



Oregon

Tina Kotek, Governor

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Lauren Kasparek
Office of Oceans, Wetlands, and Communities Division
Office of Water
U.S. Environmental Protection Agency Docket Center
Water Docket, Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

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

Dear Lauren Kasparek:

The Oregon Department of Environmental Quality (DEQ) provides these comments in response to the US Environmental Protection Agency's (EPA's) January 15, 2026, request for comments on the proposed changes to § 401 Water Quality Certification regulations, *Updating the Water Quality Certification Regulations*, 91 Fed. Reg. 2008 (Jan. 15, 2026) (Proposed Rule or Proposal). Oregon maintains that a cooperative relationship among EPA and states is important to effectively safeguard water quality and aquatic resources. In fact, under 33 U.S.C. § 1251(b) Congress recognized that states have a primary role in environmental protection and natural resource management, in partnership with the federal government. However, with the Proposed Rule, EPA seeks substantive and procedural changes to Clean Water Act (CWA) Section 401 certification rules that have the potential to undermine Oregon's progress in promoting healthy and resilient waters throughout Oregon. During EPA's hosted listening sessions in 2025 regarding implementation of the current rule, Oregon provided comment in support of the 2023 401 Rule; Oregon's continued position is that EPA's 2026 Proposed Rule is unnecessary and inconsistent with the Clean Water Act.

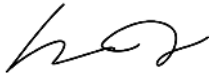
DEQ is the certifying authority for Oregon and has decades of experience implementing Section 401 to protect water quality and designated uses consistent with State law and the CWA. DEQ supports the 2023 401 Rule as it provides clarity and appropriately preserves State authority and flexibility to provide comprehensive oversight of Oregon's water quality, which supports the protection of natural resources, economies and the people who rely upon clean water. Oregon appreciated that the 2020 version of the 401 Rule brought forward some common-sense changes related to procedures and transparency in issuing 401 certifications. Since implementation of the 2020 401 Rule, DEQ has continued to implement the pre-filing meeting request, and provide citation to state rules and justifications into issued decisions. However, EPA's 2026 Proposed Rule includes several modifications that would significantly and inappropriately limit State and Tribal ability to protect water resources, which undermines the cooperative federalism principles and the specific roles reserved for states embedded in the CWA.

DEQ appreciates EPA's efforts to improve clarity of the rule but strongly suggests that EPA reconsider this proposed rule as it impedes appropriate state authorities and at a minimum, will create regulatory

confusion and likely result in legal challenges for all parties involved in Section 401 reviews. DEQ respectfully requests that EPA set aside the proposed changes that would erode the Section 401 water quality certification process and work with States to update guidance that will achieve shared goals of clean waters, administrative efficiency, and cooperative federalism.

Thank you for your consideration of Oregon's comments and recommendations regarding the proposed *Updating the Water Quality Certification Regulations* rule. Please address any written correspondence to the Oregon Department of Environmental Quality, attention: Jennifer Wigal, Water Quality Division Administrator, 700 NE Multnomah Street, Suite 600, Portland OR 97232-4100.

Sincerely,



Shannon Davis
Deputy Director
Oregon Department of Environmental Quality

Enclosure: Oregon DEQ Comments – Proposed 401 Rule Modifications

Cc: Ron Wyden, U.S. Senator
Jeff Merkley, U.S. Senator
Suzanne Bonamici, U.S. Representative (OR-1)
Cliff Bentz, U.S. Representative (OR-2)
Maxine Dexter, U.S. Representative (OR-3)
Val Hoyle, U.S. Representative (OR-4)
Janelle Bynum, U.S. Representative (OR-5)
Andrea Salinas, U.S. Representative (OR-6)
Chandra Ferrari, Natural Resource Policy Advisor, Office of Governor Tina Kotek
Jennifer Wigal, Water Quality Division Administrator

Oregon DEQ Comments – Proposed 401 Rule Revisions

Docket ID No. EPA-HQ-OW-2025-2929, Updating the Water Quality Certification Regulations

Oregon Department of Environmental Quality’s (DEQ’s) Section 401 water quality certification (WQC) program reviews and evaluates the water quality impacts of projects that require a federal permit or license to conduct any activity that may result in a discharge to waters of the US (WOTUS). The role of Section 401 has always been to ensure that the federally permitted or licensed activity will be protective of *state* water quality standards. The likely loss of federal jurisdiction for Oregon wetlands and waters due to the US Environmental Protection Agency’s (EPA’s) and the US Army Corps of Engineers’ recent proposal to limit the definition of Waters of the U.S. (WOTUS) means that Oregon will have fewer opportunities to review proposed projects that impact these waters under the 401 WQC program, and important beneficial use and antidegradation protections will be lost.

Proposed Changes to Defined Terms (Proposed §121.1)

EPA’s Proposed Rule includes several terms that are significantly re-interpreted and redefined. In addition to proposed redefinitions, EPA requests feedback on several additional proposed interpretations and limitations, to which DEQ provides input here.

Interpretation of “Other Appropriate Requirements of State Law”

EPA’s Proposed Rule requests comment on a variety of interpretations of “other appropriate requirement of state law” as follows:

- *EPA is requesting comment on an alternative interpretation of “other appropriate requirement of State law” as limited to those State and Tribal regulatory requirements that implement the enumerated provisions of the CWA that appear in section 401(d).*

DEQ emphatically disagrees with any proposed re-interpretation or any proposal to attempt to constrain evaluation of a project under all applicable water quality related state laws. Oregon’s water quality related laws include provisions for maintenance of instream flows, management of temperature from nonpoint sources, and habitat protection that are essential for aquatic life and to meet Tribal treaty obligations. Narrative criteria play an important role in protecting water quality and are designed to complement numeric criteria or to provide protection where numeric standards cannot be established. Numeric and narrative standards along with other water-related state laws work together to provide important safeguards to ensure water quality is maintained across a wide range of potential project impacts. Oregon supports maintaining the 2023 Rule’s interpretation that allows a State to issue certification with conditions based on all applicable water-related requirements of state law.

- *EPA seeks comment on whether to interpret “other appropriate requirement of State law” to be the subset of State or Tribal regulatory requirements for point source discharges that implement the CWA provisions enumerated in section 401(d).*

Section 401 certifications provide states with the opportunity to require projects to incorporate measures that protect against aquatic habitat losses and other types of degradation of beneficial uses of state waters. Projects seeking 401 certification include nonpoint source impacts, such as thermal modifications, habitat loss, and stormwater runoff that can be addressed through requirements for implementation of construction best management practices (BMPs) and other water quality related requirements. Under EPA’s proposed interpretation, these measures would fall

outside the scope of certification, leaving significant water quality risks unaddressed and therefore DEQ opposes EPA's proposed limitation of conditions limited to point source discharges.

- *EPA requests comment on whether it should limit “water quality requirements” to only numeric water quality criteria.*

DEQ opposes this proposal. Numeric-only criteria are inappropriate and an overly narrow interpretation as a basis for a comprehensive 401 evaluation because many critical protections, such as those for wetlands, lack numeric standards. In addition, restricting conditions to numeric limits would severely weaken water quality protections for long-term hydropower licenses (30–50 years) which may have broad water quality impacts associated with maintenance and operation of the reservoir in addition to point of discharge through turbines. It is important that EPA continue the Clean Water Act's intent and deference to state authority to incorporate narrative water quality standards and other regulatory requirements to ensure protection of habitat and biological resources that are reliant upon water quality.”

- *EPA seeks comment on the potential delta between its proposed interpretations of “other appropriate requirement of State law”.*

The potential “delta” among different interpretations for “other appropriate requirements of State law” proposed by EPA would be significant and unacceptable, resulting in a drastic reduction of state oversight and exclusion of important environmental safeguards that are unique and specific to a state's waterways. This narrowed interpretation would result in increased costs borne by states as alternative regulations, oversight and programs may be necessary to offset the gap in coverage.

- *EPA is seeking comment on whether State or Tribal regulatory provisions should be limited to EPA-approved provisions if the Agency were to finalize the above alternative interpretation.*

DEQ strongly opposes this approach. States must retain authority to apply all relevant water-related laws. As EPA noted in the recent WOTUS rule, states are the appropriate level for decision-making authority regarding water resources due to their expertise in local land and water management¹. EPA should not attempt to restrict state and tribal review to only those water quality provisions formally approved by EPA, as this would result in only applying requirements derived from federal statutes, which would be in direct conflict with the intent of section 401 and its focus on state law, thereby restricting state and tribal authority to provide comprehensive protection of water resources.

Use of “applicant” and removal of “project proponent” from definitions

The current regulations refer to applicants requesting a 401 WQC as the “project proponent” in CFR 121.1(h). EPA is proposing to remove the term “project proponent” and instead rely on the term “applicant.” U.S. Army Corps of Engineers Civil Works Branch (USACE Civil) is required to request a 401 water quality certification from states for USACE Civil projects that may result in a discharge to a WOTUS

¹ **EPA & Army Corps Unveil Clear, Durable WOTUS Proposal** Definition to Protect Water Resources, Accelerate Growth & Economic Opportunity. November 17, 2025.

under 33 CFR 336.1(a)(1). However, USACE Civil Works Division does not require a permit from a federal agency for the discharge and regulates themselves under CWA Section 404(b)(1) guidelines. The broader term of “project proponent” is clearly inclusive of this arrangement. Removal of this term could create confusion about the USACE’s request for a 401 WQC from certifying authorities. Any attempt to prevent state review of these projects could have significant impacts to Oregon’s waters as we cooperatively work with USACE Civil Works on 401 reviews for large-scale dredging operations and maintenance activities in federal navigation channels. DEQ requests the term “project proponent” remains in rule.

Changes to Scope of Certification (Proposed §121.3)

DEQ strongly opposes EPA’s proposal to attempt to limit the scope of Section 401 certification solely to specific point source discharges arising from the activity that is being federally licensed or permitted. The longstanding approach including the 2023 Rule’s “activity as a whole” approach is both consistent with the law and essential for ensuring states and tribes can address all potential water quality impacts that could arise from federally licensed projects. Federally licensed projects such as Federal Energy Regulatory Commission (FERC)-licensed hydropower facilities and pipelines often involve significant water quality effects beyond point source discharges, including flow alterations and habitat disruptions that may occur due to normal operation of a reservoir for purposes of generating hydropower. Restricting state authority to only pollutants from point source discharges undermines the intent of Section 401(d), which authorizes conditions necessary to ensure compliance with all applicable state law requirements and protect people, ecosystems and economies. Narrowing the scope of a 401 certification in this way for any federally permitted activity would almost certainly exclude numerous water quality rules and regulations that are important to protecting all designated beneficial uses of state waters. Narrowing the scope of certification ultimately jeopardizes a state’s ability to protect aquatic species and other designated beneficial uses.

Changes to Request for Certification (Proposed §121.5)

The proposed standardized list of request contents would remove state authority to require additional information for purposes of determining the completeness of an application for certification. This restriction is problematic because states like Oregon with a wide range of ecological and hydrological features often need site-specific data to understand the potential for water quality impacts. This data may include mixing zone modeling, or specific stormwater and construction BMPs to support project reviews and reasonable assurance determinations. This attempt to limit application requirements, while intended by EPA to create certainty and efficiency, will more likely lead to more iterative information requests, inefficient timelines, and increase the number of certification denial decisions due to insufficient information. These changes in turn create uncertainty for applicants; increase litigation risk for all parties; and no improvement in federal permitting timelines.

Under the draft rule, applicants could submit the required elements to start the “reasonable period of time” (RPT) clock, even if the application is incomplete by state standards. This creates a serious challenge for states, especially given the one-year time limit and the prohibition on withdrawal requests. If a state denies certification due to missing information, but the application was deemed “complete” under EPA’s definition, there is significant ambiguity created. In another scenario, a certification request is received by the state agency, and the RPT timeline begins even if the request contains errors, such as an incorrect applicant company name or location, or reliance upon draft environmental information that is later determined to be incorrect.

In addition, EPA's proposed suggestion that an applicant can submit "readily available water-quality-related materials" as part of their request for certification is vague and will lead to inconsistent interpretations. States must retain both the ability to identify the appropriate information to constitute a complete application and to also determine when a certification request is complete to ensure that the information provided is commensurate with the location, scope, and scale of the project. EPA's proposed changes attempt to undermine state authority and create unnecessary legal risk to all parties. EPA's insistence that it can define the components of a certification request and prohibiting states from requiring additional elements is contrary to the principle of cooperative federalism and the Clean Water Act's clear expectation of states' lead role for certifications. EPA must continue to defer to the states' and tribes' authority to define additional required contents for certification requests to ensure robust water quality protection.

401 Certification Requirement for General Permits

EPA is soliciting comments on whether the CWA 401 certification requirements apply to general permits. Case law and prior EPA rulemakings, including the 2020 rule, extends the 401 certification to general licenses and permits under 88 FR 66570. DEQ supports maintaining this status quo for general licenses and permits.

Reasonable Period of Time (§ 121.6)

Retaining RPT extensions for public comment, public notice, or a force majeure event is appropriate, particularly for FERC projects or those with complex environmental impacts. Flexibility to extend the RPT is essential for meaningful public participation, and it is unreasonable to deny states the ability to request extensions during natural disasters and emergencies. In addition, data and security breaches are a rising state agency concern that may result in unavoidable delay in completion of certifications.

Modification to a Grant of Certification (§ 121.10)

DEQ supports the existing rule language requiring that states consult with relevant federal agencies in situations where a water quality certification modification is required. EPA's Proposed Rule includes additional requirements for states to negotiate modification language with the applicant. Inserting a requirement that an applicant must approve of any modification language sets up a conflict of interest among EPA's official mission, the Clean Water Act authority, and applicants or project proponents. Requiring applicant consent to modification language would undermine state authority, potentially introducing delays, inequitable outcomes, and legal uncertainty.

Tribal Treatment as a State for 401 (Repeal of § 121.11)

DEQ supports Tribal sovereignty and participation in Section 401 processes. Removing the standalone Treatment as a State (TAS) pathway for 401 certification (see §121.11 [Removed], in 91 FR 2008–2042) creates barriers for tribes that lack financial or personnel resources to pursue full WQS TAS approval. The justification provided for the removal of this authorization is not sound, and DEQ strongly recommends that should carefully review and follow comments and preferences of tribes on this important topic.

EPA Failure to Meaningfully Consult with States or Complete Suitable Economic Analysis

EPA's economic analysis included in the Proposed Rule is incomplete because it provides analysis of impacts from only the perspective of potential applicants and federal government resources. EPA's does not mention or evaluate the potential economic burden the Proposed Rule would create for states and tribes responsible for implementing Section 401, nor the potential economic impacts from adverse impacts to aquatic resources.

The Proposed Rule reduces the authority of states and tribes, potentially weakening authorities to protect against water quality pollution. Without the authority to address non-point source impacts or ancillary impacts associated with project construction or operation, some aquatic ecosystems and resources may be compromised by sedimentation, habitat degradation, or flow alterations that may have economic impacts such as fisheries losses, increased costs for drinking water treatment, or lost recreational opportunities.

Additionally, economic impacts may be experienced by states that have pre-existing permitting platforms. Many states, including Oregon, have invested in permit submittal and tracking systems to streamline permitting; these systems are based on current 401 rules as well as state requirements for a complete certification. The Proposed Rule would require potentially significant system reprogramming, user-interface redesign, and staff and applicant training. These costs and the time required for implementation are not acknowledged by EPA's analysis.

The Proposed Rule currently underestimates the economic burden and feasibility of implementation for states and also fails to quantify potential societal and environmental costs. EPA should revise the economic analysis to more fully account for state-level implementation and aquatic resource impacts.