

August 6, 2025

Peggy Browne  
Acting Assistant Administrator  
Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**Subject:** Comments on Section 401 State Water Quality Certification Open Docket;  
Docket ID No. EPA-HQ-OW-2025-0272

Dear Ms. Browne,

The undersigned organizations write to express strong support for continued improvements to the Clean Water Act (CWA) Section 401 certification process—ensuring that the possible changes to the regulation provide clarity, certainty, and regulatory durability.

Permitting reform is essential to advancing national economic growth and modernizing critical infrastructure, while maintaining the environmental protections that are central to EPA's mission. Efficient, transparent permitting processes help accelerate the deployment of energy, transportation, and water infrastructure—driving job creation and resilience in communities across our nation. Clean Water Act Section 401 state certifications play a foundational role in this framework, ensuring that states and tribes have a meaningful voice in reviewing that federally permitted projects comply with water quality standards. Strengthening coordination and certainty around Section 401 certifications can enhance both environmental outcomes and permitting efficiency, supporting EPA's goals of protecting water resources, while enabling timely infrastructure investment.

**Predictable permitting timelines are vital to investment and efficient use of public funds.**

Permitting delays can cascade across project planning, and investment. Any uncertainty adds complexity—not just cost, but unpredictability that discourages bids, invites litigation, and limits the pool of infrastructure partners. These issues present real economic risks, demonstrating how regulatory predictability can unlock greater investment in critical sectors like broadband, clean water, data centers, energy, and transportation. We support the strict adherence to the statutory one-year decision requirement for certifications and urge EPA to restore safeguards from the 2020 rule that would prevent states from creating loopholes to extend this deadline.

A clear and enforceable one-year deadline for state action on requests for Section 401 certifications is crucial to providing the clarity developers and other stakeholders require to make informed investments in infrastructure projects needed to unleash American energy and promote American innovation.

For instance, the recent experience of Rover Pipeline, LLC (“Rover”) is instructive. We understand the following: In November 2015, Rover submitted a request to Ohio for a Section 401 certification in connection with its proposed interstate natural gas pipeline from Michigan to West Virginia. Ohio did not act on Rover’s request within the one-year timeline set by Section 401(a). Instead, Ohio sued Rover in state court in 2017, alleging violations of state water-quality requirements that Ohio could have imposed, but did not impose, through a timely Section 401 certification. In that litigation, Ohio argued that it had not waived its power to issue a Section 401 certification, contending that a state’s one-year timeline only begins to run once the state deems the request to be “complete.” That theory was rejected by both the Ohio Supreme Court and EPA’s 2020 implementing rule for Section 401 (since replaced by the Biden Administration’s 2023 rule, 88 Fed. Reg. 66,558 (Sept. 27, 2023)). See *State ex. rel. Yost v. Rover Pipeline, LLC*, 167 Ohio St. 3d 223, 226 (Ohio), *petition for cert. filed*, No. 24-1120 (Apr. 25, 2025); *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210, 42,223-24 (July 13, 2020). The very fact that the Ohio litigation is still pending—with the state having recently sought Supreme Court review in a case where it waived its Section 401 powers some *nine* years ago—only underscores the extent to which regulatory certainty and predictable permitting timelines are imperative.

As a group of thirteen states recently explained to EPA in commenting on EPA’s 2022 proposed Section 401 rule (87 Fed. Reg. 35,318 (Jun. 9, 2022) (which in turn led to EPA’s 2023 final Section 401 rule, 88 Fed. Reg. 66,558 (Sept. 27, 2023))), any lack of predictable permitting timelines under Section 401—including supposed uncertainty about whether the one-year clock begins to run when the application is received or only once it is deemed “complete”—would “dramatically hinder the permitting process,” create “arbitrary delays,” and “enable States to . . . frustrate infrastructure development” by using “bureaucratic games to effectively veto a project that has significant economic effects across an entire region.” Comments of Louisiana et al. at 7-8, Docket No. EPA-HQ-OW-2022-0128-0123 (Aug. 8, 2022), <https://perma.cc/N33H-S7CW>. The undersigned organizations strongly agree. It is long past time for EPA to eliminate uncertainty in permitting processes and timelines under Section 401.

**Section 401's scope should remain focused on the “discharge” and water quality alone.**

As we stated in our comments on EPA's 2022 proposed Section 401 rule, Section 401(a)(1) requires that states must certify that any “*discharge* will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of this Act.” CWA Section 401(a)(1); see also 85 Fed. Reg. 42232 (July 13, 2020). This unambiguous focus is supported by the statutory text on a discharge to navigable waters and the dozens of pages of legal analysis that EPA presented in the 2020 Rule. By staying focused on point-source discharges and water quality impacts, EPA would reinforce administrative efficiency and clarity across federal, tribal, and state authorities, consistent with statutory intent.

As EPA concluded in the 2020 Rule, in light of the text and structure of the Clean Water Act, as well as the history of modifications between the 1970 version of the Act and the 1972 amendments, Section 401 is best interpreted as protecting water quality from federally licensed or permitted activities that may result in point source discharges into waters of the United States. Limiting the scope to the discharge and its effect on water quality, rather than broader or indirect effects of the project as a whole, is legally appropriate and will make the permitting program more predictable for federal agencies, tribes, states, and project sponsors to navigate. Receiving a timely permitting decision, particularly for private investors, is important for predictability and cost effectiveness.

**Expanding engagement with neighboring jurisdictions adds unnecessary delays.**

We support the stronger and reinforced principles of cooperative federalism, giving states and tribes a stronger voice in protecting their water quality—even when the source of a discharge is across the border. However, any engagement should be time limited. As under the 2020 rule, once the EPA receives notification from the federal licensing or permitting agency, it has 30 days to determine whether the discharge may affect the water quality of a neighboring jurisdiction. This 30-day window is critical—it sets the pace for whether a neighboring jurisdiction can weigh in before a federal license or permit is issued. The neighboring state or tribe then has 60 days to evaluate and object to the federal license or permit. Any broader timeframe would unnecessarily delay and potentially disrupt the statutory one-year deadline for final action.

**Categorical exclusions can provide certainty for projects with limited impact.**

Consistent with exclusions established by federal agencies for various categories of activities demonstrated to have no more than minimal impact on the environment, EPA should authorize similar exclusions as part of the CWA Section 401 certification

process, which can be implemented through categorical waivers of certification, or categorical approvals.

To support this concept, applicants should be encouraged to provide data justifying the following types of limited impact activities (not an exclusive list):

- Routine maintenance activities (e.g., culvert cleaning, vegetation removal).
- Minor infrastructure upgrades (like replacing existing utility lines).
- Low-impact energy projects (such as small energy installations).
- Certain types of dredging or fill operations with well-understood impacts.
- Projects with no point source discharge, such as water withdrawals, agriculture, or other land-based construction.

### **Limits on modifying certifications enhance regulatory stability.**

Allowing modifications beyond the statutory period invites instability and undermines trust in the permitting process. We support restricting revisions outside the initial one-year statutory window. Outside of this review period, states should not be allowed to unilaterally impose new conditions without the prior approval of the applicant and federal agency.

### **Project sponsors should be included in modification discussions.**

We urge EPA to include project sponsors in modification discussions in addition to the permitting agencies and certifying authorities. Businesses and other project developers should be able to advocate for more doable implementation and are better equipped to respond to additional requirements.

### **Section 401 and permitting experiences.**

Here are a few representative examples of reports based on recent project engagement experiences, each stemming from a member or members of one or more of the undersigned associations:

- ***EPA Overreach in Alternatives Analysis:*** In some cases, EPA's comments go beyond their role as a commenting agency in the U.S. Army Corps of Engineers permitting process. For example, during a recent residential project review, EPA challenged the need for essential public services like a fire station and a school—raising concerns about the scope of their alternatives analysis input.
- ***Inconsistent U.S. Army Corps of Engineers Jurisdictional Determinations:*** There has been significant disagreement between responsible agencies concerning jurisdictional determinations. On one project involving agricultural lands, the state agency determined that the site was not wetlands, but the Army Corps took a different view, despite use of federal regulatory definitions and guidance. This kind of inconsistency creates major uncertainty for developers

*(often late in the project life) potentially increasing cost due to the additional mitigation required.*

- ***Lack of Responsiveness:*** *Timely communication is a challenge. The member or members have experienced significant delays in receiving responses from an area U.S. Army Corps of Engineers Office, which slows down permitting timelines considerably. Such delays, combined with overreaching comments, create significant impacts to schedules. A mandatory response time would be very helpful.*
- ***Improved Interactions with Out-of-State ACOE Offices:*** *There are times when overflow work has been transferred to less-burdened Corps' offices in other states, resulting in dramatic improvements in the member's or members' experiences. Some offices were responsive, professional, and easier to work with—demonstrating that effective permitting is achievable with the right team. Despite the positive experiences, the variations show the large inconsistencies in how rules are applied based on local office leadership and/or individual preferences of reviewers.*

Thank you for the opportunity to provide this feedback to the open docket. If you have any questions about these comments or if you would like to discuss further, please do not hesitate to contact us. We would welcome further engagement by the EPA concerning the proposed rule.

Sincerely,

American Exploration & Mining Association  
American Gas Association  
American Petroleum Institute  
American Road & Transportation Builders Association  
Associated Builders and Contractors  
The Associated General Contractors of America  
Independent Petroleum Association of America  
International Council of Shopping Centers  
Liquid Energy Pipeline Association  
National Asphalt Pavement Association  
National Association of Home Builders  
National Council of Farmer Cooperatives  
National Federation of Independent Business  
National Mining Association  
National Rural Electric Cooperative Association  
Treated Wood Council  
U.S. Chamber of Commerce