

Jeff Starling
Secretary of Energy & Environment



J. Kevin Stitt
Governor

STATE OF OKLAHOMA
OFFICE OF THE
SECRETARY OF ENERGY & ENVIRONMENT

February 17, 2026

Submitted via: *The Federal eRulemaking Portal:* <http://www.regulations.gov>

Lee Zeldin, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

RE: U.S. Environmental Protection Agency's (EPA's) Proposed *Updating the Water Quality Certification Regulations*, EPA Docket ID No. EPA-OW-2025-2929

Dear Administrator Zeldin:

Enclosed with this letter are comments submitted by my office and the Oklahoma Department of Environmental Quality (ODEQ) in response to the U.S. Environmental Protection Agency's (EPA's) Proposed *Updating the Water Quality Certification Regulations*, EPA Docket ID No. EPA-OW-2025-2929 (January 15, 2026). Oklahoma appreciates this opportunity to provide comments on this proposal, as well as EPA's consideration of said comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Starling".

Jeff Starling
Secretary of Energy and Environment
State of Oklahoma

Comments on U.S. Environmental Protection Agency’s Proposed *Updating the Water Quality Certification Regulations* Rule, EPA Docket ID No. EPA-HQ-OW-2025-2929

Submitted by:

Oklahoma Secretary of Energy and Environment (“OSEE”) and Oklahoma Department of Environmental Quality (“ODEQ”)

I. Introduction

The Oklahoma Secretary of Energy and Environment and the Oklahoma Department of Environmental Quality (together referred to hereafter as “Oklahoma”) appreciate the opportunity to comment on the United States Environmental Protection Agency’s (“EPA”) proposed rule entitled “Updating the Water Quality Certification Regulations,” which updates and clarifies both substantive and procedural requirements for water quality certifications under Section 401 of the Clean Water Act (“CWA”), 90 Fed. Reg. 10 (January 15, 2026). The proposed rule is intended to clarify several aspects of the certification process consistent with the Clean Water Act (CWA) statutory framework. Oklahoma is an avid proponent of this proposed rule and its reinstatement of the rule of law under the CWA, and Oklahoma encourages EPA to move forward with the rulemaking to finalize the proposal. EPA’s rulemakings should implement the letter of the law as Congress intended, and this proposed rule does exactly that. The primary effect of this proposed rulemaking is not an infringement on states’ rights because it would not remove or restrict any rights guaranteed to states either under the CWA or the U.S. Constitution. It would simply implement the statute as it is written. On behalf of the State of Oklahoma, please accept the following comments related to this rulemaking.

II. Comments

COMMENT 1: Appropriate Scope of Review: Discharge v. Activity as a Whole

As Oklahoma has stated in comments on previous CWA § 401 certification rulemakings (Attachment A), EPA’s 2023 approach of evaluating the “activity as a whole” has resulted in the exercise of state certification authority that goes beyond the scope of the CWA and the powers delegated to states thereunder. As stated by EPA in its recent memorandum regarding CWA § 401 certification, the scope of a certifying authority’s section 401 evaluation is “limited to considering adverse impacts to *water quality*, and only such impacts insofar as they prevent compliance with applicable water quality requirements.”¹ The text of CWA § 401 states:

(a)(1) Compliance with Applicable Requirements; Application; Procedures; License Suspension. Any applicant for a Federal license or permit to conduct any

¹ Peggy S. Browne, Acting Assistant Administrator, *Clarification regarding the Application of Clean Water Act Section 401 Certification* (May 21, 2025) (copy available at: https://urldefense.com/v3/https://www.epa.gov/system/files/documents/2025-05/clarification-re-application-of-cwa-401-certification_may-2025.pdf ;!!NZFi6Pppv9YRQw!t1mpa2BgogwADYg5f901CzGX1y8EgdZ8bAaN0pmyemKn7riSuUfx2em1wyh8mCwftGNmLYSwyLo 2VnK5IZE-8sRQ hK9cglSxSVxydF\$)

activity including, but not limited to, the construction or operation of facilities, which may result in any *discharge* into navigable waters, shall provide the licensing or permitting agency a certification from the State in which the *discharge* originates or will originate . . . that *any such discharge will comply* with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act. . . .

(d) Limitations and Monitoring Requirements of Certification. Any 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 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 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.

The plain reading of this statutory language necessarily leads to the conclusion that certifying authorities must evaluate the narrow question of whether the *discharge* itself will comply with applicable *water quality* provisions, and not whether states may exceed the scope of the CWA and evaluate the broader, non-discharge and/or non-water quality related environmental impacts of the “activity as a whole.” Justices Thomas and Alito correctly summarized the interpretation of these provisions in their dissent to the majority opinion in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994). They stated, “while 401(d) permits a State to place conditions on a certification to ensure compliance of the ‘applicant,’ those conditions must still be related to discharges. . . . [T]his interpretation best harmonizes the subsections of § 401. Indeed, any broader interpretation of § 401(d) would permit that subsection to swallow § 401(a)(1).” *Id.* at 727. In other words, interpreting § 401(d) to expand the scope of state review beyond the limitations set by § 401(a) is illogical because it renders § 401(a) meaningless.

Further, the CWA is intended to protect water quality only; it is not intended to protect against non-water quality risks related to air quality emissions or traffic, etc. If there are non-water quality impacts resulting from a proposed project, those impacts should be assessed under any of the other, more appropriate, statutory and regulatory mechanisms that might apply. Given all of the above, the proposed regulatory approach is in obvious alignment with proper implementation of the statute and respect for the rule of law.

COMMENT 2: Triggering “Reasonable Period of Time”

EPA has proposed to revise 40 C.F.R. § 121.5 to standardize the contents of a request for certification in order to provide applicants, certifying authorities, and Federal agencies with clear regulatory text identifying when the statutory reasonable period of time begins. 91 Fed. Reg. at 2018. In particular, EPA is proposing to require, in addition to the application or proposed permit, components related to the location and type of discharges from a Federally-licensed or permitted activity. *Id.* at 2019. The additional components, which would be set forth in 40 C.F.R. 121.5(c)(1)-(4) include: 1) a description of the proposed discharges, 2) the specific location of any discharges, 3) a map or diagram of the proposed discharges, and 4) a description of the current site conditions.

Id. Oklahoma supports the addition of these components to the regulatory text and appreciates the regulatory clarity they provide. This information is vital to a CWA § 401 certification evaluation and, under previous iterations of Part 121, certification requests have been made without providing this amount of detail. Without this basic information, it is difficult for a certifying authority to make an accurate evaluation of the project within the reasonable period of time. Oklahoma agrees with EPA's assertion that the proposal provides for sufficient information to start the reasonable period of time, and that any additional information relevant to the discharge may be requested from the certifying authority. Furthermore, Oklahoma agrees that states should not impose subjective standards regarding when the reasonable period of time begins, thereby unnecessarily prolonging the review period, and strengthening the clarity of the rule will help avoid such outcomes.

COMMENT 3: Definition of “Project Proponent” and General Permits

EPA requests comment on “whether the best reading of [CWA §] 401 extends the certification requirement even to those situations where there are no ‘applicants,’ but there nevertheless is a potential for point source discharge from a Federally licensed or permitted activity into waters of the United States.” 91 Fed. Reg. at 2021. Specifically, EPA has proposed to remove the term “project proponent” from 40 C.F.R. 121.1(h) and revise corresponding regulatory language throughout 40 C.F.R. Part 121 to use the term “applicant.” EPA states the term “applicant” is most consistent with the statutory text and would improve clarity and administrability of Part 121. However, EPA points out that, while section 401 certification applies to “an applicant for a federal license or permit,” general permits do not have an “applicant” when they would traditionally be reviewed by certifying authorities under CWA § 401. Thus, EPA also requests comment on “whether the best reading of the statute supports extending the CWA § 401 certification requirement to general permits, even in the absence of an applicant.” *Id.* at 2020. Oklahoma supports this legal interpretation of the CWA and its effect of reinstating original statutory language into the regulatory framework. Oklahoma agrees that the CWA § 401 certification process extends to general permits according to the plain language of the CWA, caselaw, and past EPA interpretations and guidance.

COMMENT 4: Ensuring Compliance with “any other appropriate requirement of state law”

In addition to certifying the discharge will comply with applicable requirements of the CWA, section 401(d) directs certifying authorities to set forth conditions ensuring compliance with “any other appropriate requirement of State law set forth in such certification . . .” The proposal states that a certifying authority certifies compliance with “water quality requirements” and EPA has proposed to define that term as “applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and applicable and *appropriate state or tribal water quality-related regulatory requirements for discharges.*” 91 Fed. Reg. 2027 (emphasis added). EPA is requesting comment on “whether it should limit ‘water quality requirements’ to only numeric water quality criteria.” *Id.* The current version of the proposed definition of “water quality requirements,” as EPA points out, does not limit certifying authorities’ review to numeric water quality criteria, and allows an evaluation of narrative water quality standards and other regulatory requirements that apply to point source discharges into waters of the United States. Oklahoma respectfully urges EPA to maintain the current proposal allowing states to evaluate narrative and numeric criteria as

they see fit, since removing the ability to evaluate narrative water quality standards would undermine states' ability to apply conditions that are state-specific and implement localized solutions.

III. Conclusion

Oklahoma supports EPA's proposed rulemaking and efforts to return to the original language and intent of the Clean Water Act. Oklahoma urges EPA to move forward with the rulemaking as proposed.

Kenneth E. Wagner
Secretary of Energy & Environment



Attachment A

J. Kevin Stitt
Governor

STATE OF OKLAHOMA
OFFICE OF THE
SECRETARY OF ENERGY & ENVIRONMENT

August 8, 2022

Submitted via: <https://www.regulations.gov/>

Michael S. Regan, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: U.S. Environmental Protection Agency's (EPA) proposed *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 87 Fed. Reg. 35318 (June 9, 2022)

Dear Administrator Regan:

Enclosed with this letter are comments submitted by my office and the Oklahoma Department of Environmental Quality in response to EPA's proposed rule, *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 87 Fed. Reg. 35318 (June 9, 2022). The proposed rule, if finalized, will substantially impact the State of Oklahoma. We appreciate this opportunity to provide comments on the proposed rule, as well as EPA's consideration of said comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Ken Wagner".

Kenneth E. Wagner
Secretary of Energy & Environment

Comments on U.S. Environmental Protection Agency’s Proposed *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, EPA Docket ID No. EPA-HQ-OW-2022-0128

Submitted by:

**Oklahoma Secretary of Energy and Environment (“OSEE”) and
Oklahoma Department of Environmental Quality (“ODEQ”)**

I. Introduction

These comments are submitted by OSEE and ODEQ (together referred to herein as “Oklahoma”) in response to the U.S. Environmental Protection Agency’s (EPA) proposed *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 87 Fed. Reg. 35318 (June 9, 2022) (hereinafter referred to as “proposal” or “proposed rule”). The comment period ends August 8, 2022.

Certain aspects of the proposed rule are concerning to Oklahoma. There are factors that Oklahoma would like EPA to consider moving forward to avoid unwanted and inappropriate outcomes on interstate commerce, which are detailed in Comment 1, below. Oklahoma would also like to offer feedback on the procedural aspects of the proposal, including the requirement to provide a draft license or permit and what constitutes a reasonable period of time for the certifying authority to make a decision.

II. Comments

COMMENT 1: State Misuse of 401 Certification Authority

Oklahoma is a fierce proponent of the proper implementation of cooperative federalism, as well as the protection of water quality and the right of states to set water quality standards. Oklahoma firmly believes the goal of EPA’s rulemaking should be to preserve states’ legitimate interest and duty to protect water quality, while also ensuring reasonable access to markets for all states’ important products and services. Unfortunately, there have been occurrences of states misusing Section 401 of the Clean Water Act (CWA) to block important pipeline projects that would have provided environmentally beneficial fuels to other parts of the country and enabled our country to be more reliant on its own natural resources. Not only that, but these projects would have facilitated the replacement of less-efficient, higher emission fuel sources in areas needing air quality improvements. *See* Comment from Kenneth Wagner, Oklahoma Secretary of Energy and Environment, on EPA’s proposed Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020) attached hereto as *Exhibit A*.

EPA’s proposed “activity as a whole” approach would expand the scope of review that states/certifying authorities could apply when reviewing a Section 401 request. This would further enable states/certifying authorities to block or delay projects based on non-water quality considerations and/or water quality considerations that are not appropriate under Section 401. This is problematic because such considerations in this context are improper under the CWA and

because the commerce clause could be implicated when states/certifying authorities impact projects that are interstate in nature. One such example is the State of Washington Department of Ecology's denial of the Millennium Bulk Terminals-Longview request for 401 certification for a proposed coal export terminal. In said case, the State of Washington Department of Ecology denied a Section 401 certification request for a coal export facility on the Millennium Bulk Terminal on the Columbia River in Longview, Washington. The project would have enabled the export of U.S. coal to countries in Asia. The Washington Department of Ecology denied the certification on the basis of the following considerations, among others: ". . . a significant increase in cancer risk for areas along rail lines and around the project site where diesel emissions primarily from trains would increase . . ." and ". . . significant unavoidable adverse impacts to vehicle traffic from the proposed action . . . due to vehicle delays caused by increased train traffic . . ." ¹ Thus, the Washington Department of Ecology looked in part to air quality and vehicular traffic considerations to make its determination. Non-water quality environmental considerations are valid, but only under the appropriate statute and not under the guise of Section 401. There are federal statutes other than the CWA that could provide the appropriate context for consideration of these factors, such as the National Environmental Policy Act (NEPA). State/certifying authority decision-making should be rooted in a legitimate legal foundation and failing to do so compromises the legitimacy of the whole system.

Oklahoma urges EPA to consider promulgating a final rule that avoids the undesired outcomes described herein, namely the misuse of the CWA and state/certifying authority regulation of interstate commerce. Oklahoma supported EPA's 2020 Rule which promulgated the "discharge only" approach, and Oklahoma reiterates that support here. A strict reading of the text of Section 401 precludes EPA from promulgating a review standard for certifying authorities that goes beyond the scope of the discharge and its direct water quality impacts on the water body in question. Therefore, Oklahoma respectfully urges EPA to carefully limit its final rule to avoid these unwanted and unlawful outcomes.

COMMENT 2: Requirement to Provide Draft License or Permit

EPA is proposing to require that every request for certification include a copy of the draft license or permit. 87 Fed. Reg. 35332. EPA states, "Accordingly, under this proposal a project proponent cannot submit a request for certification to a certifying authority until after a federal agency has developed a draft license or permit." *Id.* Oklahoma is concerned that this requirement would unnecessarily lengthen the time it takes to receive a 401 certification decision because the certifying authority cannot begin its review until the federal agency completes the permitting process. Further, this puts the state/certifying agency in a situation where the federal agency has already made a decision on the matter, putting the state/certifying authority in a position to either agree or disagree with representations the federal agency has already made to the proponent. This timing of the federal decision preceding the state decision inappropriately preferences the federal

¹ State of Washington Department of Ecology, In the Matter of Denying Section 401 Water Quality Certification To Millennium Bulk Terminals-Longview, LLC in accordance with 33 U.S.C. § 1341 (FWPCA § 401), RCW 90.48.260, RCW 43.21C.060, WAC 197-11-660, WAC 173-802-110, and Chapter 173-201A WAC at pp. 4-5 (Sept. 26, 2017) (a copy is available on the State of Washington Department of Ecology website at <https://ecology.wa.gov/DOE/files/83/8349469b-a94f-492b-acca-d8277e1ad237.pdf>).

view and is not consistent with cooperative federalism or with respecting the right of states to set water quality standards.

Oklahoma would support an alternative approach allowing the applicant to submit to the certifying authority a copy of the license or permit *when it becomes available*, thereby allowing the certifying authority to begin its review upon application. This alternative is preferable to Oklahoma because the Section 401 review by the certifying authority could begin simultaneously with the federal permitting agency review and therefore result in more timely decision-making. Furthermore, Oklahoma regulations allow the certifying authority to forgo issuing a public notice if the appropriate federal agency has issued one. *See* Okla. Admin. Code 285:611-3-3. Thus, this alternative approach would support the continued use of this “joint” public notice, which substantially shortens review time and cuts down on duplicative procedures.

COMMENT 3: Reasonable Period of Time

EPA has proposed that a collaborative approach be used by the federal permitting agency and the certifying authority to determine what period of time is “reasonable” for decision-making. 87 Fed. Reg. 35338. EPA has also proposed the regulatory default be 60 days if an agreement is not reached. *Id.* Specifically, EPA states, “Under this proposal, if the Federal agency and certifying authority do not agree upon a reasonable period of time, the default reasonable time would be 60 days from the receipt of a request for certification.” *Id.* The first 30 days after a certifying authority receives a request for certification is when this collaboration is supposed to take place. 87 Fed. Reg. 35339. Oklahoma supports the proposed collaborative approach, which gives states/certifying authorities more input into the timelines under which they must work. However, Oklahoma suggests the default period be set at 90 days rather than 60 days. If the default period is 60 days and an agreement is not reached during the 30-day timeframe, the time period for the certifying authority to issue a decision would then be truncated to 30 days. It is not a reasonable outcome for the certifying agency to be left with only a 30-day timeframe to make a decision. Therefore, Oklahoma requests that EPA set the regulatory default to 90 days.

III. Conclusion

Oklahoma is concerned about the possibility that states and other certifying authorities could use Section 401 to block developments based on considerations that are inappropriate within the context of the CWA. Oklahoma strongly urges EPA to limit the scope of Section 401 review to only the specific water quality impacts of the discharge. Oklahoma believes that EPA’s proposal to require a project proponent to submit a copy of the draft permit with its request for certification creates undue delays in the certification process and puts states/certifying authorities in a difficult situation. Oklahoma suggests EPA set the regulatory default for what is a “reasonable period” of time for the certifying authority to make a decision at 90 days rather than 60 days.



STATE OF OKLAHOMA
OFFICE OF THE
SECRETARY OF ENERGY & ENVIRONMENT

OCT 28 2019

October 21, 2019

Andrew R. Wheeler
Administrator of the Environmental Protection Agency
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W, 1101A
Washington, DC 20460

Dear Administrator Wheeler:

Thank you for the opportunity to comment upon the proposal for updates to Section 401 under the Clean Water Act ("CWA"). In short, Oklahoma is supportive of the proposal and encourages EPA to move forward with rule-making to formalize the proposal.

There are several factors we would like you to consider in moving forward. Oklahoma and Governor, Kevin Stitt, are fierce protectors of the state's right to set water quality standards and want to ensure that nothing in the proposal infringes upon that right. Under the current rule, too many states have utilized the current rule in ways not previously contemplated and for the purpose of frustrating and impeding interstate commerce. We think the proposal balances the states' legitimate interest in water quality while insuring reasonable access to markets for all states' important products and services.

Over the past several years we have seen an unfortunate increase in several states misusing Section 401 to block important pipeline projects that actually impair the ability to get environmentally beneficial fuels to other parts of the country to replace less-efficient and higher emission fuel sources to areas in need of air quality improvements. For example, during the recent winter storm known as the "Polar Vortex," the northeast was forced to utilize Russian Liquefied Natural Gas ("LNG") from a Russian Tanker docked in Boston Harbor. This abusive process also blocks US LNG from providing these emission-reducing products to emerging markets who, in their absence, will look to less environmentally friendly fuels to power their economic growth.

In considering comments, these are some points we would like you to consider:

1. We ask that EPA look to the original text of the CWA to restore original jurisdictional language that properly defines the roles of the state and federal government.
2. We support the proposition that EPA again narrow the scope of reviews to what congress intended with the original passage of Section 401.
3. The proposed timeline for reviews being limited to one-year is reasonable. We look at this period as more than sufficient to protect water resources and provide certifications that are properly requested.
4. Regulatory certainty and provision of a process that is reasonable, predictable and cost-effective to scientifically and properly set water quality standards is of utmost importance to Oklahoma.
5. Lastly, it paramount that EPA balance the legitimate states' rights with the necessity that states be allowed to move products in interstate commerce to support a healthy, growing economy throughout the United States.

If EPA decides to do any additional State and Tribal listening sessions or other workshops, please know that we would love to participate with the intended outcome of a fair, equitable and reasonable rule for all states.

Thank you for the courage to take on this important effort to reform Section 401 and restore the proper role of states' to certify those legitimate water quality interests while ensuring the integrity of interstate commerce equitably for all states. Please know that we in Oklahoma stand ready to assist anyway possible and I can be reached at Kenneth.wagner@ee.ok.gov or (405)522-7215.

Sincerely,



Kenneth Wagner
Oklahoma Secretary of Energy & Environment

CC: Kevin Stitt, Oklahoma Governor

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OCT 28 2019

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SECRETARY OF ENERGY & ENVIRONMENT
204 N. ROBINSON, SUITE 1010
OKLAHOMA CITY, OK 73102



FCL-B875-551

Environmental Protection Agency
ATT: Mr. Andrew Wheeler
1200 Pennsylvania Ave NW, 1101A
Washington, DC 20460

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