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February 17, 2026

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

Re: Comments of the Association of Clean Water Administrators on EPA's
Proposed Rule "Updating the Water Quality Certification Regulations", Docket
ID No. EPA-HQ-OW-2025-2929

Dear Administrator Zeldin,

The Association of Clean Water Administrators (ACWA) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) proposed rule entitled "*Updating the Water Quality Certification Regulations.*" ACWA is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers who serve alongside EPA as co-regulators of the Clean Water Act (CWA). Our members have a unique and important interest in any national regulatory updates or policy positions affecting implementation of the CWA, including water quality certification under Section 401. ACWA's comment development process seeks to capture the diverse perspectives of states, territories, and interstates that implement CWA programs. The agencies should give substantial consideration to comments submitted directly by individual state, interstate, and territorial agencies, as the perspectives of some ACWA members may differ from those presented in this comment letter.

State clean water agencies generally support EPA's stated goals of regulatory clarity, administrative efficiency, and timely decision-making in the Section 401 certification process. States have a long history of working collaboratively with EPA, federal permitting agencies, project proponents, and other stakeholders to ensure that federally licensed or permitted activities comply with state water quality standards and other applicable state water quality requirements.

With the enactment of the CWA, Congress recognized and preserved the primary role of states in protecting water quality within their borders. Section 101(b) of the Act expressly affirms Congress's policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." Section 401 water quality certification is a cornerstone of this cooperative federalism framework, ensuring that states can apply their water quality standards, designated uses, and other state-adopted requirements to federally licensed or permitted activities that may affect state waters.

For more than fifty years, states have exercised this authority responsibly and effectively, using Section 401 to address site-specific conditions, protect drinking water sources, safeguard aquatic habitat, and prevent degradation of water quality that would otherwise go unaddressed by federal permitting programs alone. To better understand the historic effectiveness of states' water quality certification

processes, ACWA circulated a survey to state regulators to learn about their experiences and perspectives in implementing Section 401. We have attached a summary of state input to these comments for the administrative record.

EPA's proposed revisions to the Section 401 regulations would significantly recalibrate how many states administer water quality certification. While the proposed rule preserves the basic statutory framework—states retain authority to grant, condition, deny, or waive certification—the cumulative effect of the proposed changes would meaningfully constrain state discretion, narrow long-standing certification practices, and shift key procedural and substantive determinations toward a more federally prescribed model.

If finalized in its current form, many states believe the proposed rule would unnecessarily curtail states' historic authority and autonomy under Section 401, create new implementation challenges, and undermine states' ability to protect water quality within their borders. The concerns of these states are particularly acute with respect to: (1) narrowing the scope of water quality certification review; (2) new certification application requirements and limitations on state input; (3) narrowing the definition of "other appropriate state laws"; (4) changes to certification modification processes; and (5) potential limitations on certification conditions to numeric water quality criteria. ACWA respectfully urges EPA to reconsider and revise these elements of the proposal, as discussed below.

Federalism Consultation and State Feedback

ACWA appreciates EPA's ongoing partnership with state co-regulators and recognizes the agency's efforts to engage state and local governments through the federalism consultation process under Executive Order 13132. States value the opportunity to participate in early dialogue with EPA, and the listening sessions, written outreach, and consultation materials, which have provided an important forum for state clean water regulators to share implementation experience, technical expertise, and practical concerns. At the same time, many states are concerned that the substance of the proposed rule does not meaningfully reflect the views expressed during the federalism consultation process. Many state regulators emphasized the effectiveness of current Section 401 regulations and the importance of preserving state authority and flexibility in water quality certification. Despite this input, the proposed rule advances several policies - such as narrowing the scope of certification review, limiting reliance on state law, and constraining procedural discretion—that appear inconsistent with the feedback provided by many states during the federalism consultation process. We have attached EPA's summary of state input received during federalism consultation in the development of the proposed rule and respectfully urge EPA to more fully consider and incorporate all state input as it develops a final rule.

Scope of Certification Review

Under existing practice, many states conduct activity-based reviews when issuing Section 401 certifications. While the presence of a discharge triggers certification, these states commonly assess whether the overall federally permitted activity will comply with applicable water quality requirements. This approach reflects the reality that water quality impacts often arise from multiple, interconnected components of a project and may not be fully captured by a narrow focus on discrete point source discharges.

Many states have relied on this broader scope to address impacts to designated uses, narrative criteria, biological integrity, sedimentation, temperature, flow alterations, and cumulative effects - particularly for complex projects such as hydropower facilities, pipelines, mining operations, and dredge and fill activities.

The proposed rule would limit the scope of Section 401 certification review to point source discharges into waters of the United States and whether those discharges comply with applicable water quality requirements. This represents a substantial narrowing of state authority compared to historic practice. As a result:

- States may have less flexibility to consider certain water quality impacts that are not directly attributable to a point source discharge, even where those impacts are associated with the federally permitted activity.
- Consideration of certain indirect or nonpoint source-related effects may be more limited.
- Evaluation of cumulative or secondary impacts tied to federally permitted activities may be more constrained.

This change would require some states to adjust existing certification processes and reconsider how certain water quality impacts are evaluated under Section 401.¹

Certification Application Requirements and Limitations on State Input

States currently rely on a mix of federal regulations, state statutes, and program-specific guidance to determine what constitutes a complete certification request. This flexibility allows states to tailor information requirements to project complexity, waterbody sensitivity, and state law. States often engage in iterative information exchanges with applicants before deeming a request complete and starting the statutory review clock.

The proposed rule establishes a standardized set of required application elements and ties the commencement of the certification timeline to receipt of these materials. While intended to increase predictability, this approach limits states' discretion to require additional information prior to starting the review period (which may not exceed one year). Potential effects of this regulatory change would include:

- Reduced state ability to define completeness based on project-specific or state-law considerations;
- Increased risk that the certification clock begins before a state has sufficient information to conduct a meaningful technical review; and
- Potential conflicts with state administrative procedures or statutory completeness determinations.

¹ The scope of 401 review is one of the most controversial sections of the proposed rule and ACWA would like to acknowledge that, while most states believe broad authority is needed to protect water quality in states, there are some states that believe the narrowing of scope in the proposed rule is appropriate and consistent with the CWA.

Although states may request additional information after the clock begins, the proposed rule would pressure states to conduct complex analyses within fixed timelines, even where critical data may be missing or incomplete.

New Requirements for Certification Decision Contents

States currently issue water quality certification decisions in accordance with state law and administrative practice. While certification decisions generally identify conditions and supporting rationale, the format and level of detail vary widely. This flexibility allows states to align certification documents with state permitting frameworks and enforcement mechanisms.

The proposed rule prescribes detailed requirements for what must be included in certification decisions, including explicit findings linking each condition to compliance with specific water quality requirements; citations to the legal authority supporting each condition; and detailed explanations supporting certification grants or denials.

These new requirements would increase administrative burdens on some state agencies, particularly for routine or high-volume certifications. Additionally, the proposed rule would potentially create new litigation risk by inviting challenges to the sufficiency or phrasing of decision rationales.

While transparency is an important goal for all states, it is important to retain flexibility in how states achieve this objective while also ensuring that agencies have sufficient resources to conduct the substantive water quality analyses needed for certifications.

Narrowing the Definition of “Other Appropriate State Laws”

States have long relied on “other appropriate state laws” - including statutes, regulations, and policies related to water quality protection - to inform Section 401 certification conditions. These authorities often complement EPA-approved water quality standards and reflect state-specific legal frameworks.

The proposed rule would narrow the role of “other appropriate state laws,” creating uncertainty about whether states may continue to rely on laws that are not explicitly incorporated into EPA-approved water quality standards. This limitation would likely:

- Limit states’ ability to apply state-specific water quality protections through Section 401;
- Create tension between federal regulations and state statutory mandates; and
- Potentially preempt valid state authorities that have historically been incorporated into water quality certification.

ACWA is concerned that the proposed rule would unduly narrow the universe of state laws that may be considered in the certification process, potentially excluding state statutes and regulations that are integrally related to water quality protection but are not expressly incorporated into EPA-

approved water quality standards. Such an approach would undermine states' ability to implement Section 401 in a manner consistent with their own legal authorities.

Congress explicitly preserved a role for state law in Section 401, recognizing that states are best positioned to identify and apply appropriate water quality protections within their borders. EPA should avoid interpretations that implicitly preempt or discount valid state authorities that have long supported effective water quality certification programs.

Changes to Certification Modification Procedures

States have historically retained flexibility to modify certification conditions post-issuance in response to new information, changed circumstances, adaptive management needs, or compliance issues. Modification authority has been essential to ensuring ongoing compliance with water quality standards over the life of long-term or complex projects.

The proposed rule would significantly revise how water quality certifications may be modified after issuance by introducing new procedural requirements for applicant consent and increased federal agency coordination. Modifications to an existing Section 401 certification would require the written agreement of the applicant, rather than allowing certifying authorities to unilaterally revise conditions in response to new information or changed circumstances. This represents a departure from long-standing state practice in which certifying authorities have retained flexibility to modify certifications, as necessary, to ensure continued compliance with water quality requirements. Potential effects of the proposed rule include:

- Reduced state authority to unilaterally modify certifications when necessary to protect water quality;
- Increased procedural complexity and delay in addressing emerging water quality concerns; and
- Constraints on adaptive management approaches commonly used by states.

These changes could limit states' ability to respond effectively to unanticipated impacts or evolving scientific understanding, undermining long-term water quality protection. The proposed updates to certification modification procedures raise both legal and practical concerns for state regulators. States routinely encounter situations where certification conditions must be modified to respond to new information, changed circumstances, or adaptive management needs. The proposed rule's emphasis on applicants' consent and additional procedural steps could unduly restrict states' ability to respond effectively to evolving water quality concerns.

ACWA is concerned that these changes may limit states' flexibility to ensure ongoing compliance with water quality standards over the life of a federally permitted activity. Any modification framework should preserve states' authority to adjust certification conditions when necessary to protect water quality, consistent with due process and coordination with federal agencies.

Effects of Changing “Project Proponent” to Applicant

The proposed rule would replace the term “project proponent” with “applicant” throughout Section 401 regulations, a change that has substantive legal and practical implications for state certifying authorities. Under the proposed framework, the “applicant” is defined narrowly as the entity that submits the request for water quality certification in connection with a federal license or permit. This shift has the effect of limiting state engagement, obligations, and enforcement leverage to a single party, even where multiple entities are responsible for project design, construction, operation, or compliance.

Historically, states have treated the project proponent concept more broadly to encompass owners, operators, permittees, and other responsible entities whose actions affect water quality. By tying key procedural rights—such as consent to certification modifications, provision of application materials, and receipt of state communications—to the “applicant” alone, the proposed rule may prevent states from requiring participation or accountability from other entities with direct control over project impacts. This narrowing could complicate implementation for complex or multi-party projects, including linear infrastructure, public-private partnerships, or projects involving delegated construction and operational responsibilities.

ACWA is concerned that this proposed change would also have enforcement and federalism implications. Conditioning state authority on the actions or consent of a single “applicant” may weaken states’ ability to ensure that certification conditions remain effective and enforceable over time, particularly if project ownership or operational control changes after certification is issued.

Applicability of Water Quality Certification to General Permits

ACWA appreciates EPA’s solicitation of comment on whether Section 401 certification should apply to general permits and other circumstances in which there may not technically be an “applicant.” ACWA strongly supports the continued application of Section 401 certification requirements to general permits, including where certification is requested by a federal agency rather than an individual permittee. This interpretation is consistent with both the text and purpose of Section 401 and has been reflected in prior regulations through the use of the term “project proponent,” defined to include not only an applicant for a federal license or permit, but also the entity seeking certification.

Limiting Section 401 certification to situations involving a discrete “applicant” would have significant and unintended consequences for state programs. For example, in non-delegated NPDES states, certifying authorities provide certifications directly to EPA for draft NPDES permits, rather than to individual permit applicants. EPA’s increasing reliance on general permits in such states means that a narrow interpretation could effectively eliminate state certification authority for a substantial portion of NPDES permitting. ACWA urges EPA to clearly affirm in the final rule that Section 401 certification applies to general permits and other federally permitted activities, regardless of whether an individual applicant is identified, consistent with long-standing practice and the CWA’s cooperative federalism framework.

Preservation of State Authority to Extend the Reasonable Period of Time

ACWA is concerned with EPA's proposal to remove 40 CFR § 121.6(d), which allows certifying authorities to extend the reasonable period of time (RPT) to accommodate state public notice requirements or force majeure events. While ACWA supports establishing an RPT under typical circumstances, eliminating this flexibility would impair effective Section 401 implementation.

States must retain discretion to extend the RPT when unanticipated conditions arise, including substantial public comment or force majeure events. Without this authority, certifying agencies may be forced to limit public participation or curtail technical review, undermining the quality and defensibility of certification decisions.

Potential Limitation of Certification Conditions to Numeric Water Quality Criteria

ACWA is also concerned that the proposed rule could be interpreted to limit certification conditions primarily—or exclusively—to numeric water quality criteria. States have historically relied on a combination of narrative and numeric standards to craft certification conditions that are tailored to the unique characteristics of individual projects and waterbodies. Any regulatory interpretation that disfavors narrative criteria or constrains states' ability to impose conditions necessary to meet designated uses would significantly weaken Section 401 as a water quality protection tool.

EPA should make clear that certification conditions may be based on all applicable components of state water quality standards, including narrative criteria and antidegradation requirements, and not solely on numeric limits.

Request for Delayed Effective Date

Finally, ACWA respectfully requests that EPA provide a delayed effective date for any final rule adopted pursuant to this proposal. States will require adequate time to evaluate the final regulatory requirements, update program guidance and regulations as necessary, train staff, and coordinate with federal agencies and regulated entities.

A delayed effective date is particularly important given the significant procedural and substantive changes contemplated by the proposed rule and the diversity of state Section 401 programs nationwide. Providing sufficient implementation time will promote consistent application, reduce confusion, and support the shared goal of efficient and effective water quality certification.

Conclusion

While the proposed rule seeks to clarify and promote greater consistency in Section 401 certification procedures, several proposed revisions could result in a framework that shifts away from cooperative federalism and would alter how many states have historically implemented the program. Changes to the scope of review, application processes, certification contents, modification procedures, and the role of state law may influence how states structure and administer their Section 401 programs going forward.

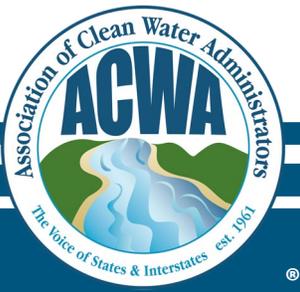
For state clean water regulators, these revisions raise important questions regarding implementation, administrative adjustments, and continued alignment with state water quality protection responsibilities. Depending on how the rule is finalized, some states may need to revisit existing procedures and program structures to ensure consistency with federal requirements while maintaining effective water quality oversight.

We appreciate the opportunity to provide these recommendations and look forward to continued collaboration as the rulemaking proceeds. Please contact ACWA Executive Director Julia Anastasio at janastasio@acwa-us.org or (202) 756-0600 with any questions regarding these comments.

Sincerely,

A handwritten signature in cursive script that reads "Shelley Lemon".

Shelley Lemon
President
Association of Clean Water Administrators



October 27, 2025

Peggy S. Browne
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency

Re: State Information Regarding Implementation of Clean Water Section 401
Certification

The Association of Clean Water Administrators (ACWA) is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers who serve as co-regulators of the federal Clean Water Act (CWA). The U.S. Environmental Protection Agency (EPA) has announced that it is in the process of determining whether guidance or rulemaking may be necessary to address identified areas of regulatory uncertainty or implementation challenges regarding the scope of state water quality certification under CWA Section 401.

ACWA appreciates EPA's early engagement with states and others regarding this effort and submits the following information provided by states, through an ACWA survey, regarding their experiences in water quality certification under CWA Section 401.

While these comments and recommendations are intended to capture the diverse perspectives of the state, interstate, and territorial clean water administrators, EPA should also seriously consider the recommendations that come directly from individual states, interstates, and territories. ACWA would like to reiterate its appreciation to EPA for the opportunity to provide pre-proposal recommendations and looks forward to continuing meaningful engagement with EPA throughout this effort.

Sincerely,

Julia Anastasio
ACWA Executive Director and General Counsel

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To better understand what aspects of Section 401 can be improved to more effectively and efficiently protect the nation's waters, ACWA has gathered information from state clean water regulators regarding their experiences in the Section 401 water quality certification process. Responses were received from officials from 24 states, largely demonstrating that: (i) CWA Section 401 certification denials are minimal; (ii) delays in certification – while rare – are largely due to applicants' submittal on incomplete applications or other federal statutory requirements (e.g., National Environmental Policy Act, Endangered Species Act), rather than state certification processes; and (iii) that states have taken a variety of steps to promote timely, transparent, and scientifically-supported water quality certification determinations.

The following is a summary of state responses to 12 questions covering a broad spectrum of issues relating to CWA Section 401 state certification processes:

2. *What is the average length of time it takes to complete a Clean Water Act Section 401 water quality certification ("certification") once you have received a completed application?*

State responses averaged **77 days** for certification completion. Responses varied from **14 days to 180 days**.

3. *Approximately how many certification requests does your state review each year? How many are denied?*

State responses varied greatly as to the number of certifications processed annually. However, the number of denials of certifications reported was notably low. **A majority of responding states (13) reported no certification denials.** 17 states indicated 0-2 certification denials. No state reported a certification denial rate higher than 3.5%.

4. *What steps has your state taken to make timely certification decisions?*

States reported using a mix of front-loading, standardization, automation, interagency coordination, and targeted staffing to reduce back-and-forth and shorten review times. Steps described included:

- **Pre-filing / early engagement**

- Detailed pre-filing meetings with applicants (and the Corps) to resolve issues before formal submittal; some states prepare drafts by the end of the public comment period.
- Frequent, transparent communication with applicants throughout review.
- **Clear guidance and application improvements**
 - Revised application forms and instructional materials (many updated after the 2023 federal rule) so requests are complete on first submission.
 - Publicly posted process descriptions, templates, and example applications (via FOIA or website) so applicants know expectations.
- **Standardization & templates**
 - Standardized data requirements (e.g., sediment characterization), standardized conditions, and use of templates/decision documents to speed application and review.
 - Categorical/programmatic certifications and condensed permit conditions placed in state regulations to reduce need for individual decisions.
- **Regulatory/administrative changes**
 - Regulatory updates to streamline certification of nationwide/general permits (avoiding lengthy state rulemaking) and to embed common conditions in regulation.
 - Use of programmatic reasonable periods (many states typically reported ~90 days rather than defaulting to six months).
- **Electronic processing & web tools**
 - Online submission portals that validate fields, allow e-signatures, track workflow, and send automated reviewer notifications.
 - Acceptance of electronic information and correspondence to speed exchange.
- **Interagency coordination**
 - MOUs and formal coordination with USACE to align pre-filing, timelines, concurrence steps, and programmatic certifications — saving time and resources.
- **Staffing, training & internal controls**
 - Dedicated staff or FTEs, hiring contractors to augment capacity, staff training, internal SOPs, and tracking of deadlines and metrics.
 - Internal performance expectations and tracking to keep reviews on schedule.
- **Expedited processes for emergencies**
 - Special/expedited public notice and processing procedures for disaster recovery and emergency projects.

States emphasized preventing incomplete submissions (clear guidance + pre-filing), reducing repetitive review work (standardized requirements, templates, programmatic certifications), speeding handling (electronic systems + staffing), and improving coordination with the Corps to achieve timelier certification decisions.

5. *What factors does your state consider in determining whether a certification request is complete and acceptable? Do you have clear requirements outlining what constitutes a complete application?*

Most states reported having clear, codified, or guidance-based requirements that define what makes a Section 401 application complete. Completeness determinations typically rely on federal requirements under 40 CFR §121.5, state regulations or administrative codes, and agency-developed forms, checklists, or guidance documents. The goal is to ensure that all necessary project details, water quality information, and supporting documentation are submitted at the outset to minimize delays. Common factors considered in determining an application's completeness included:

- **Compliance with Federal and State Regulatory Requirements**
 - Many states directly referenced 40 CFR §121.5(a)–(b) as the baseline for completeness.
 - Several also cited state statutes or administrative rules
 - Applications must align with both federal and state water quality standards.
- **Basic Administrative Requirements**
 - Completed and signed application form.
 - Payment of applicable fees.
 - Accurate contact information, project location, and maps.
 - Submission of the public notice (if applicable) and proof of publication.
- **Project Description and Technical Detail**
 - Clear and complete description of proposed activities and discharges.
 - Inclusion of plans, maps, site drawings, and photographs.
 - Quantification and characterization of impacts on waters, including wetland delineations, stream assessments, and mitigation proposals.
 - Explanation of avoidance and minimization measures.
- **Supporting Documentation**
 - Copy of the federal license or permit application (e.g., U.S. Army Corps 404 permit or FERC documents).
 - Documentation of agency coordination, including correspondence with USACE, USFWS, and state natural resource agencies.
 - Water quality-related data, sediment characterization, and/or use attainability analyses.
 - Mitigation plans with legal protection mechanisms (e.g., easements).
 - Applicable best management practices (BMPs).

- **Environmental and Regulatory Context**
 - Consistency with state water quality standards, management plans, and antidegradation policies.
 - Consideration of feasible alternatives, cumulative impacts, and threatened or endangered species.
 - Demonstrated compliance with state and federal stormwater management and nonpoint source requirements.

- **Agency-Specific or Activity-Based Requirements**
 - Some states require specialized studies or forms depending on project type (e.g., wetland fills, stream modifications, hydropower relicensing).
 - A few agencies tie completeness reviews to other permitting programs (e.g., wetlands or flood hazard applications) with synchronized timelines.

Most states have formalized, transparent, and federally aligned standards defining a “complete” 401 certification request. Completeness hinges on providing a full, accurate, and well-documented project description—including federal permit information, water quality data, and mitigation details—so that reviewers can assess compliance with water quality standards without extensive follow-up.

6. Do you have best practices, such as early consultation processes, types of materials needed, etc. for applicants to understand what constitutes a complete application? If so, please elaborate.

Nearly all respondents indicated that they have established formal or informal mechanisms to support applicants and improve application completeness. Common themes included the use of pre-filing meetings, detailed checklists or guidance documents, online submission tools that ensure completeness, and active interagency coordination.

- **Pre-Filing Consultation and Early Coordination:** A strong majority of states emphasized the importance of pre-filing or pre-application meetings to ensure applicants understand requirements before submission. Many states require or strongly encourage pre-filing meetings, often at least 30 days prior to submittal. These meetings allow agencies to discuss project details, clarify expectations, identify potential deficiencies, and tailor information requests.

Early coordination also provides opportunities for joint engagement with federal permitting agencies, such as the U.S. Army Corps of Engineers (USACE), and other state or local entities to align requirements and avoid duplication.

Some states (e.g., Nevada, Maryland, and California) noted that early consultation reduces incomplete applications and expedites review by identifying data gaps in advance.

- **Checklists, Forms, and Guidance Documents:** Many states use application checklists, standardized forms, or detailed guidance documents to outline the specific materials and information needed for a complete submission. Some states provide formal lists of required elements in regulation or via agency websites. Several states have project-specific or activity-specific checklists (e.g., for dredge and fill, linear projects, or stormwater-related activities).

Guidance documents often include examples or templates for required plans such as inadvertent return plans, groundwater protection plans, and stormwater pollution prevention plans. Some states have developed comprehensive, fillable forms that serve as both guidance and the official application vehicle. A few respondents (e.g., California, Arizona, and Nevada) have detailed online application portals that prevent submission until all required information fields are completed.

Across the board, states recognize that early and proactive communication is the most effective strategy to ensure complete and high-quality Section 401 certification applications. The combination of structured pre-filing meetings, clear written guidance, interactive online tools, and ongoing consultation has proven successful in minimizing delays and improving application quality.

7. If an application for certification is incomplete, what steps are taken as a remedy?

When a Section 401 certification application is found incomplete, nearly all states reported taking immediate corrective action by notifying the applicant in writing—most often through email or formal letters—detailing the deficiencies and requesting the missing information. States emphasized maintaining communication and providing clear direction to help applicants achieve a complete submission without restarting the process. Common steps states pointed to included:

- **Written Notification of Deficiencies**
 - The most common remedy is a formal notice of deficiency or incomplete letter that:
 - Lists the specific missing or insufficient items.
 - Explains what is required to correct them.
 - Provides instructions, guidance documents, or examples to assist the applicant.
- **Timely Communication**
 - Several agencies commit to sending notices within a defined timeframe (e.g., within 15 business days of receipt).
 - Follow-up notices may be sent at regular intervals (e.g., 35, 55, and 65 days) if deficiencies remain unresolved.
- **Direct Applicant Engagement**

- Many states contact applicants directly via email or phone to discuss deficiencies and clarify expectations.
- Some agencies conduct coordination meetings or consultations (often including the U.S. Army Corps of Engineers) to resolve complex issues.
- **Iterative Information Requests**
 - If initial corrections are incomplete, agencies continue to request additional information until the submission meets completeness standards.
 - This process is collaborative, not punitive—agencies rarely “deny” applications outright for incompleteness.
- **Administrative Handling**
 - In some cases, incomplete applications are formally rejected or returned as “administratively incomplete” (not denied) until all required materials are received.
 - Once deficiencies are corrected, the application can be re-entered into the review process.
- **Provision of Resources**
 - Some states direct applicants to reference materials (e.g., example applications available through FOIA or agency websites) to clarify expectations and improve future submissions.
- **Interagency Coordination**
 - A few states coordinate closely with USACE to ensure that the applicant’s materials are consistent with the federal public notice process and related NPDES or stormwater requirements.

Across states, incomplete water quality certification applications are handled through a transparent, supportive, and iterative process. State agencies reported promptly identifying missing information, communicating clearly with applicants, and providing resources or coordination to ensure the application becomes complete - helping maintain efficiency and avoid formal denials or delays.

8. *What types of studies or requests for more information are most often requested?*

The most frequently requested additional information or studies for Section 401 certification concern site characterization, environmental impacts, mitigation, and compliance documentation. Applicants are most often asked to provide maps, plans, photos, and technical analyses that clarify potential effects on water quality, aquatic life, wetlands, and endangered species. Requests for more information generally fall into a few consistent categories:

- Project documentation and mapping
- Ecological and habitat studies,
- Engineering and hydrologic analyses

- Mitigation and restoration planning, and
- Administrative completeness and coordination materials.

9. *What complicating factors may extend the time required to gather appropriate information?*

States consistently reported that delays in receiving complete, accurate, or updated information from applicants are the primary factors extending review timelines for WQC applications. Other major causes include project complexity or changes, interagency coordination delays, seasonal or technical study requirements, and public comment responses. Overall, delays arise from both applicant-side issues (such as incomplete submittals or redesigns) and external coordination factors (such as federal permitting, environmental review documents, or seasonal field constraints).

The time required to gather appropriate information for Water Quality Certification is most often extended by:

- Slow or incomplete applicant responses,
- Evolving or complex project scopes, and
- Coordination dependencies with federal or state partners.

Additional complications—such as public comments, seasonal field conditions, and internal staffing or administrative limits—further lengthen review timelines. In short, timeliness and quality of applicant-provided information, combined with project complexity and interagency coordination, are the dominant factors influencing delays in the WQC process.

10. *What are the top three reasons for a delay in issuing a certification?*

States reported that the most frequent reasons for delay in issuing certifications are:

1. **Incomplete or inadequate applications** (including missing information or insufficient documentation).
2. **Slow or unresponsive applicants** (delayed responses to requests for information, or submission of incorrect materials).
3. **Interagency coordination and public process requirements** (e.g., waiting on U.S. Army Corps of Engineers (USACE), public comments, or environmental review documents).

Additional but less frequent reasons include project changes during review, complex or controversial projects, staffing and workload constraints, and applicant payment or administrative issues.

The most consistent sources of delay in issuing water quality certifications are incomplete applications and slow applicant responses. These are compounded by federal coordination requirements, public review processes, and staffing limitations. Timeliness depends on applicant preparedness, responsiveness, and interagency alignment—factors largely outside the immediate control of state 401 programs.

11. At what point or points in the review process may your state decide to deny with or without prejudice a certification request?

Most states reported that denial of a water quality certification is rare and typically occurs late in the review process—after a complete application has been received, technical review has been conducted, and public notice requirements have been satisfied. However, states distinguish between two main categories of denial:

1. **Denial without prejudice** – most often issued when an applicant fails to provide sufficient information or becomes nonresponsive, making it impossible to complete review within the reasonable period of time (RPOT) under the Clean Water Act.
2. **Denial with prejudice** – issued when the project as proposed cannot meet state water quality standards, even with potential modifications or conditions.

In general, respondents expressed a strong preference to work with applicants to resolve deficiencies and avoid outright denials whenever possible.

States may deny certification requests at multiple points, but in practice:

- Procedural denials (without prejudice) occur when information is incomplete or deadlines approach.
- Substantive denials (with prejudice) occur only after full review confirms noncompliance with water quality standards.

Most states emphasized **collaboration, flexibility, and avoidance of formal denials** - favoring withdrawal or resubmission - to ensure compliance and maintain cooperative relationships with applicants and federal partners.

12. Other than the CWA, what statutes, regulations, and/or related requirements factor into the certification timeline review timeline?

States widely reported that the timeline for Section 401 water quality certification review is shaped not only by the federal Clean Water Act, but also by a patchwork of state statutes, administrative codes, environmental regulations, and procedural requirements. These additional authorities typically fall into four broad categories:

- State water quality laws and implementing regulations
- Public notice, hearing, and administrative procedure requirements
- Environmental review and coordination mandates (e.g., NEPA, CEQA, state-level equivalents)
- Other programmatic requirements (wetlands, floodplain, coastal zone, endangered species, etc.)

Collectively, these overlapping requirements determine how quickly an application can be processed, when the clock starts, and whether additional consultation or comment periods are required, often extending overall review time. While the Clean Water Act provides the federal foundation for Section 401 certification, state-specific laws and administrative codes overwhelmingly determine the pace and sequencing of reviews. These include:

- Mandatory pre-filing and public notice periods,
- Integration with other state permitting and environmental review processes, and
- Distinct procedural and antidegradation requirements.

As a result, certification timelines vary widely by state—reflecting each state’s broader regulatory framework, environmental protection priorities, and administrative coordination requirements.

13. Please describe other challenges or hurdles that your state has faced in implementing the Section 401 water quality certification program under recent federal rules.

Most states acknowledge that the 2023 Section 401 rule improved clarity and restored flexibility compared to the 2020 version. However, they continue to face implementation challenges - particularly around coordination with federal agencies, inconsistent timelines, limited staffing, and the constantly shifting regulatory landscape. Persistent uncertainty over WOTUS definitions, RPOT determinations, and scope of state authority remain significant hurdles to smooth administration of the Section 401 certification program.

Summary Report of Federalism on the U.S. EPA: “Implementation Challenges Associated with the Clean Water Act Section 401”

Section I. Overview

On July 1, 2025, the U.S. Environmental Protection Agency announced a *Federal Register* notice initiating a series of public listening sessions and a 30-day recommendations docket inviting States, Tribes, applicants, and the public to provide their input on regulatory uncertainty or implementation challenges associated with the Clean Water Act section 401 certification process as defined in the 2023 Water Quality Certification Improvement Rule (2023 Rule).¹ The agency requested States, Tribes, applicants, and the public provide their feedback on six topics:

1. The 2023 Rule’s interpretation of the scope of certification and certification conditions, including whether clarification is needed on the scope of applicable waters;
2. The 2023 Rule’s definition of “water quality requirements” including, whether the agency should further clarify or revise its interpretation of the statutory phrase “other appropriate requirements of State law”;
3. How the agency should consider whether a neighboring jurisdiction’s water quality may be affected by discharge for purposes of 401(a)(2) and whether there are parameters to consider in making this determination;
4. Whether there are specific types of activities, geographic regions, types of waterbodies, or other types of circumstances, etc., which may support the agency establishing a categorical determination that the quality of no neighboring jurisdiction’s waters may be affected by discharge in such circumstances;
5. Experiences with the application of the 2023 Rule, including certification procedures, the 401(a)(2) process, and the application of treatment in a similar manner as a state (TAS) solely for section 401; and
6. Experiences with the application of the 2023 Rule’s scope of certification, including examples of certification decisions issued under the 2023 Rule that were believed to exceed the 2023 Rule’s scope of certification.

On July 16 and 30, 2025, the agency hosted two webinar-based listening sessions, to hear input on these six topics identified in the *Federal Register* notice. Public listening sessions were open to States, Tribes, applicants, and the public. Additionally, the EPA accepted written feedback for 30 days (July 7 through August 6, 2025). Separate from this process, the agency initiated the Federalism and Tribal consultation process on July 7, 2025, to obtain written feedback from States, local governments, and their representatives, as well as Tribes and their representatives. The Federalism Consultation kick-off meeting was hosted on July 22, 2025. Both Federalism and Tribal consultation closed on September 7, 2025.

This document summarizes the written input received from State and State associations during the consultation period. This summary is available in Docket ID No. EPA-HQ-OW-2025-2929;

¹ 88 FR 66558 (September 27, 2023). The 2023 Water Quality Certification Improvement Rule, referred to as the 2023 Rule, can be accessed at <https://www.federalregister.gov/d/2023-20219>.

individual letters and other supporting documents are available in Docket ID No. EPA-HQ-OW-2025-0272.

Section II. Engagement Summary

EPA received a total of nineteen letters during the Federalism consultation period. The agency received fifteen letters from State government agencies and four letters from State associations.

State government agencies:

1. California, Department of Transportation (#3)
2. California, State Water Resources Control Board (#96)
3. Idaho, Department of Environmental Quality (#57)
4. Indiana, Department of Environmental Management (#92)
5. Massachusetts, Department of Transportation (#100)
6. Maryland, Department of Environment (#54)
7. Michigan, Department of Environment, Great Lakes, and Energy (#115)
8. Minnesota, Pollution Control Agency (#43)
9. Nevada, Division of Environmental Protection (#52)
10. New Jersey, Department of Environmental Protection (#74)
11. New York, State Department of Environmental Conservation (#6)
12. Oregon, Department of Environmental Quality (verbal)
13. Rhode Island, Office of Water Resources in the Department of Environmental Management (#4)
14. Washington, Department of Ecology (#81)
15. Wyoming, Department of Environmental Quality (#66)

State Associations

1. Association of Clean Water Administrators (ACWA) (#136)
2. National Association of Wetland Managers (NAWM) (#49)
3. New England Interstate Water Pollution Control Commission (NEIWPCC) (#85)
4. Western States Water Council (WSWC) (#137)

State agencies and State associations provided detailed input on many topics outlined in the *Federal Register* (see Section 1). Broadly, State agencies and State associations addressed topics related to the 2023 Rule's interpretation of the scope of certification and definition of water quality requirements, the section 401(a)(2) process and categorical determinations, and experiences with the application of the 2023 Rule. Topic-specific input is summarized by category below.² It is important to note that not all State agencies and State associations provided input on each of the six topics identified in the *Federal Register* notice.

² This summary document relies on the topics identified in the *Federal Register* notice to organize comments; however, the EPA combined input received on stakeholder experience into a single category.

Section III. Input Summary

Overall Feedback

State agencies and State associations expressed their appreciation for the opportunity to provide input to the EPA on the implementation of section 401 under the 2023 Rule. State agencies and State associations described Clean Water Act section 401 as a vital State authority, expressly delegated by Congress, to ensure that federally licensed or permitted projects comply with State water quality requirements. State agencies noted that as co-regulators of section 401 they are uniquely positioned to provide valuable input on the implementation of the 2023 Rule and have a vested interest in ensuring the section 401 regulations are clear and durable. Several State agencies and State associations expressed belief that the 2023 Rule established clear and effective procedures. In contrast, some State agencies highlighted specific challenges and provided recommendations for clarifying and streamlining the water quality certification process. There was consensus among State agencies and State associations that certain aspects of the 2023 Rule (e.g., pre-filing meeting requests, cooperative federalism) provided efficiencies over previous regulations and that conditions should be tied to water quality requirements. While State agencies and State associations generally supported the EPA's efforts to promote consistency in interpretation and implementation of section 401, perspectives on how to achieve this goal varied by issue.

Several State agencies and State associations described generally positive experiences with the 2023 Rule and urged the EPA to retain the current regulations. These State agencies and State associations asserted the 2023 Rule established clear and predictable processes. For example, several State agencies stated the pre-filing meeting request and reasonable period of time (RPT) provisions enhanced coordination and provided flexibility to accommodate a range of projects requiring certification and unforeseen circumstances. Several State agencies also declared they were effectively implementing the 2023 Rule and issuing timely certifications. State agencies emphasized the current scope of certification³ affords the best environmental protection of the State's waters because it allows certifying authorities to holistically evaluate potential effects of a discharge on water quality. Several State agencies and State associations also asserted the current scope of certification aligns with the EPA's longstanding principles, congressional intent, the plain language of section 401, and Supreme Court precedent. State agencies and State associations expressed concern and cautioned against revising the scope of certification and associated definitions. A few State agencies and State associations asserted the EPA lacks evidence to support their claims of implementation challenges with the 2023 Rule, and expressed concern the EPA may return to inflexible, administratively burdensome processes that created implementation challenges.

³ See 40 CFR 121.3 (2023).

A few State agencies and State associations also expressed concern that a new rule would limit State authority. State agencies and State associations providing input on the topic emphasized that Congress intended for States to manage and protect their aquatic resources. A few State agencies and State associations further asserted they have responsibly exercised their delegated authority under section 401 and questions of law have been resolved by the courts. One State agency also emphasized that through cooperative federalism, States and the Federal government have a long history of effectively coordinating and working together to ensure that environmental protection and economic growth can coexist. Collectively, State agencies and State associations providing input on the topic urged the EPA to preserve the cooperative federalism framework established in the 2023 Rule.

Furthermore, several State agencies and State associations expressed concern that another rulemaking would not resolve implementation challenges but instead would create uncertainty and implementation challenges for all parties involved in the water quality certification process. Several State agencies and State associations highlighted that the section 401 regulations have changed multiple times over the last five years. A few State agencies and State associations commented further. These State agencies asserted the recurring and substantial changes to the regulatory framework is burdensome to all stakeholders because it requires all parties involved to learn the new requirements and align internal practices. Additionally, a few State agencies noted a new rule may necessitate changes to State laws and/or require States to update their data collection systems. Thus, State agencies asserted that a new rule would compound regulatory uncertainty, delay projects, and increase costs. State agencies and State associations providing input on the topic collectively urged the EPA not to proceed with a new rulemaking. A few State agencies and State associations encouraged the EPA to continue engaging with States to understand implementation challenges. State agencies and State associations also encouraged the EPA to consider other approaches, such as issuing guidance documents, templates, and working with individual certifying authorities, to resolve specific implementation challenges.

In contrast, a few State agencies noted specific challenges with the 2023 Rule and encouraged the EPA to make targeted revisions to the current regulations and/or issue guidance to clarify specific interpretations and processes. For example, two State agencies recommended the EPA revise the scope of certification to limit it to the “discharge” into waters of the United States. One State agency asserted that the current “activity” scope of certification does not align with the statutory language. Furthermore, the State agency asserted the term “activity” is ambiguous, which may result in certifying authorities inappropriately establishing conditions that are only speculatively or obscurely linked to the actual discharges. The same State asserted the EPA returning to the scope of certification as defined by the 2020 Rule⁴ would align with the intent and authorities of the Clean Water Act. In another example, two State agencies encouraged the

⁴ 85 FR 42210 (July 13, 2020). The Clean Water Act Section 401 Certification Rule, referred to as the 2020 Rule, can be accessed at <https://www.federalregister.gov/d/2020-12081>.

EPA to revise the definition of water quality requirements. While the recommendations of the two States differed, both States asserted their proposed revisions would promote consistent implementation across States and Tribes.

In addition to revising definitions, a few State agencies provided recommendations to help improve the overall water quality certification process. For example, a few State agencies recommended the EPA could clarify the start of the reasonable period of time and reduce the default reasonable period of time for certain permit types. A few State agencies also recommended the EPA could reduce project delays associated with section 401(a)(2) by better coordinating Federal agency review of Federal permits, establishing categorical determinations, providing templates and examples, and/or establishing web-based geographic information systems (GIS) mapping tools to help identify potential neighboring jurisdictions. Additional detail about these recommendations, as well as additional summaries on the specific topics the EPA solicited input on, are available below.

Scope of Certification

Several State agencies and State associations supported the scope of certification as defined in the 2023 Rule.⁵ Several State agencies and one association acknowledged the trigger for a water quality certification has always been that a project does or may result in a discharge into waters of the United States. Once a discharge is established, however, the State agencies and State association asserted the certifying authority must review both the discharge and the activity that results in the discharge to properly evaluate whether the activity authorized by the Federal license or permit will comply with applicable water quality requirements. Additionally, several State agencies and one association asserted the current scope of certification aligns with the EPA's longstanding principles and with congressional intent, and the current interpretation is consistent with the plain language of section 401 and binding U.S. Supreme Court precedent in *PUD No. 1*⁶ and *SD Warren*⁷. Of those providing input on the topic, a few State agencies expressed concern that the EPA may return to the “discharge” only approach applied in the 2020 Rule. These State agencies asserted the 2020 Rule approach did not align with the purpose of the Clean Water Act, and one State agency asserted the discharge approach had “significant impacts on State and Tribal regulatory programs and water quality across the nation.”

One State agency recommended the EPA clarify certain aspects of scope of certification. Specifically, the State agency noted they supported the EPA's current interpretation of the scope of certification as outlined in the May 2025 memorandum.⁸ They noted the activity-based approach ensures the certification review aligns with the statutory framework of section 401 and

⁵ 40 CFR 121.3 (2023).

⁶ *PUD No. 2 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994)

⁷ *S.D. Warren Co. v. Maine Bd. Of Environmental Protection*, 547 U.S. 370 (2006)

⁸ *Clarification regarding Application of Clean Water Act Section 401 Certification* issued on May 21, 2025, can be accessed at https://www.epa.gov/system/files/documents/2025-05/clarification-re-application-of-cwa-401-certification_may-2025.pdf.

stays focused on the water quality-related impacts. The State agency recommended the EPA provide further clarity to reinforce that certification reviews should center on direct and reasonably foreseeable, that evaluation of “operations” is appropriate only when operation is explicitly included in the Federal license, and that certifying authorities should not be expected to assess generalized land use or ongoing facility operations that fall outside the scope of the federal action triggering section 401. Together, the State agency asserted these clarifications would improve predictability for applicants and agencies, reduce the risk of legal disputes, and preserve the core water quality protection purpose of section 401. Another State agency noted that any revision to the rule should be consistent with congressionally delegated authority for the review of reasonably foreseeable impacts to water quality that project poses in order to empower certifying authorities to adequately fulfill their obligation to protect and maintain water quality.

In contrast, two State agencies recommended the EPA return to the scope of certification as defined by the 2020 Rule. One State asserted that the current interpretation does not align with the statutory language. Additionally, the same State agency noted the ambiguous term “activity” may allow certifying authorities to inappropriately establish conditions on activities that are only speculatively or obscurely linked to the actual discharges or may inappropriately insert Federal jurisdiction over activities on waters that are not waters of the United States. The State agency stated revising the scope of certification to the 2020 Rule interpretation would appropriately focus the certification review and conditions to be in accordance with the Clean Water Act.

Regarding applicable waters, one State agency stated section 303(b)(3) clearly indicates that it is the State – and not necessarily the federal government – that determines which waters are applicable. The State agency noted that a State clearly defines “waters of the State,” and thus a discharge under a Federal permit or license affecting State waters is subject to section 401 review and certification requirements. The State also asserted the term “applicable waters” does not need to be synonymous with waters of the United States. The State agency asserted that limiting certification only to waters of the United States would undermine State responsibility under independent legal frameworks and could leave significant water resources (e.g., headwaters, wetlands, and floodplains) without adequate protection. Another State agency asserted the applicability of the rule would be clearer if the EPA used consistent terminology to describe applicable waters (i.e., navigable waters, waters of the United States, etc.).

Lastly, two State agencies acknowledged that certification conditions must relate to water quality impacts and not based on issues outside the scope of authority or include conditions that have no basis in statute or applicable regulations. A few State agencies agreed with the EPA noting they found it was reasonable to include justifications or legal citations with their certification decisions. In fact, these same State agencies noted they are already including a short statement or legal citation to justify the condition to ensure their certifications are appropriately tied to the State’s water quality standard and enforceable. In contrast, a few State agencies and one State association asserted that justifications are unnecessary because the connection between a condition and water quality standard are clear. These State agencies and the one State association

noted that requiring justifications could result in duplication and inconsistencies, may interfere with the readability of the certification, may lengthen the time necessary to issue a certification, and could shift limited staff resources from protection of water quality to a “purely administrative task.”

A few State agencies and one State association noted that Federal agencies should defer to the certifying authority to determine appropriate conditions to comply with State water quality requirements and utilize other appropriate approaches, such as the Administrative Procedure Act or appropriate courts of law, to resolve disagreements.

Definition of Water Quality Requirements

Several State agencies and State associations asserted that the 2023 Rule appropriately defined water quality requirements and urged the EPA to preserve the current definition. One State agency recommended the EPA revise the definition to explicitly include all Federally regulated discharges that impact the waters of the United States and include a reference to the 40 CFR part 230 regulations⁹. Additionally, one State agency recommended the EPA revise the definition of “water quality requirements” to only point source discharges and replace “water quality-related requirements” with “water quality requirements.”

Neighboring Jurisdiction Process (Section 401(a)(2))

State agencies and State associations generally agreed that the section 401(a)(2) process needs to be predictable for planning purposes. A few State agencies and one State association stated the 2023 Rule established clear procedures, transparent thresholds, and defined timelines that support consistent decision-making. Two State agencies noted that, as a neighboring State, they are interested in the opportunity to evaluate discharges that may affect their State’s waters. One State agency noted the requirements to coordinate are “not overly burdensome.” Finally, one State agency said the expertise to complete the “may affect” determination lies at the regional level and urged the EPA to retain their involvement in the process.

In contrast, a few State agencies asserted that the section 401(a)(2) process resulted in unnecessary delays. Specifically, two State agencies providing input on the topic noted the EPA completing their “may affect” evaluation creates unnecessary delays for projects without neighboring jurisdictions. One State agency recommended the EPA could streamline the process by develop online mapping tools to automate and identify low-risk location and project activities, and another States agency recommended the EPA revise the process to allow States to establish programmatic agreements with the EPA to identify areas or projects that they may consider not to have an effect. In another example, one State agency noted the 2023 Rule has resulted in duplicative review process. The State agency recommended the EPA could streamline the section 401(a)(2) by allowing the “may affect” determination to occur concurrently with the EPA’s and the Corp’s review of Federal permit (e.g., section 404 and 10 permits). State agencies

⁹ Also commonly referred to as the 404(b)(1) Guidelines.

providing input on the topic recommended the EPA develop resources (e.g., guidance, tools protocols, or templates) to assist States and Tribes in documenting their evaluation of section 401(a)(2) and deciding whether a “may affect” referral is appropriate.

State agencies had varying perspectives on how the EPA completes its “may affect” determination. For example, one State agency and one State association noted that the non-exhaustive list of factors the EPA relies on in their “may affect” determination is appropriate. On the other hand, a few State agencies noted the EPA’s process for making a “may affect” determination was less clear and recommended the EPA be more transparent about their determination process. For example, two State agency recommended the EPA could clarify when the EPA requires supplemental information to make a determination, what criteria the EPA uses to support their decision, and what the standards and thresholds are for triggering a “may affect” referral to a neighboring jurisdiction. Additionally, one State agency noted that the EPA could clarify the notification timelines and exchange of information. As for the neighboring jurisdiction’s “will violate” determination, one State highlighted the section 401(a)(2) process does not allow for potential reconciling terms and conditions prior to a public hearing. The State agency recommended the EPA revise the regulations to include an option for arbitration and reconciliations prior to a public hearing request.

Categorical Determinations

Several State agencies agreed with the EPA that categorical determination may be appropriate for certain circumstance and could promote efficiencies in the section 401(a)(2) process. Several State agencies provided example factors for the EPA to consider; these factors included project type, size, and location to a neighboring jurisdiction in addition to the type of discharge and the quality of the receiving water body. Those supporting categorical decisions expressed the EPA should establish a flexible, science-based approach, include a timeline for completion of categorical determinations in the new rulemaking, consult with neighboring jurisdictions when developing criteria, and/or provide the opportunity for States to formally review and offer comment on proposed categories.

A few State agencies and State associations expressed skepticism about the EPA using categories to make a “may affect” determination. For example, one State agency and one State association expressed that the EPA’s current “may affect” determination process is not transparent and expressed concern that establishing categorical determinations could further complicate the neighboring jurisdiction process. In another example, one State agency and one State association indicated the diverse nature of a State’s aquatic resources requires the EPA to evaluate the facts and specific factors associated with each project. Finally, one State association raised questions about the legality of categorical determinations.

State Experience with the 2023 Rule

Several State agencies and State associations asserted the 2023 Rule enhanced transparency, promoted early engagement, and supported more consistent and effective certification reviews

across a range of project types and permitting actions. Several States noted they are effectively and efficiently issuing water quality certifications within the scope. In contrast, a few State agencies noted challenges with specific aspects of the section 401 regulations and provided recommendations to help improve implementation. Summaries of these experiences are organized by theme below.

Theme 1: Pre-filing Meeting Request

Several State agencies and one State association noted the 2023 Rule's pre-filing meeting request provision improved efficiency in the certification process. Specifically, they noted the current provision provided clarity and flexibility, as well as promoted early engagement between certifying authorities and applicants. The resulting effect was described as saving certifying authorities and applicants both time and resources. Collectively, they recommended the EPA preserve the pre-filing meeting request regulations as written.

Theme 2: Contents of a Certification Request

One State agency noted that the current regulations made it easier for applicants to submit complete applications to the certifying authority. Specifically, the State agency noted the 2023 Rule made it easier for applicants to satisfy both Federal and State certification requirements, which reduced certification delays and confusion on process and timeline.

Two State agencies noted recurring issues that limit effective implementation of the 2023 Rule. Both State agencies asserted missing (e.g., point of contact) and/or inadequate information (e.g., permitting information, types of impacts, extent of jurisdictional waters) in the request for certification creates delays and inefficiencies in the certification process. Additionally, both State agencies noted that there is uncertainty about the federal permitting pathways whether an activity falls under a general permit or requires an individual permit. The two State agencies recommended the EPA should amend the request for certification to require additional information from applicants, issue supplementary guidance, and/or provide examples (such as a template) to help ensure the certifying authority is receiving the necessary information needed to make a decision. One State agency also noted that the certifying authorities should retain the discretion to request supplemental information.

Theme 3: Reasonable Period of Time

A few State agencies stated the reasonable period of time requirements under the 2023 Rule promote transparency, enhance coordination, and provide flexibility. One State agency asserted the procedures defined under the 2023 Rule reduce the risk of unintentional waivers, support tailored review timelines based on project complexity, and reinforce the principles of cooperative federalism. Two State agencies emphasized that projects vary in size – from small projects with limited discharges to large, complex projects – and thus review and certification can range in time depending on the required technical review and public notice. A few State agencies stated the default reasonable period of time promotes tailored agreements between the certifying

authority and Federal agency on the reasonable period of time and supports reasonable scheduling adjustments. One State agency noted this flexibility accommodates the varying needs of technical review and public notice on projects, as well as allows State agencies to address unforeseen circumstances (e.g., delays in information or expanded public participation needs) without risking waiver by inaction. The same State agency stated they opposed any rule changes that would unilaterally limit the reasonable period of time; instead, they asserted it is up to the States and Tribes to determine adequate timelines within the constraints of the Clean Water Act deadlines to complete review and public notice.

In contrast, one State agency encouraged the EPA to revise the current “reasonable period of time” procedures. The State agency asserted most 401 certification reviews were issued within 60-90 days after an application was deemed complete. The State agency recommended the reasonable period of time for Nationwide Permits (NWP) and Regional General Permits (RGPs) should be limited to four months after the application is deemed complete. The State agency further recommended the EPA reduce the reasonable period of time (e.g., 60 days) for non-reporting NWP.

Two State agencies discussed the start of the reasonable period of time. One State agency requested the EPA clarify what triggers the start of the reasonable period of time, and another State agency noted that the reasonable period of time should not begin until the application is considered complete.

Theme 4: Certification Decisions

One State agency stated that the certification decision framework defined under 40 CFR 121.7(a) prevents certifying authorities from certifying portions of a project while excluding others, even when only discharges present water quality concerns. The State agency expressed this inflexibility in certification actions limit tailored environmental protection and recommended the EPA issue guidance and amend the regulations to clearly define scope limitations or allow for segmented certifications.

Theme 5: Modifications

Two State agencies supported the retention of the current modification procedures defined in the 2023 Rule. One State agency stated that the modification process (along with other provisions) enhanced the efficiency and clarity of section 401 certification process, and another State agency stated the modification procedures is very helpful when small changes need to be made on project schedules or project scope.

One State association noted the 2023 Rule continues to prohibit reopener clauses allowing unilateral modification. The State association asserted that reopener clauses allow permitting authorities to dexterously respond to changes in standards, technologies, water quality needs, public concern, and regulatory frameworks. The State association urged the EPA to reconsider and consult with States regarding reopener clauses.

Theme 6: Other

One State requested the EPA update and reissue the rescinded guidance document, “CWA section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (May 2010).” The State agency asserted it would improve clarity, support consistent implementation, and enhance interagency coordination.

Another State association noted they would like the EPA to consult with States regarding section 401 certification authority over lands of exclusive Federal jurisdiction.