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Via: Regulations.gov

Lauren Kasparek
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Oceans, Wetlands, and Communities Division
Office of Water
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Washington, DC 30460
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RE: Comments on Proposed Clean Water Act Section 401 Rule, Docket No. EPA-HQ-OW-2025-2929

Dear Ms. Kasparek:

Orange County Coastkeeper respectfully submits these comments on the U.S. Environmental Protection Agency's ("EPA") Proposed Clean Water Act Section 401 Rule.

Section 401 of the Clean Water Act is a direct grant of authority to states and tribes (approved for "treatment as a state" status) to review any project that causes a discharge into waters of the United States and the affected state or tribe that requires a federal license or permit. Section 401 Water Quality Certifications are an act of cooperative federalism that the EPA now seeks to diminish.

Orange County Coastkeeper submits the following comments in opposition to the proposed changes to the Clean Water Act Section 401. The changes would detrimentally limit the scope of state and tribe issued water quality certifications, leading to environmental harm and federal overstep. The EPA seeks to ignore judicial precedent and take away rights that the Supreme Court has explicitly granted to the states. The EPA has not provided any data or information regarding a problem with the status quo. The proposed rule seeks to fix a problem it has failed to identify. The EPA should not move forward with the proposed changes to Section 401.

I. Background of the Clean Water Act.

a. Section 401

The Clean Water Act ("CWA") was established to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[1] Section 401 is a direct grant of authority to States and Tribes to review for compliance with appropriate federal, state, and tribal water quality requirements any discharge into waters of the United States ("WOTUS") that may result from a proposed activity

[1] 33 U.S.C. § 1251

that requires a federal license or permit.[2] Under Section 401, a federal agency may not issue a license of permit to conduct any activity that may result in any discharge into WOTUS, unless the state or authorized tribe where the discharge would originate either issues a 401 water quality certification finding compliance with applicable water quality requirements or certification is waived.[3] Where a state or tribe does not have authority, the EPA is responsible for issuing certification.

Certifying authorities must act on a Section 401 certification request "within a reasonable period of time," not to exceed one year after receipt of a request.[4] A certifying authority may waive certification expressly, or by failing or refusing to act within the established reasonable period of time. When making a decision to grant, grant with conditions, or deny requests, certifying authorities consider whether the federally licensed or permitted activity will comply with applicable water quality requirements (including water quality standards, effluent limitations, new source performance standards, toxic pollutants restrictions, and other appropriate water quality requirements of state or tribal law).[5]

b. 2020 Rule

Until 2020, regulations promulgated in 1971 and interim guidance published in 2010 were in effect.[6] In 2020, the Trump Administration introduced the 2020 Rule.[7] The 2020 rule addressed two issues: certification timelines and the scope of certification. The rule also included a new process for federal review of certifications and newly authorized the federal licensing and permitting agencies as the enforcement authorities.[8]

The proposed rule contradicted the Supreme Court's holding in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994). In that case, the Supreme Court held that a state acted appropriately under Section 401 when it granted a certification request with a condition that the project would maintain specific minimum stream flows to protect salmon and steelhead runs.[9] The Court confirmed that under Section 401, states and tribes have authority to grant certifications with conditions that applied to the whole project instead of only discharges that would occur as a result of the project. Despite this, the 2020 rule limited conditions to discharges.

c. 2023 Rule: President Biden's Response to the 2020 Rule

In 2021, President Biden issued an executive order that directed agencies to review the 2020 rule.[10] EPA's review of the rule identified a number of concerns, prompting the EPA to publish a notice of intention to reconsider and revise the rule.[11] EPA asked courts to remand the 2020 rule to

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[2] *Clean Water Act Section 401: Overview and Recent Developments*, Congress.gov (Feb. 7, 2025) https://www.congress.gov/crs-product/R46615
[3] *Id*.
[4] 33 U.S.C. §1341(a)(1).
[5] *Id*.
[6] *Clean Water Act Section 401: Overview and Recent Developments*, *supra* note 2
[7] *Id*.
[8] *Id*.
[9] *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 703 (1994)
[10] *Clean Water Act Section 401: Overview and Recent Developments*, *supra* note 2.
[11] *Id*.

the agency while it developed a new regulation.[12] On October 21, 2021, the U.S. District Court for the Northern District of California issued an order remanding and vacating EPA's 2020 Rule.[13] After the rule was remanded and vacated, EPA indicated that the vacatur applied nationwide and required a temporary return to EPA's 1971 regulations until a new rule was finalized.[14] Various states and industry groups appealed. On April 6, 2022, the Supreme Court issued an unsigned order granting an application for a stay pending the appeal in the Ninth Circuit, temporarily reinstating the 2020 rule.[15] The Ninth Circuit reversed the district court's order, holding that courts lack authority to vacate an agency's regulation without first holding it unlawful.[16] The case was remanded, and in the process of proceedings, the 2023 rule was proposed, rendering the case moot.

In 2023, the EPA published a new rule that introduced changes to address certification timelines and scope, intended to restore the fundamental authority granted by Congress to states, territories, and tribes to protect water resources while advancing federally permitted projects in a transparent, timely, and predictable way.[17] The change provided that federal licensing or permitting agencies may jointly agree in writing to the reasonable period of time, provided that it does not exceed one year from the date that the request for certification was received. If the federal agency and certifying authority do not agree on the reasonable period of time, the 2023 rule established a six-month default time period. The 2023 rule also included provisions for extensions or to accommodate certain public notice procedures or unexpected events, provided that the reasonable period of time does not exceed one year.

d. 2026 Proposed Rule

Now, the EPA seeks to revise the 2023 rule with respect to contents of a request for certification, the scope of certification, the contents of a certification decision, and the modification process.[18] First, under the proposed rule, a request for certification must include all applicable components to start the statutory clock and would remove the text that currently allows state and tribal certifying authorities to define additional contents in a request for certification.[19] States and tribes will be prohibited from asking applicants to withdraw and resubmit their request for certification. Second, EPA is also proposing to limit "discharge" to refer to a discharge from a point source into waters of the United States, as opposed to "activity as a whole." If there is no related discharge from a point source to federal waters, the proposed rule may eliminate any consideration by the states or tribes for a variety of impacts from a project. Lastly, the proposed rule would remove regulatory text regarding "treatment in a similar manner as a state" (TAS) for tribes and instead rely on the existing regulatory process for TAS.[20] This will limit tribal authority, and force tribes to rely on the EPA to act on certification requests.

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Updating the Water Quality Certification Regulations*, Environmental Protection Agency (Jan. 15, 2026) https://www.regulations.gov/document/EPA-HQ-OW-2025-2929-0001
[19] *Id.*
[20] *Id.*

II. Changing Certification Timeline Requirements is Redundant and Unnecessary Given Approval Rates and the 2023 Rule.

Currently, Section 401 requires states and tribes to issue a Section 401 certification within a reasonable period of time, not to exceed one year, or the certifying authority waives certification for the project. States, including California, have denied applications without prejudice or asked applicants to withdraw and resubmit their request for certification to have more time to review the discharge and condition the certification without exceeding the one-year period.

In 2019, the Association of Clean Water Administrators surveyed the states about their Section 401 certification process, including the average number of certification requests and denials, timeliness, request completeness, and best practices; 31 states responded.[21] The average length of time for states to issue a certification decision once they receive a complete request was 132 days.[22] Incomplete requests were the most cited common reason for delays.[23] Denials were uncommon, with 17 states averaging zero denials per year and other states rarely issuing denials.[24] The ultimate conclusion from the survey was that denials were uncommon, and most decisions were made between 40-90 days.[25]

With the proposed change, states and tribes would be prohibited from asking applicants to withdraw and resubmit their request for certification. This means that if an applicant does not provide all of the necessary information upfront, the only options are denial or uninformed approval. The EPA believes that a timing issue still exists despite the data, and while that may be true for complicated projects that require more information, this is not the best response as it will lead to detrimental effects of parties not providing needed information, and no avenue for recourse. Such a rule would leave tribes and states with inadequate information to make informed decisions.

The 2023 rule established a clear, implementable certification process that provided sensible limits and allowed the certification process to move more expeditiously.[26] In fact, the industry has not been able to demonstrate harm under the 2023 rule.[27] Of 7,500 projects submitted during the Biden Administration, fewer than 1% were denied.[28] Most were approved with conditions such as mitigation measures and sediment traps to prevent water pollution during construction, and tribal review outcomes were similar.[29] This indicates that such a dramatic change is completely unnecessary. The timeline issue regarding project approvals was addressed with the 2023 rule, and there is no evidence that the issue still exists. Projects requiring 401 water quality certifications are often complex. Allowing

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[21] *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking*, U.S. Environmental Protection Agency (Aug. 2019), EPA-HQ-OW-2019-0405-0022_content.pdf
[22] *Id*.
[23] *Id.*
[24] *Id*.
[25] *Id*.
[26] *Summary Report of Public Listening Sessions on the U.S. EPA: "Implementation Challenges Associated with the Clean Water Act Section 401"*, U.S. Environmental Protection Agency (Jan. 2026), https://www.epa.gov/system/files/documents/2026-01/cwa401_public-listening-sessions-summary_jan2026_508c.pdf
[27] *Id*.
[28] Miacel Spotted Elk, *An EPA proposal would make it harder for tribes to protect their water*, High Country News (Jan. 28, 2026), https://www.hcn.org/articles/an-epa-proposal-would-make-it-harder-for-tribes-to-protect-their-water/
[29] *Id*.

applicants to withdraw and resubmit a more complete application provides the applicant with flexibility and the opportunity to avoid a denial. This may take longer than the approval process for a project that is not so complicated, but the data shows very few projects are denied, and the 2019 survey showed that very few projects are resubmitted. States and tribes should not be prohibited from asking applicants to withdraw and resubmit their request for certification which allows the applicant flexibility instead of facing a denial.

III. EPA Seeks to Ignore Binding Precedent by Limiting Approval to Discharge Only.

In 1994, the Supreme Court held that Section 401(d) allowed states and tribes to regulate the entire activity leading to a discharge to a WOTUS.[30] States were allowed to impose additional environmental protection conditions on projects not directly related to water quality and potential discharges to a WOTUS. Despite longstanding tradition and understanding of Section 401, the EPA would like to ignore the doctrine of *stare decisis* and forget the Supreme Court's holding on the basis of a misapplied legal argument.

The Clean Water Act sought to encourage cooperative federalism by establishing distinct roles for the federal and state governments. The United States Supreme Court interpreted and decided the scope of Section 401, holding that certifying authorities may impose conditions on the "activity as a whole."[31] In *PUD No. 1*, the state of Washington adopted comprehensive water quality standards to regulate the state's navigable waters and a statewide antidegradation policy.[32] The Supreme Court turned to Section 401(d), which "provides that any certification shall set forth 'any effluent limitations and other limitations…necessary to ensure that any applicant' will comply with various provisions of the Act and appropriate state law requirements."[33] The Court held that Section 401(d) thus allows the state to impose other limitations on the project to assure compliance with various provisions of the Clean Water Act and other appropriate state law requirements.[34] The Court further noted that this view is consistent with the EPA's regulations implementing Section 401, and that the EPA's conclusion that activities, not just discharges, must comply with state water quality standards was a reasonable interpretation.[35]

The EPA references the 2024 *Loper Bright* decision to note that the Supreme Court emphasized reviewing courts must "exercise independent judgement in determining the meaning of statutory provisions."[36] To resolve the meaning of disputed statutory language, a court must adopt the interpretation that the court concludes is best after applying all relevant interpretive tools.[37] When a court reviews an agency's statutory interpretations, courts may seek aid from the interpretations of those responsible for implementing particular statutes.[38] *Loper Bright* overruled the longstanding *Chevron* deference doctrine, which gave agencies deference when statutory language was ambiguous. Interestingly, the Court's interpretation of Section 401 in *PUD No. 1* did not arise out of a statutory

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[30] *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 700 (1994)
[31] *Id*.
[32] *Id*. at 707.
[33] *Id*. (quoting 33 U.S.C. § 1341(d)).
[34] *Id*. at 711.
[35] *Id*. at 712.
[36] Updating the Water Quality Certification Regulations, *supra* Note 13 (quoting *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 394 (2024)).
[37] *Loper Bright Enterprises*, 603 U.S. 369, 400 (2024).
[38] *Id*. at 394.

ambiguity. In determining whether compliance with Section 303 was a proper function of the Section 401 certification, the Court reasoned that the statute allows states to impose limitations to ensure compliance with Section 301, and Section 301 incorporates Section 304 by reference.[39] The Court then merely observed that this interpretation is consistent with EPA's view of the statute.[40] Because the Supreme Court did not apply *Chevron* and instead relied on ordinary statutory interpretation, the EPA's discussion of *Loper Bright* is irrelevant, and the Supreme Court's interpretation of Section 401 governs. In fact, *Loper Bright* makes it more clear, not less clear, that the Court's interpretation of Section 401 is what is binding.

Now, under the proposed change, states and authorized tribes would be limited to reviewing only the direct water-quality impacts of a project's discharges and not broader water-quality effects.[41] This would weaken oversight of projects such as dams, where water released from a dam may meet quality standards while the structure itself blocks fish migration and disrupts river flow.[42] As written, if there is no related discharge from a point source to federal waters, the proposed rule may eliminate any consideration by the states or tribes of a variety of impacts of a project, significantly limiting states' rights to consider effects such as impacts to wetlands and fisheries downstream of a dam.[43] It is important to remember the necessity of protecting water quality, which extends to supporting downstream resources, including maintaining habitats. Meeting water quality standards does not automatically mean the denial of a project; rather, the project can be approved contingent on including important mitigative initiatives.

The Supreme Court's decision in *PUD No. 1* is binding. Failure to abide by the Supreme Court's interpretation of statute is a breach of the EPA's executive authority. States have the authority, as the Supreme Court held in *PUD No. 1*, to ensure that projects within their jurisdiction comply with state and tribal laws. It is the states and tribes that understand their own laws and regulation, and the primary authority must remain with them. States have imposed construction-season restrictions meant to prevent soil erosion, landslides, and impairment of riparian habitat; protection of intermittent and seasonal stream; requirements for karst surveys and dye studies to assure that potential underground paths of pollutant discharge can be identified; maintenance of stream buffers and revegetation; compensatory mitigation, and more.[44] Now, these restrictions will be significantly limited if not impossible to impose with the EPA's desire to limit the scope to discharges from point sources. States have the right, acknowledged by the Supreme Court, to factor in water quality and consistency with other state laws when reviewing Section 401 certifications.

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[39] *PUD No. 1* 511 U.S. at 712-713.
[40] *Id*. at 713.
[41] Teresa Tomassoni, *New EPA Proposal Would Strip States' and Tribes' Authority to Block Oil and Gas Pipelines, Other Infrastructure Projects*, Inside Climate News (Jan. 14, 2026), https://insideclimatenews.org/news/14012026/epa-proposal-streamlines-oil-gas-infrastructure-approval/#:~:text=Under%20the%20proposal%2C%20states%20and,waterways%20qualify%20for%20federal%20protection
[42] *Id*.
[43] John L. Watson, *EPA Wants to Change the Scope of the Clean Water Act's Rule 401 Certification Process. The Review Process Landscape Changes Dramatically*, Spencer Fane (Jan. 21, 2026), https://www.spencerfane.com/insight/epa-wants-to-change-the-scope-of-the-clean-water-acts-rule-401-certification-process-the-review-process-landscape-changes-dramatically/
[44] James M. McElfish, Jr. *States May Lose CWA Section 401 Powers*, Environmental Law Institute (Feb. 5, 2026) https://www.eli.org/vibrant-environment-blog/states-may-lose-cwa-section-401-powers

IV. The Decision to Limit Tribal Authority Undermines a Longstanding History of Acknowledging and Supporting Tribal Sovereignty.

Tribes have the inherent right to exercise sovereignty over their members and territory. Tribes have a unique relationship with water and the greater ecological landscape of their ancestral homelands including considerations for the environment, economy, and culture that supports the health and wellness of their members and surrounding community.[45] The proposed rule limits how tribes can gain regulatory authority to assess water quality under the Treatment in a Similar Manner as a State program (TAS). Currently, tribes are able to act as regulators and directly set conditions to limit factors that would pollute waters near tribal lands.[46] Section 401 grants tribes that can demonstrate the capacity and resources the ability to review water quality standards, expanding regulatory powers beyond tribes with larger resources.[47] The EPA wants to significantly strike down that authority and only allow TAS tribes to perform evaluations through a separate, more rigorous authorization program.[48] Currently, the 2023 Rule includes a process for tribes to obtain TAS for Section 401 or Section 401(a)(2) process. With the proposed rule, both processes would be eliminated, and tribes would only be able to obtain TAS for Section 401 through Section 303(c) (water quality standards), which means forcing tribes to rely on the EPA to act on certification requests.[49]

Tribes' resources vary significantly, but the EPA wants to pressure tribes to show larger-scale capacity, even though tribes are comprised of an array of different resources, and it will now be difficult for smaller tribes and tribes with less resources to properly care for their water. Tribes have the right to care for the rivers and waterways that have sustained their communities, and it is important that the EPA does not deprive them of this right. Congress explicitly gave states and tribes the authority to have meaningful engagement in the certification process.[50] The EPA will not and should not get away diminishing this authority and going against precedent. Tribal expertise and knowledge are incredibly important in assessing water quality impacts, and states and tribes are best positioned to understand and protect their water sources.[51]

Tribes have been granted a central role in protecting water quality. Under the current rule, tribes are able to look at the proposed project holistically and consider environmental impacts. The EPA wants tribes to ignore project-related pollution risks that threaten downstream communities and ecosystems, which will have far greater, detrimental environmental impacts than mitigation measures or a slight delay in project approval.

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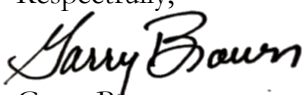
[45] *Tribal Policy*, California Department of Water Resources, https://water.ca.gov/about/tribal-policy
[46] Miacel Spotted Elk, *supra* note 8, at https://www.hcn.org/articles/an-epa-proposal-would-make-it-harder-for-tribes-to-protect-their-water/
[47] *Id*.
[48] *Id*.
[49] Tasha Sturgis, *Proposed Revisions to Clean Water Act Section 401 Could Narrow State and Tribal Review*, Environmental Science Associates (Jan. 30, 2026), https://esassoc.com/news-and-ideas/2026/01/proposed-revisions-to-clean-water-act-section-401-could-narrow-state-and-tribal-review/
[50] U.S. Environmental Protection Agency, *supra* note 6, at https://www.epa.gov/system/files/documents/2026-01/cwa401_public-listening-sessions-summary_jan2026_508c.pdf
[51] *Id*.

V. Conclusion

The proposed changes to Section 401 seek to shift more power to the federal government, away from the states and tribes, under the guise of fixing a problem that doesn't exist. The need for stricter timing requirements was addressed and met by the 2023 Rule. The EPA has not and cannot show that a problem with the certification timeline still exists. In fact, data shows the opposite, as very few projects are denied, and ever fewer resubmitted. The EPA also seeks to shift power by limiting project consideration to discharges only and prohibiting other water quality considerations. This usurpation of state and tribal authority ignores the Supreme Court's interpretation in *PUD No. 1*. The EPA's *Loper Bright* argument is misguided and, if anything, is another reason why the Supreme Court's holding in *PUD No. 1* must be followed. This type of regulatory gamesmanship only harms project applicants who seek, above all, regulatory consistency. Lastly, the EPA's desire to limit tribal authority is disrespectful, dangerous, and has the potential to further strain federal-tribal relationships. It is important to acknowledge and uphold tribal sovereignty, as Congress intended and instructed, and the EPA's proposed changes completely ignore this fundamental idea. Coastkeeper respectfully requests the EPA rescind the proposed rule.

Respectfully,



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