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October 21, 2019

***Via www.regulations.gov***

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Office of the Administrator
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ms. Lauren Kasparek
Oceans, Wetlands, and Communities Division (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

***Re: Comments on "Updating Regulations on Water Quality Certification"***
**Docket No. EPA-HQ-OW-2019-0405**

Dear Administrator Wheeler and Ms. Kasparek:

Together, our 77 organizations write to ask you to protect the streams, rivers, and wetlands that are essential to our country's natural environment, cultural history, and economy. We and our millions of members recognize that section 401 of the Clean Water Act gives states and tribes—and the public—a vital role in decisions that could impact the quality of waters where we swim, fish, boat, paddle, hunt, and get our drinking water. This administration must not undermine the section 401 process at the behest of a few special interests who stand to profit at the expense of our waterways and our members.

Section 401 is a foundational part of the Clean Water Act, providing a way for states and tribes to collaborate with the federal government. It also ensures they can protect their valuable water and related resources from the adverse effects of federally sanctioned projects like pipelines, dams, and mines. Changes to section 401 of the Clean Water Act would have significant ramifications for our nation's waters and for the effective implementation and enforcement of the Clean Water Act. As proposed, the changes are also illegal and unnecessary. We thus respectfully request that the U.S. Environmental Protection Agency ("EPA" or "agency") withdraw the proposed rule.

The Southern Environmental Law Center submits these comments on its own behalf and on behalf of:

350.org
Alabama Rivers Alliance
Allegheny-Blue Ridge Alliance
Alliance for the Shenandoah Valley
Altamaha Riverkeeper
American Rivers
Appalachian Voices
Black Warrior Riverkeeper, Inc.
Cape Fear River Watch
Catawba Riverkeeper Foundation
Center for a Sustainable Coast
Charleston Waterkeeper
Chatham Research Group
Chattahoochee Riverkeeper
Chesapeake Legal Alliance
Clean Fairfax
Clean Water Action
Coastal Conservation League
Congaree Riverkeeper
Conservation Voters of South Carolina
Coosa River Basin Initiative
Coosa Riverkeeper
Dan Riverkeeper
Defenders of Wildlife
Environment Virginia
Friends of the Earth U.S.
Friends of the Rappahannock
Friends of the Reedy River
Gills Creek Watershed Association
Good Stewards of Rockingham
Harpeth Conservancy
Haw River Assembly
James River Association
Loudoun Wildlife Conservancy
Lumber Riverkeeper
Lynnhaven River NOW
Mobile Baykeeper Inc.
Mountain Lakes Preservation Alliance
MountainTrue
National Parks Conservation Association
Naturaland Trust
North Carolina Coastal Federation
North Carolina Conservation Network
North Carolina League of Conservation Voters
North Carolina Wildlife Federation
Ogeechee Riverkeeper
Oil Change U.S.
Pamlico-Tar Riverkeeper
Piedmont Environmental Council
Potomac Riverkeeper Network
Preserve Franklin County
Preserve Giles County
Preserve Montgomery County VA
Protect Our Water Heritage Rights
Rappahannock League for Environmental Protection
River Guardian Foundation
Roanoke River Basin Association
Rockbridge Area Conservation Council
Savannah Riverkeeper
Save Our Saluda
South Carolina Native Plant Society
South Carolina Wildlife Federation
St. Mary's EarthKeepers
Tennessee Chapter Sierra Club
Tennessee Citizens for Wilderness Planning
Tennessee Environmental Council
Tennessee Scenic Rivers Association
Upper Neuse Riverkeeper
Upstate Forever
Virginia Citizens Consumer Council
Virginia Conservation Network
Virginia League of Conservation Voters
Waccamaw Riverkeeper
Wetlands Watch
Winyah Rivers Alliance
Yadkin Riverkeeper

## I. SUMMARY OF COMMENTS

Nearly fifty years ago, Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] To advance that objective, section 401 of the Act granted states the power to veto local projects that might otherwise win federal licensing if those projects violate state law.[2] In this sense, section 401 embodies the central purpose of the Clean Water Act: it adds a layer of protection on top of federal licensing for the "chemical, physical, and biological integrity of the nation's waters."[3] It is also a "primary mechanism[] through which states may exercise" their statutory role "as the prime bulwark in the effort to abate water pollution" from federally approved projects.[4]

That plain-language reading of the statute has controlled for more than 40 years. As written, and as interpreted by the U.S. Supreme Court, section 401 gives states significant authority—which this rulemaking threatens to eliminate. Courts have uniformly held that if a state denies a water quality certification, federal agencies "lack[] the authority to issue a license,"[5] and if a state grants certification with conditions, the "state conditions *must* be conditions of the" federal permit.[6] Courts are the arbiters of the law, and the Supreme Court "has already interpreted [section 401], and there is no longer any different construction" this administration can craft to strip away state authority under section 401.[7] The EPA is powerless to propose a rule that violates these legal requirements.

Since its enactment, states have depended on the Clean Water Act section 401 certification process to ensure that projects requiring federal licenses and permits will not impair the waters within their borders—projects like dams, river alterations, wetland fills, and interstate pipelines. Through section 401, states have required that federal dams preserve stream flow necessary for aquatic life and provide fish passage for spawning; that pipeline projects control runoff and other water pollution; and that marsh and wetland destruction be avoided, minimized, and mitigated.

Now, in yet another attempt to weaken the Clean Water Act, the current administration has proposed a rule that would upend the section 401 certification process and cripple state authority.[8] This proposal advances novel interpretations that contradict 40 years of established

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[1] 33 U.S.C. § 1251(a).
[2] *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).
[3] 33 U.S.C. § 1251(a).
[4] *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 393-94 (D.C. Cir. 2017).
[5] *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006).
[6] *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 645 (4th Cir. 2018)
[7] *United States v. Home Concrete & Supply*, 566 U.S. 478, 487 (2012).
[8] Ironically, this administration cited interference with state authority as a major reason for repealing the 2015 definition of Waters of the United States adopted by the previous administration to clarify the jurisdictional scope of the Clean Water Act. But with this proposal, the administration is gutting state section 401 authority, toppling the express reservation of state authority embodied in Clean Water Act section 101(b) it has touted as central to the Act throughout its efforts to restrict federal clean water protections.

law and practice. What this administration characterizes as a "holistic" view of the law is, in fact, an unprecedented interpretation designed to undercut the role of states in protecting their local waterways and wetlands and the public's ability to participate in reviews of destructive projects. Restricting the 401 certification process as proposed would make it more difficult (and likely impossible) for a state to prevent a proposed industrial facility or project from polluting streams, rivers, and wetlands, contrary to congressional intent.

The changes this administration proposes are in direct response to President Trump's ill-advised Executive Order 13868[9] issued to fast track energy projects. EPA attempts to justify its sweeping restrictions to the section 401 process on the grounds that states have abused their certification authority—overlooking the fact that EPA does not have the authority to make that determination, as that is a decision left to state courts.

Rather than exceeding their authority under section 401 or abusing the section 401 process, as the Executive Order and EPA suggest, states handle numerous certification applications annually for a wide range of projects. Where a state denies or conditions a section 401 certification, it is exercising its statutorily mandated authority to protect water quality under the cooperative federalism system established by the Clean Water Act. And because those decisions are subject to judicial review, there is no danger of states abusing their power or arbitrarily denying applications for section 401 certifications.

Still, it is clear that this proposal comes at the bidding of polluting industries,[10] to prevent pipelines and coal terminals from being delayed or inconvenienced by having to comply with state protections. That single-mindedness has resulted in EPA's improper elevation of polluters' interests over the purpose of the Clean Water Act. It has also led to the administration's attempted razing of statutory text, congressional intent, Supreme Court precedent, and state authority.

Through sections 401(a) and 401(d), Congress provided that states have the authority to review and condition federal licenses in a manner that ensures the project as a whole complies with all "appropriate" state requirements. EPA may not overturn the well-established, statutorily mandated role of states in implementing the Clean Water Act's protections within their borders. It must withdraw this ill-founded, short-sighted rule.[11]

## II. THE SOUTHEASTERN STATES HAVE A TREMENDOUS STAKE IN PRESERVING THEIR SECTION 401 AUTHORITY.

As the Supreme Court has stated, "State certifications under section 401 are essential in the scheme to preserve state authority to address the broad range of pollution" posed by large

[9] Executive Office of the President, Executive Order: Promoting Energy Infrastructure and Economic Growth (April 10, 2019), https://www.federalregister.gov/documents/2019/04/15/2019-07656/promoting-energy-infrastructure-and-economic-growth (last visited Oct. 21, 2019).
[10] Dominion Energy, Meeting Handout (EPA-HQ-OW-2019-0405-0006) (June 27, 2019).
[11] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,111 n.43 (Aug. 22, 2019) ("Proposed Rule").

federally sanctioned industrial developments.[12] When an applicant seeks a federal permit or license for certain activities—such as building a hydropower plant[13] or discharging dredged or fill material[14]—section 401 grants the affected State power to veto the project if, in the State's judgment, the project's construction or operation would cause a violation of State water quality standards.[15] Section 401 also allows the State to certify a project with conditions to ensure that the activity as a whole[16] will comply with state law.[17] Through these safeguards, section 401 makes certain that "[n]o polluter will be able to hide behind a Federal license or permit as an excuse" to violate state water quality standards and other "appropriate requirements" and that "[n]o state water pollution control agency will be confronted with a *fait accompli* by an industry that has built a plant without consideration of water quality requirements."[18]

Southeastern states have relied on section 401 certifications to ensure that some of the region's largest, and potentially most destructive, projects do not degrade state waters. States achieve this protection by ensuring that those projects comply with "appropriate requirements" under state law such as riparian buffers, erosion and sedimentation controls, chloride monitoring, mitigation, fish and wildlife protection, drinking water protections, fish ladders, flow requirements, and adaptive management measures. Under the current proposal, none of these types of conditions would be allowed, and many projects could move forward untethered to state law and without meaningful state or public input. As the following examples illustrate, the result would be catastrophic. State section 401 certification authority to protect the waters within state boundaries must be preserved.

A. North Carolina – PCS Phosphate Mine in the Albemarle-Pamlico Estuary

Since 1965, PCS Phosphate ("PCS") (now known as Nutrien Aurora Phosphate) and its predecessors have mined land in northeastern North Carolina to extract phosphate ore.[19] The PCS mine site abuts the Pamlico River.[20] Several tributaries of the Pamlico River flow across the mine site. Three of the creeks that cut across PCS's mine site have been designated as primary nursery areas by the North Carolina Wildlife Resources Commission, a title that recognizes their importance as habitat for juvenile finfish and shellfish. Those primary nursery areas flow into a special secondary nursery area, South Creek, which has also been recognized for its habitat

[12] *S.D. Warren v. Maine Bd. of Envtl Prot.*, 547 U.S. 370, 386 (2006).
[13] *See* 16 U.S.C. § 817(1).
[14] *See* 33 U.S.C. § 1344.
[15] 33 U.S.C. § 1341(a)(1); *accord Keating*, 927 F.2d at 622.
[16] *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994).
[17] 33 U.S.C. § 1341(d).
[18] 116 Cong. Rec. 8984 (1970).
[19] Notice of Availability of the Final Environmental Impact Statement (FEIS) for the Proposed Potash Corporation of Saskatchewan Phosphate Mine Continuation Near Aurora, in Beaufort County, NC ("PCS FEIS Notice"), 73 Fed. Reg. 30,094, 30,094 (May 23, 2008).
[20] *Id.*

values. The mine site lies within the Albemarle-Pamlico estuary, the nation's second largest estuary system,[21] which the United States Fish and Wildlife Service characterized as "nationally significant."[22]

In addition to its great scenic beauty and widespread recreational opportunities, the Pamlico River is economically vital to North Carolina. The River is home to commercially and recreationally important fish and shellfish species as well as waterfowl, shorebirds, and other migratory birds. The estuary functions as a nursery for more than 90 percent of the commercial seafood species caught in North Carolina. The catch is worth over $1 billion annually.[23]

Still, as the strip mine advanced into wetlands closer to the Pamlico River, PCS applied for a Clean Water Act section 404 permit in 2000 to expand and continue its mining operations for the next 37 years.[24] The expanded mine would encompass more than 15,100 acres, including 4,124 acres of wetlands, 55.14 acres of riparian buffers, and 29,288 linear feet of streams.[25]

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[21] Albemarle-Pamlico National Estuary Partnership, Our Estuary, Fast Facts, https://apnep.nc.gov/our-estuary/fast-facts (last visited Oct. 21, 2019).
[22] Albemarle-Pamlico National Estuary Partnership, Our History, https://apnep.nc.gov/about-apnep/our-history (last visited Oct. 21, 2019).
[23] Albemarle-Pamlico National Estuary Partnership, Our Estuary, Fast Facts, https://apnep.nc.gov/our-estuary/fast-facts (last visited Oct. 21, 2019).
[24] PCS FEIS Notice, 73 Fed. Reg. at 30,094.
[25] Letter from Ross M. Smith, PCS, to Cyndi Karoly, Division of Water Quality, 6-9, 11 (June 6, 2008) (Application), attached as Ex. A.

Within the wetlands lay a 58-acre bottom-land hardwood forest that is a nationally significant natural heritage area as defined by the North Carolina Natural Heritage Program.[26]

In its application, PCS did not provide the North Carolina Division of Water Quality ("DWQ") with sufficient information to process the certification. DWQ was forced to seek additional information from PCS—information that PCS should have provided initially to complete its application. Among other things, DWQ needed to know: (1) how PCS was going to monitor in-stream effects of the drainage reductions the expansion would cause, (2) what PCS was going to do to minimize adverse impacts, and (3) what mitigation strategies PCS would employ to compensate for any remaining adverse effects to the estuary.[27] PCS did not supply of needed information to DWQ until January 6, 2009—almost 120 days after DWQ requested it.[28]

DWQ issued an initial 401 certification on December 5, 2008,[29] and a revised version on January 15, 2009,[30] after PCS supplied its final collection of information.[31] Despite PCS's delays in sending the information necessary to support its expansion, DWQ issued a revised 401 certification only nine days after PCS delivered its final round of information.[32]

Although the revised section 401 certification issued by DWQ did not include all the protections required to adequately protect the estuary, it did include some valuable conditions. For instance, the certification includes state law restrictions on sedimentation and erosion control, mitigation, the avoidance of hardwood wetlands, and groundwater monitoring.[33] Each of these conditions is rooted in state law. They are designed to protect water quality and could have only been formulated by DWQ with adequate information from the applicant. Yet, most of these conditions would not be accepted as section 401 conditions under the current proposal, given they do not regulate specific "point source discharges" and were not approved by EPA, subjecting a "nationally significant" estuary to even more loss. Moreover, had DWQ been forced to process the section 401 certification for this massive project without sufficient information, as

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[26] John Dorney, Division of Water Quality, Memorandum to File, 3 (Jan. 14, 2009), attached as Ex. B; Letter from Coleen H. Sullins, Division of Water Quality, to Ross M. Smith, PCS, 6 (Jan. 15, 2009) (401 Water Quality Certification), attached as Ex. C.

[27] Letter from Paul Rawls, Division of Water Quality, to Ross M. Smith, PCS, Request for Additional Information (Aug. 7, 2008), attached as Ex. D.

[28] Letter from Ross M. Smith, PCS, to John Dorney, Division of Water Quality, Response to Request for Additional Information (Sept. 4, 2008), attached as Ex. E; Letter from Ross M. Smith, PCS, to John Dorney, Division of Water Quality, Response to Request for Additional Information (Nov. 3, 2008), attached as Ex. F; John Dorney, Division of Water Quality, Memorandum to File, 3 (Jan. 14, 2009), attached as Ex. B.

[29] Letter from Coleen H. Sullins, Division of Water Quality, to Ross M. Smith, PCS, 1 (Jan. 15, 2009) (401 Water Quality Certification), attached as Ex. C.

[30] *Id.*

[31] *Id.*

[32] *Compare* John Dorney, Division of Water Quality, Memorandum to File, 3 (Jan. 14, 2009), attached as Ex. B (discussing maps received on January 6, 2009) *with* Letter from Coleen H. Sullins, Division of Water Quality, to Ross M. Smith, PCS (Jan. 15, 2009) (401 Water Quality Certification), attached as Ex. C.

[33] Letter from Coleen H. Sullins, Division of Water Quality, to Ross M. Smith, PCS, 4-8 (Jan. 15, 2009) (401 Water Quality Certification), attached as Ex. C.

the proposed rule appears to require, DWQ would have had to deny PCS's application or risk violating its certification obligations under Clean Water Act. To make matters worse, if EPA objected to the grounds for DWQ's certification denial, the proposed rule would allow EPA to convert the State's explicit denial into a waiver and ignore it.

B. Georgia and South Carolina – Deepening the Savannah Harbor

In 2010, the Georgia Ports Authority proposed to expand and further deepen the Savannah Harbor navigation channel by up to four feet[34] to make it navigable for supersized ships. Unlike other ports that are located in more accessible harbors close to the ocean, the Savannah port is located in a relatively narrow, shallow (about 20 feet deep) segment of the Savannah River, which is 16 miles upstream from the ocean. That segment of the Savannah River also directly abuts one of the oldest national wildlife refuges in the country – the Savannah National Wildlife Refuge (the "Refuge"). Given its location, the $650 million proposed deepening would severely degrade water quality and related resources. Further complicating matters, the border between South Carolina and Georgia meanders down the middle of the Savannah River, meaning that both states would be affected by the proposal and both states would have to provide section 401 certifications before the deepening could advance. The project remains a telling example of why states must maintain flexible time schedules and scope of conditions when making 401 determinations.[35]

Over time, prior deepenings have caused salt water from the Atlantic Ocean to intrude up the Savannah River, seriously altering the area's natural mix of salt water and fresh water. This saltwater intrusion resulted from harbor deepenings, storm events, and sea level rise. Salt water intrusion kills freshwater marsh. This marsh is extremely rare. In fact, the U.S. Fish and Wildlife Service identified the tidal freshwater marsh in the Savannah River as the single most critical natural resource in the estuary. After decades of saltwater encroachment, the area's once extensive tidal freshwater marsh is largely contained within the Refuge. This marsh within the Savannah River estuary has been reduced from approximately 12,000 acres to about 3,300 acres due to previous harbor deepenings.

Successive deepenings of the Savannah River also contributed to the reduction of dissolved oxygen levels to critically low levels on the River's bottom. Dissolved oxygen reductions imperil aquatic species while channel maintenance and deepenings directly destroy and disrupt fish and wildlife habitat through dredging and the placement of millions of cubic yards of dredged spoil on the River and ocean floor.

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[34] South Carolina Department of Health and Environmental Control, Staff Assessment, 401 Certification, Savannah Harbor Expansion Project, 1 (Sept. 30, 2011), attached as Ex. G.

[35] For background on the project and its impacts, *see* Letter from Christopher K. DeScherer & William W. Sapp, SELC, to Jeffrey M. Hall, Colonel, U.S. Army Corps of Engineers re Notice of Availability of a Draft Tier II Environmental Impact Statement (January 25, 2011), attached as Ex. H; and U.S. Army Corps of Engineers, Final Environmental Impact Statement for Savannah Harbor Expansion Project (January 2012, revised July 2012), https://www.sas.usace.army.mil/Portals/61/docs/SHEP/Reports/EIS/Section%201%20with%20TOC%20SHEP%20FINAL%20EIS.pdf (last visited Oct. 21, 2019).

The United States Army Corps of Engineers ("Corps") issued the public notice for the project on November 15, 2010. Georgia issued its certification on February 16, 2011.[36] After extensive information exchange and negotiations between the Corps, the Georgia Ports Authority, and the South Carolina Department of Health and Environmental Control ("DHEC"), South Carolina issued a 401 certification on November 15, 2011—exactly one year after the public notice.

After reviewing the Georgia Ports Authority's application, the Georgia Department of Natural Resources imposed state law conditions in its certification. The City of Savannah anticipated that the project would cause salt water to reach groundwater and its drinking water and industrial water intake systems. Thus, the Georgia Department of Natural Resources determined that the effect of the project on the Upper Floridan Aquifer, a critical water supply throughout most of Georgia, must be studied. To that end, Georgia required the installation of monitoring wells at locations it selected. If the aquifer were irreparably damaged by any saltwater intrusion, the state reserved the right to require that the aquifer be cleaned up.

Georgia also prohibited dredging in certain areas during the striped bass spawning period and when sea turtles are abundant. The State also required mitigation for impacts to bass habitat, recognizing the importance of the fish to the fishing industry. Finally, in light of the project's profound negative impacts on habitat and stream functions, Georgia required that the Georgia Ports Authority comply with state buffer requirements and construct a fish ladder at the New Savannah Bluff Lock and Dam, which is located upstream from the Savannah Harbor.[37]

In its 401 certification, the South Carolina DHEC also determined that additional protections were needed to protect water quality.[38] DHEC's primary concern was that the deepening of the navigational channel would cause a decrease in dissolved oxygen at the bottom of the channel, adversely affecting the endangered shortnose sturgeon, which travels in the deepest parts of the river as it moves from the ocean to spawning grounds upriver.[39] DHEC predicted that in addition to impacting endangered aquatic life, the decrease in dissolved oxygen would compromise the estuary's ability to absorb point and non-point pollution.[40] DHEC also predicted that the deepened channel would allow salt water to penetrate further up the estuary and harm over 1,000 acres of freshwater wetlands and saltwater marsh.[41]

DHEC was initially displeased with the manner in which the Corps was treating these anticipated wetland and marsh impacts, but an interagency coordination team was formed, and it developed an acceptable minimization and mitigation plan for the wetlands and marsh.[42] On

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[36] Letter from Allen Barnes, Georgia Department of Natural Resources, to Col. Jeffrey Hall, U.S. Army Corps of Engineers, Water Quality Certification, 1 (Feb. 16, 2011), attached as Ex. I.
[37] *Id*. at 2-9.
[38] Letter from Heather Preston, DHEC, to U.S. Army Corps of Engineers, Certification in Accordance with Section 401 of the Clean Water Act, as amended (Nov. 15, 2011), attached as Ex. J.
[39] South Carolina Department of Health and Environmental Control, Staff Assessment, 401 Certification, Savannah Harbor Expansion Project, 2 (Sept. 30, 2011), attached as Ex. G.
[40] *Id*. at 3.
[41] *Id*. at 4.
[42] *Id*. at 8.

November 15, 2011, DHEC issued its section 401 certification.[43]

Among other things, South Carolina's certification requires that the Corps and Georgia Ports Authority collectively ensure that dredging in certain locations within the Inner Harbor is prohibited during the striped bass spawning period and funding is available to operate and maintain the project's oxygen injection system for the life of the project.[44] The project's oxygen injection system is designed to mitigate any dissolved oxygen reductions that might develop as a result of the deepening.[45] Through its certification, South Carolina also requires that the impacts to the wetlands and marsh caused by the project are adequately mitigated.[46]

The outcome of this section 401 certification process would have been drastically different under the current proposal. Many of the conditions imposed by Georgia and South Carolina would not be available under the proposed rule, such as fish ladders, limits on dredging based on the presence of striped bass, mitigation, financial assurances, and riparian buffer requirements. Moreover, had South Carolina not had the freedom—and time—to work with the other stakeholders to develop a wetlands and marsh mitigation plan, South Carolina may never have achieved the reasonable assurances necessary to allow the project to go forward. Similarly, if South Carolina had not been able to require that funds be available to operate and maintain the oxygen injection system for the life of the project, future Corps or Georgia Ports Authority financial shortfalls could have jeopardized the system.

C. South Carolina – The Lake Murray Dam, Saluda River

The Lake Murray Dam (also known as the Dreher Shoals or Saluda Dam) was built in 1930 to harness the energy of the Saluda River. At 1.5 miles long and 213 feet high, it was billed at the time as the largest earthen dam in the world. The lake it created—Lake Murray—is one of the largest man-made lakes constructed for power production. The deep lake holds frigid waters at its bottom so the dam releases transform the Saluda into a chilly river that mimics the cold water streams of the Appalachians.[47]

The Saluda Dam controls the vast majority of flow in the 10 miles of the Lower Saluda River that runs from the dam to the Saluda River's confluence with the Broad and Congaree Rivers, a reach designated as a state scenic river within sight of downtown Columbia. Today,

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[43] *See* Letter from Heather Preston, DHEC, to U.S. Army Corps of Engineers, Certification in Accordance with Section 401 of the Clean Water Act, as amended (Nov. 15, 2011), attached as Ex. J. This certification was soon challenged by another South Carolina agency, the Savannah River Maritime Commission, which contended that it, not DHEC, had authority to issue section 401 certifications for Savannah River projects. *In re: Application of the U.S. Army Corps of Engineers, Savannah District for Certification and Permitting of the Savannah Harbor Expansion Project*, Savannah River Maritime Commission, 5 (June 3, 2013), attached as Ex. K. The South Carolina Supreme Court agreed. *Id.* at 6. The Savannah River Maritime Commission issued the certification with a comprehensive list of protective conditions. *Id*. at 16-23.

[44] *Id*. at 16-23.

[45] *Id*. at 17.

[46] *Id*. at 20-24.

[47] *See* Congaree Riverkeeper, Lower Saluda River, http://www.congareeriverkeeper.org/lower-saluda-river (last visited Oct. 21, 2019).

Lake Murray and the Lower Saluda River provide a recreational mecca in the Midlands of South Carolina that is enjoyed by anglers, boaters, kayakers, tubers, paddle boarders, and swimmers. The cold water releases from the dam support a popular trout fishery, allow brown and rainbow trout to survive and reproduce, and create a summer refuge for the state fish—the striped bass.[48]

Trout need clean, cold water that is high in oxygen to survive and reproduce. But, until recently, many of the trout stocked in the Saluda died by late summer as oxygen levels dropped and water temperatures rose in central South Carolina. "By fall, trout were sluggish, if they could be found at all."[49]

Consequently, the South Carolina DHEC included in its section 401 water quality certification for Federal Energy Regulatory Commission's ("FERC") relicensing of the project the requirement that SCE&G (now known as Dominion Energy South Carolina) make additional modifications to meet state dissolved oxygen standards and comply with minimum flow requirements in the Saluda River.[50] SCE&G thus began pumping more oxygen into the water and releasing higher volumes of water in the summer. DHEC also required the power company to support and enhance aquatic communities in the area consistent with the State's Trout Evaluation and Monitoring Program; the Freshwater Mussel Enhancement Program; the Rare, Threatened and Endangered Species Management Program; and the Sturgeon Protection and Adaptive Management Program.[51] Under the current proposal, these conditions would be vetoed by the federal government or, if imposed by the State, could result in its constructive waiver of its certification authority.

South Carolina's ability to condition FERC's license for the Lake Murray Dam in this manner ensured that the State's priorities—and not those of FERC—were protected. It also resulted in an unrivaled fishery with interesting contrast found almost nowhere else: "Trees that drip with Spanish moss, a signature plant of the coastal plain, line a river filled with trout similar to those that thrive in the Blue Ridge" mountains.[52]

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[48] *See id*.
[49] Southern Trout Magazine, Looing Flies to Spanish Moss at the Saluda River (Mar. 12, 2017), http://www.southerntrout.com/blog/2017/3/12/loosing-flies-to-spanish-moss-at-the-saluda-river.
[50] DHEC, Notice of Department Decision – Water Quality Certification, Continued Operation of the Saluda Hydroelectric Project (Sept. 27, 2010), attached as Ex. L.
[51] *Id*.
[52] Southern Trout Magazine, Looing Flies to Spanish Moss at the Saluda River (Mar. 12, 2017), http://www.southerntrout.com/blog/2017/3/12/loosing-flies-to-spanish-moss-at-the-saluda-river; *see also*, Margaret Clay, *A River Runs Through It*, Columbia Metropolitan (June 2015), https://columbiametro.com/article/a-river-runs-through-it/.

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A. Georgia – Twin Pines Minerals Mine in Okefenokee Swamp

In the near future, the state of Georgia will be called upon to determine whether a titanium mine proposed by Twin Mines Minerals in southeast Georgia should receive a 401 certification.[54] The mine would be located on the edge of the iconic Okefenokee Swamp—a pristine and unique wetland home to the Okefenokee National Wildlife Refuge, [55] a National Natural Landmark,[56] the largest blackwater swamp in North America, and the third largest wildlife refuge east of the Mississippi River.[57] In its application, Twin Pines proposes scraping off the top soil, digging up to 70-feet deep into the wetlands and sandy soils on site, separating out the heavy metals, sorting out a spongy layer of soil called humate, and then attempting to put all of the layers back together again in a way that maintains the hydraulic functionality of the wetlands.[58]

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[53] Photo Credit – Jake Howard, Saluda Valley Guides (2019).
[54] *See* U.S. Army Corps of Engineers, Joint Public Notice (July 12, 2019), https://www.sas.usace.army.mil/Portals/61/docs/SAS-2018-00554-Charlton-0712-SP%20(HAR).pdf?ver=2019-07-12-160626-380 (last visited Oct. 21, 2019).
[55] *See id*.
[56] National Park Service, National Natural Landmarks, https://www.nps.gov/subjects/nnlandmarks/site.htm?Site=OKSW-GA (last visited Oct. 21, 2019).
[57] *See* United States Fish & Wildlife Service, Okefenokee National Wildlife Refuge, Summary of Draft Comprehensive Conservation Plan, https://www.fws.gov/southeast/planning/PDFdocuments/OkefenokeeDraftCCP/OKE%20CCP%20Summary%20with%20maps.pdf (last visited Oct. 21, 2019).
[58] Twin Pines Minerals, LLC, Heavy Minerals Mine, Individual Permit Application, Project No. SAS-2018-00554, 1-4 (July 3, 2019) ("Permit Application"), http://www.wwals.net/pictures/2019-07-12--tpm-

The mining process will likely cause long-term water quality impacts. Phase one of the mine would destroy approximately 600 acres of wetlands and 5,000 linear feet of streams.[59] Over the 30-year-life of the mine, Twin Pines will excavate almost 12,000 acres of land.[60] Ground water will also be impacted. Twin Pines intends to pump 4,320,000 gallons per day from the Floridan Aquifer for thirty years.[61] In addition to significant questions around how the company intends to restore the hundreds of acres of destroyed wetlands within the site, local residents and visitors to the refuge are concerned that the mining operations could harm the hydrology of the swamp and impact the flow of groundwater.

This proposed project is complex. If Georgia gives the project the attention it deserves, it will need adequate time to obtain essential information, analyze it, allow public comment, and reach a conclusion. During this process, Georgia will consider whether the project warrants conditions relating to buffers, erosion and sedimentation, stream flow, water levels, and groundwater withdrawal—all state law requirements that would not be allowed under the current proposal.

EPA's proposed rule would severely limit the authority granted by Congress to the states to ensure that projects like these and federally licensed pipelines, coal terminals, liquefied natural gas facilities and other major energy infrastructure projects will not violate state water quality laws. Section 401 explicitly preserves states' independent and broad authority to protect the quality of waters within their borders. Neither the President's Executive Order nor EPA's

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usace/Twin-Pines-Individual-Permit-Application--complete.pdf (last visited Oct. 21, 2019). Roughly one sixth of Phase One will be mined up to 25 feet deep using a different machine. *Id.* at 10.

[59] *Id*. at 7.

[60] *Id.* at 1.

[61] Twin Pines Minerals, LLC, Application for Industrial Groundwater Withdrawal Permit (July 22, 2019), https://www.scribd.com/document/424772086/7-24-19-Final-Application-for-Industrial-Groundwater-Withdrawal-Permit (last visited Oct. 21, 2019).

guidance[62] and proposed regulations can contradict or undermine the plain language and congressional intent of section 401.[63]

## III. EPA MAY NOT IMPAIR STATES' WELL-ESTABLISHED AUTHORITY TO INDEPENDENTLY EVALUATE THE WATER QUALITY IMPACTS OF FEDERAL PROJECTS ON STATE WATERS.

Through section 401 of the Clean Water Act, Congress granted states the power to veto projects, like the Twin Pines mine proposed at the edge of the iconic Okefenokee Swamp, that might otherwise win federal approval.[64] The very purpose of state certification under section 401 "is to assure that Federal licensing or permitting agencies cannot override state water quality requirements."[65] EPA thus has no authority to restrict that power as proposed in this rulemaking.

Specifically, EPA lacks the authority to do two things. First, when a state says it is denying a water quality certification, it is a denial, and "[n]o [federal] license or permit *shall* be granted."[66] If Congress had intended to authorize EPA to convert a state's denial of certification into a waiver, ignore it, and license the project anyway, as proposed here, Congress would not have plainly stated that "[n]o license or permit shall be granted"[67] when a state denies certification. Section 401 authorizes states to veto the EPA, not vice versa.

Second, when a state grants certification with conditions, those conditions "*shall* become a condition of any Federal license or permit,"[68] and the unambiguous terms of section 401(d) prevent EPA from reviewing, rejecting, or limiting the conditions states may impose.[69]

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[62] EPA, Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (June 7, 2019) ("2019 401 Guidance"), https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf (last visited Oct. 15, 2019).

[63] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (President cannot use Executive Order to promote policy goals in absence of statutory or constitutional authority); *id*. at 637-38; (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb"); *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013) ("[T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections.").

[64] *Keating*, 927 F.2d at 622.

[65] S. Rep. No. 92-414, at 3735 (1971).

[66] 33 U.S.C. § 1341(a)(1) (emphasis added).

[67] *Id.*

[68] 33 U.S.C. § 1341(d) (emphasis added).

[69] *Id.* EPA includes a proposal for constructive waiver when the certifying authority acts "outside the scope of certification, as defined in [the] proposal." Proposed Rule, 84 Fed. Reg. at 44,110. This proposal, if adopted, would also represent a fundamental—and illegal—transfer of decision-making authority under section 401 from state certifying authorities to federal permitting agencies. State certifying authorities, not federal permitting agencies, are charged by section 401 of the Clean Water Act with effectuating protection of state waters and compliance with water quality standards. EPA lacks the authority to elevate a federal agency's judgment about what is "within the scope" of the certification over a state certifying authority's judgment about what is necessary to protect state water quality from the proposed activity.

The term "shall" used in sections 401(a)(1) and 401(d) is "an unambiguously mandatory term" that "leaves no room for interpretation."[70] Every circuit court that has considered the issue agrees.[71] As these courts "have uniformly held," [72] Congress' use of the term "shall" precludes federal agencies from licensing a project when a state has denied certification,[73] and from reviewing, altering, rejecting, or limiting the conditions states may impose when they grant it.[74]

In its 40-plus page proposal, however, EPA has virtually no response to these critiques, and what little it does say withers under the mildest scrutiny. EPA simply "disagrees" with the overwhelming judicial authority foreclosing its proposal.[75] Still, the agency claims that it is "not proposing to modify" the "plain language interpretation" of section 401 as adopted by numerous circuit courts, but rather, "is proposing to define the term 'condition' to address ambiguity in the statute[.]"[76] But this retort is nonsensical, given the agency proposes to define the term so as to empower *itself* to reject state conditions that "do not satisfy" EPA's definition of the scope of certification[77]—the precise authority circuit courts say the agency lacks.[78]

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[70] *Sierra Club*, 909 F.3d at 645.
[71] *See id.* (collecting cases).
[72] *See, e.g.*, *id.* at 645-46 ("The plain language of Section 1341(d) . . . leaves no room for interpretation. 'Shall' is an unambiguously mandatory term, meaning . . . that state conditions *must* be conditions of the [federal permit] . . . Every Circuit to address this provision has concluded that 'a federal licensing agency lacks authority to reject state [§ 401(d)] conditions in a federal permit.'"); *Lake Carriers' Ass'n v. EPA* 652 F.3d 1, 6 (D.C. Cir. 2011) ("We do find persuasive, however, EPA's argument that the petitioners have failed to show that EPA has power to amend or reject the state certifications at issue in this case . . . ."); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1219 (9th Cir. 2008) (same, but holding that federal agencies "may require additional license conditions that do not conflict with or weaken the protections provided by" state conditions); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 110-11 (2d Cir. 1997) (holding federal agencies do "not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401."); *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates"); *Roosevelt Campobello Intern. Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) ("[F]ederal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification."); *accord Keating*, 927 F.2d at 622.
[73] *See, e.g.*, *City of Tacoma*, 460 F.3d at 68.
[74] *See supra* note 72.
[75] Proposed Rule, 84 Fed. Reg. at 44,111 n.43 ("To the extent any of these cases arguably stand for the proposition that licensing agencies lack the authority or discretion to make appropriate determinations regarding the adequacy of certain aspects of a state's or authorized tribe's certification, EPA disagrees.")
[76] Proposed Rule, 84 Fed. Reg. at 44,104-06.
[77] *See* Proposed Rule, 84 Fed. Reg. at 44,105-06 ("[T]his proposal would specifically provide federal agencies the ability to determine whether certification conditions meet the new regulatory definition for condition, and whether the state or tribe has provided the information required for each condition. . . . [I]f a condition does not satisfy these requirements, it may not be included in the federal license or permit.").
[78] *Sierra Club*, 909 F.3d at 645-46 ("Every Circuit to address this provision has concluded that 'a federal licensing agency lacks authority to reject [state section 401(d)] conditions in a federal permit.'").

The EPA wastes the vast majority of the proposed rule attempting to justify its substantive interpretations,[79] barely addressing the antecedent (and fundamental) flaw in the rule: the agency lacks the authority to do any of this.

## IV. THE PROPOSED RULE VIOLATES CONTROLLING SUPREME COURT CASE LAW.

The Supreme Court's decision in *PUD No. 1* is also fatal to this rulemaking—holding section 401 "contradicts" EPA's position here "that [a] State may only impose water quality limitations specifically tied to a 'discharge.'"[80] Rather than adhere to the principle of *stare decisis*, the agency attempts to sidestep the plain language of the Clean Water Act and overturn *PUD No. 1* through a fictional reading of Supreme Court case law, primarily the opinion in *National Cable & Telecommunications Association v. Brand X Internet Services*.[81] This, the agency cannot do.

First, EPA's interpretation of *Brand X* is wrong as demonstrated by subsequent Supreme Court case law as well as recent agency action.[82] Second, even if the agency's interpretation of *Brand X* were correct, it does not upset the holding in *PUD No. 1*, which found the plain language of section 401 controlling independent of EPA's regulations.

### A. The Agency Cannot Overrule *PUD No. 1*

Faced with case law squarely foreclosing its proposal, EPA has built this rulemaking on the Supreme Court's decision in *Brand X*. The decision cannot bear that weight.

In *Brand X*, the Court reversed a lower court decision that declined to apply *Chevron* deference when interpreting a regulation. In so doing, the Court announced the principle that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the

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[79] EPA also advances an argument that appears to justify its proposed rule on the ground that states lack the authority to impose conditions or deny certification when the reasons for doing so fall outside the scope of their section 401 authority, as now refined by EPA. *See, e.g.*, 84 Fed. Reg. at 44,111 n.43 (quoting language from case law "that any *valid* conditions imposed" by states "must and will be respected" by the federal agency) (emphasis added). This statement suffers from the same fundamental error—the reality that there are some constraints on state 401 certification authority does not empower EPA to establish or enforce those constraints, that is a task for the courts. The EPA "does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of [section] 401." *Am. Rivers, Inc.*, 129 F.3d at 110-11. The agency cannot grant itself such a mandate in this rulemaking.

[80] 511 U.S. 700, 711 (1994).

[81] 545 U.S. 967 (2005).

[82] *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."); *Brand X*, 545 U.S. at 983 ("[J]udicial decisions [are not] subject to reversal by executive officers.") (internal citations omitted). *See also* Pre-Publication Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, Final Rule at 2 (Sept. 12, 2019).

unambiguous terms of the statute and thus leaves no room for agency discretion."[83]

In *United States v. Home Concrete & Supply*, however, the Court clearly limits the scope of *Brand X*.[84] Like EPA here, the federal government in *Home Concrete* argued that, under *Brand X*, prior case law could not bind agency rulemaking. The agency there argued that "since . . . the regulation embodies a reasonable, hence permissible, construction of the statute, the Government believes it must win."[85] The Court firmly rejected that argument, holding that it "has already interpreted the statute, and there is no longer any different construction . . . available for adoption by the agency."[86]

The remainder of *Home Concrete* emphasizes the futility of EPA's position here. Four justices, including Justice Clarence Thomas, explained why *Brand X* cannot be used to overturn Supreme Court precedent in such a cursory manner as assumed in the agency's current proposal. Citing *Chevron*, the plurality held that "[i]f a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[87] That is true even if the statutory language being interpreted is "not 'unambiguous.'"[88]

Justice Antonin Scalia wrote separately in *Home Concrete*, citing his dissenting opinion in *Brand X*,[89] to more forcefully reject *Brand X*. After stating that "[o]nce a court has decided upon its *de novo* construction of the statute, there no longer is a different construction that is consistent with the court's holding and available for adoption by the agency," he concluded that "the Court should abandon . . . *Brand X*."[90]

EPA's interpretation of *Brand X* has not only been rejected by the Supreme Court, it was also rejected by the agency less than a month after this rule was proposed. On September 12, 2019, the agency finalized its rule repealing the 2015 Clean Water Rule because, according to EPA and U.S. Army Corps of Engineers,[91] it did not comply with Justice Anthony Kennedy's decision in *Rapanos v. United States*. Moreover, the repeal rule notice extensively cites an August 2019 decision by the Southern District of Georgia finding that the Clean Water Rule was unlawful because it failed to meet Justice Kennedy's significant nexus test as it was outlined in

[83] 545 U.S. at 980, 982.
[84] 566 U.S. 478, 486 (2012).
[85] *Id.* at 484-87.
[86] *Id.*
[87] *Id.* at 488 (emphasis added).
[88] *Id.* Justice John Paul Stevens recognized as much in *Brand X*. *See* 545 U.S. at 1003 (Stevens, J., concurring).
[89] 566 U.S. at 492-93.
[90] *Id.* at 496 (Scalia, J. concurring in part and in the judgment) (joining the plurality to uphold the precedent at issue, and rejecting the agency's interpretation).
[91] Pre-Publication Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, Final Rule at 2 (Sept. 12, 2019).

*Rapanos*.[92] It cannot be, as EPA would have it, that a prior administration's rulemaking is bound by Supreme Court case law but this administration's rulemaking is not.

Because *PUD No. 1* interpreted the unambiguous terms of section 401 to allow states to impose conditions on a permitted activity as a whole, EPA's proposal here to limit state conditions to specific discharges is an unconstitutional administrative revision of a Supreme Court holding.[93] The EPA falls back on Justice Thomas' *dissenting* opinion in *PUD No. 1*, which concludes that states' section 401 conditions "must . . . be related to discharges,"[94] but "it is axiomatic that Supreme Court dissents do not state controlling law."[95] Seven justices rejected Justice Thomas' view, and EPA lacks the authority to re-write Supreme Court precedent.

For an agency purporting to take a "holistic" view of section 401, EPA has taken an unlawfully myopic view of the case law controlling this rulemaking. *Brand X* does not stand for the foundational premise underlying EPA's proposal, as any basic case law research would uncover. *PUD No. 1* controls and, therefore, this rulemaking must fail.

### B. The Plain Statutory Language, Legislative History, and Case Law Demonstrate that Section 401 is Unambiguous.

Even if *Brand X* and *Home Concrete*, read together, stood for the principle that Supreme Court precedent is only binding when it interprets unambiguous statutory provisions, this rulemaking fails for yet another reason—as described in *PUD No. 1*: the statute is unambiguous.[96] The Court reached that conclusion based on the Clean Water Act independent of EPA's regulations and no interpretation of *Brand X* can justify dispensing with the precedent.

#### *1. The Clean Water Act prohibits EPA's interpretation.*

Section 401(a)(1) describes when a 401 certification is required.[97] The *PUD No. 1* majority recognized that subsection (a)(1) creates a "threshold condition" that triggers state veto power over projects seeking federal licensure: an activity must carry the *potential* to "result in any discharge into the navigable waters."[98] If an activity has discharge potential, section 401 applies, and an applicant must secure state certification before a federal agency licenses the activity, unless the State waives its certification authority.[99]

Section 401(d) describes the content of the certification.[100] It allows states to grant certification with conditions "to assure that any *applicant*" will comply with state law.[101] Section

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[92] *See, e.g.*, *id.* at 15 (citing *See Georgia v. Wheeler*, No. 2:15-cv-00079, 2019 WL 3949922, at *1 (S.D. Ga. Aug. 21, 2019)).
[93] *See Plaut*, 514 U.S. at 218; *Brand X*, 545 U.S. at 983.
[94] 84 Fed. Reg. at 44,097 (citing *PUD No. 1*, 511 U.S. at 726–27 (Thomas, J., dissenting)).
[95] *Harrington v. United States*, 689 F. 3d 124, 136 n.7 (2d Cir. 2012).
[96] *See PUD No. 1*, 511 U.S. at 728 (Thomas, J., dissenting) (recognizing that the Court did not identify any statutory ambiguity).
[97] 33 U.S.C. § 1341(a)(1) (requiring a certification of compliance with, *inter alia*, section 303).
[98] *PUD No. 1*, 511 U.S. at 707, 711-12 (quoting 33 U.S.C. § 1341(a)).
[99] 33 U.S.C. § 1341(a)(1).
[100] *Id.* § 1341(d).

401(d) "expands the State's authority to impose conditions on the certification of a project" beyond the "discharges" addressed in section 401(a)(1).[102] Plainly, the term "discharge" means something different than the term "applicant."[103] Indeed, the Supreme Court explicitly held in *PUD No. 1* that "[section] 401(d) is most reasonably read as authorizing additional conditions and limitations on the *activity as a whole* once the threshold condition, the existence of a discharge, is satisfied." [104] That is, the trigger for the certification requirement—the potential for a "discharge"—does not delimit the conditions states may impose once section 401 applies. Those conditions are not confined to regulating specific *discharges*.

*2. Existing EPA regulations are consistent with the Clean Water Act.*

The secondary role of EPA's regulations in *PUD No. 1* is clear—the Court reached its conclusions with respect to the reach of section 401 before it addressed the regulations. In analyzing section 401, the Court emphasized its "view of the statute:"[105] *"[t]he[statutory] text* refers to the compliance of the applicant, not the discharge;" thus, "the State [may] impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law.'"[106]

The Court addressed EPA's regulations *after* reaching this conclusion. Then, the Court went on to state that its view of the statute "is consistent" with EPA's regulations.[107] The decision did not depend on the regulations, but rather recognized the regulations as confirmation of the Court's interpretation of the statutory text.

*3. Legislative history supports EPA's decades-old interpretation of section 401.*

Looking beyond the text of the statute, the purpose, structure, and legislative history of the Clean Water Act are equally clear about the scope of state authority under section 401. As noted, the purpose of the Act is to protect the "chemical, physical, and biological integrity" of the nation's waters,[108] and, secondarily, to empower states to play an essential role implementing statutory programs.[109] To that end, the Act authorizes states to enact their own water quality standards, even if they are stricter than EPA's,[110] and mandates that those standards be sufficient "to protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act]. Such standards shall be established taking into consideration [a waterway's] use and value for public water supplies, propagation of fish and wildlife, recreation[] . . . and other

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[101] *Id.* (emphasis added).
[102] *PUD No. 1*, 511 U.S. at 711.
[103] *See Transbrasil S.A. Linhas Aereas v. Dep't of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986) ("[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings.").
[104] *PUD No. 1*, 511 U.S. at 712.
[105] *Id.*
[106] *Id.* at 711 (emphasis added).
[107] *Id.* at 712.
[108] 33 U.S.C. § 1251(a).
[109] *Id.* § 1251(a).
[110] *Id.* §§ 1313, 1311(b)(1)(C), 1370.

purposes. . . ."[111] An interpretation of section 401 that confines states to regulating discharges—when the deleterious water quality effects of federally licensed activities as a whole may equal or exceed them—is inconsistent with the fundamental principles of the Clean Water Act.

Within this broader structure, section 401 serves "to assure that Federal licensing or permitting agencies cannot override state water quality requirements,"[112] and specifically, to ensure "that a federally licensed or permitted *activity* . . . [is] certified to comply with State water quality standards" before operating.[113] If Congress envisioned that EPA could restrict states to regulating discharges and prevent states from regulating the water quality effects of projects as a whole, the text, structure, purpose, and legislative history of the Clean Water Act are incoherent.

*4. EPA cannot create ambiguity in the Clean Water Act by inventing phrases that do not exist in the statutory text.*

In the absence of actual ambiguity in the statute, EPA has created new phrases to give itself broader discretion.[114] Congress may have implicitly delegated EPA the authority to reasonably resolve ambiguities in the *text* of section 401,[115] but the phrase "scope of certification" appears nowhere in the Clean Water Act.[116] Rather, the agency *invented* the phrase to *inject* ambiguity into a statute that is otherwise unambiguous and to support restriction of state authority under section 401 as proposed under this rule. There is no basis to claim, that Congress intended EPA interpretations of non-statutory terms restricting the scope of conditions states may impose under section 401 to carry the "force of law."[117]

Even if there were ambiguity in the statute (there is not), the agency's interpretation of section 401 is still patently unreasonable. Section 401(a)(1) uses the term "discharge" to describe what triggers certification, and section 401(d) uses the term "applicant" to define the scope of conditions states may impose. Congress could have used the same language in section 401(d) to describe the scope of conditions states may impose as it used to describe what triggers section 401 certification—a "discharge"—but it chose not to.[118] The presumption that different words have different meanings is particularly strong here, given that the distinct terms appear in the *same section* of the Clean Water Act and were selected by Congress as part of the *same 1972 amendments* to the Act.[119] Legislative history from later amendments confirms that the term "applicant" in section 401(d) was not intended to limit states to imposing conditions on specific

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[111] *Id.* § 1313(c)(2)(A).
[112] S. Rep. No. 92-414, at 3735 (1971).
[113] S. Rep. No. 95-370, at 4,397 (1977) (emphasis added); H.R. Rep. No. 95-830, at 4471 (1977) (emphasis added).
[114] *See* Proposed Rule, 84 Fed. Reg. at 44,104, 44,120.
[115] *See Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc*., 467 U.S. 837, 842-44 (1984).
[116] *See* 33 U.S.C. § 1251 *et seq*.
[117] *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (agency deference appropriate only where Congress delegated interpretive authority to the agency with respect to provision in question).
[118] *See, e.g., Transbrasil*, 791 F.2d at 205 ("[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings."); *Equal Rights Ctr. v. Abercrombie & Fitch Co.*, 767 F. Supp. 2d 510, 522 (D. Md. 2010) ("I must presume that when Congress uses different language in different sections of a statute, it does so intentionally.").
[119] *See* Pub. L. No. 92-500, 86 Stat. 877, 879-80 (1972).

discharges.[120] As such, even if the Clean Water Act and the Supreme Court left some ambiguity as to which conditions states may impose under section 401(d), EPA's interpretation here—that the term "applicant" is limited by, and effectively interchangeable with, the term "discharge"—clearly falls outside the scope of that ambiguity and is thus unreasonable.[121]

*5. EPA cannot interpret "appropriate requirement of state law" in a way that conflicts with PUD No. 1.*

The agency employs one final tactic to escape *PUD No. 1*. As noted, section 401(d) allows states to impose conditions "necessary to assure that any applicant for a federal license or permit will comply" with enumerated provisions of the Clean Water Act and "*any other appropriate requirement of state law*."[122] The EPA proposes to define the term "appropriate requirement of state law" as limited to "EPA-approved [Clean Water Act] regulatory programs that control *discharges*."[123] Citing the interpretive principle "ejusdem generis,"[124] the agency contends that "the general term 'appropriate requirement' follows an enumeration of four specific sections of the Clean Water Act that are all focused on the protection of water quality from point source discharges;"[125] thus, says the agency, the catchall "other appropriate requirement" is similarly confined to regulating discharges.[126]

This argument suffers from two fatal flaws. First, the enumerated list in section 401(d) contains section 301 of the Clean Water Act, 33 U.S.C. § 1311, which necessarily incorporates section 303.[127] The added provision of other "appropriate requirement of state law" must then allow a broader set of conditions than the federally approved water quality standards addressed in section 303, because statutes cannot be interpreted to render provisions meaningless.[128] That is particularly so in a statute that provides for states to play a critical role in regulating nonpoint sources and groundwater, both of which have significant effects on our nation's waters.

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[120] S. Rep. No. 95-370, at 4,397 (noting that the 1977 amendments to § 401 "mean[] that a federally licensed or permitted *activity* . . . must be certified to comply with State water quality standards . . . ."); H.R. Rep. No. 95-830, at 4,471 (same).

[121] *See Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality) (holding that, even where a statutory term is ambiguous, agency interpretations that do not fall within "[t]he *scope* of that ambiguity" are still unreasonable).

[122] 33 U.S.C. § 1341(d) (emphasis added).

[123] Proposed Rule, 84 Fed. Reg. at 44,095 (emphasis added).

[124] *Id*. Under this principle, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).

[125] Proposed Rule, 84 Fed. Reg. at 44,095.

[126] *Id.*

[127] H.R. Conf. Rep. No. 95-830, at 4,471 (1977) ("Section 303 is always included by reference where section 301 is listed.").

[128] It is axiomatic that congressional enactments are to be interpreted such that every word, clause and sentence of a statute is given effect. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (a statute must, if possible, be construed in such fashion that every word has some operative effect"); *United States v. Gooding*, 25 U.S. 460, 477 (1827) ("it is the duty of the Court, when it can, to give effect to every word in every enactment, if it can be done without violating the obvious intention of the legislature.").

Second, "the ejusdem generis rule is not applicable when the context of the statutory provision manifests a contrary intention."[129] Section 401(d) uses the term "applicant," not "discharge," and authorizes "additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[130] Read in this broader context, the phrase "appropriate requirements of state law" in section 401(d) cannot be reasonably construed as limited to discharges. Ejusdem generis does not authorize EPA to read terms in a vacuum.

In sum, EPA's interpretation of section 401(d) is foreclosed by the unambiguous terms of the statute, as interpreted by the Supreme Court in *PUD No. 1*. And if *PUD No. 1* left any room for doubt, the agency's interpretation is still patently unreasonable.[131]

## V. EPA'S SEIZURE OF STATE SECTION 401 CERTIFICATION POWER IS BOTH UNNECESSARY AND CONTRARY TO THE REGIME DESIGNED BY CONGRESS.

EPA's proposed rule is not only unlawful, it is unnecessary and unjustified by the reasons cited to support it. The agency advocates a full regulatory overhaul, severely limiting the timing and scope of state certification and seizing for EPA the power to override state action inconsistent with these limitations. The agency offers scant justification for these sweeping changes, citing "confusion and uncertainty"[132] under the existing regulations, but failing to specify the source of these alleged defects with any precision. The two concrete justifications advanced by the agency—addressing states' purported abuse of their certification authority and "updating" regulations to reflect statutory changes—do not withstand the mildest scrutiny. But even if EPA's concerns were legitimate, the breadth of the proposed rule overwhelms the modest tweaks that could address those concerns. EPA's approach reveals these concerns for what they are: pretext to enable the administration to seize control over the section 401 certification process so it can allow industrial interests to pollute state waters over local objections.

### A. States Responsibly Exercise Their Section 401 Certification Authority.

For decades, states have exercised their authority under section 401 to protect the quality and designated uses of their waters.[133] As history shows, the certification process is vital to enabling states to ward off industrial pollution from federally licensed projects; the only other line of defense—federal permitting agencies—may view local water quality as a "parochial"[134]concern, to be subjugated in pursuit of national interests.[135]

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[129] *United States v. Anderson*, 626 F.2d 1358, 1366 (8th Cir. 1980).
[130] *PUD No. 1*, 511 U.S. at 712.
[131] Because EPA lacks the authority to limit the conditions states may impose, and because section 401(d) unambiguously protects states' right to impose conditions on federally permitted activities as a whole, the agency's proposal to force states to waive their certification authority if their conditions are not related to specific discharges, *see* 84 Fed. Reg. at 44,110, 44,120, is also unlawful. *See supra* pages 14-16 and n. 72.
[132] Proposed Rule, 84 Fed. Reg. at 44,082.
[133] *PUD No. 1*, 511 U.S. at 714-15 (holding Clean Water Act is "most naturally read" to require projects to comply with "the designated use *and* the water quality criteria" of the states (emphasis in original)).
[134] *Id.* at 735 (Thomas, J., dissenting).

Rather than exceeding their authority under section 401 or abusing the section 401 process, as the President's Executive Order and Administrator Wheeler seem to suggest, certification practice shows that states have wielded this crucial authority efficiently and responsibly.[136] As the data EPA summarizes in support of the proposed rule shows,[137] "states work hard to issue section 401 certifications in a timely manner and very rarely issue denials of certification" and "[t]he average length of time it takes these states to complete a certification once a complete application is received is approximately 132 days (under 4.5 months)," with incomplete applications as the most common reason cited for delay.[138] In North Carolina, for example, of more than 2,500 certifications issued between July 1, 2015 and June 30, 2017, about 90% were issued within sixty calendar days.[139] Of the thirty-two applications that took more than six months, most of the delay was "attributable to waiting on the applicant to provide information necessary" for the state to make the certification.[140] When the complete application was received, North Carolina issued its certification within an average of twenty-one days.[141]

Nevertheless, EPA asserts that states have abused their certification authority. The agency does not, however, identify a *single instance* of a state abusing its power; EPA merely speculates that "some certifying authorities have included conditions in a certification that have nothing to do with . . . water quality,"[142] and that some states have delayed certification decisions beyond the statutory timeframe.[143] Even if these claims were true, "the proper forum to review the appropriateness of a state's certification is the state court,"[144] or applicants may petition federal agencies with evidence that a state has not conducted its certification review in a timely

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[135] *Id*. (Thomas, J., dissenting) (comparing Washington's interests in "insur[ing that] waters of the state are protected and fully utilized for the greatest benefit to the people of the state" under Wash. Rev. Code § 90.54.010(2), with FERC's need to "balance the *Nation's* power needs together with the need for energy conservation, irrigation, flood control, fish and wildlife protection, and recreation," under 16 U.S.C. § 797(e) (emphasis in original)).

[136] *See* Section II, *supra*.

[137] EPA, Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking 6 (EPA-HQ-OW-2019-0405-0022) 6 (Aug. 2019) ("Economic Analysis") (summarizing Association of Clean Water Administrators (ACWA) survey results).

[138] Letter from Allison Woodall, President, Special Assistant, Texas Commission on Environmental Quality, ACWA, Attachment A: Survey Summary (EPA-HQ-OW-2018-0855-0045).

[139] Letter from Sheila C. Holman, Asst. Sec'y for the Environment, North Carolina Department of Environmental Quality to The Hon. Andrew Wheeler, Administrator, U.S. EPA, RE: U.S. EPA's Review of Clean Water Act Section 401 Guidance and Regulations ( EPA-HQ-OW-2018-0855-0073) 2 (May 24, 2019).

[140] *Id.*

[141] *Id*.

[142] *See, e.g.*, Proposed Rule, 84 Fed. Reg. at 44,105.

[143] *See, e.g., id.* at 44,108.

[144] *Roosevelt Campobello Intern. Park*, 684 F.2d at 1056; *Keating*, 927 F.2d at 622-23 (collecting cases and noting "a number of courts have held that disputes over [state conditions], *at least so long as they precede the issuance of any federal license or permit*, are properly left to the states themselves."); *Am. Rivers Inc.*, 129 F.3d at 112; *Del Ackels v. EPA*, 7 F.3d 862, 867 (9th Cir. 1993). The legislative history of the 1972 amendments confirms the reading of numerous circuit courts of appeals. *See* 2 Leg. Hist. at 1487 (1973) ("Should [] an affirmative denial [of certification] occur no license or permit could be issued by [] federal agencies . . . unless the State action was overturned in the appropriate courts of jurisdiction.").

fashion,[145] with a right of appeal to federal court.[146] In those rare occasions where an applicant believes a state has acted improperly under section 401, there are ample judicial and administrative remedies available to challenge the state's conduct.[147]

EPA upends this carefully crafted approach, installing preemptive limitations on the timing and scope of state certification and seizing for *itself* the power to adjudicate the legality of state certifications—*even in the absence of a petition by an aggrieved applicant*.[148] The proposal is not just unlawful, it is simply unnecessary: there is no history of state abuse to justify restricting the scope or timing of certification, and there is no lack of remedies for applicants aggrieved by a state's conduct. But even if the existing regulatory scheme were deficient, EPA's proposal to vest *itself* with the authority to override state certification decisions—*the precise authority Congress denied the agency in section 401*[149]—is a blatant power grab that cannot conceivably be responsive to the agency's stated concerns.

B. The Modest Changes in Statutory Text Do Not Justify EPA's Sweeping Changes To the Decades-Tested Section 401 Process.

EPA justifies its power grab by claiming that existing section 401 regulations and associated guidance[150] are "outdated" and that changes in the statutory text since 1971 necessitate a full regulatory overhaul.[151] However, the post-1971 amendments to section 401 are far too modest to justify the sweeping changes proposed by the agency.

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[145] *See, e.g.*, *Millennium Pipeline Co., LLC v. SEGGOS*, 860 F.3d 696, 700-1 (D.C. Cir. 2017) (holding that, once a state agency "has delayed for more than a year," an applicant's remedy is to "present evidence of waiver" to the relevant federal agency).

[146] *See, e.g.*, 16 U.S.C. § 825l(b) (providing all parties to proceedings before FERC the right to appeal an adverse decision to the District of Columbia Circuit).

[147] *See, e.g.*, *supra* notes 144-146; 15 U.S.C. § 717r(d)(1) (providing, with respect to natural gas facilities, that the "United States Court of Appeals for the circuit in which a facility . . . is proposed to be constructed, . . . shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit [or] license . . . required under Federal law . . . ."); *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl Protection*, 482 F.3d 79, 92 (2d Cir. 2006) ("[F]ederal court review [of a challenge to a State's denial of certification] involves no infringement of state jurisdiction over its lands."); *King v. N.C. Envtl. Mgmt. Comm'n*, 436 S.E.2d 865, 868-69 (N.C. Ct. App. 1993) (undertaking state judicial review of challenge to state agency's decision to deny Section 401 certification for a project); *Arnold Irrigation Dist. v. Dep't of Envtl. Quality*, 717 P.2d 1274, 1276-77 (Or. Ct. App. 1986) (same).

[148] Proposed Rule, 84 Fed. Reg. at 44,106 ("[T]his proposal would specifically provide federal agencies the ability to determine whether certification conditions meet the new regulatory definition for condition . . . ."). In this respect, the agency seizes far more authority than is currently vested in state and federal courts and administrative agencies to adjudicate the lawfulness of a state's conditions.

[149] "The purpose of the certification mechanism provided in [the Clean Water Act] is to assure that federal licensing or permitting agencies *cannot* override State water quality requirements." 2 Leg. Hist. 1487 (1973) (emphasis added); *accord* S. Rep. No. 92-414, at 3,735.

[150] EPA, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (2010) ("2010 401 Guidance"), https://www.nrc.gov /docs/ML1121/ML112160635.pdf (last visited Oct. 21, 2019).

[151] *See, e.g.* Proposed Rule, 84 Fed. Reg. at 44,081-82, 44,087-88.

Section 401 of the Clean Water Act originated as section 21(b) of the 1970 amendments to the Clean Water Act known as the Water Quality Improvement Act, Pub. L. 91-224, 84 Stat. 108–10 (1970).[152] In 1971, the EPA promulgated the bulk of the current regulatory framework that governs the certification process under section 401.[153] In 1972, Congress made "minor changes" to section 21(b),[154] and re-designated the provision as section 401.[155] In 1977, Congress made more "minor changes" to section 401,[156] and in 1983, EPA promulgated regulations addressing section 401 certification in the context of the NPDES permitting program.[157] In 2010, EPA issued informal but detailed guidance on the section 401 certification process, largely consistent with the statutory text and regulations.[158] The current regulations and the 2010 guidance better reflect the statutory text, and EPA's claims of inconsistency are contrived.

1. *The change from "activity" to "discharge" in section 401(a)(1) and the addition of section 401(d) confirm that conditions apply to a project as a whole.*

Relying on the 1972 amendments to section 401(a)(1),[159] the agency proposes to limit the scope of *conditions* states may impose under section 401(d) to regulating point source discharges.[160] EPA claims that "[t]ogether, these provisions [] [f]ocus section 401 on discharges."[161] Aside from violating the Supreme Court decision in *PUD No. 1*, this interpretation implies an absurd result; namely, when Congress amended the Clean Water Act in 1972 and used the term "discharge" in section 401(a)(1) to define the trigger for certification and referred to the compliance of the "applicant" in section 401(d), *Congress intended those terms to mean the exact same thing*. As previously shown, the agency's interpretation violates a fundamental principle of statutory interpretation: that "the words Congress use[s] . . . are not surplusage; they have some meaning and were intended to accomplish some purpose of their own."[162]

EPA ignores the broader import of the legislative history. If, as the agency suggests, Congress intended the 1972 amendments to significantly reduce the scope of conditions states may impose under section 401(d)—that is, limiting states to regulating specific discharges rather than federally licensed activities—Congress would not have characterized the changes as

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[152] *See, e.g.*, Alia S. Miles, Note: *Searching for the Definition of "Discharge": Section 401 of the Clean Water Act*, 28 ENVTL L. J. 191, 216 (1998).
[153] *See* State Certification of Activities Requiring a Federal License or Permit, 36 Fed. Reg. 22,487 (Nov. 25, 1971) (codified at 40 C.F.R. § 121 *et. seq.*).
[154] 2 Leg. Hist. 1394 (1973).
[155] Pub. L. No. 92-500, 86 Stat. 877-80 (1972).
[156] *See* Memorandum from Catherine A. Winer, Attorney, EPA Office of General Counsel, to David K. Sabock, North Carolina Department of Natural Resources 4 (November 12, 1985), attached as Ex. M (reviewing legislative history); Pub. L. No. 95-217, 91 Stat. 1598-99 (1977).
[157] Procedures for Decisionmaking, 48 Fed. Reg. 14,264 (Apr. 1, 1983) (codified at 40 C.F.R. 124.53–124.55).
[158] 2010 401 Guidance, *supra* note 150.
[159] Proposed Rule, 84 Fed. Reg. at 44,096.
[160] *See id.* at 44,104-06, 44,120.
[161] *Id.* at 44,096.
[162] *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 130 (1960).

"minor" [163] or later noted that states retain the same certification authority they had before the 1972 amendments: to ensure "that a federally licensed or permitted *activity* . . . [is] certified to comply with State water quality standards" before operating.[164]

EPA subscribed to this common-sense reading of section 401 up until August 22, 2019, when it proposal this rule.[165] The agency pays short shrift to its decades-old interpretation of section 401, simply implying that the previous approach was not "holistic."[166] But EPA's new, so-called "holistic" reading of the 1972 amendments to the Clean Water Act ignores the text, purpose, and legislative history of section 401, as well as binding Supreme Court precedent—factors the "outdated"[167] regulations more fully respected. This is a far cry from the "good reasons" the EPA must show to reverse its prior position.[168]

*2. The broader restructuring of the Clean Water Act confirms that Congress's central focus was on empowering states to protect the quality of their waters from federal projects, not on regulating point-source discharges.*

EPA next contends that several of its changes to the section 401 regulatory regime are consistent "with the overall framework of the amended statutory regime [in 1972]," rather than changes to section 401 specifically.[169] For instance, EPA asserts that the 1972 restructuring of the Clean Water Act "focus[ed] on eliminating discharges,"[170] implying that other forms of water pollution—*i.e.*, pollution flowing from a permitted activity as a whole rather than a specific discharge—would be addressed through "non-regulatory means" and "financial assistance."[171]

EPA interprets the change in section 401(a) from "activity" to "discharge" as consistent with the focus in 1972 on regulating discharges,[172] but as noted, EPA ignores that Congress used plainly different language in section 401(d) to describe the scope of conditions states may impose on an "applicant." The supposed narrowing of other provisions of the Clean Water Act to focus on discharges cannot override the plain terms used in section 401 that specifically allow

[163] 2 Leg. Hist. 1394 (1973).
[164] S. Rep. No. 95-370, at 43,987; *see also* H.R. Conf. Rep. No. 95-830, at 4,471 ("[A] federally licensed or permitted *activity*, *including a discharge* permit under section 402, must be certified to comply with State water quality standards" (emphasis added)).
[165] *See* Memorandum from Catherine A. Winer, attached as Ex. M, *supra* note 156, at 4 ("[S]ection 401 . . . allow[s] state certifications to address any water quality standard violation resulting from an activity for which a certification is required, whether or not the violation is directly caused by a 'discharge' in the narrow sense."); 2010 401 Guidance, *supra* note 150 ("Conditions to protect water quality need not focus solely on the potential discharge. Once a potential discharge triggers the requirement for section 401, the certifying agency may develop 'additional conditions and limitations on the activity as a whole'" (quoting *PUD No. 1*, 511 U.S. at 712)).
[166] Proposed Rule, 84 Fed. Reg. at 44,096.
[167] *Id.* at 44,088.
[168] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[169] *See, e.g.*, Proposed Rule, 84 Fed. Reg. at 44,096.
[170] *Id.*
[171] *Id.* at 44,085.
[172] *Id.*

states to impose conditions on certified activities as a whole.[173] But even if it could, the broader restructuring of the Clean Water Act does not support the EPA's proposal.

In 1972, Congress empowered states in section 303 to create and enforce water quality standards unrelated to point source discharges,[174] and specifically referenced this section in defining states' authority under section 401. It would thus be illogical to assume that the broader changes to the Clean Water Act were intended to limit the scope of certification to point source discharges. Nothing in the Act suggests that Congress intended to *limit* state regulatory authority over nonpoint sources, as this rulemaking would do. The agency cherry-picks language from other portions of the statute to suggest that the 1972 restructuring was *solely* focused on regulating discharges,[175] but other portions of the Act show that Congress' central concern was meeting the goals of the Clean Water Act more broadly.

*3. Other purported inconsistencies between 1971 regulations and the current section 401 regulations do not justify this rulemaking.*

Finally, the agency isolates a few phrases in the existing section 401 regulations, claims that they reflect language used in the pre-1972 version of the statute, and uses these purported differences to justify a *complete* regulatory overhaul. An overhaul is not justified.

EPA enacted its section 401 regulations in 1971.[176] Those regulations provide that a "certification made by a certifying agency shall include" a "statement that there is a *reasonable assurance* that the *activity* will be conducted in a manner which will not violate applicable water quality standards."[177] The EPA asserts that this language is outdated because the 1972 amendments to section 401(a) changed the term "activity" to "discharge" and omitted the "reasonable assurance" language.[178] The Supreme Court has held, however, that this specific regulation sets forth the "most reasonabl[e] read[ing]" of *the current version of section 401* given that section 401(d) "refers to the compliance of the applicant, not the discharge."[179] Granting states authority over the applicant clearly includes authority over the activity. As a result, EPA's argument fails.

In sum, none of the reasons cited by EPA to justify the proposed rule holds water. If finalized, this rule will join the dozens of other administrative actions by this administration that have been struck down as illegal.

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[173] *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("It is a commonplace of statutory construction that the specific governs the general" (citations and quotations omitted)).
[174] *See* 33 U.S.C. § 1313.
[175] *See, e.g.*, Proposed Rule, 84 Fed. Reg. at 44,084-88, 44,096; 33 U.S.C. § 1251 (a)(1) ("[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985").
[176] *See* 36 Fed. Reg. 224,878 (Nov. 25, 1971) (labeled § 115.2) (codified at 40 C.F.R. § 121.2).
[177] 40 C.F.R. § 121.2(a)(3) (emphasis added).
[178] Proposed Rule, 84 Fed. Reg. at 44,088.
[179] *PUD No. 1*, 511 U.S. at 711-12.

## VI. EPA MUST NOT RESTRICT STATES' ABILITY TO COMPLY WITH SECTION 401 AND STATE LAW.

In addition to the authority it provides to states, section 401 imposes several obligations on states, which states cannot fulfill under the current proposal. Under section 401(a), states must certify that any discharge from a federally licensed project "will comply with the applicable provisions" of the Act.[180] Under section 401(d), any certification issued "shall" set forth requirements "necessary to assure that [the project] will comply with these provisions *and* "with any other appropriate requirement of State law."[181] States must also establish, and adhere to, procedures for public notice on all applications for certification. And, then, there is the separate requirement that states must comply with their own laws throughout the certification process. By restricting the time and scope of the state administrative review of section 401 applications, the agency makes it impossible for states to meet their obligations.

### A. To Enable States to Issue Section 401-Compliant Certifications, the Timeframe for State Review Must Commence Only Once the State Receives a *Complete* Application.

As the data EPA points to indicates,[182] incomplete applications are the most common reason states cite for delays in their certification decisions.[183] Still, EPA proposes that the statutory timeline for state section 401 review begins to run at the time of receipt by the certifying authority of a certification *request*, regardless of whether the application is complete.[184] To ensure that states are able to meaningfully evaluate certification applications and accurately certify that a project "will comply with any applicable [enumerated Clean Water Act requirements] and with any other appropriate requirement of state law,"[185] EPA must clarify that only the receipt of a *complete application* triggers commencement of the state review period.[186]

Several states, like North Carolina and South Carolina, have outlined in their own regulations the information an applicant must submit in order to allow for meaningful state review.[187] Where insufficient information is received, states may request additional information.[188] It often takes time for a state to receive the information necessary for it to make a section 401-compliant certification. Indeed, "the process of obtaining required information is not

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[180] 33 U.S.C. § 1341(a)(1).
[181] *Id.* § 1341(d).
[182] Economic Analysis at 6.
[183] Letter from Allison Woodall, President, Special Assistant, Texas Commission on Environmental Quality, Association of Clean Water Administrators (ACWA), Attachment A: Survey Summary (EPA-HQ-OW-2018-0855-0045).
[184] Proposed Rule, 84 Fed. Reg. at 44,101-02.
[185] 33 U.S.C. §§ 1341(a)(1), (d).
[186] *See, e.g.*, *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009) (Army Corps rule interpreting that only "valid request" for certification will trigger one-year waiver period permissible in light of statutory text and reasonable).
[187] *E.g.*, 15A N.C. Admin. Code § 2H. 0502.
[188] N.C. Admin. Code § 2H. 0503; S.C. Code Regs. 61-101.

entirely within the reviewing agency's control: applicants can frustrate the timeframe for review by failing to provide requested materials necessary to the state's review of the application."[189]

Rather than penalizing *states* for an applicant's failure to submit a complete application and rendering completeness irrelevant by timing review from the receipt of *any* certification request, EPA should incentivize applicants to submit complete applications. If EPA fails to initiate the timeframe for state review on the state's receipt of a *complete application*, states will be unable to process, review, and make informed decisions, without facing the prospect of waiving their certification authority. They will be unable to provide for the congressionally mandated public notice and comment that can only happen upon receipt of a complete application. [190] What's more, states may be forced to deny certification in order to protect water quality, where adequate time to review a completed application would likely have resulted in the grant of certification.[191]

States already have limited resources to evaluate complex projects in order to protect water quality. Adopting the unreasonable approach proposed here could give applicants an incentive to submit an incomplete application and wait out the clock. States would be forced to choose between ceding their authority to protect water quality and denying applications which could have, under a more reasonable system, been processed and certified. This creates uncertainty and unneeded risk not only for state agencies, but also the public and the applicant—particularly.[192]

[189] Comment Letter from Leticia James, Attorney General, New York State, et. al, (EPA-HQ-OW-2018-0855-0059) (May 2019) ("Attorney General Pre-Proposal Comments").

[190] *See, e.g., Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 674 F.Supp. 2d 783, 800-02 (S.D. W. Va. 2010) (stating that "[c]ompletion and public notice are inextricably linked" and rejecting notice and comment undertaken on incomplete application).

[191] *E.g.*, Letter from Melanie D. Davenport, Director, Water Permitting Division, Virginia Department of Environmental Quality to David Ross, Asst. Admin. for Water, U.S. EPA, and R.D. James, Asst. Sec'y of the Army (Civil Works) RE: Pre-Proposal Comments on Clean Water Act Section 401 Water Quality Certification Rulemaking and Guidance (2019) (EPA-HQ-OW-2018-0855-0034) 2 (May 23, 2019) ("Virginia Pre-Proposal Comments") (describing how EPA's proposed review period would "lead us to deny certification on some projects simply to meet the federal review deadline" and urging EPA to "provide programmatic flexibility" to allow states "the ability to complete our state review process without the artificial need to deny" certification based on a strict review deadline).

[192] Purporting to respond to stakeholder concerns about the effect of limited certification review timeframes on state and tribal resources, the proposal would require a pre-filing meeting when *EPA* is the certifying authority. But EPA fails to include a similar safeguard for other certifying authorities. Proposed Rule, 84 Fed. Reg. at 44,108. Such meetings would allow for certifying agencies to set expectations about information needs and make requirements clear to applicants, potentially reducing unnecessary delay resulting from inadequate submittals by applicants.

B. The Strict Timeframe Proposed Will Prevent States from Complying with Section 401's Requirement for Public Notice.

Section 401(a)(1) requires that states establish procedures for public notice for all applications for certification and allows states to establish procedures for public hearings where appropriate.[193] In addition to the statutory requirement to establish such procedures, states must also, of course, comply with their requirements.[194] Any regulation adopted by EPA must then allow the necessary latitude for states to comply with their own statutory and regulatory requirements in reviewing applications for certification under section 401. The current proposal does not.

Recognizing that meaningful state and public certification review cannot be rushed, Congress gave states a reasonable period—up to "one year"[195]— to complete the necessary state administrative procedures (including application review, requests for additional information, public notice and, if appropriate, hearings) when making a section 401 certification determination.[196] Once sufficient information has been received in support of an application for a state to deem an application complete, section 401 requires states to provide public notice and encourages public hearings.[197] In many cases, states must hold a public comment period ranging from fifteen to sixty days.[198] And, in some cases, states also must await completion of federal and/or state environmental reviews required under the National Environmental Policy Act or analogous state laws before making determinations on applications.[199]

In Virginia,[200] for example, interagency consultation, public notice and comment, and the certifying agency's review period are established by state law, and, assuming receipt of a complete application, typically fall well within the Clean Water Act's one-year review period. However, it would be impossible for Virginia to comply with a constricted review period *and* comply with the procedural and substantive requirements of state law, including the state's own

[193] 33 U.S.C. § 1341(a)(1) (Certifying state "shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.").
[194] *See City of Tacoma*, 460 F.3d at 67-68 (". . . by implication, section 401(a)(1) also requires states to *comply* with their public notice procedures[.]").
[195] 33 U.S.C. § 1341(a)(1).
[196] Attorney General Pre-Proposal Comments (EPA-HQ-OW-2018-0855-0059) at 8.
[197] 33 U.S.C. § 1341(a)(1).
[198] *See* Attorney General Pre-Proposal Comments (EPA-HQ-OW-2018-0855-0059) at 8 (summarizing state public comment periods). *See also* S.C. Regulation 61-101(D) (extending notice period to up to 60 days where agency determines application involves major activity).
[199] Attorney General Pre-Proposal Comments (EPA-HQ-OW-2018-0855-0059) at 7-8 (citing 23 Cal. Code Regs. §§ 3836(c), 3837(b)(2) (projects subject to section 401 water quality certification must be reviewed under the California Environmental Quality Act, Pub. Resources Code, § 21000 *et seq*., as appropriate, before approval by the State Water Resources Control Board or the Regional Water Quality Control Boards); and 6 N.Y.C.R.R. § 621.3(a)(7) (an application is not considered complete until a negative declaration or draft environmental impact statement have been prepared pursuant to state environmental quality review act, ECL article 8). *See also* S.C. Regulation 61-101.
[200] Under Virginia law, the issuance of a Virginia Water Protection Permit in most cases constitutes the certification required under Clean Water Act section 401. Va. Code § 62.1-44.15:20(D).

notice and comment period.[201] To be sure, the State Water Control Board has 120 days from receipt of a complete application[202] to issue a certification, issue a certification with conditions, deny the certification, or decide to conduct a public meeting or hearing.[203] If the Board decides to hold a public hearing or meeting, it must be held within 60 days of the decision to do so, and a final decision on the certification is to be made within 90 days of completion of the hearing or meeting.[204] An additional public process taking up to an additional 60 days is required for certain projects (e.g., natural gas transmission pipelines larger than 36 inches in diameter), in order to address the potential for water quality impacts from activities in upland areas.[205] In fact, Virginia's Department of Environmental Quality has noted that while most section 401 actions requiring public comment can be completed within 110 to 130 days, certifications for more complex projects can take a year or more,[206] especially where incomplete applications are submitted.[207]

States' administrative procedures and substantive requirements for evaluation of requests for section 401 certification are already calibrated to comply with the statute's one-year review period, provided applicants deliver adequate information. EPA should not artificially constrain decision-making timeframes. Such action would interfere with public input, and make it impossible for states to comply with state law.

C. The Proposed Rule Conflicts with Key Aspects of State Certification Programs, Leaving States with No Good Options and Massive Uncertainty.

Congress empowered states to grant, deny, or condition certifications based on an applicant's compliance with state standards,[208] *even where state standards are more stringent*

[201] State law requires a 45-day comment period for state agencies to weigh on 401 certifications. Va. Code § 62.1-44.15:20(C). Concurrent with that period, the public must be provided "at least 30 days" to comment on a draft Virginia Water Protection permit (which serves as the state's certification of a project under section 401). 9 Va. Admin. Code § 25-210-140(B). Public notice of this comment period must be published within 14 days of the applicant's receipt of a draft certification. 9 Va. Admin. Code § 25-210-140(A).

[202] As determined by the Board. *See* Va. Code. § 62.1-44.15:21(E) ("the Board shall review the application for completeness . . . .").

[203] Va. Code § 62.1-44.15:21(E).

[204] *Id*.

[205] *See* Va. Code. § 62.1-44.15:81(A)-(C). *See also* Va. Code § 62.1-44.15:81(D) (before land-disturbing activities may commence, Virginia Department of Environmental Quality must also review an erosion and sediment control plan, and a stormwater management plan, and approve or disapprove within 60 days of submittal of a completed plan).

[206] *Id*.

[207] Virginia Pre-Proposal Comments (EPA-HQ-OW-2018-0855-0034) at 4.

[208] 33 U.S.C. § 1341(a), (d); *Keating*, 927 F.2d at 620 ("Through [the certification] requirement, Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval."); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 991 (9th Cir. 1995) ("States may condition certification upon any limitations necessary to ensure compliance with state water quality standards.") (Kleinfeld, J., dissenting) (citations omitted).

*than federal law*.[209] Far from a procedural exercise, "[t]he certification authority granted States is one of the primary mechanisms through which they may exercise [their] role . . . as the prime bulwark in the effort to abate water pollution."[210] This means that "the decision whether to issue a section 401 certification generally turns on questions of state law," and the role of federal agencies is "limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless."[211]

As has been established, section 401 allows states to look beyond point source discharges and consider the water quality impacts of proposed activities as a whole.[212] Relatedly, states may use certification to protect the designated uses of their waters under state law—for drinking, recreation, supporting wildlife and the like—and are not confined to policing compliance with quantitative discharge standards.[213] For example, states may—and often do—condition or deny certification to projects that would divert or reduce water flow, to the detriment of local aquatic life[214] or recreational water uses. In those cases, the harm to designated uses does not result from a discharge, but rather, an intake, and the solution is not to enforce effluent limitations, but rather, minimum stream flow requirements. Congress intended states to protect the designated uses of their waters;[215] obviously, this requires states to regulate conduct beyond point source discharges and to impose broader water quality conditions. Indeed, if EPA were correct that states can only review and impose conditions strictly limited to the proposed discharge itself, the

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[209] *See, e.g., Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 116, 134 (D.D.C. 2006) ("[T]he purpose of Section 401 is to preserve the authority for the States to set standards that are more stringent than the level of protection afforded in a federal permit . . . .").

[210] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) (citations and quotations omitted).

[211] *City of Tacoma*, 460 F.3d at 67.

[212] *PUD No. 1*, 511 U.S. at 712 ("[Section] 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."); *see also S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 375-78 (2006) (holding that the threshold condition that triggers State certification authority—the potential for a "discharge"—does not require the discharge of any pollutants).

[213] *See, e.g., Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 756 (4th Cir. 2019) ("Under the [Clean Water Act] . . . States must initially classify the uses for which their water is to be protected and then determine the necessary level of water quality for their preferred uses."); *accord PUD No. 1*, 511 U.S. at 715 ("[U]nder the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.").

[214] *PUD No. 1*, 511 U.S. at 711-13.

[215] The Clean Water Act plainly spells out Congress' intent for States to protect beneficial water uses:

> Whenever the State revises or adopts a new standard. . . [s]uch revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. § 1313(c)(2)(A).

Supreme Court's decision in *PUD No. 1*—recognizing the ability of states to impose conditions (such as additional flow to protect aquatic life) that are definitionally *beyond* the proposed discharge—would be illogical.

For years, Southeastern states have largely wielded their certification authority with the breadth and responsibility that Congress intended. For example, South Carolina law requires the South Carolina DHEC to consider impacts to the State's waters beyond point source discharges and effluent limitations. Under South Carolina's "antidegradation" policy, DHEC must deny certification if a project would impair "[e]xisting water uses and the level of water quality necessary to protect these existing uses."[216] "Where surface water quality exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water, that quality shall be maintained and protected."[217] South Carolina law forbids the certification of projects that would impair the "stream flows necessary to protect" these beneficial uses of the State's waters,[218] unless DHEC finds that "allowing lower water quality is necessary to important economic or social development."[219]

North Carolina,[220] Virginia,[221] and Tennessee[222] have similar antidegradation policies, requiring state agencies to deny certification where an activity would impair beneficial uses of state waters. Like South Carolina, these states demand that their regulatory agencies scrutinize water quality impacts beyond point source discharges and effluent limitations. Like Congress, they correctly recognize that these broader policies are *essential* to protect beneficial water use.

Southeastern states also use the certification process to protect the beneficial uses of their groundwaters for human consumption. It is the policy of South Carolina, for example, "to maintain the quality of ground water consistent with the highest potential uses. Most South Carolina ground water is presently suitable for drinking water without treatment and the State

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[216] S.C. Code Ann. Regs. § 61-68(D)(1); *see also* S.C. Code Ann. Regs. § 61–101(F)(2) (requiring applicant to demonstrate project's compliance with § 61–68 before DHEC will certify).
[217] S.C. Code Ann. Regs. § 61-68(D)(2).
[218] S.C. Code Ann. Regs. § 61-68(D)(1)(B).
[219] S.C. Code Ann. Regs. § 61-68(D)(2).
[220] 15A N.C. Admin. Code § 2H. 0506(a) ("In evaluating requests for certification . . . , the Director shall determine if the proposed activity has the potential to remove or degrade those significant existing uses which are present in the wetland or surface water.").
[221] 9 Va. Admin. Code § 25-210-50(A) ("Except in compliance with a [Virginia Water Protection Permit]. . . no person shall . . . alter the physical, chemical, or biological properties of state waters . . . and make them detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses . . . ."); *see also* Va. Code Ann. § 62.1–44.15:20(D) ("Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act . . . .").
[222] Tenn. Comp. R. & Regs. § 0400-40-07-.04(6)(c) ("[N]o activity [may] be authorized by the Commissioner unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value. . . .[T]he Commissioner . . . shall consider," *inter alia*, "direct loss of stream length . . . direct loss of in-stream, waters, or wetlands habitat due to the proposed activity . . . [and] whether the proposed activity is reasonably likely to have cumulative or secondary impacts to the water resource").

relies heavily upon ground water for drinking water."[223] South Carolina will thus deny certification where an activity renders groundwater unsafe for drinking.[224] Similarly, North Carolina requires its Department of Environmental Quality to consider whether an activity may degrade groundwaters in evaluating applications for certification.[225] Groundwater contamination flows from a myriad of sources, including non-point sources such as rainfall and snowmelt, which cause pollutants to seep into aquifers and drinking wells.[226] States' ability to protect their groundwaters for drinking thus depends on more than their authority to regulate point source discharges to navigable waters.

The proposed rule would dismantle these crucial aspects of state section 401 programs. The agency's plan would limit the scope of state certification authority to ensuring that a *point source discharge into navigable waters* complies with state water quality standards.[227] The EPA would then seize the veto power Congress granted the states, installing *itself* as arbiter of whether state certification decisions are legitimate or whether they fall outside EPA's narrow view of the scope of section 401.[228]

Under EPA's proposal, when states impose conditions to ensure that projects will not usurp the stream flows necessary to sustain the beneficial uses of their waters, EPA would *strike those conditions from the federal permit and license the project anyway*.[229] When states impose conditions to ensure that their groundwaters remain safe for drinking, EPA would *strike those conditions from the federal permit and license the project anyway*.[230] The proposed rule would render States powerless to protect the beneficial uses of their waters—for drinking, recreation, and wildlife—from the industry interests that have captured EPA.

But the proposed rule does more than cripple states' efforts to protect the beneficial uses of their waters—it creates a bureaucratic conundrum in the states that take those efforts seriously. In states like North and South Carolina that incorporate minimum stream flow requirements and groundwater protections into the certification process, state officials will face a Hobson's choice: enforce state law and impose conditions to protect beneficial uses of state waters, only to have EPA ignore them, or ignore state law themselves and certify projects that will harm state waters, as EPA prefers. States may (rightly) believe EPA lacks authority to

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[223] S.C. Code Ann. Regs. § 61-68(H)(2).
[224] S.C. Code Ann. Regs. § 61-68(D)(1)(c) ("Existing or classified ground water uses and the conditions necessary to protect those uses shall be maintained and protected."); *see also* S.C. Code Ann. Regs. § 61–101(F)(2) (requiring applicant to demonstrate project's compliance with section 61–68 before DHEC will certify).
[225] 15A N.C. Admin. Code § 2H. 0506(b) ("The Director shall issue a certification upon determining that existing uses are not removed or degraded by a discharge to classified surface waters for an activity which . . . does not result in the degradation of groundwaters . . . .").
[226] *See generally* Robert Pitt et al., G*roundwater Contamination Potential from Stormwater Infiltration Practices*, 1 URBAN WATER 217 (1999), https://pdfs.semanticscholar.org/34ec/0d177ae062be346ea08cb5420b043bf77226.pdf (last visited Oct. 21, 2019).
[227] Proposed Rule, 84 Fed. Reg. at 44,104.
[228] *Id.* at 44,105-06, 44,110-11.
[229] *Id.* at 44,104.
[230] *Id.*

nullify state conditions,[231] and this aspect of EPA's current proposal will prompt needless litigation.

The proposed rule leaves states with no good options and massive uncertainty. It guarantees bureaucratic nightmare and will prompt needless litigation over clearly established state certification authority. It conflicts with crucial aspects of state programs designed to protect beneficial water uses, nullifying state conditions, such as minimum stream flow requirements or groundwater protection. The proposal would, in short, create the regulatory uncertainty that EPA claims to address.

## VII. EPA CANNOT PROCEED WITH ITS PROPOSAL WITHOUT CONSULTING WITH THE U.S. FISH AND WILDLIFE SERVICE AND THE NATIONAL MARINE FISHERIES SERVICE REGARDING THE IMPACTS ON IMPERILED SPECIES

In proposing this rule, the agency has also disregarded the requirements of the Endangered Species Act. For more than four decades, the Endangered Species Act has established a vital program for the conservation of both imperiled species and "the ecosystems upon which … [they] depend[.]"[232] Central to this program are the consultation requirements of Section 7(a)(2) of the Act, "[e]ach Federal agency" is required,

> in consultation with and with the assistance of the Secretary [of the Interior or the Secretary of Commerce], [to] insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat[.][233]

This language imposes both substantive and procedural obligations on federal agencies. Substantively, agencies must make certain their actions are "not likely" to leave an imperiled species in jeopardy or adversely modify its critical habitat.[234] Procedurally, agencies must evaluate the potential impact of their actions "in consultation with" federal wildlife experts.[235]

Before moving forward with the proposed action, EPA must satisfy these requirements.[236] If finalized, the proposed rule would prevent states from imposing conditions on

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[231] *See, e.g., Sierra Club*, 909 F.3d at 645-46 ("Every Circuit to address this provision has concluded that a federal licensing agency lacks authority to reject [state section 401(d)] conditions in a federal permit.")
[232] 16 U.S.C. § 1531(b).
[233] *Id.* § 1536(a)(2). *See also id.* § 1536(a)(1) (requiring federal agencies to "utilize their authorities in furtherance of the purposes of … [the Endangered Species Act] by carrying out programs for the conservation of endangered species and threatened species listed" under the statute).
[234] *Id.* § 1536(a)(2).
[235] *Id.*
[236] *See, e.g., Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018-19 (9th Cir. 2009) (holding that consultation was required under the Endangered Species Act before the defendant agency could repeal and replace regulatory protections that had been "in effect without injunction for three months," as

section 401 certifications that protect endangered species and their habitats from a variety of impacts, such as installing fish ladders, preserving instream flows or reducing sediment pollution caused by upland activity. If states are no longer able to impose these conditions, endangered or threatened species and their habitats will likely suffer. And if the proposed rule's restrictive timing provisions lead to the waiver of state certification, there would be no conditions in place at all to protect species and their habitats.

In light of the proposed rule's inevitable impacts on imperiled species and their habitats, EPA must immediately initiate consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.[237]

## VIII. THE PROPOSAL VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

In addition to the host of other reasons why this rulemaking is substantively flawed, it also violates the Administrative Procedure Act, as this administration has made a practice of doing.[238] A recent example of which, *New York v. U.S. Department of Labor*,[239] is perhaps the most applicable here. In that case, the Department of Labor implemented an executive order by the President to undo the Affordable Care Act. To do so, the Department reversed decades of agency policy and reinterpreted a key term under the Employment Retirement Income Security Act in a way that, in the words of the court, "scraps ERISA's careful statutory scheme" and "exceeds the statutory authority delegated by Congress."[240]

This rulemaking is no different. The President issued an ill-advised Executive Order on April 15, 2019, to fast-track energy projects. Since that time, the agencies have been set on achieving that pre-determined goal—first, by adopting guidance based on Justice Thomas's dissent in *PUD No. 1*,[241]and now, by proposing changes to the 401 certification process that are designed to restrict the role of states in protecting their local waterways and wetlands and the public's ability to participate in reviews of destructive projects. The record here demonstrates that pre-determination. As discussed below, the agency has failed to provide a valid, reasoned basis for departing from decades of agency practice or an explanation of how this proposal would meet the objectives of Clean Water Act section 401. The agency's single-mindedness has also resulted in its consideration of factors not allowed by Congress, including its elevation of the interests of developers and the prerogatives of politicized federal agencies over the purpose of Clean Water Act section 401. For these reasons, this proposal must be withdrawn.

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the agency had "fail[ed] to cite any support for the proposition that it can ignore a valid rule, codified in the Code of Federal Regulations, simply because the rule was not in effect long enough").

[237] *See* 16 U.S.C. § 1536(a)(2).

[238] Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration is Constantly Losing in Court*, WASHINGTON POST (Mar. 19, 2019), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html?utm_term=.75ba7ff15b2f (last visited Oct. 21, 2019).

[239] 363 F. Supp. 3d 109 (D.D.C. 2019)

[240] *Id*. at 117-118.

[241] 2019 401 Guidance; 511 U.S. at 724 (Thomas, J. dissenting).

A. The Proposal Fails to Justify Reversal of Decades of Agency Practice.

The agency attempts to justify its reversal of decades of 401 certification practice based on President Trump's Executive Order 13868, its rejection of the majority opinion in *PUD No. 1*, the adoption of Justice Thomas's dissent in that case, and feigned inconsistencies between the current regulations and the text of Clean Water Act section 401. As discussed above, these form improper legal bases for abandoning the carefully crafted dual federalism approach contemplated by section 401 and prior agency guidance, falling far short of the "reasoned explanation" EPA must provide to support its complete reversal of policy.[242] Indeed, EPA offers no valid basis for abandoning the section 401 certification adhered to by federal and state agencies for decades.

The recent decision in *New York v. U.S. Department of Labor* is instructive on this point. The department adopted a final rule that "departs significantly from DOL's prior sub-regulatory guidance."[243] The final rule was a reversal of the "more-than-forty-year history" under the act in question—one that "twist[s] the language of the statute and defeat[s] the purposes of Congress."[244] The court rejected the rule that "scraps ERISA's careful statutory scheme . . . and exceeds the statutory authority delegated by Congress."[245] This rule, and its rejection of more than 40 years of consistent application of state section 401 authority, is no different and, if finalized, this rule should suffer the same fate.

B. The Proposal Considers Factors Not Allowed by Congress.

In departing from decades of agency section 401 policy that implemented the objective of the Clean Water Act, the agencies have considered factors that were not intended by Congress. Courts recognize that "[a]gency action is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider."[246] Two factors warrant comment here: the agency's elevation of industrial interests over state section 401 authority and of industrial development over water quality.

As is plain from the agency's "Economic Analysis," the administration has placed great emphasis on permitting delays and state certification denials of a few projects, with an interest in curbing state authority to ensure that federally sanctioned projects do not degrade the waters within state boundaries under section 401. But section 401 is intended to protect water quality from federally sanctioned projects, not the other way around. Indeed, Senator Muskie, chief sponsor[247] of the section 401 process, explained:

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[242] *Fox Television Stations, Inc.*, 556 U.S. at 515.
[243] *New York*, 363 F. Supp. 3d at 131.
[244] *Id*. at 136.
[245] *Id*. at 117-118.
[246] *Nat'l Lifeline Ass'n v. FCC*, 915 F.3d 19 (D.C. Cir. 2019) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).
[247] Senator Muskie was the chief sponsor of the Water Quality Improvement Act of 1970, which contained the Section 21(b) certification requirement. *See New Hampshire v. Atomic Energy Comm'n*, 406 F.2d 170, 176 (1st Cir. 1969), *cert. denied*, 395 U.S. 962 (1969).

> No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards.[248]

The administration's emphasis on fast-tracking industrial developments by allowing them to proceed untethered by state water quality protections undercuts Congress's stated purpose of Clean Water Act section 401 and renders this rulemaking invalid.

C. The Proposal Fails to Consider Important Aspects of the Rulemaking.

By focusing on factors that the agency cannot lawfully consider, the proposal fails to consider important aspects of the rulemaking. It is a basic tenant of administrative law that "an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem."[249]

The only document the agency prepared in support of its rulemaking is a 32-page paper labeled as an "economic analysis."[250] The document title is a misnomer: the document contains no economics and no analysis. And in no way does the document meet the agency's own guidelines for conducting economic analyses.[251] This quote from those guidelines is particularly telling—the agency did not complete any of these "fundamental" steps here:

> ***A general "effect-by-effect" approach to benefits analysis***
> This approach consists of separately evaluating the major effects of a given policy, and then summing these individual estimates to arrive at an overall estimate of total benefits. The effect-by-effect approach for benefits analysis requires three fundamental steps:
>
> 1. Identify benefit categories potentially affected by the policies under consideration;
>
> 2. Quantify significant endpoints to the extent possible by working with managers, risk assessors, ecologists, physical scientists, and other experts; and
>
> 3. Estimate the values of these effects using appropriate valuation methods for new studies or existing value estimates from previous studies that focus on the same or sufficiently similar endpoints.[252]

[248] 116 Cong. Rec. 8984 (1970).
[249] *State Farm*, 463 U.S. at 43.
[250] *See generally* Economic Analysis (EPA-HQ-OW-2019-0405-0022).
[251] EPA, Guidelines for Preparing Economic Analyses (Dec. 17, 2018, updated May 2014), https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf (last visited October 10, 2019).
[252] *Id.* at 7-3.

The agency did not identify any "major effects" of the rulemaking, much less "benefit categories," "significant endpoints," or "values." At the most basic level, the agency has not assessed its proposal's effect on the ability of states to protect the waters within their borders from large federally licensed and permitted projects. Nor has the agency grappled with what effects the rule changes would have on the ground. What the agency's economic analysis does reveal is that it is trying to clear the path for pipelines and coal terminals.[253] Those are really the only effects the agency looked at (though they do not pretend to quantify those effects either). The agency did not, and could not, conduct an economic analysis consistent with its guidelines because EPA failed to analyze the effects of its rulemaking *at all*.

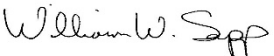
As discussed in section IV, the agency's proposal would prevent states from meeting their obligations under section 401 and from exercising their authority under section 401 to protect the waters within their borders. The agency simply failed to meaningfully consider these challenges or any other impact of their proposal; thus, the proposal is arbitrary and capricious.

## IX. CONCLUSION

Clean water is fundamental to our health and way of life. Section 401 of the Clean Water Act gives states, tribes, and the public the power to ensure that federally approved projects do not degrade our waters, and to veto those projects that would. Our families and communities depend on these protections to ensure the quality of the waters where we swim, fish, and drink from. With its proposal, this administration would upend this carefully crafted approach, seizing for *itself* the power granted by Congress to states and tribes. Not only are the proposed changes not necessary, they are illegal. We urge EPA to withdraw this rule.

Sincerely,

Kelly F. Moser
Senior Attorney



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[253] *Id*. at 11-13.

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