying authority cannot certify that the discharge(s) ~~activity~~ will comply with applicable water quality requirements as defined in this part, including the specific water quality

requirements with which the discharge(s) will not comply~~, including but not limited to a description of any missing water quality-related information if the denial is based on insufficient information~~; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(f) An express waiver shall be in writing and should include the following:

(1) Identification of the decision as an express waiver of certification;

(2) Identification of the applicable Federal license or permit;

(3) A statement that the certifying authority expressly waives its authority to act on the request for certification; and

(4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(g) If the certifying authority determines that no applicable water quality requirements as defined in this part are applicable to the activity, the certifying authority shall grant certification.

40 C.F.R. § 121.8 – Extent of Federal agency review.

Upon receipt of the certifying authority's decision to grant certification with conditions or deny certification, the relevant Federal agency shall, in coordination with the Administrator or Regional Administrator, determine:

(a) Whether the decision issued within the reasonable period of time;

(b) Complied with the requirements of § 121.7(d)–(e), as applicable; and

(c) Complied with the other procedural requirements of CWA section 401.

~~To the extent a Federal agency verifies compliance with the requirements of Clean Water Act section 401, its review is limited to whether: the appropriate certifying authority issued the certification decision; the certifying authority confirmed it complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1); and the certifying authority acted on the request for certification within the reasonable period of time.~~

40 C.F.R. § 121.9 – Failure or refusal to act.

(a) The certification requirement shall be deemed waived ~~only~~ pursuant to section 401 of the CWA if the Federal agency determines, in coordination with the Administrator or Regional Administrator, that the certifying authority failed to

comply as set forth in §§ 121.7–9 ~~a certifying authority fails or refuses to act on a request for certification within the reasonable period of time~~.

(b) If the Federal agency determines, in coordination with the Administrator or Regional Administrator, that the certifying authority failed to comply as set forth in § 121.7–9 ~~did not act on a request for certification within the reasonable period of time~~, the Federal agency shall promptly notify the certifying authority and project proponent in writing that the certification requirement has been waived in accordance with subsection (a)~~§ 121.8~~. Such notice shall satisfy the project proponent's requirement to obtain certification.