



## Memorandum

Water Quality Subcommittee

Coal Policy Task Force

Minerals Policy Task Force

Tawny Bridgeford, General Counsel & Senior Vice President, Regulatory Affairs

July 10, 2025

EPA Opens Docket on CWA 401 Implementation Challenges

The U.S. Environmental Protection Agency (EPA) recently [announced](#) its intent to open a public docket and host listening sessions on Clean Water Act (CWA) section 401 implementation challenges. According to EPA, the agency will use feedback received to determine next steps to address "identified areas of regulatory uncertainty or implementation challenges regarding the scope of certification."

On July 7, 2025, EPA published [notice](#) of this opportunity in the *Federal Register*. **Written feedback must be received by Aug. 6, 2025.** EPA will also hold **two webinar-based listening sessions** to solicit feedback on the questions identified in the *Federal Register* notice: (1) **July 16, 2025**, from 1:00 - 4:30 p.m. (Eastern) (register [here](#)); and (2) **July 30, 2025**, from 1:00 - 4:30 p.m. (Eastern) (register [here](#)). Additional information, including links to previous engagement efforts and other resources, is available [here](#).

**The National Mining Association (NMA) is determining whether to weigh in at this juncture. Given the short comment period, please send all feedback to me at [tbridgeford@nma.org](mailto:tbridgeford@nma.org) no later than July 18, 2025.**

**Background**

On Sept. 27, 2023, EPA published its revised CWA section 401 certification rule ([2023 Rule](#)). 88 Fed. Reg. 66,558 (Sept. 27, 2023). The final rule went into effect on Nov. 27, 2023. Overall, the final rule retained some of the helpful improvements from the Trump administration's 2020 rule and revised several provisions based on concerns raised in both NMA's [association](#) comments and those raised in our [coalition](#) comments. However, there are aspects of the rule that are vague and could be interpreted and applied broadly by states and tribes that want to use the section 401 process to block or delay certain projects.

Notably, the final rule returned to the broader scope of review that was in place prior to the 2020 rule by providing that a state or Tribe shall evaluate the water quality-related impacts from the entire activity, including construction and operation, and not solely the aspect of the activity directly authorized by a given Federal license or permit. While the regulatory text and preamble provided some helpful guardrails, such as limiting the scope of review to water-quality impacts, EPA still left ample flexibility for states and tribes to interpret these provisions broadly.

EPA also expanded the neighboring jurisdiction process established by CWA section 401(a)(2) by including both grants of certification (with or without conditions) and waivers of certification, while broadening the definition of the term "neighboring jurisdiction" to include any jurisdiction other than the one in which the discharge originates or will originate.

Finally, the final rule included provisions for Tribes to obtain "treatment in a similar manner as a state" (TAS) status for purposes of section 401 certification or to obtain TAS to act as a neighboring jurisdiction under section 401(a)(2). This marked the first time Tribes have been given these options without also applying for TAS for water quality standards under CWA section 303(c).

## **Trump Administration's Reconsideration**

On May 22, 2025, EPA [announced](#) a [memorandum](#) clarifying the scope of the CWA section 401 certification process. The NMA welcomed this development, as this program's scope has been a longstanding priority for the Water Quality Subcommittee. Importantly, EPA emphasized its longstanding view that the process is limited to "addressing only water-quality related impacts"

and that 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)."

EPA has now opened a pre-rulemaking docket to receive feedback on the following questions to inform future guidance or rulemaking efforts to address regulatory uncertainty or implementation challenges.

1. Defining the scope of certification generally and the scope of certification conditions: EPA is seeking stakeholder input on the 2023 Rule's interpretation of the scope of certification and certification conditions, including but not limited to, the legal rationale for interpreting scope as applicable to the "discharge" versus the "activity" and whether the agency should clarify or revise its interpretation of scope of certification. EPA also seeks input on whether justification is necessary to demonstrate that certification conditions included in a certification decision are within the appropriate scope, and whether further clarification is needed on the waters considered in acting on a request for certification, also known as applicable waters. EPA encourages the submission of any examples of specific legal vulnerabilities, implementation challenges, or regulatory uncertainty related to the 2023 Rule.
2. Water quality requirements. EPA requests stakeholder input on the definition of "water quality requirements" including but not limited to, whether the agency should further clarify or revise its interpretation of the statutory phrase "other appropriate requirements of State law" from CWA section 401(d), whether the Agency should clarify or revise the definition of "water quality requirements," and any legal rationale for such clarifications or revisions.
3. Neighboring jurisdictions. EPA seeks data or information from stakeholders about how the agency should consider whether a neighboring jurisdiction's water quality may be affected by discharge for purposes of CWA section 401(a)(2) and whether there are parameters to consider in making this determination.

4. Categorical determinations under CWA section 401(a)(2). EPA requests data or information from stakeholders on whether there are specific types of activities, geographic regions, types of waterbodies, or other types of circumstances that 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. Stakeholder input on CWA section 401 certification experiences. EPA seeks data and information from stakeholders on their experiences with the 2023 Rule, including certification procedures, the CWA section 401(a)(2) process, and the application of TAS solely for section 401, which may assist the agency in identifying any areas for simplifying certification procedures or improving agency business processes.
6. Data and other information. EPA requests data or information from stakeholders about the application of the 2023 Rule's scope of certification, including but not limited to, examples of certification decisions issued under the 2023 Rule that are believed to exceed the 2023 Rule's scope of certification.

## Next Steps

The NMA is interested in your company's feedback on these questions. The NMA will determine whether association engagement is warranted based on member feedback on the questions provided and review of our historical positions on this CWA program. We are also coordinating with coalition partners on this matter on potential coalition comments.

Please contact me at [tbridgeford@nma.org](mailto:tbridgeford@nma.org) by **July 18, 2025**, if this pre-rulemaking docket is a priority for your company or have feedback on the questions provided.

