



**OFFICE OF WATER**  
WASHINGTON, D.C. 20460

May 21, 2025

**MEMORANDUM**

**SUBJECT:** Clarification regarding the Application of Clean Water Act Section 401 Certification

**FROM:** Peggy S. Browne, Acting Assistant Administrator

Consistent with the overall cooperative federalism framework of the Clean Water Act, Section 401 authorizes states and authorized Tribes to play a role, but a specific and limited one, in the federal licensing or permitting process. The U.S. Environmental Protection Agency, as the lead federal agency for administering the CWA, is responsible for developing regulations and guidance to ensure effective implementation of CWA programs, including Section 401. The agency promulgated regulations on CWA Section 401 certifications in September 2023 (2023 Rule). Recently, some stakeholders have raised questions about potential applications of the 2023 Rule's scope of certification.<sup>1</sup> The purpose of this document<sup>2</sup> is to reiterate the EPA's longstanding position that states and Tribes must utilize CWA Section 401 only for its statutory purpose – to protect water quality – and not as a weapon to shut down projects for reasons with no basis in the statute or applicable regulations. A certifying authority's evaluation is limited to considering adverse impacts to water quality, and only such impacts insofar as they prevent compliance with applicable water quality requirements.

The scope of certification refers to the purview of a certifying state's or authorized Tribe's analysis when it evaluates a request for certification related to an application for a federal license or permit, to determine whether it will issue certification, deny certification, or waive certification. The most common examples of federal licenses or permits that may be subject to CWA Section 401 certification are CWA Section 404 permits for the discharge of dredged or fill material permits issued by the Army Corps of Engineers as well as Rivers and Harbors Act Sections 9 and 10 permits issued by the Army Corps of Engineers; hydropower and interstate natural gas pipeline licenses issued by the Federal Energy Regulatory Commission; and CWA Section 402 National Pollutant Discharge Elimination System permits issued by the EPA in jurisdictions where the EPA administers the NPDES permitting program.

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<sup>1</sup> See, e.g., America Builds: Clean Water Permitting and Project Delivery Hearing before Subcommittee on Water Resources and Environment, 119th Cong. (2025) (statement of Robert D. Singletary, Executive Director, Oklahoma Department of Environmental Quality, statement of Noah Hanners, Executive Vice President, Nucor Corporation, on behalf of the National Ass'n of Manufacturers).

<sup>2</sup> This document is not a regulation, nor does it change or substitute for any applicable regulations. Thus, it does not impose legally binding requirements on the EPA, states, Tribes, other federal agencies or the regulated community. This document neither alters legal rights or obligations nor changes or creates law. In the event of a conflict between the discussion in this document and any statute or regulation, this document would not be controlling.

Accordingly, energy, critical mineral, infrastructure and development projects that are key to economic growth and the EPA's "Powering the Great American Comeback" initiative are often subject to CWA Section 401.

The 2023 rule and all prior EPA regulations and guidance documents have consistently stated that CWA Section 401 is limited to addressing only water quality-related impacts. Similarly, the regulations do not authorize a certification condition based on generalized concerns about water quality untethered to noncompliance with a specific applicable water quality requirement or requirements. It would be inconsistent with CWA Section 401 to deny or condition a certification based on potential impacts not connected to water quality (e.g., based solely on potential impacts to air quality, traffic, noise, project preference, or economic impacts that have no direct connection to water quality). If a certifying authority imposes certification conditions or denies certification for a reason or reasons such as these, then that certification decision would not comply with CWA Section 401 or the EPA's regulations.

The agency will use a forthcoming Federal Register notice and recommendations docket to identify additional areas of implementation challenges and regulatory uncertainty related to the 2023 Rule's scope of certification to be later addressed through additional guidance or rulemaking.