United States Senate

April 8, 2026

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

The Honorable Jess Kramer
Assistant Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Administrator Zeldin and Assistant Administrator Kramer,

We write to express our strong objection to the Environmental Protection Agency's (EPA's) proposed rule limiting the application of Section 401 of the *Clean Water Act*, which would severely limit states' and Tribes' ability to regulate the water quality impacts of hydropower dams within their lands. By denying states' and Tribes' right to protect their waters and water quality, the proposed rule would eviscerate the *Clean Water Act's* core principle of cooperative federalism.

Congress enacted Section 401 to address a specific regulatory gap: federally licensed or permitted activities that could affect water quality but would otherwise proceed without compliance with state and Tribal water quality requirements, which include designated uses (such as known drinking water sources), the criteria that protect those uses, and other requirements that relate to water quality. Section 401 ensures that states and Tribes retain authority to protect their waters and the communities dependent upon them before federal licenses are issued, reflecting Congress's express policy to "recognize, preserve, and protect the primary responsibilities and rights of states" in preventing pollution. 33 U.S.C. § 1251(b).

Contrary to this Congressional intent, EPA's proposed rule would severely constrict the scope of Section 401 water quality certifications, including their ability to address the impacts of more than 400 hydropower dams that must be relicensed within the next decade. Hydropower projects cause profound water quality impacts on stream systems, including: habitat loss; barriers to fish passage; harmful algae blooms; reductions in stream flows; alterations to stream geomorphology; and changes in temperature, dissolved oxygen, nutrients, metals bioaccumulation, and sediment-related conditions, like water clarity, silt, and erosion. These impacts often do not fall neatly into "discharges", and their integrated nature dictates that they are best addressed by looking at the "activity as a whole."

Hydropower alters the temperature regime of rivers, often to the detriment of cold-water species such as salmonids and other aquatic plants and animals that are adapted to colder waters. Water stored in reservoirs greatly increases the surface area exposed to heating by the sun and reservoir operations may reduce the extent of the area protected by shade. Large reservoirs "stratify" in summer, so the water is warmer at the surface and cooler below the thermocline in deeper waters. Absent any control devices, or multi-level outlets, downstream temperature management is primarily achieved directly through flow management. In addition to changes in temperature due to reservoir storage and release, reservoirs also modify the temperature regime of downstream reaches by diminishing the volume of water below diversions for hydropower generation. Hydroelectric dams, which are generally built to take advantage of mountain gradients, also can block upstream fish migration; trapping fish in the typically warmer, valley

reaches of a river, absent effective fish passage. Thus, in addition to the thermal impacts of the hydropower dams themselves, the facilities can prevent fish from reaching waters of appropriate temperature upstream.

As a result, diversions, reservoir storage, and dams contribute to altered water temperatures and flow regimes that injure and even kill salmon and other native aquatic species, encourage warm-water and non-native fishes, and alter the base of the food web. In addition, these conditions allow toxic algae (e.g., *Microcystis*), and submerged invasive aquatic vegetation (e.g., *Egeria*) to become established and potentially widespread. In sum, temperature impacts are directly related to hydroelectric facility construction and operations. Thus, as appropriate, certifications include requirements for temperature management to ensure protection of water quality and beneficial uses of a state's waters. At times, these conditions are best expressed as temperature and flow requirements at point source discharges – at other times, water quality certifications address the issues more effectively through conditions aimed at other actions, such as habitat restoration to provide increased riparian shade or refugia and replace upstream lost habitat, reservoir operation requirements to manage cold-water pools, posting to warn the public about dangerous toxins, or measures to monitor and control nuisance species. The proposed rule casts doubt on the state's ability to use the most effective tools to address pollution problems from hydropower projects.

In addition to severely limiting states' and Tribes' ability to address the water quality impacts of hydropower dams, the rule is problematic for other Federally permitted activities as well, including pipelines and Section 404 permits for discharges of dredged or fill material.

Under the proposed rule, Section 401 certifications could only address the impacts of dredged or fill material on those portions of affected wetlands or other waters that constitute waters of the United States. Some of the affected wetlands that lack a "continuous surface connection" or streams that are deemed to lack "relatively permanent" flow under the new proposed "Waters of the United States" rule could not be addressed by Section 401 certifications. This limitation of certification authority will create problems, even in states like California that have state law water quality permitting authority broad enough to address all of the affected wetlands or other waters. Where under current law the project would need to obtain only a Section 401 certification from the state, the proposed rule would force the applicant to file and the state to process two applications for two approvals—one for water quality certification and one for the state law permit—adding unnecessary delay and expense for both the state and the applicant.

Furthermore, the EPA's proposed rule would reduce opportunities for Tribes to protect water quality. The 2023 rule appropriately recognized that a Tribe's ability to develop regulations under Section 303(c) is not tied to its authority to exercise Section 401 to protect its waters. EPA now proposes to repeal this provision, removing a critical tool that supports Tribal water quality protection. This is a step backward, and Tribes have not even had sufficient time to apply for or implement these new authorities before EPA seeks to reverse course. Rather than providing clarity, this change would create additional uncertainty in the regulatory process.

We urge EPA to preserve states' and Tribes' broad authority under the Section 401 certification process. The *Clean Water Act* has been successful for decades in large part because

EPA has recognized and deferred to state and Tribal authority over water quality impacts within their lands. We respectfully request that EPA preserve this tradition of cooperative federalism.

Thank you for your consideration.

Sincerely,

Alex Padilla
United States Senator

Adam B. Schiff
United States Senator

Jeffrey A. Merkley
United States Senator

Jeanne Shaheen
United States Senator

Chris Van Hollen
United States Senator

Ron Wyden
United States Senator

Bernard Sanders
United States Senator

Richard Blumenthal
United States Senator

Patty Murray
United States Senator

Kirsten Gillibrand
United States Senator

Maria Cantwell
United States Senator