
State Water Resources Control Board

August 6, 2025

Peggy S. Browne
Acting Assistant Administrator
Office of Water, United States Environmental Protection Agency

Submitted via Federal eRulemaking Portal (<https://www.regulations.gov/>)

Re: Docket ID No. EPA-HQ-OW-2025-0272

Dear Ms. Browne:

Thank you for the opportunity to provide recommendations to inform any future administrative actions by the U.S. Environmental Protection Agency (“U.S. EPA”) regarding the regulations governing Clean Water Act section 401 water quality certifications (“certifications”). The California State Water Resources Control Board (“State Water Board”) and the nine California Regional Water Quality Control Boards (collectively, “Water Boards”) are certifying authorities pursuant to section 401 of the Clean Water Act. The Water Boards support the continued implementation of the Clean Water Act Section 401 Water Quality Certification Improvement Rule (88 Fed. Reg. 66,558 (Sept. 27, 2023)) (“2023 Rule”). The 2023 Rule is closely aligned with the federal regulations that were implemented for almost 50 years prior to 2020 and accordingly restored a familiar regulatory environment for both regulators and dischargers. The Water Boards also submit specific recommendations below, which address some of the topics that U.S. EPA identified in its notice.

First, the permissible scope of certifications set forth in the 2023 Rule is consistent with the plain language of section 401 and binding U.S. Supreme Court precedent in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994) and *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006). “Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges,” while section 401(d) “authoriz[es] additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.” *PUD No. 1*, 511 U.S. at 711-12; *see also S.D. Warren*, 547 U.S. at 375 (conditions of certification were not limited to the triggering discharge). Retaining the ability to address potential water quality impacts from the “activity as a whole” in a certification, not just impacts to water quality from the “discharge,” is vital to preserving and protecting the authority of states to protect water quality and effectuate Congressional intent. 33 U.S.C. §§ 1251(a), 1251(b), 1341(d). 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. U.S. EPA should retain its clear, longstanding interpretation, which allows certifying authorities to evaluate all water quality impacts resulting from the project.

Continued implementation of the 2023 Rule is critical to the State Water Board's ability to protect water quality during the decades-long term of Federal Energy Regulatory Commission ("FERC") licenses in the hydropower licensing context. Certifying authorities must be able to fully address the water quality impacts of such activities as a whole during the 30- to 50- year term of the FERC license to reduce water quality impacts that, depending on the circumstances, may not be attributable to a point-source discharge, but result from the activity's construction, operations, and facilities. Common water quality impacts associated with hydropower activities include changes in turbidity, sediment, temperature, habitat loss, alterations to stream geomorphology, algal productivity and algal-produced toxins, and reductions in streamflow. Each of these impacts can have profound, generational impacts on the state's water resources. Maintaining U.S. EPA's longstanding interpretation is clear, avoids needless arguments about the nexus between the discharge and the impact, and allows certifying authorities to focus on all water quality impacts resulting from the project.

U.S. EPA regulations should not require justifications for certification conditions. Administrative procedures and judicial review of state certification are governed by state law and proceed in state court, which establish appropriate requirements for evidentiary support or findings. Adding federal requirements would result in overlap, duplication, and inconsistencies. Moreover, the connection between a condition and complying with water quality standards is generally already clear. Requiring additional justifications can lengthen the time necessary to issue a certification and shift limited staff resources from protection of water quality to a purely administrative task. Justifications are often highly repetitive and the inclusion of additional justifications to satisfy federal rulemaking requirements may interfere with the readability of certifications.

Second, revisions to the definition of "water quality requirements" are not necessary because the 2023 Rule already specifies that any other requirement of state or Tribal law must be "water quality-related." 40 C.F.R. § 121.1(j). As the Water Boards' mission is to preserve, enhance, and restore the quality of California's water resources, the Water Boards' certifications are focused on water quality issues.

Finally, the Water Boards' experiences implementing the 2023 Rule have been largely positive. Requiring pre-filing meeting requests 30 days in advance and allowing the certifying authority to waive or shorten this requirement (40 C.F.R. § 121.4), has promoted early engagement and increased the frequency with which complete applications are submitted to the Water Boards in the first instance. Requiring requests for certification to include water quality-related information identified by the certifying authority (40 C.F.R. § 121.5(c)), has similarly made it easier for applicants to submit complete applications to the Water Boards. As a result, and in addition to other process

improvements like increased multiagency coordination, the Water Boards have seen a reduction in the average time taken to issue certifications under the 2023 Rule.

If U.S. EPA pursues revisions to 40 Code of Federal Regulations part 121, any proposed changes must reflect a state's authority to regulate its own water resources and respect the principles of cooperative federalism established by the Clean Water Act and repeatedly affirmed by the U. S. Supreme Court. The Water Boards request that U.S. EPA work closely with all certifying authorities to understand the consequences of any proposed regulatory revisions.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Oppenheimer". The signature is fluid and cursive, with a long horizontal stroke at the end.

Eric Oppenheimer
Executive Director