



U.S. Environmental Protection Agency
Pacific Southwest / Region 9

EPA's Water Quality Certifications on Tribal Lands of the Pacific Southwest

Water Division
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Under Section 401 of the Clean Water Act (CWA), any activity requiring a federal license or permit that might result in a discharge to jurisdictional waters (which include many wetlands) must also receive a certification ensuring the permit or license will protect water quality. The certifying authority can either grant, deny, or condition a certification, or determine that a certification isn't needed (a waiver).



Usually, states issue these certifications. However, because states lack jurisdiction on most tribal lands, the CWA requires the federal government – in this case EPA – to fulfill this role. In some circumstances, tribes may assume this and related responsibilities from EPA (see box below).

For larger impacts, a typical EPA certification involves reviewing project details, working with project proponents to minimize environmental harm, and certifying the project with specific conditions, usually within 60 days.

The most common federal permits subject to Section 401 certifications are CWA Section 404 permits for placing dredged or fill material in jurisdictional waterways and wetlands, including seasonally dry creek beds or wetlands that are common on tribal lands in the West. These permits are often needed for building roads, utility lines and other structures, or even ecosystem restoration or flood control.

The U.S. Army Corps of Engineers (Corps) issues Section 404 permits, and coordinates with EPA or the applicable state or tribal government for the Section 401 certification. Usually, EPA uses the same information for a 401 certification that the Corps requires for the 404 permit.

However, certifications are not limited to 404 permits, and may also be needed for Federal Energy Regulatory Commission hydropower licenses, Rivers and Harbors Act Section 9 and 10 permits, and CWA Section 402 permits for storm and waste water.

Tribal Treatment as a State (TAS)

Some tribes can apply for "treatment in a similar manner as a state," or TAS, for implementing certain environmental programs under the Clean Air Act, Clean Water Act, and Safe Drinking Water Act.

Once EPA grants TAS for water quality standards, the tribe can also assume responsibility for processing 401 certification applications and ensuring water quality is protected. To apply for TAS, a tribe must:

- ✓ Be federally recognized
- ✓ Have a governing body carrying out substantial governmental duties
- ✓ Demonstrate legal jurisdiction over waters
- ✓ Have organizational capacity to implement environmental programs

What Water Quality Standards Apply on Tribal Lands?

Where tribes have EPA-approved water quality standards, those tribal standards apply. If a tribe does not have EPA-approved standards, and a waterbody flows into an adjacent state, the state standards for the receiving water body are generally applied to tribal lands.

Traditional cultural water uses are also important. If a water body needs stronger protections due to its use by a tribe (for example, there are threatened species on tribal lands not covered by the state standard, or there is a higher fish consumption rate than covered by the state standard), then EPA will coordinate with the affected tribe(s) to ensure these uses are protected as much as possible.

At a minimum, the federal water quality criteria set by EPA in Section 304(a) of the CWA are applied. This national framework protects different water uses with different criteria for specific substances. Generally the criteria that protect the most sensitive use is applied.



Typical Conditions of an EPA 401 Certification:

- Erosion control measures
- Construction stormwater management
- Spill control and cleanup requirements
- Vegetated buffers around waters
- Seasonal or weather-related work windows
- Restoration of temporarily disturbed areas

For more information, visit www.epa.gov/cwa-404, click “Laws and Regulations” and then the Section 401 Overview. To find EPA staff in your area, go to www.epa.gov/wetlands and click “Regional Contacts.”

Corps “Nationwide Permits” and Blanket Certifications

The Corps can approve a project’s filling of waters with either “standard” or “general” 404 permits. Regardless of which 404 permit is used, EPA always coordinates certifications with affected tribe(s).

“Nationwide” permits (NWP) are one type of 404 general permit that streamline approval of low-impact fills (for example, a half-acre of fill for a utility line). There are about 50 activity-specific NWPs, and they are reissued as a group every five years (next in March 2017).

When NWPs are being reissued, EPA Region 9 evaluates them for a conditional blanket (or “programmatic”) water quality certification. This avoids most case-by-case reviews, as the majority of fill projects (under most NWPs) are covered simply by notifying EPA and following conditions in the blanket certification.

This is why it is particularly important for EPA to receive input from the public – and especially affected tribes – as we consider certifying the NWP program every five years. EPA sends letters to all affected tribes in the Pacific Southwest to notify them of the review and solicit comments.

A few of the NWPs may not warrant a blanket approach. For these, and higher-impact “standard” Corps permits in general, EPA reviews certification applications case-by-case. So, while most projects are certified “in advance” under EPA’s conditions for the NWPs, EPA also tailors 401 conditions for higher-impact 404 permits to the particular action and water body.

Typical Steps for 401 Certification of Corps Permits

