

BACKGROUND:

Clean Water Act (CWA) Section 401 gives states and authorized tribes authority to assess potential water quality impacts of discharges from federally permitted or licensed projects that may affect navigable waters within their borders. Properly implemented, Section 401 is central to the concept of cooperative federalism enshrined in the CWA and an important tool that can be used to help protect water quality while allowing federal permitting and licensing processes to proceed in a timely manner.

Within the federal regulatory process, CWA 401 certifications are necessary for Environmental Protection Agency (EPA) and US Army Corps of Engineers (USACE) approval of CWA Section 404 permits for projects like oil and gas production, coal and hard rock mining, pipeline and transmission line construction, homebuilding, road construction, and agricultural irrigation. Finalization of CWA Section 401 certifications and CWA 404 permits are also necessary for the Federal Energy Regulatory Commission (FERC) approval of energy transmission and distribution projects.

WHAT THE BILL DOES:

This legislation codifies the Trump Administration's 2020 *Clean Water Act Section 401 Certification Rule* (401 Rule). This legislation also increases the transparency and efficiency of the CWA Section 401 certification process in order to promote the timely review of infrastructure projects while continuing to ensure that Americans have clean water for drinking and recreation. Specifically, the *Section 401 Certification Act*:

- Specifies statutory and regulatory timelines for a state's review and action on a Section 401 certification-requiring final action to be taken within one year of receiving a certification request.
- Clarifies the scope of Section 401, including that 401 certification is limited to a project's actual potential impacts on waters. This makes clear that when states look at issues other than the impact on water quality – such as climate change or de facto opposition to pipeline development – they go beyond the scope of the *Clean Water Act*.
- Explains EPA's roles under Section 401.
- Reaffirms the agency's statutory responsibility to provide technical assistance to any party involved in a Section 401 water quality certification process.
- Promotes early engagement and coordination among project proponents, certifying authorities, and federal licensing and permitting agencies.



Section 401 Certification Act (S.3277)

The legislation is sponsored by EPW Ranking Member Shelley Moore Capito (R-W.Va.). Original co-sponsors of the bill include, Senators John Boozman (R-Ark.), Kevin Cramer (R-N.D.), Joni Ernst (R-Iowa), Lindsey Graham (R-S.C.), Jim Inhofe (R-Okla.), Cynthia Lummis (R-Wyo.), Richard Shelby (R-Ala.), Dan Sullivan (R-Alaska), and Roger Wicker (R-Miss.)

WHY THIS LEGISLATION IS ESSENTIAL TO REGULATORY CERTAINTY:

The need for this legislation has become pressing due to the U.S. District Court for the Northern District of California vacating and remanding the 401 Rule on October 21, 2021. While EPA has not explicitly stated that they will apply this ruling nationwide, that is likely based on the agency's actions on the 2020 Navigable Waters Protection Rule.

In the past, states have weaponized CWA Section 401 to veto projects, such as natural gas pipeline projects, for things entirely unrelated to water quality or simply based on the type of project. Other states abused timelines or changed criteria during reviews, moving the goalposts on projects under consideration – even those already under construction.

The 401 Rule returned the use of CWA Section 401 certifications to their intended use – providing states and tribes with a tool to ensure protection of *water quality* within their jurisdictions. The 401 Rule also ensured that states acted in a timely manner, in accordance with the plain text of the CWA and congressional intent.

With energy and commodity prices skyrocketing, allowing EPA to return to a statutory interpretation that enables states to veto, or cause undue delays in issuing, CWA Section 401 certifications for projects essential to commerce on the basis of issues unrelated to water quality will place additional financial burden on American households that are already bearing the brunt of inflation. These price increases will hit all of the essential commodities upon which our families depend – electricity, natural gas, fuel, food, and even housing itself. And with the recent enactment of the *Infrastructure Investment and Jobs Act*, it is imperative that abuse of the CWA Section 401 certification process not be allowed to pose an insurmountable obstacle to infrastructure investment in the years to come.

The economic recovery and long-term investments in America's infrastructure require the regulatory certainty provided by the *Section 401 Certification Act*.

