



**COLORADO**

Department of  
Natural Resources

February 17, 2026

U.S. Environmental Protection Agency  
Docket Center Office of Water  
Docket Mail Code 28221T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**Subject: Docket ID No. EPA-HQ-OW-2025-2929; Comments on "Updating the Water Quality Certification Regulations" Proposed Rule**

Dear Administrator Zeldin and EPA Office of Water Staff:

Thank you for the opportunity to provide comments on the proposed rule for updating the water quality certification regulations published in the Federal Register by the Environmental Protection Agency (EPA) on January 15, 2026 (Proposed Rule), Docket ID No. EPA-HQ-OW-2025-2929. The mission of the Colorado Department of Natural Resources (CODNR) is to develop, preserve, and enhance the state's natural resources for the benefit and enjoyment of current and future generations. Through its eight divisions, CODNR strives to be a steward of the state's natural resources.

CODNR submits the following comments on the Proposed Rule from two of our divisions, Colorado Parks and Wildlife (CPW) and Colorado Water Conservation Board (CWCB). Although our divisions have distinct missions and their comments are presented separately, each division's work is critical to protecting Colorado's unique and varied water resources. Together their recommendations represent CODNR's comments on the EPA's Proposed Rule to amend the Clean Water Act's (CWA) 401 Water Quality Certification Regulations.

**Colorado Parks and Wildlife**

The mission of Colorado Parks and Wildlife (CPW) is to perpetuate the wildlife resources of the state, to provide a quality state parks system, and to provide enjoyable and sustainable outdoor recreation opportunities that educate and inspire current and future generations to serve as active stewards of Colorado's natural resources. CPW has a statutory responsibility to manage all wildlife species in Colorado and to promote various recreational opportunities throughout the state. CPW holds unique expertise in fish and wildlife and their habitats, as well as mitigation strategies to avoid and minimize impacts to those resources from water project development. While the Colorado Department of Public Health and Environment (CDPHE)

serves as the State 401 Certifying Authority, CPW relies on the Section 401 certification process to ensure that major federal water projects comply with state water quality standards that protect aquatic life uses, as well as to ensure conditions developed in the state's Fish and Wildlife Mitigation and Enhancement Plans (FWMEPs) are implemented pursuant to section 37-60-122.2 of Colorado Revised Statutes.

### **Narrowing the Scope of Certifications**

The EPA is proposing the following text at 40 CFR 121.3: *“The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a federally licensed or permitted activity will comply with applicable and appropriate water quality requirements.”* In addition, “discharge” is further limited to mean only discharge from a point source into Waters of the United States. Together, this proposal would substantially narrow the scope of certification conditions to only impacts from discharges from a point source, explicitly rejecting the “activity as a whole” standard established in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994). In Colorado, the primary impacts on aquatic life from water projects include hydrologic alteration, habitat fragmentation, migration barriers, wetland loss, and dewatering, which are caused by water development activities and structures themselves, not by pollutant discharge alone.

### *Designated Uses and Narrative Standards*

CPW notes that under the CWA, water quality standards consist of three elements: designated uses, water quality criteria (numeric and narrative), and antidegradation requirements (40 C.F.R. 131.3(i)). In Colorado, Aquatic Life is a designated use (C.R.S 25-8-102(1)) applicable to most lakes and river systems in the state, and therefore, protection of this use is a water quality standards requirement that state 401 certification conditions must be enabled to protect. By limiting 401 certification conditions to only focus on “discharge from a point source into Waters of the United States,” the Proposed Rule would prevent states from ensuring water projects seeking 401 certification comply with the designated uses that are integral to the water quality standards framework.

In addition, narrative criteria (outlined at 5 CCR 1002-31.11) in Colorado specify:

*“Except where authorized by permits, BMPs, 401 certifications, or plans of operation approved by the Division or other applicable agencies, state surface waters shall be free from substances attributable to human-caused point source or nonpoint source discharge in amounts, concentrations or combinations which:*

*(a) for all surface waters except wetlands;*

*(i) can settle to form bottom deposits detrimental to the beneficial uses. Depositions are stream bottom buildup of materials which include but are not limited to anaerobic sludges, mine slurry or tailings, silt, or mud; or*

*(ii) form floating debris, scum, or other surface materials sufficient to harm existing beneficial uses; or*

*(iii) produce color, odor, or other conditions in such a degree as to create a nuisance or harm existing beneficial uses or impart any undesirable taste to significant edible aquatic species or to the water; or*

*(iv) are harmful to the beneficial uses or toxic to humans, animals, plants, or aquatic life; or*

These standards apply to conditions that are harmful to beneficial (designated) uses. Aquatic Life Use attainment depends on more than just meeting water quality criteria at a point source discharge. Water project development, such as construction of new reservoirs, can result in stream dewatering, altered hydrographs, temperature and dissolved oxygen issues, fish migration barriers, and loss of aquatic habitat needed to sustain aquatic life. If 401 certifications are limited to regulating point source discharges alone, states would appear to be legally prevented from addressing foreseeable project effects that cause or contribute to violations of narrative water quality criteria and designated uses. This limitation would prevent states from fulfilling one of the 401 certifications' core requirements, namely ensuring that federally permitted activities comply with all applicable water quality requirements.

#### *401 Certification Conditions in CO Water Projects*

Under the Proposed Rule, 401 conditions critical to protecting the Aquatic Life Use that have been applied to previous 401 certifications throughout the state would no longer be permissible as certification conditions. Examples of 401 certification conditions designed to protect the aquatic life use based on the “activity as a whole” standard include:

1. Temperature mitigation via bypass flows, whereby diversions can be reduced during warm parts of the year when real-time monitoring shows river temperatures exceed standards.
2. Sediment mitigation via flushing flows and sediment pond operation and maintenance.
3. Stream channel and habitat improvements to mitigate sediment, hydrologic, and temperature impacts from reduced flows in affected stream reaches.
4. E. coli and nutrient load reduction measures via third-party non-point source to offset the loss of dilution.

5. Aquatic macroinvertebrate community annual monitoring, impairment investigation and remedial action plan to bring waterbody back to attainment with WQCD Aquatic Life Use Standard.
6. Fish tissue mercury and in-reservoir water quality monitoring.
7. Adaptive Management.

CPW provided technical review and recommendations on these temperature mitigation strategies, identified the sections of river suitable for habitat improvement, flushing flows and remains a member of adaptive management workgroups throughout the state. These 401 certification conditions are all crucial to avoiding the largest impacts from major reservoir and transbasin diversion projects. Many of these conditions implement the state Fish and Wildlife Mitigation Plan commitments, which serve as the state's official position on reasonable avoidance, minimization, and mitigation. By restricting the definition to "discharge" regulations, the EPA effectively invalidates the use of 401 certifications as a vehicle to enforce these comprehensive state Fish and Wildlife Mitigation Plans on federal projects.

CPW urges the EPA to retain the "activity as a whole" framework, as physical alterations to waterbodies are a primary driver of aquatic life impairment in Colorado and requests that the definition of "Water Quality Requirements" include any state law aimed at protecting the chemical, physical, or biological integrity of state waters, regardless of whether it specifically regulates a "discharge."

### **Modifications to Certifications**

The Proposed Rule proposes to revise the regulatory text at 40 CFR 121.10 *"to require the Federal agency, the certifying authority and the applicant to all agree before the certifying authority may modify a grant of certification."* Aquatic ecosystems are dynamic, and at times CPW, water project applicants, and state water managers rely on adaptive management principles to address the impacts of long-term projects, such as adjusting flow releases based on real-time temperature monitoring or fish kill events. Giving a regulated entity functional veto power over necessary adjustments to water project mitigation severely limits opportunities to address unforeseen impacts from federal water projects, in particular, reservoir operations.

CPW recommends removing the requirement for applicant consensus on modifications, or specifically exempting "Adaptive Management" conditions derived from state wildlife mitigation plans. The proposed rule would undercut one of the primary tools for managing the intersection of federal infrastructure and state wildlife resources.

### **CPW Closing Comments**

The CWA requires protection of the physical, chemical, and biological integrity of the nation's waters, which necessitates regulating the "activity" of water projects, not just their discharge. In order to ensure that states can certify that federal projects comply with legal water quality requirements, they must be enabled to issue conditions that protect aquatic life uses, through numeric and narrative criteria, as well as modify certifications if modeling or baseline estimates of impacts are insufficient to characterize and mitigate real impacts from water project development and operation.

### **Colorado Water Conservation Board**

The Colorado Water Conservation Board (CWCB) appreciates the opportunity to provide comments on the proposed rule for updating the water quality certification regulations published in the Federal Register by the Environmental Protection Agency (EPA) on January 15, 2026 (Proposed Rule).

### **CWCB's Interests**

The CWCB is the state agency charged with the protection and development of the waters of the State of Colorado. It is governed by a 15-member board with responsibilities that include, among other things, protecting Colorado's interstate compact apportionments and collaborating with other states and federal agencies. The CWCB also develops and implements the Colorado Water Plan, through which the CWCB determines state policy regarding development of Colorado's water resources. The CWCB has the exclusive authority to appropriate and hold minimum flow rights to preserve the natural environment.

### **Comments on the Proposed Rule**

The EPA requested comments related to the EPA's determination under section 401(a)(2) of the Clean Water Act (CWA) whether a discharge "may affect" the water quality in another state and the criteria for making that initial determination. As a headwaters state for multiple river systems that flow into or border 19 other states on both sides of the Continental Divide, the CWCB believes the Proposed Rules should incorporate reasonable factors for the "may affect" determination. In particular, adopting factors in the Proposed Rule to expressly consider distance between the discharge and interstate boundaries would provide a greater level of certainty that the scope of the section 401(a)(2) process would not extend far upstream of a state's borders. This approach would be in line with section 101(g) of the CWA, which is particularly important to the western states where water resources are often limited and water rights are carefully administered. Congress and the U.S. Supreme Court have placed important limitations on the jurisdictional reach of the Act and have consistently recognized the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction," which decisions "shall not be superseded, abrogated, or otherwise impaired by th[e CWA]." 33.

U.S.C. § 1251(g); PUD No. 1 of Jefferson Cty. v. Wash. Dept. of Ecology, 511 U.S. 700, 720–21 (1994).

**Reservation of Rights**

In the course of reviewing the Proposed Rule, the CODNR and its divisions may have overlooked other factual or legal assertions that impact the department. The failure to raise specific factual or legal assertions that could impact the CODNR and its divisions, or failure to correct what it believes to be an inaccurate assertion, shall not be construed as an admission with respect to any factual or legal issue, or as a waiver of any rights for the purposes of any future legal, administrative, or other proceeding.

**Conclusion**

Thank you again for the opportunity to provide comments. We urge the EPA to take the recommendations provided by our divisions, CPW and CWCB, into consideration. Our division staff are experts in their respective fields and have vast local knowledge that should be incorporated into the Proposed Rule.

Sincerely,



Dan Gibbs

Executive Director

Colorado Department of Natural Resources