

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

October 21, 2019

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue N.W.
Washington, DC 20460

Dear Administrator Wheeler,

We are writing to express our strong support for EPA’s commitment to improve implementation of Section 401 of the Clean Water Act. Just over a year ago, we wrote the attached letter asking you to withdraw draft, inaccurate guidance issued in 2010 to implement Section 401. We also asked that “EPA – as the lead federal agency – work with other federal agencies to determine what government-wide direction is needed, including the need for new clarifying guidance or regulations.” We appreciate your and President Trump’s commitment to prioritizing our request for Section 401 reform under Executive Order 13868, the April 2019 Executive Order titled “Promoting Energy Infrastructure and Economic Growth.”

Modernization of the Clean Water Act Section 401 water quality certification process remains a top priority for us. The regulations that you propose to revise are forty-eight years old. As you have noted, the 1971 regulations predate Section 401 itself, which was created through the 1972 amendments to the Federal Water Pollution Control Act of 1948. The long unaddressed need for a rulemaking has only grown more acute since our October 2018 letter. Coastal states opposed to American energy production and use at home and abroad continue to weaponize Section 401. They attempt to wield Section 401 to block large energy projects from moving forward.

Coastal states have denied water quality certifications under Section 401 that prevent the transmission of natural gas and the export of American coal and liquefied natural gas. These states’ actions hurt other states’ sovereign interests. As state officials have observed, “the actions of individual state actors are disruptions to interstate commerce and negate the intent of providing the consistent and reliable permitting process envisioned by the Clean Water Act.”¹

The economic harm caused by crippling energy projects is real. As the Wall Street Journal reported in July, utilities around New York City will not link up new customers because the State of New York is blocking new natural gas pipelines.² As the Journal reported, “With limited

¹ Letter from the Attorneys General of Louisiana, South Carolina, Alabama, Texas, Montana, West Virginia, and Nebraska to Acting Administrator Wheeler (February 26, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0855-0011>

² Stephanie Yang & Ryan Dezember, “The U.S. Is Overflowing with Natural Gas. Not Everyone Can Get It,” Wall Street Journal (July 8, 2019), <https://www.wsj.com/articles/the-u-s-is-overflowing-with-natural-gas-not-everyone-can-get-it-11562518355>.

pipelines to smooth the distribution of gas around the country, price spikes have become wild. In 2018, natural gas prices in New York City surged as high as \$175 during a snowstorm that spurred record heating demand. A week later, they returned to about \$3.”

Continued abuses of Section 401 will hurt not only American energy consumers, but also hardworking Americans and communities whose livelihoods depend on energy production. The Environment and Public Works Committee held a hearing on Section 401 in August 2018. Brent Booker, Secretary-Treasurer of North America’s Building Trades Unions, testified about the Constitution Pipeline in New York—just one of the pipelines for which New York has denied a Section 401 certification. He stated:

[A] safe, modern, and affordable solution, the Constitution pipeline, was delayed from being built after already receiving [Federal Energy Regulatory Commission] approval. This permit denial is still delaying about 2,400 direct and indirect jobs from the pipeline construction generating \$130 million in labor income and economic activity for the region. The decision continues to cost local governments approximately \$13 million in annual property tax revenue.

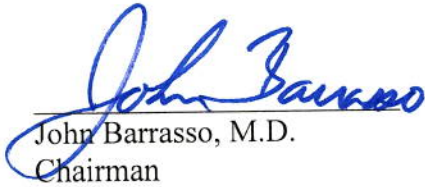
CJ Stewart, a Crow Tribal member and Board Member and Co-Founder of the National Tribal Energy Association, testified about the State of Washington’s denial of Section 401 certification for a coal export terminal. He testified:

The U.S. holds more of the world’s coal reserves than any other country, and the coal mined by the Crow Nation is preferred by high efficiency, low emission power plants that are in operation and being built around the world. However, even though our coal resources provide a critical component of U.S. export trade, our ability to get our coal to fast-growing Asian markets is being hindered by states on the West Coast who continue to refuse to grant needed approvals to build state of the art export facilities for political – not water quality – reasons.

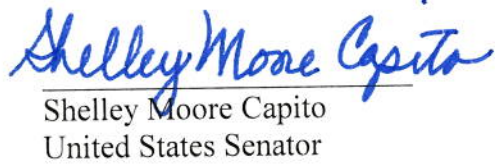
We stand ready to support you as your agency moves forward in this rulemaking. This work is critical to America’s prosperity and to our standing as an energy leader in the world. Global energy usage is going to grow across all sectors – renewables, petroleum, natural gas, and coal – between now and 2050.³ Section 401 cannot continue to be used to block America’s ability to deliver on that demand. Section 401 of the Clean Water Act must be implemented as Congress intended – a careful scalpel to protect water quality, not a bludgeon for select states to kill critically important projects.

³ Energy Information Administration (EIA), “EIA projects nearly 50% increase in world energy usage by 2050, led by growth in Asia” (Sept. 24, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=41433>.

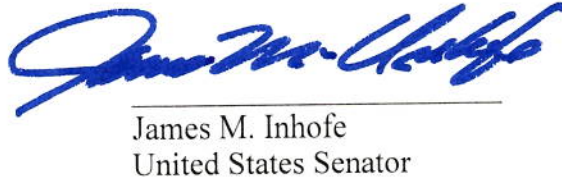
Sincerely,

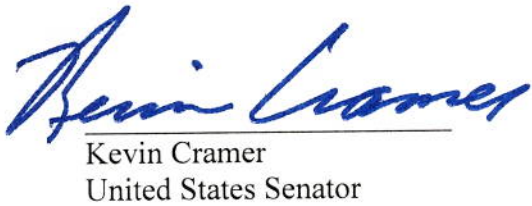

John Barrasso, M.D.
Chairman

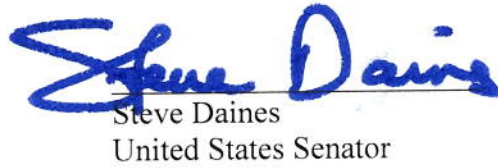
Committee on Environment & Public Works


Shelley Moore Capito
United States Senator


Michael B. Enzi
United States Senator


James M. Inhofe
United States Senator


Kevin Cramer
United States Senator


Steve Daines
United States Senator

Enclosures