NEVADA DIVISION OF
ENVIRONMENTAL
PROTECTION

STATE OF NEVADA
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February 13, 2026

Mr. Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

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Subject: Comments on the U.S. Environmental Protection Agency's Proposed Rule—Updating the Water Quality Certification Regulations [Docket ID: EPA–HQ–OW–2025–2929; FRL–6976.2–01–OW]

Dear Administrator Zeldin:

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's) proposed rule *Updating the Water Quality Certification Regulations* (Proposed Rule) pertaining to implementation of Clean Water Act (CWA) Section 401. NDEP has implemented multiple iterations of the Section 401 certification rule, including the 1971 Rule, the 2020 Rule, and the 2023 Water Quality Certification Improvement Rule. Given this extensive experience, we therefore have valuable perspective on the implementability of the proposed certification rule.

The CWA 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 CWA, 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 CWA Section 101(a).[2] As such, we have a vested interest in ensuring the rule has the clarity and durability the EPA is seeking.

NDEP recommends that EPA retain the 2023 Water Quality Certification Improvement Rule currently in effect in Nevada rather than revising or replacing it. Over the past several years since this Rule has been in effect, NDEP has demonstrated exceptional efficiency and effectiveness in administering Clean Water Act Section 401 certifications. Despite operating with less than one full-time employee, NDEP issued approximately 50+ certification decisions annually, with only three denials—two involving U.S. Army Corps of Engineers general

[1] CWA §101(b), 33 U.S.C. §125(b)
[2] CWA §101(a), 33 U.S.C. §125(a)

permits to allow for individual project review and one due to insufficient information but was later certified following resubmittal. The average time for issuing certification has been 76 days, reflecting timely and consistent performance. Having recently executed a Memorandum of Understanding (MOU) with U.S. Army Corps of Engineers has further streamlined the process under the 2023 Rule by formalizing coordination steps such as pre-filing meetings, establishing reasonable timeframes, and concurrence for certain modifications, saving time and resources for all parties. Additionally, NDEP's use of programmatic certifications for regional general permits enables project proponents to proceed without individual certification when compliance conditions are met, reducing administrative burden while maintaining water quality standards. The strategic partnerships and process optimization developed under the 2023 Rule enable NDEP to manage growing workloads and protect water quality with limited staffing. Retaining this rule is critical to preserve these efficiencies and ensure regulatory consistency—avoiding costly disruptions, maintaining stakeholder confidence, and supporting long-term compliance.

Nevada's experience under the 1971, 2020, and 2023 rules demonstrates that an activity-based scope, flexible processes, and the ability to reference applicable state laws and regulations are critical for safeguarding water quality in complex projects. However, as drafted, the Proposed Rule would significantly reduce state discretion and restrict long-standing practices that have reliably protected water quality under Section 401. These changes would shift key procedural and substantive decisions toward a more federally prescribed model, undermining cooperative federalism and complicating implementation across Nevada's diverse hydrologic and project contexts. Congress delegated authority to states to independently evaluate water quality impacts of federally authorized activities that may result in discharges within their jurisdiction. The Proposed Rule, by narrowing this delegated authority, would impair states' ability to prevent, reduce, and eliminate pollution through Section 401.

Below are significant issues identified with the Proposed Rule. NDEP respectfully urges EPA to reconsider and revise these elements of the proposal, as discussed below.

Request for Certification

The proposal sets a single enumerated list of materials constituting a complete "request for certification" as determined by the EPA and prohibits certifying authorities from defining additional contents required to initiate the reasonable period of time (RPOT). The proposal notes that applicants *may* submit additional information in response to certifying authorities request for more information within the RPOT. However, enabling the clock to start before essential, project specific information is provided (e.g., construction methodology, site specific best management practices, mitigation plans, etc.) would compress timelines, resulting in the increased likelihood of denials for complex projects due to a lack of information necessary to evaluate the water quality impacts of a proposed project.

NDEP's experience under the 2023 Rule demonstrates that pre-filing meetings and state-defined application content significantly reduce incomplete submissions and ensure that the certifying authority receives the information necessary to properly evaluate proposed projects. Allowing certifying authorities to establish the minimum required content for a complete application provides clarity for project proponents regarding informational requirements and promotes efficiency in the certification process. This approach streamlines the

process for both agencies and project proponents by reducing the need for supplemental information requests. Preserving the authority of certifying authorities to define informational requirements upholds the longstanding principles of cooperative federalism embedded in Section 401 and is critical to ensuring that all essential water quality-related information is provided to the certifying authority at the outset of the review process.

In practice, the enumerated list proposed by EPA would function as a rigid prerequisite rather than a flexible baseline, thereby increasing uncertainty for both applicants and agencies. As the entity intimately familiar with the information required to conduct a thorough project review, the certifying authority—rather than EPA—should determine the necessary contents of an application and establish when an application is deemed complete in accordance with submission procedures. This approach is essential to ensure that certification decisions are well-informed and legally defensible.

Recommendations:

- Treat EPA's proposed list as minimum elements and explicitly authorize certifying authorities to define required application content prior to RPOT commencement.
- Clarify that the RPOT begins upon receipt of an application submitted in compliance with state defined procedures.

Terminology Change — "Project Proponent" to "Applicant" and Applicability to General Permits

The proposal replaces the term "Project Proponent" with the term "Applicant." EPA's preamble also solicits comment on the applicability of Section 401 to general permits in the absence of the proposed change to the term "Applicant." In the context of general certifications—such as Nationwide Permits issued by the U.S. Army Corps of Engineers—there may not be a distinct applicant as there would be for an individual project. Instead, the certification request may originate from a federal agency rather than an individual or organization seeking authorization for a project. Narrowing the terminology to "Applicant" risks eliminating general certifications, thereby requiring individual Section 401 reviews for each authorization under a general permit. General certification of Nationwide Permits and Regional General Permits advances the agency's stated objective of enhancing predictability and efficiency in the certification process while ensuring water quality protection at a programmatic level.

In Nevada, general permits (such as Nationwide Permits and Regional General Permits) represent the vast majority of federal permits that trigger Section 401 certification. These permits are specifically designed to streamline regulatory processes for categories of activities that have minimal individual and cumulative adverse effects on the aquatic environment. The proposed approach, which would require project proponents to obtain individual certifications for every activity authorized under a general permit, would fundamentally undermine this efficiency. Such a requirement would impose significant administrative burdens on both project proponents and certifying authorities. For project proponents, this change would introduce unnecessary complexity, increase costs, and create delays for activities that could be eligible for general certifications. For certifying authorities, the additional workload would divert limited resources away from projects that warrant more detailed review, reducing overall program effectiveness.

Moreover, this approach is inconsistent with the stated goals of predictability and efficiency in the certification process. By replacing a programmatic review mechanism with a project-by-project certification requirement, EPA risks creating bottlenecks that slow economic development and infrastructure improvements without providing any corresponding benefit to water quality protection. General certifications have proven to be an effective tool for ensuring compliance with water quality requirements while maintaining administrative efficiency. Eliminating or restricting their use could erode these benefits and compromise the cooperative federalism principles embedded in Section 401.

NDEP strongly supports the current framework that allows certifying authorities to issue general certifications for general permits, as this approach balances environmental protection with practical implementation and resource constraints.

Recommendations:

- Retain current implementation of "Project Proponent" rather than "Applicant."
- Affirm that Section 401 applies to general permits regardless of whether an individual applicant is identified.

Timeframe for Certification Analysis and Decision

The Proposed Rule repeals automatic extensions to the RPOT for public notice and force majeure events. Although NDEP has not historically relied on automatic extensions, removing these tools reduces coordination efficiency and imposes additional administrative burdens for both the federal permitting agencies and certifying authorities when unanticipated conditions arise (extended public comment periods or emergency events). The proposal also encourages development of Memorandum of Agreements to make administrative procedures predictable. However, the new rule may invalidate the MOU between NDEP and the U.S. Army Corps of Engineers recently executed under the 2023 Rule, the development of which was a significant undertaking. At the very least, the need would exist to update the MOU to conform with provisions of a new rule. Developing a new MOA or updating the existing MOU would be an inefficient use of resources and divert focus from the core priority of administering the certification program for the State of Nevada.

NDEP and the U.S. Army Corps of Engineers Sacramento District have demonstrated the value of a formal MOU for prefiling coordination, programmatic RPOT establishment, and concurrence on certain modifications—saving time and resources for both agencies and project proponents. Preserving such agreements is vital for effective implementation of the certification process in Nevada. Given that the existing MOU enables fewer than one full-time staff member to efficiently process over 50 certification requests annually and that the current process is functioning effectively, promulgating a new Section 401 Rule and potentially requiring development of a new MOA is both unnecessary and counterproductive.

Recommendations:

- Preserve automatic extensions for force majeure and statutory public notice.
- Retain the 2023 Water Quality Certification Improvement Rule to preserve the existing MOU between NDEP and the U.S. Army Corps of Engineers.

Appropriate Scope for Section 401 Certification Review

The Proposed Rule restricts certifying authority review to determining whether federally regulated discharges from a federally licensed or permitted project will comply with applicable water quality requirements. This approach excludes consideration of water quality impacts resulting from the activity as a whole that are made possible by the federal authorization. To enable certifying authorities to properly evaluate compliance with the enumerated sections of the Clean Water Act and applicable State water quality requirements, the scope of Section 401 certification review should encompass all categories of discharges made possible by a federal license or permit—not merely the discharge that triggers the federal permit or license. This approach acknowledges that water quality impacts often stem from multiple, interrelated aspects of a project and cannot always be fully addressed by focusing narrowly on individual point source discharges. It is imperative for a certifying authority to consider all potential water quality impacts of a project, as defined in CWA Section 401(d). Without consideration of the activity as a whole, confidence is significantly reduced that protections are sufficient to comply with federal and state water quality requirements. 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 through Section 401.

Section 401(a)(1) states "[a]ny applicant for a Federal license or permit to conduct any activity [emphasis added] including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." The proposal acknowledges that courts have previously held that ""activities—not merely discharges—must comply with state water quality standards is a reasonable interpretation of § 401 and is entitled to deference." Id. at 712 (citing, inter alia, Chevron)" (90 Fed. Reg. 2025). To align with the Clean Water Act and judicial precedent, and to fully account for a project's potential impact on water quality, once the threshold requirement of a federally regulated point source discharge is met, the review should encompass all water quality impacts resulting from the permitted activity—not solely the discharge subject to federal regulation. EPA should interpret Section 401 broadly, as written in 33 U.S.C. §1341(a)(1) and §1341(d), to allow certifying authorities to comprehensively evaluate a project's effects on water quality.

At a minimum, certifying authorities should have the ability to evaluate the following water quality impacts of a project to ensure consistency with the enumerated provisions of the CWA and any other appropriate State water quality requirement:

- Short-term, long-term, and cumulative sources of pollution associated with a project
- Direct and indirect water quality impacts from 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.

Recommendation:

- Retain the current scope of review established in the 2023 Rule, which appropriately focuses on the activity as a whole, rather than limiting consideration to the federally regulated discharge alone.

Water Quality Requirements

When crafting CWA 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." Further, the 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 CWA, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality related requirement of state or Tribal law." Any interpretation of "water quality requirements" should adhere to the plain language of the CWA and ensure that certifying authorities retain sufficient scope of review, while clarifying that evaluations of proposed impacts remain focused exclusively on water quality, consistent with congressional intent.

Although the proposal suggests that the definition of "water quality requirements" would not restrict states to numeric criteria, EPA has requested comment on limiting this term exclusively to numeric criteria. Section 401 of the CWA imposes no such limitation on the scope of certifying authority review. In fact, imposing this restriction would directly conflict with Congress's explicit directive in Section 401(d), which requires compliance "with any other appropriate requirement of State law set forth in such certification." Section 401 provides certifying authorities with a mechanism to assess whether federally regulated activities comply with the requirements of the Act as well as applicable state laws and regulations including water quality standards. 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.

Nevada, like many states, has carefully developed and relies on a comprehensive suite of water quality requirements beyond numeric criteria. Comprised of designated beneficial uses of aquatic resources, numeric water quality criteria to protect beneficial uses, and antidegradation policy, water quality standards represent a comprehensive approach to protecting and enhancing aquatic resources. 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. 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. Restricting Section 401 certifications to numeric criteria would not only undermine these critical protections but would also contravene Section 401(d), which authorizes certifying authorities to include "any other appropriate requirement of State law" in certifications.

It is incumbent upon certifying authorities—not the federal agency—to determine whether and how to impose conditions on a certification, as deemed necessary to protect water quality and supported by applicable federal and state laws and regulations. Certifying authorities must be allowed to exert their water quality standards and requirements to fulfill the obligation to prevent, reduce, and eliminate pollution within their jurisdiction. The scope of the aforementioned term "other appropriate 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 CWA and will prevent certifying authorities from evaluating water quality impacts that could result from a federally permitted or licensed activity. Any limitation placed on certifying authorities to manage their water quality would erode cooperative federalism, would compromise effective water quality protection through Section 401, and is an unacceptable limitation of state rights.

Recommendation:

- Reject the concept of restricting "water quality requirements" to solely numeric criteria and affirm that "water quality requirements" include enumerated sections of the CWA as well as any other appropriate requirement of State laws and regulations.

Content of a Certification Decision

The proposal requires that, where conditions are imposed on a certification, each condition includes a statement explaining why the condition is necessary to assure that the discharge(s) from the proposed project will comply with water quality requirements, and a citation to the applicable federal or state law or regulation upon which the condition is based. Consistent with 40 CFR §121.7(d)(3), conditions applied to certifications issued by NDEP already include a statement explaining why each condition is necessary to ensure compliance with water quality requirements, along with references to the applicable law or regulation that support the condition.

NDEP's established practice of providing clear rationales and regulatory citations for certification conditions promotes both defensibility and transparency for federal permitting agencies and project proponents. This approach facilitates informed decision-making, reduces uncertainty, and ensures that conditions are legally and technically sound. Because these elements are integral to NDEP's existing process, the proposed requirement is unlikely to impose additional burdens on NDEP's Certification Program.

Modifications — Authority, Process, and Applicant Involvement

The proposal states that the Federal agency, the certifying authority, and the project proponent all agree before a certification may be modified—and that the applicant must approve the language of the modification.

While supportive of the agency's intent to retain provisions allowing for modification of certifications, the proposal to grant applicants influence over the language of certification conditions is fundamentally problematic. Certification conditions are developed by certifying authorities to ensure compliance with water quality standards and other applicable requirements under the CWA and state applicable State water quality requirements. Conditions developed by NDEP are regulatory obligations grounded in scientific, technical, and legal considerations.

While NDEP actively collaborates with project proponents throughout the modification process, project proponents are not involved in the development of these conditions. Providing applicants with a new authority over condition language introduces a conflict of interest; undermines the integrity of the certification process; and could lead to diluted or ambiguous requirements, thereby jeopardizing water quality protection, creating unnecessary disputes, and exposing certifying authorities to increased legal risk.

Moreover, a statutory basis for this limitation does not appear to exist. CWA Section 401 explicitly grants certifying authorities the power to impose conditions it deems necessary to ensure compliance with applicable water quality requirements. It does not impose any requirement for applicant approval or participation in drafting these conditions. Introducing such a limitation through rulemaking would exceed the scope of the CWA and erode the autonomy of certifying authorities, contrary to the intent of Congress.

Modifications represent an important provision that enables certifying authorities to respond to changes in circumstances—such as adjustments to project timing or minor design alterations—without requiring the certification process to be restarted in its entirety. Modification provisions are important for flexibility and efficiency for both the certifying authority and the project proponent, however they must remain under the discretion of certifying authorities in coordination with the federal permitting agency. While including rationale or justification related to the need for the modification might be acceptable to improve transparency and to document decision rationale, any requirement enabling applicant's approval authority over condition language is inconsistent with the CWA, undermines regulatory integrity, and poses significant risks to water quality protection.

Recommendations:

- Require agreement of the certifying authority and Federal agency for modifications; do not require applicant approval of condition language. Support solicitation of applicant input but preserve state authority over final language.
- Provide a streamlined pathway for state-initiated modifications when standards or regulations change, ensuring timely alignment with applicable laws and regulations.

Section 401(a)(2) Process

The proposal's substitution of the term "neighboring jurisdiction" with the term "other State" is deeply problematic, as it risks excluding Tribal governments from consultation—a critical oversight in Nevada, where

Tribal interests are substantial and water-related decisions may impact Tribal lands and uses. This exclusion undermines the principles of cooperative federalism and fails to honor the federal trust responsibility to Tribes.

Equally concerning is the proposed alternative approach to initiate the Section 401(a)(2)/Neighboring Jurisdiction process at the six-month mark if the certification decision has not yet been issued. This sequencing is fundamentally flawed since the proposed approach would commence the Neighboring Jurisdiction review potentially prior to the certifying authority's decision. It would create procedural inefficiencies, misalign statutory intent, and contradict EPA's own statements that certification decisions are evaluated during the 401(a)(2) review. Proceeding with a neighboring jurisdiction review without knowing whether the certifying authority will issue a certification, waiver, or denial is not only impractical but would waste significant time and resources for all parties involved.

Moreover, EPA indicates that the certifying authority's decision is an integral component of its Neighboring Jurisdiction review. However, this assertion may appear inconsistent if the review is initiated prior to the certification decision, which could raise concerns regarding the clarity and defensibility of the proposed process. EPA should abandon this alternative approach and reaffirm a process that respects statutory requirements, promotes efficiency, and ensures meaningful participation by all affected jurisdictions—including state and tribal governments.

Recommendations:

- Clarify Tribal inclusion in Section401(a)(2) consultation and provide clear guidance on the Agency's coordination practices.
- Consistent with current and historic practice, sequence Section401(a)(2) review to begin after the certifying authority's decision to avoid duplication and resource waste.

Extended or Phased Effective Date

Given the breadth of procedural and substantive changes contemplated, certifying authorities will require time to evaluate final requirements, update guidance and application material, train staff, and coordinate with federal partners as well as the regulated community. A phased or extended effective date will promote consistent application, reduce confusion during rule transition, and support efficient and effective certification programs. The frequent rule changes since 2020 have contributed substantially to regulatory uncertainty, confusion, and permitting delays, underscoring the need for durable, well-paced implementation. Furthermore, rule changes obligate certifying authorities to make major investments of time and resources to review and update programmatic operations and documentation to ensure alignment with the proposed changes. The implications of regulatory changes warrant thorough consideration, and EPA must truly evaluate the full breadth of impacts associated with implementing yet another rule change.

Recommendation:

- Provide a reasonable implementation period for any final rule, coupled with guidance for certifying authorities to transition between rules.
- If a new rule is finalized, the language should clearly state that the rule will not apply retroactively to certification decisions under the 2023 Rule.

Closing

NDEP has consistently demonstrated effective and efficient administration of the 2023 Water Quality Certification Improvement Rule and meeting the objectives of the Clean Water Act. Through streamlined coordination, programmatic certifications, MOU development, and process improvements, NDEP continues to manage its workload successfully while achieving the congressionally delegated authority to protect and maintain water quality through Section 401. Therefore, NDEP strongly supports the Agency retaining the 2023 Rule. 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). Integrating the recommendations above would preserve the states' coregulator role to achieve the goals of the CWA. Additionally, 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 to the Proposed Rule and recent listening sessions regarding CWA Section 401, we encourage active ongoing engagement with state coregulators. This should be conducted directly with certifying authorities 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 Proposed Rule could result in changes to NDEP's administration of the certification process, it is critical that states be included in any subsequent rule revision. We take the role of certifying authority seriously and look forward to continuing to engage with the agency on this topic.

Sincerely,

Jason Kvachnicki

Chief, Bureau of Water Quality Planning

ec: Jennifer Carr, Administrator
Danilo Dragoni, Deputy Administrator