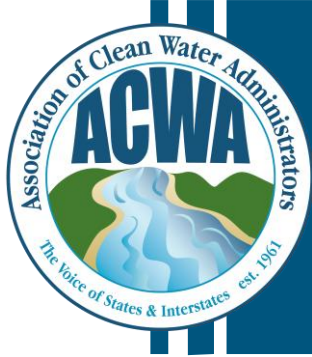




October 1, 2026

Summary and Analysis of Provisions Affecting Clean Water Act Programs Included in the Bipartisan American Affordability and Jobs Act of 2026

On September 30, 2026, the U.S. Senate released proposed language in the [“Bipartisan American Affordability and Jobs Act of 2026.”](#) The bill contains several significant amendments to the Clean Water Act (CWA) affecting state and federal implementation of water quality standards, Section 401 water quality certification, Section 402 National Pollutant Discharge Elimination System (NPDES) permitting, and Section 404 dredge-and-fill permitting. The legislation also establishes new judicial-review requirements and includes separate transmission-permitting provisions that expressly encompass state Section 401 certifications.

The bill's CWA provisions are contained primarily in Division A, Title II (§§1201–1205). In broad terms, the legislation would: (i) require EPA to use Administrative Procedure Act rulemaking when developing CWA Section 304(a) water quality criteria and expressly provide for judicial review of final Section 304(a) criteria and definitions of “waters of the United States” (WOTUS); (ii) substantially revise Section 401 water quality certification procedures and the substantive standards governing state certifications; (iii) increase the maximum NPDES permit term from five to ten years; (iv) significantly revise the Section 404 general and nationwide permit program and limit EPA's Section 404(c) authority; and (v) establish new limitations and procedures for judicial review of Section 404 actions.

Section 1201 – Water Quality Criteria

Section 1201 would amend CWA Section 304(a) by requiring EPA to conduct a formal rulemaking under the Administrative Procedure Act when developing any criterion under Section 304(a). This would alter the current statutory framework which currently requires EPA to publish criteria as national scientific recommendations that states and authorized Tribes may use when developing water quality standards. The new requirement would subject development of those criteria to notice-and-comment rulemaking procedures.

Section 1201 also amends CWA Section 509(b)(1), which governs judicial review of certain EPA actions in federal courts of appeals. The legislation would add two categories of EPA actions to Section 509 review: (i) finalization of Section 304(a) water quality criteria; and (ii) EPA actions defining the scope of “waters of the United States” for purposes of the CWA.

Section 1202 – Section 401 Water Quality Certification

Section 1202 would make significant statutory changes to Section 401 water quality certification, establishing new federal statutory parameters governing: (i) the scope of certification review; (ii) certification conditions and denials; (iii) application requirements; (iv) information requests; and (v) other certification procedures. Importantly, these changes would be incorporated directly into the CWA, and could substantially affect how states and authorized Tribes administer certification programs.

- **Narrowing the Scope of Certification Review.** Section 1202 would provide that the scope of a Section 401 certification is limited to ensuring compliance with applicable “water quality requirements.” This represents a shift from the broader “activity” approach reflected in EPA’s 2023 Section 401 regulations. The legislation would, therefore, establish a statutory limitation on the matters a certifying authority may consider when reviewing a federally licensed or permitted activity.
- **New Requirements for Certification Conditions.** The proposal would impose significant new requirements on a state’s ability to condition a certification. A certifying authority could impose a condition only where it determines, *based on clear and convincing evidence*, that the condition is necessary to ensure compliance with applicable water quality requirements. Conditions would also *have to constitute the “least burdensome”* means of ensuring compliance and be consistent with the requirements of the underlying federal license or permit.

These provisions could require states to develop a more detailed administrative record supporting individual certification conditions. In particular, states would be required to document both why a condition is necessary to address an identified water quality concern and why a less burdensome alternative would not adequately ensure compliance.

- **Higher Threshold for Certification Denials.** Section 1202 would also *establish a new evidentiary standard for denying certification*. A certifying authority could deny an application only upon determining, based on clear and convincing evidence, that certification cannot be granted without violating applicable water quality requirements. The state would need to determine that modifications to the proposed activity or reasonable certification conditions could not adequately address the water quality issue.

In practice, this provision would make certification denial more explicitly a measure of last resort and could require states to document why potential project modifications or certification conditions would be insufficient before denying certification.

- **More Standardized Certification Applications.** The bill would establish statutory requirements for a “certification application.” Required information would include: (i) identification of the applicant and relevant federal license or permit; (ii) a description of the proposed activity; (iii) information regarding the location and nature of potential discharges and receiving waters; and (iv) specified information and certifications from the applicant.

The proposal would therefore move toward a more nationally standardized process for determining what constitutes a certification application and when the limited timeline for Section 401 review process begins.

- **Limitations on Additional Information Requests.** Section 1202 would also constrain state requests for additional information during certification review. Additional materials requested by a certifying authority would need to relate to the information necessary to evaluate the certification application and applicable water quality requirements. EPA would be directed to promulgate regulations addressing certification application requirements.

These provisions could reduce states' flexibility to request information during the review process unless the state can demonstrate a clear connection between the requested information and its Section 401 water quality review.

- **Pre-Filing and Public Participation Procedures.** The proposal would place additional procedural requirements directly into Section 401. A prospective applicant could request a pre-filing meeting with the certifying authority, which would generally be required to respond within seven days and conduct the meeting within 30 days. The legislation also includes public-notice and hearing provisions associated with certification applications.

Section 1202 would preserve the fundamental state role in Section 401 certification: states would continue to grant certifications, grant certifications with conditions, deny certification, or waive certification. However, the legislation would establish considerably more detailed federal statutory standards governing how states exercise that authority.

Section 1203 – NPDES Permit Terms

Section 1203 makes a short but potentially consequential amendment to Section 402. It would change the statutory maximum term for permits issued by authorized NPDES *programs from five years to ten years*. The provision does not require every permit to have a ten-year term, nor does the language in Section 1203 itself establish separate eligibility criteria for longer permit terms.

For permitting authorities, the change could reduce the frequency of routine permit reissuances and potentially reduce permit backlogs and administrative workload. At the same time, longer permit cycles could affect how frequently permit limits and conditions are reconsidered in light of revised water quality standards, TMDLs, effluent guidelines, new monitoring information, or changes in facility operations.

Sections 1204–1205 – Section 404 Dredged and Fill Material Permitting

Sections 1204 and 1205 contain several significant amendments to the Section 404 Dredged and Fill Material program.

- **EPA Section 404(c) Authority.** Section 1204 would limit the period during which EPA may exercise its Section 404(c) authority to prohibit, restrict, deny, or withdraw specification of an area as a disposal site. Under the bill, EPA's authority *would begin when an applicant submits a complete §404 permit application and end when the Secretary of the Army issues the permit*. EPA would no longer have the same ability to exercise Section 404(c) authority either before a

permit application has been submitted or after the Corps has issued the permit. The provision would apply to Section 404 applications submitted after the bill's enactment.

- **General Permit Terms.** The bill would increase the maximum duration of Section 404 general permits *from five years to ten years*, similar to changes to Section 402 permitting.
- **Scope of Environmental-Effects Review.** In determining the environmental effects of activities for purposes of Section 404(e) general permits, the Secretary would be directed to consider *only the effects of a dredged-or-fill discharge on compliance with the bill's defined "water quality requirements."* The bill further provides that effects associated with discharges into less than two acres of navigable waters are to be considered a "minimal adverse environmental effect." This would establish a statutory presumption regarding the environmental effects of certain smaller discharges and could substantially affect how the Corps determines eligibility for general permits.
- **Required Nationwide Permits.** Section 1204 would require the Corps to maintain nationwide general permits for activities currently covered by Nationwide Permits 12, 14, 43, 57, and 58, provided the activity results in a dredged-or-fill discharge affecting less than two acres for each single and complete project.
- **Reissuance of Nationwide Permits.** The bill also streamlines the process for reissuing nationwide permits. For qualifying reissuances, it would *eliminate specified state and federal Endangered Species Act consultation requirements and National Historic Preservation Act consultation*, while providing that NEPA requirements would be satisfied through a programmatic environmental assessment. These streamlined procedures would apply only where reissuance does not narrow or eliminate preconstruction requirements or raise applicable preconstruction thresholds.

Section 1205 – Judicial Review of Section 404 Decisions

Section 1205 establishes a new statutory judicial-review framework specifically for Section 404. The bill would impose a *150-day statute of limitations* for challenges to: (i) EPA approval of a state Section 404 permit program; (ii) individual or general Section 404 permits; and Corps verifications that activities are authorized under a Section 404 general permit.

For certain challenges, plaintiffs would also have to demonstrate that they participated in the applicable public-comment process and submitted comments sufficiently detailed to place EPA, the Corps, or the state on notice of the issue later raised in court. This limitation applies where a draft action was published and the agency provided at least a 30-day comment period.

The bill also significantly limits judicial remedies. Where a court finds that the Corps or an authorized state failed to comply with Section 404 or acted arbitrarily and capriciously, the normal remedy would be remand to the permitting authority. A court generally *could not vacate, revoke, enjoin, or otherwise limit a permit* unless the permitted activity presents an "imminent and substantial danger" to human health or the environment for which no other equitable remedy is available. Similar restrictions would apply to injunctions involving general-permit verifications. Where a matter is remanded, the court

generally would be required to establish a schedule requiring the responsible federal agency or state to *act within 180 days*.

Other Provisions Affecting CWA Implementation

Outside the CWA title, the legislation contains at least one provision of particular relevance to state water programs. Section 2101, addressing interstate electric transmission, amends the Federal Power Act to expressly include a Section 401 certification issued by a state or other certifying authority within the definition of a “Federal authorization” for purposes of coordinated transmission permitting. The legislation would therefore bring state §401 decisions associated with covered transmission facilities into the Federal Power Act's coordinated authorization process. It also provides for judicial review of actions by federal agencies or state administrative agencies acting under federal law to issue, condition, or deny these authorizations in the same federal courts that review relevant FERC orders.

Key Takeaways for State CWA Programs

The legislation would affect state CWA programs in several distinct ways. For water quality standards programs, Section 304(a) criteria development would become subject to APA notice-and-comment rulemaking, and final criteria—as well as EPA WOTUS definitions—would expressly be subject to direct appellate judicial review under Section 509.

The Section 401 amendments are the most extensive direct change to state authority, establishing narrower substantive boundaries, heightened evidentiary standards for conditions and denials, more prescriptive application procedures, and new judicial-review requirements. The special rules for interstate natural-gas pipelines and transmission projects would narrow certification further by focusing review on direct point-source discharges and imposing a nine-month maximum review period.

For NPDES programs, the principal statutory change is straightforward but significant: the maximum permit term would double from five to ten years. States would need to evaluate whether and when to use longer permit terms and how those terms interact with permit modification, reopening, water quality standards, TMDLs, and other evolving requirements.

Finally, the Section 404 provisions would substantially change both federal and assumed state program implementation by limiting EPA's Section 404(c) authority, extending general permit terms, establishing a less-than-two-acre threshold for minimal adverse effects, statutorily maintaining specified nationwide permits, streamlining nationwide permit reissuance, and imposing new restrictions on litigation and judicial remedies.

The bill would make substantial changes to several of the principal mechanisms through which states, EPA, and the Corps regulate federally permitted projects and point- and dredge-and-fill discharges. For state agencies, the provisions most likely to require changes to existing program procedures are the Section 401 certification requirements, the potential use of ten-year NPDES permits, and—particularly for states with assumed Section 404 programs—the new dredged and fill material permitting and judicial-review framework.