

# EPA 401 Listening Session for WSWC

## Transcript (edited for clarity)

Listening Session held virtually on June 23, 2021 at 11:00am Mountain Time.

In attendance:

Roger Gorke, EPA

Russ Kaiser, EPA

Lauren Kasparek, EPA

Emma Maschal, EPA

Tony Willardson, Western States Water Council

Michelle Bushman, Western States Water Council

Jessica Reimer, Western States Water Council

Representative from State of Arizona

Nicola Rowan, State of Colorado

Annette Quill, State of Colorado

Tom Stiles, States of Kansas

Keenan Storrar, State of Montana

Jim Macy, State of Nebraska

Jennifer Carr, State of Nevada

Karl Rockeman, State of North Dakota

Shannon Minerich, State of South Dakota

Leanna Littler-Wolf, State of Utah

Kelly Wood, State of Washington

Mary Verner, State of Washington

Jennifer Zygmunt, State of Wyoming

**Jessica Reimer (JR):** Good morning everyone, and thanks for joining. My name is Jessica Reimer and I'm with the Western States Water Council. I'm here in Cody, Wyoming at the Council's Summer Meetings in a conference room with a few of our states. I know we have several states joining remotely from their own locations. We're about ready to start.

**Roger Gorke (EPA):** [EPA] has Russ Kaiser on, Section 401 Branch Chief, along with myself, Emma Maschal, and Lauren Kasparek.

**JR:** Great. Let's start here with Jennifer Zygmunt from Wyoming and then other states can follow with their comments.

**Jennifer Zygmunt (WY):** Good morning. My name is Jennifer Zygmunt. I am the Acting Administrator for the Water Quality Division with the Wyoming Department of Environmental Quality. Thank you for the opportunity to provide comments today on this important topic.

As revisions to the Section 401 Certification Rule are considered, we look forward to actively engaging with EPA to provide input on the rule's substantive and procedural components and to ensure alignment with cooperative federalism principles. The Wyoming DEQ is currently working on preparing written comments, and we do anticipate having comments on all 10 areas outlined in the Federal Register notice. However, for the purposes of today, I would just like to focus on two main comments related to the scope of certifications, which was Item Number 4 in the Federal Register.

First, we support the current scope of certification and definition of water quality requirements. The federal regulations state that the scope of certification is limited to ensuring that a discharge from the federally-permitted

activity will comply with state water quality requirements. “Water quality requirements” are defined in the federal regulations as applicable provisions of Sections 301, 302, 303, 306 and 307 of the Clean Water Act and state or tribal regulatory requirements for point source discharges into waters of the United States. This language in the rule focuses and clarifies the intent of the Clean Water Act as protecting water quality and avoids the inclusion of conditions unrelated to water quality that go beyond the outer limits of power that Congress established under the Clean Water Act.

Second, we recommend clarification for the definition of “discharge.” We contend that the definition of “discharge” at 40 CFR 121.1.f should include equipment and construction activities associated with the discharge of dredged or fill material that have an immediate and direct potential water quality impact, to be consistent with Supreme Court decisions. Though the preamble of the current rule confirms this statement, we believe this conclusion needs to be added to the definition of “discharge” to provide clarity and regulatory certainty.

Again, we look forward to active engagement with EPA as revisions are considered. We recommend providing meaningful opportunities for state and federal collaboration. In addition to these listening session opportunities, we advocate for in-person meetings between state and federal partners to facilitate in-depth conversations on substantive content prior to rulemaking. Thank you for the opportunity to comment today.

**Kelly Wood (WA):** Hi, this is Kelly Wood from Washington State. I do appreciate the opportunity today. I'm with our Attorney General's office, but I'm speaking today on behalf of Laura Watson, the Director of the Department of Ecology, which is the certifying authority here in Washington. As I think with most states here, we intend to provide detailed written comments ahead of the August 2 deadline, but I did want to touch on most of the things that EPA has requested feedback on. We appreciate the opportunity to comment a little more in-depth than some of the prior listening sessions have allowed.

Starting with the pre-filing meeting requirements, in practice, I don't think these meetings are really happening. And I think that's for a couple of reasons. One, there are simply too many applications for [the meetings] to occur regularly, and there are too few [projects] where it actually makes sense to hold a pre-filing meeting. An engagement is more helpful after receiving the application. That's something that the states used to have the flexibility to do when they had more time in the rule to get these decisions out the door. With the “clamping down” on that flexibility, and shortening the amount of time that states have to process applications, the engagement with applicants has fallen by the wayside. We're hoping EPA can eliminate the pre-filing meeting request requirement in favor of allowing states to determine when they're necessary, or allowing applicants to make that decision themselves. I practiced privately for a few years and did some §401 work during that time. Savvy practitioners in this area know when their projects are complex enough where it makes sense to engage early before they submit their application, so that they understand the expectations of the certifying authority. This is usually when they can have helpful dialogues. We think the states should have that flexibility.

In terms of the certification request itself, I struggled to think of another context where the permitting agency is not the one determining and having the final say on when an application is complete. Given that what's being asked here of the states is to certify with regard not only to EPA approved water quality standards, but really any other appropriate aspect of state law that touches on water quality. Federal agencies aren't the ones that are in the best position to determine what materials are necessary for states to make that assurance of compliance. We think the rule should allow certifying authorities to define the information necessary for a certification request, and they

should have final say on when those materials are complete. I know a lot of states do have those regulations on the books. Washington is not one of those states. We do not have independent §401 regulations, but we do have a very well-defined application process through our Joint Aquatic Resources Permit Application (JARPA) permit, which is basically a joint aquatics permit. [It is a single permit application that streamlines the environmental permitting process of multiple regulatory agencies, including aquaculture, wetlands and 401 water quality certification.] This permit has a really well-defined set of materials that walk you through the aspects of your project and where you may have water quality impacts. We think states should retain that flexibility to define what the certification requests look like.

In terms of the reasonable period of time, I think most certification decisions happen well within 60 days, especially for these more routine applications. But some projects do simply take more time. I think it is going to be difficult to try to define in rule specifically where those projects are going to take more time. It's one example of why for decades, some states, including Washington, had agreements with federal agencies that allowed the entire one-year period of time on every application. This then gave the states, including Washington, the flexibility to determine when a project may take more time. Washington strives to get them out, in every case, as quickly as possible, but sometimes these things do take more time, and states need to have that flexibility to make the determination. We're hopeful that the new rule would return to that model and allow states working in conjunction with federal agencies to have flexibility in determining that amount of time.

We also believe that the withdrawal and resubmittal [of an application] should restart the one-year clock, consistent with the [*Hoopa Valley Tribe v. FERC*] decision. *Hoopa Valley* was a very narrow decision that focused on a particular practice that was basically an agreement by the parties to put off §401 certification. We think you are likely to get some very instructive language out of the Fourth Circuit and the *North Carolina v. FERC* appeal, for which oral argument was scheduled earlier this spring. We anticipate we should have a decision on that soon. That oral argument was really instructive, where the court struggled with some sort of artificial distinction, trying to draw a hard line between when you've got incoming material in the pipeline that is clearly going to impact and have bearing on the state certification. Sometimes it just makes sense for applicants to have the flexibility, and for states to have the flexibility, to wait for that information. I think we are going to get some gloss on this from the from the Fourth Circuit that helps us narrow and isolate the potential impact of *Hoopa Valley*.

On the scope of certification, I think this is the most critical aspect of the rule. But I think it's also the easiest talking point. EPA should adopt the [*PUD No. 1 of Jefferson County v. Washington Department of Ecology*] standard, and the standard that was set out in its prior guidance, which is that §401 certifications must consider all water quality impacts of the project, both direct and indirect, and over the life of the project. I think that's the only way to effectuate the goals of §401 and the goals of the Clean Water Act.

On the certification actions and federal agency review, §401 requires certifying authorities to ensure that any applicant for a federal license or permit complies both with water quality standards and any other appropriate requirements of state law. We believe EPA should return to its long-standing interpretation of this language, acknowledging that the scope is broad. I think what EPA attempted to do in its 2010 guidance is instructive here. It set out examples of how states have complied with this provision and what types of state law have been applied in order to satisfy what states need to do under §401 to hit that “other appropriate requirements of state law” mark. The guidance was certainly helpful, but I think you could, in rule, outline or highlight that it is broad, and

certainly much more broad than EPA determined in the 2020 rule. Providing states with some of those examples in the rule could help them understand what EPA believes is in-bounds there.

In terms of procedural compliance, which is another aspect of what EPA is seeking feedback on here, Washington has always tried to explain its §401 decisions in writing. But we do not think that it is appropriate to require that, and certainly not appropriate to determine non-compliance by the state in a broad determination of waiver by the by the federal government. We do not think that is what Congress intended when it talked about cooperative federalism here. I think you are free to continue to encourage states, as you did in your prior guidance, to explain their decisions. Frankly, that's just being a good regulatory agency and a responsible partner with the private entities that are seeking these approvals. But it should not be something that results in a waiver.

On the enforcement piece, we think the rule should retain the statement that §401 conditions become part of a federal license or permit. That is pretty black letter §401. But we think that it should also affirm that federal agencies can enforce §401 conditions as a mandatory requirement of the permit, and should acknowledge that states can enforce these conditions under both state and federal law. You asked specifically about whether §401 certifications are contained within the Clean Water Act citizen suit provisions - clearly they are expressly included within the citizen suit provisions. And the bulk of the authority in the United States has recognized that states are also citizens for purposes of citizen suit enforcement. We think the rule should reflect the state of law there.

And then finally, on modifications, certifying authorities need to have the flexibility to modify certification conditions without making a project proponent restart the whole process. This flexibility simply acknowledges the fact that sometimes plans change, and that the parties need to have the flexibility to deal with changed circumstances. We think that this can be done and is supported within the statutory text. I think the limitation you're dealing with is the one-year limitation, but the legislative history on that is pretty clear. That one-year limit was adopted because of a concern that was raised, that states could stymie the §401 process through sheer inactivity. When you have a situation where a state has already acted upon a certification request, that's not the same concern that is expressed there. We don't think that there's anything within the Clean Water Act, or certainly not §401, that precludes states from modifying an existing certification based on changed circumstances. So again, that's all I wanted to touch on this morning. I really appreciate the opportunity to do so in more detail, and we look forward to providing written feedback. Thank you.

**Nicola Rowan (CO):** Good morning, everyone. My name is Nicola Rowan. I work for the Water Quality Control Division at the Colorado Department of Public Health and Environment. I'm joined by Annette Quill, who's in our Attorney General's office. We both have some remarks that we promise to keep under the 10 minutes. Thank you so much for the opportunity to provide Colorado's perspective on this very important issue. We also plan to submit written comments and are working on those.

We wanted to spend some time today on our unique interest in EPA's §401 Certification Rule because of its applicability to construction and operation of large water supply and storage projects here in Colorado. These projects are imperative to support the state's economy and our growing communities. Our population here in Colorado is projected to double by 2050. A large percentage of our water supply comes from snowmelt, which serves all areas of the state both on the east and west side of the Continental Divide. Engineered systems to transfer, divert, and store water are imperative to get water to where it's needed within the state to support all of our beneficial uses. At the same time, we acknowledge that the operation of these projects, if not subject to

mitigation, can cause extreme changes to water quality. Colorado has historically used conditions in §401 certifications to ensure that these projects are protective and sustainable.

Our water projects require individual §404 permits because they involve dredge and fill activity in the construction of reservoirs, dams and pipelines. The conditions included in Colorado's §401 certifications, which are then incorporated into the §404 permits, have proven to be a powerful tool to balance important interests to Colorado. This includes ensuring adequate water supply to support the state's economy and growing population, with the interest of protecting our valuable water resources for all designated uses, including aquatic life and recreation, which is consistent with the directives in the Clean Water Act and the Colorado Water Quality Control Act. Colorado has issued four certifications for large water projects in the past nine years. All of those were under the framework of EPA's previous rule. We are aware of many more projects planned for construction in the near future, and the 2020 rule drastically limits our ability to impose protective conditions on those projects.

In light of this background, we have four primary areas of concern that we'd like to highlight. We will highlight these in more detail in our written comments as you revisit the 2020 rule. First, the scope of the §401 certifications should extend to the activity as the whole as it did before, instead of being limited to the discharge that triggers the need for a federal permit. Second, the scope of §401 certification conditions should be more flexible, consistent with the Clean Water Act and prior agency practice. Third, the reasonable assurance standard should be reinstated. Finally, the period of time to complete certifications needs to remain flexible for up to one year to accommodate certification of our large complex water projects. Again, thank you for the opportunity to talk to you all about this today. I'm going to pass it over to Annette, who's going to provide a little bit more detail on each of our four concerns.

**Annette Quill (CO):** Good morning, everybody, I'm Annette Quill with the Colorado Attorney General's Office. As Nicole said, I'm going to go into a bit more detail about those four main concerns. We will be sure to address the issues that EPA specifically asked for certifying authorities to address in our written comments.

Our primary concern, just like the state of Washington said, is a critical concern, and that is the overall scope of §401 certifications. The 2020 rule departed from EPA's long-standing practice and the Supreme Court's directive that certifications apply to the activity as a whole, and it set up limits on the scope of certifications to the discharge from the federally-permitted activity. For our large water supply projects that require §404 permits, this means that we can only evaluate impacts from the dredge and fill activity or the initial construction activity itself and not the long-term operation of the project. That is where the major impacts really are. Colorado's last certification, as Nicole mentioned, was under the prior rule. It included 30 conditions to mitigate against predicted impacts. It was 100 pages long. All but one of those conditions related to the project's operation. There was only one condition related to stormwater management that would have been associated with the construction. The change in scope really curtails our ability to make sure that these projects are protective in their long-term operation. We encourage EPA to reinstate the practice of recognizing that certifications cover the activity as a whole.

Second, we are concerned about the scope of certification conditions. Currently, states are limited under the current rule to evaluating compliance with water quality requirements, which is narrowly defined in the 2020 rule. EPA's previous practice, and Kelly from Washington alluded to this as well, allowed states broader discretion to set forth effluent limits and other limitations necessary to ensure compliance with various provisions of the

Federal Act and any other appropriate requirement of state law. Under that framework, Colorado works with applicants to formulate creative conditions so that certifications can be granted. For example, consistent with our own regulations, we have included conditions that result in what we term “net environmental benefit,” and this includes conditions such as riparian habitat protection and restoration. Those arguably would not be allowed under the current rule. This “net environmental benefit” concept has proven to be really effective in allowing certifications to be issued and allowing these projects to be constructed. Colorado urges that this flexibility for certifying authorities be reinstated, consistent with the text of the Clean Water Act.

Our third concern with the 2020 rule is the removal of the concept of “reasonable assurance” and replacing it with the definitive requirement to certify that discharges “will comply” with water quality requirements. The change to this definitive standard called into question Colorado's long-standing reliance on modeling to predict future impacts. On the other side of that, it also called into question adaptive management as a protective backstop in the event that future impacts are not what we expected, or to account for changing conditions in the future that we cannot foresee. The definitive “will comply” standard would actually lead to many certification denials, because we cannot be absolutely certain that water quality requirements would never be violated in the future through the long-term operation of a project. Colorado urges EPA to reinstate the reasonable assurance standard for this reason.

And finally, on the time to process §401 applications, again these large complex projects are our primary concern. We encourage EPA to continue to allow flexibility in that time period to process applications. We want to get our applications out the door as quickly as possible, but honestly in our experience, we need every day of that one-year statutory time period to formulate protective conditions for these large complex projects. For any guidance that EPA issues on this topic, we would request that it also reflect consideration of these types of complex projects. I will leave it at that. Thank you so much for allowing us this opportunity today. We really appreciate it.

**Leanna Littler-Wolf (UT):** Good morning. My name is Leanna Littler-Wolf and I am the manager overseeing the §401 certification program in the State of Utah’s Division of Water Quality. I am submitting comments on behalf of the Division in place of Erica Gaddis, the Director of Water Quality. The State of Utah appreciates the opportunity to provide comments to the EPA on the Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule. Utah supports a rule review and revision process that is transparent and inclusive of certifying authorities concerned. We are submitting comments that correspond with EPA requests in the Federal Register.

In regard to pre-filing meetings, Utah has found pre-filing meetings to be a beneficial tool to initiate early engagement between the project proponent, the federal agency, and the state. Utah is better able to prepare the applicant for state requirements in Utah and is better informed on projects before certification requests are received. Although pre-filing meetings have been beneficial, Utah would not be opposed to a rule revision that allows certifying authorities to waive that 30-day wait period if they deem it unnecessary.

In regard to certification requests, the contents of a certification request, as defined in the 2020 rule, are limited, insufficient, and restrictive. The rule only required information for the discharge location, type of discharge, and how it will be monitored, rather than information that specifically addresses each state's water quality standards, which is fundamental information states need to make a certification decision. This places the burden on the state to acquire all pertinent information from the project proponent within the reasonable period of time. The rule does

not provide for pausing the state's reasonable period of time for any reason, including failure of the project proponent to provide necessary information to the state in a reasonable amount of time, putting the states in a situation where they did not have sufficient time to review the additional information. Prior to the rule change, the timelines in Utah were based on a complete application. Everything that was required for an application is listed in the Utah Administrative Code and in the §401 application form, which provides a transparent process to project proponents. Utah supports a rule revision that requires states to have a clear and transparent process, but also provides flexibility for each state to determine what is necessary to make a certifying decision and that does not start the reasonable period of time until a complete application is received.

In regard to the reasonable period of time, the rule shortens the reasonable timeframe for certification from the previous statutory maximum of one year, which has resulted in insufficient timelines for states to review, process, and issue certifying decisions. Under the rule, the U.S. Army Corps of Engineers' Sacramento district had issued reasonable periods of time based on permit type. In Utah, for standard permits, that's 90 days. As a result, Utah must review and evaluate proposed projects, request and wait to receive any additional information needed from the project proponent, draft a certification decision, put the draft certification decision out for public notice for 30 days, and review and respond to public comment before finalizing decisions, all within a 90-day period. This is an aggressive timeline, especially for a state that employs a 0.5 full time employee (FTE) in the §401 certification program. As larger projects are proposed, the strain on the §401 certification program in Utah will be exacerbated. The reasonable period of time of up to one year should be reinstated to allow for states to be able to thoroughly review larger projects and allow enough time for states to receive necessary information to make the certifying decision.

In regard to the scope of certification, the rule unnecessarily narrows the scope of the certification authority by limiting considerations to point source discharges, and by preventing consideration of other state laws when those laws are not explicitly included within the applicable provisions of the Clean Water Act, but are designed to protect water resources within the state. The previous authority to evaluate water quality impacts of the project or activity as a whole should be reinstated. Activities in both construction and operation resulting in non-point source discharges (runoff) should be considered in certification decisions, as well as water quality impacts associated with changes to the hydrologic regime. States should be allowed to rely on all aspects of water quality standards, and not be limited to the applicable provisions of the Clean Water Act listed in the rule.

In regard to certification actions and federal agency review, the rule allows federal agencies to determine whether a condition complies with procedural requirements and allows for federal agencies to throw out or waive conditions that they determine are not applicable or otherwise do not comply with the Clean Water Act. In doing so the rule favors how the federal agency interprets state law over how the state interprets its own law. Utah echoes EPA's concerns that a federal agency's review could result in one of our certifications or conditions being permanently and inadvertently waived in error as a result of a non-substantive and easily fixed procedural issue.

In regard to modification, the rule's prohibition of modifications unreasonably limits the state's and the project proponent's ability to adapt to changing circumstances. Under this rule, if the project proponent requests a modification of their certification request, or a waiver or replacement of a particular condition, then the §401 certification process and federal permitting process must start over, including a request for a pre-filing meeting, 30-day wait period, federal permit public notice period, state review and associated fees, state public notice of draft decision, and neighboring jurisdiction review. This places additional administrative burdens on the state and

federal agencies and can increase costs and delay a project, negatively impacting the project proponent. Allowing for reopener clauses or modifications gives a project proponent, federal agency, and the certifying authority opportunity to work cooperatively to address and adapt to changing circumstances without having to complete procedural requirements more than once.

In regard to implementation and coordination, the State of Utah welcomes an expeditious review and revision of the current §401 certification rule. Utah requests that a revised rule give states appropriate amounts of time and the adequate authority to review and issue certification decisions so that the state can be confident projects meet water quality requirements. Updating the rule to be consistent with cooperative federalism and returning states' authority, currently limited under the 2020 §401 certification rule, would benefit Utah greatly. Utah supports concomitant regulatory changes being proposed and finalized simultaneously by relevant federal agencies to prevent inconsistencies in regard to interpretations. The State of Utah is considering submitting more substantive written comments that correspond with EPA's request. Thank you for listening to our concerns today.

**Karl Rockeman (ND):** This is Karl Rockeman with the North Dakota Department of Environmental Quality, and I will share some of our concerns. Again, like other speakers, we too will be providing more formal comments in written form. We appreciate the opportunity to have this listening session. I hope this is the start of continued collaboration with the states on this issue, both directly with the states and through our regional and national organizations such as the Western States Water Council and the Association of Clean Water Administrators (ACWA).

I'll start with one issue that seems to rise to the top of everyone's list and that is the pre-filing meeting requests. While we support the use of that and the opportunity to request that when it is needed, we find that it is not needed for the majority of cases that we've come across. We need a mechanism so that we can waive that as needed. Otherwise, that is just dead time that benefits no one. It does not benefit the certifying authority if we feel we do not need it, and it does not benefit the other agencies, as they're not part of the process at that point. We would ask that that be made an optional request that the certifying agencies can require, but can waive as well.

The other issues that you have heard are the completeness of an application and the timeliness of decisions, not so much on the requirements. We feel that the mechanism for the review by the Corps on those items presents some federalism issues with this process. I think one of the problems there is that it is being looked at similar to other delegated programs where EPA or other federal agencies have delegated authority to the states. But we know that the water quality standards in §401 are different. Those are reserved specifically for the states and are not necessarily a delegated authority. We think having those items reviewed by a federal executive agency is inappropriate in those cases. While we do support inclusions to fulfill what is necessary for completeness or for timeliness, we do not believe that should be a decision made by the Federal permitting agency.

The third item I will raise is the certification of the [Army Corps of Engineers'] nationwide general permits. The current rule did not account for any consideration of how that was supposed to work. We would ask that the process be better outlined in the upcoming rule to specify how that can work. Of particular concern there is the certifying of draft permits. As a state, we really need to know what that final permit says before we can certify it for compliance with our water quality standards. We've asked for additional clarification, specifically for nationwide general permits.



The final issue I'll raise is the review for neighboring jurisdiction impacts. EPA, again, recognizes the importance and the necessity of this, but that timeframe can be problematic. When we combine the time necessary for that review with the pre-filing meeting review, and then the required public notice period, we're taking an entire construction season for those reviews, at least here in North Dakota. A project proposed at the beginning of the construction season may be pushed back an entire year simply because of those mandated timelines. We would ask that if there's any way to expedite that neighboring jurisdiction review, such as having it run concurrently with the public comment period or having that review as part of the pre-filing meeting timeframe, that would be beneficial. Again, we appreciate the time and the opportunity to provide these comments. We will provide more formal comments in written form. Thank you.

**Jennifer Carr (NV):** Good morning. We were mostly in listening mode [during this session], as we provided our three minutes of comment the other day. I wanted to track some of the conversations today and see if there was anything else that we might be able to cover. A lot of what is going to be included in our letter to the docket has been mentioned by a number the other states here this morning. I think I would like to emphasize the scope question. Nevada is interested in expanding the scope [of §401] as well - specifically to include short- and long-term sources of pollution, direct and indirect impacts of implementation and operation of a project, as has been mentioned, upstream and downstream impacts, nonpoint sources of pollution, impacts to waters of the United States and waters of the state, as well as upstream placement of dredged and excavated materials. It is also important to emphasize the upstream and downstream impacts, because the point source itself, or the project itself, could have repercussions that are far broader than the project itself. And I think it is very important to be able to include those items in consideration of the project.

I am trying not to duplicate what the other states have said. Washington and North Dakota covered a lot of our comments on the required information. We agree that the certifying authority should be the one to decide what constitutes a “complete and sufficient application” and initiates the reasonable period of time. A lot of the reasonable period of time comments I won't go over again. We also agree with what has been covered by Utah and others regarding the pre-filing meeting waiting period. It is good in some projects, but I think it was North Dakota or Utah that called it “dead time” when it's not needed. We should be able to waive those 30 days and move on when it is not needed and streamline our processes. We also work with a limited number of FTEs and making this process as efficient as possible is critical to being able to move these projects in a timely manner.

One thing that is really not workable for us is the issue surrounding reopener conditions. We have had what is now considered “reopener” language. In the past, has been a valuable tool in the process to allow us to adapt to changing circumstances of the project. When projects may change after the certification is provided by the state, we must be able to address those changing conditions and continue to ensure that the scope of the project does not affect water quality conditions of Nevada waters. The scope, as written right now, allows applicants to modify the scope of the project following issuances post-certification, without the opportunity for the state of Nevada to determine if the modification will have the same level of impact as the originally certified activities. That just really needs to change. I am looking forward to seeing how that, in particular, will be addressed by modifications to the rule. I have a couple of staff online if I missed anything critical that hasn't already been covered by one of the other states. Zachary or Paul, feel free to speak up. Otherwise, I appreciate the other states' comments here this morning, as well as the folks at EPA providing this opportunity for us to really have a close one-on-one conversation, which has been better than just the open webinar three-minute format. So thank you.

**Jim Macy (NE):** Well, I don't know if it's good morning or good afternoon, so I'll say "good day." I'm Jim Macy from Nebraska. I am the Director of Environment and Energy within Nebraska. We will also be submitting more substantial and focused comments before the August deadline. Generally, Nebraska supports the current rule that stands. We believe §401 should have a limited and narrow focus on water quality issues. We support the timely issuance of permits. We also support meaningful collaboration with the states and support the concept and the practice of cooperative federalism. Thanks for your time today. We will give you some more comments a little bit later.

**JR:** We've got about 14 minutes left. If there are any other comments other states would like to make, feel free. I am not sure if EPA has anything that they'd like to say. But if we can use this time, great. If not, then everyone can get going early. We'd like to reserve it as states would like to use it.

**Keenan Storrar (MT):** This is Keenan Storrar with Montana the Department of Environmental Quality (DEQ). This is not so much a comment, but a request that EPA, when they revise this rule, expand upon where they are drawing their authority under §101b and §501 of the Clean Water Act as its legal justification for the 2020 §401 rule and the current upcoming rule that they are going to be revising. I would like to see more justification on that.

**JR:** Great, thanks, Keenan. Anyone else have any comments they would like to make or want to take advantage of having EPA on the phone?

**Roger Gorke (RG EPA):** This is this is Roger Gorke. During the Water Quality Committee tomorrow, we will have Lauren Kasparek or Russ Kaiser on, or I'll have talking points. That will provide the basic timeline regarding [EPA's process] for folks, because I know there's obviously other states that are not here. It will be more of "here's the status and timeline" and that kind of stuff.

**Russ Kaiser (EPA):** Yes, you're absolutely right, Roger. Lauren Kasparek will give the update on §401, and then I will have Whitney Beck doing an update on WOTUS. Before we all sign off, I would just like to take the opportunity to say thank you for inviting us to listen to the great comments and concerns that are being presented and we really look forward to your formal documentation - presenting your concerns in writing - so that we can review those as we're moving forward in the process.

**RG:** And this might be clearly stating the obvious, but please make sure all your comments are provided in writing. It's helpful for us to have some redundancy and potentially other context that would not be stated in the verbal comments.

**Shannon Minerich (SD):** Hi this is Shannon Minerich. I'm with the State of South Dakota. I just had another comment I wanted to add and expand upon Karl from North Dakota's comments - mostly because I haven't heard a lot about it today. In the case where the project proponent is the same as the federal agency, as in the case of the nationwide permit reissuance, we find it really inappropriate for [the federal agency] to be determining that reasonable period of time and not allowing extensions when some of the states requested that. We will also be providing written comments, but that was one in particular that I just wanted to further expand upon. I realized there are not a lot of cases where the project proponent would be the federal agency. It would be nice to see some type of rule that did not allow that to happen. Seems kind of like the "fox watching the henhouse" situation. Thank you.

**JR:** Thanks, Shannon. Thank you to EPA for taking the time to join the Western States Water Council today. I think it has been beneficial for everyone who has been able to participate and everyone who has been listening, as well. Please feel free to reach out to the Council, either Michelle Bushman, our Assistant Director, or Tony Willardson, our Executive Director with any questions or comments. We really appreciate all the time the states took and that EPA took to make this happen today. Unless anyone else has other comments, I think that we can wrap it up. Thanks again, everybody.