February 17, 2026

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

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

Submitted online via regulations.gov.

Dear Administrator Zeldin:

The undersigned organizations are dedicated to preserving the quality of our waters. We span the state of Massachusetts and beyond, working closely with communities large and small to protect our water resources. Our members cherish rivers, lakes, streams, and wetlands as drinking water sources, places to recreate, habitat for wildlife, and for their role in mitigating the effects of climate change.

We are concerned that EPA's proposed changes to the Section 401 certification process will reduce the quality of our waters by undermining the role of certifying agencies. We are particularly opposed to EPA's proposal to limit the scope of 401 certification to impacts from discharges from point sources to navigable waters as contrary to both the text and purpose of the Clean Water Act. We urge EPA to not adopt the proposed changes.

I. We Oppose EPA's Proposal to Narrow the Scope of 401 Certifications to Discharges from a Point Source to Navigable Waters.

A. Narrowing the scope of 401 certifications would contradict the plain language of Section 401.

EPA must continue to follow the plain language in Section 401 which explicitly pertains to any "activity" by the applicant "which may result in any discharge into the navigable waters."[1] Section 401 allows the certifying authority to review the facility or activity in its entirety for compliance with water quality requirements, not just the discharge, and to impose additional conditions on such activity. The Supreme Court has found that such a plain reading of Section 401 is the "most reasonable" reading.[2] EPA's proposal to limit the scope of 401 certification to just point source discharges into navigable waters itself ignores this explicit statutory language.

[1] 33 U.S.C. § 1341(a)(1), (4).
[2] *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 712 (1994) ("Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.")

Congress deliberately drafted Section 401 to extend to a broader range of activities than Sections 402 and 404. EPA should therefore not rely on the more specific "discharge" language in Sections 402 and 404 to guide its interpretation of Section 401.[3] The language in 402 and 404 specifically regulates "discharges," in contrast to the broad "activity" language in 401.[4] In contrast, the activities regulated by 401 are those that "*may* result in any discharge into the navigable waters," and the certification analysis focuses on the activity, not merely the discharge.[5]

By reducing the ability of states to protect their own waters without clear statutory authority, EPA's proposal would violate recent Supreme Court precedent. Section 401 empowers states to protect their waters from federal permits that would violate state law. Unbounded by the limits of the commerce clause, states can regulate water resources other than navigable waters (including groundwater, non-jurisdictional wetlands, buffer zones, vernal pools, etc.). Such "[r]egulation of land and water use lies at the core of traditional state authority."[6] EPA's proposal to strictly curb the authority of state certification under 401 to a smaller universe than the federal government would "significantly alter the balance between federal and state power"—which *Sackett* prohibits without "exceedingly clear [statutory] language."[7] Adding to the absurdity of such a proposal: EPA would even deny states the authority to consider nonpoint source discharges in certification decisions, which would make the scope of Section 401 even more limited than the scope of Section 402.[8]

B. Certifying authorities must be able to consider impacts to waterbodies protected under state law but that are not WOTUS.

Certifications under Section 401 must include the necessary conditions to ensure that applicants comply with "any. . . appropriate requirement of State law."[9] Massachusetts state law includes protection for water resources that go beyond what is protected under the Clean Water Act, including protection for non-jurisdictional wetlands, vernal pools, buffer zones bordering wetlands and other waterbodies, and groundwater.[10] In order to ensure that applicants comply

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[3] *See* Updating the Water Quality Certification Regulations, 91 Fed. Reg. 2028 (Jan. 15, 2026).
[4] *See* 33 U.S.C. § 1342(a)(1) ("discharge of any pollutant or combination of pollutants"); 33 U.S.C. § 1344(a) ("discharge of dredged or fill material into the navigable waters").
[5] 33 U.S.C. § 1341(a)(4)(The certifying authority must be provided an opportunity "to review the manner
[6] *Sackett v. EPA*, 598 U.S. 651, 679 (2023).; *see also* Updating the Water Quality Certification Regulations, 91 Fed. Reg. 2028 (Jan. 15, 2026).
[7] *Id.*
[8] EPA mischaracterizes the scope of Section 402, 33 U.S.C. § 1342, which do not "apply only to point source discharges." Updating the Water Quality Certification Regulations, 91 Fed. Reg 2028 (Jan. 15, 2026). Section 402 applies also to municipal and industrial stormwater discharges (i.e. nonpoint source discharges). 33 U.S.C. § 1342(p).
[9] 33 U.S.C. § 1341(d).
[10] *See*, e.g., Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40.

with state law, certifying authorities must be allowed to consider all potential impacts on water quality from applicant's activities.

C. Certifying authorities should be able to consider impacts from nonpoint source pollution.

We are concerned that EPA's proposed narrowed scope would not let certifying authorities consider impacts from or set conditions on nonpoint source pollution. Stormwater runoff is the major source of pollution for Massachusetts' urban rivers, like the Charles and the Mystic Rivers. Nutrient pollution from fertilizer runoff, parking lots, and roadways triggers outbreaks of toxic cyanobacteria and harmful algae each summer, endangering the health of the people who use the water.

The Clean Water Act explicitly addresses nonpoint source pollution elsewhere, including in section 402, indicating Congress's desire for such pollution to fall under the purview of the Clean Water Act. As Section 401 is drafted more broadly than 402, EPA should allow certifying authorities to consider nonpoint source pollution.

D. Certifying authorities should be able to consider impacts to non-navigable waters.

We are concerned that not allowing certifying authorities to consider harms to non-jurisdictional wetlands, ephemeral streams, and other non-navigable waters could threaten Massachusetts' vital water resources. Such impacts are contrary to the purpose of the Clean Water Act, namely, "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters." [11] Wetlands and streams are fundamentally important—not just to our members, but to the environmental health of Massachusetts.

Wetlands and streams are valuable resources that provide essential fish and wildlife habitats, store carbon, prevent flooding, filter out harmful pollution, and protect clean drinking water vital to public health. They are also the source of drinking water for tens if not hundreds of millions of Americans. Additionally, these waters are key to ensuring the health of watersheds more broadly. Major rivers and lakes cannot be effectively protected from pollution if the small streams that flow into them are unprotected; and wetlands are the kidneys of the watershed, filtering out pollution.

Healthy headwaters – including tributaries and ephemeral streams – are vital to the health of Massachusetts' ecosystems and economy. Fish and wildlife populations only thrive with the

[11] 33 U.S.C.A. § 1251; *see*, *e.g., City and County of San Francisco v. EPA*, 604 U.S. 334, 355 (2025) (The courts "are not obligated to accept administrative guidance that conflicts with the statutory language it purports to implement."); *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020) (rejecting reading of Clean Water Act that would have "consequences that are inconsistent with major congressional objectives").

clean, cool flows provided by healthy wetlands and headwater streams. Tributary streams contribute over 60% of discharge from drainage areas, making them an essential part of watershed hydrology and biogeochemical processes.[12] Ephemeral streams dramatically affect interstate waters, including between states with varying standards of water quality. Massachusetts is also home to four Wild & Scenic River systems. It is crucial that the small streams and tributaries in the headwater regions of these watersheds remain healthy to ensure that these nationally significant rivers continue to thrive, especially amidst a changing climate and growing development pressures.

In Massachusetts, healthy wetlands and waterways protected by the Clean Water Act contribute to our state's $13.2 billion annual recreation economy and our $11 billion commercial fishery. The undersigned organizations represent members and stakeholders that rely on water resources of all kinds, including wetlands, for recreational, agricultural, and business activities that contribute to the health and wealth of our state.

Although far less arid than the West, Massachusetts still experiences severe drought, and our rivers, drinking water supply, agricultural industry, and ecosystems have suffered as a result. We need to ensure our drinking water supplies are protected, as climate change brings more frequent and more severe droughts to our region.

II. EPA's Proposal Would Undermine the Purpose of Section 401 and Certifying Authorities' Ability to Protect Water Resources.

Certifying authorities are experts in their state or region's specific waters, environmental challenges, and laws: they are better positioned than EPA to determine how to issue certification decisions. EPA should let certifying authorities determine what information to request from applicants, when an application is complete, when extensions are needed, and which of an applicant's activities to evaluate.

We oppose EPA's proposal to require only a "singular enumerated list of documents and information" from applicants and to start the clock on the "reasonable period of time" as soon as they are submitted.[13] Without the authority to request the specific information needed before the clock starts, certifying authorities would be forced to make rushed and ill-informed decisions with the potential to jeopardize the health of the water resources. The current process is more consistent with the goals of the Clean Water Act and should be retained.

EPA should also retain the provision at 40 CFR 121.6(d) that allows for automatic extensions to the reasonable time period to accommodate public notice procedures or force majeure events.

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[12] *See* Laurie C. Alexander, *Science at the Boundaries: Scientific Support for the Clean Water Rule*, Freshwater Sci. 1588, 1588-94.
[13] *See* Updating the Water Quality Certification Regulations, 91 Fed. Reg. 2017 (Jan. 15, 2026).

Public notice procedures and force majeure events are both outside the control of certifying agencies. Certifying agencies should be allowed the time they need to complete their work.

We are also concerned about EPA's proposal to no longer require applicants to submit information regarding (1) "dates on which proposed activity is planned to begin and end and . . . the approximate dates when any discharge may commence," and (2) the list of "authorizations required for the proposed activity and the current status of each authorization."[14] The dates of the discharge and required authorizations are both fundamental pieces of information that are relevant to the certifying authority's decisions.

III. EPA's Proposal Could Weaken Compliance with Public Notice Requirements.

We oppose EPA's proposal to remove the requirement that grants of certification contain an assertion that the certifying agency has compliance with the Clean Water Act's public notice procedures.[15] The public notice requirements are legally mandated by the Clean Water Act, and it is appropriate for EPA to ensure that certifying authorities comply with them.[16] Moreover, public notice provides an important avenue for the community members most affected by the proposed pollution to share their concerns.

IV. We Oppose EPA's Proposal to Stop Treating Tribes as States for the Purpose of 401 Certification.

Section 518 of the Clean Water Act authorizes EPA to give tribes the same 401 certification authority as states and to impose conditions on federal permits.[17] If EPA takes away this authority, tribes could not condition or deny federal permits affecting waters within their jurisdiction. Limiting tribal authority to act as states in the context of 401 certifications undermines tribal sovereignty.[18]

Tribal lands often face disproportionate impacts from infrastructure and energy development that receive federal permits and endanger water quality, including pipelines and hydroelectric dams. 401 certification is a critical mechanism for protecting tribal waters and enforcing tribal water quality standards.

V. EPA Should Continue to Allow Modifications to the Grant of Certification Without the Agreement of the Applicant.

We oppose EPA's proposal to require the applicant's agreement before modifying a grant of certification.[19] Such an agreement is not consistent with the process for granting certification

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[14] *See* Updating the Water Quality Certification Regulations, 91 Fed. Reg. 2019 (Jan. 15, 2026).
[15] *See* 40 CFR 121.7(c)(4), (d)(4), (e)(4), and (f)(4).
[16] Clean Water Act section 401(a)(1)
[17] 33 U.S.C. § 1377(e); *see State of Mont. v. U.S. E.P.A.,* 941 F. Supp. 945, 957 (D. Mont. 1996), aff'd sub nom. *State of Montana v. U.S. E.P.A.*, 137 F.3d 1135 (9th Cir. 1998).
[18] *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788 (2014).
[19] *See* Updating the Water Quality Certification Regulations, 91 Fed. Reg. 2030 (Jan. 15, 2026).

(which does not require an applicant's agreement) and would make any meaningful modification significantly more challenging if not impossible.

For the reasons above, the undersigned organizations urge EPA to not adopt the proposed changes to the 401 certification process.

Thank you for considering our comments.

Sincerely,

Heather Clish
Policy Director
Massachusetts Rivers Alliance

Andrew Gottleib
Executive Director
Association to Preserve Cape Cod

Laura Jasinski
Executive Director
Charles River Conservancy

Jonathan Flynn
Legal Director
Charles River Watershed Association

Nina Gordon-Kirsch
Massachusetts River Steward
Connecticut River Conservancy

Clare Soria
Staff Attorney, Clean Air and Water Program
Conservation Law Foundation

Molly Courson
Resiliency Program Director
Ipswich River Watershed Association

Pine duBois
Executive Director
Jones River Watershed Association

Mike Yeomans
President
Greater Boston Chapter of Trout Unlimited

Arianna Alexsandra Collins
Executive Director
Hoosic River Watershed Association (HooRWA)

Dan Winograd
Vice Chair
MWRA Wastewater Advisory Committee

Kerry Malloy Snyder
Managing Director for Community Resilience
Neponset River Watershed Association

Samantha Woods
Executive Director
North and South Rivers Watershed Association