



# National Association of Wetland Managers

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

## **Executive Director**

Portia Osborne  
500 Washington Avenue, Suite 201  
Portland, ME 04103  
(207) 892-3399

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KY Division of Water  
300 Sower Boulevard, 3<sup>rd</sup> Floor  
Frankfort, KY 40601  
(502) 782-6995

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Great Lakes, and Energy  
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(517) 331-7966

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PO Box 47600  
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NH Dept. of Environmental Services

February 17, 2026

Ms. Lauren Kasparek  
Oceans, Wetlands, and Communities Division  
Office of Water (4504-T)  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

## **Re: “Updating the Water Quality Certification Regulations,” EPA-HQ-OW-2025-2929**

Dear Ms. Kasparek:

The National Association of Wetland Managers (NAWM) submits the following comments in response to the request from the U.S. Environmental Protection Agency (EPA) for written feedback on the proposal titled “Updating the Water Quality Certification Regulations,” published on January 15, 2026.

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 state and tribal co-regulators, NAWM understands the complexity of the Clean Water Act (CWA) and the implementation challenges the Act poses. We have worked together with federal agencies in the implementation of regulatory and non-regulatory programs designed to protect waters of the United States (WOTUS), such as challenges in determining the jurisdictional status of wetlands and other waters as WOTUS, CWA section 404 permit program for dredged or fill material, state and tribal water quality standards for wetlands, and CWA section 401 water quality certification of federal licenses and permits.

CWA section 401 provides that a federal agency cannot issue a license or permit that may result in a discharge to WOTUS, 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.<sup>1</sup> If a certifying authority does not issue a section 401 water quality certification or waiver, then the federal agency cannot 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.<sup>2</sup> Those statutory goals cannot be met if regulations inappropriately limit the section 401 certification process and narrow the 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.<sup>3</sup>

### **State and Tribal Authority and Cooperative Federalism are Essential for Achieving CWA Goals.**

The primary goal of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters,”<sup>4</sup> and the Act expressly recognizes the critical and important role states and Tribes play in protecting and enhancing waters within their respective borders.<sup>5</sup> 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.<sup>6</sup> EPA most recently acknowledged this key state role in protecting water quality in its preamble to the WOTUS proposal, repeatedly mentioning how revisions to the WOTUS definition were intended to preserve the primacy of states in regulating aquatic resources.<sup>7</sup>

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<sup>1</sup> CWA Section §401(a)(1), 33 U.S.C. §1341(a)(1).

<sup>2</sup> 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).

<sup>3</sup> 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.

<sup>4</sup> CWA §101(a), 33 U.S.C. §1251(a).

<sup>5</sup> “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. §1251(b).

<sup>6</sup> CWA §510, 33 U.S.C. §1341(a).

<sup>7</sup> 90 Fed.Reg. 52498, 52518 (November 20, 2025).

The CWA adopts a cooperative federalism approach to achieving its objective of restoring and maintaining the Nation's waters, by establishing states and Tribes as co-regulators with federal agencies. For example, the statute authorizes states (and Tribes with TAS) to implement the section 402 and 404 permitting programs.<sup>8</sup> The CWA likewise establishes a role for states and Tribes with TAS in implementing several other programs that are central to achieving the Act's objective, such as administering the water quality standards program and the impaired waters and total maximum daily loads programs under section 303. Section 401 provides states and authorized Tribes with authority to review proposed federal permits and licenses that may result in a discharge into WOTUS, and to certify whether the proposed authorizations would be consistent with water quality standards and certain other CWA and state or tribal provisions.

Federal agencies may issue many types of licenses or permits that authorize discharges into waters,<sup>9</sup> creating challenges for the states and Tribes who have primary responsibility for protecting water quality within their jurisdictions. Congress in CWA section 401 expressly empowers states and authorized Tribes to independently review the water quality implications of proposed projects that require a federal license or permit because they may result in a discharge, to ensure such projects would be consistent with water quality requirements.<sup>10</sup> In other words, CWA section 401 water quality certification encompasses both the Act's recognition of state authority and its cooperative federalism approach to achieve the Act's primary goal of restoring and maintaining the integrity of the Nation's waters. Section 401 is a direct grant of authority from Congress to the states, which emphasizes the importance Congress placed on water quality certification and is in stark contrast to numerous other CWA programs such as section 402 National Pollution Discharge Elimination System (NPDES) permits that rely on an EPA decision to delegate authority with oversight.

NAWM is concerned that the Proposed Certification Rule shifts the balance of cooperative federalism embodied in section 401 in a manner inconsistent with Congress' direct grant of 401 certification authority. The proposal would place limits on the scope of certification analysis, limits on what constitutes "any other appropriate requirement of state law," limits on the ability of a state or tribal certifying authority to request information, removes additional pathways for Tribes to receive TAS, and limits on other aspects of 401 implementation. These concerns are discussed in greater detail throughout this public comment, explaining why NAWM believes the Proposed Certification Rule would reduce

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<sup>8</sup> CWA §502(7), 33 U.S.C. §362(7).

<sup>9</sup> The proposal lists several of these, including CWA section 402 NPDES permits in states where EPA administers the permitting program, CWA section 404 and RHA sections 9 and 10 permits issued by the Corps of Engineers, bridge permits issued by the U.S. Coast Guard, and hydropower and pipeline licenses issued by the Federal Energy Regulatory Commission. 91 Fed.Reg. 2008, 2012 (January 15, 2026).

<sup>10</sup> CWA §401(a), 33 U.S.C. §1341(a).

the effectiveness of 401 certification as a water quality tool and is inconsistent with the CWA.

### **Revisions to the Existing Section 401 Certification Regulations are Unnecessary.**

One issue raised by the Proposed Certification Rule is not directly called out for public comment: namely, whether the rulemaking is necessary, considering the fact states and Tribes have been successfully implementing water quality certifications under the current 401 certification regulations promulgated in September 2023.<sup>11</sup> NAWM believes a revision of current 401 certification regulations is unnecessary. NAWM has found no evidence to support claims that the certification process is broken. 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 2025. Based on 24 responses, ACWA's data indicated the average certification processing time was 77 days (approximately 2.5 months) after all necessary information was received. Thirteen 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 standard data requirements and submittal templates, hired additional staff to assist with certifications, provided clear guidance on application requirements, engaged in early and frequent communication with applicants for a 401 certification, and through state regulations have streamlined certification of nationwide general permits, embedded common conditions in regulation, and set hard time limits for review. State websites often have guidance documents and other materials to assist applicants for a certification. States also reach out directly to applicants when certification requests are incomplete. Further, many states accept the information provided in 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 indicates the certification process under the 2023 Rule is predictable and efficient. Since the 2023 Rule was promulgated with its flexibility in pre-filing meeting request timelines along with the ability to identify additional requirements within the certification request, NAWM has heard from its state and tribal members that early engagement with applicants for a certification 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

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<sup>11</sup> "Clean Water Act Section 401 Water Quality Certification Improvement Rule," 88 Fed.Reg. 66558 (September 27, 2023).

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.

**Recommendation: EPA should withdraw the proposal and the 2023 Certification Rule should remain in effect as the CWA section 401 process is not "broken." Instead of changing the regulations governing the scope and procedures of section 401, NAWM recommends EPA work with states and authorized Tribes to identify any 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.**

Input by states and Tribes to any Certification regulatory revisions is essential. In addition to being most familiar with state and tribal water quality laws and potentially affected aquatic resources, state and tribal co-regulators have over fifty years of experience implementing section 401 water quality certification programs. As a result, state and tribal perspectives are critical to ensure an updated 401 certification regulation is defensible and informed by implementation experience. NAWM appreciates EPA soliciting public comment on the Proposed Certification Rule and holding a series of listening sessions to solicit recommendations from state and tribal coregulators as well as a diverse group of stakeholders. However, while EPA did solicit Pre-Proposal input during summer of 2025, these actual proposed rule changes were developed without state and tribal collaboration who along with the public have only been provided a 30-day comment period. NAWM has significant concerns about the Proposed Rule changes that limit state and Tribes' authority to protect their waters.

**Recommendation: When developing any updated 401 certification regulations or guidance, EPA should hold a series of interactive regional working meetings with states and Tribes. Meaningful engagement means actual collaborative discussion.** NAWM encourages EPA to reach out to state governors and tribal leaders to invite them or their designees to participate in a future workshop or workshops focused on certification implementation challenges and opportunities.

Should EPA proceed with the proposal, NAWM submits the following additional comments for consideration. NAWM encourages EPA to work together with states and Tribes with TAS in a productive manner to support cooperative federalism and the chemical, physical, and biological integrity of the state, tribal, and Nation's waters.

### **Proposed Changes to Section 401 Certification Regulations.**

EPA's proposed "Updating the Water Quality Certification Regulations" seeks comments on numerous regulatory approaches to CWA section 401, including provisions affecting state

and tribal implementation of section 401 certification, as well as when EPA acts as a certifying authority.

NAWM has chosen to focus its comment letter on issues identified as key by our state and tribal members, and where we can offer information and perspectives helpful for ensuring final 401 certification policy decisions are consistent with CWA goals. NAWM's comments focus primarily on provisions affecting state and tribal certifying authorities, including:

1. Request for Certification
2. Timeframe for Certification Analysis and Decision
3. Appropriate Scope for Section 401 Certification Review
4. Contents of a Certification Decision
5. Modifications
6. Section 401(a)(2) Process
7. Treatment in a Similar Manner as a State (TAS)
8. Enforceability of Certification Conditions
9. Other Clarifying and Confirming Revisions

Issues which NAWM is not addressing in this letter should not be interpreted as areas where NAWM has no concerns. NAWM is encouraging its state and tribal members to comment directly and provide additional specifics and information.

### **1. Request for Certification**

CWA section 401 does not describe the contents of a request for certification. Section 401 is a direct grant of authority to states to certify federal licenses or permits that may result in a discharge to WOTUS, and to attach conditions to certifications where necessary. Because of this direct grant of authority from Congress to states, Congress strongly indicated that EPA's authority to prescribe processes for state certification programs is limited to those elements explicitly laid out by Congress in the CWA (such as the Reasonable Period of Time (RPT) is not to exceed one year).<sup>12</sup>

#### **1(a) -- Data Required for a Request for Certification.**

EPA's 2023 401 certification regulations currently in effect provide a list of seven categories of information that, at a minimum, a request for certification must include before the RPT begins and the clock starts for a certifying authority to complete its 401 certification analysis.<sup>13</sup> In addition to the minimum seven categories, the current

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<sup>12</sup> CWA §401(a), 33 U.S.C. §401(a).

<sup>13</sup> 88 Fed.Reg. 66558, 66574 (September 27, 2023). The list of required minimum information includes : (a) A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity; (b) The specific location of any discharge(s) that may result from the proposed activity; (c) A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways; (d) A description of current activity site conditions, including but not

regulations allow state or tribal certifying authorities to define the additional contents of a request for certification in lieu of relying on EPA's default list.<sup>14</sup> In contrast, under the Proposed Rule a request for certification would be deemed sufficient and start the RPT, once the request includes EPA's minimum required contents,<sup>15</sup> regardless of whether the certifying authority has the information necessary to evaluate water quality impacts. The proposal does not allow state or tribal certifying authorities to add to the list of required contents for a certification application. NAWM believes the proposed minimum requirements would be insufficient to support meaningful section 401 review in many cases and likely will result in many requests for certification that include insufficient data for the certifying authority to undertake a certification analysis. Results for such requests likely will be certification denial and its associated delay and prohibition on proposed projects.

NAWM is concerned that the Proposed Rule would significantly limit state and tribal certifying authorities' ability to ensure that certification requests contain sufficient information to evaluate compliance with water quality requirements. In particular, NAWM is concerned with EPA's proposal to remove 40 C.F.R. § 121.5(c), which currently allows certifying authorities to identify additional information necessary before a request for certification is deemed sufficient to start the RPT, and to instead limit required request contents to a minimum list defined exclusively by EPA. Of significant concern is the Proposed Rule's statement that a) only available information and b) only the point source discharge location, not the entire project area, is all that would be required about the proposed project and its aquatic resource impacts. For example, the Proposed Rule would not require applicants for a certification to provide, at the time the RPT begins, information identifying WOTUS or other waters potentially affected by the discharge; sufficient detail regarding the nature, constituents, or magnitude of the proposed discharge(s), or adequate descriptions of construction methods or operational activities that may affect water quality. The Proposed Rule also would not require submission of plans for use of best

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limited to relevant site data, photographs that represent current site conditions, or other relevant documentation; (e) The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence; (f) A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and (g) Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing meeting request requirement was waived. 40 CFR 121.5.

<sup>14</sup> 88 Fed.Reg. 66558, 66574 (September 27, 2023), discussing 40 C.F.R. § 121.5(c).

<sup>15</sup> 91 Fed.Reg. 2008, 2017 (September 27, 2023), discussing required content of a Request for Certification. The Proposed Rule's regulatory text indicates a Request for Certification must contain (a) a copy of the federal license or permit application or a copy of the draft permit or license; (b) any readily available water quality-related materials on any potential discharges that informed development of the application or draft license or permit; (c) additional project information if not already included in the Request that is applicable, including a (i) description of the proposed discharge, (ii) specific location of any discharge that may result from the federally licensed or permitted activity, (iii), a map or diagram of the proposed discharges, (iv) description of current site conditions where discharges are proposed, and (v) documentation that a pre-filing meeting request was submitted unless waived. Proposed 40 C.F.R. §121.5.

management practices, spill prevention and counter measures, stormwater management, and compensatory mitigation or other information necessary to demonstrate compliance with applicable state or tribal water quality requirements, including wetland protection requirements, at the outset of the certification review. No certifying authority can complete a defensible section 401 review without this information. As a result, certifying authorities will be forced to request critical information after the RPT has already begun, increasing the likelihood of rushed reviews, denials based on incomplete information, or inadvertent waivers if information cannot be obtained within the RPT.

The Proposed Rule would require applicants for a certification to submit only “readily available” water quality-related materials that “informed the development of the application or draft Federal license or permit.”<sup>16</sup> NAWM is concerned that this standard is inherently applicant-controlled and incentivizes minimal upfront analysis. If an applicant did not evaluate downstream water quality impacts, seasonal conditions, biological resources as part of analyzing the proposed discharge or its reasonable impacts during development of the federal application, those data would not be required to be submitted with the certification request, even if they are critical to a certifying authority’s analysis. This approach effectively shifts the burden to certifying authorities to identify and request essential information after the RPT has started, rather than ensuring that adequate information is provided upfront. It may be necessary to collect additional data on waters (including wetlands) that may be affected by the discharge, in order to accurately complete the analysis called for by section 401. Review and a certification decision would be unnecessarily delayed while the certifying authority requests and waits for this basic additional information, likely leading to more denials due to lack of information.

NAWM is also concerned that allowing applicants for a certification to redact or exclude “other sensitive information,” in the absence of clear parameters, could result in the withholding of technical or site-specific information necessary for certification review. Most agencies have their own procedures for restricting confidential or proprietary information from the public, but the information may be necessary for the certifying authority to complete its review.

The Proposed Rule calls for submission of additional project information only “as applicable,” but does not clearly identify who determines applicability or what criteria govern that determination.<sup>17</sup> In practice, this ambiguity is likely to default to the applicant’s interpretation or to the scope of the federal application, rather than the certifying authority’s water quality requirements and the “applicable information” decided upon will likely often be inadequate. Completion of the certification review and decision would thus

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<sup>16</sup> 91 Fed.Reg. 2008, 2017 (January 15, 2026).

<sup>17</sup> 91 Fed.Reg. 2008, 2017 (January 15, 2026), discussing proposed 40 C.F.R. §121.5(c).

be delayed, possibly also resulting in a denial due to lack of information provided in a timely manner during the review period.

For complex projects involving multiple federal permits or phased construction, cross-referencing incomplete or fragmented application materials will be burdensome and inefficient, increasing staff review time and complicating certification analyses. This burden will be particularly acute for general permits, where discharge locations and site-specific impacts may not be fully defined at the time of the request for certification, creating legal risk and uncertainty for certifying authorities.

NAWM is particularly concerned that the Proposed Rule would require certifying authorities to begin the RPT without critical information needed to evaluate water quality impacts. Many states and Tribes currently coordinate with federal agencies to establish RPTs that begin only once an application is complete under state or tribal law. These practices promote cooperative federalism, efficiency, predictability, and defensible decision-making. By requiring the RPT to begin upon receipt of a minimally sufficient request as defined by EPA, the Proposed Rule would materially alter longstanding certification practices and create significant implementation challenges for certifying authorities. Beginning the RPT before essential information is available also heightens the risk of inadvertent waivers or denials where information gaps cannot be resolved within the allotted timeframe. In addition, the Proposed Rule would shift increased reliance to pre-filing meetings to identify information needs, despite the fact that such meetings are not enforceable and, in practice, are inconsistently used.

**Recommendation: EPA should retain the 2023 Certification Rule’s approach to defining required contents of a request for certification, including allowing state and tribal certifying authorities to determine what additional information should be required for 401 requests within their state or tribal territory as necessary to support certification decisions.** NAWM further recommends that EPA retain regulatory language currently in effect regarding required certification request contents and delete the proposed “readily available” and “additional information, as applicable”, which would unnecessarily constrain the information provided to certifying authorities and incentivize minimal upfront analysis by applicants. Similarly, EPA should not include the proposed provision allowing applicants to redact or exclude any information it considers “sensitive.”

1(b) -- Changing Terms from “Project Proponent” to “Applicant.”

The Proposed Rule indicates it will use the term “applicant” to refer to the individual responsible for obtaining certification, instead of “project proponent,” the term used in the current 401 certification regulations.<sup>18</sup> This proposed change may initially seem to have no substantive consequence, but nonetheless may cause substantial confusion about what

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<sup>18</sup> 91 Fed.Reg. 2008, 2009 fn. 2 (January 15, 2026).

federal licensing or permitting actions would be subject to 401 certification. For example, it becomes unclear if the Proposed Rule would continue to require certification for general permits and other situations where there may be no specific applicant at the time the general permit is established. Similarly, it becomes unclear if certification would continue to be required when a federal agency is the project proponent, such as with Army Corps of Engineers civil works projects or dredging projects, where the Corps does not apply for an authorization from themselves but nonetheless must comply with the CWA and other applicable laws.

General permits authorize a group of similar discharges from a variety of future project proponents that affect water quality, such as EPA's CWA section 402 vessel general permit,<sup>19</sup> EPA's CWA section 402 general permit for fish farms on the Columbia River,<sup>20</sup> and the Army Corps of Engineers' nationwide general permits (NWP), as well as numerous Regional General Permits. General permits are used to streamline permit authorization for categories of activities, and as with NWPs, are intended to result in no more than minimal adverse impacts individually or cumulatively.<sup>21</sup> To date, section 401 certification has been required for these federally issued general permits at the point they are initially issued, to ensure water quality requirements are in fact met on an individual and cumulative basis. Army Corps of Engineers' NWPs routinely require regional conditions as well as each of the relevant state and tribal 401 water quality certifications to ensure these general permits actually do not cause more than minimal adverse impacts. Additionally, general permits may require certification from more than one certifying authority if their geographic scope includes more than one state or tribal jurisdiction. If a state or Tribe does not certify a general permit, longstanding practice has been for a project proponent wishing to be covered under the general permit to seek a project-specific 401 certification from the state or Tribe where their discharge would occur. In these circumstances there would be an "applicant" for that specific individual authorization, but that would not be the case at the time the general permit is initially issued or reauthorized. Also, if a project proponent is unable to comply with the conditions of an issued certification of a general permit and is therefore required to obtain a project-specific 401 certification, but the activity otherwise qualifies for coverage under a non-reporting general permit, there may be no identifiable "applicant," creating uncertainty as to whether and how section 401 certification requirements would apply.

As noted in the preamble, there are no individual applicants for a certification associated with an entire suite of activities under a general permit at the time the permit is issued.<sup>22</sup>

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<sup>19</sup> "Vessel Incidental Discharge National Standards of Performance," 89 Fed. Reg. 82074 (Oct. 9, 2024).

<sup>20</sup> NPDES General Permit for Tribal and Federal Aquaculture Facilities (WAG130000).

<sup>21</sup> CWA §404(e), 33 U.S.C. §1344(e).

<sup>22</sup> 91 Fed.Reg. 2008, 2021 (January 15, 2026) ("...general permits do not involve an "applicant," such as the issuance of nationwide and regional general permits for dredged and fill material issued by the Corps... [t]here are also instances where individual projects do not involve an "application," such as the Corps' civil works projects...")

However, the scope of future authorizations under the general permit may be numerous with the potential for cumulative impacts that cannot be known up front. NAWM strongly believes the Proposed Rule should not eliminate the requirement for 401 certification when federal agencies issue general permits. Approximately 95% of the Corps of Engineers' regulatory workload is processed under general permits, including NWP's.<sup>23</sup> To exclude general permits from 401 certification requirements would be inconsistent with the language and goals of the CWA, and in the case of NWP's would make it virtually impossible for states and Tribes to meet water quality requirements if NWP's were not subject to certification in light of their very broad use. Section 401 certification is triggered by a federal license or permit that may result in a discharge to WOTUS, regardless of whether the authorization is an individual permit with a clear applicant or a general permit authorizing future projects of a similar nature.

Similarly, NAWM believes that when a federal agency is itself the project proponent the associated discharge is subject to 401 certification because the CWA explicitly provides the activity is subject to all federal, state, interstate, and local requirements, processes, and sanctions.<sup>24</sup> Many federal agency projects may result in a discharge even if the agency does not issue itself a permit or license authorizing the discharge. Longstanding practice has been for those federal agency projects to be subject to 401 certification because of their potential impacts on water quality. For example, civil works projects by the Corps of Engineers require a certification.<sup>25</sup> In short, section 401 establishes "requirements" and "processes" that federal discharging activities are subject to by the clear terms of the CWA.

**Recommendation: EPA should retain the term "project proponent" and not replace it with "applicant," and indicate that general permits and other situations where there is no applicant continue to be subject to 401 certification, as do federal projects where a federal agency is the project proponent and does not issue itself a permit or license.** <sup>26</sup>

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<sup>23</sup> See Corps of Engineers Institute for Water Resources "Regulatory: Permits," found at: [Regulatory: Permits](#)

<sup>24</sup> CWA §313(a), 33 U.S.C. §1313(a). ("Each department, agency, or instrumentality ... of the Federal Government ... engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants ... shall be subject to, and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity... The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.")

<sup>25</sup> 33 C.F.R. §336.1(a)(1), "The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S.", 33 C.F.R. §335.2 ("The Corps does not issue itself a CWA permit to authorize Corps discharges of dredged material or fill material into U.S. waters but does apply the 404(b)(1) guidelines and other substantive requirements of the CWA and other environmental laws.")

<sup>26</sup> Consistent with this recommendation, note that the remainder of NAWM's letter will use "project proponent" to mean an entity applying for a section 401 certification necessary to receive a license or permit for the project, including instances where the Proposed Rule would use the term "applicant."

## 2. Timeframe for Certification Analysis and Decision

The Proposed Rule would add regulatory text in 40 CFR §121.6(e) providing that the certifying authority may not request the project proponent to withdraw a request for certification or take any action to extend the RPT (which the statute limits to one year or less).<sup>27</sup> The Proposed Rule does not place similar limitations on a project proponent's withdrawal and resubmission of a certification request.

NAWM is concerned that the Proposed Rule would eliminate long-standing state and tribal administrative practices related to withdrawal and resubmittal of certification requests, while simultaneously codifying project proponent-driven mechanisms that allow for strategic withdrawal and resubmittal to avoid denials. Certifying authorities have historically used administrative withdrawal procedures not to avoid exceeding the RPT, but to manage certification requests that are incomplete, lack information necessary to support a certification decision, involve large and highly complex projects requiring Environmental Impact Statements, or where the project proponent has failed to respond to information requests in a timely manner or at all. The Proposed Rule's prohibition on certifying authorities requesting withdrawal in these circumstances, combined with the CWA section 401 one-year limitation on certification review, would deprive states and Tribes of an essential administrative tool for ensuring that certification decisions are based on sufficient information. Without the ability to use administrative withdrawal procedures, a certifying authority will have little recourse but to deny the certification.

NAWM does not believe the proposed revisions to 40 CFR 121.6(e) resolve the regulatory uncertainty identified by stakeholders. Rather, the proposed approach would replace existing well-understood state and tribal administrative practices with a framework that increases uncertainty, limits certifying authority discretion, and incentivizes strategic project proponent behavior.

Many states and authorized Tribes have established regulatory or administrative procedures that allow certifying authorities to administratively withdraw or reject applications that are incomplete or otherwise insufficient to support a certification decision. Historically, such withdrawals occurred because a complete request, as defined under state or tribal law, had not yet been received, and therefore the RPT had not begun. By instead defining request contents exclusively at the federal level and requiring the RPT to begin once those minimum requirements are met, the Proposed Rule would effectively eliminate state and tribal discretion to manage incomplete requests through administrative withdrawal.

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<sup>27</sup> CWA §401(a), 33 U.S.C. §1341(a) ("a reasonable period of time (which shall not exceed one year) after receipt of [a certification] request.")

NAWM is concerned that removal of this authority would deprive certifying authorities of a critical tool for managing certification reviews in a predictable and orderly manner. Without the ability to administratively withdraw or reject incomplete requests, certifying authorities will be back to where they were under the 2020 401 Certification Rule and forced to deny certification solely due to information gaps that cannot be resolved within the RPT. This outcome would increase the number of denials not because projects are inconsistent with applicable water quality requirements, but because certifying authorities are unable to obtain necessary information within a constrained review window to make a determination of compliance with their water quality requirements. Such an outcome would represent a significant departure from longstanding certification practice, as many NAWM member programs historically issue few, if any, denials and rely on administrative processes to resolve information deficiencies prior to decision-making.

At the same time, the Proposed Rule expressly allows project proponents to withdraw and later resubmit certification requests, thereby codifying a project proponent-driven reset mechanism.<sup>28</sup> NAWM is concerned that this asymmetry creates incentives for strategic withdrawals by project proponents seeking to avoid denial, pressure certifying authorities, or restart review timelines, while denying states and Tribes comparable administrative tools to manage incomplete requests. This approach undermines certainty for certifying authorities and erodes clarity regarding when certification review timelines are final.

NAWM also notes that EPA's discussion of *Hoopa Valley Tribe v. FERC* and *Village of Morrisville v. FERC* does not compel the proposed outcome. Those cases addressed circumstances involving coordinated, repetitive withdrawals intended to indefinitely delay federal licensing decisions. The cases need not compel EPA to eliminate state and tribal authority to manage incomplete certification requests through administrative withdrawal where no complete request has been submitted or where necessary information has not been provided. Treating all withdrawals as functionally equivalent, regardless of purpose or procedural posture, risks extending those decisions beyond their facts and intent.

**Recommendation: EPA should preserve state and tribal authority to administratively withdraw or reject incomplete certification requests where information necessary to support a certification decision has not been provided.** EPA should also avoid codifying project proponent-driven withdrawal and resubmittal mechanisms that incentivize strategic behavior and create uncertainty for certifying authorities. Clarifying that the RPT begins only after a certifying authority has received a certification request that includes all necessary information, as determined by state or tribal procedures, would better align the rule with longstanding practice, cooperative federalism principles, and the purpose of CWA section 401.

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<sup>28</sup> 91 Fed.Reg. 2008, 2022 (January 15, 2026).

### 3. Appropriate Scope of Certification

Congress did not provide a single unambiguous definition of the appropriate scope of section 401.<sup>29</sup> This letter addresses three issues about scope of 401 in this Proposed Rule: (a) whether a certifying authority may consider effects of the “activity as a whole” or are limited to just the discharge, (b) what “water quality requirements” of state or tribal law may be considered, and (c) alternative issues that are not proposed but on which EPA seeks comment.

#### 3(a) -- Proposed Focus on “Discharge,” Rather than the Project as a Whole.

The 2023 Certification Rule expressly focused not just on impacts of a proposed discharge but on water quality effects of the “activity as a whole.”<sup>30</sup> In contrast, the Proposed Rule would limit the scope of certification to “assuring that a discharge from a federally licensed or permitted activity will comply with applicable and appropriate water quality requirements,”<sup>31</sup> while proposing that “discharge” means point source discharges.<sup>32</sup>

This precise issue was addressed by the U.S. Supreme Court in the 1994 decision, *P.U.D. No. 1 of Jefferson County v. Washington Dept. of Ecology*.<sup>33</sup> In *Jefferson County PUD*, the Court held that the appropriate scope of section 401 certification analysis encompassed the project as a whole and was not limited to water quality controls specifically tied to a discharge.<sup>34</sup> 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.’”<sup>35</sup> 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.”<sup>36</sup> In other words, the Supreme Court interprets the full scope of section 401 as broader than the initial discharge to WOTUS that triggers the requirement for a federal license or permit. Once a federal license or permit is required, then the entire scope of the overall project and its associated activities are within the purview of the certifying authority’s consideration.

States and Tribes rely on their ability to condition 401 certifications to ensure specific project-related construction and operation activities do not violate water quality

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<sup>29</sup> See, e.g., 85 Fed.Reg. 42210, 42250 (June 13, 2020).

<sup>30</sup> “Clean Water Act Section 401 Water Quality Certification Improvement Rule,” 88 Fed.Reg. 66558 (September 27, 2023).

<sup>31</sup> Proposed 40 C.F.R. §121.3, discussed in 91 Fed.Reg. 2008, 2023-2028 (January 15, 2026).

<sup>32</sup> 91 Fed.Reg. 2008, 2017 *fn*, 27 (January 15, 2026).

<sup>33</sup> *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994).

<sup>34</sup> *Id.* at 711.

<sup>35</sup> *Id.* at 711.

<sup>36</sup> *Id.* at 711-712.

requirements. Examples of the type of discharges potentially affecting water quality that certifying authorities often consider include: accidental discharges from failures in fracking, landslides, leaks from pipelines, inadvertent return water, contaminated soils or waters, improperly following approved plans, leaching (from mines or when building on landfills), incidental discharges from dredging and spills from trans-loading facilities, prop wash from barges or vessels, and erosion runoff from site development or mitigation activities<sup>37</sup> Conditions can outline the measures to take in the event of an unintended discharge or ensure that authorized activities and associated discharges are conducted in a specified manner that the certified entity and regulatory agency understand, while without these measures the project proponent can be held liable for water quality violations and be subject to additional and costly remedial measures.

NAWM notes that water quality impacts from discharges and their constituents result from how activities are conducted, including construction techniques, operations, and remedial measures. It is not possible to review the effects of a discharge, and how they can be minimized, without considering these critical factors. **Recommendation: EPA should include language that clearly states that all activities that may result in a discharge are within the scope of the 401 certification decision process.** An inability to impose relevant conditions on activities and associated discharges likely would result in denials of certification where otherwise the certification could have been issued with conditions.

NAWM agrees with the Supreme Court's ruling in *Jefferson County PUD No. 1* and believes EPA's interpretation in the Proposed Rule to be incorrect. In the preamble to the Proposed Rule, EPA explains that while the *Jefferson County PUD* decision upheld one interpretation of CWA section 401 as reasonable, that does not preclude the Agency from adopting a different interpretation. Citing the *Loper Bright* decision that eliminated *Chevron* deference to an agency's interpretation, EPA in effect argues that its new interpretation of 401 scope

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<sup>37</sup> State and tribal certifying authorities historically have considered many types of discharges associated with the project-related activity that potentially affect compliance with water quality requirements. These potential discharges might occur during either construction or operations. Illustrative examples, in addition to those identified above, include: (1) Earthmoving, Grading, and Excavation: These activities expose soil to wind and water, leading to high-volume sediment runoff that clogs waterways and smothers aquatic habitats; (2) Improper Concrete Truck Washout: Concrete washout contains high pH, heavy metals, and suspended solids that can be toxic to fish and aquatic life if they enter storm drains; (3) Fueling and Equipment Maintenance: Spills or leaks of fuel, oil, and grease from machinery can wash into water bodies; (4) Dewatering Operations: Removing groundwater during excavation can introduce contaminated groundwater, silt, or sediment into surface waters; (5) Demolition and Debris Handling: Loose debris (paint, wood, masonry, drywall) can enter storm drains and cause nutrient releases; (6) Underground Utility Installation/Vibration: Activities such as pile driving or trenching can break existing pipes, cause water main breaks, and disturb biofilms that contaminate water supplies; (7) Impervious Surface Runoff: Finished surfaces like parking lots and roofs prevent water infiltration, increasing the velocity and volume of runoff, which picks up oils, grease, and heavy metals; (8) Lack of Commissioning/System Maintenance: Failure to properly flush, disinfect, and monitor water distribution systems during start-up can lead to biofilm growth and poor water quality; (9) Storage of Materials Outside: Storing hazardous chemicals, paints, solvents, and fertilizers outside allows contaminants to leach into stormwater; and (10) Improper Waste Disposal: Dumping liquid or solid waste into drains and waterways.

is entitled to deference and may override a longstanding Supreme Court decision.<sup>38</sup> NAWM observes *Loper Bright* calls for courts to “exercise independent judgement in determining the meaning of statutory provisions,”<sup>39</sup> a holding that EPA ironically uses as a basis for overturning the Supreme Court. Justice Stevens concurrence in *Jefferson County PUD* is instructive in this regard:

“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).”<sup>40</sup>

**Recommendation: EPA should indicate the scope of analysis for 401 certification is the project as a whole, such as construction and operation activities, and not just the discharge triggering the need for a federal license or permit.** This approach allows consideration of a broader range of water quality-related issues, such as nonpoint source impacts likely to arise under the project. This approach also is consistent with the U.S. Supreme Court interpretation in *Jefferson County PUD*, is well-understood because of the decades of experience implementing *Jefferson County PUD*, and is consistent with the broader goals of the CWA and of section 401 as an effective water quality protection tool. If the EPA wishes a different interpretation of the CWA and the scope of section 401, its remedy is to seek legislative change through Congress.

### 3(b) -- Interpretation of “Other Appropriate Requirements of State Law.”

CWA section 401 requires certifying authorities to consider the extent to which a proposed project's discharge will be consistent with enumerated CWA sections and “other appropriate requirements of state law,” but does not define what are considered to be “other appropriate requirements.”<sup>41</sup> The Proposed Rule defines “water quality requirements” as “applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and applicable and appropriate state or tribal water quality-related regulatory requirements for discharges.”<sup>42</sup> When read with the definition of “discharge” as meaning a discharge from a point source into WOTUS,<sup>43</sup> this proposed definition is a narrowing of the statutory definition of “other appropriate provisions of state law.” This is

<sup>38</sup> *Loper Bright v. Raimondo*, 603 U.S. 369 (2024), discussed at 91 Fed.Reg. 2008, 2015 (January 15, 2026).

<sup>39</sup> *Id.* at 394.

<sup>40</sup> *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 411 U.S. 700 (1994), Stevens, J., concurring.

<sup>41</sup> CWA §401(a), §401(d), 33 U.S.C. §1341(a), §1341(d).

<sup>42</sup> Proposed 40 C.F.R. §121.1(f), discussed at 90 Fed.Reg. 2008, 2026 (January 15, 2026).

<sup>43</sup> Proposed 40 CFR §121.1(c), discussed at 90 Fed.Reg. 2008, 2026-7 (January 15, 2026).

substantially narrower from the 2023 section 401 certification regulations currently in effect, which interprets the term “other appropriate requirements of state law” to broadly mean “other water quality-related requirement of state or tribal law.”<sup>44</sup>

The Proposed Rule’s definition essentially returns to EPA’s definition of “water quality requirements” from the vacated 2020 Certification Rule.<sup>45</sup> NAWM believes this proposed definition is inappropriately narrow due, in part, to its focus on only point source discharges and WOTUS. The CWA includes specific language providing broad authority to states and Tribes. For example, section 401(b) contains nothing that limits the authority of states or Tribes to require compliance with any applicable water quality requirements, such as applicable effluent and other limitations, water quality standards, other regulations or requirements, or water quality criteria.<sup>46</sup> Section 401(d) indicates any certification shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to ensure any project proponent for a federal license or permit will comply with any applicable requirements and “with any other appropriate requirement of State law ... and shall become a condition on any Federal license or permit.”<sup>47</sup> CWA section 510 establishes the right of any state to adopt or enforce any standard or limitation respecting discharges of pollutants so long as the standards or limitations are at least as stringent as federal requirements.<sup>48</sup>

Nothing in the CWA expressly precludes certifying authorities from imposing appropriate conditions to protect water quality and ensure that discharges into Waters of the State or Tribe will not violate water quality requirements. Indeed, such conditions are compelled by the text of section 401: “...such limitations ... shall become a condition on any Federal license or permit...”<sup>49</sup> EPA historically has deferred 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.<sup>50</sup>

EPA’s view in recent years has been that a discharge that triggers section 401 certification must be from a point source.<sup>51</sup> However, the breadth of section 401 indicates that even if the Agency considers a point source discharge as a threshold requirement for 401 (despite no such requirement in CWA text), states and authorized Tribes nonetheless may evaluate a broader scope of considerations when developing appropriate conditions under section

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<sup>44</sup>40 C.F.R. §121.1(j).

<sup>45</sup> See 85 Fed.Reg. 42210, 42285 (July 13, 2020), and its 40 C.F.R. §121.1(n) defining “water quality requirements: as meaning “applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.”

<sup>46</sup> CWA §401(b), 33 U.S.C. §1341(b).

<sup>47</sup> CWA §401(d), 33 U.S.C. §1341(b).

<sup>48</sup> CWA §510, 33 U.S.C. §1370.

<sup>49</sup> CWA §401(d), 33 U.S.C. §1341(d).

<sup>50</sup> See, e.g., the Proposed Rule discussion regarding appropriate provisions of state or tribal law, 87 Fed.Reg. 35318, 35349 (June 9, 2022).

<sup>51</sup> See, e.g., 88 Fed.Reg. 66558, 66567 (September 27, 2023).

401(d), including those posed by nonpoint sources. Consistent with Congress’s intent to empower states to protect their waters from the effects of federally licensed or permitted projects, section 401 “assure[d] that Federal licensing or permitting agencies cannot override State water quality requirements.”<sup>52</sup> As CWA section 305(b) and other water quality assessments indicate, nonpoint sources remain a major source of water quality impairment.<sup>53</sup>

For similar reasons, state and tribal certifying authorities should be able under section 401(d) to consider the effects of proposed federal permits and licenses on Waters of the State or Tribe that are not WOTUS. Under the 401 Certification Rule currently in effect, certifying authorities may consider waters beyond WOTUS when certifying compliance with requirements of state or tribal law that otherwise apply to Waters of the State or Tribe beyond WOTUS.<sup>54</sup> EPA has recognized the primary responsibility of states and Tribes to protect their aquatic resources. For example, the recent WOTUS proposal emphasized that states and Tribes have both responsibility and authority to protect their waters:

“With the proposed [WOTUS] definition, the agencies seek to avoid “impairing or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such States.” See 33 U.S.C. 1370. States and Tribes are free to address rivers, lakes, streams, ponds, and other features that do not meet the definition of ‘relatively permanent’ as “waters of the State” or “waters of the Tribe’ under their own laws to the extent they deem appropriate.”<sup>55</sup>

This assurance from EPA about state and tribal ability to protect their waters rings hollow if states and Tribes cannot consider impacts on their waters when certifying a federal license or permit under section 401.

If there is dispute over what is appropriate, the final decision should be made by the courts. Thus, it is not consistent with the CWA to limit “other appropriate requirements of State law” to only regulatory water quality requirements related to point sources and for EPA to make the decision on what is appropriate.

**Recommendation: EPA should define “other appropriate requirements of State law” under CWA section 401(d) as including discharges from both point and nonpoint sources and not limit 401(d) water quality considerations to WOTUS only.**

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<sup>52</sup> S.Rep. No. 92-414, at 69 (1971), quoted at 88 Fed.Reg. 66558, 66561 (September 27, 2023).

<sup>53</sup> See, e.g., “National Water Quality Inventory Report to Congress,” available at [National Water Quality Inventory Report to Congress | US EPA](#)

<sup>54</sup> 88 Fed.Reg. 66558, 66604 (September 27, 2023).

<sup>55</sup> 90 Fed.Reg. 52498, 52523 (November 20, 2025).

### 3(c) -- Comments on Policy Options Not Currently Proposed Affecting Scope of 401 Review.

The Proposed Certification Rule preamble seeks comments on several potential policies that EPA currently is not proposing but nonetheless might be reflected in a Final Rule. These include (1) limiting “water quality requirements” to only numeric water quality criteria, (2) limiting state or tribal water quality requirements to listed CWA programs, and (3) limiting water quality requirements to only monitoring requirements. For the reasons discussed below, NAWM believes these potential changes would be inconsistent with the CWA and its goals.

The proposal asks for comment on whether EPA should limit “water quality requirements” to only numeric water quality criteria.<sup>56</sup> Water quality criteria indicate the quality of water consistent with the water’s designated use (such as drinking water, fishing, swimming, agriculture) and are a key component of water quality standards. Numeric criteria work when the target for control is a single pollutant and can be articulated in terms of numeric concentrations of the pollutant (such as five parts per billion). In contrast, narrative criteria are qualitative descriptive statements that establish the desired condition of a waterbody, such as being “free from” toxins, sludge, scum, or other pollutants that could interfere with attaining designated uses. Unlike numeric criteria, narrative criteria protect aquatic life and human health from diverse pollutants and can serve as the basis for controlling pollutants where specific numeric limits are hard to define.

NAWM does not support limiting water quality requirements to only numeric water quality criteria. The CWA was deliberately drafted with broad, flexible language to enable states and Tribes to use section 401 certification to address the unique challenges and conditions of their water resources. Limiting water quality requirements to only numeric water quality criteria would not be consistent with state and tribal authority established by the CWA to develop water quality standards that incorporate either numeric or narrative standards depending on which would most effectively address the water quality challenge at hand. Water quality standards are typically reflective of specific regional or contextual considerations and may be numeric, narrative, or both. Although many standards relate to discharges, others address water quality impacts through broader considerations.

CWA section 304 calls upon EPA to develop and publish criteria for consideration by states and Tribes as they develop water quality standards.<sup>57</sup> Both numeric and narrative criteria are widely used in standards to protect the quality of rivers, lakes, streams, and other flowing waters. Many states have developed narrative nutrient criteria, such as Florida, Maine, Montana, and New Mexico. Narrative nutrient criteria are qualitative, “free from” water quality standards that prohibit nutrient concentrations from causing undesirable

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<sup>56</sup> 91 Fed.Reg. 2008, 2027 (January 15, 2026).

<sup>57</sup> CWA §304(a), 33 U.S.C. §1314(a).

aquatic life, nuisance species, or ecological imbalance. Unlike specific numeric limits, these standards rely on assessments of ecological responses—such as algal blooms or low dissolved oxygen—to determine impairment. They are used for regulatory compliance, permitting, and protecting water bodies where numerical thresholds are not yet established or applicable.

Currently, no state has numeric water quality standards specific to wetlands. Instead, many states rely on narrative water quality standards to protect wetlands and address wetland-specific impacts that are difficult to quantify, such as excessive stormwater, altered hydrology, and the introduction of sediment which can negatively impact aquatic life. Importantly, EPA itself has long recognized the necessity and appropriateness of narrative criteria for wetlands. EPA guidance from 2016 explicitly recommends that states and Tribes develop narrative water quality standards for wetlands, noting that “given the complex spatial and temporal heterogeneities of these unique ecosystems, narrative (rather than numeric) criteria may be the best approach for states when first developing water quality standards for wetlands.”<sup>58</sup> Similarly, EPA’s webpages on water quality standards for wetlands similarly emphasize the importance of narrative criteria,<sup>59</sup> and provide templates for narrative wetland water quality standards as a tool to assist states and Tribes in their development.<sup>60</sup> Restricting 401 certification “water quality requirement” considerations to only numeric criteria would be inconsistent with the CWA, such as sections 401(b), 401(d), 303c(2)(b), 303(a), and 510 which clearly mention “other limitations” beyond just numeric criteria. These other limitations or criteria would include narrative criteria for which conditions would be needed to ensure that discharges meet designated uses under water quality standards. This is made clear in CWA section 303 granting states the authority to develop water quality standards:

“Whenever the State revises or adopts a new standard, such ... revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial,

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<sup>58</sup> EPA, “Narrative Templates for Wetland Water Quality Standards Frequently Asked Questions,” EPA 820-B-16-001 (May 2016), available on February 13, 2026, at: [Narrative Templates for Wetland Water Quality Standards Frequently Asked Questions](#)

<sup>59</sup> See, e.g., EPA website [Templates for Developing Wetland Water Quality Standards | US EPA](#), which states “[e]stablishing narrative criteria is typically the best approach when first developing water quality standards for these complex [wetland] waters.” Accessed on February 13, 2026.

<sup>60</sup> See [Templates for Developing Wetland Water Quality Standards | US EPA](#).

and other purposes, and also taking into consideration their use and value for navigation.”<sup>61</sup>

The CWA provides that where “numerical criteria are not available,” a state “shall adopt criteria based on biological monitoring or assessment methods... [n]othing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods ...”<sup>62</sup> A policy of limiting “water quality requirements” to numeric criteria only would limit and delay the use of narrative criteria, expressly prohibited by the CWA.

**Recommendation: EPA should not limit “water quality requirements” to numeric criteria alone, but instead respect state and Tribes as coregulators responsible for protecting their waters and wetlands and develop their water quality standards, such as designated uses, narrative criteria, and numeric criteria as they deem appropriate, using authorities derived from both the CWA and state and tribal law.**

The proposal asks for comment on whether EPA should limit “water quality requirements” to include only CWA provisions listed in section 401’s statutory text.<sup>63</sup> The CWA includes many state responsibilities and authorities that implement the Act’s programs, such as water quality standards developed by states and Tribes that are reviewed by EPA. Section 401 lists CWA provisions that shall be among the considerations of a 401 certification analysis, including 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), as well as “any other appropriate requirement of state law.”<sup>64</sup> NAWM does not support defining “water quality requirements” as including only the listed CWA provisions. A policy limiting 401 certification considerations to only the listed CWA provisions and ignoring the inclusion of “any other appropriate requirement of state law” would be inconsistent with the statute. Canons of statutory construction assert that Congress does not enact a nullity. If Congress intended “any other appropriate requirement” to include only the CWA programs already listed in statutory text, it would not have included as additional considerations “any other appropriate requirement of state law” since it would add nothing. In addition, the policy would place limits on state and tribal ability to protect waters under their jurisdiction, by severely limiting their ability to consider state or tribal law during a 401 certification analysis. The policy would exclude from consideration state and tribal water quality requirements that EPA either lacks the authority to review or has not yet approved. This policy would create a discrepancy between federal and state permits for the same activity, creating unnecessary

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<sup>61</sup> CWA §303(c)(2)(A), 33 U.S.C. §1313(c)(2)(A).

<sup>62</sup> CWA §303(c)(2)(B), 33 U.S.C. §1313(c)(2)(B).

<sup>63</sup> 91 Fed.Reg. 2008, 2027 (January 15, 2026).

<sup>64</sup> CWA §401(d), 33 U.S.C. §1341(d).

confusion for project proponents. It is not EPA's role under CWA section 401 to determine what constitutes an appropriate requirement of state law. The plain reading of CWA Sections 401(a) and (d) does not so limit state and tribal certification authority.

**Recommendation: EPA should not limit "other appropriate requirements of state law" to include just sections enumerated in CWA section 401.**

The Proposed Rule preamble solicits comments on whether to interpret "other appropriate requirement of State law" as referring to only monitoring requirements for specific enumerated provisions of the CWA. Under this policy, which is not currently proposed, certifying authorities could only include certification conditions based on state or tribal laws that relate to a monitoring requirement necessary to demonstrate compliance with the specific CWA provisions listed in section 401.<sup>65</sup> This policy clearly contradicts several CWA provisions, including section 401, and would sharply reduce the effectiveness of section 401 as a water quality tool to achieve CWA goals. While NAWM supports conditions for monitoring, the certification conditions should not be limited only to monitoring. Monitoring is done to ensure that water quality criteria are met, and if not, that other conditions and remedial actions are to be imposed to ensure that the discharge will comply with standards and limitations. The language of CWA section 401(d) is explicit that limitations beyond monitoring may be applied, indicating

"[a]ny 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 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, 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."<sup>66</sup>

In the CWA, Congress gave broad authority to states and Tribes to condition certifications based on their own water resource laws. The CWA does not preempt state laws, nor does it suggest that state laws that are more stringent than federal requirements may be disregarded as "other appropriate requirement of State law" when implementing Section 401.<sup>67</sup> **Recommendation: EPA should not limit considerations of "other appropriate**

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<sup>65</sup> 91 Fed.Reg. 2008, 2027 (January 15, 2026).

<sup>66</sup> CWA §401(d), 33 U.S.C. §1341(d).

<sup>67</sup> CWA §510, 33 U.S.C. §1370, "...nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution [except those limitations that are less stringent than federal requirements.]'

**requirements of state law” to monitoring only.** This policy contradicts the intent of the CWA and is an unacceptable reduction and violation of state and tribal authority.

#### **4. Content of a Certification Decision**

The Proposed Rule would require that any action by a certifying authority to grant, grant with conditions, deny, or explicitly waive certification must be in writing and include supporting information regarding the legal basis for the decision.<sup>68</sup> For example, in circumstances where a certifying authority grants certification with conditions, each condition would need to include a statement explaining why the condition is necessary to assure the project’s discharges will comply with water quality requirements and a citation to the applicable water quality requirement.<sup>69</sup> For certification denials, the written notification would need to state the reasons for denial, including the specific water quality requirements with which the discharges did not comply, and an explanation of why the discharge would not comply with the identified water quality requirements. If the denial is due to insufficient information, the denial must include a description of any missing water quality-related information.<sup>70</sup>

NAWM does not believe these more prescriptive requirements are in accordance with the intent and goals of the CWA. Section 401 is a direct grant of authority to states to certify federal licenses or permits that may result in a discharge to WOTUS, and to attach conditions to certifications where necessary. Because of this direct grant of authority from Congress to states, EPA’s authority to prescribe processes for state certification programs is limited to those elements explicitly laid out by Congress in the CWA (such as the RPT not to exceed one year).<sup>71</sup> As a result, the authority of EPA or another federal agency to judge the completeness of a certification decision is no broader (and perhaps not as broad as) determining that certain elements are present, such as a general statement of legal authority. The CWA does not envision EPA or federal agencies assessing the quality of its decision and associated documentation. Were federal agencies to have such authority, it would allow the agencies to second-guess and change a state or tribal certifying authority’s decision, which would be beyond the scope Congress envisioned for actions by EPA and other federal agencies. These concerns were discussed in the preamble to the 2023 Certification Rule, which includes a regulation limiting the extent of federal agency review,<sup>72</sup> a provision the Proposed Rule does not plan to change.

The Proposed Rule is correct that a certification analysis involves identifying rationale and legal support for certification decisions and conditions, generating much of the information the proposal would require to accompany a certification decision. However, a certification

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<sup>68</sup> 91 Fed.Reg. 2008, 2028 (January 15, 2026).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> CWA §401(a), 33 U.S.C. §401(a).

<sup>72</sup> 88 Fed.Reg. 66558, 66613 (September 27, 2023); 40 C.F.R. §121.8.

authority might organize its data and analysis differently from that called for by the Proposed Rule, such as using general citations rather than more detailed cross-references and data at a different level of detail than required under the proposal, resulting in additional administrative effort to comply with the proposal's requirements potentially with no environmental benefit.

The Proposed Rule also would delete requirements that certification decisions indicate the certifying authority complied with applicable public notice procedures.<sup>73</sup> The proposal's rationale for deleting a statement regarding compliance with public notice procedures is to improve transparency. NAWM does not see how removal of the requirement improves transparency, and believes that the need to indicate the certifying authority followed applicable public notice procedures help ensure those procedures are indeed followed. NAWM is aware that some certifying authorities have state or tribal notice timing requirements that can be incompatible with the RPT limitations set by federal agencies. Retaining the requirement that certifying authorities state they complied with notice procedures can serve to highlight any incompatibilities and thus has benefits.

**Recommendation: EPA should continue to require a certifying authority to state it followed applicable public notice procedures. EPA also should retain the regulatory provisions currently in effect that limit the extent of federal agency review of certification decisions.**

## **5. Modification Process**

The Proposed Rule would revise the current certification regulations to require the federal agency, the certifying authority, and the project proponent to all agree before the certifying authority may modify a granted certification.<sup>74</sup> Additionally, the project proponent must agree on the language of the modification.<sup>75</sup> Under current regulations only the certifying authority and federal agency have to agree to modifications; the project proponent does not have a say. Additionally, the project proponent is not required to concur, nor is there any requirement that they approve the language of the modification.

NAWM supports the approach to certification modifications currently in effect under the 2023 Certification Rule and does not support the proposal to give the project proponent authority to approve a modification, along with the certifying authority and federal agency, and veto power on the modification language. The project proponent does not have approval authority over the original certification and its language, so it is not appropriate to give them the authority to do so through modifications. The statutory language of section 401 does not grant such authority to project proponents, and it would contradict and

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<sup>73</sup> 91 Fed.Reg. 2008, 2029 (January 15, 2026), explaining proposed changes to 40 C.F.R. §121.7.

<sup>74</sup> 91 Fed.Reg. 2008, 2030 (January 15, 2026), explaining proposed changes to 40 C.F.R. §121.10.

<sup>75</sup> *Id.*

undermine the broad authority given to states under the CWA.<sup>76</sup> **Recommendation: EPA should retain the approach to certification modifications in the 2023 Certification Rule, continuing to reserve modification decision making authority for certifying authorities and federal agencies and not establish a role for project proponents.**

## 6. Section 401(a)(2) Process

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 raise issues about potential water quality implications of proposed projects undergoing certification. The Proposed Rule preamble indicates both individual permits, NWP, and other types of general permits would remain subject to 401(a)(2) analysis.<sup>77</sup>

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...”<sup>78</sup> 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 project proponent.<sup>79</sup> If the neighboring jurisdiction 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.<sup>80</sup> If the neighboring jurisdiction requests a hearing, the federal licensing or permitting agency shall hold the hearing, and must respond to the concerns raised.<sup>81</sup> Note that most of this process detail is in the CWA statutory text itself, although current EPA 401 certification regulations reflect that detail.

The Proposed Rule would make several revisions to the section 401(a)(2) process. NAWM’s state and tribal members have emphasized the importance of section 401(a)(2),

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<sup>76</sup> See, e.g., CWA §§ 401(a)(4), 401(b), 401(d), and 510.

<sup>77</sup> See, e.g., 91 Fed.Reg. 2008, 2033 (January 15, 2026).

<sup>78</sup> 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 as “authorized tribes.”

<sup>79</sup> CWA §401(a)(2), 33 U.S.C. §1341(a)(2); 40 CFR. §121.13

<sup>80</sup> CWA §401(a)(2), 33 U.S.C. §1341(a)(2); 40 CFR. §121.14.

<sup>81</sup> CWA §401(a)(2), 33 U.S.C. §1341(a)(2); 40 CFR. §121.15.

particularly where addressing waters affected by discharges originating in neighboring state and tribal jurisdictions. The proposed changes to section 401(a)(2) raise a number of concerns for NAWM's state and tribal members.

6(a) -- Substituting "Other States" for "Neighboring Jurisdiction."

The Proposed Rule would remove the definition of "neighboring jurisdiction" and instead use the word "other state" when referring to the jurisdiction engaged in the 401(a)(2) process. Justification for the change is the term is "self-explanatory" and the CWA frequently uses the word "state."<sup>82</sup> The proposal nonetheless defines "other States" to refer to states or Tribes with TAS for section 401.<sup>83</sup>

NAWM is concerned that the change to "other States" from the previous term of "neighboring jurisdiction" will result in the inadvertent omission or discounted consideration of Tribes during the 401(a)(2) process including Tribes with TAS. Further, as EPA plans to continue to use the term "neighboring jurisdiction" interchangeably with "other States,"<sup>84</sup> the proposed change is unnecessary.

The meaning of "other States" is not without ambiguity. The Proposed Rule preamble explains that the term is intended to include states and Tribes with TAS. However, is the term intended to indicate that Tribes without TAS are not to be notified by EPA if a proposed license or permit and associated certification "may result" in impacts to tribal waters? The CWA is careful to indicate who shall speak for a jurisdiction without 401(a) authority, with Congressional intent being to assure no waters are outside the scope of 401 certification protections: EPA does certification for a state<sup>85</sup> or Tribe lacking 401 authority under 401(a). If "other States" exclude Tribes without TAS, who certifies on their behalf during the 401(a)(2) process? This issue is related to the Proposed Rule's changes to the TAS process, particularly by its elimination of an opportunity for Tribes to receive TAS just for 401(a)(2).

**Recommendation: EPA should retain and use the current definition of "neighboring jurisdiction," and clarify how waters will be evaluated under Section 401(a)(2) when the Tribe lacks TAS.**

6(b) -- Substituting "Administrator" for "Regional Administrator."

The Proposed Rule requests comment on the proposed removal of the term "Regional Administrator" and substitute the term "Administrator"<sup>86</sup> to indicate which EPA official will

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<sup>82</sup> 91 Fed.Reg. 2008, 2031-2 (January 15, 2026).

<sup>83</sup> 91 Fed.Reg. 2008, 2032 (January 15, 2026),

<sup>84</sup> 91 Fed.Reg. 2008, 2032 (January 15, 2026)

<sup>85</sup> CWA 401(a), 33 U.S.C. 1341 ("In any case where a State or interstate agency has no authority to give such a certification such certification shall be from the Administrator.")

<sup>86</sup> 91 Fed.Reg. 2008, 2032-33 (January 15, 2026).

act on EPA's behalf in the 401(a)(2) process while acknowledging the potential for delegation.<sup>87</sup> The CWA uses the term "Administrator" when establishing EPA authorities and responsibilities for its various programs,<sup>88</sup> and the Administrator historically has relied heavily on delegation to Regional Administrators and other EPA managers for implementation of many CWA programs. Indeed, data indicates that the CWA has accounted for 91 delegations, the largest number of delegations under any environmental statute administered by EPA.<sup>89</sup>

NAWM acknowledges that the CWA uses the term "Administrator" while supporting the use of appropriate designees in decisionmaking. NAWM believes EPA's section 401 certification-related decisions are best left to the Regional Administrator and regional designees as they have the most knowledge of waters within their areas of responsibility, as well as familiarity with applicable state and tribal programs and standards. NAWM recommends that EPA identifies the Regional Administrator and regional designees as the primary EPA decisionmakers during both the 401(a)(1) and 401(a)(2) processes. Without a clear designation, the possibility exists that much of the 401-related decisions would be made by EPA Headquarters which would be far less familiar with local aquatic resources and state or tribal authorities.

**Recommendation: EPA should indicate that, as a general rule, the Regional Administrator and regional staff should act on EPA's behalf during the 401(a)(2) process and when certifying on behalf of a Tribe without TAS under 401(a)(1).**

6(c) -- Factors to be Considered in EPA "May Affect" Determinations on a Categorical or Case-by-case Basis.

Under the CWA, EPA has 30 days to determine whether the discharge "may affect. . . the quality of the waters of any other State..."<sup>90</sup> 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 project proponent.<sup>91</sup> EPA is not charged with determining the certified project will affect neighboring waters, merely that it "may," a lower analytical threshold.

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<sup>87</sup> 91 Fed.Reg. 2008, 2032 (January 15, 2026).

<sup>88</sup> See, e.g., CWA §401(a), 33 U.S.C. §1341(a) ("In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator.")

<sup>89</sup> See "Delegations of Authority – What Managers Need to Know," available on February 13, 2026, at: [Document Display | NEPIS | US EPA](#). Of the more than 555 delegations in EPA's Delegations Manual, the CWA has accounted for 91 delegations. *Id.* at 1-2.

<sup>90</sup> 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 as "authorized tribes."

<sup>91</sup> CWA §401(a)(2), 33 U.S.C. §1341(a)(2); 40 CFR. §121.13.

The Proposed Rule requests recommendations for categories, thresholds, and documentation related to its review of potential cross-boundary effects of a discharge.

NAWM believes that a “may affect” determination is inherently fact-dependent and must reflect situation-specific circumstances. Therefore, a detailed list of factors to be considered in all “may affect” determinations are not possible in a nationwide rule, but instead the Rule should be a non-exhaustive illustrative list of factors that EPA may consider. Factors will vary based on the type of discharge and the condition and characteristics of receiving waters, such as whether the receiving water body is TMDL-listed or has specific designated beneficial uses that must be met. Other illustrative factors for consideration could include, for example:

- The extent, amount, type, chemical and physical parameters, and constituents of the discharge;
- proximity of the discharges to WOTUS or other waters that could carry pollutants to WOTUS;
- distance to the neighboring (often downstream, but could be upstream or adjacent to) state or Tribe;
- conditions and characteristics of the trans-boundary water included associated wetlands, designated beneficial uses, existing impairments, TMDLs, or proximity of high quality resources;
- monitoring results and other documentation related to the discharge and trans-boundary water, such as those related to chemical, physical, and biological integrity;
- construction methods and equipment;
- operational implementation and related management plans; and
- plans for remedial actions for inadvertent discharge.

The results of a section 401(a)(2) analysis and process would be more predictable and factually informed if neighboring jurisdictions have an opportunity to identify in advance of a 401(a)(2) action particular key information for EPA, certifying authorities, and other neighboring jurisdictions. Key information could involve watersheds, types and extents of discharges, and categories of activities about which neighboring jurisdictions are concerned. Such information would be particularly helpful to EPA for their “may affect” determinations.

The Proposed Rule seeks comment on the appropriateness of categorical and case-specific “may affect” determinations.<sup>92</sup> The preamble notes that the proposal would distinguish “categorical determination” from an exclusion.”<sup>93</sup> A categorical “may affect” determination “refers to a standardized way of reviewing and acting upon notifications that meet a set of criteria for a ‘category’ of discharge types, project types, and/or projects in specific

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<sup>92</sup> 91 Fed.Reg. 2008, 2034 (January 15, 2026).

<sup>93</sup> 91 Fed.Reg. 2008, 2034 (January 15, 2026).

locations.”<sup>94</sup> NAWM has serious concerns about excluding from an affirmative “may affect” determination any areas based upon a lack of hydrologic connection, if the same criteria for the connection is that proposed for wetlands and waters in the recent WOTUS proposal.<sup>95</sup> The CWA recognizes the importance of groundwater.<sup>96</sup> Groundwater connections as well as seasonal or periodic surface water connections should be included as hydrologic connections that may convey discharges to a neighboring jurisdiction. As discussed below, discharge through groundwater connections can serve as the “functional equivalent of a discharge” regulated under the CWA, consistent with the Supreme Court’s decision in the *Maui* case.<sup>97</sup> The proposal provides an example of a categorical “may affect” determination as where no hydrologic connection exists between the water which would receive discharge and a neighboring jurisdiction, “e.g. discharges into the ocean.”<sup>98</sup> The Proposed Rule’s use of “discharges into the ocean” illustrates the problem with categorical “may affect” determinations. Discharges into the ocean can and often do affect the water quality of neighboring jurisdictions when ocean currents carry pollutants along the coastline.

In its 401(a)(2) regulations, EPA should avoid any suggestion that regional general permits, nationwide permits, or other categories of activities or discharges are not subject to section 401, including 401(a)(2).

**Recommendation: EPA should continue to distinguish “categorical determination” from an exclusion. Any “categorical determinations” should be agreed upon by states, Tribes with TAS, and the federal permitting or licensing agency, and EPA.**

#### 6(d) -- Timeframes for section 401(a)(2) Processes

The statutory timeline for a “may affect” determination is 30 days for EPA and review and objection by states and Tribes with TAS is another 60 days.<sup>99</sup> These short timelines are appropriate only when all information needed by the neighboring jurisdiction is available up front prior to the commencement of the timeframe, along with a complete application for the permit or license. NAWM supports having a low analytical bar for EPA’s “may affect” decision, making it easier for the Agency to notify neighboring jurisdictions of the possibility of an effect, given the abbreviated timeframe.

The Proposed Rule would provide that when objections are raised by neighboring states and Tribes with TAS, federal agencies would have 90 days to hold a public hearing and make a determination on the concerns and objections. NAWM disagrees that the 90-day

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<sup>94</sup> *Id.*

<sup>95</sup> “Updated Definition of Waters of the United States” (Docket ID No. EPA–HQ–OW–2025–0322.), in 90 Fed.Reg. 52498 (November 20, 2025).

<sup>96</sup> See, e.g., CWA §§102(a) and 304(a)(1).

<sup>97</sup> *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 183-84 (2020) (holding that the CWA requires a permit “when there is the functional equivalent of a direct discharge.”)

<sup>98</sup> 91 Fed.Reg. 2008, 2034 (January 15, 2026).

<sup>99</sup> CWA §401(a)(2), 33 U.S.C. §1341(a)(2).

timeline would provide “enough time” to resolve the process. Public hearing and comment periods for complex projects alone may require a 60-day public notice period. Final decisions on permit or license requirements often require additional time as well.

In addition, after the neighboring state or Tribe with TAS has made its objection, the timeframe for holding the public hearing should be of sufficient duration to allow project proponents, EPA, the federal licensing or permitting agency, and neighboring jurisdictions to prepare for testimony, arrange for subject matter experts, and organize data and evidence. The process could be streamlined when information specified by the neighboring jurisdiction is made available, and the neighboring jurisdiction was previously given the opportunity to pre-identify certain waters and discharges and associated conditions that would help ensure that water quality standards are not violated. The CWA does not establish a required timeframe for holding a hearing, so it is appropriate and consistent with the CWA for the hearing to be held only after the appropriate information and logistics can be arranged. This would not “unreasonably delay” projects, a concern noted in the preamble.<sup>100</sup>

The Proposed Rule’s alternative approach to begin the 401(a)(2) process at the 6-month mark also fails to result in defensible decisions unless all needed information is provided at the beginning of the process. In some cases, there may be a need to collect data during specific timeframes, analyze the data, and prepare it for presentation at a hearing within a timeframe that may not coincide with the limited timeframes proposed. If there is not adequate time to acquire and analyze the information, NAWM predicts that certification for the license or permit will be denied due to lack of information.

**Recommendation: EPA should establish suggested, not mandatory, timeframes for hearings under 401(a)(2) that allow sufficient time for public notice, preparing for and holding the public hearing, analysis by the neighboring jurisdiction, and for the federal agency to make informed license or permit decisions that resolve the objections. A deadline of 90 days as a national standard would be too short, failing to accommodate the analytical challenges posed by complex projects.**

6(e) -- Removal of EPA ability to request supplemental information and mandating use of an online notification portal

The Proposed Rule indicates it would remove the entire section 121.12(c), which authorizes EPA to request supplemental information to inform its “may affect” determination.<sup>101</sup> If that section is removed, the ability of EPA to request supplemental information becomes much less clear, as under the Proposed Rule it is mentioned only in the preamble that an online portal will be used for submitting information. Additional new

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<sup>100</sup> 91 Fed.Reg. 2008, 2035 (January 15, 2026).

<sup>101</sup> 91 Fed.Reg. 2008, 2032-2033 (January 15, 2026).

and existing data may need to be collected on the condition of existing interstate waters, as well as management plans for construction, operations and inadvertent discharges. The submittal of additional information is not prohibited under Section 401(a)(2). Lack of such information would result in less certainty for EPA in making “may affect” determinations. Detailed agreements, especially those developed with states and Tribes with TAS, would better address information needs, unique circumstances, requirements, and resources and ultimately result in a more efficient process.

EPA is requesting comment on the proposed standardization of the 401(a)(2) notification process and procurement of any additional information through the use of the Agency’s new online notification portal.<sup>102</sup> NAWM recognizes the efficiencies in review that can be obtained through use of online tools. However, online tools and portals are subject to change over time and require maintenance and upkeep to function as users’ computer hardware and software changes. Online tools can suffer from outages that could cause delays in the already tight timelines built into the section 401(a)(2) process.

**Recommendation: EPA should retain section 121.12(c) in its current form, which explicitly authorizes EPA to request information in support of its “may affect” determination. Retaining the section will not extend the process since the “may affect” decisions are statutorily capped at 30 days. Due to the short time frame, the bar should remain low for EPA to make a “may affect” determination. EPA should allow, but not require, use of an online portal.**

## **7. Treatment in a Similar Manner as a State (TAS)**

CWA section 518(e) authorizes EPA to treat eligible federally recognized Indian tribes “in a similar manner as a state” (TAS) for implementing and managing certain environmental programs. Indian tribes that successfully apply to receive TAS may play essentially the same role in Indian country that states do within state lands. Currently, over 80 Tribes have TAS for section 401.

How Tribes receive TAS for section 401 has varied over time. Prior to 2023, a Tribe with TAS for the section 303(c) water quality standards program was automatically eligible for TAS for the section 401 water quality certification program unless the Tribe elected not to seek such eligibility. The 303(c) process has tended to be an onerous one that can take many years. The 2023 Certification Rule currently in effect established a procedure for Tribes to directly apply and receive TAS for section 401, as well as a more limited TAS to serve as a neighboring jurisdiction under CWA section 401(a)(2). Under the first option, a Tribe that receives 401 TAS becomes the 401 certifying authority for all federal licenses and permits within their jurisdiction and is considered a neighboring jurisdiction (“other State”) under the section 401(a)(2) process. The second option in the 2023 Rule provides

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<sup>102</sup> 91 Fed.Reg. 2008, 2032-2033 (January 15, 2026).

Tribes with the ability to apply for TAS just for 401(a)(2) and be recognized by EPA as a neighboring jurisdiction (“other State”) and participate in the 402(a)(2) process. The 2023 certification regulations recognized the importance of providing streamlined approaches for Tribes to obtain TAS for section 401 and recognition as a neighboring jurisdiction under section 401(a)(2) that would be less labor intensive and take less time than receiving 401 TAS as part of the section 303(c) water quality standards TAS process. The Proposed Rule would repeal the current provisions providing an opportunity for Tribes to apply for TAS for the 401 certification program or for TAS as a neighboring jurisdiction only. Instead, under the proposal Tribes could only elect to receive TAS for 401 as part of receiving TAS for the water quality standards program.

The Proposed Rule would remove provisions from the 2023 Certification Rule currently in effect that provides the two pathways for Tribes to apply for and receive TAS for section 401 and to become a neighboring jurisdiction. This proposal would return to TAS for 303(c) as the sole pathway for Tribes to receive TAS for section 401 and participate in the 401(a)(2) process. In other words, EPA would not coordinate with Tribes that lack TAS under 303(c) to determine if a federally licensed or permitted project that receives a 401 certification from another jurisdiction may affect tribal water quality. As discussed earlier, the Proposed Rule should clarify how waters within the jurisdiction of a Tribe without TAS for 401 will be protected.

Currently, Tribes with TAS for 401 or for only 401(a)(2) can use certification as a tool to ensure their waters, water quality, and associated impacts to Traditional Resource Rights and Treaty Rights would be appropriately protected under federal licenses and permits. Removal of the option to apply directly for section 401 or section 401(a)(2) TAS significantly impedes the ability of Tribes to ensure protection for tribal aquatic resources, particularly when coupled with the Proposed Rule’s changes that (1) significantly narrow the scope of 401 analysis from the project as a whole to just point source discharges, (2) narrow the scope of information required to be submitted in 401 certification requests to just the footprint of the discharge - not the whole project, and (3) discuss policy options to limit the type of water quality requirements to either EPA-approved, or numeric criteria only, or both. Other EPA actions have even further limited Tribes’ ability to use section 401 as a water quality protection tool, including the recent proposal that would define WOTUS more narrowly, the withdrawal of a proposal that would provide baseline tribal water quality standards, and the frequent failure to consider the Federal Trust Responsibility when EPA acts as the certifying authority for tribal waters.

These likely impacts on a Tribe’s ability to protect their waters and resource rights are of paramount concern to NAWM. EPA section 401 regulations must provide Tribes with reasonable access to TAS for section 401. **Recommendation: EPA should retain the 2023 Rule’s section 121.11 and its two pathways for Tribes (receive either TAS for all of section 401 certification or TAS only as a 401(a)(2) neighboring jurisdiction ).** At

present, of the 575 Federally recognized Tribes in the United States, 85 Tribes have TAS authorizing them to develop water quality standards under the 303(c) program.<sup>103</sup> Of those, only 52 Tribes have received EPA approval for their water quality standards and one Tribe has EPA-promulgated water quality standards. These statistics highlight inherent delays and challenges if EPA decides to allow only the section 303(c) TAS program as a Tribe's sole access to 401 certification authority.

## **8. Enforceability of Certification Conditions**

The Clean Water Act's cooperative federalism framework expressly preserves state and Tribal authority to adopt and enforce water quality requirements, including through CWA section 401. CWA section 510 establishes the right of any state to adopt or enforce any standard or discharge limitations so long as they are at least as stringent as federal requirements.<sup>104</sup> Nothing in the Act indicates that incorporation of certification conditions into a federal license or permit was intended to supersede or limit state or Tribal enforcement authority.

NAWM is concerned that the Proposed Rule does not clearly address how enforcement of CWA section 401 certification conditions is intended to function under the revised framework, particularly with regard to the respective roles of federal agencies and state and Tribal certifying authorities. While the Proposed Rule discusses incorporation of certification conditions into federal licenses or permits, it does not adequately explain whether, or to what extent, states and Tribes retain independent authority to enforce those conditions under state or tribal law once they become conditions of a federal authorization.

NAWM is further concerned that the Proposed Rule's silence on this issue may be interpreted to suggest that enforcement of certification conditions rests solely with federal agencies once those conditions are incorporated into a federal license or permit. Such an interpretation would be inconsistent with CWA section 510, represent a significant departure from longstanding practice, and could undermine the ability of states and Tribes to effectively implement and enforce their water quality requirements. Many certifying authorities rely on state or tribal enforcement mechanisms to ensure compliance with certification conditions, particularly where federal agencies may lack the resources, jurisdictional focus, or enforcement priorities necessary to address site-specific or ongoing compliance issues.

The absence of clear regulatory or preamble language addressing enforcement also creates uncertainty for regulated entities, certifying authorities, and federal agencies alike. Without clarity, disputes may arise regarding which entity has primary enforcement responsibility,

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<sup>103</sup> See <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas>.

<sup>104</sup> CWA §510, 33 U.S.C. §1370.

whether state or tribal enforcement actions are preempted by federal permitting, and how overlapping enforcement authorities are intended to operate in practice.

**Recommendation: EPA must clearly acknowledge that incorporation of section 401 certification conditions into a federal license or permit does not supersede or limit state or tribal authority to enforce those conditions under state or tribal law. EPA should also clarify that federal enforcement authority supplements, rather than replaces, state and tribal enforcement authority, consistent with the cooperative federalism framework of the CWA.**

## **9. Other Clarifying and Confirming Revisions**

### **9(a) -- Section 401 Addresses Both Direct and Indirect Discharges.**

The Proposed Rule would provide that a certification analysis should focus on a discharge from a point source, and that only discharges to WOTUS would be subject to certification. This policy approach must be interpreted and implemented in light of court decisions regarding indirect discharges into WOTUS, such as the 2020 U.S. Supreme Court decision in *County of Maui*.<sup>105</sup> *Maui* held that the CWA requires a permit for indirect discharges, such as a discharge via groundwater or other types of nonpoint source, when there is a functional equivalent of a direct discharge. As a result, were the Proposed Rule finalized with a focus on point source discharges, permits would be required for indirect discharges that are the functional equivalent of direct discharges and those permits would be subject to section 401 water quality certification.

CWA section 401(a)(1) provides that “[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, 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...” This provision does not mandate that the triggering discharge be direct, only that a discharge *may* enter a WOTUS.

**Recommendation: EPA should better reflect the *County of Maui v. Hawaii Wildlife Fund (2020)* U.S. Supreme Court decision and indicate that indirect discharges which trigger a Federal permit also trigger 401 certification, and once 401 is triggered the scope of certification applies broadly to activities and any associated discharges (whether direct, indirect, point source, or nonpoint source).**

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<sup>105</sup> *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 183-84 (2020) (holding that the statute requires a permit “when there is the functional equivalent of a direct discharge.”)

9(b) -- Automatic Extensions to Address Public Notice Requirements and Force Majeure Events.

NAWM is concerned that several additional revisions in the Proposed Rule, taken together, would reduce flexibility for certifying authorities and create new implementation challenges without clear corresponding benefits. For example, the Proposed Rule eliminates automatic extensions previously available to accommodate public notice requirements and force majeure events, and the increased reliance on formal memoranda of agreement (MOAs) to address timing and coordination issues.

Many certifying authorities rely on limited extensions to account for circumstances beyond their control, such as public notice requirements, natural disasters, emergencies, or other force majeure events that temporarily disrupt review processes. Eliminating these mechanisms removes an important source of administrative flexibility and may increase the likelihood of denials or inadvertent waivers in circumstances unrelated to the merits of a proposed project. NAWM is concerned that the Proposed Rule does not adequately explain how certifying authorities are expected to manage these unavoidable disruptions within a rigid RPT framework.

NAWM is also concerned that the Proposed Rule's emphasis on formal MOAs as a means of addressing timing and coordination issues may be impractical for many states and Tribes. Developing, negotiating, and periodically revising MOAs can be time-consuming and resource-intensive, particularly given the frequency with which section 401 regulations have changed in recent years. Reliance on MOAs as a primary implementation tool may therefore reduce, rather than enhance, predictability and efficiency for certifying authorities and federal agencies alike.

NAWM encourages EPA to provide clear examples in the regulatory text or preamble illustrating how certifying authorities are expected to address public notice requirements, force majeure events, and other unforeseen circumstances under the proposed framework. Without such examples, certifying authorities may face uncertainty regarding permissible approaches to managing review timelines and coordinating with federal agencies.

Finally, NAWM notes that these procedural changes interact with other aspects of the Proposed Rule, including limitations on certifying authorities' ability to define certification request contents. Taken together, these changes reduce certifying authorities' ability to manage information needs and timing issues in a coordinated manner, increasing the risk of incomplete reviews, unnecessary denials, or inadvertent waivers.

**Recommendation: EPA should retain the 2023 Certification Rule's automatic extensions to accommodate public notice requirements, force majeure events, and other circumstances beyond the control of certifying authorities. NAWM further recommends that EPA not rely on formal memoranda of agreement as the primary**

**mechanism for managing reasonable period of time issues, and instead preserve regulatory flexibility within the section 401 regulations themselves. Finally, EPA should provide clear examples in its final certification policy decisions of how to respond to unforeseen circumstances beyond the control of certifying authorities, such as notice requirements and force majeure events.**

9(c) -- Adequate Provisions for Tribal Consultation and Input

The Proposed Rule contains several provisions directly impacting a Tribe's ability to use 401 certification as an effective water quality tool. As a result, in finalizing its certification policies, EPA should maximize opportunities for tribal input. The 30-day comment period for this overall proposed rulemaking should be extended by a minimum of 30 additional days, and formal government-to-government consultation letters should be sent to federally recognized Tribes. For each Tribe that requests consultation on these proposed rule changes, time should be made to ensure meaningful engagement and consultation. The July 2025 engagement that the EPA is calling consultation does not substitute for consultation on these specific proposed rule language changes and their potential impacts to Tribes. Tribes should be afforded sufficient time and opportunity to consult and no final certification policy decision should be made until meaningful tribal consultation on the Proposed Rule changes is completed.

**Recommendation: EPA should send tribal consultation offer letters to Tribes on these Proposed Rule changes and maximize opportunities for tribal input to inform any certification rulemaking decisions.**

Conclusions

While this letter focuses on comments regarding this specific Proposed Rule, the proposal sets a concerning precedent of reducing state and tribal authority in cooperative federalism-based regulatory relationships. Cooperative federalism serves as the cornerstone for most of the nation's environmental policies. Other non-environmental policies also rely on strong state and tribal roles. NAWM requests EPA to reconsider this Proposed Rule for many reasons, including the problematic move away from cooperative federalism and the precedent it sets for other rules and regulations that are critical to governance and the protection of public goods.

The Proposed Rule repeatedly cites recent judicial developments, including *Loper Bright Enterprises v. Raimondo*, as justification for narrowing state and tribal authority under CWA section 401. NAWM is concerned that this reliance is misplaced. While *Loper Bright* addresses the scope of judicial deference to agency interpretations, it does not compel the specific regulatory changes proposed here, nor does it require EPA to adopt interpretations that diminish long-recognized state and tribal roles under the CWA. Nothing in *Loper Bright*

alters the statutory text of section 401 or Congress's express preservation of state and tribal authority within the CWA's cooperative federalism framework.

With its novel interpretation of the law and inconsistencies with U.S. Supreme Court precedent, the Proposed Rule will likely be stayed upon final rule promulgation. This creates tremendous confusion for states and Tribes who will be uncertain about what, how, and when to implement section 401. If the rule is not stayed, there will be new challenges filling the gaps in state and tribal law to support conditions that may leave resources poorly protected with negative impacts to water quality and valuable aquatic resources. In the end, this Proposed Rule limits the law more than the CWA currently allows and will create confusion, delays, and a potential increase in the number of certification denials.

The cumulative proposed revisions to the section 401 rule fail to achieve the objectives of the CWA and will worsen water quality and harm all users of waters. NAWM asks EPA to also explore whether this erosion of state and tribal authority will increase costs to relevant industries and jurisdictions, such as commercial/industrial users of water, treatment and drinking water plants and the public.

In summary, NAWM opposes the proposed changes to the rule as unwarranted, unproductive, and contrary to the text and intent of the CWA. If EPA proceeds with this rulemaking, as discussed in this letter numerous sections should be deleted or completely revised and re-proposed.

The Proposed Rule is the latest in a series of efforts to weaken federal provisions for protecting and restoring waters, to the extent that even state and tribal authority is deemed undesirable. These efforts include multiple policy and regulatory changes, with the most impactful to wetlands and waterways being the reduction in federal jurisdictional waters in the recently proposed WOTUS rule and pending legislative proposals such as the PERMIT Act,<sup>106</sup> which, if enacted, would further alter federal permitting frameworks relevant to section 401. NAWM is concerned that proceeding with this rulemaking in parallel with ongoing statutory and policy changes increases regulatory instability and may necessitate additional rulemakings in the near future, imposing unnecessary administrative burdens on EPA, states, Tribes, and regulated entities alike.

The proposed changes to the section 401 certification process, when combined with these other federal policy changes, present a significant and problematic reduction in state and tribal authority and protection of the Nation's waters. EPA's Proposed Rule should not be promulgated as it needs significant revision to maintain state and tribal authority and represents a move away from (not towards) cooperative federalism. For these reasons, NAWM requests that EPA withdraw the proposal. The Proposed Rule should not go

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<sup>106</sup> H.R. 3898, the "Promoting Efficient Review for Modern Infrastructure Today Act or the PERMIT Act." Available at: [H.R.3898 - 119th Congress \(2025-2026\): PERMIT Act | Congress.gov | Library of Congress](https://www.congress.gov/bills/119/house/3898)

forward to a final rule. Should EPA proceed with policy changes in any form involving section 401 certification, NAWM urges that policies be developed in collaboration with states and Tribes.

NAWM appreciates the opportunity to comment on EPA's proposal, "Updating the Water Quality Certification Regulations." 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 and tribal associations. Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,



Portia Osborne  
Executive Director  
National Association of Wetland Managers  
[portia@nawm.org](mailto:portia@nawm.org)  
(207) 892-3399

Cc:

NAWM Board of Directors  
Jessica Kramer, EPA Assistant Administrator for Water  
Brian Frazer, Director, EPA Office of Wetlands, Oceans & Watersheds