



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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August 6, 2025

Lee Zeldin, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RR: Washington State Response to Docket No. EPA-HQ-OW-2025-0272,
“Implementation Challenges Associated with Clean Water Act Section 401”

Dear Administrator Zeldin:

The 2023 Water Quality Certification Improvement Rule must remain in place without changes. I am discouraged by the Environmental Protection Agency’s reexamination of Clean Water Act section 401 implementation, two short years after the latest rule was finalized, creating regulatory uncertainty for applicants.

Over 50 years ago, Congress responded decisively to the pollution crisis plaguing communities across the country, citing the fire on the Cuyahoga River as cause for urgent action. They passed the Clean Water Act in 1972, and the Washington State Department of Ecology became first in the nation to receive federal Clean Water Act delegation. Since Congress took bipartisan action to clean up our seas, rivers, and streams, the Clean Water Act has been working as intended. The Cuyahoga River, which had eight documented fires before the infamous fire of 1969, has had zero such incidents since passage of the Act.

The Clean Water Act, and the system of cooperative federalism embodied therein, is a terrific example of how state and federal governments can work together to ensure that environmental protection and economic growth can coexist. In fact, Washington has maintained some of the strongest environmental laws in the country while earning back-to-back rankings as the number one economy in the U.S. in 2022, 2023, and 2024.¹ The state has also been an incubator of American innovation—all while maintaining the incredible natural environment that is key to attracting and retaining top talent.

¹ CHOOSEWashington, Washington by the numbers, available at <https://choosewashingtonstate.com/research-resources/about-washington/washington-by-the-numbers/>; see also Cory Smith, *Washington leads as top state economy*, KOMONews, June 3, 2024, available at <https://komonews.com/news/local/best-state-economies-ranks-include-economic-activity-and-innovation-potential-wallethub-economy-unemployment-rates-finances-income-high-tech-jobs-economic-health>;

Section 401 remains a key part of that effort, as well as the overall success of the Clean Water Act's. Washington, like states across the country, has a long and well-documented record of implementing an efficient and fair section 401 program.

In short, we urge you not to rock the regulatory landscape by attempting to fix what is not broken. Despite the whiplash that began in 2018 to change rules, requirements, and timelines for applications, Ecology has effectively implemented the procedural requirements required by the 2023 EPA Water Quality Certification Improvement Rule (2023 Rule). We ask that you continue to let us do our Congressionally mandated work of protecting waters within our states.

Below, please find specific considerations in response to the Docket questions.

Ecology Urges EPA Not to Change the Scope of Certification as Defined in the Clean Water Act and as Confirmed by the Supreme Court

The EPA must retain the scope of certification defined in both the Clean Water Act upheld by the United States Supreme Court, most significantly in *PUD No. 1 of Jefferson Cy. v. Department of Ecology*. Both the text and the legislative history of the Clean Water Act make clear that a discharge from a point source to waters of the United States is the threshold requirement for a section 401 water quality certification. Once this threshold determination is made, these authorities also make clear that the certifying authority's evaluation is limited to the water quality-related impacts resulting from the project as a whole. Reviewing the entirety of the activity, as set out in the existing rule, aligns with long-standing Supreme Court decisions regarding the proper scope of section 401 that certifying authorities have implemented successfully for many years.

Further, it should remain up to the certifying authority to determine whether a federally licensed or permitted activity may result in a discharge and therefore require a water quality certification. Certifying authorities, like Ecology, have well-established practices and work closely with local federal agencies to determine if there will be a discharge that requires a section 401 water quality certification. It is unnecessary and in conflict with the tenets of cooperative federalism to impose any requirement that conditions or removes the certifying agency's authority to determine whether an activity may result in a discharge and require a water quality certification.

Ecology Urges EPA to Retain the Definition of Water-Quality Requirements

Washington is home to 8.1 million residents and 29 federally recognized Native American tribes. These communities rely on our program to ensure that federally permitted projects do not compromise the water quality aspects of federal treaty obligations or violate state water



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quality standards. The 2023 Rule clearly defines “water quality requirements.” Section 401 explicitly allows certifying authorities to impose conditions necessary to meet water quality requirements and other appropriate requirements of state law. The EPA should retain this definition.

Ecology Urges EPA to Retain the Clear Regulatory Requirement that Regional Administrators Determine Effects on Neighboring Jurisdictions

Ecology insists that determinations as to whether a discharge from a project may affect water quality in a neighboring jurisdiction remain at the regional level where there is expertise. This section of the 2023 Rule is clear as written, and Ecology has not faced any challenges in implementation.

In closing, since the 2023 Rule was promulgated, Ecology has been successful in updating our agency guidance and working closely with our federal partners to implement this rule. Another change to section 401 will cause confusion, unnecessary delays, and harm to the environment. Rather than upend this rule yet again, the EPA should instead allow states to continue their long tradition of stewarding section 401 responsibly, justly, and consistently with the law. The people of Washington deserve no less.

If you have any questions, please contact Sharlett Mena, Special Assistant to the Director, at (360) 688-6229 or by email at Sharlett.Mena@ecy.wa.gov.

Sincerely,



Casey D. Sixkiller
Director

cc: Lauren Kasperek, EPA
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