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Subject: Docket ID No. EPA-HQ-OW-2025-0272 Implementation Challenges and Successes Associated with Clean Water Act Section 401, 90 FR 29828 (July 7, 2025)

Dear Ms. Kasparek,

The Idaho Department of Environmental Quality (IDEQ) appreciates the Environmental Protection Agency's (EPA) continued efforts to support a more efficient, transparent, and predictable Clean Water Act (CWA) § 401 Water Quality Certification process. We value EPA's commitment to upholding the principles of cooperative federalism and water quality protection that are central to the CWA and welcome the opportunity to submit comments regarding the implementation of the 2023 CWA § 401 Water Quality Certification Improvement Rule (2023 Rule).

IDEQ encourages EPA to consider these comments in evaluating the strengths and challenges of the 2023 Rule and to initiate updates and clarifications as necessary. In addition, we respectfully request that EPA update and reissue the rescinded guidance document, *CWA § 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (May 2010), to improve clarity, support consistent implementation, and enhance interagency coordination.

As the certifying authority under CWA § 401 for the State of Idaho, IDEQ supports targeted revisions to the 2023 Rule. The following comments are organized to respond to the key implementation questions and regulatory uncertainties identified in the *Federal Register* notice (90 FR 29828, July 7, 2025), including scope of certification, definition of water quality requirements, interjurisdictional considerations under § 401(a)(2), and lessons learned from the 2023 Rule.

Questions for Consideration

Defining the scope of certification generally and the scope of certification conditions.

IDEQ generally supports EPA's current interpretation of the scope of certification as outlined in the May 2025 memorandum, *Clarification regarding Application of Clean Water Act Section 401 Certification*. As stated in the *Federal Register* notice, the CWA § 401(a)(1) refers to the discharge and not to the broader activity. In practice, IDEQ's certification review focuses on the project's potential impacts to water quality, as that project is authorized by the federal permit or license—not on the broader operation of the resulting land use, project, or facility unless those operations themselves are within the scope of the federal action.

For example:

- When reviewing a § 401 certification request associated with a U.S. Army Corps of Engineers § 404 permit to fill wetlands for a proposed apartment complex or parking lot, IDEQ evaluates the water quality effects of the fill activity itself, such as sedimentation, hydrologic changes, or pollutant mobilization. IDEQ does not extend the review to the future operation of the apartment complex or parking lot, which may be subject to other federal, state, or local oversight outside the 401 context.
- If a project requires a temporary bridge to access a construction site and that bridge installation triggers a § 404 permit, IDEQ's certification review would focus on the placement of fill in waters of the U.S. for the bridge structure itself. The evaluation would address potential impacts such as sedimentation, changes in stream hydrology, and site restoration requirements. However, IDEQ would not extend its certification scope to the broader construction project that the bridge supports—such as the development of a commercial facility or transportation corridor—unless those additional activities independently require a federal license or permit. This reflects a clear, consistent boundary tied to the federally authorized activity itself.
- In the case of a hydroelectric facility licensed by the Federal Energy Regulatory Commission (FERC), ongoing operation is part of the federally licensed activity. In such cases, IDEQ's review under § 401 would appropriately consider water quality-related impacts from operations, including flow modifications, temperature effects, nutrient loading, and reservoir stratification. These operational factors are directly tied to the federal action and have well-documented implications for downstream water quality. IDEQ's approach remains focused on those operational elements that directly affect water quality and are encompassed by the federal license—not broader facility management decisions or unrelated land use components.

This activity-based approach ensures that certification reviews align with the statutory framework of § 401 and remain consistent with the language in 40 CFR § 121.3. It keeps the focus squarely on the water quality-related impacts of the activity being federally authorized, rather than extending into broader or speculative operational consequences that fall outside the scope of the federal permit.

IDEQ recommends EPA provide further clarity to reinforce that:

- Certification reviews should center on direct and reasonably foreseeable water quality impacts of the activity authorized by the federal permit or license;
- Evaluation of "operation" is appropriate only to the extent that it is part of the federally licensed activity (e.g., FERC-licensed hydroelectric operations); and
- 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 § 401.

This clarification would improve predictability for applicants and agencies, reduce the risk of legal disputes, and preserve the core water quality protection purpose of § 401.

Water quality requirements.

IDEQ generally supports the 2023 Rule’s definition of “water quality requirements” as provided in 40 CFR § 121.1(j), which appropriately includes limitations and requirements under CWA §§ 301, 302, 303, 306, and 307; associated federal and state implementing regulations; and any other water quality-related requirements of state law. This framework preserves the core intent of § 401 - to ensure that federally authorized activities comply with water quality standards established under both federal and state law.

However, IDEQ encourages EPA to issue further clarification or illustrative guidance regarding what qualifies as an “appropriate requirement of state law” under § 401(d). In our view, the phrase should be interpreted to include:

- Enforceable provisions of Idaho’s water quality standards, including designated uses, narrative and numeric criteria, antidegradation policies, and implementation procedures adopted into state rule (IDAPA 58.01.02); and
- Applicable provisions of state law or rule that directly govern water quality protection, such as sediment and erosion control requirements, riparian setback rules, or best management practices (BMPs) that are incorporated by reference into regulatory permits or certifications.

IDEQ recommends that EPA clarify that “other appropriate requirements of state law” should be water quality-related, legally enforceable, and clearly tied to implementation of CWA objectives. Conversely, EPA should affirm that this phrase does not include non-water quality-related requirements, such as those addressing land use, economic development, aesthetics, or facility design elements unrelated to pollutant discharge or control. This clarification would promote consistent implementation across states and tribes, reduce legal ambiguity, and help avoid potential challenges to 401 certifications based on conditions not clearly linked to water quality.

IDEQ also recommends EPA provide examples or case studies of acceptable and unacceptable uses of “other appropriate requirements of state law” to support nationwide consistency in interpretation and to aid permit applicants, certifying authorities, and federal agencies in understanding the boundaries of the § 401 certification process.

Neighboring Jurisdictions.

IDEQ appreciates EPA’s request for input on how to evaluate whether a discharge may affect water quality in a neighboring jurisdiction under CWA § 401(a)(2). While IDEQ has limited experience with interjurisdictional referrals under this provision, we recognize the importance of clear procedures, transparent thresholds, and defined timelines to support consistent decision-making.

To that end, IDEQ recommends that EPA provide additional guidance on:

- The types of physical or chemical parameters that would indicate a potential for cross-boundary water quality impacts (e.g., persistent pollutants, sediment load, flow alterations, temperature changes);
- Hydrologic or geographic factors to consider, such as proximity to a state or tribal boundary, location within a shared watershed, or known downstream connectivity;

- Whether the analysis should be qualitative or supported by modeling, and what level of evidence is necessary to make a referral determination.

IDEQ emphasizes that implementation of § 401(a)(2) should avoid speculative or overly expansive interpretations of “may affect.” We recommend that the standard for triggering referral to a neighboring jurisdiction remain grounded in reasonable potential for measurable water quality change, supported by site-specific conditions or credible information.

We also encourage EPA to provide clear procedural expectations for both referring and neighboring jurisdictions, including:

- Defined timelines for issuing and responding to § 401(a)(2) referrals;
- Expectations or protocols for timely communication and documentation exchanges;
- Clear guidance on how the § 401(a)(2) process integrates with the certifying authority’s review under § 401(a)(1); and
- Options to expedite or forgo referral if no comments or objections are expected from the neighboring jurisdiction, such as by incorporating a no-comment acknowledgment mechanism or by setting default concurrence timelines (e.g., if no response is received within 15 days, the review may proceed).

Finally, while IDEQ has not historically received or initiated § 401(a)(2) referrals, we recognize that shared waterbodies like the Snake River, which forms part of the Idaho – Oregon boundary, may present situations where coordination is warranted. To promote efficiency and reduce administrative burden, EPA could develop optional tools, protocols, and templates to assist states and tribes in documenting their evaluation of § 401(a)(2) and deciding whether a referral is appropriate.

Categorical Determinations under CWA § 401(a)(2).

IDEQ supports EPA exploring the potential for categorical determinations under § 401(a)(2) for project types or settings where the likelihood of affecting a neighboring jurisdiction’s water quality is de minimis or highly unlikely. This could reduce unnecessary administrative steps, support more efficient certification processes, and focus limited agency resources on higher-risk or more complex situations.

EPA could consider establishing optional categorical determinations for:

- Activities authorized under certain Nationwide Permits (NWP) that involve only small, temporary discharges with no appreciable downstream transport of pollutants;
- Projects located in closed basins or isolated headwaters that lack downstream hydrologic connection to a neighboring state or tribe;
- Discharges with no reasonable potential to affect water quality, based on flow distance, pollutant characteristics, and site-specific attenuation.

These determinations should be optional and not restrict a state’s or EPA’s ability to consider site-specific factors where warranted. To ensure transparency and flexibility, IDEQ recommends that EPA develop a framework that includes:

- Documented use of categorical determinations by EPA and certifying authorities;
- Criteria and procedures - such as checklists, decision trees, or flowcharts - to support consistent application; and
- A process for neighboring jurisdictions to request review where evidence suggests a categorical exclusion may not be appropriate in a specific case.

IDEQ further recommends that EPA provide timely procedural guidance that allows for:

- Incorporation of categorical determinations early in project planning or permitting phases;
- Expedited processing where a project clearly meets categorical criteria and no interjurisdictional concerns have been raised; and
- Transparency around the use of such determinations, including notification procedures if referrals are waived under a categorical approach.

By maintaining a flexible, science-based approach to § 401(a)(2) categorical determinations will help reduce delays, support consistent implementation, and uphold water quality protections in shared watersheds.

Stakeholder Input on 401 Certification Experiences.

Implementation Successes

IDEQ recognizes and appreciates several provisions of the 2023 Rule that have enhanced the efficiency and clarity of the § 401 certification process. These include:

1. Waiver or Shortened Prefiling Meeting Period

IDEQ supports the flexibility provided under 40 CFR § 121.4(b), which allows certifying authorities to waive or shorten the prefiling meeting period. This flexibility is particularly beneficial for straightforward or low-risk projects that do not warrant extensive prefiling engagement. The 2023 Rule appropriately affirms that certifying authorities retain discretion in determining the duration of this period, provided such decisions are documented. This provision aligns well with existing state practices and improves the efficiency of the certification process without compromising procedural integrity.

2. Agreement with Federal Agency on Reasonable Period of Time

The requirement in § 121.6 for certifying authorities and federal agencies to agree upon a reasonable period of time (RPT), not to exceed one year, promotes transparency and enhances coordination. This approach reduces the risk of unintentional waivers, supports tailored review timelines based on project complexity, and reinforces the principles of cooperative federalism.

3. Flexibility within the One-Year RPT Framework

IDEQ supports the ability to modify or extend the RPT for any reason, within the one-year limitation, if both the certifying authority and the federal agency agree. This flexibility is essential for addressing unforeseen circumstances, such as delays in information submittals or expanded public participation needs, without risking waiver by inaction.

4. Post-issuance Modification of Certification

The return to a cooperative framework for modifying certifications, as provided in § 121.10, is a significant improvement over the 2020 Rule. Allowing modifications by mutual agreement of the certifying authority, federal agency, and applicant (if applicable) supports adaptive management and ensures that certifications remain relevant and legally defensible as project details evolve.

These procedural enhancements contribute to a more effective and responsive certification program by:

- Allowing flexibility in the prefiling process;
- Promoting tailored RPT agreements;
- Supporting reasonable scheduling adjustments; and
- Enabling post-issuance modifications without requiring reissuance.

These provisions function well and should be preserved as part of EPA’s ongoing refinement of § 401 implementation.

Implementation Challenges

Despite the improvements noted above, IDEQ has identified several areas where clarification or regulatory refinement would improve implementation of the 2023 Rule.

1. Uncertainty in Permitting Pathway, Coordination Roles, and Points of Contact

Implementation Challenge:

Effective implementation of CWA § 401 certification relies on early, consistent coordination among applicants, certifying authorities, and federal permitting agencies. However, current procedures often create delays and inefficiencies due to uncertainty in the permitting pathway, unclear coordination roles, and the lack of designated points of contact.

- **Unclear Permitting Pathway:** Certification requests under 40 CFR § 121.5 may meet basic content requirements but often lack clarity on the applicable federal permit—whether the activity falls under a NWP, has been verified, or requires an Individual Permit under § 404. This ambiguity hinders certifying authorities in determining certification applicability and tailoring reviews.
- **Undefined Federal Coordination Role:** The rule does not require a federal agency to confirm the permitting pathway or lead § 401 coordination, leading to fragmented communication and inconsistent expectations, especially for complex or interagency projects. Often, key information surfaces only after review begins, causing delays.
- **No Designated Point of Contact:** Without an identified federal project manager early in the process, certifying authorities may struggle to obtain essential information during prefilings or initial review, making timely and informed certification decisions more difficult.

Regulatory Context

The 2023 Rule does not currently:

- Require confirmation of the permitting pathway (e.g., NWP vs. individual permit) before or alongside a certification request;
- Identify a federal agency lead for § 401 coordination or communication;
- Require the assignment of a project manager or other designated point of contact; or
- Establish expectations for early engagement or sharing of permitting information with certifying authorities.

These procedural gaps may lead to delays, duplicative or unnecessary work, or uncertainty regarding the need for certification or applicable review timelines.

Proposed Solutions

To improve coordination and increase process efficiency, IDEQ recommends that EPA consider the following:

- Revise 40 CFR § 121.5 or develop guidance clarifying that a certification request is not considered complete until the federal permitting pathway has been identified and relevant verification or permit documentation is provided;
- Encourage or require the identification of a federal point of contact or project manager for each certification request, made available to both the applicant and certifying authority early in the process;
- Establish interagency agreements or memoranda of understanding (e.g., between EPA and the U.S. Army Corps of Engineers) to support early coordination, clarify roles, and promote

consistent communication practices;

- Encourage the development of liaison roles or district-level coordination protocols between certifying authorities and federal agencies to streamline communication; and
- Encourage timely assignment and sharing of Department of the Army (DA) file numbers, particularly where individual certification may be needed.

These improvements would enhance transparency, promote early engagement, and support more consistent and effective certification reviews across a range of project types and permitting actions.

2. Lack of Clarity Regarding Project Activity and Project Operation

Implementation Challenge

Many certification requests fail to distinguish between the construction phase and the long-term operational impacts of a proposed activity. Project descriptions may be vague or incomplete, making it difficult to evaluate whether the activity will comply with applicable water quality standards. This is especially problematic for energy, mining, or multi-phase infrastructure projects where operation may result in different or more significant discharges than construction alone.

Regulatory Uncertainty

The 2023 Rule emphasizes evaluating the "activity as a whole," including construction and operation (40 CFR 121.3), but it does not prescribe how much detail is required in the project description. As a result, certifying authorities may be forced to request additional information—delaying decisions—or issue conditional or partial denials due to lack of clarity.

Proposed Solutions

Where ongoing operation is part of the federally authorized activity (e.g., hydroelectric licensing), project descriptions should include operational detail sufficient to evaluate long-term water quality impacts. However, such detail is not required for projects like § 404 fill permits where ongoing use falls outside the federal action. EPA should amend 40 CFR 121.5 or issue supplementary guidance to require:

- Separate, clearly defined descriptions of both construction and operational phases of the proposed activity.
- An outline of anticipated long-term discharge characteristics, seasonal variations, and any treatment or BMPs to be employed during operation.

A template or example project description could be developed to illustrate the level of detail expected. However, certifying authorities should retain the discretion to request supplemental information if the scope remains unclear, and the RPT should not begin until such clarification is received.

3. Flexibility for NWP

Implementation Challenge:

Under 40 CFR 121.7(a), certifying authorities may only grant, grant with conditions, deny, or waive certification. This binary framework prevents authorities from certifying portions of a project while excluding others, even when only certain discharges present water quality concerns.

Proposed Solutions:

Short-Term (Guidance Within Existing Rule):

- Avoid use of terms like “partial denial”; instead, issue a “grant with conditions” that clearly limits the scope of certification.
- Where certain project elements cannot be certified, deny the entire certification and allow the applicant to revise and resubmit.

Long-Term (Regulatory Update):

- Amend 40 CFR Part 121 to allow segmented certifications or clearly defined scope limitations.
- Develop EPA guidance and templates to support certifying authorities in implementing this approach without risking procedural invalidation.

4. Summary of Implementation Challenges

Several recurring issues continue to limit effective implementation of the 2023 Rule:

- Uncertainty in the federal permitting pathway;
- Incomplete permit identification in certification requests;
- Absence of designated agency contacts for interagency communication;
- Vague or incomplete project descriptions that delay evaluations; and
- Inflexibility in certification actions that limit tailored environmental protections.

EPA guidance or future rulemaking should address these issues to enhance the efficiency, transparency, and legal clarity of the certification process.

Conclusion

IDEQ appreciates EPA’s outreach and thoughtful solicitation of stakeholder input on implementation of the 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule. We support EPA’s continued efforts to uphold the principles of cooperative federalism and protect water quality through a more predictable, transparent, and efficient certification process.

IDEQ generally supports the current interpretation of the scope of certification in the 2023 Rule, particularly the emphasis on evaluating whether the activity authorized by the federal permit will comply with applicable water quality requirements. However, we recommend EPA clarify that certification reviews should remain focused on direct and reasonably foreseeable water quality impacts of the permitted activity—not on speculative or indirect operational consequences outside the scope of the federal action. EPA should also reinforce that evaluation of “operations” is appropriate only when operation is explicitly included in the federal license (e.g., FERC hydroelectric projects).

We support the 2023 Rule’s definition of “water quality requirements,” including enforceable state water quality standards, implementation provisions, and laws directly related to pollutant discharge control. EPA should issue additional guidance to clarify the meaning of “other appropriate requirements of state law” under § 401(d), including examples of what qualifies—and what does not. This clarity will help prevent overreach, reduce legal risk, and support consistent implementation.

Regarding interjurisdictional impacts, IDEQ encourages EPA to clarify how and when CWA § 401(a)(2) referrals should be considered. EPA should identify the parameters and hydrologic factors—such as pollutant characteristics, flow alterations, or proximity to downstream jurisdictions—that may indicate a reasonable potential to affect a neighboring jurisdiction’s water quality. EPA should also establish reasonable evidentiary thresholds to ensure that federal decisions are grounded in credible, site-specific information rather than speculative concerns. In tandem, IDEQ supports development of optional

categorical determinations for activities or settings where downstream effects are highly unlikely (e.g., activities authorized under certain NWP or those located in closed basins with no downstream connectivity). Any such framework should remain flexible, transparent, and voluntary, allowing for expedited processing where appropriate, while allowing for site-specific reviews in cases where additional scrutiny is warranted.

IDEQ values the improvements the 2023 Rule made to certification efficiency, including the prefiling waiver provision, the ability to tailor RPT agreements, and cooperative post-issuance modifications. These tools should be preserved. At the same time, several recurring implementation challenges warrant further attention including:

- Incomplete or unclear federal permitting pathways;
- Lack of designated federal points of contact or coordinating agencies;
- Vague project descriptions, particularly where operational impacts are relevant;
- Inflexibility in certifying portions of projects under NWPs.

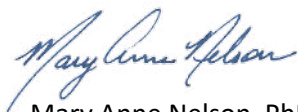
To address these issues, we recommend EPA:

- Update and reissue the CWA Section 401 Water Quality Certification handbook (May 2010 version);
- Issue targeted guidance on project description expectations, federal coordination roles, and permit documentation requirements;
- Clarify when the RPT begins in cases of incomplete applications;
- Consider regulatory amendments to support more nuanced certification actions, including limited or segmented approvals for complex projects; and
- Provide illustrative examples of certification decisions that do—or do not—fall within the appropriate scope of the 2023 Rule.

While IDEQ has not encountered certification decisions that exceed the scope of the 2023 Rule, we recognize the potential for inconsistent interpretation. We recommend that EPA collect and share examples—both appropriate and overbroad—to guide consistent implementation across jurisdictions. IDEQ's comments are focused on state implementation. While the 2023 Rule also applies to authorized tribes acting as certifying authorities, IDEQ defers to EPA and tribal governments on issues specific to tribal implementation. We support EPA's efforts to promote consistency in interpretation and application of Section 401 among all certifying authorities.

Thank you for the opportunity to provide these comments. IDEQ remains committed to improving the implementation of § 401 and welcomes continued collaboration with EPA and other partners in refining this important regulatory framework.

Sincerely,



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