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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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June 3, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Wheeler:

We write to seek additional information on Environmental Protection Agency's (EPA) efforts to modify the process for state review of applications for Clean Water Act (CWA) Section 401 water quality certifications.¹

Section 401 provides states with the explicit authority to issue or deny certification of, or place conditions on, permits or licenses for activities that may result in discharges into state waters, and is a tool at states' disposal to ensure that activities comply with federal and state water quality standards.

As you are aware, long before Congress entrusted states with the primary responsibility for reducing and eliminating pollution in waters within their borders, states already had primary authority to regulate water quality.² Congress added Section 401 to the Clean Water Act to ensure that states were sufficiently protecting water quality, while establishing a federal safety net should states fail to do so.

Section 401 is a crucial tool that states use to meet this directive by requiring assurances that any federally licensed or permitted activity resulting in a discharge to state waters will also comply with state-established water quality requirements. Congress explicitly confirmed the authority for states to condition certification on compliance with state standards and other appropriate requirements of state law.³ After nearly five decades and multiple opportunities to amend the 1972 Federal Water Pollution Control Act, Congress has never seen the need to significantly revise Section 401(d)—even after the Supreme Court's 1994 decision explicitly affirming state authority to impose conditions based on state law.⁴

The Clean Water Act carefully allocated state and federal control in a cooperative federalism structure. Indeed, the Supreme Court spoke with one voice in *S.D. Warren Company v. Maine Board of Environmental Protection*, where it held that the Clean Water Act is a "system that respects the States' concerns." The court relied on other sections of the Clean Water Act, including Section 510, to demonstrate that the State standards could be stricter than those of their federal counterparts.⁵ The court

¹ 33 U.S.C. § 1341

² See 33 USC 1251(b) "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources..."

³ 33 USC 1341(d) "[a]ny certification ... shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant ... will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] ... and with any other appropriate requirement of State law set forth in such certification." (emphasis added)

⁴ See PUD No. 1 of Jefferson Cty. v. Wash. Dept. of Ecology, 511 U.S. 700 (1994)

⁵ *S. D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370, 386 (2006).

went further to say that changes in the water quality legitimately fall within a State's legislative business.⁶ Since the inception of the Act, the federal government's role has been limited to being a safety net in the event of State *inaction*.⁷ Simply put, though the Clean Water Act is seen as promulgating "national standards," in practice, it is (and always has been) the State's primary role to set standards for water quality.⁸

We understand that EPA's current efforts may be an attempt to respond to the directives contained in two recent Executive Orders (EOs) issued by President Trump—specifically EO 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (August 15, 2017)⁹ and EO 13868, Promoting Energy Infrastructure and Economic Growth (April 10, 2019).¹⁰ EPA has announced its intentions to promptly develop guidance and promulgate new rules relating to state water quality certification under Clean Water Act (CWA) Section 401 (Docket ID: EPA-HQ-OW-2018-0855).

What we are less clear about are the motivations for these significant challenges to the much-revered concept of cooperative federalism, to which your agency gives a nod in the April 10, 2019 EPA press release announcing EPA's commitment to implement the EOs, where it says, "This state and tribal certification process for proposed projects requiring a federal permit or license is an example of the cooperative federalism goals Congress envisioned when it enacted the CWA." We agree. Our concern is that your purported deference to states and tribes flies in the face of your mandate to speed up federal permitting, and there is nothing cooperative about robbing states and tribes of the time and careful analyses they require to protect their invaluable water resources.

With that disconnect in mind, we ask that you please provide responses to the following questions and requests for information:

1. In an April 11, 2019 interview with Reuters, you stated that EPA "started working on [CWA Section 401 reforms] in advance [of Executive Order 13868], so we hope to have something out soon."
 - a. What initially prompted the agency to develop its docket to solicit public comment on this issue (EPA-HQ-OW-2018)?
 - b. When did EPA first begin to consider revisions to its guidance and regulations governing the implementation of CWA Section 401, as listed in EPA's regulatory agenda as "Clarification of State Certification Procedures Under Section 401 of the Clean Water Act" (RIN: 2040-AF86)?
 - c. When did EPA first develop docket EPA-HQ-OW-2018?

⁶ *Id.*

⁷ Bonnie A. Malloy, *Testing Cooperative Federalism: Water Quality Standards Under the Clean Water Act*, 6(1) *Env. and Energy L. & Pol. J.* 64, 82 (2011). See also Frank P. Grad, *Treatise on Environmental Law*, Ch. 3, §3.03 (Matthew Bender).

⁸ *Id.*

⁹ <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-discipline-accountability-environmental-review-permitting-process-infrastructure/>

¹⁰ <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-energy-infrastructure-economic-growth/>

- d. Please provide us with non-redacted copies of all documents (including but not limited to emails, memos, meeting notes, and correspondence) regarding all communications and meetings among EPA officials and persons representing states, tribes, and the private sector that motivated or informed EPA's decision to revise its guidance and regulations governing the implementation of CWA Section 401.
2. Which specific provisions of EPA's guidance and regulations governing the implementation of CWA Section 401 does EPA feel are in need of revision and/or clarification, and why does EPA feel they are in need of revision? Have changes in binding case law occurred since the development of EPA's guidance and regulations that support changes to EPA's policies?
 3. Please provide us with the data and information EPA has relied upon to analyze and consider the following:
 - a. Data informing EPA's determination that there is, in fact, a problem with states' implementation of Section 401 that rises to the national need for substantive changes to the agency's current guidance and regulations;
 - b. Data EPA has analyzed to determine the frequency and causes of delays in environmental permitting, specifically when CWA Section 401 is used;
 - c. A list of federal permits and licenses requiring state CWA Section 401 certification from the past 10 years that shows:
 - i. How long each took from date of application to issuance or denial;
 - ii. The average time for issuance of permits and licenses over the 10-year period;
 - iii. Delays attributable to state 401 certification reviews;
 - iv. Delays attributable to other factors and processes outside of CWA 401 certification, including:
 1. the federal permitting process;
 2. project financing; and
 3. project planning and construction delays; and
 - v. The frequency of delays in the Section 401 process that are the result of actions or inaction on the part of:
 1. federal agencies, including the designated federal licensing/permitting agency;
 2. project proponents/certification applicants; and
 3. state certifying agencies.
 4. What analysis has EPA conducted to determine what, if any, potential effects new guidance and regulations governing CWA Section 401 may have on state laws and regulations governing the implementation and administration of the CWA and other federal environmental statutes and regulatory programs? Please provide all these analyses.
 5. Has EPA conducted formal tribal consultation as part of this effort?
 - a. If so, how many (and which) tribes have been consulted?
 - b. How will the concerns and suggestions expressed by tribes be incorporated into a final guidance or proposed rule?

6. Has EPA conducted formal federalism consultation with states as part of this effort?
- a. If so, how many (and which) state officials and associations have been consulted?
 - b. How will the concerns and suggestions expressed by states be incorporated into a final guidance or proposed rule?
 - c. EPA's internal Guidance on Executive Order 13132 directs agency officials, when implementing E.O. 13132, to: (i) describe clearly the problem the rule is intended to address; (ii) explain the basis for determining the problem; (iii) indicate whether the problem is regional or national in scope; and (iv) explain any flexibility in the rule that would allow for local conditions or circumstances. Has this information been properly provided to state, local, and tribal officials? Please also provide this information to us.

We ask that you provide a response to these questions by June 21, 2019. If you have any questions, please contact Christophe Tulou, of the Committee on Environment and Public Works, at Christophe_Tulou@epw.senate.gov; Radha Adhar, of Senator Duckworth's staff, at Radha_Adhar@duckworth.senate.gov; or Adam Zipkin, of Senator Booker's staff, at Adam_Zipkin@booker.senate.gov. Thank you for your attention to this important matter.

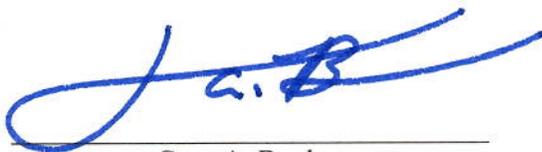
Sincerely,



Tom Carper
Ranking Member
Committee on Environment and
Public Works
U.S. Senate



Tammy Duckworth
Ranking Member
Subcommittee on Fisheries, Water
and Wildlife
Committee on Environment and
Public Works
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