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The Honorable Lee Zeldin
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave NW, Suite 1101A
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Submitted Electronically via Regulations.gov

Re: Comments of States of West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Utah on “Updating the Water Quality Certification Regulations” (Docket No. EPA-HQ-OW-2025-2929)

Dear Administrator Zeldin:

Thank you for the opportunity to comment on the Environmental Protection Agency’s proposed rule under the Clean Water Act, “Updating the Water Quality Certification Regulations.” 91 Fed. Reg. 2,008 (Jan. 15, 2026) (“Proposed Rule”).

As we explain here, the Proposed Rule appropriately shifts the focus under Section 401 back onto specific *discharges*—and whether those discharges in turn comply with specified water quality requirements. Congress did not intend the state certification process to provide an avenue for States to broadly attack disfavored infrastructure or development projects for reasons divorced from the specific environmental concerns animating the Act. CWA permitting is meant to facilitate responsible development, not kill it. The Proposed Rule mirrors that congressional intent reflected in the statute’s text.

To be sure, the Clean Water Act establishes a cooperative federalism scheme that leaves plenty of room for the States. After all, Congress commanded the federal government to “co-operate” with States and local agencies. 33 U.S.C. § 1251(g). That explains why so many of us have spoken up for state discretion under the CWA in a variety of other contexts.

But cooperative federalism is not an invitation for gamesmanship. And States too often have mistaken cooperation for obstruction. Indeed, the Federal Energy Regulatory Commission has noted for years how it is “commonplace for states to use Section 401 to hold federal licensing hostage.” *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019). Oil and gas pipelines, liquid natural gas and coal export terminals, and other energy-related facilities have proven to be favored targets of state overreach.

Because authority under Section 401 is directed at a narrow set of “waters of the United States,” 33 U.S.C. § 1341 (referring to “navigable waters”), the exercise of that authority “is not a sovereign state right,” *Islander E. Pipeline Co., LLC v. Conn. Dep’t of Envtl. Prot.*, 482 F.3d 79, 93 (2d Cir. 2006). In fact, “the issuance of a Water Quality Certification is not purely a matter of state law.” *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’t Prot.*, 833 F.3d 360, 371 (3d Cir. 2016). So when a State uses the certification process as a pretext for reviewing activities well beyond a project’s discharges, uses delay as a *de facto* development veto, or employs onerous conditions to make important infrastructure impossible, EPA can appropriately speak up.

In the Proposed Rule, EPA has done just that—and rightly so. “Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of [energy] to be borne by utility consumers in other states.” *Nat’l Fuel Gas Supply Corp. v. Pub. Serv. Comm’n of State of N.Y.*, 894 F.2d 571, 579 (2d Cir. 1990). And indeed, America needs more critical infrastructure, especially in the energy space. Section 401 can serve its environmental objectives while not standing in the way of that necessary progress.

The Proposed Rule recognizes these commonsense truths, and EPA would do well to adopt it as soon as possible.

DISCUSSION

The Proposed Rule is a welcome step towards putting a stop to certain States’ destructive efforts under Section 401. The Proposed Rule does a commendable job of addressing three issues of concern.

Scope

Scope is the first problem with the present regime. Section 401 says that federal permit applicants conducting activities that “may result in any *discharge* into the navigable waters” must obtain “a certification from the State in which the *discharge* originates or will originate”; the certification must provide that “any such *discharge* will comply with [certain provisions of the CWA].” 33 U.S.C. § 1341(a)(1) (emphasis added). Likewise, the same section tasks an affected State with determining whether “such *discharge* will affect the quality of its waters so as to violate any water quality requirements in such State” after EPA notification to the State. *Id.* § 1341(a)(2) (emphasis added). Congress thus voiced a repeated concern with the *discharge* that a project might

produce—and nothing else. As the agency has recognized in the Proposed Rule, ignoring that message risks offending both the federalism canon and the major-questions doctrine. 91 Fed. Reg. at 2,026.

A state regulator operating under Section 401 thus has “neither authority nor responsibility to engage in balancing economic, energy, environmental or other factors or to reflect public interest other than as it is set forth in the State water quality standards.” *Power Auth. of State v. Williams*, 457 N.E.2d 726, 731 (N.Y. 1983). To think otherwise would upset not just the balance found in the Clean Water Act but also “the careful balance between state and federal interests that Congress struck in the Federal Power Act.” *PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 700 (1994) (Thomas, J., dissenting).

Despite the statute’s concentrated focus, States have used Section 401 as a greenlight to evaluate covered projects or activities *as a whole* for reasons distant from discharges into jurisdictional waters of the United States (an approach later endorsed by the Biden administration, 40 C.F.R. § 121.3 (2023)). In perhaps the most infamous example, Montana and Wyoming were compelled to file an original action against Washington in the U.S. Supreme Court after Washington used Section 401 as a pretext to block construction of a key coal export terminal on political and other non-water-related grounds. *See* Walter G. Wright, *Commerce Clause/401 Certification: Montana/Wyoming U.S. Supreme Court Bill of Complaint Alleging Washington State Discriminatory Denial*, MITCHELL WILLIAMS LAW FIRM (Feb. 4, 2020), <https://tinyurl.com/atk2ddry>.

States cannot use Section 401 to address nonpoint source discharges, effects on state (non-WOTUS) waters, or policy questions like climate change and land use. *See, e.g.*, Kristen Walker, *A Smarter Clean Water Rule Would Strengthen U.S. Infrastructure*, THE HILL (Feb. 6, 2026), <https://tinyurl.com/5n6t9wfx> (“Kalama Methanol Plant in the Pacific Northwest ... was denied due to non-section 401 issues of greenhouse gas emissions and climate impacts.”). Opposition to coal, concerns about train noise, endangered species issues, coastal protection, religious respect for certain waters, and other considerations running far afield from a *discharge* simply should not play a role in Section 401 certifications. *See* Deidre Duncan & Clare Ellis, *Clean Water Act Section 401: Balancing States’ Rights and the Nation’s Need for Energy Infrastructure*, 25 HASTINGS ENVTL. L.J. 235, 251 (2019) (providing other examples of such considerations playing a role in Section 401 certification decisions).

The Proposed Rule appropriately resets the board, providing that a State should limit its review under Section 401 “to assuring that a discharge from a federally licensed or permitted activity”—that is, “a discharge from a point source into waters of the United States”—“will comply with applicable and appropriate water quality requirements.” 91 Fed. Reg. at 2,040. We appreciate how EPA has restored a three-part nexus for review, focusing on (1) the discharge, (2) the waters of the United States, and (3) a State’s water-quality requirements.

Timeliness

Delay is a second problem that has plagued the Section 401 regime. Under the CWA, “[i]f the State ... fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.” 33 U.S.C. § 1341(a)(1). The provision prevents States from “indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification.” *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). Or, as the sponsor of this provision explained, it was meant “to do away with dalliance or unreasonable delay and require a ‘yes’ or ‘no,’” from certifying states. See 115 Cong. Rec. 9,259 (statement of Rep. Edmondson).

But “dalliance” has too often remained the order of the day. Just in New York, for instance, the relevant environmental regulator has used delay exceeding the one-year cutoff to stall or kill off at least three major pipeline projects. Steven A. Weiler & Marcia A. Stanford, *New York’s Denial of Water Quality Certification for Three FERC-Authorized Pipelines: Flagrant Fiat or Valid Veto?*, 39 ENERGY L.J. 503, 511-22 (2018). Again, New York resumed its efforts to weaponize Section 401 against one of the pipelines just last week. See Daniel Markind, *New York Again Tries to Block Constitution Pipeline*, FORBES (Feb. 10, 2026, 10:07 am), <https://tinyurl.com/n6hkazsw>. Thanks to New York’s obstruction, this last project has dragged on now for more than a decade.¹

The Proposed Rule appropriately eliminates many of the tricks that States have used to “blur the bright-line rule into a subjective standard.” *N.Y. State Dep’t of Env’t Conservation v. FERC*, 991 F.3d 439, 448 (2d Cir. 2021) (cleaned up); see also *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (repudiating state efforts to use delays to “circumvent a congressionally granted authority over the licensing, conditioning, and developing of a[n energy] project”). For one, the Proposed Rule slams the door on abusive, *seriatim* requests for information by specifying the 40 pieces of information that constitute a complete application triggering the reasonable period. 91 Fed. Reg. at 2,018. States should not be permitted to pile on their own requirements for completeness, as that allowance would permit the *seriatim* requests to start anew despite the list. For another, the Proposed Rule forecloses the coercive practice of having applicants withdraw and resubmit their applications for purposes of restarting the clock. *Id.* at 2,022. That exercise does nothing but mock congressional intent. And finally, the Proposed Rule erases the unjustified bases for “extensions” of the reasonable time found in the past iteration of this rule. *Id.* at 2,021. Those loopholes only created uncertainty about final deadlines.

The agency might consider taking one more step: eliminating denials “without prejudice.” Oddly, the D.C. Circuit has rejected the reasonable argument that “State agencies could extend the time

¹ The problem is so pervasive that even the Biden EPA pushed back on attempts to delay. For instance, one court suggested that a State might avoid waiver merely by “tak[ing] timely action to review and process a certification request ... even if it takes the State longer than a year to make its final certification decision.” *N.C. Dep’t of Env’t Quality v. FERC*, 3 F.4th 655, 670 (4th Cir. 2021); see also generally, e.g., Christine Y. LeBel, *Does “To Act” Under CWA § 401 Mean “Final Action?”*, 32 NAT. RESOURCES & ENV’T 53 (2018) (general counsel for Massachusetts regulator arguing the same). EPA was thus compelled to clarify that “[a] certifying authority may act on a request for certification in one of four ways: grant certification, grant certification with conditions, deny certification, or expressly waive certification.” 40 C.F.R. § 121.7(a) (2023).

for decision indefinitely by denying one certification request after another without prejudice, thus nullifying section 401's one-year limit." *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1184 (D.C. Cir. 2022). This rule provides the perfect chance to correct that mistake, which looks to have been premised on unstated *Chevron* deference. *Id.* at 1184 (finding that denial without prejudice was acceptable because it reflected "rational judgment").

Especially with a narrower focus on the actual discharge into waters of the United States (instead of the roving project-wide review that has come to characterize Section 401 review in some places), any concerns that these changes will leave States with too little time to act are overstated. We have confidence that States can complete their work within the one-year period once they receive the information identified in the Proposed Rule's uniform standard, especially considering that state regulators are often subject to separate state timeliness requirements, too. *See, e.g., W. VA. CODE R. § 47-5A-4.* And we appreciate the Proposed Rule's acknowledgement that States can still request additional information from applicants, preserving some flexibility for States depending on local needs. *See* 91 Fed. Reg. at 2,018. Project proponents will be motivated to submit information quickly, lest they risk a denial for incompleteness. *See* 40 C.F.R. § 121.7(e).

Altogether, the Proposed Rule ensures that States remain equipped to issue understandable, defensible certification decisions in a timely way. At the same time, it provides the kind of regulatory clarity that's necessary to launch massive capital projects like those subject to the Section 401 process.

Continued Oversight

The third problem concerns continued state oversight of covered projects even after certification is complete. Through broad certification conditions and lingering threats of modifications, States can effectively appoint themselves project superintendents for the duration of the work. Victor Y. Xu, *EPA To Limit States' Role Under CWA In Federal Permitting*, MARTENS (Feb. 5, 2026), <https://tinyurl.com/3hkw2ry2> (providing examples of broad state-imposed conditions "that can significantly influence project development"). The Proposed Rule effectively forecloses that approach in two ways.

First, the Proposed Rule rightly cabins conditions to those addressing discharges, paralleling the scope of the certification itself. 91 Fed. Reg. at 2,026. We see no reason to believe that Congress intended for States to examine *discharge* compliance while simultaneously empowering States to impose *non-discharge*-related conditions.² That setup would enable States to give their own State laws the force of federal law without any showing that the conditions were strictly necessary under the federal scheme. *See Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 9 (D.C. Cir. 2011) ("The CWA does not merely authorize state certifications; it incorporates those certifications into federal law."). Certainly nothing in Section 401(d) hints at that odd result, and Congress does not "hide

² That said, the statute would seem to allow for discharge-related conditions beyond mere monitoring, as the statute allows States to incorporate "other limitations" into their certifications. 33 U.S.C. § 1341(d). We see no basis to read the subsequent and separate reference to "monitoring requirements" as a restriction on the "other limitations" language. *See* 91 Fed. Reg. at 2,027 (raising question).

elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). Quite the opposite: Congress said the conditions are meant to ensure compliance with state-law requirements “set forth in such certification,” 33 U.S.C. § 1341(d)—a certification confined to discharge.

The proposed additional requirements for a State’s written explanation of conditions should press the certifying State to respect this restriction. 91 Fed. Reg. at 2,029. “The reasoned explanation requirement” should ensure that “agencies offer genuine justifications for [their] important decisions, reasons that can be scrutinized by courts and the interested public.” *Dep’t of Com. v. New York*, 588 U.S. 752, 785 (2019). Still, the scrutiny will come through protracted litigation. And litigation is no guarantee; indeed, some courts have demanded that States impose *additional* expansive conditions to survive judicial review. *See, e.g., Sierra Club v. W. Va. Dep’t of Env’t Prot.*, 64 F.4th 487, 506 (4th Cir. 2023). To avoid leaving it to the courtroom, EPA might consider granting itself a role in reviewing conditions (before adoption) or controlling enforcement (after adoption) to confirm they fall within the statute’s scope.

Second, the Proposed Rule appropriately restrains modifications. As the agency recognizes, “CWA section 401 does not expressly authorize or prohibit modifications of certifications.” 91 Fed. Reg. at 2,031; *contrast with* 42 U.S.C. § 7410(a)(2)(H) (expressly providing for revisions of state-submitted plans under the Clean Air Act). And as the above discussion suggests, the statute treats certification as a flashpoint-in-time assessment, not a device through which States can seize indefinite control of a project. So at most, EPA should recognize that authority only cautiously. The Proposed Rule does so. By requiring agreement from all stakeholders for a modification—State, federal agency, and regulated party alike—EPA avoids creating a backdoor process through which conditions that would not have survived initial review can nevertheless be snuck through. The consent requirement respects Congress’s wish that state review be confined to no more than “one year.” 33 U.S.C. § 1341(a).

CONCLUSION

Especially in the energy space, allowing States to delay, obstruct, and impede critical interstate infrastructure projects through a CWA-based “veto power” would “subordinate to the control of the State the ‘comprehensive’ planning” that federal law grants to “representatives of the Federal Government.” *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm’n*, 328 U.S. 152, 164 (1946). The Proposed Rule ends any such runaway veto power. While Section 401 is an appropriate and meaningful power for States, meaningful safeguards like those embodied in the Proposed Rule are needed, too. We thus urge the agency to finalize the Proposed Rule as soon as possible.

Sincerely,



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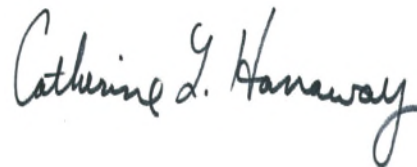
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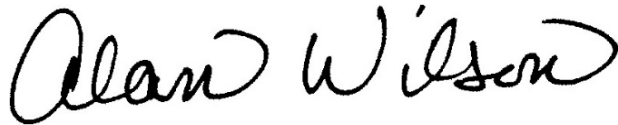
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