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March 30, 2026

VIA EMAIL AND US MAIL

Andrew Edwards
Bureau of Water
South Carolina Department of Environmental Services
2600 Bull Street
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RE: Triennial Review of Water Quality Standards, South Carolina Department of Environmental Services

Dear Mr. Edwards:

Please find enclosed herewith Public Comments to the Triennial Review of Water Quality Standards requested by the South Carolina Department of Environmental Services, South Carolina Register Vol. 50, Issue 2, p. 18, February 27, 2026. Please consider these Public Comments as part of the Triennial Review process.

Sincerely,



Ethan R. Ware
Williams Mullen

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TRIENNIAL REVIEW OF WATER QUALITY STANDARDS
STATE OF SOUTH CAROLINA

TO: Bureau of Water Standards Coordinator, South Carolina Department of Environmental Services

FROM: Ethan R. Ware, Williams Mullen, 1230 Main Street, Suite 330, Columbia, South Carolina, 29201. eware@williamsmullen.com.

DATE: March 30, 2026

RE: Triennial Review of Water Quality Standards, South Carolina Department of Environmental Services

Pursuant to Section 303(c) of the federal Clean Water Act (“CWA”), South Carolina water quality standards (WQS) must be reviewed at least once every three years. Referred to as the Triennial Review, this required process consists of reviewing and amending, where appropriate, water classifications, designated uses, water quality criteria, site-specific standards, and antidegradation policy. *S.C. State Register*, Vol. 50, Issue 2, p. 18 (February 27, 2026) In reviewing its water classifications and standards, the Department will give consideration to the factors listed in S.C. Code Ann. Section 48-1-80. The Notice of Drafting period ends March 30, 2026.

This Memorandum is submitted to DES to provide comments for the Administrative Record and consideration in the Triennial Review rulemaking process on water quality criteria enforced by the Department in S.C. Code Ann. Regs. 61-101.

Requirements Governing Activities in Regs. 61-101 –are Enforced as Water Quality Standards Subject to Triennial Review

The Triennial Review appears to limit public comment to necessary changes for regulation Regs. 61-68 and 69. Narrative water quality criteria set out by 401 water quality

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certification (“401 WQC”) requirements in S.C. Code Ann. Regs. 61-101 are appropriately included in a Triennial Review and should be revised to be consistent with the Clean Water Act.

An applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department. S.C. Code Regs. 61-101.A.2. In fact, Federal law provides that no Federal license or permit is to be granted until such certification is obtained.

The 401 WQC process implements provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, and those sections prescribe the water quality criteria covered by the Triennial Review. S.C. Code Ann. Regs. 61-101.F.2. The 401 WQC regulations require the Department consider narrative water quality criteria governing an “activity” or “project” as part of the 401 WQC process, not the water quality of the discharge from that activity or project as enforceable water quality standards for water discharge permits. S.C. Code Ann. Regs. 61-101.A.4 and C.1(b) (narrative requirements for the “activity” are enforced as “water quality standards”), F.3(a) and (b) (water dependent and feasible alternative analysis applied to “activity”), and F.4 and F.5 (feasible alternatives to “activities” preclude grant of 401 WQC). S.C. Code Ann. Regs. 61-101 further includes these narrative criteria in the list of water quality standards under the Clean Water Act subject to Triennial Review. S.C. Code Ann. Regs. 61-101.A.4 (“Any certification issued by the Department shall specify where

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appropriate that any such discharge will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Federal Clean Water Act.”),

COMMENT: To be Consistent with EPA Interpretation of the Statute, the Clean Water Act is Properly Limited to Criterion Governing “Discharges”, not “Activities”, as Part of the 401 WQC Process.

The best reading of the text of Clean Water Act Section 401 is the statute limits scope of 401 WQC issued by the states to “discharges” and not to an “activity.” This approach is consistent with EPA reading of the Clean Water Act set forth by Federal Register Notice and proposed revision to 401 WQC regulations January 15, 2026. See, 91 Federal Register 2008, 2023-24 (January 15, 2026) (“*EPA Guidance*”).

The first sentence in Clean Water Act Section 401(a)(1) provides limits the Department’s authority during the 401 WQC process: “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 301, 302, 303, 306, and 307 of this Act” (emphasis added). The use of the phrase “such discharge” in the very sentence that identifies what a State must certify is strong textual support for EPA’s proposed interpretation. See *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”); *PG&E v. FERC*, 113 F.4th 943, 948 (D.C. Cir. 2024) (explaining that, “when `addressing a question of statutory interpretation, we

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begin with the text' ") (quoting *City of Clarksville v. FERC*, 888 F.3d 477, 482 (D.C. Cir. 2018));
EPA Guidance, at 2023

Importantly, Section 401(a)(1) of the CWA uses the term “activity,” but not in reference to the scope of certification process, only the type of permit for which a 401 WQC may be necessary. *EPA Guidance*, at 2023. The term “activity” describes the type of Federal license or permit that triggers 401 WQC—namely, 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.” *Id.* Whereas “such discharge” identifies the scope of the 401 WQC itself. Further, if a Federal license or permit to conduct an activity may result in a discharge, then the Department “would certify that ‘any such discharge’ will comply with the enumerated provisions of the CWA,” not the activity. *Id.*

The language of the rest of Clean Water Act Section 401 supports this limitation to S.C. Code Ann. Regs. 61-101. Section 401(a)(2) of the statute requires EPA to determine whether “*such a discharge* may affect” the quality of the waters of any other State beyond the State in which the discharge originates (emphasis added), and subsequently notify that affected other State. Section 401(a)(2) of the statute also requires a notified State that objects to a Federal license or permit to determine whether “*such discharge* will affect the quality of its waters so as to violate any water quality requirements” (emphasis added). These references to “discharge” are clear indications that the subject of the entire Section 401 process—from certification pursuant to Clean Water Act Section 401(a)(1) to the neighboring jurisdiction process pursuant to Section 401(a)(2)—is focused on discharges, not the broader activity. The scope of Section 401(a)(2) process is restricted to discharges, and this provides strong support that the scope of certification

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in CWA section 401(a) is also clearly limited to discharges. *EPA Guidance* at 2023-24. The legislative history notes Congress intended its changed framing from “activity” to “discharge” to have real meaning, with the purpose of making the new CWA section 401 WQC procedures consistent with the new regulatory framework of the Act. *EPA Guidance* at 2024. The 1971 Senate Report reiterates that CWA section 401 WQC procedures involve “certification from the State in which the discharge occurs that any such discharge will comply” with water quality requirements. S. Rep. No. 92-414, at 69 (1971) (emphasis added). The report continues that CWA section 401 “is substantially section 21(b) of existing law . . . amended to assure consistency with the bill’s changed emphasis from water quality standards to *effluent limitations* based on the elimination of any discharge of pollutants.” *Id.* (emphasis added); see also H.R. Rep. No. 92-911 at 121 (1972) (“Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the [1972 Act].”). The legislative history indicates that Congress amended the existing water quality certification framework to “assure consistency” with the 1972 Act’s “changed emphasis” of controlling “discharges.”

Although the Clean Water Act, Section 401(a), does authorize a state to consider “other appropriate requirement of State law” as part of the 401 WQC process, the Department may not enforce water quality standards (like restrictions on “activities” in S.C. Code Ann. Regs. 61-101) that violate the Clean Water Act. A proper reading of the statute is that the Department regulations are to be limited to other appropriate provisions of State law governing “discharges” not activities or projects. *EPA Guidance* at 2026. This interpretation of “other appropriate requirement of State law” makes sense because general words should follow an enumeration of two or more things, they apply only to things of the same general kind or class specifically mentioned. See *Wash. State*

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Dept. of Soc. & Health Servs.v.Keffeler,537 U.S. 371, 383-85 (2003). The use of the word “appropriate” in Section 401(d) indicates that Congress intended that limitation to be informed by the enumerated provisions of the statute appearing in section 401(d) directly before “other appropriate requirement of State law”—which all regulate point source *discharges* into waters of the United States—as well as other key statutory touchstones such as terms “discharge” and “navigable waters,” i.e., “waters of the United States.” The phrase “any other appropriate requirement of State law” in CWA section 401(d) is not unlimited or expansive, but rather it contains limiting language (“appropriate”) that must not be read out of the statute.

REQUIRED CHANGES TO BE CONSISTENT WITH THE CLEAN WATER ACT:

Revise S.C. Code Ann. Regs. 61-101 as follows to be consistent with the scope and authority of a state to place conditions on projects and activities during the 401 WQC process.

S.C. Code Ann. Regs. 61-101.A.4: Any certification issued by the Department shall specify where appropriate that any such discharge will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Federal Clean Water Act. If there is not an applicable effluent limit or standard under such sections, the Department will so certify. ~~The Department shall also certify that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards regulations.~~ No certification will be issued if such assurance is not provided.

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S.C. Code Ann. Regs. C.1. Any applicant for certification needed for a Federal license or permit must present a complete application to the Department in a manner specified by the Department. Federal application forms or forms provided by the Department will be accepted. Upon receipt of an application, the Department may require additional information to make the application complete. The Department will accept a public notice issued by the Federal permitting or licensing agency as application for certification if it contains sufficient information. Generally, the date of receipt of the public notice will be considered the date of application for certification. As a minimum the application must contain the following information: (a) the name, address, phone numbers, principal place of business of the applicant and, if applicable, the name and address of the agent for the applicant. (b) ~~a complete description of the proposed permitted activity, including the location, affected waterbody(s), purpose, and intent of the project;~~ maps, drawings, and plans sufficient for review purposes (detailed engineering plans are not required). (c) a description of all proposed ~~activities~~ discharge reasonably associated with the proposed permitted project either directly or indirectly, including planned or proposed future development ~~related discharges~~ that relate to water quality considerations.

S.C. Code Ann. Regs. 61-101.F.3. In assessing the water quality impacts of the ~~project discharge~~, the Department will address and consider the following factors: ~~(a) whether the activity is water dependent and the intended purpose of the activity;~~ (b) whether ~~there are feasible alternatives to the activity;~~ * * * * *

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Requested Revision to S.C. Code Ann. Regs. 61-101.F.4. ~~Certification of the activities listed below will be issued when there are no feasible alternatives.~~ When issuing certification for such ~~discharges activities~~, the Department shall condition the certification upon compliance with all measures necessary to minimize adverse effects, including stormwater management. * * * * *

S.C. Code Ann. Regs. 61-101.F.5. 5. Certification will be denied if: (a) the proposed ~~activity discharge~~ permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired; (b) ~~there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses;~~ (c) the proposed ~~activity discharge permanently~~ adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species; (d) the proposed ~~discharge activity permanently~~ adversely impacts special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers;