



February 17, 2026

VIA ELECTRONIC SUBMISSION

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
Washington, DC 20460

Re: Updating the Water Quality Certification Regulations, Docket No. EPA-HQ-OW-2025-2929.

Dear Administrator Zeldin:

On January 15, 2026, the U.S. Environmental Protection Agency (EPA) published a proposed rule updating the Clean Water Act's (CWA) water quality certification regulations.¹ This letter constitutes the Office of Advocacy's (Advocacy) public comments on the agencies' proposal.

Advocacy supports the EPA's proposed updates to CWA section 401. They will aid small entities by adding regulatory clarity to the water quality certification process. Advocacy also recommends that the EPA refrain from requiring section 401 certification for general permits and explore options for conducting parts of the section 401 process concurrently, where feasible, to further minimize delays.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy in 1976 under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent voice within the executive branch that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the Small Business Administration (SBA) or the Administration.

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process.

¹ 91 Fed. Reg. 2008 (Jan. 15, 2026).

² Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.³ If a rule is not expected to have a significant economic impact on a substantial number of small entities, agencies may certify it as such and submit a statement of the factual basis for such a determination that adequately supports its certification.⁴

Additionally, section 609 of the RFA requires the EPA to conduct special outreach efforts through a small business advocacy review (SBAR) panel.⁵ The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.⁶

Advocacy's comments are consistent with congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁷

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁸ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁹

B. The EPA's Revisions to the Water Quality Certification Process

CWA section 401 grants authority to states (and some tribes) to review any discharge into a water of the United States (WOTUS) within their borders resulting from a proposed activity requiring a federal license or permit.¹⁰ A federal agency may not issue a license or permit to conduct any activity that may result in any discharge into a WOTUS, unless the affected State issues a section 401 certification or the certification is waived.¹¹

In 2023, the EPA revised section 401 regulations and made several changes to the certification process, including the scope of certification, the contents of a request for certification and certification decision, and modification to certification decisions.¹² In 2025, the EPA sought comment on regulatory uncertainty resulting from the 2023 changes.¹³

³ 5 U.S.C. § 603.

⁴ *Id.* § 605(b).

⁵ *Id.* § 609.

⁶ *Id.*

⁷ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

⁸ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

⁹ *Id.*

¹⁰ 33 U.S.C. § 1341.

¹¹ *Id.*

¹² 88 Fed. Reg. 66558 (Sept. 27, 2023).

¹³ 90 Fed. Reg. 29828 (July 7, 2025).

In response to the input received, the EPA proposed revisions to the following elements of the section 401 certification process:

- The contents of a request for certification.
- The scope of certification.
- The contents of a certification decision.
- The modification process.
- Withdrawal and resubmittal of requests for certification.
- The automatic extension process to the reasonable period of time.
- “Treatment in a similar manner as a State” (TAS) for tribes.¹⁴

The goal of the proposed changes is to “clarify several aspects of the certification process consistent with the statutory framework.”¹⁵

II. Small Entities Support the EPA’s Proposed Changes to the Water Quality Certification Process.

The small entities subject to the requirements of this proposal are those applying for federal licenses or permits subject to section 401 certification, such as construction, manufacturing, mining, and utility firms. Collectively, these sectors account for more than one million small businesses.¹⁶

Advocacy held a small entity roundtable on January 29, 2026, to discuss the proposed rule. A common theme amongst the small entities attending the roundtable was support for the EPA’s reforms to the water quality certification process.

A. Permitting “Discharges” as Opposed to “Activities as a Whole” Will Provide Predictability and Clarity to Small Entities While Also Accomplishing the Clean Water Act’s Goals.

In 2023, the EPA expanded the scope of water quality certifications to focus on “activities as a whole” rather than discharges.¹⁷ In practical terms, this meant that CWA section 401 applied to the entire scope of a project, rather than just the parts of a project that resulted in discharges to a WOTUS. For larger projects, such as public infrastructure projects, this new focus broadened the CWA’s regulatory jurisdiction considerably and resulted in:

[a]dded conditions to permits for unrelated considerations such as wildlife crossings, access for the public, restoration activities, and wildlife restrictions. These conditions are

¹⁴ 91 Fed. Reg. 2008, 2010 (Jan. 15, 2026).

¹⁵ *Id.* at 2008.

¹⁶ Office of Advocacy analysis of the U.S. Census Bureau Statistics of U.S. Businesses (SUSB), available at <https://www.census.gov/programs-surveys/susb.html>.

¹⁷ 88 Fed. Reg. 66558 (Sept. 27, 2023).

outside the scope of water quality, can require the hiring of specialized staff, and lead to construction scheduling delays.¹⁸

For mining projects, the “activities as whole” turned the section 401 certification process into a:

“[c]atch all” to evaluate any potential environmental impacts that theoretically could impact some waters at some point or to pursue state environmental goals potentially unrelated to water quality that should more appropriately be done through a separate state regulatory program.¹⁹

Delays and increased staff expenses result in additional costs for the small businesses who work on these projects. Additionally, the vagueness of regulating an “activity as a whole” makes it difficult for small businesses to plan for the conditions which could be attached to a section 401 permit.

On April 9, 2025, President Donald J. Trump issued a Presidential Memorandum titled *Directing the Repeal of Unlawful Regulations*.²⁰ The memorandum directed agencies to ensure that their regulations complied with a list of 10 different Supreme Court cases, including *Loper Bright Enterprises v. Raimondo*.²¹ The memorandum directs agencies to “immediately take steps to effectuate the repeal of any regulation, or the portion of any regulation, that clearly exceeds the agency’s statutory authority or is otherwise unlawful” and gives priority to rules in conflict with the listed Supreme Court decisions.²²

In *Loper Bright*, the Court states that when analyzing the limits of agency authority, the only question that matters is, “[d]oes the statute authorize the challenged agency action?”²³ Here, as the EPA notes “[t]he plain language of CWA section 401(a) directs States to certify that any **discharge** resulting the proposed Federally licensed or permitted activity will comply with the enumerated provisions of the CWA.”²⁴ Thus, the 2023 expansion of CWA section 401 to include “activities as a whole” as opposed to “discharges” is in violation of both *Loper Bright* and the President’s April 9, 2025 memorandum.

The EPA’s proposed rule refocuses the water quality certification process on discharges of pollutants into WOTUS. Specifically, the agency offers the following regulatory text:

¹⁸ Associated General Contractors of America, Comments on Implementation Challenges Associated with Clean Water Act Section 401 (Aug. 6, 2025), <https://www.regulations.gov/comment/EPA-HQ-OW-2025-0272-0062>.

¹⁹ National Mining Association, Comments on Implementation Challenges Associated with Clean Water Act Section 401 (Aug. 6, 2025), <https://www.regulations.gov/comment/EPA-HQ-OW-2025-0272-0076>.

²⁰ The White House, *Memorandum for the Heads of Executive Departments and Agencies, Directing the Repeal of Unlawful Regulations*, (April 9, 2025), <https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/>.

²¹ 603 U.S. 369 (2024).

²² The White House, *supra* note 20.

²³ *Loper Bright*, 603 U.S. at 375.

²⁴ 91 Fed. Reg. 2008, 2023 (Jan. 15, 2026) (emphasis added).

[t]he scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a federally licensed or permitted activity will comply with applicable and appropriate water quality requirements.²⁵

Advocacy supports the EPA's proposed regulatory language. Clarifying the scope of section 401 will benefit small businesses by limiting CWA requirements to only those portions of a project which result in discharges. This will ensure that the goals of the CWA are achieved without unfairly imposing additional regulatory requirements unrelated to water quality on small businesses. Additionally, the EPA's changes will bring section 401 regulations into compliance with *Loper Bright*.

B. The EPA Should Not Extend Section 401 Requirements to General Permits.

The EPA has asked for comment on whether the best reading of the CWA supports extending section 401 requirements to “general permits, even in the absence of an ‘applicant.’”²⁶ The agency's current position is that section 401 “extends to general licenses and permits such as CWA general permits.”²⁷ Under CWA section 404,²⁸ general permits are issued for “discharges that will have only minimal adverse effects.”²⁹ Examples of activities requiring a section 404 general permit include “minor road activities, utility line backfill, and bedding.”³⁰

President Trump's Executive Order (EO) 14219, *Ensuring Lawful Governance and Implementing the President's “Department of Governmental Efficiency” Initiative*,³¹ instructs agencies to specifically identify “regulations that impose undue burdens on small business and impede private enterprise and entrepreneurship.”³² Here, the extension of section 401 requirements runs counter to President Trump's goal of reducing regulatory burdens.

As the EPA notes, general permits are issued for activities where the discharge is minor, if not de-minimis. As such, these discharges should not be treated the same as more significant discharges requiring the use of an individualized permit process. The goal of general permits is to simplify the permitting process where impacts to the environment are so minor that they do not require individual examination. Attaching section 401 requirements to general permits runs counter to this goal and treats general permits the same as individual permits.

Small businesses rely on general permits as a tool to reduce unnecessary regulatory burdens for frequently performed minor activities. Advocacy recommends that the section 401 certification requirements not be applied to general permits. This will prevent project proponents, including small businesses, from incurring additional costs for activities that do not warrant regulation.

²⁵ *Id.*

²⁶ *Id.* at 2020.

²⁷ 88 Fed. Reg. 66570 (Sept. 27, 2023).

²⁸ 33 U.S.C. § 1341.

²⁹ U.S. Env't Prot. Agency, *Permit Program Under CWA Section 404*, <https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404>. (last updated Feb. 26, 2025).

³⁰ *Id.*

³¹ 90 Fed. Reg. 10583 (Feb. 25, 2025).

³² *Id.*

C. Any Use of Narrative Water Quality Standards in the Certification Process Must Comply with the Supreme Court’s Holding in *San Francisco v. EPA*.³³

The EPA has requested comments on “whether it should limit ‘water quality requirements’ to only numeric water quality criteria”.³⁴ The alternative to numeric water quality criteria are narrative water quality criteria, which describe “the desired conditions of a water body being free from certain negative conditions.”³⁵

In *San Francisco v. EPA*,³⁶ the Supreme Court struck down the EPA’s use of narrative water quality criteria because they did not provide sufficient guidance on how the permittee could achieve the permit’s conditions. Specifically, the Court stated “[s]imply telling a permittee to ensure that the end result is reached is not a “concrete plan” for achieving the desired result. Such a directive simply states the desired result; it does not implement that result.”³⁷

Numeric water quality criteria provide clarity and predictability to small businesses because they identify a specific limit which must be achieved. Narrative water quality criteria, on the other hand, can provide small businesses with flexibility because they identify a goal and allow the permittee to use methods that best suit their individual situation to meet that goal. However, if the narrative criteria are too vague then small businesses could be in a situation where they are unable to achieve necessary permit conditions.

Advocacy recommends that any use of narrative water quality criteria in the section 401 process comply with the Supreme Court’s decision in *San Francisco v. EPA*. This will ensure that permits are flexible enough to account for different situations while also giving small businesses the predictability necessary for proper compliance.

D. Running Multiple Aspects of the Water Quality Certification Process Concurrently Could Result in Increased Efficiency.

The EPA requests comment on whether portions of the water quality certification process should be run concurrently.³⁸ During his first term, President Trump introduced “One Federal Decision,” which required multiple agencies to concurrently run different aspects of the environmental review process concurrently.³⁹ The purpose of “One Federal Decision” was to decrease the time involved in the environmental review process by completing multiple parts of the review process at the same time as opposed to one after the other.⁴⁰ The “One Federal

³³ 604 U.S. 334 (2025).

³⁴ 90 Fed. Reg. 2008, 2027 (Jan. 15, 2026).

³⁵ U.S. Env’t Prot. Agency, *What are Water Quality Standards*, <https://www.epa.gov/wqs-tech/what-are-water-quality-standards>. (last updated June 3, 2025).

³⁶ 604 U.S. 334 (2025).

³⁷ *Id.*

³⁸ 90 Fed. Reg. 2008, 2035 (Jan. 15, 2026).

³⁹ 82 Fed. Reg. 40463 (Aug. 24, 2017).

⁴⁰ U.S. Dept. of Transportation, One Federal Decision – Fact Sheet, <https://www.transportation.gov/sites/dot.gov/files/docs/policy-initiatives/320411/ofd-fact-sheet.pdf>.

Decision” process was later codified into law as part of the Infrastructure Investment and Jobs Act.⁴¹

One of the major themes raised by commenters during the EPA’s review of the 2023 water quality certification rule was unnecessary delay.⁴² In enacting “One Federal Decision,” President Trump recognized that concurrent reviews reduce unnecessary delay by eliminating duplication of work. Rather than requiring each segment of a process to end before another can begin, concurrence allows multiple aspects of a process to be completed at the same time. Advocacy recommends the EPA consider running multiple aspects of the section 401 process concurrently to help reduce project delays.

E. Requiring States to Specify Water Quality Violations Adds Clarity to the Certification Process.

The EPA’s proposed rule adds clarity to the regulatory process by requiring additional conditions required for certification to be based on specific water quality requirements.⁴³ Additionally, when certification is denied, the proposed rule requires the denial to state the specific water quality requirements that a discharge will violate.⁴⁴ The proposed rule also requires neighboring states and jurisdictions to cite specific water quality violations if they object to a certification decision.⁴⁵

The EPA explains that including this additional information:

would provide transparency for the overall certification process and allow the applicant to understand the legal and/or technical basis for each condition, to assess whether a condition is within the statute's lawful scope, and to identify what recourse may be available to challenge it in an appropriate court of competent jurisdiction. Certifying authorities should already be generating this type of information to build complete and legally defensible administrative records to support their certification actions and thus this requirement should not unduly burden the certifying authority.⁴⁶

During the EPA’s review of the 2023 section 401 certification rule, commenters were concerned about:

⁴¹ 22 U.S.C. § 139.

⁴² See, e.g., Interstate National Gass Association of America, Comment Letter on Implementation Challenges Associated with Clean Water Act Section 401, p.15 (Aug. 6, 2025), <https://www.regulations.gov/comment/EPA-HQ-OW-2025-0272-0069> (discussing a project that underwent a three-year review period only to have certification denied).

⁴³ 91 Fed. Reg. 2008, 2028 (Jan. 15, 2026).

⁴⁴ *Id.*

⁴⁵ *Id.* at 2034.

⁴⁶ *Id.* at 2030.

unlawful abuses of [s]ection 401 authority in which states would withhold certification or impose certification conditions that had nothing to do with the water quality effects of the project's discharges and sometimes nothing to do with the effects of the project at all.⁴⁷

Requiring specific water quality standards and violations to be cited will help prevent abuse of section 401. If a condition, denial or objection is raised under section 401, it should be tied to violation of a specific water quality criterion. If no water quality criteria can be cited, then the condition, denial or objection is outside of the scope of section 401.

The additional information required by the EPA will help all parties in the process identify specific issues and provide solutions allowing projects to proceed, rather than being unnecessarily halted. Advocacy supports the EPA's efforts to enhance clarity in the section 401 process by requiring readily available information, enabling businesses participating in the process to better understand any conditions, objections, or denials as they occur.

F. The EPA Should Quantify Proposed Rule's Benefits for Small Entities.

In the proposed rule's accompanying Economic Analysis,⁴⁸ the EPA estimated a 10.4 percent decrease in the costs to file for a 402 permit, resulting in a labor cost savings of \$2.5 million spread out over 77,000 applications every year.⁴⁹ Beyond the direct savings to applicants, the proposed rules changes are also expected to decrease the burden on the agencies as well by 13.1 percent which could translate to shorter delays further increasing small business savings.

As the EPA's reforms to the section 401 process are finalized and implemented, Advocacy urges the agency to quantify the benefits that are realized by participants, including small entities. This information could help to inform future regulatory reform efforts. Advocacy stands ready to help the EPA in this effort.

III. Conclusion

Advocacy supports the EPA's revisions to the section 401 water quality certification process. The EPA's proposed rule will better align the section 401 requirements with the overall goals of the Clean Water Act. Additionally, the increased clarity from the EPA's proposal will reduce regulatory burdens on small entities involved in the section 401 process.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Nick Goldstein at (202) 772-6948 or nick.goldstein@sba.gov.

⁴⁷ American Exploration and Production Council, Comment Letter on Implementation Challenges Associated with Clean Water Act Section 401, p.9 (Aug. 6, 2025), <https://www.regulations.gov/comment/EPA-HQ-OW-2025-0272-0059>.

⁴⁸ U.S. Env't Prot. Agency, *Economic Analysis for the Proposed Updating [of] the Water Quality Certification Regulations*, <https://www.regulations.gov/document/EPA-HQ-OW-2025-2929-0009> (Jan. 2026).

⁴⁹ U.S. Env't Prot. Agency, *Information Collection Request Supporting Statement*, https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202309-2040-001 (Sept. 2023).

Sincerely,

/s/

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