

August 6, 2025

Lauren Kasparek
U.S. Environmental Protection Agency
Office of Water
Oceans, Wetlands and Communities Division
4502-T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

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

RE: U.S. Environmental Protection Agency: Clean Water Act Section 401 Implementation Challenges—Docket ID No. EPA-HQ-OW-2025-0272

Dear Ms. Kasparek:

The Association of California Water Agencies (ACWA) respectfully submits comments regarding the U.S. Environmental Protection Agency's (EPA) request regarding the Clean Water Act (CWA) Section 401 certification process.¹ ACWA supports EPA actions to address implementation challenges and promote regulatory certainty to meet the nation's water quality needs.

ACWA is the largest statewide coalition of public water agencies in the country. ACWA's more than 470 member agencies are responsible for delivering about 90 percent of the water to communities, farms, and businesses in California. ACWA represents water management entities in every sector of water supply, including municipal and agricultural water, water recycling, water reuse, wastewater management, and stormwater management. For more than a century, ACWA and its members have been working to provide high-quality, reliable water supplies in an environmentally sustainable and fiscally responsible manner.

ACWA recognizes the important water quality improvements brought about by passage and implementation of the CWA. Source water protection is vital to our members and ACWA has a history of encouraging EPA to use its authorities to prevent pollutants from entering California's water supply. For this reason, ACWA has been very active in legislative and regulatory initiatives related to the scope of the CWA.

ACWA supports the CWA Section 401 certification process as an important tool to protect water quality while enabling critical infrastructure development, including drinking water and wastewater projects. For example, ACWA member agencies receive CWA Section 401 certifications to be eligible for activities that may result in discharges into federally regulated waters. This includes permits under CWA Section 402, the National Pollutant Discharge

¹ *Establishment of Public Docket and Listening Sessions on Implementation Challenges Associated With Clean Water Act Section 401*, 90 Fed. Reg. 29828 (July 7, 2025). <https://www.govinfo.gov/content/pkg/FR-2025-07-07/pdf/2025-12564.pdf>.

Elimination Systems (NPDES), and CWA Section 404 permits for the discharge of dredged or fill material permits issued by the U.S. Army Corps of Engineers.

ACWA's responses to EPA's questions are discussed below.

1. Scope of Certification and Conditions

Objectives of the 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule included restoring regulatory authority to states, tribes, and territories to protect their water resources.² While the rule attempted to clarify and reinforce CWA Section 401 certification practices, it led to uncertainty among the regulated community. To achieve water quality goals, ACWA members and other water managers need predictability and certainty in determining the scope of certification and conditions for CWA Section 401. Regulatory certainty is essential for water agencies to understand how to plan for and meet water supply and water quality objectives.

ACWA recommends that EPA explicitly regulate the scope of certification to include actual discharges into navigable waters. ACWA agrees with EPA that "It would be inconsistent with CWA Section 401 to deny or condition a certification based on potential impacts not connected to water quality."³ Specifically, ACWA believes EPA should define the scope of certification and conditions as a "discharge into the navigable waters" under CWA Section 401(a)(1)⁴ rather than an "activity" per the 2023 rule. This will better regulate pollutants in waterbodies and protect water quality. Rather, if EPA interpreted the scope of CWA Section 401 per the 2023 rule to regulate an "activity", water and water-related operations like construction, maintenance, and treatment, that are needed to protect water quality could be hindered. Without this clarity, certifying agencies may be uncertain about how broadly they can evaluate project impacts during certification.

CWA Section 401(a)(1) already authorizes states to certify that a discharge from a federally licensed or permitted activity will comply with applicable water quality requirements. CWA Section 401(a)(1) infers that a State or interstate agency has authority to give this certification. California's State Water Resources Control Board and nine Regional Water Quality Control Boards (California Water Boards) are the designated certifying authorities under CWA Section 401 for activities within California.⁵

Relatedly, ACWA supports EPA's adherence to CWA Section 401(d) for certifying authorities to impose conditions that are necessary to ensure compliance with "any other appropriate requirement of State law." These conditions are vital in California, where water quality standards are implemented through a combination of statewide Basin Plans, regional permit programs, and best practices developed under state environmental laws. For example, a single project might impact water quality differently depending on regional hydrology. ACWA recommends that EPA

² *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 88 Fed. Reg. 66558 (September 27, 2023). <https://www.govinfo.gov/content/pkg/FR-2023-09-27/pdf/2023-20219.pdf>.

³ U.S. EPA Office of Water Memorandum: *Clarification regarding the Application of Clean Water Act Section 401 Certification* (May 21, 2025). https://www.epa.gov/system/files/documents/2025-05/clarification-re-application-of-cwa-401-certification_may-2025.pdf.

⁴ U.S. EPA: *Clean Water Act Section 401: State Certification of Water Quality* (November 20, 2024). <https://www.epa.gov/cwa-401/clean-water-act-section-401-state-certification-water-quality>.

⁵ California State Water Resources Control Board: 401 Water Quality Certification and Wetlands Program (April 22, 2025). https://www.waterboards.ca.gov/water_issues/programs/cwa401.

preserve states' flexibility to tailor conditions to site-specific circumstances and impose such conditions when there is a legal rationale linked to water quality protection.

2. Water Quality Requirements

As mentioned above, ACWA supports EPA's respect for state laws and regulations. This includes water-quality requirements. ACWA believes EPA's definition of "water quality requirements" in the 2023 rule is sufficient; it supports regulatory language affirming that "water quality requirements" includes CWA Section 401(a)(1) requirements and Federal and state laws or regulations related to water quality requirements—regardless of whether they apply to point or nonpoint source discharges.

This interpretation is also supported by the statutory language in Section 401(d) and longstanding administrative practice, which is essential to maintaining the integrity and enforceability of state certifications. For these reasons, ACWA also agrees with EPA the phrase "any other appropriate requirement of State law" pursuant to CWA Section 401(d) should be read broadly in reference to water quality requirements.

EPA should reaffirm this scope of "water quality requirements" to avoid varying interpretations by federal agencies, state certifying authorities, applicants, and even courts. This could lead to more inconsistent implementation of Section 401 certifications.

3. Neighboring Jurisdictions

In California, many watersheds cross multiple regional or jurisdictional boundaries. For example, projects may affect multiple water bodies through a combination of direct and indirect impacts, including seasonal flows and watershed management strategies. California's water quality may therefore impact another State's. The potential for neighboring jurisdiction involvement is therefore common.

EPA should clearly outline notification, response, and resolution time requirements in CWA Section 401(a)(2) for neighboring jurisdiction processes. This will avoid unnecessary delays and promote coordinated water quality protection across jurisdictional boundaries. For example, EPA should outline parameters like the specific timeframe of "immediately" for notifying EPA and the threshold for determining whether a discharge "may affect" another jurisdiction's water quality through science-based, measurable criteria to avoid overly broad interpretations.

4. Categorical Determinations

A categorical determination can serve as an effective and efficient tool to streamline the CWA Section 401(a)(2) process, particularly in cases where a discharge has been well-studied and found not to result in cross-jurisdictional water quality effects. ACWA thus supports EPA's concept of categorical determinations for CWA Section 401(a)(2) to support a "no neighboring jurisdiction" for water quality impacts, as long as it is completed with transparency, science-based evidence, and consultation with certifying authorities. This includes water quality monitoring data, environmental assessments, and past permitting experience.

In California, water bodies vary significantly in hydrology, ecology, and regulatory context. However, ACWA understands that there are certain activities, geographic regions, types of waterbodies, or other circumstances such that no neighboring jurisdiction's waters may be affected by discharge. For example, a categorical determination may be appropriate for discharges with minimal or no water quality impacts like certain small-scale hydropower projects or sediment control measures.

ACWA strongly recommends any categorical determination process be open and transparent with the public. EPA should therefore issue a formal notice-and-comment procedure to allow consultation with interested parties. The public, including experienced water professionals, must be given the opportunity to participate in the technical evaluation to provide input on whether proposed categorical determinations are appropriate for the specific water quality conditions within their jurisdictions. Without such engagement, there is a risk that categorical determinations could undermine state authority and weaken protections for water bodies.

5. Stakeholder Experiences

ACWA member agencies have experienced both positive developments and ongoing challenges that merit attention as EPA considers potential improvements to the CWA Section 401 certification process.

CWA Section 401(a)(1) calls for action on a water quality certification. As written, a reasonable period of time is stated as within one year. Under the 2023 rule, EPA determined the “reasonable period of time” as six months from the date that the request for certification was received, if EPA and the certifying authority do not agree upon a reasonable period of time.⁶ California Water Boards typically take two to six months to certify a project.⁷ ACWA therefore believes EPA should redetermine a reasonable period of time as three months to obtain a water quality certification. This aligns with timelines already met by certifying authorities like the California Water Boards, and it promotes an expedited, efficient certification process.

Additionally, EPA's 2023 rule proposed provisions enabling Tribes to obtain “treatment in a similar manner as a state” (TAS) for CWA Section 401, as well as provisions on how Tribes can obtain TAS for participating as a neighboring jurisdiction under CWA Section 401(a)(2). Due to the fluidity of water itself, many of California's watersheds know no boundaries; California waters are intertwined, even if tribal sovereignty exists. Adherence to TAS may therefore provide EPA—and applicants—a simpler, consistent, and efficient manner to implement CWA Section 401 certifications. However, ACWA suggests EPA better define how TAS designations are communicated to neighboring jurisdictions and how overlapping regulatory responsibilities are coordinated.

⁶ 40 CFR 121.6(c). <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-D/part-121/subpart-A/section-121.6>.

⁷ California State Water Resources Control Board: *California Water Boards' Annual Performance Report - Fiscal Year 2020-21* (December 1, 2021). https://www.waterboards.ca.gov/about_us/performance_report_2021/regulate/262_wqcertification.html.

6. Data and Other Information

ACWA appreciates EPA seeking information from interested parties about the application of the 2023 Rule's scope of certification. ACWA member agencies will continue to engage with EPA and provide relevant information to assist in effective and efficient procedures regarding CWA Section 401.

Conclusion

ACWA thanks EPA for its work to address implementation challenges and promote regulatory certainty to meet the nation's water quality needs. Please let us know if there are further opportunities for ACWA to collaborate on water quality efforts or if we can provide additional information and resources. If you have any questions or would like to follow up on this matter, please contact ACWA Federal Relations Representative, Caleb Raspler, at calebr@acwa.com or (202) 434 - 4762.

Respectfully,

A handwritten signature in black ink, appearing to read "Caleb Raspler", with a stylized flourish at the end.

Caleb Raspler
Federal Relations Representative
Association of California Water Agencies