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Comments submitted via Federal eRulemaking Portal: <https://www.regulations.gov>

Lauren Kasparek, Wetlands and Communities Division
EPA Docket Center, Water Docket
1200 Pennsylvania Avenue NW
Washington, DC 20460
cwa401@epa.gov

Subject: Docket ID No. EPA-HQ-OW-2025-2929 Updating the Water Quality Certification Regulations, 91 FR 2008 (January 15, 2026)

Dear Ms. Kasparek:

The Idaho Department of Environmental Quality (IDEQ) appreciates the opportunity to submit comments on the Environmental Protection Agency's (EPA) proposed revisions to the Clean Water Act (CWA) Section 401 water quality certification rule (Docket ID No. EPA-HQ-OW-2025-2929) and the accompanying amendments to 40 CFR part 121.

As Idaho's certifying authority under CWA § 401 (except on tribal lands), IDEQ generally supports targeted revisions to the 2023 Rule that improve clarity, predictability, and administrative efficiency while preserving states' and tribes' ability to fully implement EPA-approved water quality standards (WQS). IDEQ has reviewed the proposed rule updates and offers the following comments and recommendations.

COMMENTS

Idaho generally supports a § 401 certification scope focused on discharges from a point source authorized by the applicable federal license or permit. When properly framed, a discharge-focused scope promotes regulatory clarity, avoids duplicative or open-ended review of overall project purpose or design, and remains consistent with the CWA's cooperative federalism framework and the complementary roles of federal permitting agencies and certifying authorities.

At the same time, IDEQ emphasizes that the scope must function effectively for permits issued under CWA § 404 and other federal authorizations that affect water quality without a traditional outfall. The following comments are intended to preserve the benefits of a clarified scope while ensuring certifying authorities retain the ability to fully implement EPA-approved WQS, including designated uses, narrative criteria, and antidegradation requirements.

IDEQ requests that EPA clarify how a discharge-focused scope applies to Federal Energy Regulatory Commission (FERC) hydropower licensing and relicensing actions. In the FERC context, the federal license commonly authorizes ongoing operational discharges and operational regimes - such as flow releases, spill, bypass reach conditions, and ramping rates - that directly determine water quality outcomes. A discharge-focused scope must therefore allow certifying authorities to include conditions addressing operational elements of a licensed project to the extent those elements constitute, control, or are inseparable from the authorized discharge and are necessary to assure compliance with applicable water quality requirements.

1. Point Source Discharges in the § 404 Context

IDEQ recommends that the final rule clarify that, in the context of § 404 permits, a “point source discharge” includes the placement, release, or redeposit of dredged or fill material and associated pollutants authorized by the permit, as well as the reasonably foreseeable water quality effects of that placement on the receiving water.

Many § 404-authorized activities affect water quality through sediment mobilization, turbidity, and short-term disturbance, even where no discrete outfall exists. Clarifying that these effects are within the point source discharge-focused scope of a § 401 review will ensure that the rule functions effectively for dredge and fill permits without reverting to an expansive “activity as a whole” analysis.

While the preamble includes a summary of court decisions relevant to the “point source discharge” definition provided as footnote 28, IDEQ recommends that EPA consider incorporating the following clarifications into the regulatory text and/or preamble discussion:

For purposes of section 401 certification, “point source discharge” includes the placement, release, or redeposit of dredged or fill material and associated pollutants authorized by a federal permit, and the reasonably foreseeable water quality effects of that discharge on the receiving water.

2. Distinction from NPDES-Style Effluent Review

IDEQ supports clarifying that § 401 certification review is not limited to numeric effluent limitations and does not require an NPDES-style effluent analysis where such limits are not applicable under the federal permit.

For § 404 permits and FERC licensing, compliance with WQS is often ensured through water quality-based conditions such as best management practices (BMPs), performance standards, construction sequencing, timing restrictions, and narrative criteria. Explicitly distinguishing § 401 review from NPDES effluent permitting will reduce confusion and promote consistent implementation across permitting programs.

IDEQ recommends that EPA consider incorporating the following clarifications into the preamble discussion:

Section 401 certification review is not limited to numeric effluent limitations and does not require an effluent-based analysis where such limits are not applicable. Certifying authorities may rely on best management practices, performance standards, temporal restrictions, and narrative water quality criteria to ensure compliance with applicable water quality requirements.

3. Antidegradation Review Within a Narrowed Scope

Idaho’s EPA-approved antidegradation policy is implemented through evaluations of the anticipated water quality effects of permitted discharges, consistent with 40 CFR 131.12 and IDAPA 58.01.02.051.

IDEQ supports a § 401 scope that allows certifying authorities to conduct Tier I and Tier II antidegradation reviews based on the effects of authorized discharges, without requiring evaluation of unrelated, speculative, or indirect project impacts.

IDEQ recommends that EPA consider incorporating the following clarification into the regulatory text and/or preamble discussion:

Nothing in this rule limits a certifying authority's ability to conduct antidegradation reviews based on the anticipated physical, chemical, or biological effects of an authorized discharge, provided such review is limited to determining compliance with EPA-approved water quality standards.

4. Recognition of Narrative Criteria and Designated Uses

IDEQ encourages EPA to explicitly recognize that “applicable water quality requirements” include narrative criteria and designated uses, in addition to numeric criteria. Many water quality impacts associated with § 404 permits - such as sedimentation, habitat disturbance, and temperature-related effects - are addressed through narrative standards and best professional judgment rather than numeric limits.

IDEQ recommends that EPA consider incorporating the following clarification into the regulatory text and/or preamble discussion:

Applicable water quality requirements include numeric and narrative criteria, designated uses, and antidegradation requirements. Compliance determinations may be based on qualitative analyses and best professional judgment where numeric criteria are not available or appropriate.

5. Interpretation of “Other Appropriate Requirement of State Law” and Limitation of State-Law Conditions to Monitoring

IDEQ recognizes EPA’s interest in clarifying that “other appropriate requirement of State law” refers to water quality-related regulatory requirements applicable to discharges authorized by a federal license or permit. However, IDEQ emphasizes that this clarification should not be interpreted to limit certifying authorities to numeric effluent limits or monitoring conditions alone. Narrative water quality criteria, designated uses, and antidegradation requirements are core water quality requirements under state law and the Clean Water Act, and conditions necessary to assure compliance with those requirements fall squarely within the scope of section 401.

IDEQ is concerned by EPA’s request to interpret the phrase “any other appropriate requirement of State law” in CWA § 401(d) as limited to state or tribal regulatory requirements implementing only CWA §§ 301, 302, 306, and 307, and to further limit such conditions to monitoring requirements necessary to demonstrate compliance with those provisions. IDEQ does not support these alternative interpretations.

Clean Water Act § 401(d) authorizes certifying authorities to ensure compliance with:

- Applicable effluent limitations and standards under CWA §§ 301, 302, 306, and 307; and
- “Any other appropriate requirement of State law.”

Many state-law requirements are essential to protecting water quality - particularly those implementing narrative criteria, designated uses, and antidegradation policies - are substantive and preventive, not monitoring requirements. These conditions are often designed to avoid or minimize degradation in the first instance through BMPs, design constraints, construction sequencing, timing restrictions, performance standards, and adaptive management measures, rather than verifying compliance after impacts have occurred.

The Supreme Court has confirmed that § 401(d) authorizes states to impose substantive conditions based on EPA-approved WQS, including narrative criteria, designated uses, and antidegradation policies (PUD No. 1 of Jefferson County v. Washington Department of Ecology). EPA has historically recognized that “other appropriate requirement of State law” encompasses these protections. Limiting this authority would represent a significant departure from longstanding regulatory practice and judicial interpretation and would:

- Constrain certifying authorities’ ability to impose project-specific conditions necessary to prevent WQS violations, particularly where compliance depends on best professional judgment rather than numeric effluent limits;
- Conflict with EPA-approved state antidegradation implementation methods that rely on qualitative analyses and non-monitoring conditions; and
- Introduce uncertainty regarding enforceability and whether a condition qualifies as “monitoring,” weakening § 401’s preventive function by shifting focus to post-hoc verification.

IDEQ recommends that EPA:

- Retain the longstanding interpretation that “other appropriate requirement of State law” includes all EPA-approved state and tribal water quality requirements, including narrative criteria, designated uses, and antidegradation policies;
- Decline to limit state- or tribal-law-based certification conditions to those implementing only the enumerated CWA provisions; and
- Reject any requirement that confines state- or tribal-law conditions to monitoring requirements only.

Certifying authorities must retain discretion to impose substantive, water quality–based conditions grounded in EPA-approved WQS and other appropriate requirements of state law to ensure compliance with CWA § 401(d).

6. Illustrative § 404 Implementation Example

IDEQ recommends that EPA include a § 404-specific implementation example in the preamble to clarify the intended application of the rule. For example:

For Clean Water Act section 404 permits, certifying authorities may impose water quality–based conditions addressing sediment, turbidity, and construction-related impacts that are inseparable from the placement of dredged or fill material, even where no discrete outfall exists, provided such conditions are necessary to ensure compliance with water quality standards.

Including such an example would promote consistent interpretation among federal permitting agencies and certifying authorities and reduce implementation uncertainty.

For example, in the context of FERC hydropower licensing and relicensing actions, a certifying authority may include conditions governing flow releases, ramping rates, bypass reach protections, temperature management measures, sediment management practices, and monitoring or adaptive management provisions where such conditions are necessary to assure that the authorized discharges will comply with applicable water quality requirements, including narrative criteria, designated uses, and antidegradation requirements.

7. Certification Request Contents Under 40 CFR § 121.5

IDEQ supports EPA's goals of improving predictability and timeliness through baseline certification request content requirements. However, IDEQ is concerned that the proposed limitations in 40 CFR § 121.5, may unintentionally constrain a certifying authority's ability to obtain the information reasonably necessary to evaluate compliance with WQS, including antidegradation requirements.

Many federally authorized activities - particularly under § 404 - require project-specific information (e.g., construction sequencing, discharge pathways, BMPs, duration and timing of disturbance, and receiving water conditions) to support defensible WQS determinations. A rigid, federally prescribed list may not account for these realities and could force premature denials or inadequately supported certifications.

IDEQ encourages EPA to adopt a balanced approach in the final rule. Specifically, IDEQ recommends that EPA:

- Establish baseline minimum certification request contents at 40 CFR § 121.5, while expressly preserving a certifying authority's ability to request additional information that is reasonably related to evaluating whether an authorized discharge will comply with applicable WQS, including antidegradation requirements;
- Clarify that supplemental information requests must have a clear nexus to the discharge and to WQS compliance, thereby preventing open-ended or activity-wide inquiries unrelated to water quality; and
- Allow certifying authorities to request such supplemental information within a defined initial review period without altering the date of receipt, ensuring procedural certainty for applicants and federal agencies while preserving substantive adequacy of certification decisions.

This approach would advance EPA's objectives of predictability, efficiency, and transparency while ensuring certifying authorities retain the practical ability to fulfill their statutory responsibility to protect water quality.

8. Receipt and Completeness of a Certification Request

IDEQ supports a clear and consistent definition of "receipt" that provides certainty to applicants, federal agencies, and certifying authorities. IDEQ recommends that the final rule expressly recognize a certifying authority's ability to deem a certification request complete within a specified timeframe (e.g., 15-30 days) following receipt. If the certifying authority does not act within the specified timeframe, the certification request could also be deemed complete by operation of law, and the reasonable period of time should automatically begin from the date of receipt.

IDEQ recommends that the final rule expressly recognize a certifying authority's ability to notify the applicant and the federal permitting or licensing agency, in writing, when a certification request is deemed complete. IDEQ further recommends that the reasonable period of time begins only when the certifying authority issues an acknowledgement receipt confirming that the certification request is deemed complete. IDEQ further recommends that EPA clarify that the reasonable period of time begins upon issuance of such written acknowledgement confirming that the certification request contains the information necessary to evaluate compliance with applicable water quality requirements.

This clarification would promote transparency, reduce disputes regarding waiver, and support certification decisions based on an adequate administrative record. Allowing a certifying authority to conduct a brief completeness review prior to initiating the reasonable period of time would facilitate early communication regarding missing or deficient information and help avoid initiation of the reasonable period of time before sufficient information is available to conduct a meaningful review. Using an acknowledgement receipt as the completeness determination allows certifying authorities to efficiently identify missing or deficient information, communicate early with the federal agency and applicant, and avoid premature initiation of the reasonable period of time. This approach is particularly important for CWA § 404 actions, where review of compliance with narrative criteria and antidegradation requirements often depends on receipt of project-specific information.

To balance procedural certainty with administrative efficiency, IDEQ recommends that EPA clarify in the final rule that:

- A certifying authority may review a certification request for completeness before initiating the reasonable period of time;
- The certifying authority must make a completeness determination within a specified timeframe following receipt of the request;
- If the certifying authority does not issue a completeness determination within that timeframe, the certification request is deemed complete, and the reasonable period of time begins automatically;
- The reasonable period of time begins upon issuance of a written acknowledgement receipt confirming completeness; and
- The acknowledgement receipt must be transmitted to both the applicant and the federal permitting or licensing agency and serves as the official notice of receipt for purposes of 40 CFR part 121.

This clarification would improve procedural predictability, support efficient coordination among certifying authorities, applicants and federal agencies, and preserve certifying authorities' ability to conduct defensible water quality certification reviews consistent with CWA § 401.

IDEQ recommends that EPA consider incorporating the following clarification into the regulatory text:

Add a new paragraph:

Completeness determination.

A certifying authority may review a certification request to determine whether it contains sufficient information to evaluate compliance with applicable water quality requirements. The certifying authority shall notify the applicant and the federal permitting or licensing agency in writing when the certification request is deemed complete. Such notification shall be issued within a specified timeframe following receipt of the request. If no notification is issued within that time frame, the certification request shall be deemed complete. The reasonable period of time shall commence upon issuance of such written acknowledgement or, if no acknowledgement is issued, upon expiration of the completeness review timeframe.

9. Withdrawal and Resubmission of Requests for Certification (40 CFR 121.6(e))

IDEQ supports EPA's effort to clarify the treatment of withdrawal-and-resubmission practices under section 401 of the Clean Water Act and agrees that coordinated schemes between applicants and certifying authorities designed to evade the statutory one-year maximum review period are impermissible. At the same time, IDEQ requests that EPA clearly distinguish such coordinated arrangements from unilateral applicant withdrawals that occur outside the certifying authority's control.

This distinction is particularly important in the context of FERC hydropower licensing and relicensing, where applicants may withdraw requests for certification for a variety of reasons unrelated to state review, including changes in project design, federal licensing schedules, or litigation risk. IDEQ recommends that EPA's final rule and preamble clarify that unilateral applicant withdrawals do not constitute a state waiver, while preserving the one-year statutory limit and preventing coordinated delay tactics. Clear guidance on this point will promote regulatory certainty for certifying authorities, applicants, and federal licensing agencies alike.

10. Replacement of "Project Proponent" with "Applicant"

IDEQ generally supports replacing "project proponent" with the statutory term "applicant," but recommends clear clarification that this change is not intended to narrow the applicability of § 401. Without additional clarification, this revision could create uncertainty regarding the applicability of § 401 certification to general permits and federally authorized activities for which there is no discrete non-federal applicant.

Section 401 is a critical tool through which IDEQ implements Idaho's EPA-approved WQS, including the antidegradation policy at IDAPA 58.01.02.051, as required by CWA §§ 401(d) and 303. General permits - particularly nationwide and regional permits issued by the U.S. Army Corps of Engineers (USACE) - are a core component of IDEQ's § 401 program. IDEQ has historically issued § 401 certifications for USACE nationwide permits and regional general permits issued under CWA § 404(e), including conditions addressing antidegradation, turbidity, sediment control, and BMPs.

IDEQ is concerned that replacing "project proponent" with "applicant," without additional clarification, could be interpreted to exclude these longstanding categories of certifications from the applicability of § 401. Such an interpretation would depart from decades of EPA regulations, guidance, and implementation practice and would impair IDEQ's ability to fully implement its EPA-approved WQS and antidegradation policy.

Accordingly, IDEQ recommends that EPA clearly and affirmatively state - either in the regulatory text or in the preamble - that replacing "project proponent" with "applicant" is intended solely to align the rule with statutory terminology and is not intended to limit the applicability § 401.

IDEQ recommends that EPA specifically clarify that § 401 certification remains required for:

1. Federal general permits, including nationwide and regional permits issued under CWA §§ 402 and 404; and
2. Federally authorized activities that may result in discharges to waters of the United States, including federal agency projects, even where no discrete non-federal applicant exists.

IDEQ recommends that EPA consider incorporating the following clarifications into the regulatory text:

§ 121.1 Applicability of certification where no applicant exists.

For purposes of this part, the requirement to obtain a certification under Clean Water Act section 401 applies to any federal license or permit that authorizes an activity which may result in a

discharge into waters of the United States, including general licenses or permits and federal agency activities, regardless of whether the federal action involves a discrete non-federal applicant.

IDEQ further recommends that EPA consider incorporating the following clarification into the preamble discussion:

EPA emphasizes that the replacement of the term “project proponent” with “applicant” is intended to align the regulations with statutory terminology and is not intended to alter the applicability of Clean Water Act section 401. Section 401 continues to apply to federal general permits and to federal agency activities that may result in discharges to waters of the United States, consistent with longstanding Agency interpretation and practice.

IDEQ further requests that EPA consider the substantial reliance interests of states that have implemented section 401 programs based on longstanding interpretations of scope, timing, and enforceability. States have developed permitting frameworks, staffing models, guidance documents, and coordination procedures with federal agencies that rely on the ability to impose conditions necessary to assure compliance with narrative criteria, designated uses, and antidegradation requirements. Any clarification of scope should avoid disrupting these reliance interests or creating uncertainty for existing certification programs, particularly for general permits and federal authorizations that do not involve a traditional point-source discharge.

11. Modification

IDEQ recommends that EPA retain the 2023 Rule’s approach to modifications of CWA § 401 certifications rather than the proposed approach. The 2023 Rule appropriately reflects the statutory structure of § 401 by recognizing that certification decisions, including any subsequent modifications, are regulatory determinations made by the certifying authority in coordination with the federal permitting or licensing agency—not negotiated agreements involving the applicant.

Clean Water Act § 401 establishes a government-to-government process between the certifying authority and the federal permitting or licensing agency. Under the 2023 Rule, certification conditions and any modifications are issued by the certifying authority to ensure compliance with EPA-approved WQS and become enforceable conditions of the federal permit by operation of law. Modifying a certification does not reopen the certification for EPA review or approval of certification language, nor does it alter the certifying authority’s independent regulatory judgment. This framework properly distinguishes certification conditions from contractual or negotiated permit terms and avoids introducing procedural requirements that are not grounded in the statute.

IDEQ is concerned that the proposed approach—by suggesting that applicants must be parties to, or agree to, modifications of certifications—could blur this distinction and create confusion regarding the legal status of certification conditions. Requiring or soliciting applicant agreement risks undermining the regulatory nature of § 401 conditions, creating ambiguity regarding final agency action, and increasing the potential for waiver or timing disputes under the proposed rule. Applicant participation in modification decisions may also delay certification, blur statutory roles, and weaken the defensibility and enforceability of conditions, particularly where compliance relies on narrative criteria or antidegradation requirements that depend on professional judgment rather than fixed permit limits.

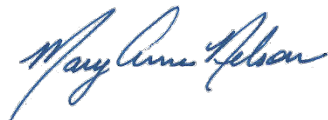
IDEQ supports a clear framework in which applicants provide information necessary to evaluate potential water quality impacts and receive notice of certification decisions, while final authority over certification conditions and any modifications remains solely with the certifying authority and the

federal permitting or licensing agency. Retaining the 2023 Rule's approach would promote transparency, reduce litigation risk, preserve the enforceability of certification conditions, and support timely and defensible implementation of CWA § 401 consistent with EPA's regulatory framework.

CONCLUSION

IDEQ generally supports EPA's proposed revisions to the CWA § 401 rule and appreciates the Agency's efforts to clarify the scope and procedures. With appropriate clarifications, the final rule can improve predictability and consistency for federal agencies, applicants, and certifying authorities, while preserving states' and tribes' ability to implement EPA-approved WQS and antidegradation requirements. IDEQ encourages EPA to ensure that the rule clearly maintains the applicability of § 401 to all federally authorized activities that may result in discharges to waters of the United States, including general permits and federal agency projects, consistent with statute and longstanding implementation practice.

Sincerely,

A handwritten signature in blue ink that reads "Mary Anne Nelson". The signature is written in a cursive, flowing style.

Mary Anne Nelson, PhD
Surface and Wastewater Division Administrator