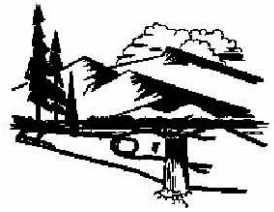




Mark Gordon, Governor

# Department of Environmental Quality

*To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.*



Todd Parfitt, Director

August 6, 2025

Lee Zeldin, Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Submitted electronically via: <http://www.regulations.gov>

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

Dear Administrator Zeldin,

The Wyoming Department of Environmental Quality (WDEQ) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA), July 7, 2025, Federal Register notice, "Establishment of Public Docket and Listening Sessions on Implementation Challenges Associated with Clean Water Act Section 401." As a co-regulator in implementing the Clean Water Act (CWA), the WDEQ is responsible for issuing water quality certifications under Section 401. Section 401 is an essential tool granted to states by Congress for ensuring that discharges under consideration for a federal permit or license comply with the CWA and state surface water quality standards.

With this Federal Register notice, EPA is providing an opportunity for co-regulators to provide input on whether guidance or rulemaking is necessary to address regulatory uncertainty or other challenges associated with implementation of the 2023 Water Quality Certification Improvement Rule (2023 Rule). As the certifying authority in Wyoming, the WDEQ is keenly aware of the importance of Section 401 in empowering states to review, certify, and condition discharges proposed under federal permits and licenses to ensure the state's water quality is protected. However, we are also keenly aware that such reviews, certifications, and conditions must remain within the scope of the CWA by being limited to the discharge being permitted and by being limited to ensuring compliance with state water quality standards.

To this end, the WDEQ recommends that EPA undertake formal rulemaking to revise the 2023 Rule to clarify the scope of Section 401 certifications and the scope of certification conditions. In addition, we advise reasonable and practical modifications to EPA's neighboring jurisdictional review process that uphold statutory requirements under Section 401(a)(2) while focusing resources on projects where

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water quality impacts to a neighboring state or tribe are likely. Below you will find our detailed comments, which have been organized to follow the order of EPA's request in the Federal Register notice.

### **Defining the scope of certification generally and the scope of certification conditions**

*Discharges from Point Sources* - The term "activity" in the 2023 Rule at 40 CFR §121.3 is ambiguous and may be used by certifying authorities to inappropriately (1) establish conditions on activities that are only speculatively or obscurely linked to the actual discharge or are not point source discharges in and of themselves or (2) insert federal jurisdiction over activities on waters that are not waters of the United States (WOTUS). Potential impacts to water quality from such activities (e.g., nonpoint source pollution, discharges to non-WOTUS waters) are addressed through other CWA or state programs, but regulating these activities under Section 401 exceeds the scope of Section 401 as established under the CWA.

We recommend returning to the scope of certification as defined by the 2020 Clean Water Act Section 401 Certification Rule (2020 Rule), where the scope of certification was confined to the *discharge* being "from a point source into a water of the United States," in accordance with Sections 401, 402, and 404. We recommend that the definition of "discharge" should explicitly include equipment use and construction activities associated with the proposed discharge that have the potential for an immediate and direct impact to water quality. These changes will appropriately focus the scope of certification to discharges from point sources to WOTUS in accordance with the intent and authorities of the CWA.

*Certification Justification* - The WDEQ finds it reasonable for certifying authorities to provide justification that all conditions of a water quality certification are within the scope of 40 CFR §121.3. WDEQ's 401 certifications include these justifications to ensure that certification conditions are tied directly to compliance with a state's surface water quality standards.

### **Water quality requirements**

The 2023 Rule defines "water quality requirements" 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." Though we appreciated that the 2023 Rule's definition incorporated much of the focused language from the 2020 Rule, it did not appropriately limit the scope of water quality requirements to only point sources (as was required under the 2020 Rule), nor did it appropriately prohibit certifying authorities from imposing conditions unrelated or only weakly related to water quality based on the interpretation of the phrase "water quality-related."

The CWA under Sections 401, 402 and 404 makes it clear that only discharges from point sources to WOTUS are regulated (i.e., require a permit or certification) under the CWA—a determination that has been upheld by the courts. Addressing nonpoint sources of pollution was assigned to the states by Congress through its 1987 CWA amendments establishing the Section 319 grant program. The omission of the term point source from "water quality requirements," combined with our previous comments

about the use of the term "activity," is concerning because it creates the potential for federal overreach into the regulation of nonpoint sources on waters in the project area that may or may not be WOTUS.

To appropriately limit 401 certification to point sources, adhere to the fundamental tenants of the CWA, clarify the intent of the CWA as the protection of water quality, and respect state authorities, the EPA should qualify the definition of "water quality requirements" to only point source discharges and replace "water quality-related requirements" with "water quality requirements."

#### **Neighboring Jurisdictions**

To increase efficiency in the implementation of EPA's CWA 401(a)(2) neighboring jurisdictional reviews while still upholding the intent of these reviews, the WDEQ recommends that EPA develop criteria that would be used to evaluate the likelihood of impacts to water quality in downstream states or tribes. Those criteria could include factors such as whether the downstream state or tribe has requested a neighboring jurisdictional review, the type and size of the proposed project, and the proximity of the discharge to the neighboring jurisdiction. Establishing criteria for neighboring jurisdiction reviews will help avoid unnecessary project reviews, increasing efficiency and ensuring that state and federal resources will be focused on projects where water quality concerns in downstream jurisdictions are most likely to occur.

#### **Stakeholder Input on 401 Certification Experiences**

The WDEQ continues to support the 2023 Rule's requirement for pre-filing meetings. Pre-filing procedures from the 2023 Rule have improved and increased early stakeholder engagement in the certification process. This promotes efficiency and early coordination to discuss needed water quality information that is required at the time of submission to ensure an application is complete and complies with state water quality standards.

#### **Closing Remarks**

The WDEQ appreciates EPA's engagement with state co-regulators and its commitment to cooperative federalism as it considers revisions to the Section 401 rule. Thank you for the opportunity to provide comments during this notice period as well as the recent listening sessions. We look forward to working alongside EPA and other state co-regulators during future engagement opportunities.

Please contact David Waterstreet, WDEQ Watershed Protection Section Manager, at david.waterstreet@wyo.gov or (307) 777-6079 with any questions regarding these comments.

Sincerely,

  
for Todd Parfitt  
Director

Department of Environmental Quality

TP/JZ/DHW/JMZ/JJT

Cc: Jennifer Zygmunt, Administrator, Water Quality Division  
David Waterstreet, Manager, Watershed Protection Section  
Jeremy ZumBerge, Supervisor, Watershed Protection Section