



Environmental Protection Agency
EPA Docket Center - Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2025-2929 - Comments on Clean Water Act Section 401 Regulatory Requirements

I. Introduction and Framing

The Alliance for Tribal Clean Energy (Alliance) appreciates the opportunity to comment on the U.S. Environmental Protection Agency’s (EPA) proposed revisions to the regulations implementing Section 401 of the Clean Water Act (CWA). EPA frames the proposal as a procedural update intended to improve permitting predictability and consistency. The Alliance recognizes the importance of clear timelines and regulatory certainty, particularly for energy and transmission projects that are critical to Tribal economic development and national clean energy goals.

Recent federal permitting reform discussions, including a recent hearing before the Senate Committee on Environment and Public Works, underscore that Section 401 is now being treated as a core component of national energy and transmission policy, not merely a water quality rule. Witnesses from labor, industry, and state governments repeatedly characterized Section 401 as a decisive threshold in the federal permitting process; one that can determine whether major interstate energy and transmission infrastructure proceeds, is delayed, or is fundamentally altered.¹

For example, Brent Booker of the Laborers’ International Union of North America identified Section 401 as “one of the most persistent” permitting challenges and emphasized the need for clear, timely, and transparent decisions, stating that certifying authorities should issue a definitive approval or denial within a defined timeframe, with an opportunity for applicants to address deficiencies and reapply. Similarly, Dustin Meyer of the American Petroleum Institute described Section 401 as having been “weaponized” to block major interstate energy infrastructure, highlighting how certification decisions now function as gatekeeping determinations rather than narrow, technical reviews, underscoring the extent to which certification decisions now determine whether large-scale projects move forward at all.

Section 401 certification is one of the remaining points in the federal permitting process where Tribes may exercise direct regulatory authority to protect their rights to use and access their waters and natural resources. Any narrowing or streamlining of that authority, even if procedural in form, risks materially reducing Tribal Nations’ regulatory authority over their own lands and waters. As these witness’ statements make clear, any alteration of Section 401 authority, whether characterized as procedural or substantive, will directly affect how energy and transmission projects move through Tribal lands and

¹ *Hearing to Examine the Federal Environmental Review and Permitting Processes, Part II*, U.S. Senate Committee on Environment and Public Works (January 28, 2026), witness testimony of Brent Booker (Laborers’ International Union of North America) and Dustin Meyer (American Petroleum Institute)



waters, and risks materially reducing Tribal authority within federal infrastructure decision-making. Clear, well-defined certification authority and timelines are therefore essential not only for water quality protection, but also for project certainty and long-term infrastructure investment.

The Alliance submits these comments with a deliberately narrow focus: protecting Tribal certification authority and Government-to-Government Consultation under Section 401, while supporting reasonable, predictable permitting timelines. This approach reflects the Alliance's view that Tribal sovereignty and permitting certainty are not in tension; rather, durable and timely project development depends on regulatory processes that respect Tribal authority and produce legally and socially defensible outcomes.

II. Tribal Sovereignty, Trust Responsibility, and Section 401

Section 401 of the Clean Water Act plays a unique role for Tribal Nations. For Tribes that have obtained, or seek to obtain, authority to issue water quality certifications, Section 401 functions as an expression of their inherent sovereignty and is a practical mechanism for protecting Tribal waters, subsistence practices, cultural uses, and downstream communities.

EPA's 2023 Section 401 rule recognized this role by expanding pathways for Tribal participation, including a standalone process for Tribes to obtain Treatment in a Similar Manner as a state (TAS) solely for purposes of Section 401.² The current proposal moves away from that framework and toward a more constrained, efficiency-driven approach. While Tribal participation is preserved in form, the proposed revisions risk constraining Tribal authority in practice.

Because Tribal certification authority depends on EPA approval of TAS status, the accessibility and clarity of those pathways directly affect whether Section 401 functions as a predictable component of federal permitting for projects affecting Tribal waters. Where TAS pathways are streamlined and appropriately scaled, certification authority can operate as an orderly and stabilizing part of the permitting process. Where those pathways become more burdensome or uncertain, participation may be reduced, increasing the likelihood of later disputes or delays.

The Alliance is particularly concerned that the proposal does not adequately address how the revisions comport with the federal trust responsibility or respect Tribal regulatory authority. Given that EPA proposes to repeal provisions that explicitly facilitated Tribal participation, the Agency should clearly articulate how the final rule upholds Tribal sovereignty and trust obligations.

III. Key Substantive Concerns

A. Narrowing Section 401 to a Discharge-Only Scope

The proposal signals a return to a narrower interpretation of Section 401 focused primarily on point source discharges, critiquing broader readings as exceeding statutory text. For Tribal Nations, this

² U.S. Environmental Protection Agency, *Clean Water Act Section 401 Certification Rule*, 88 Fed. Reg. 66,964 (September 27, 2023).



approach does not reflect how federally permitted projects affect water quality in practice. Energy, transmission, hydropower, and other linear infrastructure projects often create water quality impacts that are inseparable from the overall activity, including changes to flow, temperature, sedimentation, habitat, and downstream conditions.

Limiting certification authority to a discharge-only analysis risks preventing Tribes and other certifying authorities from addressing real and foreseeable impacts to designated uses, antidegradation requirements, and narrative criteria that reflect Tribal subsistence, ceremonial, and cultural water uses. EPA should clarify that certifying authorities may continue to condition certifications. This will ensure compliance with all applicable water quality requirements, not solely numeric effluent limits. Providing this clarity will improve consistency and reduce the likelihood of post-certification disputes regarding scope, thereby enhancing regulatory certainty for project sponsors and affected communities.

B. Elimination of the Standalone Section 401 TAS Pathway

EPA proposes to repeal 40 C.F.R. § 121.11(a)-(c), which under the 2023 rule allowed Tribes to obtain TAS solely for purposes of Section 401 certification, instead directing Tribes to pursue TAS through the Section 303(c) water quality standards framework. While water quality standards TAS remains an important pathway, it is significantly more resource-intensive and time-consuming.

For many Tribes, particularly those with limited staff and funding, eliminating the Section 401-only TAS pathway will function as a practical barrier to exercising certification authority at all. This may result in fewer Tribes being able to participate meaningfully in Section 401, running contrary to EPA's stated goals of cooperative federalism and inclusive permitting. Where projects directly affect Tribal waters, reduced access to certification authority will introduce uncertainty into the permitting projects, as affected Tribes would have fewer formal avenues for resolving water quality concerns within the Section 401. The Alliance urges EPA to retain the standalone Section 401 TAS pathway or, at minimum, provide an equivalent, streamlined alternative.

C. Standardization of Certification Request Contents

The proposal would standardize a national list of required certification request components and remove the provision allowing states and Tribes to define additional required contents in advance. While clarity for applicants is important, a one-size-fits-all approach risks depriving Tribes of the flexibility needed to evaluate project-specific impacts on Tribal waters and uses.

The Alliance recommends that EPA clarify that any national list of certification request components serves as a minimum floor, not a ceiling. Tribes must retain the ability to request additional information necessary to assess compliance with applicable water quality requirements, particularly where projects affect treaty-protected resources or downstream Tribal communities.

D. Timelines and Consultation



The Alliance supports predictable timelines for Section 401 review. However, permitting certainty cannot be achieved by compressing or truncating Government-to-Government Consultation or limiting the development of a defensible administrative record for Tribal certification decisions.

Certification decisions that lack adequate record support increase the risk of remand or reversal, creating exactly the uncertainty that permitting reform efforts seek to avoid. EPA should include explicit guardrails clarifying that timeline requirements do not override Consultation obligations or constrain a Tribe's ability to support conditions addressing complex water quality impacts. Clear timelines, paired with sufficient opportunity to develop a complete record, will produce decisions that are more durable and less susceptible to litigation.

IV. Cumulative, Downstream, and Activity-Based Impacts

Many federally permitted energy and transmission projects have cumulative and downstream impacts on Tribal waters, even when the discharge occurs outside reservation boundaries. The Alliance urges EPA to explicitly confirm that certifying authorities may evaluate and condition certifications to address downstream water quality effects and cumulative impacts where those effects are relevant to compliance with water quality standards, including antidegradation, temperature, turbidity, nutrient loading, and habitat-related criteria.

Similarly, EPA should preserve the 2023 rule's recognition that certification applies to the full scope of activity authorized by a federal permit and not just the discharge point. This approach better reflects how large infrastructure projects operate and how water quality impacts manifest over time, improving clarity and reducing disputes regarding scope.

V. Implementation Support and Neighboring Jurisdiction Protections

If EPA proceeds with revisions to the Section 401 regulations, the Alliance strongly urges the Agency to pair any final rule with Tribal-specific implementation guidance, technical assistance, and funding support. This should include model certification request checklists, templates, training, and targeted assistance for Tribes newly seeking to exercise Section 401 authority.

Additionally, EPA should confirm that neighboring jurisdiction provisions remain meaningful for Tribes and do not become procedural formalities, particularly where off-reservation discharges may affect Tribal waters, uses, or downstream communities. Clear processes for cross-jurisdictional coordination will enhance predictability for applicants and affected governments alike.

VI. Conclusion

The Alliance supports efforts to improve permitting predictability and certainty for energy and transmission projects. However, weakening Tribal certification authority under Section 401 will not produce durable or equitable outcomes. Section 401 functions as a stabilizing feature of federal permitting when Tribal sovereignty, water quality protection, and Consultation are meaningfully respected.



Clear and well-supported certification decisions reduce the likelihood of post-permit litigation, project redesign, and costly delays. Regulatory approaches that maintain clarity while preserving meaningful review authority are more likely to produce projects that withstand judicial scrutiny and proceed to construction.

EPA should revise the proposed rule to preserve the core elements of the 2023 framework that expanded Tribal participation, clarify the scope of Tribal conditioning authority, retain accessible TAS pathways, and ensure that efficiency gains do not come at the expense of Tribal regulatory authority or trust responsibilities. Doing so will strengthen, rather than hinder, timely and lawful infrastructure development affecting Tribal lands and waters.

Sincerely,

A handwritten signature in black ink that reads "Chéri Smith".

Chéri Smith (*Mi'kmaq Descendant*)
President & CEO
Alliance for Tribal Clean Energy
cheri@Tribalcleanenergy.org

NOTES

Quotes from Senate Committee Hearing on

Here are two quotes from the hearing that clearly show Section 401 is being treated as a core permitting and energy infrastructure gate, not just a narrow water rule.

Labor perspective

Brent Booker, Laborers' International Union of North America

“One of the most persistent is Section 401 water quality certification. States should be required to issue a clear yes or no decision within a defined time frame. If a project meets the standards, it should be approved. If it does not, the state should deny the application, explain the deficiencies, and allow the applicant to correct them and reapply.”

Helpful because it frames 401 as a consistent bottleneck and focuses on clear, timely decisions rather than weakening standards. It reads as practical and community-oriented, which fits well with a Tribal governance lens.



Industry perspective

Dustin Meyer, American Petroleum Institute

“Section 401 has been weaponized by states to block major interstate natural gas pipelines, delaying billions in investment and driving higher energy costs across entire regions.”

Helpful because it makes the structural point directly. It shows 401 is functioning as an energy and transmission gatekeeper that determines whether major infrastructure moves forward.

Together, these show cross-sector agreement that 401 is a decisive point in the permitting process. This supports keeping our comments narrowly focused on protecting Tribal certification authority and consultation while still backing clarity and timelines.

Ravynn’s thoughts:

Senate Committee on Environment and Public Works last week, my takeaway is that Section 401 is being treated as **core energy and transmission policy**, not just a water rule. Witnesses across business, labor, and states repeatedly flagged 401 as a major choke point for energy projects, which means EPA’s proposal directly affects how infrastructure moves through Tribal lands and waters. Because 401 certification is one of the few places where Tribes exercise real sovereign authority in federal permitting, any narrowing or streamlining could meaningfully reduce that leverage.

Given that the consistent theme of the hearing was predictability and permit certainty, which also benefits Tribal energy development, I recommend we submit a short, narrowly scoped comment focused only on protecting Tribal certification authority and consultation while supporting clear timelines. That lets us safeguard sovereignty without getting pulled into the broader permitting politics.

SOMETHING TO NOTE UNDER SECTION 401 THAT LIMITS SOVEREIGNTY OR IMPOSES STRUCTURAL BARRIERS.

EPA’s proposed revisions to the CWA Section 401 regulations include language stating that certification authority is a direct grant of authority to states “*and Tribes that have been approved for treatment as a State (TAS) status.*” This phrasing comes directly from how the Clean Water Act is structured and reflects a long-standing federal approach in which Tribal regulatory authority under certain environmental laws is not automatic, but instead requires additional approval by EPA. (major barrier) This means that even though Tribes are federally recognized sovereign governments, they do not automatically have the same authority as states to issue water quality certifications under Section 401. To exercise that authority, a Tribe must apply to EPA for TAS approval, and that approval is granted on a program by program basis.



A Tribe may have TAS for one Clean Water Act program but not another, and the process can require significant time, technical capacity, and resources. (more barriers)

This issue became more significant in the context of EPA's current proposal because the Agency is considering changes that would narrow the scope of Section 401 review and eliminate the standalone TAS pathway that was created in the 2023 rule specifically to allow Tribes to obtain certification authority without first adopting full water quality standards. When EPA emphasizes that Section 401 authority belongs only to states and TAS-approved Tribes, it highlights how much Tribal participation depends on the accessibility of those TAS pathways. If those pathways are narrowed or made more burdensome, fewer Tribes may be able to exercise Section 401 authority, even though projects may directly affect Tribal waters, resources, and uses.

The concern being flagged is not that EPA is misreading the statute, EPA is accurately reflecting the Clean Water Act as written, but that this statutory structure treats Tribal regulatory authority as conditional and contingent on federal approval. While EPA cannot change that structure through rulemaking, the choices it makes in this rule about TAS pathways, timelines, and scope will directly affect whether Tribal Nations can meaningfully participate in federal permitting decisions that impact their lands and waters.