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February 05, 2026

Submitted via Regulations.gov

Lee Zeldin, Administrator
U.S. Environmental Protection Agency
EPA Docket Center
EPA-HQ-OW-2025-2929; FRL-6976.2-01-OW,
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: U.S. Environmental Protection Agency's ("EPA") Proposed Rule – "Updating the Water Quality Certification Regulations"; 91 Fed. Reg. 2,008 (January 15, 2026) – Docket EPA ID No. EPA-HQ-OW-2025-2929; FRL-6976.2-01-OW

Dear Administrator Zeldin:

The Kentucky Division of Water (Division) respectfully submits the attached comments on the EPA's proposed rulemaking for the "Updating the Water Quality Certification Regulations" published on January 15, 2026 (91 Fed. Reg. 2,008).

The Division requests an extension of the comment period to at least 60 days. This proposal interplays with EPA's recent waters of the United States (WOTUS) proposed rulemaking and provides for numerous procedural changes. The Division seeks additional time for full consideration and review. In the event this extension request is not granted, the Division submits the attached comments for consideration.

Thank you for the opportunity to provide comment, for further clarification, please feel free to contact me at Sarah.Marshall@ky.gov or 502-782-3279,

Sincerely,

Sarah Marshall, Director
Kentucky Division of Water

Comments on U.S. Environmental Protection Agency’s (“EPA”) Proposed Rule – “Updating the Water Quality Certification Regulations”; 91 Fed. Reg. 2,008 (January 15, 2026)

Cooperative Federalism and WOTUS

The recent waters of the United States (WOTUS) proposed rulemaking¹ promotes cooperative federalism by recognizing and preserving the primary responsibilities and rights of States to prevent pollution within their borders and to plan the development and use of their land and water resources. See 33 U.S.C. 1251(b). As stated in the WOTUS comments submitted by the Commonwealth of Kentucky (Commonwealth) on December 30, 2025², the Commonwealth supports continued cooperative federalism as contemplated by the Clean Water Act (CWA), and agrees that the States are in the best position to implement responsibilities over their own waters, and to carry out Congress' overall objectives to restore and maintain the integrity of the Nation's waters in a manner that preserves the traditional sovereignty of States over their own land and water resources.³ However, the newly proposed “Updating the Water Quality Certification Regulations” rulemaking contradicts this premise as it significantly limits state authority to protect, maintain, and restore waters within the Commonwealth.

The proposed rule, by its change to 40 C.F.R. 121.1(c), would narrow the current regulation’s broad “activity”-based scope of certifying authority review to an assessment of whether a facility’s point source discharges into waters of the United States (WOTUS) will comply with specified water quality requirements.⁴ Accordingly, under the EPA’s proposal, certifying authorities cannot consider water quality impacts to waters beyond WOTUS, or impacts from outside the discharge itself. This would be a departure from the current regulations, which allow for consideration of State waters that are not WOTUS in certain circumstances. Specifically, under the current regulations, certifying authorities may consider waters beyond WOTUS when certifying compliance with requirements of State law that otherwise apply to waters of the State beyond WOTUS. (88 Fed. Reg. 66,604). This interplay would invoke further issues to the Commonwealth as outlined in the Commonwealth’s recent comment letter on WOTUS. Furthermore, without a final WOTUS rulemaking, the Commonwealth cannot fully evaluate the impacts this secondary rule has on its waters, regulated entities, and the public.

“Water Quality Requirements”

EPA is requesting comment on whether it should limit “water quality requirements” to only numeric water quality criteria, excluding narrative water quality criteria. “Water quality requirements” should not be limited to only numeric water quality criteria. The CWA delegates to States the authority to develop and maintain a comprehensive Water Pollution Control Program with the

¹ See “Updated Definition of ‘Waters of the United States’” 90 Fed. Reg. 52,498 (November 20, 2025).

² <https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0340>.

³ Currently, the Commonwealth’s statutory definition of “Water” or “Waters of the Commonwealth,” found in KRS 224.1-010(32), includes all waters designated as navigable waters, as defined in 33 U.S.C. sec. 1362, and other waters with special characteristics that are meant to protect groundwater. The Commonwealth’s definition of its state waters is tied directly to the federal definition of WOTUS.

⁴ Section 401 certification is required for Federal licenses or permits that authorize any activity which may result in any discharge from a point source into waters of the United States. EPA and the Corps recently published a proposed rule that would define the scope of “waters of the United States.” See “Updated Definition of ‘Waters of the United States’” 90 Fed. Reg. 52,498 (November 20, 2025). Any changes in which waters qualify as waters of the United States will impact the waters in which federally licensed or permitted activities must seek section 401 certification.

express intent of abating and controlling existing and future sources of pollution to protect the physical, chemical, and biological integrity of waters. Central to this framework, both numeric and narrative water quality criteria collectively establish the minimum thresholds necessary for designated uses to be fully supported. Limiting “Water Quality Requirements” solely to numeric criteria would significantly constrain the Commonwealth’s regulatory capacity and undermine its ability to ensure that waters continue to support essential functions, including the propagation of fish, shellfish, and wildlife, as well as recreational uses.

Content of a Request for Certification – 40 CFR§ 121.5

The EPA’s proposed replacement of the term “project proponent” with “applicant”, when combined with the revised discharge only scope, raises significant concern that determinations regarding whether 401 water quality certifications apply will increasingly be made by federal permitting agencies rather than the certifying authorities. This shift risks creating procedural loopholes for general permits⁵ and other federal actions, particularly where no clearly identifiable applicant exists. If the federal agency is permitted to make categorical or project-level determinations that no point source discharge is present, and consequently no certification request is required, States could lose the opportunity to issue 401 water quality certifications for Nationwide Permits or other general permits further undermining cooperative federalism.

Scope of Certification - 40 CFR § 121.3

The proposed requirement that a certification request include “[a]ny readily available water quality-related materials... that informed the development of the application or draft license or permit” is ambiguous, unenforceable, and problematic for certifying authorities. This language allows applicants to exclude information necessary for the certifying authority to evaluate compliance with water quality standards simply by asserting that the information was not considered, not in their possession, or not considered during project development. This shifts control of the completeness of certification requests from certifying authorities to applicants, and when combined with strict review timelines, risks forcing States to act on incomplete information or deny 401 water quality certification requests. The EPA should revise this provision to require submission of all information necessary for the certifying authority to evaluate compliance, rather than limiting required materials to those selectively provided by the applicant.

Withdrawal and Resubmittal - 40 CFR § 121.6

The proposed rule removes the ability of certifying authorities, such as the Commonwealth, to administratively withdraw or reject incomplete certification requests once the minimum federal requirements for a request are met and provides no mechanism for State-initiated withdrawal procedures. This change would override long-standing and effective state practices used to ensure certification decisions are based on sufficient information. In the Commonwealth, withdrawal has been used only when an application was incomplete and the requested

⁵ The CWA, 33 U.S.C. Sec. 1341, supports extending the CWA section 401 water quality certification requirement to general permits, even in the absence of an ‘applicant.’ This is a long-established interpretation by EPA, and the proposed rulemaking does not support a clear justification to depart from this interpretation.

information was not provided by the applicant, allowing deficiencies to be resolved without denial. Removing this authority deprives States of a critical tool for managing incomplete applications.

The proposal expressly allows applicants to withdraw and later resubmit certification requests, thereby codifying applicant-driven reset mechanisms, while denying States' comparable tools to manage incomplete applications. This encourages strategic withdrawals by applicants to avoid denial, while forcing States to proceed to denial when information deficiencies remain unresolved.