



August 5, 2025

Ms. Lauren Kasparek
Oceans, Wetlands and Communities Division
Office of Water (4502—T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

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Re: Comments on Establishment of Public Docket and Listening Sessions on Implementation Challenges Associated with Clean Water Act Section 401 [Docket ID No. EPA-HQ-OW-2025-0272]

Dear Ms. Kasparek:

The Nevada Division of Environmental Protection (NDEP) thanks the agency for the opportunity to provide comment on the U.S. Environmental Protection Agency's (EPA) establishment of public docket and listening sessions on Implementation Challenges Associated with Clean Water Act Section 401. These comments are in response to the questions for consideration that EPA plans to evaluate when determining whether guidance or rulemaking are necessary to address identified areas of regulatory uncertainty or implementation challenges regarding the scope of certification. As future implementers of the rule, States are in the unique position to have valuable perspective on how implementable the finer points of the certification rule may be and have a vested interest in ensuring the rule has the clarity and durability the EPA is seeking.

The Clean Water Act made clear that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources[...]"¹ Additionally, the State of Nevada is obligated to protect waters of the State as authorized in both the Nevada Revised Statutes (NRS) and Nevada Administrative Code (NAC). The 401 Certification process is an effective tool that not only ensures the compliance of a federally permitted or licensed project with water quality requirements in the Clean Water Act, NRS, and NAC, but Section 401 also upholds the State's role of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters consistent with the language of the Clean Water Act CWA in §101(a).²

The State of Nevada has administered multiple versions of the certification rule including the 1971 Rule, the 2020 Rule, and the 2023 Water Quality Certification Improvement Rule. NDEP recommends that EPA not revise or replace the 2023 Rule currently in effect. While states have received delegated authority from congress to independently evaluate water quality implications of federally authorized activities that may result in a discharge within their jurisdiction, the ability to prevent, reduce, and eliminate pollution through Section 401 has been adversely affected by previous actions narrowing that delegated authority. Prior to undertaking any revisions to the existing Clean Water Act Section 401 Certification regulations and guidance, EPA should take into consideration the following comments in response to the questions posed in the public docket.

¹ CWA §101(b), 33 U.S.C. §125(b)

² CWA §101(a), 33 U.S.C. §125(a)

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

To ensure that a certifying authority can properly evaluate compliance with the enumerated sections of the Clean Water Act, and any other appropriate requirement of State law, the scope of the 401 Certification review should include all categories of discharges made possible by a federal license or permit. It is imperative for a certifying authority to consider all potential water quality impacts of a project, as defined in section 401(d) of the Clean Water Act. Without consideration of the activity as a whole, a project cannot be guaranteed to comply with federal and state water quality requirements, thus degrading the effectiveness of federal protections afforded to our nation's waters. Any revisions to the rule should be consistent with congressionally delegated authority for the review of reasonably foreseeable impacts to water quality that a project poses in order to empower certifying authorities to adequately fulfill their obligation to protect and maintain water quality.

To fully consider a project's impact on water quality, once the requisite federally regulated point source discharge to waters of the United States requirement is met, the scope of review should include all potential impacts to the water quality/aquatic resources that may result from the permitted activity. EPA should interpret the scope of review under Section 401 as broadly as written in statute (33 U.S.C. 1341 (a)(1) and 33 U.S.C. 1341(d)) to allow certifying authorities to comprehensively evaluate a proposed project's impact to water quality.

At a minimum, certifying authorities should be able to evaluate the following water quality impacts of a project for consistency with the enumerated sections of the Clean Water Act and any other appropriate requirement of State law:

- Short- and long-term sources of pollution associated with a project
- Direct and indirect impacts, implementation and operation of a project
- Onsite water quality impacts as well as upstream and downstream effects
- Nonpoint sources of pollution
- Impacts to waters of the United States and waters of the State
- Upland placement of dredged and excavated materials.

The agency also seeks input on whether justification is necessary to demonstrate that conditions included in a certification decision are within the appropriate scope. Consistent with 40 CFR 121.7(d)(3) conditions applied to certifications issued by NDEP include a statement explaining why each of the included conditions is necessary to assure that the activity will comply with water quality requirements as well as references to applicable water quality requirements justifying prompting the condition. However, the federal permitting agency should not have the authority to invalidate or waive conditions or certifications issued by a certifying authority without the opportunity to rectify perceived issues by demonstrating the connection of the condition to water quality requirements.

NDEP recommends that EPA not revise the current scope of review in the 2023 Rule.

2. *Water quality requirements.*

When crafting Clean Water Act Section 401, it was Congress's intent to provide states and tribes with a powerful tool to manage and protect water quality within their respective jurisdictions. Section 401(d) states that "[a]ny certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."³ Further, the

³ CWA 401(d), 33 U.S.C. 1341(d)

2023 Rule defines water quality requirements at 40 CFR 121.1(d) as “[...] any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality related requirement of state or Tribal law.” This interpretation of water quality requirements provides certifying authorities with sufficient scope of review while clarifying that the evaluation of proposed impacts be limited to water quality consistent with congressional intent.

Clean Water Act Section 401 provides certifying authorities with a means to evaluate compliance of federally regulated activities with state water quality standards and requirements. Water quality standards, comprised designated beneficial uses of aquatic resources, numeric water quality criteria to protect beneficial uses, and antidegradation policy, represent a comprehensive approach to protecting and enhancing water quality. Water quality standards are carefully developed across the state to protect aquatic resources for the benefit of the public, the environment, and the economies that depend on these resources. Water quality standards should be allowed to serve as “applicable water quality requirements” in the development of conditions placed on a certification. Such standards work to limit potential impacts from a myriad of water quality concerns, including erosion and sediment control, toxic material management, best management practices, and stormwater pollution prevention. Additionally, the 401 process provides an opportunity to verify a proposed project’s compliance with water quality requirements prior to implementation; which consumes less time, funding, and resources compared to enforcement and restoration actions.

It is incumbent upon certifying authorities, and not the federal agency, to determine whether and how to condition a certification as determined to be necessary to protect water quality. Certifying authorities must be allowed to exert their water quality standards and water quality requirements to fulfill the obligation to prevent, reduce, and eliminate pollution within their jurisdiction. The scope of the aforementioned term “other requirements of state law” should be determined by certifying authorities to ensure a project will comply with applicable water quality requirements in their jurisdiction. Placing limitations on the term “water quality requirements”, including “other requirements of state law”, is inconsistent with the Clean Water Act and will prevent certifying authorities from evaluating the broad range of water quality impacts that could result from a federally permitted or licensed activity. Any limitation placed on certifying authorities to manage their water quality is counter to cooperative federalism and is an unacceptable limitation of state rights.

NDEP recommends that any future rule or guidance reflect the broad authority congress delegated to states in Section 401(d) including the enumerated section of the Clean Water Act and “[...] any other appropriate requirement of State law [...].”

3. *Neighboring Jurisdictions.*

Upon issuance of a certification, conditional certification, or waiver by a certifying authority which may affect the water quality of a neighboring jurisdiction, Section 401(a)(2) authorizes the EPA to assume responsibility for determining whether a project may impact the water quality of a neighboring or downstream jurisdiction. The determination process and consultation with the neighboring jurisdiction are wholly at the discretion of the EPA. The factors EPA considers when making this determination are not publicly available and this discretionary authority may not be sufficiently protective of the water quality within the neighboring jurisdiction. Projects that may comply with water quality requirements in the upstream jurisdiction may not meet the water quality requirements of the downstream jurisdiction.

NDEP recommends that prior to the issuance of a federal license or permit, neighboring jurisdictions must be notified and provided a reasonable opportunity to consult when a project may impact interstate waters to prevent regulation violations of the impacted jurisdiction(s). This process can be facilitated by the EPA but should not be at the discretion of the EPA, and the federal permitting or licensing agency should ensure any necessary consultation has occurred prior to issuance of an authorization.

4. *Categorical Determinations under 401(a)(2).*

Development of publicly available maps, including digital maps, categorically identifying interstate waterbodies that would trigger the 401(a)(2) process would greatly improve transparency of the neighboring jurisdiction process. Many waterbodies in Nevada are endorheic, which are watersheds that flow to terminal basins rather than discharging to the ocean. While some waterbodies flow entirely intrastate, some waterbodies may cross multiple jurisdictions while flowing to the terminal basin. For example, the Truckee River spans multiple jurisdictions including California, Nevada, and ultimately discharging to Pyramid Lake under the jurisdiction of the Pyramid Lake Paiute Tribe. Developing a digital spatial data resource that clearly identifies the locations where Section 401(a)(2) applies would improve understanding of this process and provide certainty for the regulated community and regulators alike. Additionally, identifying the criteria that EPA considers when making “may affect” determinations, such as project size, types of discharges, or distance to neighboring jurisdictions would also support transparency in this process.

NDEP recommends that EPA provide and update digital maps that identify the bodies of water that trigger the 401(a)(2) process and provide specific criteria that are considered when making a ‘may effect’ determination under 401(a)(2).

5. *Stakeholder Input on 401 Certification Experiences*

NDEP appreciates the clarity, specificity, and flexibility of the 2023 Water Quality Certification Improvement Rule which provides the state with the proper tools and authority to manage water quality through Section 401. The 2023 Rule retains the language of the pre-filing meeting requirement from the 2020 Rule and affords certifying authorities with flexibility by clearly stating that the meeting requirement is at the discretion of the certifying authority. Pre-filing meetings, which the federal permitting agency regularly attends, allow project proponents to ask questions of both the federal permitting agency and the certifying authority about their respective processes. Similarly, during these meetings the agencies can ask questions of the project proponent about the project as well as identify any informational needs regarding the proposed activities. *This opportunity to proactively coordinate during the pre-filing meeting step minimizes the chance that formal application submissions are incomplete, thus saving project proponents and the state time when compared to submission of incomplete applications.*

An additional strength of the 2023 Rule is the establishment of the appropriate scope of review. The 2023 Rule allows certifying authorities to evaluate water quality impacts of the project as a whole. Since a project may result in a wide range of impacts to water quality outside of the federally regulated discharge, the certifying authority must be able to evaluate water quality-related impacts that are made possible by the federal permit action. *Since the 2020 Rule narrowly defined the scope of review to water quality impacts associated with the triggering discharge, the 2023 Rule successfully aligns the scope of review consistent with congressionally delegated authority and provides a meaningful role to certifying authorities in meeting the goals of the Clean Water Act.*

Lastly, as encouraged in the 2023 Rule preamble, NDEP and USACE Sacramento District have recently executed a memorandum of understanding that addresses coordination of the 401 Certification Program between both agencies. This memorandum of understanding formalizes several steps in the certification process including pre-filing meeting coordination, programmatic reasonable period of time establishment, and concurrence for certain types of modifications. This memorandum of understanding saves both time and resources for NDEP staff, USACE staff, and project proponents throughout the certification process. Since the memorandum of understanding was specifically developed for the 2023 Water Quality Certification Rule, additional emphasis is added on the importance of retaining the 2023 Rule.

Considering the improvements to the process, clarity of the rule, and comprehensive water quality protections afforded by the 2023 Water Quality Certification Improvement Rule protections, NDEP recommends that the agency retain the 2023 Rule.

6. *Data and Other Information.*

The Public Docket states regulatory uncertainty and implementation challenges with the 2023 Rule are the basis for reevaluating the current regulations. To facilitate transparent and constructive discussion, this claim should be substantiated with examples of specific issues EPA has identified with the 2023 Rule leading to the purported uncertainties and challenges. Without documentation or evidence of the basis for the uncertainty, any rule revision or additional guidance will likely be unsuccessful at resolving the issues. Furthermore, regulatory uncertainty may come, in part, from the recent frequency of rule changes. Frequent rule changes in combination with the associated litigation have resulted in a lack of regulatory consistency for project proponents and certifying authorities, and thus higher uncertainty of the process. For example, *in the five years since the promulgation of the 2020 Rule, certifying authorities have been required to administer three different versions of the certification rule. Promulgation of yet another rule will result in more regulatory uncertainty and permitting delays associated with the need to learn and interpret a new rule and await subsequent EPA guidance. EPA should evaluate the considerable burden placed on certifying authorities when required to learn and interpret new rules, integrate revised agency guidance, and develop new resources for the regulated community.*

In summary, NDEP strongly supports retaining the 2023 Rule by the agency and preserving the states' coregulator role to achieve the goals of the Clean Water Act. NDEP does not support any rule revision that diminishes the state's ability to protect water quality under Section 401 (such as a reduction in scope or limitation on applicable water quality requirements). If there are project- or regionally-specific challenges with the certification process, EPA should provide technical assistance with those projects and to those regions rather than rewrite the rule. As the agencies compile the vast responses and answers to the inquiries set out in the *Public Docket and Listening Sessions on Implementation Challenges Associated with Clean Water Act Section 401*, we encourage active ongoing engagement with state coregulators. This should be conducted with states directly or facilitated through national organizations such as the Association of Clean Water Administrators (ACWA), National Association of Wetland Managers (NAWM), and the Western States Water Council (WSWC). As implementers of the certification rule, Nevada has a vested interest in ensuring any subsequent rule or guidance contains the clarity that the agency seeks and the authority to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Since responses to this public docket could result in changes to the certification rule, it is critical that states and tribes be included in the process if moving toward a rule revision. We take the role of coregulator seriously and will continue to engage with the agencies.

Sincerely,



Chief, Bureau of Water Quality Planning

cc: Jennifer Carr, Administrator
Danilo Dragoni, Deputy Administrator