

February 17, 2026

VIA Federal eRulemaking Portal: <https://www.regulations.gov>.

**Re: Docket ID No. EPA-HQ-OW-2025-2929  
Comments of the Business Council for Sustainable Energy on the Proposal to Update the Clean Water Act Section 401 Water Quality Certification Regulations**

The U.S. Environmental Protection Agency (EPA) proposes to update its Clean Water Act (CWA) Section 401 water quality certification regulations.<sup>1</sup> The Business Council for Sustainable Energy (BCSE) supports the proposal, which would align the regulations with Section 401 by (1) limiting the scope of certification decisions to assuring that discharges comply with applicable water quality requirements and (2) strengthening the requirement that certification decisions be made within a reasonable time, not to exceed one year from a certification request.

BCSE is a coalition of companies and trade associations from the energy efficiency, natural gas, and renewable energy sectors, and also includes independent electric power producers, investor-owned utilities, public power, industrial manufacturers, commercial end-users, and energy and environmental service companies. BCSE was founded in 1992, and advocates for policies at state, national and international levels that increase the use of commercially-available clean energy technologies, products and services.<sup>23</sup>

BCSE is a diverse coalition of organizations from all parts of the energy industry. BCSE would like to offer its general perspectives, but encourages the Commission to review the comments submitted by the National Hydropower Association (NHA) for more detailed discussion of the issues under consideration and specific recommendations.

Through Section 401, Congress has provided states and other certifying authorities a limited role in ensuring that discharges from federally licensed and permitted activities, including hydropower projects licensed by FERC, comply with specified provisions of the CWA, including state regulations implementing those provisions. Over the more than 50 years since the enactment of Section 401, however, the issues that states have sought to address in their certification decisions have expanded far beyond the water quality concerns of Section 401. Not only is this expansion inconsistent with Section 401, it undermines FERC's exclusive licensing authority by denying, delaying, and burdening hydropower and other essential

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<sup>1</sup> EPA, *Updating the Water Quality Certification Regulations*, 91 Fed. Reg. 2,008-2,042 (January 15, 2026).

<sup>2</sup> More information about BCSE is available at: [www.bcse.org](http://www.bcse.org). As BCSE is a diverse coalition, not all BCSE members endorse or take positions on the issues included in these comments. The comments contained in this filing represent the position of BCSE as an organization, but not necessarily the view of any particular member with respect to any specific issue.

<sup>3</sup> The Low Impact Hydropower Institute (LIHI) is a member of BCSE. LIHI is a national 501(c)(3) organization dedicated to reducing the impacts of hydropower generation and supporting projects that prioritize environmental, recreational, historical, and cultural resource protection. LIHI takes no position on the BCSE comments.

energy projects for reasons that have nothing to do with protecting water quality from the discharges associated with these projects.<sup>4</sup>

States have an important interest in ensuring the protection of water quality. Neither Section 401 nor any other provision of the CWA preempts states from adopting and enforcing more stringent water quality regulations than those required by the CWA.<sup>5</sup> Regardless of the scope and application of Section 401, states are generally free to regulate activities that may affect water quality and other public interests to whatever degree they believe is appropriate. Moreover, in the few instances in which some other federal law, such as the FPA, does preempt the direct application of state water quality laws, Congress has provided for robust protection of water quality, as well as state input into decisions affecting water quality.

When FERC issues a license for a hydropower project, the FPA requires FERC to “give equal consideration” to both the “power and development purposes for which licenses are issued” and the “purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.”<sup>6</sup> In addition, federal agencies that manage certain types of federal land on which a project is located may prescribe license conditions for the protection and use of those lands, including conditions related to water quality and uses.<sup>7</sup> FERC must also specifically consider recommendations from the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), and state fish and wildlife agencies for the protection of fish and wildlife,<sup>8</sup> and the USFWS and NMFS may prescribe license conditions requiring the construction, maintenance, and operation of “fishways.”<sup>9</sup>

Because FERC’s hydropower licensing authority over water quality and other issues is comprehensive, an expansive interpretation of a state’s certification authority under Section 401 would be a substantial intrusion on Congress’s clearly expressed intention in the FPA that these issues are to be addressed exclusively by FERC or through the specific authorities that Congress has assigned to the USFWS and NMFS to prescribe “fishways” and to other federal agencies to prescribe license conditions to protect lands and resources under their management.

The scope of Section 401’s certification requirement has two components: (1) What elements of a federally licensed or permitted activity are subject to certification? (2) With what laws and regulations must compliance be certified? BCSE supports the comments submitted on behalf of the National Hydropower Association supporting EPA’s proposed regulations, which limit both components consistently with Section 401.

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<sup>4</sup> The many problems associated with the implementation of Section 401 are discussed at length in NHA’s 2019 comments to EPA on its Section 401 rules, which accompany these comments.

<sup>5</sup> See 33 U.S.C. § 1370.

<sup>6</sup> 16 U.S.C. § 797(e).

<sup>7</sup> See 16 U.S.C. § 797(e); *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 (1984).

<sup>8</sup> 16 U.S.C. § 803(j).

<sup>9</sup> 16 U.S.C. § 811. FERC’s licensing decisions are also subject to a host of other federal laws, including the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-12; the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44; the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1466; and the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101-307108; see also 18 C.F.R. §§ 5.18(b)(3), 5.25.

In addition, BCSE supports the areas identified by NHA regarding clarifications in applying the scope of certification for hydropower projects.

BCSE appreciates EPA's efforts to update its Section 401 certification rules to better align them with the statute and to facilitate the federal licensing and permitting of hydropower projects and other critical energy sources.