

WATER QUALITY
CWA §401 Certification Authority**September 19, 2025**
Special Report #2679

On August 6, the Environmental Protection Agency's (EPA) comment period closed for the action titled "Establishment of Public Docket and Listening Sessions on Implementation Challenges Associated With Clean Water Act (CWA) Section 401." See WSW #2678, #2669. States provided a mix of support, targeted revisions, and comprehensive concerns regarding the 2023 Water Quality Certification Improvement Rule (2023 Rule). States generally agreed on: (1) the importance of state authority and law; (2) the value of pre-filing meeting requirement and flexibility; (3) the need for clearly defined and transparent criteria for neighboring jurisdiction determinations; and (4) upholding the principles of cooperative federalism. State comment letters, and this analysis, can be accessed in full on the WSWC webpage. See <https://westernstateswater.org/policy-letters/2025/state-letters-401-certification-implementation/>.

California

California supported the 2023 rule and emphasized retaining the ability to address potential water quality impacts from the "activity as a whole," and not just the discharge. "Impacts to groundwater, impacts to isolated surface waters, and impacts from non-point sources that would not occur without issuance of the federal permit or license are all water quality impacts that should be within a certifying authority's ability to address without extensive discussion about the nexus between the discharge and the impact."

California said the 2023 Rule restored a familiar regulatory environment, with a scope consistent with §401 and binding U.S. Supreme Court precedents, citing *PUD No. 1 of Jefferson County "Washington Dept. of Ecology" (1994)* and *S.D. Warren Co. v. Maine Bd. of Environmental Protection (2006)*. They highlighted the long duration of FERC licenses and potential impacts such as turbidity, sediment, temperature, habitat loss, stream geomorphology changes, algal growth, and reduced flows.

California believes EPA should not require state justifications for certification conditions, since state law already establishes appropriate requirements for evidentiary support. Additional federal requirements would be duplicative and burdensome. "Justifications are often highly repetitive and the inclusion of additional justifications to satisfy federal rulemaking requirements may interfere with the readability of certifications." They also said revisions to the definition of "water quality requirements" are unnecessary because the 2023 Rule already specifies that any other requirement of state or tribal law must be "water quality related."

California reported positive experiences with the 2023 Rule, noting that the pre-filing meeting requirement – along with the option to waive it – has improved communication, early engagement, and application completeness. They added that any future revisions should uphold state authority over water resources and cooperative federalism.

Idaho

Idaho supported targeted revisions to the 2023 Rule, endorsing EPA's May 2025 clarification that §401 certification applies to the "discharge," not the entire "activity." Idaho's review practices focus on water quality impacts from the specific project authorized by a federal permit or license, not the broader land use or facility, unless those operations are part of the federal action. For example, review of a temporary construction bridge would address only the fill placement, not the larger project, unless additional permits are required. By contrast, review of a FERC-licensed hydroelectric facility would include operational impacts, such as flow modifications or temperature effects, since those are integral to the licensed activity.

Idaho recommended EPA clarify that: (1) certification should focus on the direct and reasonably foreseeable water quality impacts of the federally permitted or licensed activity; (2) review of "operations" is appropriate only when they are part of the federally licensed activity; and (3) certifying authorities should not be expected to assess broader land uses or facility operations beyond the scope of the federal action triggering §401.

Idaho supported the 2023 Rule's definition of "water quality requirements" in 40 CFR §121.1(j), viewing it as consistent with §401's purpose of ensuring federally-authorized activities comply with federal and state water quality standards. Idaho encouraged EPA to issue further clarification or illustrative guidance on what qualifies as an "appropriate requirement of state law" under CWA §401(d). They suggested this phrase should be interpreted to include enforceable provisions of Idaho water quality standards (e.g., designated uses, criteria, antidegradation policies) and related laws on water protection

(e.g., sediment control, riparian setbacks, BMPs), but not non-water quality requirements such as land use, economic development, aesthetics, or facility design unrelated to pollutant control.

Regarding neighboring jurisdictions, Idaho emphasized the need for clear procedures, transparent thresholds, and defined timelines. They urged EPA to provide guidance on: (1) physical or chemical parameters indicating potential cross-boundary water quality impacts; (2) relevant hydrologic or geographic factors; and (3) the level of evidence, qualitative or modeling, needed to justify a referral. Idaho stressed that §401(a)(2) should be applied narrowly, with referrals based only on a reasonable potential for measurable water quality impacts—not speculative effects. They also called for clear procedures, including defined timelines, communication protocols, and the ability to expedite or waive referral when no comments or objections are anticipated.

Idaho supported EPA exploring categorical determinations under §401(a)(2) for projects with *de minimis* or highly unlikely impacts on neighboring jurisdictions, such as certain Nationwide Permits, closed-basin projects, or discharges with no reasonable potential to affect water quality. They emphasized that such a framework should be flexible, transparent, and voluntary.

Idaho outlined several successes of implementation under the 2023 Rule that have “enhanced the efficiency and clarity” including: (1) flexibility in waiving or shortening the prefiling meeting period; (2) the requirement for certifying authorities and federal agencies to agree on a reasonable period of time (RPT) not exceeding one year; (3) the ability to modify or extend the RPT by mutual agreement; (4) the cooperative framework for post-issuance modification of certifications.

Despite these improvements, Idaho identified recurring implementation challenges, including delays from uncertain permitting pathways, unclear coordination roles, and missing points of contact. They proposed EPA require confirmation of the permitting pathway before or alongside a certification request. They recommended EPA clarify that a certification request is incomplete until the federal permitting pathway is identified and relevant documentation provided. Idaho also urged guidance or regulations to encourage federal points of contact, interagency agreements, liaison roles or district-level coordination, and timely assignment and sharing of Department of the Army file numbers.

Idaho noted a common “lack of clarity” among certification requests regarding project activities and operations. They noted regulatory uncertainty under the 2023 Rule, which emphasized evaluating the “activity as a whole,” but does not prescribe a level of detail for the project description. The 2023 Rule’s focus on the “activity as a whole,” without prescribing a level of detail for the project description, creates regulatory uncertainty and delays as authorities seek additional information. Idaho recommended guidance or regulatory amendments requiring separate, detailed descriptions of construction and operational phases, including discharge characteristics and BMPs, and allowing supplemental information requests before the RPT begins.

Idaho argued that the current certification framework (grant, grant with conditions, deny, or waive) prevents authorities from certifying portions of a project while restricting others. In the short-term, as guidance within the existing rule, Idaho recommended certifications should avoid terms like “partial denial” in favor of “grant with conditions” language that “clearly limits the scope of certification.” In the long-term, Idaho recommended EPA amend regulations to allow segmented certifications or clearly defined scope limitations, with supporting guidance.

Nevada

Nevada supported the 2023 Rule, including an activity-inclusive scope. Nevada cited the CWA’s intent “to recognize, preserve, and protect” the primary responsibilities and rights of States to “prevent, reduce, and eliminate pollution” and plan the development of land and water resources. Nevada emphasized its obligation to protect its waters under state law. Nevada stated that previous narrowing of states’ authority hindered its ability to prevent and reduce pollution. It is “imperative” for a certifying authority to consider all potential water quality impacts of a project to guarantee compliance with water quality requirements and maintain federal protections. Once the federally-regulated point source discharge requirement is met, review should encompass all impacts to water quality and aquatic resources resulting from the permitted activity.

Nevada identified specific impacts that certifying authorities should evaluate, including: (1) short- and long-term pollution sources; (2) direct and indirect impacts from project implementation and operation; (3) onsite, upstream, and downstream effects; (4) nonpoint source pollution; (5) impacts to U.S. and state waters; and (6) upland placement of dredged or excavated materials.

Regarding justification for certification conditions, Nevada noted that its own certifications already include statements justifying conditions in line with 40 CFR 121.7(d)(3). Nevada noted that federal permitting agencies should not have the authority to invalidate or waive conditions or certifications without allowing the certifying authority an opportunity to address perceived issues.

Nevada believes that the 2023 Rules definition of “water quality requirements” at 40 CFR 121.1(d) provides sufficient scope for review while appropriately limiting evaluation to water quality impacts. They emphasized that the CWA empowers certifying authorities – not federal agencies – to evaluate federally regulated activities’ compliance with state water quality standards and to condition certifications to ensure compliance. Such standards should serve as applicable water quality requirements.

Nevada noted that under §401(a)(2), EPA has discretionary authority to determine whether a project may affect neighboring jurisdictions’ water quality. However, its decision-making factors are not public, raising concern about whether water quality is being adequately protected. Nevada recommended notifying and consulting affected jurisdictions before issuing federal licenses or permits. They also suggested EPA create publicly available maps of interstate waters that trigger §401(a)(2), along with clear criteria for “may affect” determinations.

Nevada stated that if regulatory uncertainty and implementation challenges are the basis for reevaluating the regulations, EPA should substantiate these claims with specific examples. The State suggested that regulatory uncertainty stems, in part, from the recent frequency of rule changes (three different versions in five years), which creates a lack of regulatory consistency and higher process uncertainty. Promulgating another rule would exacerbate uncertainty and delays, imposing considerable burdens on certifying authorities.

Washington

Washington strongly advocated for the retention of the 2023 Water Quality Certification Improvement Rule without any changes. They expressed deep discouragement at EPA’s examination of the rule so soon after its finalization. Washington emphasized the long-standing success of the CWA and the principles of cooperative federalism it embodies. They noted Washington’s track record of effectively and fairly implementing its §401 program while maintaining both strong environmental protections and a robust economy. “In short, we urge you not to rock the regulatory landscape by attempting to fix what is not broken.”

Washington believes that the scope of certification must follow the CWA and Supreme Court precedent (*PUD No. 1 of Jefferson Cy. v. Department of Ecology*). While a point source discharge to the Waters of the U.S. triggers certification, the authority’s review should cover all water quality impacts of the project, as affirmed by the 2023 Rule, the U.S Supreme Court, and longstanding practice. Washington emphasized that certifying authorities must retain sole discretion to determine if a federally licensed or permitted activity requires certification, warning that limiting this authority would conflict with cooperative federalism.

Washington stressed its duty to uphold state water quality standards and treaty obligations, noting that the 2023 Rule clearly defines “water quality requirements” and §401 empowers certifying authorities to impose conditions necessary to meet those requirements. They urged EPA to retain the current definition. For neighboring jurisdictions, Washington insisted that determinations remain at the regional level, where the relevant expertise resides. They stated that this section of the 2023 Rule is “clear as written” and has presented no implementation challenges for them.

In conclusion, Washington warned that another change to §401 would lead to confusion, unnecessary delays, and harm to the environment. “EPA should instead allow states to continue their long tradition of stewarding §401 responsibly, justly, and consistently with the law. The people of Washington deserve no less.”

Wyoming

Wyoming advocated for revising the 2023 Rule to restore the scope of certification defined by the 2020 Clean Water Act Section 401 Certification Rule (2020 Rule). “We recommend that the definition of ‘discharge’ should explicitly include equipment use and construction activities associated with the proposed discharge that have the potential for an immediate and direct impact to water quality. These changes will appropriately focus the scope of certification to discharges from point sources to WOTUS in accordance with the intent and authorities of the CWA.”

Wyoming recommended “reasonable and practical” modifications to EPA’s neighboring jurisdictional review process. Wyoming believed the term “activity” to be ambiguous and open to being inappropriately applied. They argued that the term “activity” is ambiguous and could be misapplied to impose conditions on projects only loosely connected to the discharge or to assert federal authority over non-WOTUS waters. Regarding justification for certification conditions, Wyoming found it reasonable for certifying authorities to provide assurances that all conditions align with the scope of 40 CFR §121.3, a practice already incorporated into Wyoming’s own §401 certifications.

Wyoming expressed concern that the 2023 Rule’s definition of “water quality requirements” is too broad. While it incorporated some 2020 Rule language, Wyoming argued it fails to limit requirements to point sources and allows conditions only loosely related to water quality. They emphasized that CWA §§401, 402, and 404 – and court decisions –

restrict regulation to point source discharges to WOTUS. Wyoming warned that omitting “point source” and broadly applying “activity” risks federal overreach into nonpoint source regulation. They recommended redefining “water quality requirements” to apply only to point source discharges and replacing “water quality-related requirements” with “water quality requirements.”

Regarding neighboring jurisdictions, Wyoming recommended that EPA develop specific criteria for evaluating the likelihood of water quality impacts on downstream States or Tribes. These criteria could include whether a downstream jurisdiction has requested a review, the type and size of the proposed project, and the proximity of the discharge to the neighboring jurisdiction.

Wyoming supported the 2023 Rule’s requirement for pre-filing meetings, recognizing that these procedures have enhanced early stakeholder engagement and coordination, leading to greater efficiency and more complete applications that comply with state water quality standards.