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Lauren Kasparek
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted via Regulations.gov

RE: Docket ID No. EPA-HQ-OW-2025-2929

Dear Ms. Kasparek:

On behalf of the Competitive Enterprise Institute, I appreciate this opportunity to provide comments on the proposed rule entitled "Updating the Water Quality Certification Regulations."[1] The focus of my comments will be on the scope of Section 401 certification.

I. Background

When Congress passed the Clean Water Act (CWA), it recognized the importance of cooperative federalism and the role of states in protecting water quality. At the start of the statute Congress stated, "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution…"

Section 401 reflects this belief in cooperative federalism. In the CWA, Congress ensured that states[2] could have a voice regarding the issuance of certain federal permits and licenses through state certification. Specifically, states have a means to push back when the federal government is trying to issue a permit or license that could harm water quality. Unfortunately, this voice for states has too often become a state veto on projects for reasons that have nothing to do with water quality issues.

[1] Environmental Protection Agency, "Updating the Water Quality Certification Regulations," proposed rule, *Federal Register*, Vol. 91, No. 10 (January 15, 2026), pp. 2008 – 2042, https://www.federalregister.gov/documents/2026/01/15/2026-00754/updating-the-water-quality-certification-regulations.
[2] For simplicity purposes, "states" will be used to cover all certifying authorities

The Trump administration's EPA 2020 "Clean Water Act Section 401 Certification Rule"[3] (2020 rule) helped to outline the problem:

> [C]ertifying authorities have on occasion required in a certification condition the construction of biking and hiking trails, requiring one-time and recurring payments to State agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and the creation of public access for fishing along waters of the United States. Certifying authorities have also attempted to address all potential environmental impacts from the creation, manufacture, or subsequent use of products generated by a proposed federally licensed or permitted activity or project that may be identified in an environmental impact statement or environmental assessment, prepared pursuant to the NEPA or a State law equivalent. This includes, for example, consideration of impacts associated with air emissions and transportation effects.[4]

The proposed rule, like the 2020 rule, addresses this overreach. The EPA in the 2020 rule developed regulations[5] for the first time implementing the certification language from the Clean Water Act of 1972. As the proposed rule states, "The 2020 Rule was the Agency's first comprehensive effort to promulgate Federal rules governing the implementation of CWA section 401, informed by a holistic analysis of the statutory text, legislative history, and relevant case law."[6] The previous regulations were from 1971 and interpreted statutory language prior to the modern CWA.

The proposed rule, like the 2020 rule, looks to the language in the modern-day CWA and relies on the best reading of the statute.[7]

II. Scope of Section 401

Misinterpreting Section 401 can make it possible for states to have sweeping veto power over federal permits and licenses. This is precisely what occurred with the Biden administration's

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[3] Environmental Protection Agency, "Clean Water Act Section 401 Certification Rule," final rule, *Federal Register*, Vol. 85, No. 134 (July 13, 2020), pp. 42210-42287, https://www.federalregister.gov/documents/2020/07/13/2020-12081/clean-water-act-section-401-certification-rule.

[4] Ibid.

[5] "Since the 1972 CWA amendments, the EPA issued two guidance documents and participated as amicus curiae in court cases concerning CWA section 401, but the Agency has not updated its regulations to comport with the 1972 amendments and has not, to date, established robust internal procedures for implementing its roles under section 401." Environmental Protection Agency, "Clean Water Act Section 401 Certification Rule," final rule, *Federal Register*, Vol. 85, No. 134 (July 13, 2020), p. 42211, https://www.federalregister.gov/documents/2020/07/13/2020-12081/clean-water-act-section-401-certification-rule.

[6] Environmental Protection Agency, "Updating the Water Quality Certification Regulations," proposed rule, *Federal Register*, Vol. 91, No. 10 (January 15, 2026), p. 2010, https://www.federalregister.gov/documents/2026/01/15/2026-00754/updating-the-water-quality-certification-regulations.

[7] This proposed rule provides extensive and compelling reasons for revising the scope of review provisions of the 2023 rule. It easily represents a reasonable interpretation of the law that corrects the 2023 rule's structural overreach and therefore satisfies the agency's obligation to provide a reasoned explanation for the revisions.

2023 rule.[8] Under that rule, once a specific trigger is met, then the state can block federal permits and licenses for a wide range of reasons beyond what is authorized under Section 401.

Specifically, "once there is a prerequisite potential for a point source discharge into waters of the United States, then the certifying authority may evaluate and place conditions on the 'activity,' which includes consideration of water quality-related impacts from both point sources and nonpoint sources."[9] Further, once there is this potential discharge, a state is not limited to considering the effects on navigable waters.

Quite simply, the 2023 rule expands the scope of certification beyond what is consistent with the statute, including allowing states and other certifying authorities to look beyond discharges, point sources, and navigable waters.

Beyond Discharges. A central problem of the 2023 rule is its "activity as a whole"[10] approach to Section 401 as opposed to a discharge-only approach. The rule states, "EPA has concluded that the best reading of the statutory text is that the scope of certification is the activity subject to the Federal license or permit, not merely its potential point source discharges."[11]

Beyond Point Sources. The 2023 rule allows states to look to nonpoint sources, explaining, "With respect to using section 401 certifications to address nonpoint source discharges, certifying authorities may consider water quality-related impacts from nonpoint source discharges after determining that the project satisfies the prerequisite potential for a point source discharge into waters of the United States."[12]

Beyond Navigable Waters. The 2023 rule does not even limit the scope of certification to navigable waters, explaining "the Agency concludes that while a certifying authority is limited to considering impacts to "waters of the United States" when certifying compliance with the enumerated provisions of the CWA, a certifying authority is not so limited when certifying

[8] Environmental Protection Agency, "Clean Water Act Section 401 Water Quality Certification Improvement Rule," final rule, *Federal Register*, Vol. 88, No. 186 (September 27, 2023), pp. 66558-66666, https://www.federalregister.gov/documents/2023/09/27/2023-20219/clean-water-act-section-401-water-quality-certification-improvement-rule.
[9] Ibid.
[10] The 2023 final rule removes "as a whole" and uses "activity," but the agency was not interpreting the scope differently. "This modification does not represent a change in substance from proposal. The Agency does not interpret the terms "activity" and "activity as a whole" as having different meanings…" Environmental Protection Agency, "Clean Water Act Section 401 Water Quality Certification Improvement Rule," final rule, *Federal Register*, Vol. 88, No. 186 (September 27, 2023), p. 66592, https://www.federalregister.gov/documents/2023/09/27/2023-20219/clean-water-act-section-401-water-quality-certification-improvement-rule.
[11] Ibid.
[12] Environmental Protection Agency, "Clean Water Act Section 401 Water Quality Certification Improvement Rule," final rule, *Federal Register*, Vol. 88, No. 186 (September 27, 2023), p. 66570, https://www.federalregister.gov/documents/2023/09/27/2023-20219/clean-water-act-section-401-water-quality-certification-improvement-rule.

compliance with requirements of state or Tribal law that otherwise apply to waters of the state or Tribe beyond waters of the United States."[13]

The 2023 rule's misinterpretation of Section 401(a) and Section 401(d) is at the heart of the problem. The proposed rule properly interprets Section 401.

The following is the start of Section 401(a)(1), which lays out the core requirements under Section 401:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.[14]

This Section 401 process exists to address "any discharge into the navigable waters" of the activity. The language expressly references "discharges" and "navigable waters." Discharges are required to be from point sources under this section, as the 2023 rule acknowledges.[15] Additional language, "in which the discharge originates or will originate," supports the requirement that the discharges be from point sources. In addition, Section 401(a)(1) also requires compliance with other CWA sections that are discharge-related and in no way apply regulatory requirements beyond discharges, point sources, and navigable waters.

The proposed rule correctly rejects an activity as a whole approach to the scope of certification review, unlike the 2023 rule. This flawed activity as a whole approach is heavily swayed by the fact that Section 401(d) does not use the term "discharge" but instead uses "applicant." The Section 401(d) language says, "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that *any applicant* for a Federal license or permit will comply…." [Emphasis added].[16]

As a result, the 2023 rule took the activity as a whole approach, arguing "Because section 401(d) requires that a section 401(a)(1) certification include conditions necessary to assure the 'applicant . . . will comply' with water quality requirements, section 401 is most reasonably read to require the certifying authority—when it reviews a request for certification under section

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[13] Ibid. The EPA in the 2023 rule when discussing the meaning of "discharge into the navigable waters" conflates "navigable waters" and "waters of the United States."
[14] 33 U.S.C. § 1341(a), https://www.law.cornell.edu/uscode/text/33/1341.
[15] Environmental Protection Agency, "Clean Water Act Section 401 Water Quality Certification Improvement Rule," final rule, *Federal Register*, Vol. 88, No. 186 (September 27, 2023), p. 66569, https://www.federalregister.gov/documents/2023/09/27/2023-20219/clean-water-act-section-401-water-quality-certification-improvement-rule. See also *Natural Desert Ass'n (ONDA)* v. *Dombeck,* 172 F.3d 1092, 1095-99 (9th Cir. 1998).
[16] 33 U.S.C. § 1341(d), https://www.law.cornell.edu/uscode/text/33/1341.

401(a)(1)—to review the applicant's activity subject to the Federal license or permit, and not merely the potential point source discharges."[17]

This interpretation is problematic for many reasons. Section 401(a)(1), which focuses on discharges, is the foundation of the certification process yet the 2023 rule treats it as secondary to Section 401(d), a narrow provision that is limited in scope. The rule would in effect have Section 401(d) swallow up the core requirements established in Section 401(a)(1).

Further, Section 401(d) did not ignore discharges. The compliance requirements being imposed on an applicant are to comply with water quality concerns related to discharges. Section 401(d)'s compliance requirements involve cross-referenced sections of the CWA that address discharges.

Section 401(d) does require an applicant to comply with "any other appropriate requirement of State law." This state language follows a list dealing with CWA discharge-related requirements. The principle of statutory interpretation *ejusdem generis* requires that the state law requirements be like the preceding requirements in the list.[18]

Therefore, any requirement should be related to the CWA discharges of concern. It is not meant to allow states to impose compliance requirements that have nothing to do with water quality concerns. In addition, the language in Section 401(d) does not say "any requirement of State law" but expressly conditions the requirements to those that are "any other *appropriate*"

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[17] Environmental Protection Agency, "Clean Water Act Section 401 Water Quality Certification Improvement Rule," final rule, *Federal Register*, Vol. 88, No. 186 (September 27, 2023), p. 66594, https://www.federalregister.gov/documents/2023/09/27/2023-20219/clean-water-act-section-401-water-quality-certification-improvement-rule.

[18] Most, if not all of these points regarding a "discharge-only" approach, were rightfully made by the EPA in the 2020 rule and argued by Justice Clarence Thomas in his dissent in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). The EPA was correct in 2020 in explaining that it is not bound by the majority opinion in this case (for many reasons). See e.g. "Given the circumstances of the *PUD No. 1* litigation, and the fact that the Supreme Court did not analyze section 401 under *Chevron* step 1 or rely on unambiguous terms in the CWA to support its interpretation of the statute, *PUD No. 1* does not foreclose the Agency's interpretation of section 401 in this final rule. The Supreme Court's "choice of one reasonable reading" of section 401 does not prevent the EPA "from later adopting a different reasonable interpretation." [Internal citations omitted]. Environmental Protection Agency, "Clean Water Act Section 401 Certification Rule," final rule, *Federal Register*, Vol. 85, No. 134 (July 13, 2020), p. 42234, https://www.federalregister.gov/documents/2020/07/13/2020-12081/clean-water-act-section-401-certification-rule.

The proposed rule is correct when it explains "It is significant that, not only did the majority in *PUD No. 1* employ *Chevron* deference to EPA regulations, those regulations were not based on the statutory text before the Court. The Court relied on EPA regulations that predated the 1972 CWA amendments and therefore contained outdated statutory terminology, most importantly "activity" rather than "discharge" in CWA section 401(a)(1). This is yet another important reason not to treat *PUD No. 1* as the final word on the proper scope of certification." Environmental Protection Agency, "Updating the Water Quality Certification Regulations," proposed rule, *Federal Register*, Vol. 91, No. 10 (January 15, 2026), p. 2025, https://www.federalregister.gov/documents/2026/01/15/2026-00754/updating-the-water-quality-certification-regulations.

In addition, as the proposed rule mentions, "In *Loper Bright* v. *Raimondo,* 603 U.S. 369 (2024), the Supreme Court overruled the longstanding *Chevron* deference doctrine." The agency needs to develop the best reading of the statute, not just a reasonable one. The discharge-only approach is the best reading.

requirements. This is an express signal that any state law requirements be consistent with the preceding requirements dealing with discharges.

III. Conclusion

In 2020, the EPA, after nearly 50 years, finally updated the CWA regulations to interpret the modern-day CWA Section 401 language. To its credit, the EPA through this proposed rule is reverting to this proper approach to the scope of review. When examining the scope issue, the EPA must adopt the best reading of the statute. The EPA has done this. Therefore, the agency should finalize the scope requirements as proposed.

Sincerely,

Daren Bakst
Director, Center for Energy and Environment
Competitive Enterprise Institute