MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

February 17, 2026

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

Via email: OW-Docket@epa.gov
Via Federal eRulemaking Portal: https://www.regulations.gov/

Re: Comments on Updating the Water Quality Certification Regulations, Docket ID No. EPA–HQ–OW–2025-2929

Dear Administrator Zeldin,

On behalf of the New Mexico Environment Department, enclosed please find our comments on the proposed rulemaking by the U.S. Environmental Protection Agency (EPA) replacing the existing water quality certification regulations at 40 C.F.R. Part 121, Docket ID No. EPA–HQ–OW–2025–2929. *See* 91 FR 2008 (January 15, 2026).

NMED strongly opposes the U.S. Environmental Protection Agency's proposed rule, "Updating the Water Quality Certification Regulations," as it directly contradicts states' sovereign authority to protect their water resources under Section 401 of the Clean Water Act. By narrowing the scope of state review and imposing rigid federal timelines, this proposal limits New Mexico in its ability to evaluate major energy projects, such as pipelines and coal terminals, for potential impacts on our unique and often ephemeral and intermittent waterways. This administrative overreach prioritizes industry speed over environmental integrity, undermining the cooperative federalism that is essential for safeguarding New Mexico's public health and environment from long-term pollution. We urge the EPA to withdraw this rule and instead uphold the rights of states and nations, pueblos, and tribes to maintain rigorous oversight over any activities that threaten the quality and safety of our community water supplies.

Thank you for the opportunity to comment.

Sincerely,

DocuSigned by:
James C. Kenney
66C7CB6F3B03408...
James C. Kenney
Cabinet Secretary

Cc: Courtney Kerster, Senior Advisor, Office of Governor Michelle Lujan Grisham
Jonas Armstrong, Water Protection Division Director, NMED
Shelly Lemon, Surface Water Quality Bureau Chief, NMED
Zachary Ogaz, General Counsel, NMED
Brecken Scott, Assistant General Counsel, NMED

Introduction

The New Mexico Environment Department (NMED) is charged with certifying federal permits issued pursuant to the Clean Water Act (CWA). See NMSA 1978, Section 74-6-5(B); 20.6.2.2001–20.6.2.2003 NMAC. As a co-regulator, NMED's role is to ensure that these federal permits comply with the requirements of state law in order to maintain and protect water quality within our borders. The CWA Section 401 certification is part of a larger water quality protection effort that is an integral part of the CWA. New Mexico has been applying this process successfully for many years.

CWA Section 401 certification authority is crucial for New Mexico to:

- Ensure compliance with state water quality standards;
- Assist regulated entities and EPA with implementation and protection of state standards;
- Identify and correct errors in publicly noticed draft permits;
- Ensure that the state's antidegradation process and final decisions are adequately implemented into permits in a timely manner; and
- Ensure that "any other appropriate requirements of State and Tribal law" are met, such as:
    - water rights considerations under Small Municipal Separate Storm Sewer System permits,
    - cultural or religious value of water,
    - protection of a waterbody's designation under the Wild and Scenic Rivers Act,
    - state regulations dealing with Outstanding National Resource Waters protection,
    - implementation of temporary standards (i.e., variances),
    - required in-stream flows for threatened and endangered species pursuant to the Endangered Species Act, and
    - implementation of state general criteria (i.e., applicable to all waters).

CWA Section 401 certification is a critical tool that allows New Mexico to require federal agencies to include conditions in federal permits for monitoring and/or mitigation in the event of contamination where quantitative water quality standards do not yet exist, but the state wants to prevent exceedances of health-related criteria from known sources (e.g., emerging contaminants). The Proposed Rule infringes on states' authority and autonomy to manage and protect water resources within their borders and to implement CWA Section 401.

NMED is also concerned about the compressed timeframe for this rulemaking and public comment period and requested an extension on January 21, 2026. The EPA provided states, Nations, Tribes, and Pueblos, and other interested parties 30 days to review and comment on a proposed rule with incredibly high stakes and wide scope that deviates from decades of established practice of a cooperative and functional EPA/state relationship. Due to the inadequate public comment period, NMED was unable to comment fully on all issues in the proposed rule.

The Proposed Rule conflicts with the intent of the CWA and has significant legal and policy implications for states' rights to protect water quality within their own borders. While our comments only address state certification, New Mexico has 15 Nations, Tribes, and Pueblos that have authority similar to a state with respect to CWA Section 401 certifications. Their authority and rights are dramatically altered and diminished under the Proposed Rule provisions, which in turn reduces protections for surface waters shared by Nations, Tribes, Pueblos, and communities throughout New Mexico.

Comment 1: The Proposed Rule conflicts with the explicit Congressional intent of the CWA.

Under the CWA, Congress recognizes states' primary authority over water resources, purposefully designates states as co-regulators under a system of cooperative federalism, and clearly expresses its intent 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, and to consult with the Administrator in the exercise of his authority under this Act.
> 33 U.S.C. § 1251(b).

Through this statement, the CWA explicitly recognizes that states have the technical expertise and first-hand knowledge to manage and protect their water resources. The CWA also recognizes that state management is preferable to a federally mandated one-size-fits-all approach to water quality management that does not accommodate the practical realities of climatological, ecological, geological, geographical, and hydrological diversity between states. Furthermore, states have been applying this process cooperatively and successfully with EPA for decades.

The proposed rule erodes state and tribal authorities and responsibilities by narrowing the scope of certification review, limiting reliance on state law and water quality standards, and constraining professional judgement and procedural discretion. Eroding or shrinking state and tribal authority under CWA Section 401 will have deleterious effects on the state and federal partnership and would be inconsistent with statutory intent. *See S. D. Warren Co. v. Maine Bd. of Envtl. Prot*., 547 U.S. 370, 386 (2006). NMED strongly encourages the EPA to support the role of States, Nations, Tribes, and Pueblos with certifying authority as co-regulators and fully incorporate state and tribal input as it develops a final rule to ensure that certifying authorities and the federal government are working *together* at every step of the way, which will strengthen the rule's effectiveness, durability, and alignment with the CWA's cooperative federalism framework.

In sum, EPA has caused imbalance with the Proposed Rule and tipped the cooperative federalism scales in the federal government's favor. In addition, the restrictions in the Proposed Rule diminish the "robust" and "major" role that State certifying authorities serve. *See* 91 FR 2010-2011. "State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution…" *S. D. Warren Co.* at 386.

Comment 2: Narrowing the scope of certification to "discharge" only is not science-based.

The proposed revision to 40 CFR 121.3 (Scope of certification) is not consistent with Clean Water Act Section 401. EPA interprets Section 401 too narrowly and, thus, the proposed scope of Part 121 does not align with the scope of Section 401. In the Background of the preamble, EPA noted that the 1972 restructuring of the Clean Water Act provided a "comprehensive scheme" that gave the agency broad authority to prevent pollution throughout the nation's waters because prior statutes were deficient in addressing water quality issues. This broad authority was supported by the *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.* decision, which stated that "the Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally[.]" See 91 FR 2011. However, EPA's Proposed Rule does the exact opposite: it forces states to narrowly focus on only the "discharge" associated with the broader activity. These two aims are at odds with each other and result in a mismatch when it comes to Section 401 certification. The proposed revision states:

> 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.

This represents a substantial and substantive narrowing of state and tribal authority compared to 50 years of prior practice. The scope of certification must be consistent with the CWA section 401(a)(1), which covers any activity including, but not limited to, the construction or operation of facilities requiring a Federal license or permit which may result in any discharge into the navigable waters in order to ensure any such discharge will comply with the applicable provisions of CWA sections 301, 302, 303, 306 and 307. Limiting certifying authorities' review to the discharge is constrictive to the point of dysfunction.

The Supreme Court decision in *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994), confirmed that states may regulate the impacts of a project as a whole, so long as there is a discharge involved. The Court first interpreted the language of Section 401, which has not changed since 1972, *then* proceeded to confirm the EPA's views and actions under 40 CFR Part 121 were consistent with the statute. *PUD No. 1* at 727-730.

The ruling in *PUD No. 1* remains valid law. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). While *Loper Bright* ended the practice of *Chevron* deference, the Court explicitly stated that this shift in "interpretive methodology" does not automatically overrule past precedents. Under the principle of *statutory stare decisis*, previous holdings—including those that relied on the *Chevron* framework—remain legally binding and are not overturned simply because the court's approach to interpreting statutes has changed. In her dissenting opinion, Justice Kagan wrote that under *stare decisis* the Supreme Court "needs an exceptionally strong reason to overturn [a] decision, above and beyond thinking it wrong." *Id.* at 470-471.

NMED asserts that EPA should be acting in accordance with the precedent set in *PUD No. 1* and *S.D. Warren Co*., including decades of comprehensive, broad authority that has improved the quality of our nation's waters. Activities as a whole should be considered by certifying authorities to determine compliance with state water quality standards. Certifying authorities should appropriately address impacts to designated uses, water quality criteria, flow alterations, and cumulative impacts when determining compliance, especially for complex projects and complex water resource management areas. Nearly 50 years of state and federal practice as well as numerous Court of Appeals decisions (e.g., *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997)) support and extend this approach and reasoning.

Similarly, the effect of EPA's added definition of "discharge" severely restricts states' oversight of water quality within their boundaries. EPA's definition fails to honor the term's common and ordinary meaning utilized by several courts, including the U.S. Supreme Court on several occasions. *See S. D. Warren Co.* at 376. NMED urges EPA to remove their definition of "discharge" as 40 CFR 121.2 clearly conveys the common and ordinary meaning of the term for purposes of CWA Section 401.

Comment 3: The Proposed Rule must allow certifying authorities the option to develop additional contents of certification for their areas of authority.

The proposed revision of 40 CFR 121.5 (Request for certification) excludes certifying authorities from participating in the development of the contents of certification and therefore directly opposes the principles of cooperative federalism.

The proposed rule establishes a standardized set of required application elements and ties the certification timeline to the certifying authority's receipt of these materials. While EPA intends to increase predictability and efficiency, the materials may not be sufficient to conduct a meaningful technical review. New Mexico relies on a combination of federal regulations, state statutes, and program-specific guidance to determine what constitutes a complete certification request. New Mexico also often engages in iterative information exchanges with applicants before deeming a request complete and starting the statutory review clock. The proposed rule pressures the certifying authority to conduct complex analyses within fixed timelines, even where critical data are missing or incomplete.

NMED urges EPA to re-introduce one of the contents of certification from the 2020 Rule that was removed in the 2023 Rule, "a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge." The rationale in the preamble to the 2023 Rule was that this component "is unnecessary since the final rule requires a project proponent to provide the Federal license or permit application or draft Federal license or permit, as appropriate, and any readily available water quality-related materials that informed the development of the application or draft Federal license or permit in its request." NMED asserts that it is necessary to require the "methods to monitor, treat, control or manage the discharge" in a request for certification because it is not guaranteed that this information will be included as part of the "readily available water quality-related materials."

To ensure that certification requests contain sufficient information for a state or Nation, Tribe, or Pueblo to evaluate the water quality impacts, the Final Rule should not remove the description of the activity, the dates of the activity and discharge, the list and status of other authorizations, or the methods to monitor, treat, control or manage the discharge, nor should the Final Rule prohibit certifying authorities from developing their own contents for a request for certification. The executive summary for the proposed 2026 Rule says the revision is necessary to increase transparency, efficiency and predictability. The certifying authority requires sufficient information to support transparency, efficiency and predictability.

Comment 4: It is essential that the reasonable period of time start after the certifying authority has received sufficient information to conduct a technical review.

New Mexico often engages in iterative information exchanges with applicants before deeming a request complete and starting the technical review because of project-specific or state requirements. The revised reasonable period of time (RPOT) in section 121.5 creates a situation where projects could start with insufficient information, which will negatively impact certifying authorities and their ability to protect water quality. Although New Mexico may request additional information after the RPOT begins, the Proposed Rule would pressure NMED to conduct complex analyses within fixed timelines, even where critical data are missing or incomplete.

Submitting insufficient information cannot be used as a strategy to run out the clock on the RPOT. Starting the RPOT with insufficient information may also result in negative consequences for the applicant, because the certifying authority may be forced to deny certification without prejudice based on insufficient information, which is an acceptable reason to deny certification. It is in everyone's best interest to ensure the RPOT begins with sufficient information. Therefore, NMED urges EPA to start the RPOT after the certifying authority has received sufficient information.

In addition, NMED urges EPA to keep the provision in 40 CFR 121.6(d) that allows for automatic extensions for the RPOT to accommodate the certifying authority, if deemed necessary.

Comment 5: The new requirements for Certification Decision Contents are unnecessary, increase administrative burdens on States, and create litigation risks.

The proposed revision to 40 CFR 121.7(d)(4) (Certification decisions) requires a citation to the water quality requirement upon which each condition is based is unnecessary. Clean Water Act section 401(d) itself allows certifying authorities to impose any limits or monitoring requirements, i.e., conditions. CWA Section 401 is the water quality requirement upon which each condition may be based upon. The preamble's rationale says this revision is needed for transparency and consistency; however, there is nothing secretive about water quality certification conditions being used to protect state water quality standards. States currently issue certification decisions in accordance with state law and administrative practice. Further, the preamble does not cite any instances where transparency or consistency has been an issue.

These new requirements reduce flexibility and increase administrative burdens on state agencies, particularly for routine or high-volume certifications. Additionally, the Proposed Rule would potentially create new litigation risk by inviting challenges to the sufficiency or phrasing of decision rationales and undermine the ability of certifying authorities to fulfill their legal responsibility to ensure that federally permitted or licensed discharges into navigable waters will not violate CWA sections 301, 302, 303, 306, and 307.

Comment 6: EPA must preserve states' authority to modify certifications when necessary to protect water quality.

States have historically retained flexibility to modify certification conditions post-issuance in response to new information, changed circumstances, adaptive management needs, or compliance issues—although New Mexico has rarely used this authority. The proposed revision to 40 CFR 121.10 (Modification to a grant of certification) will require the certifying authority to obtain the applicant's agreement on the language of the modification. This represents a significant shift from past practice and reduces state authority to modify certifications when necessary to protect water quality, increases administrative and procedural complexity, and limits adaptive management approaches commonly used by states. These changes will limit states' ability to respond to new information, changed circumstances, or evolving science, and will undermine long-term water quality protection.

The proposed revision enables applicants to obstruct the certification process whenever it is in their best interest to do so. It is clear in the plain language of the CWA that Congress did not give, or intend to give, applicants authority over the certification process or water quality protections. The proposed revision to 40 CFR 121.10 must not go into effect; otherwise, EPA will be granting applicants the authority to obstruct the certification process (and thereby impeding water quality safeguards) by simply refusing to agree to the language in the modification.

Comment 7: Request for Delayed Effective Date

NMED requests that EPA provide a delayed effective date for any Final Rule to allow certifying

authorities time to evaluate the final regulatory requirements, update guidance and regulations as necessary, and implement new processes in coordination with federal agencies and regulated entities.