



STATE OF WASHINGTON

February 17, 2026

Administrator Lee Zeldin
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue Northwest
Washington, DC 20460

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

Dear Administrator Zeldin:

Thank you for the opportunity to comment on the U.S. Environmental Protection Agency's proposed Rule, *Updating the Water Quality Certification Regulations*. The state of Washington has significant concerns regarding the implications of the proposed changes. The proposed Rule does not fulfill the Clean Water Act's core purposes - to restore and maintain the chemical, physical and biological integrity of the Nation's waters, and to recognize, preserve, and protect the rights of states to prevent, reduce and eliminate pollution. The proposed Rule is unnecessary, inconsistent with the intent of Section 401 of the Clean Water Act, and will contribute to regulatory uncertainty, and significantly hinder Washington's ability and authority to safeguard water resources which our residents rely on for drinking, fishing, recreation, and environmental health.

The Washington State Department of Ecology serves as the state's designated water quality authority and the certifying agency for Section 401. Washington has a long and well-documented history of protecting the state's waters and implementing a fair, effective, and nationally respected Section 401 program. Our state's Water Pollution Control Act predates the federal Clean Water Act, reflecting Washington's early leadership in protecting water resources. Ecology was also the first state agency in the nation to receive delegated authority under the federal Clean Water Act nearly fifty years ago, underscoring our commitment to responsible and science-based water quality management.

The reason is straightforward. Robust environmental protection provides the foundation for sustainable economic growth, community well-being, and long-term prosperity. Clean water is essential to the health and vitality of Washington's agriculture, fisheries, shellfish and recreational industries, which are cornerstones of Washington's economy. Our state's annual agriculture production is valued at \$12.8 billion, including more than \$20 billion in food and

agricultural exports¹. Washington also leads the nation in shellfish sales, an industry entirely dependent on clean water with annual sales of nearly \$243 million.²

Protecting Washington's water quality is also critical to sustaining the state's iconic salmon populations and the endangered Southern Resident killer whales, which rely exclusively on these fish for survival. All five salmon species native to Washington require healthy aquatic ecosystems with abundant, cool, and clean water to thrive. Washington also helps uphold treaty-reserved fishing rights for Indian Tribes by ensuring that federally licensed or certified projects meet state water quality requirements. This work helps maintain water quality that ensure salmon have the water quality conditions needed to survive, thrive, and remain available for sustainable harvest. Since 2010, our state has invested \$2.1 billion to restore and protect salmon habitat and address threats. In the last four years alone, we have invested \$600 million. Every \$1 million the state invests in salmon habitat restoration supports up to 32 local jobs and generates \$2.2 to \$3.4 million annually in economic activity.³

Since the 2023 Water Quality Certification Rule was put in place, Ecology devoted significant time and resources developing clear, comprehensive guidance for applicants seeking water quality certification for their projects. These efforts have improved predictability for applicants while supporting timely, consistent decision-making.

However, the proposed Rule would roll this progress back by reintroducing regulatory uncertainty. The proposed Rule will diminish the authority of states to review and condition federal activities. If finalized, the proposed Rule would impose an unnecessary burden on states, requiring them to implement yet another Section 401 Rule. These changes directly threaten Washington's water quality and substantially weaken the state's authority to manage and protect the water quality our communities require. Even more critically, this proposal undermines our ability to ensure federally permitted projects do not violate state and federal water quality standards, compromise federal treaty obligations, and disrupt the cultural, environmental, and economic way of life in the Pacific Northwest.

The proposed Rule seeks to diminish State authority to review and condition federal activities.

The manner in which EPA proposes to interpret the scope of Section 401 certification is inconsistent with congressional intent, the statutory framework, and decades of established precedent. In enacting the 1972 amendments to the Clean Water Act, Congress made clear its

¹ WSDA 2025. Washington State Agricultural Competitiveness and Business Viability Study, <https://agr.wa.gov/departments/directors-office/agricultural-competitiveness-and-business-viability-study>

² USDA, 2024. 2023 Census of Aquaculture, https://www.nass.usda.gov/Publications/AgCensus/2022/Online_Resources/Aquaculture/Aqua.pdf

³ GRISO, 2024. State of Salmon in Watersheds Executive Summary, <https://stateofsalmon.wa.gov/wp-content/uploads/2025/05/ExecSummary-2024.pdf>

intent to preserve state primacy over water quality protection. Section 401 authority is key to that effort, which is why the authority for Section 401 vested certification authority with the states rather than the federal government. Congress also made it abundantly clear that states may adopt and enforce water quality protections more stringent than federal standards.

Preserving state authority is central to Section 401, which empowers states to approve, condition, or deny applications to ensure that construction and operation of a project will not degrade water quality. When an applicant seeks certification, any measures necessary to protect water quality are included as conditions in the certification. Those conditions are then expressly incorporated into the federal permit. As Congress intended both on the face of the statute and in its legislative history, the scope of this review goes beyond just point source impacts. Section 401 water quality certifications address discharges from project operations that are not covered under other federal permits. For example, a pier with a conveyor belt component may have incidental discharges into water from operations such as moving gravel from a stockpile to a vessel. Or, without appropriate conditions, construction and operation of a marina may result in direct and long-term harm to water quality and designated uses. The Clean Water Act authorizes states to apply necessary conditions to all water pollution associated with the activity as a whole, free from federal restriction. This authority ensures that projects do not circumvent water quality protections and enables states to evaluate and condition these impacts to safeguard designated uses.

However, EPA's proposed Rule would unlawfully narrow the scope of the type of pollution states can review to only point source discharges. The Rule preamble states EPA will continue to rely on the definition of point source as defined in Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14), highlighting cases where courts have concluded that bulldozers, mechanized land clearing machinery and similar types of equipment used in dredge and fill activities are considered point sources under the Clean Water Act. By narrowly confining Section 401 reviews to just discrete point-source discharges, the proposed Rule would exclude activities that cause clear, measurable and adverse impacts such as physical disturbances, rewatering or flow restoration despite the fact these activities have clear, direct and measurable water quality impacts.

EPA's proposal to narrow the scope of Section 401 is unsound policy and directly conflicts with the plain language of the Clean Water Act as well as two seminal Supreme Court decisions interpreting Section 401. In 1994, the U.S. Supreme Court unequivocally held that the scope of Section 401 certification applies to the activity as a whole not solely point source discharges, *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994) (PUD No. 1). Twelve years later, the Court reiterated this principle in *S. D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006). EPA's proposal attempts to sidestep *PUD No. 1* and disregards *S.D. Warren* despite the binding nature of these precedents. These binding precedents make clear that EPA's narrow interpretation of the scope of Section 401 to apply only to point source discharges

to waters of the United States is unlawful. Because Section 401 authority derives directly from statute, EPA lacks discretion to reinterpret its scope in a manner inconsistent with congressional intent and binding judicial precedent. In other words, the Clean Water Act does not give EPA this authority.

The proposed Rule contravenes the spirit and plain language of the Clean Water Act, ignores Supreme Court precedent, and makes it impossible for states to protect water quality in the way Congress clearly intended to preserve.

Proposed contents of a request for certification creates confusion and inefficiency for applicants and certifying authorities.

The Rule proposes to identify the contents of a request for water quality certification that must be submitted in order for the reasonable period of time to begin. Among these requirements, and consistent with the current Rule at 121.5(1)(i), is the requirement that a copy of the federal permit or license application submitted to the federal agency be included with a request for certification. This requirement has been problematic and caused applicant confusion for a number of reasons. First, the initial application submitted to the federal agency is not always considered complete by the agency and is often not the final application. There are requirements for additional information from the applicant before it is considered complete, and if this information is not provided to the federal agency within a specified time frame, the application can be cancelled. Once the application is resubmitted, elements of the project may have changed, creating a scenario where the federal permit application and the application submitted with the request for water quality certification may not match. This can be resolved by requiring that the applicant, or the federal agency, on behalf of the applicant, provide a copy of the federally complete application or draft permit or license, along with the contents of the request, to begin the reasonable period of time. This allows the certifying authority to review the same activity as the federal agency and be aware of how the project will be authorized (by individual or general permit for example).

Washington is concerned about the proposed removal of 121.5(c) which allows the certifying authority to identify the contents of a request for certification prior to receipt of such request. Ecology has implemented this provision successfully by developing clear, comprehensive guidance that informs applicants of the information necessary to evaluate impacts before the reasonable period of time begins. Identifying the contents of a request relevant to the water quality related impacts has allowed us to efficiently move through our review and issuance of a decision, which is also a benefit to applicants. Since the 2023 Rule has been in effect, only 6% of requests received for water quality certification have resulted in a denial. All of which were issued as a denial without prejudice because we did not have the water quality related information needed to grant certification. Waiting to request such information until the reasonable period of time has begun, puts applicants at risk of being unable to prepare and submit the necessary information within the timeframe. Rather than streamlining certification,

this change would increase procedural disputes and create avoidable inefficiencies. Washington has had success in implementing this aspect of the 2023 Rule and has found identifying the contents of the request prior to receiving a request certification to clarify expectations for applicants and streamline review. Further, removal of this provision will further erode the Clean Water Act's overarching goal of cooperative federalism.

Defining the reasonable period of time outside the plain language of the Clean Water Act adds unnecessary administrative burden.

The Clean Water Act clearly states, "if a state or tribe fails to act within the reasonable period of time (not to exceed one year) the certification requirement is considered waived[.]" 33 U.S.C. § 1341(a)(1). Defining the reasonable period of less than one year erodes state authority and undermines the cooperative federalism framework of the Clean Water Act. Additionally, the requirement for federal agencies and certifying authorities to agree in writing to extend the reasonable period of time creates unnecessary administrative burden and shifts focus away from substantive water quality review.

Certifying authorities are acting in good faith to review and issue a water quality certification decision in a timely manner. In Washington, the average time to issue a water quality certification decision from January 1, 2020 – December 31, 2025, is 149 days. Congress intentionally provided up to one year to allow states to conduct project-specific reviews based on complexity and potential water quality impacts. A prescribed shortened timeframe would encourage incomplete applications, increase procedural disputes, and force premature decisions that prioritize speed over water quality protection and increase the likelihood of certification denials due to inadequate information. While we appreciate the idea that the federal agency and certifying authority can create memorandums of understanding with regard to the reasonable period of time to create an established and predictable process, these agreements are not always supported by federal agencies or existing agreements may be terminated. Alternatively, many states have state-specific goals and reporting requirements that foster a predictable and reasonable period of time, making a federally prescribed timeline, in addition to the statutory prescribed timeline, unnecessary. We encourage EPA to rely on the statutory language of a reasonable period of time (not to exceed one year).

Water quality certification is required for all federally licensed or permitted actions that may result in a discharge and cannot be authorized without water quality certification.

Under Section 401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States, unless the State or authorized Tribe where the discharge would originate either issues a section 401 water quality certification finding compliance with applicable water quality requirements or certification is waived. As defined in the preamble, the term "applicant" applies to the person or entity applying for a federal license or permit, contractors, or other agents of that person or entity, or any other

entity that may seek certification. In the case of a general permit such as the U.S. Army Corps of Engineers (Corps) Nationwide Permit, the Corps is seeking water quality certification for a suite of activities that may result in a discharge into waters of the United States. In the absence of a general water quality certification, applicants would be responsible for obtaining an individual water quality certification for any activities authorized by the Corps Nationwide Permits, thereby negating any efficiencies and intent of a nationwide program. The economic analysis for the proposed Rule estimates the Corps issues an average of 53,325 general permits annually under their Section 404 and Section 10 authority, and the EPA issues an average of 16 general Section 402 permits. The existing requirement for the Corps to seek water quality certification for both civil works projects and general permits is clear in 33 CFR 336.1(a) and 33 CFR 336.1(a)(1). The EPA should retain the existing regulatory framework, consistent with prior rules and case law, and not pursue any changes to the existing regulatory framework which requires water quality certification in these scenarios. Case law⁴ and prior Rules, including the 2023 EPA Rule, have correctly asserted that both general permits and activities where the federal agency is conducting the activity are subject to Section 401 water quality certification. Further, the proposed Rule should explicitly recognize general permits for what they are - federal permits and licenses subject to Section 401 water quality certification, including the Corps Nationwide Permit program.

The economic analysis is incomplete and fails to account for environmental, programmatic, and implementation costs

The economic analysis states that the EPA anticipates the proposed Rule would result in a cost decrease and reduction in burden to certifying authorities and applicants, and that the proposed changes to scope would reduce the burden on certifying authorities. This conclusion is unsupported by the analysis and does not reflect the realities of Section 401 implementation. It is up to the certifying authority to ensure that the discharge associated with a federally licensed or permitted project will comply with water quality requirements. It is the state's responsibility, not burden, under the Clean Water Act to manage our waters and reduce, prevent, and eliminate pollution.

The economic analysis incorrectly asserts that the proposed Rule would have no environmental impacts. We dispute this finding. For a hydropower project, for example, a water quality certification is often conditioned to address any water quality impacts created by the impoundment and release of water from a dam. This is consistent with prior case law, and crucial to supporting beneficial uses for Endangered Species Act listed salmon and steelhead. As discussed previously in this letter, the state has invested heavily in projects for salmon, which are integral to the state's economic vitality and environmental health, and are culturally significant to the Tribes in our region. If water quality impacts are not addressed, salmon are placed at greater risk threatening our obligations to protect Tribal rights for salmon harvests

⁴ United States v. Marathon Dev. Corp., 867 F.2d 96, 100 (1st Cir. 1989)

under existing treaties. We remind the EPA of its obligations to Tribal nations and note that the proposed Rule places treaty resources at risk.

As noted in Table 3 of the economic analysis, proposed changes to the modification process will result in increased administrative burden and cost. Under the current Rule, the administrative burden is on the certifying authority and federal agency to agree in writing to modify the certification decision. The proposed Rule takes this a step further, adding applicant approval of the modification to the written agreement. This is another example of the proposed Rule seeking to fix what is not broken. In our current practice the applicant is always involved in the modification of a water quality certification. Requiring this formally in writing will double the time and effort currently spent on an already consuming modification coordination with the federal agency.

Further, Washington is concerned with the limited time provided to analyze and evaluate the effects on the proposed Rule to our long-standing authority to protect the waters in the state. Additionally, the preamble contains a multitude of questions posed by the agency, without language proposed in Rule, creating ambiguity in what exactly we are being asked to evaluate in this Rule. We have addressed the gravest of these issues to the extent practicable within the truncated time frame and with the limited coordination offered by the EPA in proposing this Rule. We urge the EPA, in good faith as evidenced by the listening sessions, to extend the comment period and provide meaningful engagement and transparency in this process.

In closing, the 2023 EPA Rule is functioning as intended, and the EPA should not finalize the proposed Rule as it conflicts with the plain language and congressional intent of the Clean Water Act and established case law. This proposal undermines the cooperative federalism framework that has governed Section 401 for decades. Adopting this proposal would diminish states' ability to protect water quality, uphold Tribal treaty obligations, and ensure that federally authorized activities do not degrade water quality. EPA should abandon this effort to curtail state authority and allow states to continue their longstanding, responsible stewardship of Section 401 consistent with both the law and congressional intent.

Sincerely,



Casey D. Sixkiller, Director
Department of Ecology



Kelly Susewind, Director
Department of Fish & Wildlife