National Association of Wetland Managers

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

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Submitted via www.regulations.gov
Docket ID No. EPA-HQ-OW-2025-0272

Dear Ms. Kasparek:

These comments were prepared by the National Association of Wetland Managers (NAWM) for inclusion in Docket ID No. EPA-HQ-OW-2025-0272, in response to the July 7, 2025, Federal Register notice "Establishment of Public Docket and Listening Sessions on Implementation Challenges Associated with Clean Water Act Section 401".

NAWM is a national 501(c)(3) professional organization that supports the use of sound science, law, and policy in development and implementation of state and Tribal wetland and aquatic resource protection programs. Since 1983, our organization and our member states and Tribes have had longstanding positive and effective working relationships with federal agencies. As an association representing states and Tribes as co-regulators tasked with implementation of regulations within the Clean Water Act (CWA), NAWM understands the complexity of the CWA and the implementation challenges the Act poses. We have worked for many years together with federal, state, and Tribal agencies in the implementation of regulatory and non-regulatory programs designed to protect waters of the United States (WOTUS). Our collaboration has involved programs such as the CWA section 401 water quality certification of federal licenses and permits, section 404 permit program for dredged or fill material, state and Tribal water quality standards for wetlands, and the jurisdictional status of wetlands and other waters as WOTUS.

CWA section 401 provides that a federal agency cannot issue a license or permit that may result in a discharge to waters of the United States, unless the state or authorized tribe where the discharge would originate certifies the discharge would be consistent with water quality requirements or waives its authority to do so.[1] If a certifying authority does not issue a Section 401 Water Quality Certification, then the federal agency can not issue a federal permit or license. The authority in section 401 is a direct grant from Congress to states (and Tribes with "treatment in a similar manner as a state" (TAS) status) and does not require EPA program approval. The CWA relies on Section 401 to help ensure that federal licenses and permits are consistent with aquatic resource protection and goals of the Act.[2] Those statutory goals cannot be met if regulations inappropriately limit the section 401 certification process and narrow scope of review. Section 401 certification is a critical aquatic resource protection tool for many states and Tribes. For example, NAWM data indicates that more than half of states rely on section 401 certification as their wetland protection program.[3]

In its July 2025 Federal Register notice, "Establishment of Public Docket and Listening Sessions on Implementation Challenges Associated with Clean Water Act Section 401" ("Notice") EPA indicated that it "invite[s] written feedback on regulatory uncertainty or implementation challenges associated with the Clean Water Act (CWA) section 401 certification process as defined in the 2023 Water Quality Certification Improvement Rule."

NAWM is concerned that the focus of the Notice on section 401's possible uncertainty and implementation challenges signals an intent to limit state and Tribal use of 401 as a water quality protection tool. The primary goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters,"[4] and the Act expressly recognizes the critical and important role states and Tribes play in protecting and enhancing waters within their respective borders.[5] The CWA includes express provisions preserving state authority. For example, Congress maintained for each state the authority to adopt or enforce the conditions and restrictions the state considers necessary to protect its waters, provided those standards are not less protective than federal standards.[6] And, Congress in CWA section 401 expressly authorized states to independently review the water quality implications of projects that may result in a discharge requiring a federal

[1] CWA Section §401(a)(1), 33 U.S.C. §1341(a)(1).
[2] Congress intended section 401 to help ensure that all discharge activities authorized by federal agencies would comply with "state law" and that "Federal licensing or permitting agencies [could not] override State water quality requirements." See S.Rep. 92-313 at 69, reproduced in 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1487 (1973).
[3] Association of State Wetland Managers, Inc., 2015. Status and Trends Report on State Wetland Programs in the United States. NAWM is in the process of updating the report and thus far is seeing a similarly heavy reliance on CWA section 401 to protect wetlands and other waters.
[4] CWA §101(a), 33 U.S.C. §125(a).
[5] "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." CWA §101(b), 33 U.S.C. §125(b).
[6] CWA §510, 33 U.S.C. §1341(a).

license or permit to ensure such projects are consistent with water quality requirements.[7] It is essential that the EPA strongly consider such provisions and the cooperative federalism approach, which is echoed through the CWA, as a guide during the review of the 2023 Rule.

Regulatory Revisions Are Not Necessary

NAWM has found no evidence to support claims that the certification process is broken and therefore does not believe EPA needs to revise the certification regulations from 2023. CWA section 401 has worked well for over fifty years, helping ensure proper environmental management is coupled with responsible growth and economic development.

The Association of Clean Water Administrators (ACWA) surveyed states regarding their state section 401 certification processes in 2019. Based on 31 responses, ACWA's data indicated the average number of certification requests received per state annually was approximately 70, with an average certification processing time of 132 days (under 4.5 months) after all necessary information was received. Seventeen states had zero denials per year, with other states rarely issuing denials. States have taken significant steps to address potential causes of delay, such as incomplete certification requests and inadequate staffing levels. States have adopted electronic submittals, hired additional staff to assist with certifications, and through state regulations have clarified request requirements and "completeness," and set hard time limits for review. State websites often have guidance documents and other materials to assist applicants. States also reach out directly to applicants when requests are incomplete. Twenty-one states accept the information provided in a related federal Army Corps of Engineers Section 404 permit applications as sufficient for certification reviews, thereby streamlining the process.

The 2023 Rule further clarified the certification requirements and process. Anecdotal data NAWM has received from its state and Tribal members indicate the certification process under the 2023 Rule is predictable and efficient. For example, the ACWA 2019 survey found that 27 states of the 31 respondents required or encourage pre-request consultations. Since the 2023 Rule was promulgated with its pre-application consultation requirements, NAWM has heard from its state and Tribal members that early engagement with applicants or their consultants has become the norm and has resulted in increases in predictability and timeliness. Similarly, state and Tribal certification programs focus on "water quality requirements" when developing certification decisions, a scope of analysis clarified in the 2023 Rule. States and Tribes also have indicated that the 2023 Rule's additional detail for the "neighboring consultation" provisions of section 401(a)(2) has been helpful for ensuring parties understand what is required and the provision is implemented to meet Congressional intent.

[7] CWA §401(a), 33 U.S.C. §1341(a).

Recommendation: NAWM believes that CWA section 401 is not "broken," and the 2023 Rule should remain in effect. Instead of initiating a lengthy and expensive rulemaking process, NAWM suggests EPA should work with states and authorized Tribes to identify needs for improved guidance and tools that could help increase the effectiveness of section 401 to appropriately balance water quality protection with economic development, consistent with the CWA.

Responses to Selected "Questions for Consideration"

1. Defining the Scope of Certification Generally and the Scope of Certification Conditions

The Notice requests input on whether the scope of Section 401 certification analyses should consider the effect of the discharge on the "activity" or "project as a whole," and whether certifying authorities should be required to justify that certification conditions are within the appropriate scope of section 401.

Congress did not provide a single unambiguous definition of the appropriate scope of section 401. The CWA indicates the certifying authority should consider whether the proposed project subject to certification would be consistent with CWA sections 301 (technology-based effluent limits), 302 (water quality-based effluent limits), 303 (water quality standards), 306 (effluent limits for new sources), and 307 (toxic treatment standards),[8] as well as "any other appropriate requirement of state law." [9] Generally, past certification regulations have interpreted "appropriate" as any water quality-focused requirement.[10] The 2023 Rule generally defers to states and Tribes to define which of their water quality-related provisions qualify as appropriate "state laws" or "Tribal laws" for purposes of implementing section 401 so long as they are related to water quality.[11]

Interpretations of the analytical scope of section 401 have a direct effect on the usefulness of certification as a water quality tool to help achieve CWA goals. When thinking about the scope of section 401 water quality certification, NAWM has found it helpful to consider a quote from a 10th Circuit Court of Appeals decision: "…in construing the Act, 'the guiding star' is the intent of Congress to improve and preserve the quality of the Nation's waters. All issues must be viewed in the light of that intent."[12]

[8] CWA §401(a), 33 U.S.C. §1341(a).
[9] CWA §401(d), 33 U.S.C. §1341(d).
[10] *See*, e.g., 87 Fed.Reg. 35318, 35349 (June 9, 2022), and 85 Fed.Reg. 42210, 42250 (June 13, 2020).
[11] *See* 88 Fed.Reg. 66558 (September 27, 2023).
[12] *Kennecott Copper Corp. v. Envtl. Prot. Agency*, 612 F.2d 1232, 1236 (10th Cir. 1979) (quoting *Am. Petroleum Institute v. Envtl. Prot. Agency,* 540 F.2d 1023, 1028 (10th Cir. 1976).

The Appropriate Focus of 401 Certification Analyses is on the Activity as a Whole, Not the Discharge

A recurring 401 certification-related debate has been whether the appropriate scope of certification analysis should be the impacts of a proposed discharge or the water quality effects of the activity as a whole.

Underlying the debate is the U.S. Supreme Court holding in *Jefferson County PUD No. 170*, the 1994 decision addressing the appropriate scope of analysis for CWA section 401 certification review. In *Jefferson County*, the Court considered the appropriate scope of analysis for review, and concluded it encompassed the activity as a whole and was not limited to water quality controls specifically tied to a discharge.[13] The Court noted that section 401 "allows [certifying authorities] to impose 'other limitations' on the project in general to assure compliance with various provisions of the Act and with 'any other appropriate requirement of State law.'"[14] As a result, while section 401(a)(1) "identifies the category of activities subject to certification (namely, those with "discharges"), the Court held section 401(d) authorizes additional conditions and limitations "on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[15]

In 2020, EPA issued the "Clean Water Act Section 401 Certification Rule"[16] ("2020 Rule"). In the preamble to the 2020 Rule, EPA explained that the term "discharge" as set out in section 401(a) was ambiguous, and thus EPA's interpretation of the term and its relationship to section 401(d) was entitled to deference from the courts.[17] The Agency at that time interpreted Congress' use of the word "discharge" in section 401(a)(1) as supporting the proposition that certifying authorities could only consider water quality impacts from the project's discharges.[18] When developing the 2023 Rule, EPA instead concluded that Congress' use of the words "applicant," "activity," and "discharge" in section 401(a) and its failure to use the word "discharge" in section 401(d) created enough ambiguity to support a conclusion that the scope of section 401 review is the "activity as a whole," and that the 2020 Rule's interpretation was overly narrow and inconsistent with the CWA and its goals. As a result, the 2023 Rule decided the most proper reading of section 401(a)(1) and 401(d) was to view the analytical scope of 401 review was the "activity as a whole," agreeing with the Supreme Court decision in *Jefferson County.*[19]

NAWM considers the rationale in *Jefferson County PUD* and the 2023 Rule as more compelling than the perspective reflected in the 2020 Rule. Section 401(d) requires consideration of "any other appropriate provision of state law," without language limiting

[13] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 411 U.S. 700 (1994).
[14] *Id*. at 711.
[15] *Id*. at 711-12.
[16] 85 Fed.Reg. 42210 (July 13, 2020).
[17] 85 Fed.Reg. 42210 42251-53 (July 13, 2020).
[18] *Id.*
[19] 88 Fed.Reg. 66558 (September 27, 2023).

consideration to "discharge." Section 401(d) enables state and Tribal certifying authorities to ensure the results of a federal license or permit will be consistent with water quality laws of the state or Tribe. Justice Stevens' concurrence in *Jefferson County PUD* is directly on point:

> "While I agree fully with the thorough analysis in the Court's opinion, I add this comment for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards. See, e. g., § 301(b)(1)(C), 33 U. S. C. § 1311(b)(1)(C)."[20]

Interpreting the scope of section 401 review as allowing consideration of only the discharge and not impacts of the activity as a whole would so narrow the provision as to make it inconsistent with CWA text and goals. The impacts of a federally licensed or permitted project on a certifying authority's water resources may be caused by aspects of the project's activity other than the potential discharge that triggered the need for a CWA section 401 certification, such as non-discharge impacts from the construction and operation of the project. Another indication of the analytical scope of section 401 is section 401(a)(3), which indicates that the certification analysis is not constrained to those activities directly authorized by the federal license or permit in question. Section 401(a)(3) makes clear that a certification for a federal license or permit for construction may address potential water quality impacts from the subsequent operation even though the operation may be subject to a different federal license or permit.[21] By providing that a construction permit certification shall also serve as an operating permit certification (unless notice is given of changes which call into question whether the operation will in fact comply with water quality requirements), section 401(a)(3) necessarily contemplates that the certification of the construction permit will have considered whether the subsequent operation will comply with water quality requirements.

For twenty-six years prior to the 2020 Rule, federal agencies and certifying authorities interpreted section 401 as addressing impacts of an activity as a whole. That interpretation is well-understood and capable of consistent and predictable implementation. As demonstrated by the ACWA survey of state 401 certification programs (discussed above), the analytical scope being the activity as a whole has not resulted in undue delay or uncertainty. Also, considering all potential water quality impacts resulting from issuance of

[20] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 411 U.S. 700 (1994), Stevens, J., concurring

[21] CWA §401(a)(3), 33 U.S.C. 1341(a)(3) (''The certification . . . with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility'' except in the circumstances described in section 401(a)(3)).

a federal license or permit is more closely aligned with the statutory text and goals of section 401.

Recommendation: NAWM believes that the scope of 401 certification analyses should be the activity as a whole and not be focused just on the discharge. Such an interpretation would be consistent with longstanding U.S. Supreme Court precedent, and years of implementation experience indicate certification decision making addressing the activity as a whole can be both consistent and predictable as it protects water quality.

Documenting What are "Applicable Water Quality Requirements" Can be Burdensome

The Notice asks whether documentation from the certifying authority that justifies section 401 certification decisions is necessary to ensure certification decisions are based on appropriate considerations such as "applicable water quality requirements."

Specific documentation requirements and federal review of 401 considerations have not worked well in the past. Many states and Tribes found the 2020 Rule's documentation requirements to be burdensome and with limited water quality benefit, particularly because the federal agencies' review of documentation was only to verify its presence. Several certifying authorities found that the documentation requirements delayed rather than streamlined the certification process.[22] One example of the problems with this approach can be seen with the 2020 Nationwide General Permit (NWP) review process.[23] The 2020 Rule in effect gave federal agencies veto power over certifying authorities' certification decisions if the agency felt the decisions were derived from considerations outside the scope of 401. The Army Corps of Engineers (Corps) sought certification on a NWP package in September 2020. Many Corps districts reviewed the substance of some of the resulting certification conditions and concluded the conditions were impermissible "reopener clauses." States have told NAWM that some districts viewed the disputed condition as invalid while considering the balance of the certification as valid, other districts believed the disputed condition resulted in a certification denial, and at least one district redrafted a certification condition as part of their review. The process was not predictable, transparent, or consistent and resulted in substantive changes to certifications not envisioned by the CWA. In addition, NAWM is aware of certifying authorities whose conditions were not only rejected but subjected to a Corps-established new category of action "decline" or "decline to rely on" by the federal agency. Such an option is not provided in CWA Section 401.[24]

The 2023 Rule adopts an approach that, for the most part, has worked well for state and Tribal certification authorities. Under the 2023 Rule, certification authorities explain their

[22] *See, e.g.,* 87 Fed.Reg. 35318, 35312 (June 9, 2022).
[23] *See, e.g.,* Association of State Wetland Managers Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302 on June 30, 2021).
[24] *Id.*

certification analyses and decisions, but do not need to list all water quality-related requirements that led to a decision in order for a federal agency to reflect the certification in the resulting license or permit. This more general approach to documentation and explanation is appropriate and fully consistent with section 401 and CWA goals.

Recommendation: NAWM supports the more general explanation and documentation requirements in the 2023 Rule, rather than specific requirements such as those established by the 2020 Rule. In addition, the Final Rule preamble should reiterate that the federal licensing or permitting agency will defer to the certifying authority's explanation and documentation and not make an evaluation of its adequacy.

2. **Defining Water Quality Requirements**

The CWA does not establish the scope of "any other appropriate requirement of state law" that section 401(d) includes as within the scope of certification analyses and conditioning. EPA section 401 certification regulations generally have indicated that "other appropriate requirements of state law" refers to water quality requirements. The 2023 Rule currently defines the scope of 401 certification analyses as including "any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act and any Federal and state or Tribal laws or regulations implementing these sections, and any other water quality-related requirement of state or Tribal law."[25] The 2020 Rule interpreted the phrase "water quality requirement" more narrowly as meaning "state or tribal regulatory requirements for point source discharges into waters of the United States."[26]

The Notice seeks input on whether EPA should further clarify or revise its interpretation of CWA section 401(d)'s term "other appropriate requirements of State law." Specifically, the Notice seeks input on how to define "water quality requirements," and whether the current definition should be clarified or modified.

NAWM agrees that considerations under section 401(d) of "other appropriate requirements of state law" should involve only requirements addressing water quality. However, it is essential to note that requirements affecting water quality can be quite diverse because of the diversity of potential sources of impacts. For example, potential sources of water quality effects include (but are not limited to): discharges that affect the chemical, physical, or biological integrity of the water; building and maintaining fish passages; maintaining minimum flow rates; compensatory wetland and riparian mitigation; and construction of recreation facilities.[27] Not all effects are water quality effects. For example, effects from an activity might include environmental or societal impacts not related to water quality, such as potential air quality, traffic, noise, or economic impacts

[25] 40 C.F.R. §121.1(j).
[26] 40 C.F.R. §121.1(n).
[27] *See, e.g.,* 87 Fed.Reg. 35318, 35348 (June 9, 2022).

with no connection to water quality. NAWM agrees that requirements not addressing water quality may be important but seem beyond the scope of section 401.

Recommendation: NAWM strongly believes the 2023 Rule's approach to interpreting "other appropriate provisions of State law" is itself appropriate and should be retained.

"Water Quality Requirements" Should Not be Limited to Those Involving Point Sources

The 2020 Rule defined "water quality requirements" to be focused on point sources only. Many significant water quality effects stem from causes other than point source discharges. CWA section 305(b) biannual reports consistently indicate nonpoint sources are substantial sources of impairment for a majority of waters. Reflecting this data, Congress annually provides significant grant funding under CWA section 319 for state and Tribal programs addressing nonpoint sources, signaling that Congress believes efforts to control nonpoint sources are necessary to achieve CWA goals.

Substantial water quality effects may result from diffuse "nonpoint" runoff from land use activities, increased water withdrawals, aquatic habitat loss, contamination of groundwater supplies that serve as base flow for surface streams, increased erosion and sedimentation, reduced stormwater infiltration, disconnected ecosystems, contaminant loading from spills, and harm to endangered aquatic species, among others. For example, in Washington State, hydropower projects "implicate a broad range of water quality impacts from the project as a whole that are unassociated with any specific point source discharge. Dams specifically contribute to increased water temperature from decreased water flows within streams and decreased flow rates caused by ponding behind dam structures. Dam reservoirs also cause resuspension of shoreline sediments due to wave action and pool fluctuations and overall vegetation loss, reduced shading and increasing temperatures."[28]

Recommendation: NAWM urges EPA to continue interpreting "water quality requirements" as including requirements addressing a broad range of potential sources of water quality impairments and not limit the term to point source discharges. Limiting the scope of CWA section certification to point sources, thereby failing to address some of the greatest sources of water quality impairment, would be inconsistent with CWA goals as well as with Congressional goals expressed in annual appropriations.

"Water Quality Requirements" Should Not be Limited to Those Involving Waters of the United States

The 2020 Rule defined "water quality requirements" as focused only on WOTUS. Caselaw and EPA 401 certification regulations interpret section 401 certification as applying when a federal license or permit may result in a discharge to WOTUS.[29] However, once the initial

[28] State of Washington Department of Ecology Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302 July 30, 2022).
[29] CWA §401, 33 U.S.C. §1370.

threshold condition of a discharge into WOTUS has been met and triggered the need for section 401 certification, the text of CWA section 401 does not omit from consideration impacts to waters of the state or waters of the Tribe that are not WOTUS.

State and Tribal ability to use section 401 to protect all their waters became increasingly important after the U.S. Supreme Court decision in *Sackett v. EPA*.[30] *Sackett* sharply reduced what waters were considered WOTUS, excluding ephemeral waters and wetlands without a continuous surface connection to a relatively permanent water.[31] Many anticipated that states and Tribes would need to "fill the gap" in aquatic resource protection, protecting those Waters of the State or Waters of the Tribe that were no longer protected as WOTUS.[32] Some states and Tribes have enacted new laws to protect these waters,[33] while others have used CWA section 401 as a source of protection from impacts of federally licensed or permitted projects discharging into WOTUS that also affect non-WOTUS waters. Were the scope of 401 certification analyses and conditioning limited to WOTUS impacts, states and Tribes would lose section 401 as an important water quality tool for protecting their non-federal waters.

State and Tribal water quality requirements address Waters of the State or Waters of the Tribe, typically not differentiating which state or Tribal waters remain WOTUS and which do not. If "water quality requirements" were limited to those affecting WOTUS, states and Tribes would face a new CWA section certification implementation challenge: doing federal jurisdictional determinations (JDs) on all potentially affected waters as a precursor to a certification analysis, which would be a necessary step for determining which waters are within the scope of certification consideration. The federal government has faced time-consuming challenges performing JDs. Adding such JD-related challenges to the certification process could consume the "reasonable period of time" certification authorities have to complete their analyses, potentially resulting in additional certification denials if data needed to certify a proposed project's impacts is not available within the certification timeframe.

Limiting water quality requirements to those affecting WOTUS also would be inconsistent with CWA statutory text and with Congressional intent. Congress intended section 401 to help ensure that all discharge activities authorized by federal agencies would comply with "state law" and that "Federal licensing or permitting agencies [could not] override State

[30] *Sackett v. EPA,* 598 U.S. 651 (2023).

[31] *See, e.g.,* NRDC, "Mapping Destruction: Using GIS Modeling to Show the Disastrous Impacts of *Sackett v.* EPA on America's Wetlands (March 2025).

[32] *See, e.g.,* ELI, "Navigating Newly Non-'WOTUS Wetlands: A Study of Six States' Wetlands Programs after Sackett v. EPA," (September 2024), available at: Navigating Newly Non-WOTUS Wetlands: A Study of Six States' Wetlands Programs after Sackett v. EPA | Environmental Law Institute. See also

[33] *See, e.g.,* Colorado's House Bill 24-1379, which establishes a state-run dredged and fill permitting program to regulate activities in all Waters of the State. Colorado is the first state to enact legislation explicitly to fill the gap in protection created by the *Sackett* decision.

water quality requirements."[34] Excluding from section 401 considerations those requirements that protect state and Tribal waters that are not WOTUS would directly conflict with Congressional intent.

Recommendation: NAWM supports a broad definition of "water quality requirements," that does not limit consideration only to requirements affecting WOTUS. As discussed above, a definition limiting considerations to WOTUS could significantly increase the time required for analyses in support of a 401 certification and associated conditions, thereby decreasing program efficiency and increasing the number of denials. NAWM also supports EPA giving deference to states and Tribes to determine what provisions qualify as appropriate state or Tribal laws for purposes of implementing section 401.

3. **Neighboring Jurisdictions**

CWA section 401 certification authority rests with the state or authorized Tribe where the discharge triggering section 401 originates. However, the CWA acknowledges that waters in neighboring states and Tribes may be affected by the proposed activity. Section 401(a)(2) establishes a process under which neighboring jurisdictions can be notified and have an opportunity to be heard about potential water quality implications of proposed projects undergoing certification. The 2020 Rule provided little detail on neighboring jurisdiction consultation beyond that in the statutory text; the 2023 Rule provided additional detail that has proven to be helpful in increasing transparency and predictability.

The section 401(a)(2) process begins when a federal licensing or permitting agency notifies EPA that they have received a license or permit application and associated water quality certification. The statute provides EPA with 30 days to determine whether the discharge "may affect. . . the quality of the waters of any other State..."[35] If EPA determines that the discharge from the certified project may affect water quality in a neighboring jurisdiction, the Administrator "shall notify" the neighboring jurisdiction, the licensing or permitting agency, and the applicant.[36] If the neighboring state determines that the proposed discharge will violate any of the state's water quality requirements, under the CWA the state may notify the Administrator and federal agency in writing of its objection to the issuance of such license or permit and request a public hearing, provided the written objections are sent within 60 days since being notified by EPA of the proposal[37] If the neighboring jurisdiction requests a hearing, the federal licensing or permitting agency shall

[34] *See* S.Rep. 92-313 at 69, reproduced in 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1487 (1973).

[35] CWA §401(a)(2), 33 U.S.C. §1341(a)(2); 40 C.F.R. §121.13. Under both the 2023 and 2020 Rules, a "neighboring jurisdiction" can be a state or a tribe with "Treatment in a Manner as a State" (TAS) under CWA §518(e). Amendments to the CWA enacted after section 401 provided that tribes could seek TAS. As a result, when 401(a)(2) uses the word "state" or "states," EPA has interpreted the words as including states as well as tribes with TAS status for section 401. EPA also refers to tribes with TAS for section 401 also referred to as "authorized tribes."

[36] CWA §401(a)(2), 33 U.S.C. §1341(a)(2); 40 CFR. §121.13.

[37] CWA §401(a)(2), 33 U.S.C. §1341(a)(2); 40 CFR. §121.14.

hold the hearing, and must respond to the concerns raised.[38] Note that most of this process detail is in the CWA statutory text itself, although EPA 401 certification regulations incorporate that detail.

NAWM's state and Tribal members have emphasized the importance of section 401(a)(2), particularly where addressing waters with discharges from multiple states. For example, in its 2019 comment letter, Maryland Department of the Environment emphasized the critical importance of 401(a)(2) given the state's extensive investment in meeting Chesapeake Bay's Total Maximum Daily Load (TMDL) requirements.[39]

EPA's "May Affect" Determinations are Mandatory, Not Discretionary

A legal and policy question that has been in flux is whether EPA must make a "may affect" determination, reflecting whether there is the potential for a proposed project to affect water quality in neighboring jurisdictions and not whether such an effect is likely. The 2020 Rule asserted that under section 401(a)(2), EPA had only a discretionary duty to make a "may affect" determination and did not provide factors for consideration when making a determination. The 2023 Rule interprets EPA's "may affect" determination as mandatory, not discretionary.[40] This conclusion reflects caselaw since the 2020 Rule[41] and implications of the CWA language in section 401(a)(2) indicating EPA "shall" make a determination.[42] The 2023 Rule provided illustrative examples of what EPA might consider when making a "may affect" determination. The 2023 Rule preamble also emphasizes that the "may affect" determination is not a high analytical bar, with the implication that a determination should not consume considerable federal administrative resources or time. The 2023 Rule also explicitly states "a Federal license or permit may not be issued until the section 401(a)(2) process is complete."[43]

Directly on point to the question of whether EPA has a mandatory or discretionary responsibility to make "may affect" determinations is the court's opinion in *Fond du Lac Band of Lake Superior Chippewa v. Wheeler.* In its decision, the court noted: 519 F. Supp. 3d 549 (D. Minn. 2021).

[38] CWA §401(a)(2), 33 U.S.C. §1341(a)(2); 40 CFR. §121.15.
[39] *See* Maryland Department of Environment Comment Letter re Updating Regulations on Water Quality Certifications (Submitted to Docket ID No. EPA-HQ-OW-2019-0405-0025 on October 21, 2019, Attachment 1, p. 1.
[40] 40 C.F.R. §121.13(a), 88 Fed.Reg. 66558, 66642 (September 27, 2023).
[41] *Fond du Lac Band of Lake Superior Chippewa v. Wheeler,* 519 F. Supp. 3d 549 (D. Minn. 2021). In this case, the Court concluded that EPA is required to determine whether the discharge may affect the quality of a neighboring jurisdiction's waters under section 401(a)(2).
[42] In the preamble to the final rule, EPA discusses the importance of the "shall" language in the Agency's conclusion that the "may affect" determination is a mandatory act and not discretionary. 88 Fed.Reg. 66558, 66642-3 (September 27, 2023).
[43] 40 C.F.R. 121.13(d).

> "Given that the purpose of [CWA §401(a)(2)] appears to be to provide a mechanism to work out potential interstate conflicts over water pollution, it seems unlikely that, when a discharge permitted by State A may pollute the waters of State B, Congress intended to leave State B's participation rights entirely up to the unreviewable discretion of EPA. See 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…)"[44]

The *Fond du Lac* court's decision highlights a particular issue NAWM has heard often from our state and Tribal members: a concern about the potential impact to their waters from upstream waters or wetlands, where upstream states or Tribes lack independent authority to regulate discharges into those waters. If a state or Tribe lacks independent authority to address such discharges, the sole recourse for reviewing federally authorized discharge activities is through CWA section 401 certification. If EPA's duty to determine whether discharges "may affect" the water quality in neighboring jurisdictions is wholly discretionary, section 401(a)(2) may not significantly reduce the likelihood that activities in upstream waters and wetlands will threaten water quality in downstream waters.

NAWM is not unmindful of the potential administrative burden a mandatory duty to make a "may affect" determination could place on EPA's regional offices. It may be helpful to note that EPA regional offices are not determining "will affect" but only whether there is a possibility a proposed project's discharges may have an effect, which is a determination requiring significantly less technical analysis. Administrative resource implications of a mandatory duty are discussed in the preamble to the 2023 Rule and generally are not viewed as a likely problem. [45]

Recommendation: NAWM strongly believes that the section 401(a)(2) requirement for EPA to provide a "may affect" determination is mandatory, not discretionary. NAWM reaches this conclusion in light of persuasive caselaw, CWA statutory text, and the considerable value of the 401(a)(2) process to states and authorized Tribes seeking to manage cross-border effects from other jurisdictions, particularly those seeking federal permits or licenses to discharge. The opportunity for input from neighboring jurisdictions into the decision-making process should not rely on the level of EPA interest in the proposed project or on Agency decisions of how to expend administrative resources.

> The 2023 Rule's Discussion of Illustrative Factors to Consider in a "May Affect" Determination Remains Helpful

In the Preamble to the 2023 Rule, EPA noted it has discretion to look at a variety of factors depending on the type of federal license or permit and discharge when the Agency is

[44] *Fond du Lac Band of Lake Superior Chippewa v. Wheeler,* 519 F. Supp. 3d 549 (D. Minn. 2021).
[45] 88 Fed.Reg. 66558, 66637-66646 (September 27, 2023).

providing a "may affect" determination.[46] The Preamble provided several illustrative examples of potential factors EPA might consider, including but not limited to: "the type of project and discharge covered in the Federal license or permit, the proximity of the project and discharge to other jurisdictions, certification conditions and other conditions already contained in the draft Federal license or permit, and the neighboring jurisdiction's water quality requirements."[47]

A number of states and Tribes have indicated that the 401(a)(2) neighboring jurisdiction process was rather mysterious prior to the details provided in the 2023 Rule. For example, prior to the 2023 Rule, EPA had provided little if any information about factors it would consider when deciding a "may affect" determination, what EPA considers to be a "neighboring jurisdiction" for purposes of section 401(a)(2), what neighboring jurisdictions should include in a 401(a)(2) objection to a proposed permit, and other details. Many states and Tribes found the lack of detail in how 401(a)(2) processes would work to be unhelpful. For example, Wisconsin Department of Transportation (WSDOT) expressed concern over the "lack of scope and predictability of criteria under consideration." In its pre-proposal comment letter, WSDOT suggested that the rule "include defined criteria as a basis for the federal agency to determine if coordination with a neighboring jurisdiction or jurisdictions is appropriate. Some criteria for making this determination may include the type of project (e.g., new alignment v. modifying and maintaining existing infrastructure), thresholds or categories for impacts, size, and quantity of aquatic resources (e.g., project impacts to a large river may be more likely to affect neighboring jurisdictions than project impacts to a small stream or wetland), and project proximity to neighboring jurisdictions."[48] NAWM is pleased to note the Proposed Rule provides considerably greater detail on these and other issues, thereby increasing certainty and predictability.

Recommendation: NAWM encourages EPA to retain the illustrative factors for consideration during a "may affect" determination, while avoiding mandatory factors (for reasons discussed in the next section of this letter, on categorical determinations). Availability of illustrative non-exhaustive factors EPA might consider in a "may affect" determination helps focus the analysis on the site-specific nature of the activity under consideration, and as a result likely reduces administrative costs. Such illustrative factors also increase predictability and transparency of the "may affect" determination.

4. Categorical Determinations under 401(a)(2)

The Notice solicits comment on whether EPA should develop categorical determinations under section 401(a)(2), under which specified circumstances identified for a category

[46] 88 Fed.Reg. 66558, 66637-66644 (September 27, 2023).
[47] *Id.*
[48] Wisconsin DOT Comment Letter on Docket ID No. EPA–HQ–OW–2021–0302 submitted to EPA on July 15, 2022.

would allow EPA to assume that the quality of no neighboring jurisdiction's waters may be affected by discharges.

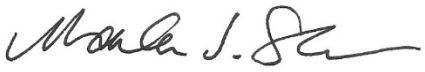
In the preamble to the 2023 Rule, EPA emphasized it was not proposing to identify specific factors EPA might analyze in making a "may affect" determination, given the range of federal licenses or permits that are covered by section 401(a)(2) and EPA's discretion to look at various factors.[49] EPA's preamble discussion noted that each "may affect" determination is likely to be fact-dependent and based on situation-specific circumstances and expressed uncertainty that a list of required factors would be appropriate for implementing 401(a)(2).[50]

Recommendation: NAWM believes that a "may affect" determination is inherently fact-dependent and must reflect situation-specific circumstances. As a result, categorical determinations are inappropriate and potentially illegal, because they likely would result in inaccurate conclusions that would be inconsistent with the CWA requirement under section 401(a)(2) that EPA notify neighboring jurisdictions about the potential for a federal license or permit to affect their water quality.

In Conclusion

NAWM appreciates the opportunity to comment on EPA's consideration of implementation of CWA section 401 water quality certification, and the potential need for rulemaking. NAWM has found no evidence to support claims that the certification process is broken and therefore does not believe EPA needs to revise the certification regulations from 2023. While these comments have been prepared by NAWM with input from the NAWM Board of Directors, they do not necessarily represent the individual views of all states and Tribes. We therefore encourage your full consideration of the comments of individual states and Tribes and other state/Tribal associations. Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,



Marla J. Stelk
Executive Director
National Association of Wetland Managers

Cc: NAWM Board of Directors

[49] *Id.*
[50] *Id.*