



**Senate Environment & Public Works Committee Testimony -- Nov. 19, 2019**

***Hearing title: "Hearing on S. 1087, the Water Quality Certification Improvement Act of 2019, and Other Potential Reforms to Improve Implementation of Section 401 of the Clean Water Act: State Perspectives."***

Good afternoon Chairman Barrasso, Ranking Member Carper, Members of the Committee. My name is Mark Gordon. I am the 33rd Governor of the State of Wyoming. Thank you for the opportunity to discuss with you Wyoming's perspective of the need for Clean Water Act Section 401 reform.

Wyoming is blessed with an abundance of resources: coal, oil, gas, uranium, sun, and wind -- lots of wind. Wyoming is headwaters to three of the nation's major rivers -- the Missouri, the Colorado, and the Columbia. Protecting water quality within our state, and when it flows across state boundaries, has always been important to Wyoming. We recognize the value of clean water and its importance to downstream users in the northwest, the southwest, and the center of this great nation. It is in our best interest to protect our waters. This is done, in part, through responsible application of the Clean Water Act Section 401 certification decisions.

Wyoming has long been a center of energy production and a leader in environmental protection.

We provide the fuel to heat homes, light cities and run American factories. We are home to thriving wildlife, clean air and water. The bulk of Wyoming's economy is dependent upon exporting our energy resources to where it is needed. Unfortunately, a recent Clean Water Act Section 401 certification decision conducted by Washington State imperiled the development of infrastructure that would enable Wyoming's access to energy markets overseas.

In the case of the Millennium Bulk Terminal, in 2017, Washington State blocked the terminal's construction by inappropriately denying the State's Section 401 certification on account of non-water quality related impacts -- a protectionist maneuver based on alleged effects that are outside of the scope of Section 401. Instead, through imaginative interpretation of Section 401 processes, Washington State actively prevented coal mined in Wyoming, Montana, Utah and Colorado from moving to foreign and interstate commerce.

The Clean Water Act, particularly Section 401, is designed to allow States to protect the water quality. It is not a tool to erect a trade barrier based on political whims or parochial politics. I strongly contend that Section 401 must not be used to impede lawful interstate commerce. Thus, Section 401 reform is not an "assault on the environment," a means to prevent states from "taking control of their own destiny" or, at worst, a cloaked attempt at "climate change denial." We know the world needs power to build things, transport things, and improve the quality of life. We acknowledge that CO<sub>2</sub> concentrations in our atmosphere are an urgent concern for our climate that must be addressed effectively. With commitment, vision, and courage, we can take

advantage of all our resources in a responsible manner. However, Section 401 certification decisions are not the appropriate means to achieve this.

Clean Water Act Section 401 reform should be focused, be driven by fact and minimize the negative externalities and social costs that result when loopholes in federal environmental regulations are used to advance peripheral agendas. I come to you today with the goal of finding solutions: we *can* protect water quality, build infrastructure responsibly, address climate change, and promote interstate commerce under Section 401. The Clean Water Act already provides a framework for this by granting broad responsibilities to states under Section 401 while allowing the necessary flexibility to fulfill their roles as co-regulators to protect our nation's waters. Section 401 certification decisions, however, have also led to inconsistent interpretation and implementation of the statute among states. This must be fixed.

Section 401 certification decisions should be focused, be efficient, and appropriately balance the federal government's jurisdiction with state autonomy. EPA's recent effort to update its guidance for Section 401 certification is a well-needed step toward correcting the misapplication of Section 401 by some states to stymie the industries and commerce of others. President Trump's Executive Order (EO) 13868 re-centers the application of the law on its original purpose as a precise tool to protect our water quality, rather than a blunt tool to block commerce and advance the individual political interests of one state over another. Chairman Barrasso's bill S. 1087 entitled "Water Quality Certification Improvement Act of 2019" takes a hard look at the aspects to Clean Water Act Section 401 certification processes that are in need of improvement. I emphatically support these efforts.

In Wyoming, our Section 401 certifications are always water quality-based and completed within reasonable time frames of review (that is, 60 days or less, on average). Outside of our state, there are a handful of ways Clean Water Act Section 401 certification processes have acted as a barrier against Wyoming. The two main areas that I advocate for reform in context to Wyoming's experience relate to: 1) the scope of environmental reviews, and 2) the basis for certification denials.

First, there is no risk of overstating the importance of the Congressional purpose of the CWA: to protect and maintain water quality. Some certifying authorities have previously interpreted Section 401 in a manner that resulted in the incorporation of non-water quality related considerations into their certification review processes. Washington Department of Ecology's decision to employ the State's discretionary, policy-based denial of the Millennium Bulk Terminal Section 401 certification is one such example. Washington's 401 certification denial was heavily skewed on non-water quality-based adverse impacts. These include nine non-water quality-based reasons for certification denial, ranging from: greenhouse gas emissions from rail, noise and vibration from trains, social and community impacts from noise and air pollution, decreased rail safety, as well as tribal and cultural resource impacts, to name a few. The inclusion of these factors was tangential and therefore not relevant to the intent of the implementation of these regulations.

I strongly advocate that the scope of a Section 401 review or action must directly connect to the purpose of the Clean Water Act, those being water quality impacts from the potential discharge associated with a proposed federally licensed or permitted project.

Second, the basis for certification denials are of major interest to Wyoming. Again, Washington Department of Ecology's denial of the Millennium Bulk Terminal Section 401 certification was discretionary with loose, if not absent, connection to impacts on water quality. Washington State denied the project proponent's 401 certification application "with prejudice," meaning that the proponent could never reapply. Wyoming is keenly aware that some states may opt instead to use certification denial "with prejudice" as a tool to hamper projects from being implemented.

I advocate that certification denials must have a clear and reasonable assertion that project activities would: 1) result in violation or fail to conform to one or more surface water quality standards, 2) result in an increase in pollutant loading to a Clean Water Act 303(d) listed water, or 3) would not conform to applicable 401 certification conditions or Corps nationwide permit conditions.

Separately, there is considerable debate concerning Section 401 certifications centering on cooperative federalism and States' rights. I wholeheartedly support the general interpretation that state authority over land and water resources within their borders must be recognized and preserved. I agree that Section 401 is an essential tool granted by Congress intended to allow states a great deal of discretion in reviewing and conditioning 401 certifications to ensure compliance with the Clean Water Act and state surface water quality standards. We need to make

sure Section 401 implementation lines up with the Clean Water Act's intent. This is founded on the principle that states can exercise their discretion but not abuse it.

In closing, a modernized approach to Section 401 will reduce uncertainty and prevent misuse. Congress needs to take action so we are not left with ambiguities or regulations that creep to suit sectarian or selfish political aims but are rather squarely centered on purpose -- in this case water quality. I appreciate any effort that can address this issue, especially the draft "Water Quality Certification Improvement Act of 2019" sponsored by Chairman Barrasso and Senators Daines, Inhofe, Capito, Enzi, and Cramer. I also support regulatory fixes aimed at focusing Section 401 certification implementation, such as EPA's recent efforts to modernize its Section 401 guidance.

I look forward to working with the Environment and Public Works committee to answer any questions you may have of me concerning Executive Order 13868 and related Section 401 reform efforts. Wyoming stands ready to work on this. Thank you.