February 17, 2026

Submitted via Federal eRulemaking Portal at regulations.gov

Ms. Stacey Jensen
Oceans, Wetlands and Communities Division
Office of Water (4504T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Joint Comments from APPA and NRECA on Proposed Rule "Updating the Water Quality Certification Regulation," Docket No. EPA-HQ-OW-2025-2929

Dear Ms. Jensen,

The American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) (the Associations) respectfully submit these comments to the U.S. Environmental Protection Agency (EPA) on the proposed rule entitled "Updating the Water Quality Certification Regulations" (the Proposal) which updates and clarifies important requirements for water quality certification under Clean Water Act (CWA or Act) section 401.[1]

APPA and NRECA are the national trade associations representing rural electric cooperatives and public power utilities nationwide. Together, we provide power to one in four Americans. The Associations represent not-for-profit electric utilities that are actively working to address rising electricity demand by building and maintaining critical energy infrastructure, from power plants to substations. The Association's members also own or operate numerous hydroelectric facilities across the country which provide affordable, reliable electricity to their communities. APPA and NRECA have a significant interest in the Proposal since the construction of new infrastructure and the re-licensing of existing infrastructure like hydroelectric facilities often requires certification under CWA § 401, and the proper and efficient implementation of the CWA § 401 certification process can have

[1] 91 Fed. Reg. 2008 (January 15, 2026).

significant implications on a project, and especially on a project constructed and operated by rural and public power electric utilities such as those represented by APPA and NRECA.

I. Executive Summary

The CWA establishes a framework for shared responsibilities among the federal government, states, and tribes. APPA and NRECA recognize and support this balance, including the role of states and tribes to serve as certifying authorities under CWA § 401. However, while most states have acted in good faith to certify, waive certification, or request conditions under CWA § 401, some bad actors have sought to weaponize the program by going beyond the parameters established by Congress to either block projects for concerns having little to nothing to do with water quality or weigh down projects with costly conditions that project proponents often have no choice but to accept if they want their project to proceed. Such actions can delay or block important projects that APPA and NRECA members are undertaking to respond to the country's surging energy demand. Such actions can also add unnecessary costs that are ultimately passed down to consumers.

EPA's Proposal seeks to establish an appropriate scope for the factors that may be considered by states and tribes under the statute and makes other important changes to the CWA § 401 certification process that will provide APPA and NRECA members with regulatory clarity and facilitate their continued goal of providing reliable and affordable energy. APPA and NRECA thus support the proposal in general and offer several recommendations to further improve the CWA § 401 certification process as noted below.

- **Clarify exclusions from CWA § 401 certification** to confirm that activities resulting only in *incidental fallback* do not constitute a discharge requiring certification, consistent with existing Corps regulations, in order to prevent unnecessary delays, costs, and misapplication of CWA § 401 authority.

- **Establish an administrative appeals process** allowing applicants to challenge improper CWA § 401 certification decisions—such as overly broad scope determinations or misapplied water quality standards—through a limited, timely federal review before resorting to litigation, improving transparency, consistency, and regulatory certainty.

- **Maintain CWA § 401 certification at the general permit level**, particularly for Nationwide Permits, as upfront certification is far more efficient than project-by-project review and is essential to preserving routine maintenance, repair, and reliability work critical to electric service, especially for public power utilities and rural electric cooperatives.

II. Overview of America's Electric Cooperatives and Public Power Utilities

APPA and NRECA members are committed to providing affordable, reliable, and safe electricity while advancing energy innovation and integrating more renewable resources.

As not-for-profit utilities, they must balance environmental compliance and replacement power costs with limited financing options. These costs are ultimately borne by the communities they serve. The financial burdens imposed by the current rule place additional strain on small utilities with fewer resources, thereby extending project timelines.

Together, APPA and NRECA members serve one in four of the nation's electricity customers. We therefore share a strong interest in environmental policies that reflect small-entity considerations, provide feasible compliance timelines, support reliable electric service, and achieve cost-effective outcomes.

A. About APPA

APPA is a trade association composed of not-for-profit, community-owned utilities that provide electricity to 2,000 towns and cities nationwide. APPA protects the interests of nearly 55 million people served by public power utilities and the 96,000 people they employ. APPA advocates and advises on electricity policy, technology, trends, training, and operations. APPA members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power. APPA and our members have and continue to be dedicated to clean air in our communities and the protection of the environment.

Many APPA members serve smaller communities. Approximately 1,300 of the nation's 2,000 public power utilities have 10 or fewer employees and serve towns, villages, or counties with fewer than 10,000 people, and all but 144 of the nation's public power utilities would be considered a "small governmental jurisdiction" under the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA). Public power utilities operate in 49 states (all but Hawaii) and in five U.S. territories (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands).

B. About NRECA

NRECA is the national trade association representing nearly 900 not-for-profit electric cooperatives and other rural electric utilities. America's electric cooperatives are owned by the people that they serve and comprise a unique sector of the electric industry. NRECA's member cooperatives include 64 generation and transmission (G&T) cooperatives and 830 distribution cooperatives.

Electric cooperatives provide power to one in eight Americans and serve as engines of economic development for 42 million people across 56% of the nation's landmass. They own and maintain 2.7 million miles, or 42%, of the nation's electric distribution lines and serve large expanses of the United States that are primarily residential and typically sparsely populated. Those characteristics make it comparatively more expensive for rural electric cooperatives to operate than the rest of the electric sector, which tends to serve more compact, industrialized, and densely populated areas.

As not-for-profit entities, electric cooperatives are unique in the way they are financed. Cooperatives have no equity shareholders who can bear the costs of stranded generation assets, investment in new or alternative generation resources, or extensive upgrades to networks and systems. Cooperatives do not have a rate of return on equity as do investor-owned utilities. All costs are passed through directly to each cooperative's consumer-members via increased electricity rates.

Locally, cooperatives are focused on powering and empowering their communities. Nationally, electric cooperatives are focused on advocating for smart energy policy that keeps the lights on. This includes pressing for solutions to meet increasing energy demands at a cost local families and businesses can afford.

III. Background

In 2020, EPA promulgated the first rule to establish a standardized process for CWA § 401 certification, superseding practices that had been in place since before the enactment of the Clean Water Act. The 2020 rule—developed under a directive to streamline energy permitting—narrowed the scope of review to the effects of a discharge, added procedural steps like pre-filing meetings, limited states' ability to request resubmissions, and removed modification provisions (2020 Rule).[2] In 2023, EPA reversed course on key issues by expanding review to the "activity as a whole," allowing broader information requests, restoring withdrawal-and-resubmission practices, and reintroducing modification authority (2023 Rule).[3]

After significant stakeholder concerns about confusion and overly broad applications under the 2023 Rule, EPA issued a clarification memorandum, gathered input through listening sessions, and is now proposing revisions to ensure CWA § 401 certification is used only to protect water quality, improve certainty and transparency, and better align with statutory text and judicial guidance.

IV. Efficient Permitting is Critical to Affordable and Reliable Power

CWA § 401 authorizes states and tribes to grant, condition, deny, or waive water quality certifications for federally permitted activities that may result in a discharge to waters of the United States (WOTUS). Because nearly all major energy infrastructure projects require a federal permit—such as Federal Energy Regulatory Commission (FERC) hydropower licenses, pipeline authorizations, U.S. Army Corps of Engineers (Corps) section 404 permits, and National Pollutant Discharge Elimination System (NPDES) permits—section 401 plays a critical gatekeeping role in project timelines, scope, and feasibility. When section 401 reviews are uncertain or overly broad, they can delay essential energy projects and increase costs for utilities, particularly those serving rural communities and public

[2] 85 Fed Reg at 42,210 (July 13, 2020).
[3] 88 Fed. Reg at 66,558 (September 27, 2023).

power customers. Greater clarity regarding the scope of review, applicable timelines, and required information would strengthen planning certainty for grid investments, hydropower re-licensing, transmission build-out, pipelines, and generation projects, while reducing risk and improving affordability.

CWA section 401 plays a central role in this effort, and it is important that states and tribes retain meaningful roles in ensuring that federally permitted activities comply with state water quality requirements. At the same time, some certifying authorities have applied section 401 in ways that stray from the statute's intended purpose and do not materially advance water quality protection. In certain cases, the certification process has been used to shift costs or impose burdens on power providers—entities that often have little practical ability to reject such conditions because certification is a prerequisite to producing electricity. While project proponents recognize that some uncertainty is inherent in permitting, unpredictable delays can significantly increase project costs and ultimately raise electricity rates. For these reasons, APPA and NRECA members—who serve communities that are particularly sensitive to rate impacts—support the Proposal's efforts to restore clarity and predictability to the CWA § 401certification process.

The real-world consequences of an overly expansive or misapplied section 401 process are illustrated by the recent experience of Buckeye Power, Inc. (Buckeye), a not-for-profit electric cooperative serving some of the poorest communities in Ohio, where a significant portion of customers live below the poverty line. Buckeye owns and operates the Cardinal Power Plant on the Ohio River in Brilliant, Ohio. To ensure the generating unit's intakes are clear of sediment and that barges can safely deliver coal to the plant, Buckeye must periodically dredge the river—an activity that requires a permit from the Corps under section 10 of the Rivers and Harbors Act.

For decades, Buckeye and prior owners had obtained these permits without the need for state certification under CWA § 401. In late 2021, however, the state informed Buckeye that CWA § 401certification would now be required, even though the dredging activity involved removing material from the river and disposing it off-site at an approved upland disposal facility, rather than discharging it into the river. The state further required Buckeye to conduct sediment sampling and additional analyses, despite Buckeye's explanation that the only potential discharge associated with the activity—incidental fallback—is expressly excluded from regulation. Nevertheless, the certification process took approximately three years and nearly caused the plant to come off-line due to sediment buildup. The cost to complete the application was roughly $150,000 in consultant fees, third-party technical work, and application costs. While this time and expense may appear modest in isolation, for a not-for-profit electric cooperative serving economically vulnerable communities, unnecessary delays and costs can have a meaningful impact on financial stability and the ability to provide affordable, reliable power.

A. An Appropriate and Efficient CWA § 401 Certification Process is Important for Protecting Hydropower Facilities

Establishing a clear and appropriate scope of certification can be particularly important when APPA and NRECA members seek to re-license their hydroelectric facilities. Hydropower is America's oldest and most reliable renewable resource, providing dispatchable, carbon-free power that is critical for grid stability and resilience. In 2024, generation from hydroelectric facilities accounted for 6 percent of the country's electric power and supports black-start capability, which is critical for reliability during peak demand and for grid recovery after natural disasters.[4] Hydropower is particularly important for APPA and NRECA members because the facilities cost very little to maintain and operate and provide a reliable, dispatchable, source of electricity. In fact, hydropower facilities are (relatively) easy to maintain that it is no coincidence that they are some of the oldest power plants operating in the United States with some still running since the late 19th century.

APPA and NRECA members operate non-federal hydropower projects licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA). Every 50 years, these hydropower projects need to be recertified by FERC, a process that typically takes many years and can cost millions of dollars. Before FERC can issue the new license, however, it must comply with other statutes and processes, including certification under CWA § 401.

In order to ensure that APPA and NRECA can continue to provide their members with affordable and reliable hydropower, it is critical that the scope and process of certification under CWA § 401 be as efficient as possible; any unnecessary delays or conditions that exceed a state's authority under the CWA risk not only delaying projects that play an important role in providing always-on electricity but can even risk the future viability of some projects if costs driven by inappropriate conditions are high enough.

V. APPA and NRECA Support the Proposed Narrowing of the Scope of Certification

The Proposal would narrow the scope of CWA § 401 certification to an assessment of whether a facility's point-source discharges into WOTUS will comply with specified water quality requirements, rather than allowing a broader review of the entire activity.[5] This narrowing is consistent with what Congress clearly intended and would provide important clarity and certainty to permit applicants, certifying authorities, and federal agencies.

Section 401(a)(1) makes clear that certification is required only when an activity may result in a discharge to navigable waters, and that the state's role is to ensure that the discharge

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[4] U. S. Energy Information Administration, Electric Power Annual, Table 1.1, "Total Electric Power Industry Summary Statistics, 2024 and 2023." Available at https://www.eia.gov/electricity/annual/table.php?t=epa_01_01.html.

[5] 91 Fed. Reg. at 2,023.

itself complies with the Act. Because the statute repeatedly centers the certification inquiry on the discharge—not the project as a whole—EPA should return to the narrower scope reflected in the 2020 Rule, which aligned with § 1341(a)(1) by limiting section 401 review to assuring that a discharge from a federally licensed or permitted activity meets water quality requirements.

The CWA makes clear that CWA § 401 certification is required only when an activity *"may result in a discharge to navigable waters,"* and that the certifying authority's role is to ensure that the discharge itself complies with the Act. Because the statute repeatedly centers the certification inquiry on the discharge—not the broader project—it is essential that EPA restore the scope of review to the boundaries Congress intended. Returning to a discharge-focused approach will eliminate the uncertainty introduced by the 2023 Rule's "activity as a whole" framework, which expanded state and tribal authority beyond what the Act authorizes and allowed conditions unrelated to water quality. A narrower scope will improve consistency with the statutory text, reduce opportunities for misuse of the certification process, and provide greater predictability for applicants. For APPA and NRECA members—who serve communities highly sensitive to rate impacts—aligning the certification process with Congress's intent is critical to controlling costs and ensuring that section 401 functions as a water-quality tool rather than a broad permitting veto.

For example, a certifying authority might attempt to require a hydropower project to construct a fish ladder pursuant to the Endangered Species Act to enable upstream fish passage, arguing that fish are a designated use of the waterbody under the state's EPA-approved water quality standards and that such passage is therefore necessary for the project to comply with those standards. However, this type of condition extends well beyond the proper scope of a section 401 certification because it attempts to regulate the overall activity—the continued presence and operation of the dam—rather than the discharge into a WOTUS.

Section 401 authority is limited to ensuring that the discharge itself complies with the specific water quality requirements identified in sections 301, 302, 303, 306, and 307 of the CWA. It does not authorize states or tribes to impose conditions addressing broader operational, structural, or project-wide measures. A fish ladder is not an effluent limitation, nor does it regulate the chemical, physical, or biological characteristics of a discharge. Instead, it governs facility design and project operations—areas that fall squarely within the FPA's comprehensive licensing scheme.

Under the FPA, it is FERC—not a certifying authority under section 401—that determines whether fish passage measures are appropriate. FERC is required to consider recommendations from state and federal fish and wildlife agencies, and section 18 expressly authorizes the U.S. Fish and Wildlife Service and National Marine Fisheries Service to prescribe fishway requirements, including construction, operation, and maintenance of fish ladders. These federally-directed authorities demonstrate Congress's

clear intent: fish passage is a FERC licensing issue, not a water-quality-based condition appropriate for a section 401 certification.

Allowing certifying authorities to impose such conditions would improperly expand section 401 into a broad project-level veto power, contrary to the statutory text and the cooperative federalism framework of the Clean Water Act. It would also conflict directly with FERC's exclusive jurisdiction over hydropower licensing, potentially creating overlapping or inconsistent federal-state directives and undermining the uniformity Congress intended in the FPA's licensing process.

C. Scope of Granting Certification Conditions

EPA proposes to keep the longstanding principle—carried forward from both the current regulation and the 2020 Rule—that the scope for adding conditions to a certification is the same as the scope used to decide whether to grant or deny certification. APPA and NRECA support maintaining a single standard to avoid confusion among applicants, certifying authorities, and federal permitting agencies, since adding conditions to justify granting a certification is effectively equivalent to determining that certification would otherwise have to be denied.[6] Because the same analysis governs both outcomes, EPA is proposing to delete the separate regulatory paragraph on the scope of conditions. The updated text at §121.3 would clearly apply to all aspects of section 401 certification, including conditions, and EPA notes that similar language in the 2020 Rule did not create implementation issues.

D. Water Quality Requirements

For the Associations' members, the Proposal's narrower focus provides greater certainty about which conditions are permissible, helping constrain cost increases driven by state demands on non-water-quality matters. Below, we provide an example of potential impacts of water quality requirements that are clearly outside the scope of review.

The stream flow requirements contemplated in the 2018 Bay-Delta Plan would have profound consequences for the rural communities served by an APPA member in the Merced, Tuolumne, and Stanislaus watersheds. The State Water Board plan would mandate that 30–50 percent of unimpaired flows be released from upstream reservoirs—without regard to local conditions or competing needs—the Plan would significantly reduce the water available to support farming, which is central to the economic stability of these regions in California. Reduced irrigation supplies would diminish crop yields, increase production costs, and threaten the long-term viability of family farms and agricultural employers that anchor rural economies.

At the same time, diminished surface water supplies would degrade local drinking water systems, forcing small and often resource-constrained communities to pursue costly alternative supplies or treatment upgrades. Lost hydropower generation resulting from

[6] 91 Fed. Reg at 2,026.

reduced reservoir storage further compounds these impacts by removing a critical source of affordable, carbon-free electricity and increasing the financial strain on utilities that already operate with limited margins.

These combined effects translate into higher electricity and water rates for households, reduced agricultural output and employment, and declining local tax revenues—creating a cascading set of economic harms for communities that can least absorb them. Instead of advancing meaningful water quality improvements, imposing these flow mandates through the section 401 certification process exposes rural communities to long-term economic instability and undermines the reliable delivery of essential services.

VI. Language on Other Proposed Changes

A. Request for Certification

APPA and NRECA support EPA's proposal to standardize the contents of a "request for certification." [7] It is a meaningful improvement. By eliminating the potential for states or tribes to impose additional, *ad hoc* requirements, the rule would create clarity regarding when the statutory one-year review period begins. This added consistency would also help prevent delays stemming from inconsistent or overly subjective determinations about whether a request is complete.

B. Extension of Reasonable Period of Time

The proposed rule would reinforce the one-year review deadline by preventing automatic extensions and limiting any mutually agreed-upon extension to no more than one year. Just as importantly, it would stop certifying authorities from pressuring applicants to withdraw and resubmit their requests simply to restart the review clock. These changes promote accountability and ensure timely decision-making.

For small rural electric cooperatives and public power utilities, the benefits are particularly significant. These entities often operate with limited staffing, smaller technical teams, and tighter budgets than investor-owned utilities. Long or unpredictable certification timelines can strain already-constrained resources, divert personnel from essential operational duties, and delay critical infrastructure improvements. By providing greater predictability and preventing unnecessary procedural delays, the proposed rule would help small utilities better manage project planning, avoid unexpected cost escalations, and maintain reliable service to the communities they serve.

[7] 91 Fed. Reg at 2,018.

VII. Recommendations

A. Clarify Exclusions

As demonstrated by the Buckeye example discussed above, there is clear confusion about what constitutes a discharge into a WOTUS and thus requires certification under CWA § 401. Specifically, Buckeye's dredge permit was delayed by almost three years and imposed a cost of approximately $150,000 because a state determined, in effect, that incidental fallback was not exempt despite the Corps' regulations clearly stating that "the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States."[8] The Corps' regulations also explicitly lists incidental fallback among exclusions in 33 CFR 33.2(d)(2). Nonetheless, a dredging process that only discharged incidental fallback was required to receive certification under CWA § 401, so clarification by EPA is warranted.

B. Administrative Appeals Process

APPA and NRECA recommend EPA, through regulation, establish an administrative appeals process to allow applicants to challenge issues such as the scope of certification and the applicable water quality standards before resorting to the judicial system. Creating such a process would require revising the 2023 Rule, which currently limits federal licensing and permitting agencies' responsibilities to verifying procedural compliance in the certification process (40 CFR 121.8).

Under this proposed framework, the federal licensing or permitting agency would have limited jurisdiction to substantively review the conditions imposed in a CWA § 401 certification and ensure that the certifying authority's actions are consistent with federal law and regulations governing both the scope of certification and the definition of water quality requirements. An applicant could file a petition with the federal agency—within a short, defined period (e.g., 30 days) following issuance of the certification. The petition would outline the applicant's objections, identify deficiencies, and propose corrective actions. The federal agency would then have a similarly limited timeframe (e.g., 30 days) to review the petition and either deny it or issue an order requiring changes, during which time the state certifying authority would take no further action.

Establishing such an administrative appeals process would offer several important benefits. First, it would provide a transparent and efficient mechanism for resolving disputes – such as the one at the center of the Buckeye example - without requiring applicants to immediately pursue costly and time-consuming judicial review. Second, it would promote greater national consistency by ensuring that federal licensing and permitting agencies have a structured role in reviewing certification conditions that may exceed statutory authority. Third, it would improve regulatory certainty for applicants—

[8] 33 CFR 323.2(d)(1).

especially small, resource-constrained public power utilities and rural electric cooperatives—by helping prevent inappropriate or unlawful conditions from delaying critical infrastructure projects. Finally, this process would reinforce accountability within the section 401 framework, ensuring that the certification process remains focused on water quality impacts rather than broader policy objectives unrelated to the statutory scope of review.

C. Applicability of 401 Certification to General Permits

In the Proposal, EPA solicits comment on whether the best reading of the statute supports extending the CWA section 401 certification requirements to general permits.[9]

EPA has consistently maintained that section CWA 401 certification applies to general permits issued under CWA sections 402 and 404 and has noted that this interpretation is supported by case law.[10] However, EPA also recognizes that general permits do not involve an "applicant," which raises questions about whether section 401 should apply in these situations.

The Associations' members rely heavily on general permits as a critical tool for efficient and timely project authorization. Chief among these is the Nationwide Permit (NWP) program, administered by the Corps, which plays an essential role in enabling projects with no more than minimal environmental impacts to proceed under Clean Water Act section 404 without unnecessary delay. The NWPs are foundational to routine utility operations, supporting ongoing maintenance, repair, and reliability work across the electric system. As part of the Corps' recent reauthorization of the NWPs through 2031, the program appropriately underwent certification by states under CWA § 401 to ensure continued, uninterrupted use of the NWP program.[11]

Although the process for obtaining CWA § 401 certification for the NWPs required time and advance coordination to ensure the program did not lapse, APPA and NRECA believe that approach was far more efficient than the alternative. Even if EPA were to conclude that the best reading of the statute does not require CWA § 401 certification for general permits, it is unclear how project proponents would be able to rely on those permits in practice. If utilities were required—either as a legal matter or out of an abundance of caution—to seek individual CWA § 401 certification each time they sought to use a nationwide permit, it would undermine the very purpose of the NWP program. This outcome would be particularly problematic for APPA and NRECA members who rely heavily on NWP 3 to conduct routine maintenance and repair of transmission and distribution infrastructure necessary to provide reliable electric service.

[9] 91 Fed. Reg at 2,020.
[10] 91 Fed. Reg at 2,021.
[11] 91 Fed. Reg. 768 (January 8, 2026).

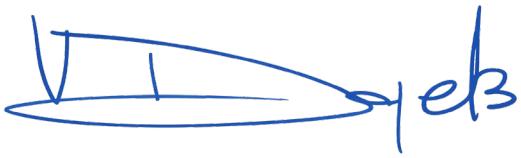
VIII. Conclusion

For the reasons discussed above, the Associations urge EPA to finalize the changes in its Proposal and address our recommendations. Failure to do so will continue to add uncertainty and costs to energy projects, thereby challenging our members' ability to provide reliable and affordable electricity.

Should you have any questions about these comments, please contact Vlad Dorjets (vlad.dorjets@nreca.coop) or Carolyn Slaughter (cslaughter@publicpower.org).

Sincerely,

Carolyn Slaughter
Senior Director, Environmental Policy
American Public Power Association



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