

## WESTERN STATES WATER COUNCIL

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Web Page: [www.westernstateswater.org](http://www.westernstateswater.org)

Date: September 7, 2025

Sent via email: [cwa401@epa.gov](mailto:cwa401@epa.gov)

The Honorable Lee M. Zeldin  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW, MC: 1101A  
Washington, DC 20460  
[zeldin.lee@epa.gov](mailto:zeldin.lee@epa.gov)

The Honorable Peggy Browne  
Acting Assistant Administrator, Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW, MC: 4101M  
Washington, DC 20460  
[brown.peggy@epa.gov](mailto:brown.peggy@epa.gov)

Re: Federalism Consultation on Establishment of Public Docket on Implementation Challenges  
Associated with Clean Water Act [Docket ID No. EPA-HQ-OW-2025-0272]

Dear Administrator Zeldin and Acting Administrator Browne,

The Western States Water Council (WSWC) is a bi-partisan government entity created by Western Governors in 1965 that represents eighteen states. Our members are appointed by and serve at the pleasure of their respective governors, advising them on water policy issues. Our mission is to ensure that the West has an adequate, secure, and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future. The WSWC has been a continuous advocate for the rights of States to conserve and protect their water resources.

We appreciate the opportunity to offer the following comments in response to the agencies' federalism consultation initiated by the U.S. Environmental Protection Agency's (EPA) establishment of public docket and listening sessions on Implementation Challenges Associated with Clean Water Act (CWA) Section 401. We understand the aim of this agency action is to determine whether new guidance or rulemaking are necessary to address areas of regulatory uncertainty or implementation challenges regarding the scope of state certifications. As EPA considers feedback, we urge the agency to engage meaningfully with individual states as co-regulators, to cooperatively assess the implementability of the 2023 CWA Section 401 Water Quality Certification Improvement Rule (2023 Rule) and the needs of state regulators moving forward. Should the Administrator determine to promulgate a policy change to the operating rule, changes should materially reflect these discussions.

### I. State Authority, Process, and Capacity

EPA has characterized CWA §401 as authorizing a "specific and limited" role in the federal licensing or permitting process. However, the CWA clearly recognized the inherent water quality protection authority of States. Section 101(b) declares: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate

pollution;” and §101(g) adds that the authority of the States to “allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act....”

Section 401 requires: “Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions...” of various CWA sections. This state water quality certification authority is a vital component of our federalist system for protecting water resources, and any conditions deemed necessary by the States to ensure compliance are a mandatory addition to any federal license or permit.

States have responsibly and timely exercised their delegated authority under §401 and under state water quality statutes. Where questions of law have arisen as to the scope of §401 and timing of state certifications, courts have stepped in as needed to address the appropriate degree of state authority under the CWA. Each State has a unique schema of water quality statutes, designated water uses, water quality standards, and procedural implementation frameworks. States must consider proposed activities in accordance with their own statutes and procedures, which naturally creates some variability in the process and timelines. Despite this variability, the vast majority of §401 certification requests are processed well within the one year allowed by the statute, and incomplete applications are generally denied without prejudice. Most delays are due to submission of an incomplete application, unresponsiveness from applicants, and the special needs of large or complex projects. The §401 certification process is an important tool for States to fulfill their responsibilities to conserve and protect their water resources, ensuring federally permitted projects comply with state water quality standards, and States are responsibly acting to execute their delegated authority in a timely manner.

As EPA considers feedback from co-regulator states and various stakeholders in the coming months, WSWC urges the agency to make every effort to accommodate and support state certification processes and timelines.

## II. Critical Infrastructure and Energy Development

EPA has noted that critical mineral, energy, infrastructure, and development projects that are key to economic growth are often subject to state certifications under CWA §401. The WSWC supports a balanced approach to achieving water and energy policy goals that recognizes legitimate state water and water quality management, protection and planning authorities. The Western States strongly support the development of critical infrastructure and efficient, streamlined permitting processes, but not at the expense of States’ authority to allocate, manage, and protect their water resources. We support these projects while appropriately protecting environmental resources and respecting States’ §401 certification authority. WSWC urges EPA to continue working with States to streamline permitting processes, coordinate regulatory reviews, eliminate duplicative procedures, reduce costs of compliance and construction, and ensure timely completion and maintenance of vital infrastructure projects.

## III. Regulatory Uncertainty

EPA seeks to address regulatory uncertainty. One source of significant regulatory uncertainty for both co-regulators and the regulated community has been the substantial and recurring changes to regulatory definitions, policies, and programs between federal Administrations. These changes can lead to confusion, loss of state resources, and unnecessary delays. As EPA contemplates whether a new rule is

necessary, we encourage the agency to discuss the possibility with individual States to determine what, if any, changes are necessary. We invite EPA to seek feedback on how any necessary changes can be promulgated to minimize regulatory whiplash. WSWC supports any changes that strengthen deference to state water laws and do not diminish the primary state authority and responsibility over water resources.

#### IV. Lands of Exclusive Federal Jurisdiction

Under the 2023 Rule, EPA identified 16 national parks as “lands of exclusive federal jurisdiction” and asserted that EPA is the §401 certifying authority in those parks. States have responsibly exercised their certification authority in some of those parks for decades. WSWC encourages EPA to consult with the affected States regarding such determinations.

#### V. Reopener Clauses

WSWC also points out that the 2020 CWA Section 401 Certification Rule (2020 Rule) led to federal agencies waiving reopener conditions in nationwide permits imposed on federal projects by States under CWA §401, inconsistent with CWA §§ 101(b) and 101(g), §27 of the Federal Power Act, and the Supreme Court ruling under *P.U.D. No.1 of Jefferson County v. Washington Department of Ecology*. The 2023 Rule continues to prohibit reopener clauses allowing unilateral modification. In many cases, reopener clauses allow permitting authorities to dexterously respond to changes in standards, technologies, water quality needs, public concern, and regulatory frameworks. WSWC urges EPA to consult with States regarding reopener clauses.

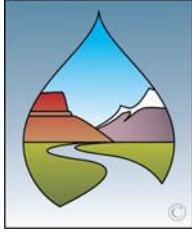
Altogether, EPA should involve the States as co-regulators in any review or future rulemaking from the start, long before any action is published for public comment. The WSWC strongly supports meaningful, substantive and early consultation with States as they work in tandem with EPA to achieve national water quality goals. We also urge EPA to carefully consider comments submitted by our individual states, who are in the best position to know how this effort will impact them.

We thank you for considering these requests, and we look forward to working together to protect water quality across our Western States.

Sincerely,



Michelle Bushman  
Deputy Director and General Counsel



**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
in support of  
STATE CWA SECTION 401 CERTIFICATION AUTHORITY**

**Lawrence, Kansas  
October 23, 2024**

**WHEREAS**, States have responsibly exercised their delegated authority under the Clean Water Act (CWA) Section 401 and under state water quality statutes to protect water quality, and must consider proposed activities and discharges in light of the states' designated water uses and related water quality standards; and

**WHEREAS**, the Council supports a balanced and integrated approach to achieve water and energy policy goals that plans for the future in sustainable ways, and recognizes legitimate state water and water quality management, protection and planning authorities to balance competing water uses; and

**WHEREAS**, the western states strongly support the planning and development of critical infrastructure and streamlined permitting processes, but such efforts should not come at the expense of states' authority to allocate, manage, and protect their water resources; and

**WHEREAS**, the development of hydropower and other federally permitted and licensed projects involving activities that may impact states' water quality standards should be appropriately undertaken in compliance with substantive and procedural state water law and delegated authority under CWA Section 401; and

**WHEREAS**, CWA Section 101(b) supports the states' critical role in protecting water quality by stating: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution;" and

**WHEREAS**, CWA Section 101(g) further provides that the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act"; and

**WHEREAS**, Section 27 of the Federal Power Act declares: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein;" and

**WHEREAS**, the Supreme Court has narrowly interpreted the Federal Power Act (16 U.S.C. 791a et seq.) reading Section 27 (16 U.S.C. 821) to limit state authority to set streamflow requirements on federally permitted and licensed projects, holding in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946) and in *California v. FERC*, 495 U.S. 490 (1990) that federal requirements preempted any state requirements, including efforts to establish minimum stream flows, noting that "...Congress remains free to alter what we have done;" and

**WHEREAS**, these rulings eroded state authority over state resources, and the Council has supported federal legislation to restore states' primary authority for regulating streamflows and water use and clarifying Congressional intent under the Federal Power Act; and

**WHEREAS**, in *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Supreme Court upheld a state's delegated authority to impose minimum stream flow conditions under

the CWA Section 401 certification process where necessary to protect a designated use for fish habitat, expressly rejecting any implied limitations on Section 401 certifications based on the *First Iowa* interpretation of the Federal Power Act; and

**WHEREAS**, an overly narrow reading of Section 401 would deprive the states of the ability to maintain the very beneficial uses that the Clean Water Act was designed to protect, and threaten the existing partnership between states and federal agencies based on cooperative federalism; and

**WHEREAS**, the vast majority of Section 401 certification requests are processed within 90 days, well within the one year allowed by current law, with relatively little if any backlog of certification actions; and

**WHEREAS**, most delays are typically due to submission of an incomplete application, applicants' non-responsiveness to requests for additional information, the completion of necessary study requirements, the size and complexity of some projects (and related impacts), substantive changes to the proposed project requiring further review, or constraints on state resources; and

**WHEREAS**, CWA Section 401 certification denials by states are rare and carefully considered, and are not examples of the failure of the system, as the process has been historically well-understood, reliable and supported by case law that provides certainty for both the states, federal agencies, and the regulated community; and

**WHEREAS**, actions taken by the federal government under the 2020 CWA Section 401 Certification Rule (85 FR 42210) caused some western states to issue an increased number of denials, due to inflexible deadlines that did not accommodate state public engagement laws or allow sufficient time to gather adequate information on project impacts; and

**WHEREAS**, the 2020 rule revision led to federal agencies waiving reopener conditions in nationwide permits imposed on federal projects by states under CWA Section 401, inconsistent with CWA Sections 101(b) and 101(g), Section 27 of the Federal Power Act, and the Supreme Court ruling under *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*; and

**WHEREAS**, EPA published a new 2023 CWA Section 401 Water Quality Certification Improvement Rule (88 FR 66558); and

**WHEREAS**, the 2023 CWA Section 401 Water Quality Certification Improvement Rule identified 16 national parks that EPA determined to be "lands of exclusive federal jurisdiction" and asserted that EPA is the Section 401 certifying authority in those parks, although states have been the certifying authority in some of those parks for decades; and

**WHEREAS**, substantial and recurring changes to regulatory definitions, policies, and programs between federal Administrations create uncertainty for co-regulators and the regulated community, often leading to unreliable results, indecision, inconsistency, and lawsuits.

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council supports any changes that strengthen the deference to state water laws and do not diminish the primary state authority and responsibility for the appropriation, allocation, development, conservation, and protection of their water resources, including minimum streamflows, and the protection of water quality and designated uses.

**BE IT FURTHER RESOLVED** that the Western States Water Council strongly supports early state engagement in federal permitting and licensing actions and the coordination of state and federal environmental requirements and review processes for critical infrastructure without diminishing state authority.

**BE IT FURTHER RESOLVED** that the Western States Water Council supports a mechanism in any rule development process for a representative number of states, as co-regulators with diverse perspectives and regions, to engage actively with EPA staff to provide direct and effective feedback on the implementability of a proposed rule.

**BE IT FURTHER RESOLVED** that the Western States Water Council encourages EPA to consult with affected states regarding EPA's certifying authority in national parks designated as "lands of exclusive federal jurisdiction" in order to resolve any jurisdictional disputes in a manner that upholds the CWA's direct grant of Section 401 certifying authority to states and its intent to empower states to protect water quality within their boundaries.

Revised and Readopted  
(See Position No. 471, September 16, 2021 and No. 426, October 26, 2018)