February 17, 2026

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

Submitted electronically via Regulations.gov

Re: Prime Mover Institute's Comment on the Proposed Rule Entitled: Clean Water Act Section 401 Water Quality Certification Improvement Rule, 91 Fed. Reg. 2008 [EPA-HQ-OW-2025-2929] (Jan. 15, 2026)

Dear Administrator Zeldin:

Prime Mover Institute respectfully submits these comments in response to the Environmental Protection Agency's proposed rule on Clean Water Act Section 401 Water Quality Certification, 91 Fed. Reg. 2008 (Jan. 15, 2026). Prime Mover Institute commends EPA for undertaking this rulemaking and for grounding the proposed rule in the best reading of the statutory text, as the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), now requires. The proposed rule is a long-overdue correction, returning the scope of Section 401 certification to the "discharge"—the word Congress chose in 1972 and the word a handful of states have spent the last decade trying to erase—and establishes procedural safeguards to prevent the systematic abuse that has blocked billions of dollars in critical energy and infrastructure investment.

For too long, Section 401 has been used by a small number of states not as a tool for protecting water quality, but as a veto over federally authorized projects they oppose on policy grounds unrelated to what enters the water. The Constitution Pipeline was abandoned after twelve years. The Millennium Bulk Terminals developer went bankrupt after a decade. The Jordan Cove LNG project was killed by serial information requests. Four FERC hydropower applications have waited more than a decade for a certification decision that Congress said must come within one year. These are not edge cases. They are the predictable consequences of a regulatory framework that lost its connection to the statutory text.

The Prime Mover Institute is a new public interest organization dedicated to advancing energy dominance in America. We work with coalition partners to engage in rulemaking processes with technical information and legal arguments, calling attention to the impacts regulation has on citizens, the grid, and the rule of law.

America stands at a crossroads. A legacy of bad policy and worse ideas threatens the nation with blackouts and bill hikes, right as demand for energy rises. In order for America to scale up its energy production and avoid the worst-case scenarios, we cannot cling to the policies and procedures that got us here. Fortunately, both policymakers and the private sector realize the need for dramatic change. And courts have begun to look more skeptically at accretions of arbitrary power, accretions that government officials used to thwart energy production and use. This points the way to a future of streamlined regulation, taxpayer savings, and cheaper, more abundant energy for all.

The main obstacle to energy dominance is what Robert Bryce calls the "anti-industry industry," the non-profits and lawyers dedicated to defending the status quo. These groups have used litigation, regulatory comments, and intimidation to forestall change. They will no doubt keep at it. But, despite their vast funding, they will not be able to maintain a policy regime that's so far out of touch with the American public and their elected representatives. So long, that is, that the advocates of energy dominance show up to defend their ideas.

In the words of Vaclav Smil, "prime movers are energy converters able to produce kinetic (mechanical) energy in forms suitable for human uses." In the same way, Prime Mover Institute helps convert insight into action.

Thank you for the opportunity to comment.

Respectfully submitted,

/Russell Greene/
Russell Greene
Managing Director
Prime Mover Institute

Table of Contents

Summary of Argument

1. Background. The statutory text, regulatory history, and case law all confirm that Section 401 certification authority is anchored to the "discharge," not the "activity as a whole." Congress replaced "activity" with "discharge" in the 1972 amendments. The Thomas-Scalia dissent in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), correctly identified this textual limitation. *Loper Bright*'s overruling of *Chevron* deference removes the doctrinal foundation of the *PUD No. 1* majority's expansive reading, making the dissent's analysis the "best reading" of the statute. Meanwhile, documented state abuse of certification authority—from New York to Washington to Oregon—has imposed billions of dollars in costs and delayed critical infrastructure projects for years or decades.

2. Scope of Certification (RFCs 1, 5). Prime Mover Institute supports EPA's proposed discharge-focused scope and urges EPA to state explicitly in the preamble that the *PUD No. 1* majority's "activity as a whole" reading is no longer the best reading post-*Loper Bright*. The scope of review should be limited to impacts on waters of the United States.

3. Water Quality Requirements (RFCs 2, 3, 4, 6). Limiting the scope of certification to discharges is necessary but not sufficient. Unless EPA also narrows the definition of "water quality requirements" that states may impose as conditions under Section 401(d), states will retain a backdoor to regulate the same non-water-quality matters the scope limitation is designed to exclude. The phrase "other appropriate requirement of State law" must be narrowed under the *ejusdem generis* canon to state requirements implementing the CWA's enumerated discharge-control provisions—the reading Justice Thomas advanced in *PUD No. 1* and that *Loper Bright* now compels because it is the most faithful reading of the statute, not a reasonable reading preferred by the EPA. To prevent circumvention through creative state-law drafting, EPA should also require that such provisions be EPA-approved before they may be imposed as certification conditions. The comma-placement argument in Section 401(d) provides an independent textual fallback, supporting a reading that limits the general phrase to monitoring requirements rather than freestanding substantive conditions.

4. Request Contents and Timeline Enforcement (RFCs 8, 9, 10, 11). EPA is right to propose a uniform federal standard for certification request contents and to remove state authority to define additional requirements—reforms that are essential to preventing certifying authorities from manipulating the start of the one-year statutory clock. The proposed elimination of automatic extensions is equally sound. On withdrawal-and-resubmission, the proposed prohibition addresses the most overt form of the scheme condemned in *Hoopa Valley*, but Prime Mover Institute urges EPA to adopt additional safeguards in the final rule to close the enforcement gap identified in *Village of Morrisville v. FERC*, 136 F.4th 1117 (D.C. Cir. 2025).

5. Decision Contents and Transparency (RFCs 12, 13, 14). The proposed rule correctly identifies mandatory decision contents as the enforcement mechanism for the narrowed certification scope. A narrowed scope means nothing without a mechanism to ensure compliance, and EPA's proposed condition-by-condition justification linked to specific water quality requirements provides that mechanism. Converting decision contents from recommended to mandatory, removing the public notice compliance statement, and codifying a minimum 30-day public comment period are all well-considered reforms that Prime Mover Institute endorses.

6. Post-Certification Modifications (RFCs 15, 16, 17). EPA's proposed tripartite-consent framework—requiring written agreement from the federal agency, certifying authority, and applicant before any modification—is a sound approach that protects investment-backed reliance interests. Prime Mover Institute urges EPA to go one step further and include explicit regulatory text requiring federal agency agreement on the specific language of any modification. The continued prohibition on unilateral modifications and reopener conditions, maintained across three successive administrations, reflects the strength of the statutory argument and the practical importance of post-certification regulatory stability, and should be finalized as proposed.

7. Section 401(a)(2) Neighboring Jurisdiction Process (RFCs 18-26). EPA's proposed 90-day hearing timeline and six-month concurrent trigger would, together, prevent the 401(a)(2) process from becoming another instrument of delay—closing the most significant remaining gap in the Section 401 timeline framework. The proposed specificity requirements for neighboring state objections are equally important. Prime Mover Institute urges EPA to go further and establish categorical determinations excluding classes of discharges with no realistic interstate impact from the 401(a)(2) process entirely.

8. EPA's Rationale for Reversal. This is not an ordinary change of course. When the Supreme Court removed the doctrinal foundation of the 2023 Rule's interpretation in *Loper Bright*, it did not leave EPA with a policy choice—it left EPA with a legal obligation. The 2023 Rule was wrong on the merits. It placed no functional limitation on state certification authority, producing exactly the unconstrained veto power Justice Thomas warned of thirty years ago. Reliance interests favor reversal, not retention—the regulated community has consistently supported a discharge-focused framework across three successive rulemakings, while the 2023 Rule's short, contested life generated no serious reliance interests worth preserving. The 2022 rulemaking record already contains the arguments the proposed rule now accepts, and EPA should strengthen the administrative record further by incorporating additional economic data documenting the full costs of the "activity as a whole" framework.

1. Background

1.1. The Statutory Framework: Congress Conditioned Certification on the Discharge, Not the Activity

Section 401(a)(1) of the Clean Water Act provides:

> 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 . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1). The certification requirement is triggered by an activity "which may result in any discharge," and the certification itself addresses whether "any such discharge will comply" with enumerated CWA provisions. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). Congress did not authorize states to certify that the *activity* complies with water quality requirements. It authorized them to certify that the *discharge* complies—and the difference between those two words is the difference between a focused water quality review and an unconstrained veto. This distinction is not incidental—it is the product of deliberate statutory revision and lies at the heart of the current rulemaking.

The enumerated CWA provisions reinforce the discharge-focused scope. Section 401(a)(1) requires compliance with sections 301 (effluent limitations for point source discharges), 302 (water quality related effluent limitations), 303 (water quality standards), 306 (new source performance standards), and 307 (toxic pollutant and pretreatment standards). 33 U.S.C. § 1341(a)(1). Each of these provisions regulates point source discharges into navigable waters. None authorizes regulation of entire activities, project operations, or impacts unrelated to what enters the water.

Section 401(d) adds that any certification "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant" will comply with those same provisions and "with any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Some have seized on the word "applicant" in this subsection to argue that certification conditions may extend to the activity as a whole. But as Justice Thomas explained in his *PUD No. 1* dissent, this reading is mistaken: "while § 401(d) permits a State to place conditions on a certification to ensure compliance of the 'applicant,' those conditions must still be related to discharges." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 726–27 (1994) (Thomas, J., dissenting). This interpretation "best harmonizes the subsections of § 401." *Id.* at 727. Reading 401(d)'s reference to the "applicant" to expand the entire scope of review beyond discharges renders the operative language of 401(a)(1)—"any such discharge will comply"—superfluous. Basic principles of statutory construction forbid that result.

1.2. The 1972 Amendments: Congress Deliberately Narrowed the Certification Scope from "Activity" to "Discharge"

The statutory history speaks for itself. Congress struck the word "activity" from Section 401 and replaced it with "discharge" in the 1972 amendments. Before 1972, the Federal Water Pollution Control Act required an applicant to certify that "such *activity* will be conducted in a manner which will not violate applicable water quality standards." Pub. L. 91-224, § 21(b)(1), 84 Stat. 91, 108 (1970) (emphasis added). When Congress enacted the comprehensive 1972 CWA amendments, it replaced this language with the current text requiring certification that "any such *discharge* will comply with the applicable provisions" of the enumerated CWA sections. 33 U.S.C. § 1341(a)(1) (emphasis added).

This was not a drafting oversight. Congress knew the word "activity"—it had used it just two years earlier—and chose to remove it. Congress replaced it with the word "discharge" and simultaneously replaced the broad reference to "applicable water quality standards" with a list of specific CWA provisions—all of which regulate point source discharges. When Congress uses different words in amending a statute, courts presume the change was intentional and meaningful. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). The 1972 amendments demonstrate that Congress considered—and rejected—an activity-based scope for Section 401 certification.

EPA's proposed rule correctly acknowledges this history. As the preamble explains, EPA's original 1971 regulations predating the 1972 amendments "were not based on the statutory text before the Court" in *PUD No. 1* and "contained outdated statutory terminology, most importantly 'activity' rather than 'discharge.'" 91 Fed. Reg. 2008, 2025 (Jan. 15, 2026). For over two decades, the regulatory text carried forward pre-1972 language that Congress had deliberately removed from the statute—a textual mismatch that no party brought to the

Supreme Court's attention in *PUD No. 1*. *Id.* The *PUD No. 1* majority's holding rested on the language of a statute that Congress had already repealed.

1.3. The Regulatory History: From Decades of Informal Practice to Three Major Rulemakings

EPA's 1971 regulations and the long period of informal administration. EPA first promulgated Section 401 regulations in 1971, prior to the comprehensive 1972 CWA amendments. 36 Fed. Reg. 22487 (Nov. 25, 1971). These regulations used the pre-1972 statutory language, requiring that the certifying state find "reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3) (1993) (emphasis added). For the next several decades, EPA did not undertake a major revision of its Section 401 regulations, leaving the pre-1972 "activity" language embedded in the regulatory text even as the statute itself required certification focused on "discharges." During this period, EPA and states generally administered Section 401 through informal guidance, and certification practices varied widely across jurisdictions.

The 2020 Rule. In 2020, EPA undertook its first comprehensive update of the Section 401 regulations in nearly fifty years. 85 Fed. Reg. 42210 (July 13, 2020). The 2020 Rule aligned the regulatory text with the post-1972 statutory language, limiting the scope of certification to "discharges" rather than "activities." *Id.* at 42286. It also established standardized request contents, strengthened the one-year timeline for certification decisions, and created a uniform federal framework for the certification process. The 2020 Rule was the first regulation to correct the longstanding mismatch between the pre-1972 regulatory language and the post-1972 statutory text. The Northern District of California vacated the 2020 Rule in *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013 (N.D. Cal. 2021), rev'd and remanded, 60 F.4th 583 (9th Cir. 2023), although the vacatur was subsequently stayed pending appeal.

The 2023 Rule. The Biden Administration promulgated a replacement rule in 2023 that reversed course and expanded the certification scope to the "activity as a whole." 88 Fed. Reg. 66558 (Sept. 27, 2023). The 2023 Rule codified the *PUD No. 1* majority's approach, notwithstanding the textual problems with that decision discussed further below. It also restored state authority to define additional contents for certification requests—a provision that commenters warned would allow states to delay or effectively prevent the start of the one-year statutory clock. The 2023 Rule was immediately challenged in *Louisiana v. EPA*, No. 2:23-cv-01714, 2024 WL 994651 (W.D. La. Mar. 7 2024), by a coalition of eleven states and major industry intervenors, including the American Petroleum Institute, the Interstate Natural Gas Association of America, and the National Hydropower Association.

The 2026 Proposed Rule. EPA now proposes to replace the 2023 Rule with a discharge-focused framework that reflects the best reading of the statutory text. 91 Fed. Reg. 2008 (Jan. 15, 2026). The proposed rule returns the scope of certification to point source discharges, removes state authority to define additional request contents, and strengthens timeline enforcement provisions. EPA grounds its reversal in the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which overruled *Chevron* deference and requires agencies to adopt the "best reading" of statutory text rather than merely a "reasonable" one. *Id.* at 400. As EPA explains, the 2023 Rule's "activity as a whole" interpretation "does not reflect this best reading of the statute." 91 Fed. Reg. at 2023. EPA's proposed interpretation "mirrors some of the reasoning discussed in the dissenting opinion" in *PUD No. 1*. *Id.* at 2025 n.37. In a post-*Loper Bright* world, this is the reading that best honors the text Congress enacted.

Prime Mover Institute commends EPA for squarely confronting this regulatory history and for acknowledging that the agency's own decades-old regulatory text—not the statute—was the source of confusion about Section 401's scope. The proposed rule represents not a departure from congressional intent, but a return to it.

1.4. The Relevant Case Law

The Supreme Court's 1994 decision in *PUD No. 1 of Jefferson County* expanded state certification authority under *Chevron* deference—a framework that *Loper Bright* has now dismantled. The lower courts, meanwhile, have consistently enforced the statute's one-year timeline against states that sought to delay federal licensing indefinitely. Read together, these decisions confirm that EPA's 2026 Proposed Rule represents the best reading of the statutory text. Certification authority attaches to the *discharge*, states must act within one year, and the era of open-ended regulatory expansion under *Chevron* is over.

1.4.1. *PUD No. 1 of Jefferson County v. Washington Department of Ecology* Was Built on Chevron Deference, and Loper Bright Has Removed Its Foundation

The majority opinion in *PUD No. 1* extended Section 401 authority well beyond the statutory text—but it did so by deferring to EPA's interpretation rather than independently reading the statute. In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Supreme Court held, 7-2, that Section 401(d) authorizes states to impose conditions on the "activity as a whole," not merely on the specific discharge triggering the certification requirement. *Id.* at 711–12. The majority reasoned that Section 401(a)(1) identifies the categories of activities "subject to certification—namely, those with discharges," while Section 401(d) "is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *Id.*

The majority's principal textual argument turned on Section 401(d)'s reference to the "applicant." Because 401(d) requires conditions "necessary to assure that any applicant . . . will comply" with water quality requirements, 33 U.S.C. § 1341(d), the majority reasoned that certification extends to the applicant's activity as a whole. 511 U.S. at 711–12. But this argument conflates the *scope* of certification with the *mechanism* for achieving compliance. Section 401(a)(1) defines what is being certified—that the "discharge" will comply. Section 401(d) addresses how compliance is assured—by imposing conditions on the "applicant." Reading 401(d)'s reference to the "applicant" to expand the entire scope of review beyond discharges renders the operative language of 401(a)(1)—"any such discharge will comply"—superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Moreover, the majority arrived at this reading only after crediting EPA's 1971 regulations, which used the pre-1972 term "activity" rather than the statutory term "discharge." *PUD No. 1*, 511 U.S. at 712. The majority's textual reasoning thus depended on treating EPA's regulatory gloss as the baseline for interpretation—the very analytical move that *Chevron* authorized.

Critically, this reading depended on judicial deference to EPA's expansive interpretation. The majority did not hold that the "activity as a whole" reading was the *only* permissible reading—it held that EPA's broad construction was a *reasonable* one, entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

The Thomas-Scalia dissent read the statute differently, and thirty years of experience have vindicated that reading. Justice Thomas, joined by Justice Scalia, dissented on the ground that the majority's reading "places no meaningful limitation on a State's authority under § 401 to impose conditions on certification." *PUD No. 1*, 511 U.S. at 724 (Thomas, J., dissenting). The dissent walked through the statutory structure with precision. Section 401(a)(1) requires that "any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters" must obtain a certification "that any such discharge will comply with the applicable provisions of sections" 301, 302, 303, 306, and 307. 33 U.S.C. § 1341(a)(1). The dissent observed that these cross-referenced provisions—Sections 301, 302, 303, 306, and 307—are discharge-related provisions. They address effluent limitations, water quality standards as applied to discharges, and national standards of performance for point sources. *PUD No. 1*, 511 U.S. at 724–26 (Thomas, J., dissenting). The phrase "shall comply with" in Section 401(d) therefore limits state conditions to ensuring the *discharge* meets these discharge-related standards—not to regulating the project in its entirety.

The dissent further argued that the majority's interpretation "significantly disrupts the careful balance between state and federal interests" embodied in the Federal Power Act. *Id.* at 732. Under the majority's reading, a state could exercise veto power over any federally licensed activity—transforming Section 401 from a focused water quality review into an unbounded permitting process.

After *Loper Bright*, the question is no longer whether EPA's broad reading is "permissible"—it is whether it represents the "best reading" of the statute. As explained in Section 1.4.5 below, *Loper Bright* overruled *Chevron* and requires courts to independently determine statutory meaning. Under this framework, the Thomas-Scalia dissent's textual analysis—grounded in the statutory text's repeated use of "discharge" and its enumeration of discharge-specific CWA provisions—represents the best reading of Section 401. Section 2 of these comments develops the prescriptive implications of this analysis for the proposed rule.

1.4.2. *S.D. Warren Co. v. Maine Board of Environmental Protection* Expanded What Triggers Certification but Did Not Expand the Scope of Review

The Supreme Court's unanimous decision in *S.D. Warren* broadened the category of activities that trigger Section 401—but it reinforced, rather than expanded, the textual focus on "discharges." In *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), the Court held that water flowing through a hydroelectric dam constitutes a "discharge" for purposes of Section 401, even absent the "addition of any pollutant." *Id.* at 375–76. The petitioner had argued that "discharge" should be limited to the narrower statutory term "discharge of a pollutant," which requires an addition of a substance to navigable waters. The Court rejected this reading, holding that Congress chose the broader term "discharge" in Section 401(a)(1)—meaning "a flowing or issuing out"—and that this ordinary meaning encompasses water passing through and over a dam. *Id.* at 377 (quoting *PUD No. 1*, 511 U.S. at 725 (Thomas, J., dissenting).

The decision is significant but should not be overread. *S.D. Warren* expanded the *trigger* for certification—more activities qualify as producing a "discharge," meaning more projects require certification. But the Court grounded its analysis squarely in the statutory text and ordinary meaning of "discharge." It did not hold—and had no occasion to hold—that once a discharge is identified, the scope of state review extends to the "activity as a whole."

S.D. Warren and *PUD No. 1* address distinct questions. *S.D. Warren* asks what triggers the need for certification; *PUD No. 1* asks how far the scope of certification extends. The proposed rule is consistent with both. It accepts the broad trigger of *S.D. Warren* while limiting the scope of review to what the statute authorizes: the discharge and its water quality impacts.

1.4.3. *Hoopa Valley Tribe* and *NYSDEC v. FERC* Establish That the One-Year Deadline Is Mandatory and Cannot Be Circumvented Through Procedural Manipulation

The D.C. Circuit held in *Hoopa Valley Tribe* that states must act on certification requests within one year or forfeit their authority. In *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), the court addressed a decade-long pattern in which California and Oregon, pursuant to the Klamath Hydroelectric Settlement Agreement, directed the applicant to withdraw and resubmit substantially identical certification requests each year to avoid the statutory waiver provision. *Id.* at 1102–04. The court held that this coordinated scheme constituted a waiver of Section 401 authority. The statutory text provides for waiver when a state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(1); *Hoopa Valley*, 913 F.3d at 1104. The court emphasized that allowing such schemes would "readily consume" this limit, effectively nullifying the waiver provision Congress enacted. *Id.* at 1105.

The Second Circuit independently confirmed this bright-line rule. In *N.Y. State Department of Environmental Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018), the Second Circuit held that FERC properly found New York had waived its Section 401 authority over the Millennium Pipeline project by failing to act within one year. *Id.* at 455–56. New York argued that its requests for additional information from the applicant should have tolled the statutory clock. The court disagreed, holding that the one-year period is a statutory requirement—not merely a guideline—and that a state's request for additional information does not suspend it. *Id.* at 455–56. The clear statutory text requires action "within a reasonable period of time (which shall not exceed one year)" and provides no exception for pending information requests. 33 U.S.C. § 1341(a)(1).

Together, these decisions establish two critical propositions the 2026 Proposed Rule correctly incorporates: (1) the one-year deadline is a hard statutory cap, not a flexible guideline, and (2) states cannot circumvent it through procedural gamesmanship—whether coordinated withdrawal-and-resubmission schemes or serial information requests. Both courts applied plain-meaning interpretation rather than deferring to agency constructions, making their reasoning particularly persuasive post-*Loper Bright*.

1.4.4. *Village of Morrisville v. FERC* Refines, but Does Not Undermine, the Waiver Framework

The D.C. Circuit's 2025 decision in *Village of Morrisville* distinguished *Hoopa Valley* on its facts but did not disturb the underlying principle that coordinated delay constitutes waiver. In *Village of Morrisville, Vermont v. FERC*, 136 F.4th 1117 (D.C. Cir. 2025), the court addressed a case in which the applicant—not the state—had unilaterally withdrawn and resubmitted its certification request to buy additional time for negotiation. *Id.* at 1121–22. The court held that Vermont did not waive its Section 401 authority because, unlike in *Hoopa Valley*, there was no evidence of a coordinated agreement between the state and the applicant to circumvent the one-year period. *Id.* at 1123. The court explained: "We thus hold that where a party unilaterally withdraws and resubmits its certification application, those actions outside of the State's control do not waive its statutory authority." *Id.* at 1127.

Morrisville narrows the circumstances in which project proponents can assert waiver, requiring evidence of bilateral coordination rather than mere unilateral applicant conduct. This distinction is analytically sound because the waiver provision is designed to prevent *states* from delaying federal licensing, and an applicant's own decision to restart the process should not be attributed to the state.

Notably, *Morrisville* does not address the scope-of-certification question—whether Section 401 review extends to the "discharge" or the "activity as a whole." The opinion recites the statutory text but does not analyze or hold on the scope of permissible conditions. *Id.* at 1121–22. Prime Mover Institute therefore cites *Morrisville* only for the limited proposition that the waiver framework operates on the basis of state conduct, and does not invoke it in connection with the discharge-versus-activity scope question addressed in Sections 1.4.1 and 1.4.2 above.

1.4.5. *Loper Bright Enterprises v. Raimondo* Overruled *Chevron* and Fundamentally Altered the Legal Landscape for Section 401

Every expansive Section 401 interpretation since 1994 has rested on *Chevron* deference. *Loper Bright* removed that foundation. In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Court overruled *Chevron*, holding that the Administrative Procedure Act requires courts to exercise their own independent judgment in determining statutory meaning. *Id.* at 393. Courts must now determine the "best reading" of the statute using "all relevant interpretive tools" but without providing binding deference to agency interpretations. *Id.* at 400. The old framework—under which an agency's "permissible" interpretation of an ambiguous statute controlled—is gone.

As discussed in Section 1.4.1, *PUD No. 1*'s "activity as a whole" reading credited EPA's expansive interpretation because it was "reasonable"—not because it was the best reading. Post-*Loper Bright*, a court addressing this question would be required to independently determine which reading best fits the statutory text. Section 401(a)(1) conditions certification on whether "any such discharge" will comply with water quality requirements. 33 U.S.C. § 1341(a)(1). Section 401(d) allows conditions to ensure compliance with "applicable effluent limitations and other limitations." *Id.* § 1341(d). Both provisions focus on the discharge. The cross-referenced Sections 301, 302, 303, 306, and 307 address effluent limitations, water quality related to discharges, and performance standards for point sources.

Prime Mover Institute respectfully submits that the Thomas-Scalia dissent in *PUD No. 1* represents the best reading of Section 401 under the *Loper Bright* framework. The dissent's textual analysis—tracing the word "discharge" through the statute's interlocking provisions—is precisely the kind of independent statutory interpretation that *Loper Bright* demands. EPA's 2026 Proposed Rule adopts this reading. In doing so, EPA is not departing from settled law; it is aligning its regulations with the best reading of a statute that was previously interpreted under a deference framework the Supreme Court has now repudiated.

The convergence of these decisions—*PUD No. 1* read through the lens of *Loper Bright*, *S.D. Warren*'s textual focus on "discharge," the *Hoopa Valley* and *NYSDEC* courts' insistence on plain-meaning enforcement of statutory deadlines, and *Morrisville*'s careful refinement of the waiver framework—collectively confirm that the 2026 Proposed Rule is on solid legal ground. The statutory text supports a discharge-focused scope. The case law, properly understood, does not require otherwise. And the demise of *Chevron* deference means that the era of expansive agency readings untethered from statutory text is over.

1.5. The Pattern of Abuse and the Economic Case for Reform

1.5.1. The Expansive Approach to Section 401 Has Enabled Systematic Obstruction of Critical Infrastructure Projects.

The record speaks for itself. The "activity as a whole" framework has produced abandoned projects, bankrupt developers, and billions of dollars in stranded investment. Over the past decade, a small number of states have exploited the breadth of Section 401 certification authority to block or indefinitely delay nationally significant energy and infrastructure projects—not because those projects posed genuine threats to water quality, but because Section 401 provided a convenient veto over federal energy and permitting decisions that those states opposed on other policy grounds. The following examples, drawn from the administrative and judicial record, illustrate a pattern of abuse that the Proposed Rule is designed to correct.

Constitution Pipeline (New York). In 2013, Constitution Pipeline Company, LLC—a subsidiary of Williams Companies—applied to the New York State Department of Environmental Conservation ("NYSDEC") for Section 401 water quality certification for a 124-mile interstate natural gas pipeline from Susquehanna County, Pennsylvania to Schoharie County, New York. FERC had approved the project and prepared a comprehensive Environmental Impact Statement. *See Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014). Rather than acting on the certification within a reasonable period, NYSDEC subjected the applicant to years of delay. The applicant withdrew and resubmitted its application twice during 2014 and 2015 in an effort to keep the process moving. In April 2016, NYSDEC denied certification, citing climate change risks and flooding—concerns that extended well beyond the discharge-specific water quality determinations that Section 401 contemplates. The Second Circuit upheld the denial. *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Env't Conservation*, 868 F.3d 87 (2d Cir. 2017). FERC initially concluded it could not overturn New York's decision, but in August 2019, FERC reversed course and found that NYSDEC had waived its Section 401 authority through the pattern of withdrawal and resubmission. *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 (2019). The litigation continued. In November 2025—more than twelve years after the initial application—Constitution Pipeline Company withdrew its application entirely, abandoning the project after investing hundreds of millions of dollars. New England consumers who would have heated their homes with abundant Appalachian gas were left to pay for liquefied natural gas shipped 2,200 miles from Trinidad—because New York wielded a water quality provision to block a pipeline on climate grounds. *See* Robert Bryce, *Out of Gas: New York's Blocked Pipelines Will Hurt Northeast Consumers*, Manhattan Inst. (June 2019).

Millennium Bulk Terminals (Washington). In 2012, Millennium Bulk Terminals-Longview LLC proposed to construct what would have been North America's largest coal export terminal in Longview, Washington. The project would have transported coal from Montana and Wyoming mines to Pacific export markets, generating significant economic benefits for coal-producing states. In September 2017, the Washington Department of Ecology denied Section 401 certification, finding significant and unavoidable adverse impacts to the environment. Critically, Washington's denial extended far beyond water quality: the state relied on concerns about rail traffic congestion, vehicle traffic, noise, and the downstream climate effects of burning exported coal—none of which are water quality impacts from a point-source discharge into navigable waters. The Pollution Control Hearings Board upheld the denial. Montana and Wyoming—whose economies were directly harmed by Washington's effective embargo on their coal exports—took the extraordinary step of petitioning the United States Supreme Court for leave to file an original action against Washington under the Commerce Clause, arguing that the denial constituted impermissible discrimination against interstate commerce. The Supreme Court denied Montana and Wyoming leave to file an original action. The developer filed for bankruptcy in 2020 and abandoned the project after eight years of regulatory conflict. Washington used a water quality certification to impose a de facto ban on coal exports—based on train noise, vehicle traffic, and the climate effects of burning coal overseas. None of those are water quality impacts. None of them belong in a Section 401 review.

Jordan Cove LNG Terminal and Pacific Connector Pipeline (Oregon). Jordan Cove Energy Project proposed an LNG export terminal and 229-mile natural gas pipeline in Coos Bay, Oregon. In October 2017, the U.S. Army Corps of Engineers received the Section 404/401 application. In May 2018, the Corps determined the application was complete, starting Oregon Department of Environmental Quality's ("DEQ") one-year certification clock. Rather than reviewing the application on its merits, Oregon DEQ issued five separate supplemental information requests between September 2018 and March 2019—effectively declaring the application incomplete despite the Corps' determination of completeness. On May 6, 2019, just weeks before the one-year statutory deadline would have expired, Oregon DEQ denied certification "without prejudice." This procedural maneuver—denial without prejudice at the eleventh hour—enabled the state to avoid a constructive waiver finding while simultaneously preventing the project from moving forward. The project was originally proposed in 2005. The developer eventually withdrew, and the project never moved forward. Jordan Cove illustrates the "serial information request" tactic: the certifying authority keeps the process open through an indefinite series of supplemental demands, then denies at the last possible moment, effectively running out the clock without ever conducting a genuine substantive review of the project's water quality impacts.

FERC Hydroelectric Relicensing. The abuse is not limited to pipeline and terminal projects. FERC has reported that as of 2020, twenty-seven of forty-three hydroelectric licensing applications pending before the Commission were awaiting state water quality certifications. *See* 85 Fed. Reg. 42210, 42217 (July 13, 2020). Four of those applications had been pending for over a decade. The most egregious example involved the Klamath River hydroelectric facilities, where the applicant, California, and Oregon entered into a settlement agreement that involved the applicant withdrawing and resubmitting its certification request annually for over a decade—from 2006 to 2019. The D.C. Circuit ultimately held that this coordinated withdrawal-and-resubmission scheme constituted "deliberate and contractual idleness" and was a waiver of Section 401 authority. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019). FERC's December 2024 final rule took a further step to address timeline abuse by categorically establishing a one-year "reasonable period of time" for all Commission proceedings requiring Section 401 certification. 89 Fed. Reg. 96524 (Dec. 5, 2024). EPA's Proposed Rule would complement FERC's timeline reforms with the equally necessary reform of limiting the substantive scope of certification review to discharge-specific water quality determinations.

These are not edge cases—they are a pattern. A small number of states have converted Section 401 from a water quality safeguard into a general-purpose veto over federal energy and infrastructure permitting. The proposed rule exists to end that conversion. In every case, states that oppose a project on policy grounds unrelated to water quality used the certification process to block, delay, or effectively kill the project, knowing that the cost and uncertainty of indefinite regulatory delay will ultimately force the developer to abandon the effort regardless of the project's actual water quality impacts.

1.5.2. The Economic Costs of Section 401 Abuse Are Substantial, and the Need for Reform Is Broadly Recognized.

The economic consequences of these delays are measured in billions of dollars. The Constitution Pipeline alone represented hundreds of millions in lost investment, and the project's demise perpetuates an energy cost disparity that falls hardest on consumers. Consolidated Edison customers in New York pay $19.97 per million BTU compared to a national average of $10.53. Northeastern electricity rates exceed the national average by 33%. Approximately 450,000 New York households that could convert from fuel oil to natural gas heating would save a combined $337.5 million annually—savings that remain unrealized because of blocked pipeline capacity. *See* Bryce, *Out of Gas*, *supra*. These are not abstract figures; they represent real costs borne by families and businesses.

The irony compounds with every winter. Blocking natural gas infrastructure does not reduce energy consumption—it redirects it toward dirtier and more expensive alternatives. Between Christmas Day 2017 and January 9, 2018, New England electricity producers burned nearly two million barrels of fuel oil because adequate natural gas pipeline capacity did not exist to meet winter demand. *Id.* ISO New England has warned of potential rolling blackouts without sufficient gas infrastructure to support grid reliability. New England imports LNG from Trinidad and Tobago—shipped over 2,200 miles by tanker—while abundant shale gas sits just across the state border in Pennsylvania. *See* Travis Fisher & Joshua Loucks, *Barriers to Energy Supply Are Everywhere—Let's Get Serious About Permitting Reform*, Cato Inst. (2024). As the Cato Institute has observed, it is "an unforced error that we face energy scarcity in a nation that leads the world in natural gas production." *Id.*

The need for reform is broadly recognized across the policy spectrum. Conservative and free-market organizations spanning a wide range of perspectives have advocated for Section 401 reform, including the Heritage Foundation, the Competitive Enterprise Institute, the Cato Institute, the American Enterprise Institute, the R Street Institute, the Manhattan Institute, the Pacific Legal Foundation, the Washington Legal Foundation, the Heartland Institute, the Institute for Energy Research, the Texas Public Policy Foundation, the Foundation for American Innovation, and the Federalist Society. *See, e.g.*, Mario Loyola, *Stop State Government Abuse of Clean Water Act*, Competitive Enter. Inst. (Oct. 2019); Daren Bakst, *Some States Abuse This Provision to Block Critical Projects*, Heritage Found. (Mar. 2019); Thomas Hochman, *Support for Clean Water Act Section 401 Reforms*, Found. for Am. Innovation (Nov. 2025). In October 2019, the Competitive Enterprise Institute led a coalition of sixteen organizations urging EPA to adopt the discharge-focused framework that ultimately became the 2020 Rule. Comments of the Competitive Enterprise Institute *et al.* on Updating Regulations on Water Quality Certification, *docketed at* EPA-HQ-OW-2019-0405 (Oct. 22, 2019). This is not a fringe position or a narrow industry concern. It reflects a broad consensus that the Section 401 certification process, in practice prior to 2020 and as interpreted under the 2023 Rule, has strayed far from its statutory purpose and that the regulatory framework must be restored to its proper scope.

These organizations share a common position. Section 401 authority must be limited to discharge-specific water quality determinations; the one-year statutory deadline must be enforced to prevent indefinite delays; states should not be permitted to consider climate change, noise, traffic, or other non-water-quality factors as a basis for denying certification; and the cooperative federalism framework of the Clean Water Act should not be converted into a state veto over federal energy and infrastructure policy. EPA's Proposed Rule addresses each of these concerns, and Prime Mover Institute urges the Agency to finalize the rule substantially as proposed.

2. The Scope of Certification Must Be Limited to the "Discharge" (RFCs 1, 5, 7)

2.1. The Statutory Text Compels a Discharge-Focused Scope of Certification (RFC-1)

Prime Mover Institute supports EPA's proposed definition of "discharge" and urges EPA to finalize a discharge-focused scope of certification as the best reading of Section 401. The plain text of the Clean Water Act answers the question EPA poses. Section 401(a)(1) provides:

> 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 . . . that any such *discharge* will comply with the applicable provisions of [sections 301, 302, 303, 306, and 307].

33 U.S.C. § 1341(a)(1) (emphasis added). What triggers certification is whether an activity "may result in any discharge into the navigable waters." What the certifying authority reviews is whether "any such discharge" will comply with the enumerated CWA provisions. The operative inquiry at every stage is the discharge, not the activity.

This reading is reinforced by the 1972 amendments to the Clean Water Act. Before 1972, the certification provision required applicants to certify that the "activity" would be conducted consistent with water quality standards. *See* Pub. L. 91-224, § 21(b)(1), 84 Stat. 91, 108 (1970). Congress deliberately replaced "activity" with "discharge" when it enacted the modern Clean Water Act. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, § 401(a)(1), 86 Stat. 816, 877. The substitution was not inadvertent. Congress could have retained "activity"—it chose "discharge." Giving the same meaning to both terms would violate the canon that Congress does not use different language to say the same thing. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation omitted)).

EPA correctly recognizes this point in the proposed rule, noting that its 1971 regulations—the very regulations the Supreme Court relied upon in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994)—"were not based on the statutory text before the Court" and "contained outdated statutory terminology, most importantly 'activity' rather than 'discharge.'" 91 Fed. Reg. at 2025. Prime Mover Institute agrees with EPA that this historical error—one that no party brought to the Court's attention—fatally undermined the *PUD No. 1* majority's reasoning. Any interpretation that reads "discharge" to mean "activity as a whole" reads the 1972 amendment out of the statute.

2.2. Post-*Loper Bright*, the Thomas-Scalia Dissent in *PUD No. 1* Represents the Best Reading of Section 401

With *Chevron* overruled, the question before EPA is no longer which reading of Section 401 is permissible—it is which reading is correct. The answer is the one Justices Thomas and Scalia articulated thirty years ago. In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court held that courts must exercise independent judgment to determine the "best reading" of a statute rather than deferring to the agency's construction. *Id.* at 400. This development is directly relevant to the scope of Section 401 certification, because the *PUD No. 1* majority's expansion of certification to the "activity as a whole" was explicitly grounded in *Chevron* deference to EPA's regulations.

The *PUD No. 1* majority held that "activities—not merely discharges—must comply with state water quality standards." 511 U.S. at 701. In reaching this holding, the majority cited EPA's 1993 regulations, which required the certifying authority to find "a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards." *Id.* at 712 (quoting 40 C.F.R. § 121.2(a)(3) (1993)) (emphasis in original). The majority then concluded that this interpretation "is a reasonable interpretation of § 401, and is entitled to deference." *Id.* (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)). *Loper Bright* removes this foundation. The relevant question is no longer whether EPA's interpretation was "reasonable," but whether it represents the "best reading" of the statute. It does not.

The Thomas-Scalia dissent provides the textually faithful alternative. Justice Thomas argued that the majority's reading "places no meaningful limitation on a State's authority under § 401 to impose conditions on certification"—a prediction that the past three decades have confirmed. *PUD No. 1*, 511 U.S. at 724 (Thomas, J., dissenting). On the text, Justice Thomas demonstrated that "subsections 401(a)(1) and (d) can easily be reconciled": "while § 401(d) permits a State to place conditions on a certification to ensure compliance of the 'applicant,' those conditions must still be related to discharges." *Id.* at 726–27. This reading "best harmonizes the subsections of § 401." *Id.* at 727.

The *PUD No. 1* majority's principal textual argument relied on Section 401(d)'s reference to the "applicant" rather than the "discharge." The majority reasoned that because Section 401(d) requires conditions "necessary to assure that any applicant . . . will comply" with water quality requirements, 33 U.S.C. § 1341(d), certification extends to the applicant's activity as a whole. 511 U.S. at 711–12. But as Justice Thomas explained, this argument conflates the *scope* of certification with the *mechanism* for achieving compliance. Section 401(a)(1) defines what is being certified—that the "discharge" will comply. Section 401(d) addresses how compliance is assured—by imposing conditions on the "applicant." Reading 401(d) to expand the scope of review beyond the discharge renders the operative language of 401(a)(1) superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quotation omitted)).

Prime Mover Institute anticipates that some commenters will argue that *PUD No. 1*'s holding survives *Loper Bright* because the majority engaged in textual analysis independent of its *Chevron* reasoning. This argument does not withstand scrutiny. The majority's textual analysis was not independent of the deference framework—it was a product of it. The majority's key textual move was to read the word "applicant" in Section 401(d) as expanding the scope of certification to the "activity as a whole." 511 U.S. at 711–12. But the majority arrived at this reading only after crediting EPA's regulations, which used the pre-1972 term "activity" rather than the statutory term "discharge." *Id.* at 712. The majority's textual reasoning thus depended on treating EPA's regulatory gloss as the baseline for interpretation—precisely the analytical move that *Chevron* authorized and that *Loper Bright* prohibits. A court conducting the independent textual analysis that *Loper Bright* requires would start from the statutory text itself, not from EPA's regulations, and the statutory text says "discharge." Moreover, even taken on its own terms, the majority's "applicant" argument fails because it produces the surplusage problem identified above: if 401(d)'s reference to the "applicant" expands the scope of review to the entire activity, then 401(a)(1)'s requirement that the certification address "any such discharge" is rendered meaningless. *PUD No. 1* remains formally undisturbed, but its analytical foundation has been removed. The critical question is not whether *PUD No. 1* remains good law—it is what *PUD No. 1* actually held. The Court upheld EPA's 1971 interpretation as "a reasonable interpretation of § 401" that "is entitled to deference." 511 U.S. at 712 (citing, *inter alia*, *Chevron*). That is a holding about the reasonableness of one interpretation under the *Chevron* framework—not a holding that the statute permits only one reading. As EPA correctly explains in the proposed rule, "that does not preclude the Agency from adopting a different interpretation. When a court, even the Supreme Court, has upheld an agency interpretation of a statute as reasonable under *Chevron*, the agency is not precluded from revising its regulation to ensure it reflects the best reading of the statute." 91 Fed. Reg. at 2025.

Post-*Loper Bright* courts have already confirmed this principle. The Ninth Circuit upheld an agency's updated statutory interpretation even after a prior circuit panel had "historically endorsed [the] prior [agency] interpretation under *Chevron*." *Lopez v. Garland*, 116 F.4th 1032, 1038–41 (9th Cir. 2024). The Supreme Court itself reaffirmed that agencies remain "free to change their existing policies as long as they provide a reasoned explanation for the change." *Food & Drug Admin. v. Wages & White Lion Investments, L.L.C.*, 604 U.S. 542, 568 (2025). And the Fourth Circuit observed that interpreting *Loper Bright* to freeze agencies into their last *Chevron*-era interpretations "strikes us as arbitrary" because "we would be stuck—forever—with the most recent agency interpretation that we upheld before *Loper Bright*." *Ozurumba v. Bondi*, 153 F.4th 396, 406 (4th Cir. 2025).

Prime Mover Institute urges EPA to build on this emerging post-*Loper Bright* consensus. The proposed rule does not ask courts to overrule *PUD No. 1*. It asks courts to recognize that *PUD No. 1*'s upholding of one interpretation as reasonable does not foreclose a different—and better—reading of the statute. To the extent any reviewing court concludes otherwise, the proposed rule and its supporting administrative record will have created the vehicle for the Supreme Court to revisit the question—with the benefit of a fully developed textual, historical, and practical record that was not before the Court in 1994.

EPA acknowledges in the proposed rule that its interpretation "mirrors some of the reasoning discussed in the dissenting opinion" in *PUD No. 1*. 91 Fed. Reg. at 2025 n.37. Prime Mover Institute urges EPA to go further. The preamble to the final rule should explicitly state that, in light of *Loper Bright*'s requirement that agencies adopt the best reading of the statute, the *PUD No. 1* majority's "activity as a whole" interpretation—premised on *Chevron* deference to outdated regulations—is no longer the best reading of Section 401. Doing so would strengthen the administrative record for judicial review and provide needed clarity for regulated entities, certifying authorities, and federal agencies.

2.3. The Scope of Certification Must Be Limited to Impacts on Waters of the United States (RFC-5)

Prime Mover Institute supports the position that the scope of certification is limited to impacts on waters of the United States and should not extend to state waters beyond federal jurisdiction. The statutory text is clear on this point. Section 401(a)(1) applies to activities "which may result in any discharge *into the navigable waters*." 33 U.S.C. § 1341(a)(1) (emphasis added). The term "navigable waters" is defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The certification requirement is thus triggered by, and limited to, discharges into waters of the United States.

This textual limitation serves an important structural purpose. The CWA is a cooperative federalism statute. It extends federal authority to "navigable waters"—i.e., waters of the United States—while reserving to the states their traditional authority over waters that fall outside federal jurisdiction. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166–67, 174 (2001). If Section 401 certification allowed states to impose conditions addressing impacts on waters beyond federal jurisdiction, it would convert a cooperative federalism provision into one that delegates unchecked federal authority to states to regulate any water body they choose, with no limiting principle tied to the CWA's jurisdictional reach.

EPA should confirm in the final rule that the scope of certification review is limited to assessing whether the discharge will comply with applicable water quality requirements as they relate to waters of the United States. Conditions addressing impacts on waters that do not qualify as "navigable waters" under the CWA fall outside the scope of Section 401 and must not be imposed as certification conditions.

Prime Mover Institute acknowledges that some commenters will argue that narrowing Section 401 to discharge-specific review undermines cooperative federalism by stripping states of meaningful authority over water quality decisions affecting their waters. This argument misapprehends the effect of the proposed rule. The discharge-focused interpretation does not diminish state authority—it clarifies the boundary between what states may do through the *federal* Section 401 certification process and what states retain the independent authority to do under their own laws. Section 510 of the CWA expressly preserves the right of states to "adopt or enforce" "any standard or limitation respecting discharge of pollutants" or "any requirement respecting control or abatement of pollution" that is not less stringent than the CWA. 33 U.S.C. § 1370. For matters beyond discharge control—land use, wildlife, cultural resources, noise, climate—states retain whatever independent authority their own laws confer. Washington's State Environmental Policy Act, California's Porter-Cologne Water Quality Control Act, and Oregon's environmental review processes all operate independently of Section 401 and are entirely unaffected by the proposed rule. What Section 401 does not authorize is the use of a *federal* certification process as a vehicle for imposing state-law requirements unrelated to the discharge into navigable waters. The difference between limiting a federal delegation and preempting state authority is the difference between federalism and federal overreach. The proposed rule draws this line correctly.

2.4. The Proposed Rule's Treatment of General Permits Should Be Finalized (RFC-7)

Prime Mover Institute supports EPA's proposed clarification regarding the applicability of Section 401 to activities authorized under general permits. 91 Fed. Reg. at 2020–21. The proposed rule appropriately confirms that activities covered by general permits—including the U.S. Army Corps of Engineers' nationwide permits under 33 C.F.R. Part 330—are subject to Section 401 certification requirements. This clarification matters because nationwide permits authorize the vast majority of dredge-and-fill activities in the United States, and uncertainty about whether and how Section 401 applies to general-permit activities has produced inconsistent treatment across jurisdictions. A clear federal rule ensures that project proponents seeking coverage under general permits can rely on a uniform certification framework. Prime Mover Institute urges EPA to finalize this clarification as proposed.

3. "Water Quality Requirements" Must Be Narrowly Defined to Prevent Regulatory Overreach (RFCs 2, 3, 4, 6)

Limiting the certification scope to discharges is necessary. It is not sufficient. Unless EPA also narrows the definition of "water quality requirements" that certifying authorities may impose as certification conditions under Section 401(d), states will retain a backdoor to regulate the same non-water-quality matters that the scope limitation was designed to exclude. EPA requests comment on four related questions that, taken together, present an opportunity to foreclose this risk. Prime Mover Institute addresses each below, beginning with the interpretation that most faithfully implements the statutory text.

3.1. "Other Appropriate Requirement of State Law" Should Be Limited to State Requirements That Implement the CWA Provisions Enumerated in Section 401(d) (RFC-3)

EPA should interpret "other appropriate requirement of State law" as limited to state and tribal requirements that implement the CWA provisions enumerated in Section 401(d). EPA requests comment on this interpretation. *See* 91 Fed. Reg. at 2027. Prime Mover Institute strongly supports this approach because it follows directly from the statutory text under established canons of construction.

Section 401(d) provides in full:

> 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 with any applicable effluent limitations and other limitations, under section [301] or [302] of this title, standards of performance under section [306] of this title, or prohibition, effluent standard, or pretreatment standard under section [307] of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. 1341(d).

The enumerated CWA provisions all regulate point source discharges into navigable waters. Sections 301 and 302 impose effluent limitations on point source discharges. Section 306 establishes standards of performance for new source discharges. Section 307 governs toxic pollutant discharge standards and pretreatment requirements. These are not a random assortment of regulatory programs. They are the CWA's core discharge-control provisions, and Congress chose them deliberately.

Under the canon of *ejusdem generis*, the general phrase "any other appropriate requirement of State law" must be construed in light of the specific provisions that precede it. Where a statute sets forth a list of specific items followed by a general or catch-all term, the general term is "construed to embrace only objects similar to those enumerated by the specific words." *Wash. State Dep't of Social & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 384 (2003). This canon exists precisely to prevent a general residual phrase from being read so broadly as to render the preceding specific terms superfluous. If "any other appropriate requirement of State law" could encompass *any* state-law requirement, regardless of whether it relates to discharge regulation, then Congress need not have enumerated Sections 301, 302, 306, and 307 at all. It could have simply authorized conditions based on "any appropriate requirement of State law" and left it at that.

Justice Thomas made this exact argument in his dissent in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994):

> The final term on the list—"appropriate requirement[s] of State law"—appears to be more general in scope. Because this reference follows a list of more limited provisions that specifically address discharges, however, the principle *ejusdem generis* would suggest that the general reference to "appropriate" requirements of state law is most reasonably construed to extend only to provisions that, like the other provisions in the list, impose discharge-related restrictions.

Id. at 727–28 (Thomas, J., dissenting). EPA's 2026 proposed rule recognizes this reasoning, acknowledging that its proposed interpretation "mirrors some of the reasoning discussed in the dissenting opinion" in *PUD No. 1.* 91 Fed. Reg. at 2025 n.37.

The related canon of *noscitur a sociis* reinforces this reading. The meaning of a word should be determined in consistency with accompanying words and understood against the background of the statute as a whole. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). As a coalition of petroleum industry associations observed in the 2022 comment period, the phrase "any other appropriate requirement" "follows an enumeration of four specific sections of the CWA that are all focused on the protection of water quality from point source discharges to waters of the United States." Comments of Alaska Oil and Gas Association et al. on Clean Water Act Section 401 Water Quality Certification Improvement Rule, 50, *docketed at* EPA-HQ-OW-2022-0128-0136 (Aug. 8, 2022) ("AOGA et al. Comments"). Section 401 "in its entirety is replete with references to requirements deemed necessary to ensure compliance with 'applicable effluent limitations' and 'water quality requirements.'" *Id.* Given this context, the phrase must be read to include only state requirements that implement the federal discharge-control provisions Congress enumerated.

As discussed in Section 2.2, *Loper Bright* requires EPA to adopt the best reading of the statute rather than defer to a merely reasonable one. The *PUD No. 1* majority's broad reading of "other appropriate requirement of State law" rested on the same *Chevron*-dependent framework. The Thomas-Scalia dissent's *ejusdem generis* analysis—grounded in the enumerated provisions and longstanding canons of construction—represents the best reading of Section 401(d).

An independent textual argument reinforces this conclusion. The punctuation and syntax of Section 401(d) support reading "other appropriate requirement of State law" as modifying "monitoring requirements"—the operative noun that immediately precedes the phrase—rather than as authorizing freestanding substantive conditions. The comma before "and with any other appropriate requirement of State law" signals that this phrase is the last item in a series identifying what monitoring requirements must assure compliance with: (1) the enumerated CWA provisions, and (2) other appropriate requirements of State law. If "other appropriate requirement of State law" were read as an independent source of substantive conditioning authority, Section 401(d) would grant states essentially unlimited power through a residual clause at the end of a sentence focused on effluent limitations and monitoring—giving the tail the power to wag the dog. This comma-placement reading is independently severable from the *ejusdem generis* analysis; both point in the same direction, but either standing alone supports the conclusion that states may not use this phrase to impose freestanding conditions unrelated to the CWA's discharge-control provisions.

Prime Mover Institute therefore urges EPA to define "other appropriate requirement of State law" as limited to state and tribal provisions that implement the CWA sections enumerated in Section 401(d). This reading is faithful to the text, supported by canons of construction, and consistent with the Thomas-Scalia dissent now vindicated by *Loper Bright*.

3.2. State Regulatory Provisions Should Be Limited to EPA-Approved Provisions (RFC-4)

If EPA limits "other appropriate requirement of State law" to state provisions implementing the CWA's enumerated discharge-control sections, it should also require that those state provisions be EPA-approved. EPA requests comment on this limitation. *See* 91 Fed. Reg. at 2027. Prime Mover Institute supports this approach as a necessary complement to the *ejusdem generis* limitation discussed above.

Without an EPA-approval requirement, the *ejusdem generis* limitation is vulnerable to circumvention. States could adopt new provisions nominally styled as implementations of CWA Sections 301, 302, 306, or 307 that in substance regulate matters far beyond discharge control. A state could, for example, adopt a "water quality standard" that incorporates greenhouse gas emission limits, environmental justice requirements, or habitat preservation mandates, then impose those requirements through the Section 401 certification process. The limitation would be hollow if states could unilaterally expand its reach through creative state-law drafting.

EPA approval provides a necessary federal gatekeeping function. Section 303 of the CWA establishes a process under which states adopt water quality standards subject to EPA review and approval. 33 U.S.C. 1313(c). This federal oversight ensures that state standards implement—rather than exceed—the CWA's discharge-focused objectives. Requiring EPA approval of state provisions before they may be imposed as Section 401 conditions extends this gatekeeping function to the full range of enumerated provisions, ensuring that the cooperative federalism structure Congress designed is maintained.

This interpretation is also consistent with the structure of the CWA. The Act creates a cooperative system in which EPA sets federal baselines and states implement those standards subject to federal oversight. Allowing states to impose unapproved requirements through the Section 401 certification process would bypass this carefully designed oversight architecture. As a 14-state attorneys general coalition argued in the 2022 comment period, the 2020 Rule's interpretation "is consistent with the *ejusdem generis* and *noscitur a sociis* canons" and "is consistent with the presumption that statutory amendments are intended to have real and substantial effect." Comments of Louisiana Attorney General et al. on Clean Water Act Section 401 Water Quality Certification Improvement Rule, 8–10, *docketed at* EPA-HQ-OW-2022-0128-0123 (Aug. 8, 2022) ("Louisiana AG et al. Comments").

Prime Mover Institute anticipates that some commenters will argue that an EPA-approval requirement would create a new bottleneck, given that EPA's review of state water quality standards under Section 303(c) has historically been slow. The solution is not to allow states to impose unapproved requirements through the Section 401 back door—it is for EPA to accelerate its approval process. This is consistent with the current administration's commitment to reducing regulatory processing times and eliminating unnecessary delays in federal permitting. An EPA-approval requirement paired with expedited review timelines would prevent state circumvention of the discharge-focused scope while ensuring that states can impose legitimate, discharge-related conditions without undue delay.

Prime Mover Institute therefore recommends that EPA pair the discharge-focused limitation on "other appropriate requirement of State law" with an EPA-approval requirement, so that state-law requirements imposed as certification conditions must be provisions that EPA has reviewed and approved as implementing the CWA sections enumerated in Section 401(d).

3.3. Narrative Water Quality Criteria Must Not Become a Backdoor for Unlimited State Discretion (RFC-2)

Where a state has reduced a water quality concern to a numeric criterion, it has committed to a concrete standard that constrains its own discretion. The certifying authority cannot deny certification or impose conditions if the discharge meets the number. The number limits both sides. For this reason, Prime Mover Institute urges EPA to give serious consideration to limiting cognizable "water quality requirements" under Section 401 to numeric water quality criteria. 91 Fed. Reg. at 2027.

The record demonstrates why. In every major Section 401 denial involving energy infrastructure, the certifying authority relied on narrative criteria rather than demonstrating that the discharge would exceed a numeric standard. New York denied the Constitution Pipeline under 6 NYCRR 703.2's narrative turbidity standard—"no increase that will cause a substantial visible contrast to natural conditions"—without identifying a single numeric criterion the discharge would violate. NYSDEC's denial of the Northeast Supply Enhancement Pipeline rested on the same narrative standard, plus a determination that benthic resource impacts were "inadequately mitigated"—again, no numeric exceedance. Oregon DEQ's 200-page denial of Jordan Cove LNG invoked narrative biocriteria requiring waters of "sufficient quality to support aquatic species without detrimental changes in the resident biological communities," OAR 340-041-0011, and the aspirational standard that water quality be maintained "at the highest possible levels," OAR 340-041-0007(1)—standards with no numeric anchor against which compliance can be measured. In FERC hydropower relicensing, states have used narrative designated-use protections to impose conditions requiring construction of hiking trails, payments to state agencies, and support for a feral hog task force—none of which bear any relationship to whether a discharge meets a numeric water quality criterion. *See* NHA Comments, 30 & n.117; 148 FERC ¶ 62,059 (July 17, 2014); 85 Fed. Reg. 42210, 42253 (July 13, 2020) (EPA acknowledging the pattern).

The structural problem is that narrative criteria provide a backdoor around the scope and definitional limitations Prime Mover Institute urges EPA to adopt in Sections 2 and 3.1. Even under a discharge-only scope, a state can deny certification by concluding that the discharge will create a "substantial visible contrast" in turbidity, "detrimentally change" a biological community, or fail to maintain water quality at the "highest possible levels." These narrative standards impose no objective threshold, leaving the certifying authority's conclusion effectively unreviewable.

Prime Mover Institute recognizes that narrative criteria are embedded in state water quality standards frameworks and have been approved by EPA under Section 303(c). A wholesale exclusion of narrative criteria from the Section 401 process may raise questions about the interaction between Sections 401 and 303. For this reason, Prime Mover Institute recommends that if EPA does not adopt the numeric-criteria-only approach, it must at minimum require heightened specificity when a certifying authority relies on a narrative criterion as the basis for a denial or condition. The certifying authority should be required to identify: (1) the specific narrative criterion invoked, (2) the specific water quality parameter at issue, (3) the factual basis—grounded in site-specific data—for concluding that the discharge would cause a violation of that criterion, and (4) why applicable numeric criteria are insufficient to address the concern. This specificity requirement would prevent narrative criteria from functioning as an open-ended delegation of authority while preserving the state's ability to enforce duly adopted water quality standards where genuine water quality concerns exist.

4. The Proposed Rule's Standardized Request Contents and Timeline Enforcement Provisions Are Necessary to Prevent Procedural Manipulation (RFCs 8, 9, 10, 11)

4.1. EPA Should Establish a Uniform Federal Standard for Certification Request Contents and Remove State Authority to Define Additional Requirements (RFCs 8 and 9)

A nationally uniform, federally defined set of certification request contents is essential to prevent certifying authorities from manipulating the start of the one-year statutory clock. Prime Mover Institute supports EPA's proposal to define one list of components to be included in all certification requests and urges EPA to finalize the removal of 40 C.F.R. § 121.5(c), which currently allows states and tribes to define additional required contents. 91 Fed. Reg. at 2017–20.

The problem EPA seeks to address is well documented. Under the 2023 Rule, certifying authorities retained the ability to define their own supplemental submission requirements and to declare certification requests "incomplete" if those requirements were not met. This authority created a perverse incentive: a state opposed to a project could impose ever-expanding information demands, preventing the one-year clock from ever starting. The Second Circuit identified this precise danger in *New York State Department of Environmental Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018). There, the court held that the statutory text creates a "bright-line rule regarding the beginning of review" and warned that allowing states to define when applications are "complete" could "blur this bright-line into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely." *Id.* at 455–56. The court held that a state's request for additional information does not toll the one-year clock under Section 401(a)(1). *Id.*

The Jordan Cove LNG project in Oregon demonstrates this abuse in practice. After the Army Corps of Engineers determined the Section 404/401 application complete in May 2018—which should have started Oregon DEQ's one-year certification clock—Oregon DEQ issued five separate supplemental information requests between September 2018 and March 2019, repeatedly asserting the application was incomplete despite the Corps' determination. Oregon DEQ then denied certification without prejudice just weeks before the one-year deadline expired, effectively converting the information-request process into an indefinite delay mechanism. The project, originally proposed in 2005, was ultimately abandoned after more than fifteen years of regulatory proceedings.

EPA proposes a single, federally defined list of request contents that applies to all certifying authorities. This approach ensures that the one-year clock starts when the applicant submits the federally required materials, not when a state agency subjectively decides it has received enough information. As EPA correctly explains, the current approach "could introduce uncertainty and delays where certifying authorities fail to transparently and objectively convey the additional required contents of a request." 91 Fed. Reg. at 2019.

Prime Mover Institute urges EPA to affirmatively remove 40 C.F.R. § 121.5(c) from the final rule. Retaining state authority to define additional contents—even in a limited form—would undermine the purpose of standardization. If states may supplement the federal list, the same gamesmanship will recur in a different guise. A nationally uniform standard also benefits multi-jurisdictional project proponents—such as interstate pipeline developers and multistate hydropower licensees—who currently face different submission requirements in each state through which a project passes. Standardization provides certainty, reduces compliance costs, and aligns the regulatory framework with the Second Circuit's bright-line principle.

Nothing in the statute authorizes states to define what constitutes a "complete" certification request. Section 401(a)(1) provides that an "applicant" must "provide" a "certification" request to the state. 33 U.S.C. § 1341(a)(1). It does not authorize states to prescribe what the request must contain, and it certainly does not authorize states to prevent the statutory clock from running by adding state-defined prerequisites. EPA, not the states, has the authority to implement the procedural requirements of Section 401 through regulation. The proposed rule correctly exercises that authority.

4.2. EPA Is Right to Remove Automatic Extensions to the Reasonable Period of Time (RFC 10)

EPA correctly proposes to eliminate the automatic extensions for public notice and force majeure that the 2023 Rule provided at 40 C.F.R. § 121.6(b) and (c). 91 Fed. Reg. at 2021–22. Prime Mover Institute supports this proposal and urges EPA to finalize it without modification.

The statutory basis for EPA's proposal is clear. Congress established a firm ceiling: the reasonable period of time for certification "shall not exceed one year." 33 U.S.C. § 1341(a)(1). As the D.C. Circuit held, "Congress intended to curb a *state's* dalliance or unreasonable delay." *Hoopa Valley*, 913 F.3d at 1104 (cleaned up). The court acknowledged that that Circuit had "repeatedly recognized that the waiver provision was created 'to prevent a State from indefinitely delaying a federal licensing proceeding.'" *Id.* at 1104–05 (quoting *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

Automatic extensions for public notice and force majeure, however well-intentioned, function as loopholes that allow certifying authorities to exceed this statutory ceiling. A state that initiates a public notice period late in the one-year window could claim an automatic extension, effectively rewarding its own delay. Force majeure provisions, while facially reasonable, are susceptible to broad interpretation—particularly where the definition of qualifying events is left to the certifying authority's discretion. The cumulative effect of these extensions is to convert a statutory bright line into a flexible guideline.

FERC's December 2024 Final Rule (89 Fed. Reg. 96524) provides a useful model. FERC categorically established that the reasonable period of time for all Commission proceedings requiring Section 401 certification is one year—the statutory maximum—with no automatic extensions. *Id.* FERC's approach follows from the statutory text. Congress set a maximum, and the regulatory framework should enforce it rather than create exceptions to it. EPA should align with FERC's approach. Consistency between the two federal agencies responsible for implementing Section 401—EPA as the rulemaking authority and FERC as the largest single federal licensing agency subject to Section 401—strengthens the regulatory framework and provides certainty to all parties.

If extraordinary circumstances genuinely prevent a certifying authority from completing its review within one year, the appropriate remedy is for the authority to issue a denial without prejudice—allowing the applicant to resubmit—or for the applicant to seek a shorter reasonable period from the federal licensing agency.

The remedy is not an open-ended extension of a statutory deadline that Congress made absolute.

4.3. EPA Should Strengthen the Withdrawal-and-Resubmission Provisions to Prevent Clock-Resetting Schemes (RFC 11)

EPA correctly proposes to prohibit certifying authorities from requesting applicants to withdraw certification requests or taking any action to extend the reasonable period of time beyond one year. 91 Fed. Reg. at 2022–23 (to be codified at 40 C.F.R. § 121.6(e)). Prime Mover Institute supports this provision and urges EPA to adopt additional safeguards in the final rule to close gaps that remain after the prohibition takes effect.

The coordinated withdrawal-and-resubmission scheme condemned in *Hoopa Valley*, *see supra* Section 1.4.3, is the paradigmatic example of this abuse. EPA's proposed prohibition directly targets that pattern.

The proposed prohibition directly addresses the most overt form of the *Hoopa Valley* scheme—a direct state request to withdraw. To strengthen this framework, Prime Mover Institute recommends that EPA also address subtler forms of coordinated action, such as informal pressure, implied threats of denial, or tacit understandings between the certifying authority and the applicant.

Prime Mover Institute recommends three additional safeguards. *First*, the final rule should clarify that when a withdrawal is requested by or coordinated with the certifying authority, the one-year clock is not reset by the subsequent resubmission but continues running from the date the certifying authority received the original complete request. This approach eliminates the incentive for coordinated schemes of the kind condemned in *Hoopa Valley* while respecting *Morrisville*'s recognition that a genuinely voluntary, applicant-initiated withdrawal stands on different footing. *See supra* Section 1.4.4. Where the applicant withdraws unilaterally and in its own interest, a clock reset is appropriate because the withdrawal reflects the applicant's choice, not the state's delay.

Second, any withdrawal at the certifying authority's request—whether formal or informal—should be treated as circumstantial evidence of an impermissible *Hoopa Valley* scheme. The burden should shift to the certifying authority to demonstrate a legitimate, non-dilatory basis for the withdrawal request. This evidentiary presumption would deter states from using informal channels to accomplish what the regulation prohibits them from doing directly.

Third, the final rule should require federal licensing agencies to document and report any withdrawal-and-resubmission pattern to EPA, creating a record that supports enforcement and deters serial abuse.

Morrisville underscores the importance of these additional safeguards. As discussed in Section 1.4.4, the court's distinction between unilateral applicant-initiated withdrawals and coordinated schemes is analytically sound—but it also identifies a gap in enforcement. Without the additional safeguards proposed above, a certifying authority could informally encourage withdrawal while maintaining plausible deniability that the action was "unilateral." EPA's final rule should close this gap.

The hydropower sector illustrates why these protections are urgent. As of 2020, FERC reported that four hydroelectric licensing applications had been awaiting state water quality certifications for more than a decade. 85 Fed. Reg. at 42217. The Constitution Pipeline applicant twice withdrew and resubmitted its certification request to NYSDEC before the project was ultimately abandoned after twelve years. *See supra* Section 1.5.1. These are not isolated incidents; they are symptoms of a systematic failure to enforce the statutory timeline. EPA's final rule must be robust enough to prevent the next generation of delay schemes, not merely the specific pattern addressed in *Hoopa Valley*.

5. States Must Justify Every Certification Condition They Impose (RFCs 12, 13, 14, 29)

5.1. Each Condition Must Be Tied to a Specific Water Quality Requirement (RFC 13)

EPA correctly proposes to require that each state-imposed certification condition include "a statement explaining why the condition is necessary to assure that the discharge(s) from the proposed project will comply with water quality requirements, and a citation to the applicable water quality requirement." 91 Fed. Reg. at 2028. Prime Mover Institute strongly supports this proposal and urges EPA to finalize it as proposed.

Without this requirement, a certifying authority can impose conditions on greenhouse gas emissions, upstream land use, noise, traffic, or other matters unrelated to the discharge—and simply decline to explain the basis. The experience documented in Section 1.5 confirms the problem. Under the 2023 Rule's recommended (but not mandatory) decision contents, certifying authorities issued denials and conditions without explaining how they related to water quality requirements, leaving applicants with no practical basis to challenge conditions and federal agencies with no record to review.

Mandatory justification addresses this at three levels. A state that must cite a specific water quality requirement for each condition cannot easily impose conditions unrelated to water quality. The federal licensing agency that must include certification conditions in its license or permit, *see* 33 U.S.C. § 1341(d), can evaluate whether conditions fall within the certification's scope. And applicants challenging overbroad conditions have a stated basis to review rather than litigating in the dark.

This requirement also reinforces the proposed rule's definition of "water quality requirements" under 40 C.F.R. § 121.3. If EPA limits cognizable requirements to those implementing the CWA sections enumerated in Section 401(d), mandatory citation creates a cross-check: a condition that cannot be traced to an enumerated provision is, by definition, outside the certification's scope.

Prime Mover Institute urges EPA to require specificity in the citation. The certifying authority should identify the specific numeric criterion, narrative criterion, or designated use—not merely general statutory or regulatory authority (e.g., "state water quality standards"). Vague citations would defeat the purpose of the requirement.

5.2. Decision Contents Should Be Mandatory, Not Recommended (RFC 14)

EPA correctly proposes to make decision contents mandatory rather than recommended. 91 Fed. Reg. at 2029–30. Prime Mover Institute supports this change. The 2023 Rule "recommended" that certification decisions include the basis for conditions, but many certifying authorities issued decisions with little or no explanation. Applicants, federal agencies, and courts were left to guess at the rationale—and the only recourse was litigation to compel an explanation after the fact.

Making these requirements mandatory changes the incentive structure. A certifying authority that knows its decision must include specified components has reason to conduct a rigorous analysis before imposing conditions, rather than forcing the applicant to litigate for an explanation afterward.

At minimum, EPA should require: (1) a clear statement of whether the certification is granted, granted with conditions, or denied; (2) for each condition, a statement explaining why it is necessary to assure discharge compliance with water quality requirements, with a citation to the specific applicable requirement; (3) identification of the specific discharge or discharges to which the certification applies; and (4) the factual and scientific basis for the certifying authority's conclusions. A certifying authority that has conducted a thorough water quality analysis will have no difficulty meeting these requirements.

5.3. Public Notice Compliance Does Not Belong in Federal Decision Contents (RFC 12)

Prime Mover Institute supports EPA's proposal to remove the requirement that certification decisions include a statement indicating compliance with public notice procedures. 91 Fed. Reg. at 2029. Whether a certifying authority complied with its own public notice requirements is a procedural matter that does not bear on the substantive merits of the certification decision. Including it in the mandatory decision contents risks creating satellite disputes over notice adequacy that distract from the core question—whether the certification conditions are tied to water quality requirements. Public notice compliance is better addressed through the certifying authority's own administrative procedures and, if necessary, through state administrative law remedies.

5.4. EPA Should Codify a Minimum 30-Day Public Comment Period for Certification Decisions (RFC-29)

Prime Mover Institute supports EPA's proposal to codify a minimum 30-day public comment period for certification decisions. 91 Fed. Reg. at 2016. A uniform federal minimum ensures that interested parties—including project proponents, downstream communities, and other stakeholders—have adequate opportunity to participate in the certification process. Codifying this requirement provides consistency across jurisdictions, prevents certifying authorities from truncating public participation, and strengthens the defensibility of certification decisions on judicial review. Prime Mover Institute urges EPA to finalize this provision as proposed.

6. Post-Certification Modifications Must Protect Applicant Reliance Interests and Prohibit Unilateral Reopeners (RFCs 15, 16, 17)

The proposed rule's modifications framework represents a significant and welcome strengthening of protections for project proponents. Under proposed 40 C.F.R. Section 121.10(a), a certification may be modified only when the federal agency, certifying authority, and applicant all agree in writing. 91 Fed. Reg. at 2031. Prime Mover Institute supports this tripartite-consent approach and urges EPA to finalize it as proposed, while also recommending explicit text requiring federal agency agreement on the language of any modification.

6.1. Applicant Participation in Modification Decisions Is Essential (RFC-15)

Applicant participation in modification decisions protects settled expectations, investment-backed reliance, and sound regulatory design. By the time a certification is issued, the applicant has invested substantial resources in obtaining the certification, structuring the project around its conditions, and securing financing predicated on the regulatory framework it reflects. The applicant may have already commenced construction or entered binding contractual commitments. Any post-issuance modification directly affects these vested interests in a way that demands meaningful participation—not mere notice.

EPA's proposed rule correctly recognizes this reality, requiring that the certifying authority obtain "the applicant's agreement on the language of the modification." 91 Fed. Reg. at 2031. As EPA explains, "[t]he applicant would ultimately need to implement any modified certification conditions and therefore should have a role in determining what any modified conditions will look like." *Id.* Prime Mover Institute agrees and urges EPA to finalize this requirement.

The case for applicant participation is particularly compelling in the infrastructure context. Energy infrastructure projects—pipelines, LNG terminals, hydropower facilities, transmission lines—involve capital investments measured in hundreds of millions or billions of dollars, multi-year construction timelines, and complex financing arrangements that depend on regulatory certainty. Industry comments in prior rulemakings documented billions of dollars in projects blocked or delayed by Section 401 certification issues—including the Jordan Cove LNG Terminal (~$9.8 billion), the Constitution Pipeline (~$750 million), and the Northeast Supply Enhancement Project (~$1 billion). *See* AOGA et al. Comments, 41–42; NHA Comments, 12 & n.38. Allowing modifications without applicant participation would compound this problem by introducing uncertainty even after a certification has been obtained.

Applicant participation also serves a practical function. The applicant possesses technical knowledge essential to evaluating whether a proposed modification is feasible and what its consequences will be. Requiring the applicant's agreement ensures that modifications are informed by relevant technical information and that the resulting conditions are actually achievable.

Prime Mover Institute therefore supports EPA's proposal that modification requires the applicant's affirmative agreement, including agreement on the specific language of any modified conditions, and urges EPA to finalize these provisions as proposed.

6.2. CWA Section 401 Does Not Authorize Unilateral Modifications, Including Through Reopener Conditions (RFC-17)

Prime Mover Institute strongly supports EPA's longstanding position that Section 401 does not provide authority for a certifying authority to unilaterally modify a certification. The proposed rule reaffirms that certifying authorities may not modify certifications "either through certification conditions that purport to authorize the certifying authority to reopen the certification in the future or through any other mechanism." 91 Fed. Reg. at 2031. This position has been maintained across administrations—it was the position of both the 2020 Rule, 85 Fed. Reg. at 42279, and the 2023 Rule, 88 Fed. Reg. at 66631—and it should be finalized in the 2026 Rule.

The statutory text provides no basis for unilateral modification authority. Section 401 establishes a defined process: an applicant requests certification, the certifying authority acts within the statutory timeframe, and the resulting certification becomes part of the federal license or permit. Nothing in Section 401 authorizes a state to revisit or unilaterally alter a certification after it has been incorporated into a federal authorization.

Reopener conditions—provisions in which a certifying authority reserves the right to add, modify, or remove conditions at a future date—are the most common mechanism by which states attempt to circumvent this limitation. These provisions are particularly harmful because they undermine the very regulatory certainty that the certification process is designed to provide. An applicant that has obtained a certification subject to a reopener condition has, in practical effect, obtained nothing of value—the state retains unilateral authority to change the terms at any time, for any reason, without the applicant's consent.

The consequences for infrastructure investment are severe. Project finance lenders evaluate regulatory risk as a central element of their credit analysis, and a certification subject to a reopener condition represents an unquantifiable risk that can impair a project's ability to obtain financing or increase its cost of capital. Reopener conditions do not merely create uncertainty—they actively deter the private investment necessary to build nationally important energy and water infrastructure.

Additionally, as EPA correctly notes, the modification process is not intended "to be used to avoid or extend the reasonable period of time." 91 Fed. Reg. at 2031. If a state could use a reopener condition to add new requirements after the initial certification, it would effectively circumvent the one-year statutory deadline by conducting ongoing, open-ended review outside the constraints Congress imposed. This would defeat the congressional purpose identified by the D.C. Circuit in *Hoopa Valley*)—preventing states "from indefinitely delaying a federal licensing proceeding." 913 F.3d 1099, 1104 (D.C. Cir. 2019) (quoting *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

Prime Mover Institute urges EPA to finalize the prohibition on unilateral modifications and reopener conditions as proposed. The bipartisan consensus on this point—maintained across three successive administrations—reflects the strength of the statutory argument and the practical importance of post-certification regulatory stability.

7. The Section 401(a)(2) Neighboring Jurisdiction Process Should Ensure Timely Resolution and Prevent Obstruction (RFCs 18-26)

Section 401(a)(2) provides a process by which states whose waters may be affected by a discharge from a project in another state may raise objections. 33 U.S.C. Section 1341(a)(2). The proposed rule makes several important improvements to this process, most notably imposing a 90-day timeline for federal agency hearings and determinations and proposing a six-month concurrent trigger that would prevent the 401(a)(2) process from extending the overall certification timeline beyond one year. Prime Mover Institute supports these changes and recommends additional measures to prevent the neighboring jurisdiction process from becoming another tool for project delay.

7.1. EPA Should Codify "May Affect" Factors and Establish Categorical Exclusions (RFCs 22, 23)

Currently, the "may affect" determination is largely standardless, creating opportunities for neighboring states to demand 401(a)(2) notification based on attenuated or theoretical impacts rather than demonstrated hydrologic connections. Prime Mover Institute supports EPA's consideration of codifying these factors. 91 Fed. Reg. at 2033. At a minimum, EPA should codify factors such as the existence and nature of a hydrologic connection between the discharge point and the neighboring state's waters, the distance between the discharge and the state boundary, the volume and duration of the discharge, and the assimilative capacity of the receiving water body.

EPA should go further and establish categorical exclusions for classes of discharges that cannot trigger the "may affect" standard. 91 Fed. Reg. at 2034. Section 401(a)(2) is triggered only when EPA determines that a discharge "may affect" the water quality of another state. 33 U.S.C. § 1341(a)(2). Where that determination can be made categorically, case-by-case review serves no purpose. At a minimum, EPA should exclude: (1) discharges into waters with no hydrologic connection to a neighboring state; (2) small or temporary construction-related discharges (dewatering, stormwater, limited dredge-and-fill) that dissipate before reaching interstate waters; and (3) activities authorized under Army Corps nationwide general permits that already incorporate Section 401 certification, *see* 33 C.F.R. Part 330; 33 C.F.R. § 330.4(c), where the water quality review has already occurred at the programmatic level.

7.2. Neighboring State Objections Should Require Citation to Specific Water Quality Requirements (RFC-24)

Prime Mover Institute supports the requirement that neighboring state objections identify specific water quality requirements that the objecting state believes will be violated by the discharge. 91 Fed. Reg. at 2034–35. Generalized objections—assertions that a discharge "may" affect water quality without identifying which requirements are at risk—do not serve the statutory purpose and should not trigger the hearing process.

This requirement parallels the condition-by-condition justification requirement discussed in Section 5.1, which requires certifying authorities to cite the specific water quality requirement underlying each certification condition. 91 Fed. Reg. at 2029–30. If the certifying state must ground its certification conditions in specific water quality requirements, the neighboring state should be held to the same standard when objecting under 401(a)(2). Requiring specificity raises the bar for frivolous or pretextual objections and ensures that federal agencies have the information they need to conduct a meaningful hearing.

Specificity also makes the hearing process more efficient. When a neighboring state identifies specific water quality requirements at issue, the federal agency can focus its inquiry accordingly, producing a more defensible determination. Vague or conclusory objections, by contrast, yield open-ended hearings that consume time and resources without advancing the statutory purpose.

7.3. The 90-Day Federal Agency Timeline and Six-Month Concurrent Trigger Prevent the 401(a)(2) Process from Becoming an Instrument of Delay (RFCs 25 and 26)

Prime Mover Institute strongly supports the proposed 90-day timeline for federal agency hearings and determinations under Section 401(a)(2). The statute specifies deadlines for every other step of the neighboring jurisdiction process—immediate notification from the federal agency to EPA, 30 days for EPA's "may affect" determination, and 60 days for notified states to respond—but is silent on the federal agency's timeline for holding a hearing and rendering a determination. 91 Fed. Reg. at 2035. This gap has produced significant delays: "one stakeholder . . . discussed one example where the Federal agency took nearly two years to conclude the process following receipt of an objection." *Id.*

A 90-day timeline fills this gap consistent with congressional intent. As EPA correctly observes, "[c]onsidering the focus on ensuring projects are not unreasonably delayed elsewhere in Section 401, *see, e.g.*, 33 U.S.C. 1341(a)(1), it is reasonable to infer Congress did not intend for Federal agencies to otherwise unreasonably delay projects through the public hearing process." 91 Fed. Reg. at

2035. The 90-day period provides sufficient time for the required 30-day notice, the hearing itself, and a determination. *Id.*

Prime Mover Institute also supports the six-month concurrent trigger proposed by EPA (RFC-26). Under this approach, the federal agency would initiate the 401(a)(2) notification process at the six-month mark of the 401(a)(1) process—coinciding with the default reasonable period of time—rather than waiting for the certification to be issued. 91 Fed. Reg. at 2035. Combined with the 90-day hearing timeline, the concurrent trigger would "allow for the section 401(a)(2) process to conclude within one year of the request for certification." *Id.*

The concurrent trigger addresses a structural problem with the sequential approach: under current practice, the 401(a)(2) process does not begin until after the 401(a)(1) certification is issued, meaning the neighboring jurisdiction process can add months—or, in the example above, years—on top of the already lengthy certification timeline. For a project where the certifying authority takes the full year to act, the 401(a)(2) process could extend total review to 18 months, two years, or longer. This sequential delay defeats the statutory purpose of the one-year deadline—preventing states from indefinitely delaying federal licensing proceedings. *See Hoopa Valley*, 913 F.3d at 1104.

Prime Mover Institute urges EPA to finalize both the 90-day timeline and the six-month concurrent trigger. Together, these provisions would close the most significant remaining gap in the Section 401 timeline framework and ensure that the neighboring jurisdiction process functions as Congress intended: as a mechanism for addressing legitimate interstate water quality concerns, not as another tool for obstructing federally authorized projects.

8. EPA's Rationale for Regulatory Reversal Is Well-Founded

8.1. *Loper Bright* Compels EPA to Revisit the 2023 Rule's Statutory Interpretation

This is not an ordinary change of course. When the Supreme Court removed the doctrinal foundation of the 2023 Rule's interpretation, it did not leave EPA with a policy choice—it left EPA with a legal obligation. Under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), an agency changing course must "display awareness that it *is* changing position" and provide a "reasoned explanation" for the change. *Id.* But the standard *Fox Television* analysis presupposes that the legal framework remains constant while the agency's policy preferences shift. Here, the legal framework itself has changed. When the Supreme Court overruled *Chevron* deference in *Loper Bright*, 603 U.S. at 407, it eliminated the doctrinal foundation on which the 2023 Rule's scope interpretation rested.

The 2023 Rule's "activity as a whole" interpretation traced directly to the *PUD No. 1* majority's holding that EPA's focus on "activities" was "a reasonable interpretation of § 401, and is entitled to deference." 511 U.S. at 712. *See supra* Section 1.4.1. Post-*Loper Bright*, the relevant question is no longer whether EPA's interpretation was "reasonable," but whether it represents the "best reading" of the statute. 603 U.S. at 400. EPA is not merely permitted to revisit this question—it is obligated to do so. An agency that persists in an interpretation grounded in a deference regime that no longer exists acts arbitrarily, because it relies on a rationale the law no longer supports. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency acts arbitrarily when it "relied on factors which Congress has not intended it to consider").

Prime Mover Institute submits that EPA's rationale for reversal is substantially stronger than a typical *Fox Television* change-in-position case. The Agency is not simply preferring one reasonable interpretation over another. It is recognizing that the legal standard governing its interpretive authority has been replaced, and applying the new standard to reach the interpretation that the statutory text compels. Every regulation built on *Chevron*-supported readings became vulnerable the day *Loper Bright* was decided. EPA deserves credit for acting promptly to bring its Section 401 regulations into alignment with the governing legal framework rather than waiting for a court to compel it. The regulatory instability documented throughout this comment—three rules in six years, with states exploiting each transition to block or delay critical infrastructure—makes this obligation urgent. *Loper Bright* provides the framework for resolving that instability on the merits rather than perpetuating it through another cycle of policy-driven rulemaking.

8.2. The 2023 Rule Was Wrong on the Merits

Even apart from *Loper Bright*, the 2023 Rule's "activity as a whole" interpretation was incorrect as a matter of statutory construction and produced harmful real-world consequences. As Prime Mover Institute explained in Section 2 of these comments, the plain text of Section 401(a)(1) defines the scope of certification in terms of the "discharge," not the "activity." 33 U.S.C. § 1341(a)(1). Congress deliberately replaced "activity" with "discharge" in the 1972 amendments. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, § 401(a)(1), 86 Stat. 816, 877. The *PUD No. 1* majority's contrary holding relied on EPA's 1971 regulations, *see supra* Section 1.4.1, which "were not based on the statutory text before the Court" and "contained outdated statutory terminology, most importantly 'activity' rather than 'discharge.'" 91 Fed. Reg. at 2025. The 2023 Rule compounded this error by readopting the "activity as a whole" framework despite full awareness of the textual problem. *See* 87 Fed. Reg. 35318, 35344 & n.45 (Jun. 9, 2022) (acknowledging that the *PUD No. 1* Court "appeared to be unaware" of the statutory revision but declining to give the issue dispositive weight).

The real-world consequences of the "activity as a whole" interpretation confirm its statutory infirmity. The interpretation placed no functional limitation on a state's authority under Section 401—precisely as Justice Thomas predicted. *PUD No. 1*, 511 U.S. at 731 (Thomas, J., dissenting). States used this unconstrained authority to deny or delay certifications based on climate change, downstream greenhouse gas emissions, rail traffic, noise, and other factors bearing no relationship to the discharge. New York denied the Constitution Pipeline on climate grounds, Washington denied Millennium Bulk Terminals based on train noise and vehicle traffic, and Oregon ran the clock on Jordan Cove LNG through serial information requests—each case discussed in detail at Section 1.5.1, *supra*. Industry comments in the 2019 and 2022 rulemakings documented individual projects valued in the hundreds of millions to billions of dollars that were blocked or delayed by Section 401 certification issues, and cited seventeen FERC hydropower licensing decisions delayed by Section 401, with eight delayed more than ten years. *See* NHA Comments, 12 & n.38; AOGA et al. Comments, 41–42.

These consequences are not incidental to the "activity as a whole" interpretation; they are its predictable result. When a statute designed to ensure that discharges comply with enumerated CWA provisions is read to authorize review of every aspect of a project, the certification process becomes indistinguishable from a general environmental review—a result Congress did not intend and the statutory text does not support. EPA's reversal corrects both the textual error and its downstream effects.

8.3. Reliance Interests Favor Reversal, Not Retention

The reliance interests in this rulemaking weigh decisively in favor of the proposed rule. Under *Fox Television*, an agency must consider whether its policy change would upset serious reliance interests. 556 U.S. at 515. Here, that analysis favors reversal.

The regulated community has consistently supported a discharge-focused interpretation across three successive rulemakings. In 2019, industry commenters urged EPA to adopt the discharge-limited scope that became the 2020 Rule. In 2022, the same commenters—including AOGA et al., INGAA and AGA (Comments of Interstate Natural Gas Association of America and American Gas Association on Clean Water Act Section 401 Water Quality Certification Improvement Rule, *docketed at* EPA-HQ-OW-2022-0128-0122 (Aug. 8, 2022) ("INGAA-AGA Comments")), the National Hydropower Association, and a 14-state attorneys general coalition led by Louisiana—opposed the Biden Administration's proposed return to the "activity as a whole" standard. The regulated community's reliance interest has always been in the discharge-focused framework, not in the 2023 Rule.

By contrast, any reliance interest in the 2023 Rule is minimal. The 2023 Rule was in effect for less than two years before being placed in abeyance in *Louisiana v. EPA*. That challenge—brought by eleven states and joined by API, INGAA, and NHA as industry intervenors—contested the 2023 Rule on the same grounds EPA now cites for reversal: that the "activity as a whole" scope exceeds the Agency's statutory authority. The court granted a 90-day abeyance in February 2025 to allow the incoming administration to address the litigation. In May 2025, EPA issued a non-binding memorandum directing certifying authorities to focus on discharge-related water quality impacts rather than project-as-a-whole impacts—effectively narrowing the 2023 Rule's scope months before proposing this rulemaking. *See* EPA, Clarification Regarding Application of CWA Section 401 Certification (May 21, 2025). In July 2025, EPA opened a public docket and held listening sessions on implementation challenges. 90 Fed. Reg. (Jul. 7, 2025).

States that relied on the 2023 Rule's expansive reading did so during a period of active litigation, administrative abeyance, and agency guidance narrowing the rule's scope. These are not the serious, settled reliance interests that *Fox Television* requires agencies to consider. The short, contested life of the 2023 Rule stands in stark contrast to the decades-long expectation of the regulated community that Section 401 review would be tethered to the discharge.

CONCLUSION

For the reasons set forth above, Prime Mover Institute supports EPA's proposed rule and urges the Agency to finalize it substantially as proposed, with the strengthening modifications recommended in these comments. Prime Mover Institute appreciates the opportunity to comment and welcomes further engagement as EPA moves toward finalization.