

August 6, 2025

Ms. Peggy Browne
Acting Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

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

RE: Comments of the American Public Power Association on the U.S. Environmental Protection Agency's Request for Feedback on Regulatory Uncertainty or Implementation Challenges Associated with the Clean Water Act Section 401 Certification Process (90 Fed. Reg. at 29,828; July 7, 2025) Docket ID No. EPA-HQ-OW-2025-0272

Dear Ms. Browne:

The American Public Power Association (APPA) appreciates the opportunity to submit the following comments in response to the U.S. Environmental Protection Agency's (EPA or Agency) request for input on any regulatory uncertainty or implementation challenges associated with the Clean Water Act (CWA) section 401 certification process.¹

APPA is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. APPA represents public power before the federal government to protect the interests of the more than 55 million people that public power utilities serve, and the over 100,000 people they employ. APPA advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

Public power utilities are essential to delivering affordable, reliable, and resilient energy to communities across the United States - a mission growing ever more critical as demand for energy continues to rise nationwide. The urgency of this mission is echoed in several of President

¹ 90 Fed. Reg. at 29,828 (July 7, 2025) (Notice).

Trump’s recent directives to promote domestic energy production and streamline to environmental permitting.^{2,3} Achieving these national energy goals depends on the timely and cost-effective development of infrastructure such as power plants, hydroelectric dams, transmission and distribution systems, and fuel delivery networks. CWA section 401 plays a decisive role in shaping the pace and feasibility of such development. When properly scoped, section 401 water quality certification serves as an effective tool for safeguarding the environment without introducing unnecessary delays or inviting jurisdictional overreach. In contrast, too broad an interpretation stalls project approvals and undermines efforts to expand and modernize the energy grid.

APPA supports predictable permitting timelines, which are essential for investment and efficient utilization of public funds. Permitting delays cascade through project planning and investment. Uncertainty adds complexity, cost, and unpredictability that deters project proponents, triggers litigation, and narrows the infrastructure partner pool. These economic risks highlight how regulatory predictability enables greater investment in critical sectors, including broadband, data centers, energy, and transportation.

I. The Scope of Certification and Certification Conditions Should Be Limited to Discharges

APPA believes that EPA should reconsider the scope of certification articulated in the 2023 Water Quality Certification rule and commence a notice and comment rulemaking to effectuate the reconsideration.⁴ We recommend the Agency explicitly establish that state review under section 401 must be limited to water quality impacts directly caused by the discharge, excluding other non-discharge elements of the activity (including potential effects on uplands, roads, or recreational amenities) and excluding indirect impacts or consequences from upstream developments or other facilities. Maintaining and acknowledging this jurisdictional boundary is crucial for defining the proper scope of the 401 water quality certifications in future applications.

CWA section 401 established a clear boundary around the scope of water quality certification- to the discharge(s) that may result from a federally licensed or permitted activity and not the activity itself. This distinction is made explicit in its statutory language:

Any applicant for a Federal license or permit to conduct an activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate

² Executive Order 14154, “Unleashing American Energy” at 90 Fed. Reg. at 8,353 (January 29, 2025).

³ Executive Order 14156, “Declaring a National Energy Emergency” at 90 Fed. Reg. at 8,433 (January 29, 2025).

⁴ 88 Fed. Reg. at 66,557, (September 27, 2023) (2023 Rule).

. . . that any such **discharge** will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title [CWA Sections 301, 302, 303, 306, and 307].⁵

The statute further authorizes certifying authorities to attach conditions on any certification, which become conditions on the federal license or permit:

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 [CWA Sections 301 and 302], standard of performance under section 1316 of this title [CWA Section 306], or prohibition, effluent standard, or pretreatment standard under section 1317 of this title [CWA Section 307], 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.⁶

Although this provision refers to ensuring that the applicant will comply, it does not expand the scope of certification to the applicant's entire activity. Rather, it identifies the responsible party for compliance. The conditions must still relate to the discharge and its compliance with the enumerated CWA sections and relevant state law.

The 2023 Rule allows a certifying authority to evaluate and place conditions on the activity if it can potentially discharge to a waters of the United States (WOTUS).⁷ A certifying authority shall include in the certification any conditions necessary to ensure that the activity will comply with applicable water quality requirements.⁸ However, the 2023 Rule is inconsistent with section 401 because it requires certification of the federally licensed or permitted "activity" and allows the certifying authority to place conditions on the "activity," rather than the discharge or discharges that may result from that activity.⁹ Further, the 2023 Rule improperly requires a grant of certification to include a "statement that the activity will comply with water quality requirements" and a denial of certification to include a "statement explaining why the certifying authority cannot certify that the activity will comply with water quality requirements."¹⁰ Many

⁵ 33 U.S.C. § 1341(a)(1).

⁶ 33 U.S.C. § 1341(d).

⁷ 40 C.F.R. § 121.3.

⁸ *Id.*

⁹ 40 C.F.R. § 121.7(d)(3); 40 C.F.R. § 121.7(g).

¹⁰ 40 C.F.R. 121.7(c)(3), (e)(3).

activities or conditions intended to protect designated uses do not affect water quality standards and should fall outside the rule's scope.

In contrast, the 2020 Rule's provisions governing certification scope and conditions aligned completely with section 401.¹¹ Section 121.3 of the 2020 Rule established that "[t]he 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 water quality requirements."¹² In accordance with this certification scope, the 2020 Rule mandated that "[a]ny action by the certifying authority to grant, grant with conditions, or deny a certification request must be within the scope of certification"¹³; stipulated that certification grants "shall include a statement that the discharge . . . will comply with water quality requirements"¹⁴; demanded that certification conditions include a "statement explaining why the condition is necessary to assure that the discharge . . . will comply with water quality requirements"¹⁵; and specified that certification denials must explain why "the discharge will not comply with the identified water quality requirements."¹⁶

APPA supports EPA reinstating these related provisions from the 2020 Rule to restore alignment with section 401's restriction of certification scope and conditions to the specific discharge or discharges that necessitated the certification requirement. Limiting the scope of certification to discharge and water quality requirements is legally sound and will enhance permitting program predictability for federal agencies, tribes, states, and project sponsors. Timely permitting decisions are crucial for predictability and cost-effectiveness.

II. Water Quality Requirements

The Notice seeks input on the definition of "water quality requirements," including, but not limited to, whether the Agency should further clarify or revise its interpretation of the phrase "other appropriate requirements of state law."¹⁷ EPA should specify that water quality certifications cannot encompass discharges to waters beyond federal jurisdiction. The Agency lacks authority to regulate waters that do not meet the "waters of the United States" definition. Therefore, any claim that EPA can empower certifying authorities to evaluate impacts on non-jurisdictional waters through the certification process violates legal boundaries and substantially exceeds EPA's statutory authority. The Agency must restrict the rule's jurisdictional reach to impacts affecting only those waters subject to the CWA.

¹¹ Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. at 42,210 (July 13, 2020) (2020 Rule).

¹² *Id.* at 42,285.

¹³ § 121.7(a); 85 Fed. Reg. at 42,286.

¹⁴ § 121.7(c); 85 Fed. Reg. at 42,286.

¹⁵ § 121.7(d)(1)(i); 85 Fed. Reg. at 42,286.

¹⁶ § 121.7(e)(1)(ii); 85 Fed. Reg. at 42,286.

¹⁷ 90 Fed. Reg. at 29,829.

III. Neighboring Jurisdiction Engagement

The Notice seeks input on how the Agency should consider whether a neighboring jurisdiction's water quality may be affected by discharge for purposes of 401(a)(2) and whether there are parameters to consider in making this determination.¹⁸ CWA section 401(a)(2) established a process for "neighboring jurisdictions" to participate in the federal licensing or permitting process where the discharge "may affect their water quality." Section 401(a)(2) limits EPA's review to considering whether a "discharge" from an activity may affect the water quality of a neighboring jurisdiction and likewise limits a neighboring jurisdiction to determine whether a "discharge" from the activity will violate its water quality requirement. Once EPA receives notification of an application and a grant certification or a waiver of certification, EPA has 30 days to decide whether there will be any water quality impact to neighbors. If EPA decides there will be an impact, then they must notify the neighboring jurisdiction, as well as the project's federal agency and project proponents.

APPA recommends that EPA revise the 2023 Rule to make the "may affect" neighboring determination discretionary, rather than mandatory.

IV. Certification Deadlines May Not Exceed One Year

EPA should revise the 2023 rule to include clean regulatory statements that the withdrawal and resubmittal tactic is unlawful, that the one-year timeline certification deadline starts when the initial application is sent, and that resubmittals do not restart or modify the one-year timeline. The statute is clear:

If the state ...fails or refuses to act on a request for certification, within a reasonable period (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such federal application.¹⁹

EPA should also explicitly prohibit the practice among certain certifying authorities of issuing "without prejudice" denials that compel applicants to resubmit their certification requests. When a denial without prejudice serves any purpose beyond constituting a final, appealable decision to deny certification for reasons within the certification's scope, it violates section 401's mandate to act on certification requests within a reasonable timeframe not exceeding one year and should be categorically forbidden.

V. Certification Modifications Should be Limited

The 2023 Rule allows states to modify a previously granted certification at any point after certification issuance, until the expiration of the federal license or permit, provided that the

¹⁸ *Id.*

¹⁹ 33 U.S.C 1341(a)(1).

federal agency and certifying authority agree in writing before modifying the grant of certification.²⁰ A “modification” means a change to an element or portion of a certification or its conditions- it does not mean a wholesale change in the type of certification decision or a reconsideration of the decision whether to certify. Through the modification process, states may not revoke a certification or change a certification into a denial or waiver. EPA does not have oversight of this process, and the project proponent does not have a formal role in the modification process. APPA supports the inclusion of project proponents in the modification process, and requests that project proponents be allowed to submit comments during the modification process, at a minimum. Permitting modifications beyond the statutory one-year period creates instability and erodes trust in the permitting process. APPA supports limiting revisions to the initial statutory window, preventing the unilateral imposition of new conditions afterward.

VI. Stakeholder Input on 401 Certification Implementation Experiences

The Agency asks for input on stakeholder experience implementing the 2023 Rule. We offer a few concerns and examples to inform improvements to the certification process.²¹ For instance a certification condition that mandates a hydropower project build a fish ladder to allow fish to migrate upstream beyond the project site. The certifying authority contends that fish are part of the designated use of the waterbody, as outlined in the state's EPA-approved water quality standards, and that providing fish passage is essential for the project to meet those standards. This condition should fall outside the scope of CWA 401 certification because it seeks to regulate the overall activity — specifically, the presence of the dam in the stream — rather than the discharge into WOTUS. However, the question of whether the project must build a fish ladder squarely falls within the Federal Energy Regulatory Commission’s (FERC) licensing authority under the Federal Power Act (FPA). FERC is required to consider recommendations from state and federal fish and wildlife agencies regarding such measures. Additionally, under FPA section 18, the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) may prescribe license conditions mandating the construction, operation, and maintenance of fish ladders and other fishways.²²

The 2023 Rule does not explicitly exclude indirect impacts to water quality or consequences arising from upstream developments or unrelated facilities, which has proven problematic for regulated entities. In the case of hydropower facilities, for example, “discharge”

²⁰ §121.10(a).

²¹ 90 Fed. Reg at 29,829.

²² See 16 U.S.C. § 811. A fish ladder is also not a point source effluent limitation under the CWA, including CWA sections 301, 302, 303, 306, or 307. See 33 U.S.C. § 1362(11) (an “effluent limitation” is “any restriction established by a State or [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources”).

has been interpreted to encompass water quality issues present in water merely passing through a run-of-river facility, even when those concerns originate upstream and are entirely outside the facility's control. This interpretation has led to hydropower operators being unjustly tasked with implementing mitigation measures that can be detrimental to operations. For instance, when hydropower facilities are subject to a total maximum daily load (TMDL) for temperature, upstream contributors may be the primary source of thermal pollution. Yet downstream operators are still required to implement costly mitigation measures, which can include structural modifications to dams - alterations that directly reduce generation capacity, impair operational efficiency, and compromise the facility's ability to deliver reliable energy. The Agency must clarify that water quality conditions attributable to upstream contributors, rather than to a direct discharge from the project undergoing certification, fall outside the scope of section 401 water quality certification.

VII. Conclusion

APPA appreciates the opportunity to provide this input and engage in this important dialogue. As outlined above, APPA recommends restoring the scope of CWA section 401 certification and its associated conditions to focus exclusively on the water quality of the discharge, consistent with the statute's original intent. This approach will promote regulatory clarity, increase permitting efficiency, and support ongoing investment in energy infrastructure.

Please contact Ms. Carolyn Slaughter at 202-467-2900 or email CSlaughter@publicpower.org should you have any questions regarding the enclosed comments.

Sincerely,



Carolyn Slaughter

Sr. Director, Environmental Policy

American Public Power Association