State Water Resources Control Board

February 17, 2026

Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Submitted via Federal eRulemaking Portal: https://www.regulations.gov/

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

Dear Administrator Zeldin:

The California State Water Resources Control Board ("State Water Board") and the nine California Regional Water Quality Control Boards (collectively, "Water Boards") are certifying agencies pursuant to section 401 of the Clean Water Act. The Water Boards oppose the proposed changes by the U.S. Environmental Protection Agency ("U.S. EPA") to the section 401 certification regulations ("Proposed Rule"). (91 Fed. Reg. 2008-42 (Jan. 15, 2026).) Instead, the Water Boards urge U.S. EPA to retain the Clean Water Act Section 401 Water Quality Certification Improvement Rule (88 Fed. Reg. 66,558 (Sept. 27, 2023)) ("2023 Rule"). There is no demonstrated need for the Proposed Rule as U.S. EPA fails to identify any specific examples of actual problems with the 2023 Rule.

Despite being characterized as a clarification, the Proposed Rule threatens to drastically redefine Clean Water Act section 401 certifications in a way that undermines the state's role in protecting its own water resources and that is contrary to well-established Supreme Court precedent. Although the Water Boards would rely on California state laws to continue to preserve robust protection of water quality, this may not always be possible; it would also impose additional costs (attributable to the Proposed Rule) on both the state and regulated entities. To avoid deleterious effects on California's waters, U.S. EPA should withdraw this disruptive dismantling of the certification process to comply with applicable law in a manner that affirms respect for state law and state institutions.

I. The Proposed Rule is inconsistent with principles of cooperative federalism.

A fundamental defect in the Proposed Rule is that it disregards state interests, thereby undermining the cooperative federalism that is a foundational component of the Clean Water Act. As set forth in Clean Water Act section 101(b), "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use. . . of land and water resources." Section 510 further specifies that, except as expressly provided, nothing in the Clean Water Act shall preclude or deny the right of any state to adopt or enforce any standard or limitation respecting discharges of pollutants or any requirement respecting control or abatement of pollution.

The section 401 certification program is an embodiment of these cooperative federalism principles. The Supreme Court has explained that "[s]tate certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution . . . ." (*S.D. Warren Co. v. Maine Board of Environmental Protection* (2006) 547 U.S. 370, 385 (*S.D. Warren*).) A state certification is the mechanism of ensuring that a federal license or permit is not used as "'an excuse to violate a state's water quality standards'." (*Id.*, at 386 [citing Sen. Muskie's comments on senate floor, 116 Cong. Rec. 8984 (1970)].) Section 401 is an acknowledgement that states are in the best position to understand their own law and that additional conditions may be necessary to ensure compliance with state law and applicable requirements. As the federal permitting or licensing agency is often not an agency primarily tasked with managing environmental issues, the federal agency may in fact be reliant on the certification authority's expertise regarding water quality. Any attempt to revise the section 401 certification program must preserve an expansive view of the federalism principles embodied in section 401 and repeatedly affirmed by the Supreme Court.

The Proposed Rule's reliance on two doctrines intended to limit *federal* agency authority is particularly inapposite here, where the U.S. EPA is attempting to improperly narrow the clear language of the statute that addresses *state* authorities, rather than those of federal agencies.

The preamble quotes *Sackett v. EPA* (2023) 598 U.S. 651 to explain the "clear statement" doctrine regarding federalism: "The Supreme Court 'require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power.'" (91 Fed. Reg. at 2026.) Purporting to apply this rule, U.S. EPA argues that if Congress has not offered a clear statement that section 401 extends beyond point source discharges to waters of the United States, then it cannot go beyond that limitation. This is a fundamental misapplication of *Sackett*. The underlying rationale in *Sackett* is precisely that "[r]egulation of land and water use lies at the core of traditional state authority." (*Sackett*, 598 U.S. at 679.) Absent a clear Congressional statement to the contrary, the regulation of water use should lie with the state. For half a century, states have exercised the ability to set conditions for federal permits requiring that the whole activity conform with state water quality requirements. There is no basis for U.S. EPA's assertion that continuing this longstanding practice would conflict with what the Proposed Rule characterizes as a federal prioritization of regulating point source discharges to waters of the United States or that it would otherwise upset the

balance of state and federal power. While the 1972 amendments added point-source control requirements, the amendments also continued, and in some respects added to, more broadly applicable requirements, including those in what the 1972 amendments renumbered as sections 303 and 401 of the Clean Water Act. There is no "clear statement" that Congress intended to "'significantly alter the balance between federal and state power'" by limiting states' broad authority to condition activities as a whole so that they meet appropriate state water quality requirements, regardless of whether pollution is caused by the discharge to waters of the United States that triggers state certification authority. Instead, the Proposed Rule—with no such Congressional support—would undermine the longstanding ability of states to protect their own waters.

Further, the Proposed Rule grievously misapplies the "major questions doctrine" which cautions "agencies against assertions of authority with vast 'economic and political significance' without 'clear congressional authorization.'" (91 Fed. Reg. at 2026 [citations omitted].) The Proposed Rule cites this doctrine as a reason to limit *states'* authority over water quality; however, the doctrine applies to delegations of authority to federal agencies. It is simply inapplicable to the interpretation of the scope of *state* certifications under section 401 of the Clean Water Act.

Despite the express language in the Clean Water Act and well-established precedent, the Proposed Rule attempts to dismantle the existing program that has been built on decades of cooperative federalism. The overall effect of the Proposed Rule would be to strip the states of their Clean Water Act authority to provide substantive review of and appropriately condition a project's effect on a state's water quality before a federal permit or license is issued.

II. The Proposed Rule must preserve a state's ability to address the effects of the activity, not just the discharge, in accordance with the express language and legislative history of the Clean Water Act and binding Supreme Court precedent.

Pursuant to the express language of the Clean Water Act, and as affirmed by the Supreme Court, certifying authorities (such as the State of California) have the authority to impose conditions on the activity as a whole to ensure compliance with certain provisions of the Clean Water Act and appropriate requirements of state law. As the Supreme Court noted, section 401(d) expressly refers to "'any effluent limitations and other limitations. . . necessary to assure that *any applicant*' will comply with various provisions of the Act and appropriate state law requirements." (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 711 (*PUD No. 1*) (emphasis in original).) Based on the language of the statute itself, the Supreme Court held that once it is determined that the activity may result in a discharge, the certifying agency's authority extends to the entire activity, not just the discharge. (*Ibid*. ["The language of this subsection [401(d)] contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge.'"]) Similarly, in *S.D. Warren*, the state's conditions of certification were not limited to the triggering discharge. In upholding its interpretation of "discharge," the unanimous Court cited to a broad definition of pollution that includes, for example, blocking fish passage and de-watering sections of stream, and Clean Water Act, section 401(d)'s grant of state authority to impose "conditions on federal licenses for *activities* that may result in a

discharge." (547 U.S. at 385-86.) The preamble fails to discuss *S.D. Warren*, but ironically, in its one and only mention of *S.D. Warren*, the preamble includes a quote from the case that acknowledges that the Clean Water Act is not limited to the addition of pollutants and instead deals with "pollution generally." (91 Fed. Reg. at 2011.)

The Supreme Court's holding in *PUD No. 1* was not dependent on *Chevron* deference, as the preamble asserts. Rather, the decision was rooted in the Court's own interpretation of the express statutory language of the Clean Water Act. The Court examined the language in section 401 and the context of the statute as a whole and concluded "§ 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." (*PUD No. 1* at 712 (emphasis added).) The Court then characterized its interpretation of the Clean Water Act as "consistent" with, but not dependent on, the language used in U.S. EPA's regulations. (*Ibid.*) Although the Court stated that the regulatory interpretation was "entitled to deference," the Court in fact accorded it none. (*Ibid.)* Even if the Supreme Court relied on *Chevron* deference in *PUD No. 1*, the *Loper Bright* Court expressly stated that, "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology." (*Loper Bright Enters. v. Raimondo* (2024) 603 U.S. 369, 412.) *Loper Bright*, therefore, would not affect the weight of the Supreme Court's determination in *PUD No. 1.* In affirming the conditions set forth in the certification, *PUD No. 1* ratified the system of cooperative federalism envisioned by the Clean Water Act whereby a state may set forth more stringent requirements in a certification to protect the quality of its waters. This decision remains good law, and the proposed regulation directly contravenes it.

The preamble states the Proposed Rule is the fourth interpretation regarding the scope of water quality certification since 1971. (91 Fed. Reg. at 2023.) This characterization fails to acknowledge that for fifty-five years, with the exception of approximately two and a half years when the 2020 regulations were in effect, the scope of certification has been consistently interpreted as addressing the activity as a whole. The preamble fails to provide a sufficiently compelling justification for upending over fifty years of agency practice and fails to sufficiently consider the states' serious reliance issues. When an agency is changing an existing position, an agency should be aware that longstanding policies may have engendered serious reliance issues. (*Encino Motorcars, LLC v. Novarro* (2016) 579 U.S. 211, 221-22 (holding that an agency's change in practice without explaining a prior inconsistent finding is arbitrary and capricious).) In such cases, a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. (*Id.*) The Proposed Rule involves a complete overhaul of longstanding existing practices, yet it fails to offer a reasoned explanation for the change.

Impacts to groundwater, impacts to surface waters that are not relatively permanent, and impacts from non-point sources that would not occur without issuance of the federal permit or license are all water quality impacts that should be within a certifying authority's ability to address through conditions.

Attempting to limit the states' authority to point source discharges also creates ambiguities as to what is considered within the scope of certification under the regulation. Far from creating regulatory clarity and efficiency, attempting to limit the scope of the certification to only discharges to waters of the United States is likely to create more uncertainty.

III. The Proposed Rule must be revised to allow certifying authorities to impose conditions to comply with water quality requirements that extend beyond point source discharges to waters of the United States.

The Proposed Rule's revisions to the definition of "water quality requirements" should be rejected as contrary to the express language of the Clean Water Act. The definition in the 2023 Rule mirrors the Clean Water Act language and correctly includes a broader swath of state law, such as statutory or constitutional requirements. At a minimum, for the reasons discussed in section II above, the definition must delete "for discharges." The definition should also delete "appropriate," which is unnecessary and confusing because the definition already specifies "water quality-related regulatory requirements." The language implies that there should be a secondary analysis that the requirements are also "appropriate."

As discussed in sections I and II, above, binding case law and the express language of Clean Water Act section 401(d) reflect that a state's water quality interests extend to all pollution in all waters. Section 401(d) of the Clean Water Act authorizes a state to condition certification based on, among other things, "any other appropriate requirement of state law." Through its definition of "water quality requirements," the Proposed Rule attempts to rewrite this statutory language to limit "any other appropriate requirement of state law" to "appropriate and applicable State or Tribal water quality-related regulatory requirements for point source discharges into waters of the United States." (91 Fed. Reg. at 2027.) If Congress intended for section 401(d) to mean this, it would have used those terms, as it does elsewhere in the Clean Water Act.

The Proposed Rule casts uncertainty regarding whether the Water Boards could include conditions that assure compliance with the Water Boards' water quality programs that regulate all waters of the state and expressly apply to all factors that affect water quality, not just point source discharges into waters of the United States. Through state policies for water quality control and water quality control plans, the Water Boards regulate all waters of the state, both federal and non-federal, in the same manner, so as to promote statewide consistency and regulatory certainty. Furthermore, it is imperative that the Water Boards be able to continue implementing their Non-Point Source Policy, required under Clean Water Act section 319, through certifications.

U.S. EPA should also reject the proposed alternatives that would take impermissibly narrow interpretations on the scope of water quality requirements. U.S. EPA asks whether it should construe "'water quality requirements' to mean only numeric water quality criteria." (91 Fed. Reg. at 2027.) The Supreme Court convincingly rejected that construction (*PUD No. 1*, 511 U.S. at pp. 714-18), and U.S. EPA has no basis for rejecting the precedent the Court's opinion establishes. Water quality requirements are not and should not be limited to numeric criteria. Designated uses and narrative criteria are important parts of Clean Water Act water quality standards and are clearly allowed

under the Clean Water Act. Neither the text of section 401 nor the greater context of the Clean Water Act supports a narrow construction that would limit applicable standards to numeric criteria, and applying this narrow construction would hamper states' ability to protect their waters.

IV. The Proposed Rule should allow certifying agencies to define what information must be submitted with certification requests.

The Proposed Rule should be revised to retain the existing language from section 121.5(c) and allow, but not require, certifying agencies to identify additional information that is required for a valid certification request. The preamble states that there is a "potential for uncertainty or delays associated with the absence of a nationally consistent definition for request for certification," 91 Fed. Reg. at 2018, but provides no evidentiary basis for these potential problems. To the contrary, nationwide consistency makes little sense where different states have different laws and different water quality requirements and therefore may identify different requirements for certification requests. Because the current additional application requirements apply when a "certifying authority has identified contents of a request for certification," U.S. EPA's concern that state requirements for certification requests would be too subjective is unsupported. For example, in California, the contents of a certification request are defined by regulation. (Cal. Code of Regs., tit. 23, § 3856.) In addition, for dredge or fill projects not involving an appropriation of water or a Federal Energy Regulatory Commission (FERC) license, the Water Boards have developed a comprehensive list of items required for all applications and items required on a case-by-case basis. (The State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State is available on the State Water Board's website at: https://waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html.) Applicants already have the opportunity to address any questions regarding state requirements for certification requests during pre-filing meetings.

Incomplete initial certification requests are the most common cause of extended section 401 timelines. The most effective way to reduce that delay is to ensure and to incentivize applicants for federal licenses to provide the states with a complete initial request for state certification, not to pare down the information required. In the Water Boards' experience, implementation of the requirement that requests for certification include water quality-related information identified by the certifying authority has made it easier for applicants to submit valid certification requests to the Water Boards.

If reference to information identified by certifying authorities as required is not retained in the regulations, the list of information in the proposed section 121.5(c) is insufficient. Although the Proposed Rule requires the submission of "any readily available water quality-related materials," that requirement is too ambiguous if not also accompanied by a more detailed list of minimum requirements. The Proposed Rule should be revised to require the following information because it is also necessary to assess the effect of the proposed discharges on water quality:

- Estimated dates for the project. If specific project dates are not known for a general permit, the certification request can specify that the permit is available for use year-round and that individual project dates are not yet known.

  - The preamble explains the deletion of this requirement because such information may not be known for general permits or licenses. This justification is insufficient to explain why this information would not be required for individual permits or licenses. When known, dates are critical information so that certifications conditions are tailored to projected timeframes. For example, a project that is planned when larger precipitation events are more common or where a particular use occurs (e.g., spawning, water-contact recreation) may need different conditions than when a project is proposing work during a timeframe that is typically dry or is outside the season of a particular use.

- A preliminary or draft list of other federal, state, and local authorizations.
  - Even if this list is preliminary or draft, this information should be part of the readily available information.
- Draft or proposed best management practices and water quality protection measures.
- If available, draft or final environmental review document.
- If applicable, proposed reservoir release schedules, compensatory mitigation and temporary impact restoration plans.
  - If there are any questions as to whether these items are required for a particular project, the applicant and certifying authority can discuss these requirements during the pre-filing meeting.
  - Draft compensatory mitigation and temporary impact restoration plans are two key pieces of information that should be submitted with the application as it frequently takes a significant amount of time to finalize those plans. Information on an applicant's plans regarding mitigation and restoration is vital to assessing the potential water quality impact of an activity.
- Applicable fees.
  - Applicants should also be required to submit any applicable fees, especially if the request for certification is the event that triggers the certifying agency's obligation to act and applicable timelines. Such a requirement is a bright-line determination that can be easily made.

In addition, the Proposed Rule should be revised to specify that if the items in proposed section 121.5(c) are included in the draft application for federal license or permit, the applicant must specify where the information listed in proposed section 121.5(c) is located within that application. For example, FERC licensing applications are lengthy, and the applicant is in a better position to efficiently identify the location of the relevant information. The Proposed Rule should also expressly allow applicants to provide some or all of the information listed section 121.5(c) in draft form to the certifying agency without triggering the start of the reasonable period of time to act. Such an allowance would promote efficacy during pre-filing consultation.

Project proponents should be required to provide the information identified above prior to the beginning of the reasonable period of time to act to ensure that the information is provided in a timely fashion and to disincentivize applicants from engaging in stonewalling to frustrate meaningful state review of projects. U.S. EPA fails to justify why it would be reasonable to start the reasonable period of time based on information that it readily admits "may not necessarily represent the totality of information a certifying authority may need to act on a request." (91 Fed. Reg. at 2018.) The preamble asserts that "[n]othing in the proposed rule would . . . preclude a certifying authority from requesting and evaluating additional information within the reasonable period of time," 91 Fed. Reg. at 2018, and "the burden is on the applicant to . . . work cooperatively to provide additional information as appropriate to facilitate the certification process." (91 Fed. Reg. at 2020.) But because there is no penalty for the applicant's failure to provide the requested information, this burden and these reassurances are meaningless. An unscrupulous applicant may try to exploit timelines to circumvent a state's meaningful review of a project's effects on water quality by refusing to disclose additional information during the appointed period of time for review. Certification authorities have decades of experience in identifying the types of information generally necessary to determine whether a project will comply with water quality standards and need to receive this information with the request for certification. Otherwise, the Proposed Rule would create an incentive for applicants to stonewall or delay until the appointed reasonable period of time to act expires. At a minimum, the Proposed Rule should include a provision expressly allowing the certifying agency to require submission of additional information beyond that provided in the applicant's request for certification and requiring the applicant to respond.

A state's only recourse to avoid waiver when applicants fail to timely provide needed information is denial. More denials will not achieve U.S. EPA's stated goal of creating a more efficient regulatory process. Instead, an increase in denials and reapplications could lengthen decision timelines and prioritize resources on procedural, rather than substantive, review. Moreover, read in conjunction with the Proposed Rule's requirement that denials based on a lack of information describe the water quality information needed, requiring the "reasonable period of time" to include times when information required for a decision is not available creates an incentive to dump information at the end of the reasonable period of time when the certifying agency has neither the time to analyze the impact of the information nor to adequately identify what information remains missing for purposes of a denial. A state's sovereign authority to protect its waters should not hang on optimism that all applicants will act in good faith.

V. The Proposed Rule should affirm that, in accordance with longstanding practice, certification is required for all projects that may result in a discharge to waters of the United States and require a federal license or permit.

U.S. EPA requests comment on whether the best reading of section 401 extends the certification requirement even to those situations where there are no "applicants," but there nevertheless is a potential for a discharge from a federally licensed or permitted activity into waters of the United States. (91 Fed. Reg. at 2020.) Section 401 certification should be required whenever there is a potential for a discharge from a

federally licensed or permitted activity. To the extent U.S. EPA intends to adopt the position that the change from "project proponent" to "applicant" necessitates a novel interpretation that general permits and civil works projects by the U.S. Army Corps of Engineers ("Corps") do not require section 401 certification, the Proposed Rule should retain "project proponent." Indeed, "project proponent" is a more fitting term for section 121.4 when there is not yet an applicant, and for section 121.10 when the applicant has become the regulated entity. "Project proponent" is also the more fitting term where a federal permit does not require notification to the federal agency, as is the case for a number of Nationwide Permits issued by the Corps.

As the preamble acknowledges, the Corps' regulations require certification for the Corps' civil works projects. There is no proffered justification for why these certifications should no longer be required. In addition, the Proposed Rule does not explain how it would apply this interpretation in the context of general permits, but assuming that it would mean that certifications must be sought for every individual project instead of on the general permit, such an interpretation would eliminate the efficiencies of certifications for general permits. Certification of general permits instead of requiring separate certifications every time those permits are used promotes regulatory efficiency, particularly in instances where there are regional general permits for emergencies. In California, the State Water Board has issued certifications for regional general permits in each of the Corps' districts in California for emergencies, when it is critical to obtain swift authorizations and where individual certification of such projects would threaten both the federal and state ability to effectively respond to emergencies.

VI. Requiring statements justifying each certification condition and citations would intrude on state processes and unnecessarily divert resources away from water quality protections to administrative tasks.

The Proposed Rule should not require a statement explaining why each of the included conditions is necessary to assure that the discharge will comply with water quality requirements and a citation to the water quality requirement. Similarly, there should not be a requirement to explain denials for failure to meet "specific water quality standards." Instead, the Proposed Rule should retain these explanations as optional.

Review of state certifications is governed by state law, which establishes the requirements for evidentiary support or findings, and proceeds in state administrative and judicial tribunals. Imposing federal requirements in addition to these state requirements would be unnecessary, create possible inconsistencies, and constitute overreach in directing *how* the state conducts its business. Clean Water Act section 401 sets forth a process requiring state evaluation of the impact of federally permitted actions on water quality and describes the scope of that evaluation and of water quality conditions that may be imposed and incorporated into the federal permit, if issued. Beyond describing the scope and impact of certification, section 401 is silent as to the contents of the state's certification. This structure leaves to the states the decision of the appropriate form and contents of a certification. Section 401 establishes a process unlike the standard-setting and permitting processes in other sections of the Clean Water Act, which are subject to U.S. EPA review and oversight, and which require the state to obtain approval for Clean Water Act implementation authority. Read in conjunction with the changes to the definition of "water quality requirements," the

proposed requirement to include a statement justifying each certification condition and citations appears to be a mechanism for indirectly policing the scope of certification.

This requirement is additionally unnecessary because the connection between a condition and complying with water quality requirements is often already clear. Requiring a statement explicitly connecting the condition to water quality requirements can lengthen the time necessary to issue a certification and shift limited staff resources from protection of water quality to a purely administrative task. Justifications are often highly repetitive, and the inclusion of additional justifications to satisfy federal rulemaking requirements may interfere with the readability of certifications.

VII. Modifications should not require the applicant's agreement or the applicant's agreement to the language of the modification.

The Proposed Rule's changes to section 121.10 should be rejected. Modifications should not require the applicant's agreement or the applicant's agreement to the language of the modification. If any changes to section 121.10 should be made, it should be to remove the requirement for federal agency consent to modifications, not to add an additional layer of approvals.

In order to determine that an activity "will comply" with a state's water quality requirements, the ability to modify conditions to account for changes to the project or its circumstances is important. Making this key ability contingent on a project proponent's agreement could cripple the state's ability to protect its waters in the face of changed circumstances. It may also have the effect that denials of certification, which are now rare, will become more common. By the express terms of section 401 of the Clean Water Act, a state's issuance of certification requires a determination that the activity "will comply" with applicable requirements. That determination may not be supportable if the state lacks authority to make appropriate modifications in response to changing circumstances, the exact contours of which cannot be fully anticipated at the time of certification.

The state's authority for continuing oversight is an essential component of its sovereign interest in water resources, and should not be circumscribed by limits beyond those set by existing constitutional limits and by statutory limits related to the individual federal permit at issue, where a more nuanced balancing of interests tailored to the relevant permit can occur. The flexibility to modify certification conditions is particularly important in the context of permits and licenses with extended terms, such as FERC licenses that remain in effect for decades.

In many cases, project proponent agreement is already implicit because the modifications are being made at the project proponent's request. Timing or design changes in implementation of projects is a common trigger for requiring modifications to certifications to protect water quality. These project changes often do not require a permit or license amendment by the federal agency that would trigger a new certification. The state's ability to act quickly in these circumstances can be important to prevent project delays even for short-term projects. For example, construction is often constrained to a specific time window to avoid the rainy season or species impacts. Specifically obtaining a project proponent's agreement to the language of the

modification, which presumably cannot be given in advance, is likely to lengthen the time necessary to make such modifications.

In other cases, a project proponent's agreement to modification should not be required because such changes should not be subject to applicant preferences. New information on dam safety requirements and new listings of aquatic species under the federal or California Endangered Species Acts are examples of regulatory changes that can trigger the need for revised or additional measures to ensure compliance. As another example, when modifications are needed to address an administrative or judicial decision that remands the certification to the certifying agency for revision, applicant agreement should not be required, and whether the modified language conforms with the administrative or judicial decision should be determined by the applicable tribunal, not the project proponent.

In addition, a project proponent's agreement to modification should not be required when there has been an unforeseeable change of circumstances that necessitates a change in conditions or new conditions. The circumstances under which a project operates can affect the measures necessary to comply with state water quality protection requirements. For example, wildfires can alter reservoir, wetland, and river chemistry in complex ways that can require changes to existing activities and their discharges to maintain a state's water quality. Dredging in or releasing water from a reservoir that has collected runoff after a wildfire can require protections to prevent the release and spread of numerous toxins that were unanticipated at the time of certification.

If project proponent consent to modifications is retained, obtaining a project proponent's agreement as to the language implementing the modification should never be required. This level of micromanagement on the language of a state's operating documents is an inappropriate limit on state sovereignty. Further, agreement by the federal agency on the modification language was not required under the 2023 Rule, and there is no explanation why it should now be.

VIII. Action on another state's objection to the issuance of the federal license or permit may require a longer or more flexible timeline.

The Proposed Rule would add a requirement to proposed section 121.14(a) that the federal agency take action on another State's objection to the federal license or permit within 90 days of the receipt of the objection. U.S. EPA should delete this timeframe. The Proposed Rule does not state what the outcome would be if the timeline is not met, but another state's objection should not be dismissed by default or otherwise prejudiced because the federal agency failed to act within a prescribed amount of time. If a timeline is retained, it should, at a minimum, be extended or have built-in flexibility to be extended because 90 days from the receipt of the objection may be too little time to fully consider competing claims. Public notice must be given at least 30 days in advance of the hearing, and more time may be appropriate to give the states, the project proponent, the Administrator, and the federal agency time to prepare for the hearing. Accordingly, the federal agency would have at most 60 days, but typically less, to make a decision. The federal agency should at least have the flexibility to extend the timeline if necessary to resolve complex interstate issues. U.S. EPA cites an example of the process taking

two years but provides no details as to why the process in that instance took two years or why the time to resolve that dispute was inappropriate. (91 Fed. Reg. at 2035.) The Proposed Rule also provides no explanation for why 90 days is an appropriate timeframe.

IX. U.S. EPA should take more time to gather information regarding the potential ramifications of the Proposed Rule.

U.S. EPA's Economic Analysis for the Proposed Rule is inadequate. U.S. EPA incorrectly "anticipates that the proposed rule would have no environmental impacts." (*Id.* at p. 29.) The basis for this determination is "certification decisions reflective of the narrower scope would be less likely to face legal challenges" and "if courts were to have found that the EPA overstepped its authority in the 2023 Rule, then any supposed or perceived lower level of environmental quality would in fact be illusory." (*Ibid.*) There is no basis for either of these assertions. Because the scope of the certification would be a new standard, it should be expected that there will be more litigation, not less. In contrast to the Proposed Rule, the scope of the 2023 Rule is based on established U.S. Supreme Court precedent. And regardless, U.S. EPA fails to explain how litigation frequency is connected to environmental impacts. As for U.S. EPA's second rationale, no court has found that U.S. EPA overstepped its authority in the 2023 Rule. A hypothetical judicial decision cannot be the basis for an analysis of potential environmental impacts. U.S. EPA fails to acknowledge that if the Proposed Rule narrows both the scope of a certification and the definition of water quality requirements that can be considered when crafting conditions, there would be negative environmental impacts—namely, the water quality impacts that would have otherwise been addressed would not be. These negative environmental impacts would be particularly damaging and lasting for certifications for FERC licenses that remain in place for decades, and for which states have limited or no other avenues through which to address water quality impacts.

U.S. EPA's assessment that there will be no human health impacts, 91 Fed. Reg. at 2038, is similarly unsupported, and impacts to children should be more carefully evaluated. Many water quality protections, including those to ensure that waters are clean enough for recreation, fish consumption, and as a source of drinking water, are integrally related to human health. The Proposed Rule does not explain how limiting states' ability to condition federal permits to protect their waters from impacts from permitted activities would not include a reduction in human health related conditions. Requirements related to pathogen, heavy metal, and toxin testing and management, for example, are important conditions to ensure that FERC-licensed reservoirs do not cause a danger to the public. As U.S. EPA is aware, pathogens, metals and toxins are often most harmful to children.

Throughout the Economic Analysis, U.S. EPA makes similarly unsupported assertions. U.S. EPA concludes that the proposed revisions to section 121.7 would have a *de minimis* impact on the certifying authority's workload despite acknowledging that some states expressly commented during pre-proposal outreach that requiring justifications for conditions would be time consuming. (Economic Analysis, at p. 20.) This has also

been the Water Boards' experience with requiring justifications during the brief period during which the 2020 Rule was in effect. In addition, U.S. EPA concludes that the proposed changes to section 121.15 would expedite the section 401(a)(2) process without providing any analysis as to what the current length of the process is. (*Id.* at p. 27.) Despite stating that there would be an expedited process, U.S. EPA also concludes that the proposed timeframe would have a *de minimis* impact. (*Ibid*.) With respect to modifications, U.S. EPA acknowledges the increased burden to certifying agencies for obtaining applicant agreement to modifications and to the language of the modification with no discussion of possible benefits to certifying agencies. (*Id.* at p. 22.) Nevertheless, U.S. EPA later lists modifications as an example of a provision that would lead to cost savings for *both* certifying authorities and applicants. (*Id.* at p. 29.)

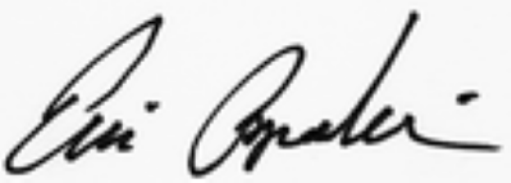
In addition, the Economic Analysis demonstrates that the Proposed Rule is a solution in search of a problem. In its Fact Sheet, U.S. EPA claims, without substantiation, that implementation of the 2023 Rule "blocked vital energy, infrastructure, and development projects critical to America's economic and national security." Relying on U.S. EPA's summary of the certification decisions issued by the Corps from November 2023 through September 2025, less than one percent of projects were denied. (*Id.* at pp. 42-43.) U.S. EPA does not have descriptive information about the projects, including the rationale for denials, and accordingly provides no basis for its claim that denials have been contrary to economic and national security. (*Id.* at p. 12.) The Economic Analysis also states that it cannot assess whether the Proposed Rule would result in a change in the number of denials. (*Id.* at p. 30.) The Fact Sheet asserts that there has been "abuse" of the section 401 process without any discussion regarding the alleged overreach and why regulatory changes are necessary.

Aside from U.S. EPA's own rushed analysis, the 30-day comment period was inadequate to meaningfully analyze the ramifications of the Proposed Rule. Additional time is also warranted in light of the pending "Updated Definition of the Waters of the United States," which proposes to redefine the scope of "waters of the United States." (90 Fed. Reg. 52498-546 (Nov. 20, 2025).) The public comment period on those regulations was also short, just 45 days that overlapped several federal holidays. The Updated Definition of the Waters of the United States purports to implement congressional intent to ensure the primary responsibilities and rights of states to regulate their land and water resources. (Id. at 52514.) That goal cannot be squared with this Proposed Rule, which would undercut the ability of states to protect their own resources. The Water Boards urge U.S. EPA to take more time to gather information regarding the potential ramifications of the Proposed Rule and to specifically address how the Proposed Rule will interact with the Updated Definition of Waters of the United States.

We encourage U.S. EPA to continue to consult with the states and Tribes as it considers public comments and if the rulemaking moves forward. If you have questions

regarding this submittal, please contact Serena Liu at serena.liu@waterboards.ca.gov and Marianna Aue at marianna.aue@waterboards.ca.gov.

Sincerely,



Eric Oppenheimer
Executive Director
State Water Resources Control Board