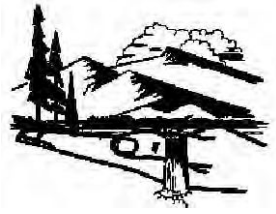




Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.



Mark Gordon, Governor



Todd Parfitt, Director

February 17, 2026

Lee Zeldin, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Submitted electronically via: <http://www.regulations.gov>

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

Dear Administrator Zeldin,

The Wyoming Department of Environmental Quality (WDEQ) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA), January 15, 2026, Federal Register notice, "Updating the Water Quality Certification Regulations" (hereafter referenced as the Proposed Rule).

As the certifying authority in Wyoming, the WDEQ recognizes the importance of Section 401 in empowering states to review, certify, and condition federally permitted discharges to ensure compliance with applicable provisions of the federal Clean Water Act (CWA) and state surface water quality standards. We maintain that this authority must remain within the scope of the CWA and be limited to surface water quality protection. This position reflects WDEQ's long-standing, discharge-focused interpretation of Section 401 and is consistent with our prior comment submissions for the 2020 and 2023 Section 401 rules. The WDEQ implements a Section 401 program that is streamlined and efficient, has no backlog, relies on effective and early communication and collaboration with applicants and federal agencies, and is committed to identifying solutions that support project development while also ensuring Wyoming's water quality is protected in accordance with state and federal regulations.

The WDEQ supports provisions of the Proposed Rule that improve alignment with statutory language by revising the scope of certification to clarify that CWA section 401 certification is limited to the discharge. We also support provisions of the Proposed Rule that increase transparency by requiring citations to water quality requirements for conditioned certifications or denials.

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The WDEQ has concerns with several provisions of the Proposed Rule that would restrict state authority, including (1) the proposed removal of 40 CFR 121.5(c), which allows certifying authorities to request the information they deem necessary to address water quality related impacts; (2) the proposal to limit water quality requirements to numeric water quality criteria; (3) the proposal to remove a certifying authority's discretion to request that an applicant withdraws and resubmits a request; and (4) the proposal that an applicant's agreement is required to modify a certification. The WDEQ offers recommendations to further improve the rule, including revisions to application procedures for streamlining and efficiency and clarifications on neighboring jurisdiction reviews.

Below you will find detailed comments and recommendations referenced to the Proposed Rule's regulatory text or passages in the preamble.

Definitions – 40 CFR § 121.1

Water quality requirements- The WDEQ supports the Proposed Rule appropriately clarifying in definition that the term “water quality requirements” limits the scope of water quality-related regulatory requirements to the discharge and not the activity as a whole.

When certification is required – 40 CFR § 121.2

The WDEQ agrees that a certification or waiver is required for “any Federal License or permit that authorizes any activity which may result in any discharge” and that Section 401 extends the certification requirement in situations where there are no applicants. Although general permits, such as nationwide or regional permits issued by the U.S. Army Corps of Engineers (Corps), may not have an official “applicant,” they still require 401 certifications because these permits authorize classes of discharges that will have individual and cumulative water quality impacts on waters of the United States (WOTUS). The 401 certification is essential to ensure these discharges comply with all applicable provisions of the CWA and state surface water quality standards.

The WDEQ recommends an additional procedural component in the Proposed Rule at 40 CFR § 121.2 that would direct the applicant to first contact the federal permitting or licensing agency to officially determine whether the discharge will impact a WOTUS and require a federal permit or license. If the discharge is to a WOTUS, the federal agency would be obligated to notify the applicant as well as the certifying authority whether a permit or license is required for the discharge and whether a 401 certification is required. This additional procedure would help streamline the certification process by ensuring that when the review clock starts, the applicant understands all applicable requirements and has applied for the correct permit (e.g., the applicant has applied for coverage under the correct Section 404 Nationwide Permit).

Scope of certification – 40 CFR § 121.3

WDEQ maintains that the term “activity” in the current rule is ambiguous and consequently allows certifying authorities to inappropriately establish conditions on activities that are only speculatively or obscurely linked to the actual discharge or are not point source discharges in their own right. Moreover, retention of the term “activity” risks unnecessary federal overreach into activities regulated under state authority. The CWA under Sections 401 and 404 makes it clear that only discharges from point sources to WOTUS are regulated (i.e., require a permit or certification) under the CWA—a determination that has been upheld by the courts. Addressing nonpoint sources of pollution was assigned to the states by Congress through its 1987 CWA amendments establishing the Section 319 grant program.

Therefore, WDEQ supports EPA’s intent to limit the scope of certification to the *discharge*, as this appropriately focuses the certifying authority’s review on the water quality related impacts of the specific discharge, provides regulatory certainty, and maintains the appropriate balance of cooperative federalism as intended by Congress. As stated in our comments submitted during scoping on the Proposed Rule, we recommend that the definition of “discharge” should explicitly include equipment use and construction activities associated with the proposed discharge that have the potential for an immediate and direct impact to water quality.

Request for certification – 40 CFR § 121.5

The WDEQ does not agree with EPA’s proposed deletion of 40 CFR § 121.5 (c) as established in the current rule. This section currently requires applicants to include information in the certification request, as determined to be necessary by the certifying authority, to address water quality related impacts from the discharge and ensure compliance with state water quality-related requirements (e.g., state surface water quality standards), as established under Section 401(d) of the CWA. While the WDEQ supports defining minimum standard requirements applicable to all certification requests, certifying authorities must be allowed to define additional requirements at their discretion provided that the requests are related to water quality associated with the discharge. The CWA is built upon the foundation of cooperative federalism as prescribed at 33 U.S.C § 1251(b): “it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” The Proposed Rule’s removal of State authority to determine compliance with state water quality requirements during Section 401 certification review is problematic and may lead to inefficiency and delays in reviewing certification requests. This proposed change runs counter to federal statute (33 U.S.C. § 1341(d)) and unnecessarily diminishes the role of states as the primary regulators responsible for protecting waters within their borders. In addition, the proposed change could result in the issuance of non-compliant

certifications or prompt States to consider using their certification denial authority more frequently.

The one-size-fits-all federal list of application components under the Proposed Rule fails to fully account for the unique characteristics of individual projects and the hydrological, biological, and geological diversity that exists across the nation and which often requires project and location specific information. While EPA notes in the preamble that certifying authorities may request and evaluate additional information within the reasonable period of time, applicants are not required to provide such supplemental information with sufficient time for meaningful review by the certifying authority. Again, this may unintentionally prompt certifying authorities to consider certification denial where sufficient information is not available to determine compliance with all water quality requirements.

To address this issue, the WDEQ recommends retaining 40 CFR § 121.5 (c) as established in the current rule with clarifications to replace “activity” with “discharge” for reasons described previously. The WDEQ also recommends replacing “project proponent” with “applicant” in this section, given that the project proponent is not always the applicant that submits a certification request.

Request for the applicant to withdraw a request – 40 CFR § 121.6

The WDEQ has concerns with the added provision denying a certifying authority’s discretion to request that an applicant withdraw and resubmit a certification request (40 CFR § 121.6). WDEQ has never denied a Section 401 certification request due to incomplete information, as we have consistently worked collaboratively with applicants to ensure certification requests are complete prior to review. However, there are situations where it could be in the best interest of the applicant to resubmit a request rather than necessitate a denial for an inadequate and substantially incomplete application. Certifying authorities should retain the discretion to use this option where appropriate and after consultation with the applicant.

Certification decisions – 40 CFR § 121.7

Consistent with our prior comments, the WDEQ finds it reasonable that certifying authorities provide the information identified in 40 CFR § 121.7, including justification for any necessary condition, a clear statement of the certification action taken (grant, grant with conditions, denial, or explicit waiver), a statement that indicates whether the discharge will comply with applicable water quality requirements, and citations to the relevant water quality requirement(s). The WDEQ currently provides this information in its certifications, and we can provide examples upon request. The WDEQ also finds it reasonable that, where a certification decision results in a denial, the certifying authority must provide written notification identifying the specific water quality requirement(s) with which the discharge will not comply,

the basis for that determination, and, where applicable, a description of any information determined to be insufficient. These requirements promote transparency for applicants and ensure that certifying authorities act within the scope of 40 CFR § 121.3, with certification conditions directly tied to state surface water quality requirements.

Modification to a grant of certification – 40 CFR § 121.10

The WDEQ has concerns with EPA’s proposal for revision of 40 CFR 121.10(a) that mandates a written agreement between the federal agency, the certifying authority, and the applicant for any modification to a grant of certification. While existing rules already require written agreement between the federal agency and certifying authority, this proposal erodes the primary rights of States to "prevent, reduce, and eliminate pollution" (33 U.S.C. § 1251(b)) by allowing the applicant a regulatory role in the certification process that is not supported by statute.

The Proposed Rule limits the necessary flexibility for certifying authorities to modify conditions when "material changes" or new data indicate that surface water quality is at risk. Moreover, this proposed language inappropriately grants applicants veto power over a state’s authority to protect water quality as intended by Congress under the CWA. To address this issue, the language in the current rule at 40 CFR § 121.10(a) should be retained. In any situation where the WDEQ would pursue modification to a grant of certification, the WDEQ would consult with the applicant on the proposed modification. This is supported by WDEQ’s long history of successfully communicating and collaborating with applicants to discuss and resolve concerns early in the process, and our commitment to work with applicants to, where possible, find solutions that support project development while also ensuring regulations are met to protect water quality.

Limiting “water quality requirements” to only numeric criteria

EPA requested comment on whether it should limit “water quality requirements” to only numeric water quality criteria. The WDEQ does not support limiting “water quality requirements” to only numeric criteria. Under 40 CFR § 131.11, states are obligated to establish water quality criteria for protection of designated uses that can be either numeric or narrative. Narrative criteria are integral to water quality protection and are developed when numeric criteria either cannot be established or to supplement numeric criteria. Narrative criteria are essential to certifying authorities’ ability to manage pollutants that lack specific numeric targets. Limiting the scope of water quality requirements to only numeric criteria under 40 CFR 121 would violate the water quality protection provisions under 40 CFR 131 and established Supreme Court precedent¹ where the use of narrative criteria was explicitly supported under Section 401 of the CWA.

¹ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) (“*PUD No. 1*”).

Determination of effects on other states

While the WDEQ appreciates EPA’s attempt to increase efficiency and transparency in the implementation of CWA 401(a)(2), further clarification is needed to ensure regulatory certainty. To reduce ambiguity, the WDEQ requests that the EPA clearly define criteria for what constitutes a neighboring jurisdiction determination either “categorically or on a case-by-case basis.” Consistent with our previous comments, WDEQ recommends that EPA develop formal criteria to evaluate the likelihood of downstream water quality impacts.

Closing remarks

The WDEQ appreciates EPA’s commitment to cooperative federalism and its efforts to improve Section 401 regulations by improving clarity and proposing procedural changes for streamlining and efficiency. That being said, the proposed procedural changes must not come at the expense of a State’s primary responsibility to ensure attainment of water quality standards. We thank EPA for the opportunity to provide comments during this notice period as well as the recent listening sessions. We look forward to working alongside EPA and other state co-regulators during future engagement opportunities.

For questions regarding these comments, please contact David Waterstreet, WDEQ Watershed Protection Section Manager, at david.waterstreet@wyo.gov or (307) 777-6079.

Sincerely,



Todd Parfitt

Director

Department of Environmental Quality

TP/JZ/DHW/JRZ/JJT/NH

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