

Summary Report of Federalism on the U.S. EPA: “Implementation Challenges Associated with the Clean Water Act Section 401”

Section I. Overview

On July 1, 2025, the U.S. Environmental Protection Agency announced a *Federal Register* notice initiating a series of public listening sessions and a 30-day recommendations docket inviting States, Tribes, applicants, and the public to provide their input on regulatory uncertainty or implementation challenges associated with the Clean Water Act section 401 certification process as defined in the 2023 Water Quality Certification Improvement Rule (2023 Rule).¹ The agency requested States, Tribes, applicants, and the public provide their feedback on six topics:

1. The 2023 Rule’s interpretation of the scope of certification and certification conditions, including whether clarification is needed on the scope of applicable waters;
2. The 2023 Rule’s definition of “water quality requirements” including, whether the agency should further clarify or revise its interpretation of the statutory phrase “other appropriate requirements of State law”;
3. How the agency should consider whether a neighboring jurisdiction’s water quality may be affected by discharge for purposes of 401(a)(2) and whether there are parameters to consider in making this determination;
4. Whether there are specific types of activities, geographic regions, types of waterbodies, or other types of circumstances, etc., which may support the agency establishing a categorical determination that the quality of no neighboring jurisdiction’s waters may be affected by discharge in such circumstances;
5. Experiences with the application of the 2023 Rule, including certification procedures, the 401(a)(2) process, and the application of treatment in a similar manner as a state (TAS) solely for section 401; and
6. Experiences with the application of the 2023 Rule’s scope of certification, including examples of certification decisions issued under the 2023 Rule that were believed to exceed the 2023 Rule’s scope of certification.

On July 16 and 30, 2025, the agency hosted two webinar-based listening sessions, to hear input on these six topics identified in the *Federal Register* notice. Public listening sessions were open to States, Tribes, applicants, and the public. Additionally, the EPA accepted written feedback for 30 days (July 7 through August 6, 2025). Separate from this process, the agency initiated the Federalism and Tribal consultation process on July 7, 2025, to obtain written feedback from States, local governments, and their representatives, as well as Tribes and their representatives. The Federalism Consultation kick-off meeting was hosted on July 22, 2025. Both Federalism and Tribal consultation closed on September 7, 2025.

This document summarizes the written input received from State and State associations during the consultation period. This summary is available in Docket ID No. EPA-HQ-OW-2025-2929;

¹ 88 FR 66558 (September 27, 2023). The 2023 Water Quality Certification Improvement Rule, referred to as the 2023 Rule, can be accessed at <https://www.federalregister.gov/d/2023-20219>.

individual letters and other supporting documents are available in Docket ID No. EPA-HQ-OW-2025-0272.

Section II. Engagement Summary

EPA received a total of nineteen letters during the Federalism consultation period. The agency received fifteen letters from State government agencies and four letters from State associations.

State government agencies:

1. California, Department of Transportation (#3)
2. California, State Water Resources Control Board (#96)
3. Idaho, Department of Environmental Quality (#57)
4. Indiana, Department of Environmental Management (#92)
5. Massachusetts, Department of Transportation (#100)
6. Maryland, Department of Environment (#54)
7. Michigan, Department of Environment, Great Lakes, and Energy (#115)
8. Minnesota, Pollution Control Agency (#43)
9. Nevada, Division of Environmental Protection (#52)
10. New Jersey, Department of Environmental Protection (#74)
11. New York, State Department of Environmental Conservation (#6)
12. Oregon, Department of Environmental Quality (verbal)
13. Rhode Island, Office of Water Resources in the Department of Environmental Management (#4)
14. Washington, Department of Ecology (#81)
15. Wyoming, Department of Environmental Quality (#66)

State Associations

1. Association of Clean Water Administrators (ACWA) (#136)
2. National Association of Wetland Managers (NAWM) (#49)
3. New England Interstate Water Pollution Control Commission (NEIWPCC) (#85)
4. Western States Water Council (WSWC) (#137)

State agencies and State associations provided detailed input on many topics outlined in the *Federal Register* (see Section 1). Broadly, State agencies and State associations addressed topics related to the 2023 Rule's interpretation of the scope of certification and definition of water quality requirements, the section 401(a)(2) process and categorical determinations, and experiences with the application of the 2023 Rule. Topic-specific input is summarized by category below.² It is important to note that not all State agencies and State associations provided input on each of the six topics identified in the *Federal Register* notice.

² This summary document relies on the topics identified in the *Federal Register* notice to organize comments; however, the EPA combined input received on stakeholder experience into a single category.

Section III. Input Summary

Overall Feedback

State agencies and State associations expressed their appreciation for the opportunity to provide input to the EPA on the implementation of section 401 under the 2023 Rule. State agencies and State associations described Clean Water Act section 401 as a vital State authority, expressly delegated by Congress, to ensure that federally licensed or permitted projects comply with State water quality requirements. State agencies noted that as co-regulators of section 401 they are uniquely positioned to provide valuable input on the implementation of the 2023 Rule and have a vested interest in ensuring the section 401 regulations are clear and durable. Several State agencies and State associations expressed belief that the 2023 Rule established clear and effective procedures. In contrast, some State agencies highlighted specific challenges and provided recommendations for clarifying and streamlining the water quality certification process. There was consensus among State agencies and State associations that certain aspects of the 2023 Rule (e.g., pre-filing meeting requests, cooperative federalism) provided efficiencies over previous regulations and that conditions should be tied to water quality requirements. While State agencies and State associations generally supported the EPA's efforts to promote consistency in interpretation and implementation of section 401, perspectives on how to achieve this goal varied by issue.

Several State agencies and State associations described generally positive experiences with the 2023 Rule and urged the EPA to retain the current regulations. These State agencies and State associations asserted the 2023 Rule established clear and predictable processes. For example, several State agencies stated the pre-filing meeting request and reasonable period of time (RPT) provisions enhanced coordination and provided flexibility to accommodate a range of projects requiring certification and unforeseen circumstances. Several State agencies also declared they were effectively implementing the 2023 Rule and issuing timely certifications. State agencies emphasized the current scope of certification³ affords the best environmental protection of the State's waters because it allows certifying authorities to holistically evaluate potential effects of a discharge on water quality. Several State agencies and State associations also asserted the current scope of certification aligns with the EPA's longstanding principles, congressional intent, the plain language of section 401, and Supreme Court precedent. State agencies and State associations expressed concern and cautioned against revising the scope of certification and associated definitions. A few State agencies and State associations asserted the EPA lacks evidence to support their claims of implementation challenges with the 2023 Rule, and expressed concern the EPA may return to inflexible, administratively burdensome processes that created implementation challenges.

³ See 40 CFR 121.3 (2023).

A few State agencies and State associations also expressed concern that a new rule would limit State authority. State agencies and State associations providing input on the topic emphasized that Congress intended for States to manage and protect their aquatic resources. A few State agencies and State associations further asserted they have responsibly exercised their delegated authority under section 401 and questions of law have been resolved by the courts. One State agency also emphasized that through cooperative federalism, States and the Federal government have a long history of effectively coordinating and working together to ensure that environmental protection and economic growth can coexist. Collectively, State agencies and State associations providing input on the topic urged the EPA to preserve the cooperative federalism framework established in the 2023 Rule.

Furthermore, several State agencies and State associations expressed concern that another rulemaking would not resolve implementation challenges but instead would create uncertainty and implementation challenges for all parties involved in the water quality certification process. Several State agencies and State associations highlighted that the section 401 regulations have changed multiple times over the last five years. A few State agencies and State associations commented further. These State agencies asserted the recurring and substantial changes to the regulatory framework is burdensome to all stakeholders because it requires all parties involved to learn the new requirements and align internal practices. Additionally, a few State agencies noted a new rule may necessitate changes to State laws and/or require States to update their data collection systems. Thus, State agencies asserted that a new rule would compound regulatory uncertainty, delay projects, and increase costs. State agencies and State associations providing input on the topic collectively urged the EPA not to proceed with a new rulemaking. A few State agencies and State associations encouraged the EPA to continue engaging with States to understand implementation challenges. State agencies and State associations also encouraged the EPA to consider other approaches, such as issuing guidance documents, templates, and working with individual certifying authorities, to resolve specific implementation challenges.

In contrast, a few State agencies noted specific challenges with the 2023 Rule and encouraged the EPA to make targeted revisions to the current regulations and/or issue guidance to clarify specific interpretations and processes. For example, two State agencies recommended the EPA revise the scope of certification to limit it to the “discharge” into waters of the United States. One State agency asserted that the current “activity” scope of certification does not align with the statutory language. Furthermore, the State agency asserted the term “activity” is ambiguous, which may result in certifying authorities inappropriately establishing conditions that are only speculatively or obscurely linked to the actual discharges. The same State asserted the EPA returning to the scope of certification as defined by the 2020 Rule⁴ would align with the intent and authorities of the Clean Water Act. In another example, two State agencies encouraged the

⁴ 85 FR 42210 (July 13, 2020). The Clean Water Act Section 401 Certification Rule, referred to as the 2020 Rule, can be accessed at <https://www.federalregister.gov/d/2020-12081>.

EPA to revise the definition of water quality requirements. While the recommendations of the two States differed, both States asserted their proposed revisions would promote consistent implementation across States and Tribes.

In addition to revising definitions, a few State agencies provided recommendations to help improve the overall water quality certification process. For example, a few State agencies recommended the EPA could clarify the start of the reasonable period of time and reduce the default reasonable period of time for certain permit types. A few State agencies also recommended the EPA could reduce project delays associated with section 401(a)(2) by better coordinating Federal agency review of Federal permits, establishing categorical determinations, providing templates and examples, and/or establishing web-based geographic information systems (GIS) mapping tools to help identify potential neighboring jurisdictions. Additional detail about these recommendations, as well as additional summaries on the specific topics the EPA solicited input on, are available below.

Scope of Certification

Several State agencies and State associations supported the scope of certification as defined in the 2023 Rule.⁵ Several State agencies and one association acknowledged the trigger for a water quality certification has always been that a project does or may result in a discharge into waters of the United States. Once a discharge is established, however, the State agencies and State association asserted the certifying authority must review both the discharge and the activity that results in the discharge to properly evaluate whether the activity authorized by the Federal license or permit will comply with applicable water quality requirements. Additionally, several State agencies and one association asserted the current scope of certification aligns with the EPA's longstanding principles and with congressional intent, and the current interpretation is consistent with the plain language of section 401 and binding U.S. Supreme Court precedent in *PUD No. 1*⁶ and *SD Warren*⁷. Of those providing input on the topic, a few State agencies expressed concern that the EPA may return to the “discharge” only approach applied in the 2020 Rule. These State agencies asserted the 2020 Rule approach did not align with the purpose of the Clean Water Act, and one State agency asserted the discharge approach had “significant impacts on State and Tribal regulatory programs and water quality across the nation.”

One State agency recommended the EPA clarify certain aspects of scope of certification. Specifically, the State agency noted they supported the EPA's current interpretation of the scope of certification as outlined in the May 2025 memorandum.⁸ They noted the activity-based approach ensures the certification review aligns with the statutory framework of section 401 and

⁵ 40 CFR 121.3 (2023).

⁶ *PUD No. 2 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994)

⁷ *S.D. Warren Co. v. Maine Bd. Of Environmental Protection*, 547 U.S. 370 (2006)

⁸ *Clarification regarding Application of Clean Water Act Section 401 Certification* issued on May 21, 2025, can be accessed at https://www.epa.gov/system/files/documents/2025-05/clarification-re-application-of-cwa-401-certification_may-2025.pdf.

stays focused on the water quality-related impacts. The State agency recommended the EPA provide further clarity to reinforce that certification reviews should center on direct and reasonably foreseeable, that evaluation of “operations” is appropriate only when operation is explicitly included in the Federal license, and that certifying authorities should not be expected to assess generalized land use or ongoing facility operations that fall outside the scope of the federal action triggering section 401. Together, the State agency asserted these clarifications would improve predictability for applicants and agencies, reduce the risk of legal disputes, and preserve the core water quality protection purpose of section 401. Another State agency noted that any revision to the rule should be consistent with congressionally delegated authority for the review of reasonably foreseeable impacts to water quality that project poses in order to empower certifying authorities to adequately fulfill their obligation to protect and maintain water quality.

In contrast, two State agencies recommended the EPA return to the scope of certification as defined by the 2020 Rule. One State asserted that the current interpretation does not align with the statutory language. Additionally, the same State agency noted the ambiguous term “activity” may allow certifying authorities to inappropriately establish conditions on activities that are only speculatively or obscurely linked to the actual discharges or may inappropriately insert Federal jurisdiction over activities on waters that are not waters of the United States. The State agency stated revising the scope of certification to the 2020 Rule interpretation would appropriately focus the certification review and conditions to be in accordance with the Clean Water Act.

Regarding applicable waters, one State agency stated section 303(b)(3) clearly indicates that it is the State – and not necessarily the federal government – that determines which waters are applicable. The State agency noted that a State clearly defines “waters of the State,” and thus a discharge under a Federal permit or license affecting State waters is subject to section 401 review and certification requirements. The State also asserted the term “applicable waters” does not need to be synonymous with waters of the United States. The State agency asserted that limiting certification only to waters of the United States would undermine State responsibility under independent legal frameworks and could leave significant water resources (e.g., headwaters, wetlands, and floodplains) without adequate protection. Another State agency asserted the applicability of the rule would be clearer if the EPA used consistent terminology to describe applicable waters (i.e., navigable waters, waters of the United States, etc.).

Lastly, two State agencies acknowledged that certification conditions must relate to water quality impacts and not based on issues outside the scope of authority or include conditions that have no basis in statute or applicable regulations. A few State agencies agreed with the EPA noting they found it was reasonable to include justifications or legal citations with their certification decisions. In fact, these same State agencies noted they are already including a short statement or legal citation to justify the condition to ensure their certifications are appropriately tied to the State’s water quality standard and enforceable. In contrast, a few State agencies and one State association asserted that justifications are unnecessary because the connection between a condition and water quality standard are clear. These State agencies and the one State association

noted that requiring justifications could result in duplication and inconsistencies, may interfere with the readability of the certification, may lengthen the time necessary to issue a certification, and could shift limited staff resources from protection of water quality to a “purely administrative task.”

A few State agencies and one State association noted that Federal agencies should defer to the certifying authority to determine appropriate conditions to comply with State water quality requirements and utilize other appropriate approaches, such as the Administrative Procedure Act or appropriate courts of law, to resolve disagreements.

Definition of Water Quality Requirements

Several State agencies and State associations asserted that the 2023 Rule appropriately defined water quality requirements and urged the EPA to preserve the current definition. One State agency recommended the EPA revise the definition to explicitly include all Federally regulated discharges that impact the waters of the United States and include a reference to the 40 CFR part 230 regulations⁹. Additionally, one State agency recommended the EPA revise the definition of “water quality requirements” to only point source discharges and replace “water quality-related requirements” with “water quality requirements.”

Neighboring Jurisdiction Process (Section 401(a)(2))

State agencies and State associations generally agreed that the section 401(a)(2) process needs to be predictable for planning purposes. A few State agencies and one State association stated the 2023 Rule established clear procedures, transparent thresholds, and defined timelines that support consistent decision-making. Two State agencies noted that, as a neighboring State, they are interested in the opportunity to evaluate discharges that may affect their State’s waters. One State agency noted the requirements to coordinate are “not overly burdensome.” Finally, one State agency said the expertise to complete the “may affect” determination lies at the regional level and urged the EPA to retain their involvement in the process.

In contrast, a few State agencies asserted that the section 401(a)(2) process resulted in unnecessary delays. Specifically, two State agencies providing input on the topic noted the EPA completing their “may affect” evaluation creates unnecessary delays for projects without neighboring jurisdictions. One State agency recommended the EPA could streamline the process by develop online mapping tools to automate and identify low-risk location and project activities, and another States agency recommended the EPA revise the process to allow States to establish programmatic agreements with the EPA to identify areas or projects that they may consider not to have an effect. In another example, one State agency noted the 2023 Rule has resulted in duplicative review process. The State agency recommended the EPA could streamline the section 401(a)(2) by allowing the “may affect” determination to occur concurrently with the EPA’s and the Corp’s review of Federal permit (e.g., section 404 and 10 permits). State agencies

⁹ Also commonly referred to as the 404(b)(1) Guidelines.

providing input on the topic recommended the EPA develop resources (e.g., guidance, tools protocols, or templates) to assist States and Tribes in documenting their evaluation of section 401(a)(2) and deciding whether a “may affect” referral is appropriate.

State agencies had varying perspectives on how the EPA completes its “may affect” determination. For example, one State agency and one State association noted that the non-exhaustive list of factors the EPA relies on in their “may affect” determination is appropriate. On the other hand, a few State agencies noted the EPA’s process for making a “may affect” determination was less clear and recommended the EPA be more transparent about their determination process. For example, two State agency recommended the EPA could clarify when the EPA requires supplemental information to make a determination, what criteria the EPA uses to support their decision, and what the standards and thresholds are for triggering a “may affect” referral to a neighboring jurisdiction. Additionally, one State agency noted that the EPA could clarify the notification timelines and exchange of information. As for the neighboring jurisdiction’s “will violate” determination, one State highlighted the section 401(a)(2) process does not allow for potential reconciling terms and conditions prior to a public hearing. The State agency recommended the EPA revise the regulations to include an option for arbitration and reconciliations prior to a public healing request.

Categorical Determinations

Several State agencies agreed with the EPA that categorical determination may be appropriate for certain circumstance and could promote efficiencies in the section 401(a)(2) process. Several State agencies provided example factors for the EPA to consider; these factors included project type, size, and location to a neighboring jurisdiction in addition to the type of discharge and the quality of the receiving water body. Those supporting categorical decisions expressed the EPA should establish a flexible, science-based approach, include a timeline for completion of categorical determinations in the new rulemaking, consult with neighboring jurisdictions when developing criteria, and/or provide the opportunity for States to formally review and offer comment on proposed categories.

A few State agencies and State associations expressed skepticism about the EPA using categories to make a “may affect” determination. For example, one State agency and one State association expressed that the EPA’s current “may affect” determination process is not transparent and expressed concern that establishing categorical determinations could further complicate the neighboring jurisdiction process. In another example, one State agency and one State association indicated the diverse nature of a State’s aquatic resources requires the EPA to evaluate the facts and specific factors associated with each project. Finally, one State association raised questions about the legality of categorical determinations.

State Experience with the 2023 Rule

Several State agencies and State associations asserted the 2023 Rule enhanced transparency, promoted early engagement, and supported more consistent and effective certification reviews

across a range of project types and permitting actions. Several States noted they are effectively and efficiently issuing water quality certifications within the scope. In contrast, a few State agencies noted challenges with specific aspects of the section 401 regulations and provided recommendations to help improve implementation. Summaries of these experiences are organized by theme below.

Theme 1: Pre-filing Meeting Request

Several State agencies and one State association noted the 2023 Rule's pre-filing meeting request provision improved efficiency in the certification process. Specifically, they noted the current provision provided clarity and flexibility, as well as promoted early engagement between certifying authorities and applicants. The resulting effect was described as saving certifying authorities and applicants both time and resources. Collectively, they recommended the EPA preserve the pre-filing meeting request regulations as written.

Theme 2: Contents of a Certification Request

One State agency noted that the current regulations made it easier for applicants to submit complete applications to the certifying authority. Specifically, the State agency noted the 2023 Rule made it easier for applicants to satisfy both Federal and State certification requirements, which reduced certification delays and confusion on process and timeline.

Two State agencies noted recurring issues that limit effective implementation of the 2023 Rule. Both State agencies asserted missing (e.g., point of contact) and/or inadequate information (e.g., permitting information, types of impacts, extent of jurisdictional waters) in the request for certification creates delays and inefficiencies in the certification process. Additionally, both State agencies noted that there is uncertainty about the federal permitting pathways whether an activity falls under a general permit or requires an individual permit. The two State agencies recommended the EPA should amend the request for certification to require additional information from applicants, issue supplementary guidance, and/or provide examples (such as a template) to help ensure the certifying authority is receiving the necessary information needed to make a decision. One State agency also noted that the certifying authorities should retain the discretion to request supplemental information.

Theme 3: Reasonable Period of Time

A few State agencies stated the reasonable period of time requirements under the 2023 Rule promote transparency, enhance coordination, and provide flexibility. One State agency asserted the procedures defined under the 2023 Rule reduce the risk of unintentional waivers, support tailored review timelines based on project complexity, and reinforce the principles of cooperative federalism. Two State agencies emphasized that projects vary in size – from small projects with limited discharges to large, complex projects – and thus review and certification can range in time depending on the required technical review and public notice. A few State agencies stated the default reasonable period of time promotes tailored agreements between the certifying

authority and Federal agency on the reasonable period of time and supports reasonable scheduling adjustments. One State agency noted this flexibility accommodates the varying needs of technical review and public notice on projects, as well as allows State agencies to address unforeseen circumstances (e.g., delays in information or expanded public participation needs) without risking waiver by inaction. The same State agency stated they opposed any rule changes that would unilaterally limit the reasonable period of time; instead, they asserted it is up to the States and Tribes to determine adequate timelines within the constraints of the Clean Water Act deadlines to complete review and public notice.

In contrast, one State agency encouraged the EPA to revise the current “reasonable period of time” procedures. The State agency asserted most 401 certification reviews were issued within 60-90 days after an application was deemed complete. The State agency recommended the reasonable period of time for Nationwide Permits (NWP) and Regional General Permits (RGPs) should be limited to four months after the application is deemed complete. The State agency further recommended the EPA reduce the reasonable period of time (e.g., 60 days) for non-reporting NWPs.

Two State agencies discussed the start of the reasonable period of time. One State agency requested the EPA clarify what triggers the start of the reasonable period of time, and another State agency noted that the reasonable period of time should not begin until the application is considered complete.

Theme 4: Certification Decisions

One State agency stated that the certification decision framework defined under 40 CFR 121.7(a) prevents certifying authorities from certifying portions of a project while excluding others, even when only discharges present water quality concerns. The State agency expressed this inflexibility in certification actions limit tailored environmental protection and recommended the EPA issue guidance and amend the regulations to clearly define scope limitations or allow for segmented certifications.

Theme 5: Modifications

Two State agencies supported the retention of the current modification procedures defined in the 2023 Rule. One State agency stated that the modification process (along with other provisions) enhanced the efficiency and clarity of section 401 certification process, and another State agency stated the modification procedures is very helpful when small changes need to be made on project schedules or project scope.

One State association noted the 2023 Rule continues to prohibit reopener clauses allowing unilateral modification. The State association asserted that reopener clauses allow permitting authorities to dexterously respond to changes in standards, technologies, water quality needs, public concern, and regulatory frameworks. The State association urged the EPA to reconsider and consult with States regarding reopener clauses.

Theme 6: Other

One State requested the EPA update and reissue the rescinded guidance document, “CWA section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (May 2010).” The State agency asserted it would improve clarity, support consistent implementation, and enhance interagency coordination.

Another State association noted they would like the EPA to consult with States regarding section 401 certification authority over lands of exclusive Federal jurisdiction.