

Testimony of Laura Watson
Senior Assistant Attorney General
Washington State Office of the Attorney General
Senate Committee on Environment and Public Works
November 19, 2019

Thank you Chairman Barrasso, Ranking Member Carper, and members of the Committee.

My name is Laura Watson. I am a Senior Assistant Attorney General of Washington State. I have worked on Clean Water Act and Section 401 issues throughout most of my twenty-plus year career with the Washington Attorney General's Office. It is an honor to be here today to discuss the important topics before us, both of which stand to have a drastic impact on water quality in the United States.

When Congress enacted the Clean Water Act in 1972, it clearly intended to preserve the states' leading role in addressing water pollution. For its nearly 50-year history, the Environmental Protection Agency (EPA) and federal agencies under administrations of both parties have respected this "policy of Congress to recognize, preserve, and protect the primary responsibilities of states" to prevent water pollution within state borders.¹ The resulting model of cooperative federalism spawned a strong state, federal, and tribal partnership that has allowed the partners to work together towards the common goal of protecting our nation's waters. Unfortunately, an extreme new rule proposed by EPA and the harmful legislation before us today would effectively rewrite Section 401 of the Clean Water Act and undermine these decades of partnership.

States have successfully implemented Section 401 for the past 50 years. Section 401 allows states to grant, condition, or deny water quality certifications for federally permitted activities within state borders. Most applications for 401 certifications are granted. Some applications are granted with conditions, while a small handful are denied. For example, over the past half century, Washington State has issued thousands of 401 certifications, hundreds of certifications with conditions, and approximately 30 denials. Only a few of these decisions have been appealed. In short, Washington State demonstrates a record of success and implementation of a fair process in making Section 401 certification decisions.

Section 401 is not broken. Rather, it is an effective and important tool to ensure that federally permitted activities do not cause water pollution.

Now, Section 401 is under attack in two ways. First, EPA has proposed a rule that would seize control of 401 decisions from states and place those decisions in the hands of federal agencies. Second, legislation has been introduced — the Water Quality Certification Improvement Act — that would similarly erode states' rights in an attempt

¹ 33 U.S.C. § 1251(b).

to benefit special interests. These two proposals run counter to the concept of cooperative federalism and the spirit and letter of the Clean Water Act, and would inevitably compromise clean water for families and communities.

EPA’s Proposed 401 Rules Are an Assault on the Cooperative Federalism Model Established by Congress in the Clean Water Act Almost 50 Years Ago

The potential harms posed by EPA’s proposed rule cannot be overstated. It would exempt pollution and some projects altogether from state oversight. And it would shift decision-making authority to federal agencies, seriously undermining the cooperative federalism embodied in the Clean Water Act.

If finalized, EPA’s proposed rule would:

- dramatically narrow the scope of 401 review;
- severely restrict the amount of time states have to make 401 decisions;
- eliminate states’ ability to receive full information prior to making decisions; and
- grant federal agencies ultimate veto authority over state decisions.

This proposal crosses the legal line in several ways, four of which I will highlight today. First, EPA is attempting to operate in a vacuum, ignoring court precedent. The Supreme Court has already interpreted the scope of Section 401 in the seminal case, *PUD No. 1 of Jefferson County*.² There, the Court confirmed that states may protect water quality by imposing 401 conditions on the federally permitted activity as a whole, not just on specific point source discharges. EPA proposes to reverse this Supreme Court precedent by redefining the scope of 401 to encompass only point source discharges. But just as EPA cannot ignore the laws written by Congress, so too does EPA lack the authority to reverse Supreme Court decisions interpreting those laws.

Second, the Supreme Court and appellate courts across the nation have confirmed that Section 401 specifically empowers states — not the federal government — to condition or deny projects that would harm water quality.³ In 1972, Congress granted this authority to states, not to federal agencies. But EPA’s proposal would allow a federal agency to ignore conditions that a state includes in a 401 certification and even override a state’s 401 denial if the federal agency believes that the state acted outside of its authority. In other words, states would be permitted to exercise 401 authority only if federal agencies agree with the way that authority is exercised. This effectively invalidates 401 and eliminates any semblance of cooperative federalism.

Third, nothing in the law authorizes EPA or other federal agencies to establish deadlines for state action under Section 401. The statute has already established a deadline: states have “a reasonable period of time” of “up to one year” to make their decisions. The vast majority of 401 decisions are made on much shorter timeframes than a year. Bigger and more complicated projects might require more time. But it is not up to EPA to dictate to states what that timeframe should be. Rather, states are free to work within the

² *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700 (1994).

³ *See, e.g., S.D. Warren Co. v. Maine Bd. of Env’tl. Protections*, 547 U.S. 370, 380 (2006).

parameters set in statute, including issuing their decisions “within a reasonable period of time” of “up to one year.”

Fourth, EPA doesn’t have the authority to arbitrarily limit the information that a state can consider in making 401 decisions. Yet that is exactly what EPA proposes to do by including a short list of seven largely non-substantive items that starts the 401 clock. This perfunctory list includes administrative rather than substantive information, such as the name and address of the applicant and a statement that the applicant seeks a 401 certification. Under EPA’s proposal, states would not be given more time to obtain additional information that might be needed if, for example, the scope of the project substantially changes after the 401 request is submitted or if the initial request fails to correctly identify the number, location, or nature of potential discharges into water.

Taken together, it is plainly evident that EPA’s interest is not in protecting water, as the Clean Water Act requires. Rather, EPA wants to gift industry a process that is so “streamlined” as to be virtually useless. This is not what is envisioned by Section 401.

States Across the Nation Are Troubled by EPA’s Power Grab

In light of the breathtaking scope of EPA’s proposal, it should come as no surprise that states across the country and across the political spectrum have expressed opposition to the proposed rules. For example, the Department of Environment and Natural Resources in South Dakota calls EPA’s proposed rule “a poorly disguised effort by the federal government to severely limit the states’ and tribes’ efforts to enforce their water quality standards and to impose appropriate conditions on federally-issued permits.” Thus, “South Dakota opposes almost all aspects of this rule . . . States and tribes are integral partners under the Clean Water Act. Section 401 certification is not an authority that EPA can give or take away.”⁴

The Arkansas Game and Fish Commission notes that “[a]llowing the federal government to override a state decision is by no means in the spirit of cooperative federalism This proposed rule will transfer decision making authority from the state to the federal permitting and licensing agencies who may be ill equipped to address state specific water quality issues.”⁵

The West Virginia Department of Environmental Protection expresses its concern that “[t]hrough the implementation of the proposed rule, state rights to protect resources from degradation and to plan the development and use of land and water resources

⁴ Secretary Hunter Roberts, South Dakota Dep’t of Environment and Natural Resources. October 21, 2019. Comment Letter to EPA Administrator Wheeler. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0951>.

⁵ Director Pat Fitts, Arkansas Game and Fish Commission. October 21, 2019. Comment Letter to EPA Administrator Wheeler. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0880>.

would be reduced.” This “would undermine the authority originally provided to states in the CWA.”⁶

Montana worries that “the proposed 401 certification rules could significantly constrain Montana’s ability to protect our water quality under section 401 of the Clean Water Act. This would undermine the principle and practice of cooperative federalism, which is the core of section 401 . . . Montana’s ability to protect our water quality should not be weakened by federal rulemaking.”⁷

The Louisiana Department of Environmental Protection points out that the “proposed rule redefines the scope of state authority and usurps the state’s authority to include conditions in certifications based on state law.” The proposed rule “essentially allows the federal agency to override additional conditions or denials, shorten the ‘reasonable time period’ at will, and limit the certifying agency’s ability to request additional information from the applicant.” And Louisiana expresses concern about the rule’s potentially devastating impact on water quality: “**Although EPA’s goal is to reduce undue burden on interstate commerce and infrastructure projects, the rule language will limit the state’s ability to regulate small projects with potentially severe, localized impacts to water quality.**”⁸

The Utah Department of Environmental Quality expresses similar concerns in noting that “many aspects of the proposed rule are inconsistent with the goal of cooperative federalism.” Utah recognizes that “[s]tate authority to certify and conditional federal permits of discharges under the CWA is vital to the CWA’s system of cooperative federalism[.]” Contrary to cooperative federalism, EPA’s proposed rule is “an inappropriate transfer of authority from the state to federal agencies.”⁹

Wyoming Governor Gordon states: “Neither the EPA nor a federal permitting or licensing agency has the authority to directly overturn a state’s certification denial. The final determination on whether the state certification denial is within the scope of water quality certification is properly decided through state judicial procedures.”¹⁰

These states’ concerns are echoed by my own state’s Department of Ecology. Ecology Director Maia Bellon notes that “EPA’s proposal amounts to no less than a rewrite of

⁶ Acting Director Katheryn Emery, West Virginia Dep’t of Environmental Protection. October 21, 2019. Comment Letter to EPA Administrator Wheeler. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0805>.

⁷ Director Shaun McGrath, Montana Dep’t of Environmental Quality. October 17, 2019. Comment Letter to EPA Administrator Wheeler. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0277>.

⁸ Assistant Secretary Elliott B. Vega, Louisiana Dep’t of Environmental Quality. October 19, 2019. Comment Letter to EPA Office of Water. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0898>.

⁹ Executive Director L. Scott Baird, Utah Dep’t of Environmental Quality, October 21, 2019. Comment Letter to EPA Administrator Wheeler. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0907>.

¹⁰ Governor Mark Gordon, State of Wyoming. October 21, 2019. Comment Letter to EPA Administrator Wheeler. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0817>.

this important law that for decades has enabled states to protect and enhance water bodies within our borders If finalized, the rule would significantly hinder states' ability and authority to manage and protect the water our residents need for drinking, fishing, and recreation.”¹¹

It is not just individual states that are concerned by EPA's astounding overreach. A dozen national and regional organizations, led by the Western Governors Association, joined a letter to express “numerous concerns about the substantial effects the proposed rule would have on states' authority and autonomy to manage and protect water resources and to implement Clean Water Act Section 401.” These organizations, representative of the full political spectrum, worry that “[a]dministratively curtailing states' historic and well-established authority under CWA Section 401 would inflict serious harm to the cooperative federalism model established by Congress under the CWA and the fundamental constitutional authority of states over water resources within their boundaries.”¹²

A coalition of 23 Attorneys General, led by Washington, New York, and California, had this to say: “Every provision of the proposed rule appears designed to curtail state authority under section 401.” Section 401 is intended to give states broad authority to prevent water pollution. “But now, called to action by an Executive Order designed to promote energy infrastructure rather than protect water quality, EPA proposes an interpretation of section 401 that is inconsistent with the Clean Water Act and would unlawfully usurp state authority to protect the quality of water within our borders.” EPA has cited no legitimate reason for its unprecedented federal overreach: “Given the numerous flaws of the proposed rule and the lack of evidence that existing section 401 regulations and procedures are inadequate, EPA should abandon its current effort and should withdraw the proposed rule.”¹³

This chorus of criticism by red and blue states alike makes two things clear. First, the intent of EPA's proposal is *not* to protect water quality. Rather, EPA seeks to weaken clean water protections at the behest of a few industry interests. Second, EPA is willing to upend the cooperative federalism embodied in the Clean Water Act in order to appease these same industry interests. Washingtonians and people across the nation who rely on clean water for drinking, fishing, swimming, and recreating deserve better than this.

¹¹ Director Maia Bellon, Washington Dep't of Ecology. October 21, 2019. Comment Letter to EPA Administrator Wheeler. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0931>.

¹² Western Governors' Ass'n, et al. October 16, 2019. Comment Letter to EPA Administrator Wheeler. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0728>. In addition to the Western Governors Association, the letter was joined by the National Conference of State Legislatures, National Association of Counties, National League of Cities, United States Conference of Mayors, Council of State Governments, Council of State Governments West, Western Interstate Region, Association of Clean Water Administrators, Association of State Floodplain Managers, Association of State Wetland Managers, and Western States Water Council.

¹³ Attorney General Bob Ferguson, et al. October 21, 2019. Comment Letter to EPA Office of Water. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0556>.

EPA’s Proposal Is Also Broadly Opposed by Native American Tribes

Washington’s 29 federally recognized Indian Tribes are integral partners in the protection of water quality. Across the nation, 45 tribes have “treatment as state” (TAS) status under the Clean Water Act, which allows them to establish their own water quality standards and issue 401 certifications for federally permitted projects within tribal jurisdiction. Non-TAS tribes share their valuable expertise with state environmental agencies to ensure that tribal rights and values are protected in the 401 process. These tribal rights, including treaty rights, are now at risk, prompting several tribes and tribal organizations to strongly oppose EPA’s federal overreach.

The Columbia River Inter-Tribal Fish Commission,¹⁴ based in the Pacific Northwest, aptly summarizes the concerns: “The Proposed Rule substantially restricts and diminishes the scope of state and TAS tribes’ 401 authority by prohibiting them from considering the complete impact while granting federal permitting agencies a new authority to overturn conditions and denials. These conditions are counter to the intent of cooperative federalism that is essential to the CWA as Congress intended.” The Commission notes that recent concerns around 401 certifications were generated by a few recent 401 denials, “but these few denials do not suggest a broken program. In fact, the CWA, and specifically section 401, was designed by Congress to protect water quality first.” In sum, “[t]he Proposed Rule largely violates the CWA, will have adverse and wide-ranging consequences beyond the purported impetus for these changes, and will not fix the purported problems EPA aims to solve.”¹⁵

The Upper Snake River Tribes Foundation¹⁶ states that EPA’s proposal “is a slap in the face of tribal sovereignty.” The proposal “undermines EPA’s professed goal of recognizing principles of cooperative federalism.” The Foundation concludes that “[t]he proposed revisions weaken EPA’s implementation of the relevant provisions of Section 401 and are not consistent with fundamental objectives to protect human health and the environment, its statutory responsibilities under the Clean Water Act, its responsibility to protect critical tribal trust resources, its consultation responsibilities, and adherence to the key principles of EPA’s 2010 § 401 guidance.”¹⁷

The National Congress of American Indians remarks that “the proposed revisions to section 401 of the Clean Water Act would dramatically reduce protections for tribal waters and water-dependent resources.” The proposed rule “impermissibly threatens Indian Tribes’ right to self-governance.” And the National Congress, like other tribal associations, points out that EPA has failed in its responsibility to consult with tribes

¹⁴ The Commission consists of Columbia River fishing tribes in Washington, Oregon, and Idaho.

¹⁵ Executive Director Jaime A. Pinkham, Columbia River Inter-Tribal Fish Comm’n. October 21, 2019. Comment Letter to EPA Office of Water. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0992>.

¹⁶ The Foundation consists of Snake River Basin tribes in Nevada, Idaho, and Oregon.

¹⁷ Executive Director Scott Hauser, Upper Snake River Tribes Foundation. October 21, 2019. Comment Letter to EPA Office of Water. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0876>.

before moving forward: “Despite the sweeping restrictions in the proposed rule, the EPA has not fulfilled its obligation to engage in meaningful tribal consultation.”¹⁸

EPA stubbornly persists on a path opposed by states and tribes alike. This is not the path envisioned by Congress when it declared a policy of recognizing, preserving, and protecting the primary responsibilities of states to prevent water pollution.

Every Senator should be concerned by this blatant disregard for the law and Congress’ intent in writing it. It is incumbent on Congress to reassert its constitutional authority in the face of federal executive overreach, demand that EPA immediately cease its misguided endeavor, and empower states and tribes to carry out the functions reserved for them by Congress in the Clean Water Act.

The Water Quality Certification Improvement Act Is Equally Ambitious in Curtailing States’ Rights and Weakening Protections Against Dirty Water

Unfortunately, the Water Quality Certification Improvement Act (S. 1087) imposes some of the same concepts as EPA’s rule that cause significant concern for states and tribes. First, the bill would abandon *PUD No. 1* and 50 years of successful 401 implementation by restricting the scope of 401 review to “discharges” into the “navigable waters.” States and tribes would no longer be able to consider and address all sources of water pollution arising from a federally permitted activity. The inevitable result would be more water pollution — in every state, from Washington to Wyoming.

In their comments to EPA, several states explained why a narrowed scope of review is unacceptable. For example, as noted by West Virginia’s Department of Environmental Protection, “Redefining the term discharge to relate only to a point source and disallowing the review of the full project raises significant concern[.]”¹⁹ The Montana Department of Environmental Quality notes that “there is not always a defined discharge or discrete pipe like in a point source. Montana prefers the ‘activity as a whole’ alternative.”²⁰

The Washington State Ecology Director remarks that limiting 401 review to specific discharges “would not only dramatically narrow the scope of what we can review within a specific project, it would exempt some projects from review altogether.” This narrowed scope of review “could drastically impact Washington’s endangered and threatened species, including the southern resident Orca and numerous salmonid species.”²¹

The Chairman’s Water Quality Certification Improvement Act would infringe on state authority in a second fundamental way. Currently, Section 401 allows states to make their 401 decisions based not only on federal water quality requirements but also based

¹⁸ National Congress of American Indians. October 21, 2019. Letter to EPA Administrator Wheeler. <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0965>.

¹⁹ *Supra* note 6.

²⁰ *Supra* note 7.

²¹ *Supra* note 11.

on other appropriate requirements of state law, such as instream flow conditions to protect fish.

Yet this legislation would eliminate states' ability to apply state water quality requirements to 401 decisions and would allow states to consider only a short list of federal requirements. As a result, several water pollution prevention measures would be on the chopping block — including measures related to erosion and sedimentation standards, construction and post-construction stormwater management, coastal protections, groundwater protections, and state laws protecting threatened and endangered species.

Each of these requirements directly relates to water quality. For example, construction stormwater management ensures that a wide variety of contaminants unearthed during the construction process and carried in stormwater do not enter the receiving water body. Sedimentation standards address similar concerns. If the Chairman's legislation were to become law, states would no longer be able to implement these critical pollution prevention measures as a condition of 401 certification.

Prohibiting states from applying their own water quality requirements contradicts the letter and the spirit of Section 510 of the Clean Water Act.²² Section 510 recognizes that the Clean Water Act sets the floor of water quality protection and that states are free to regulate above the federal floor: "nothing in [the Act] shall . . . preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution."

Section 401 gives teeth to Section 510's express intent to preserve states' traditional authority over water pollution. Courts have understood sections 401 and 510 as demonstrating a clear intent not to preempt but to "supplement and amplify" existing state authority.²³ Under Section 401, the federal government itself is powerless to preempt more restrictive state standards, even when it comes to federal permitting and licensing decisions. The Chairman's legislation would transfer that traditional state power to federal agencies, like the Environmental Protection Agency and the Federal Energy Regulatory Commission, robbing the states of their power and harming water quality.

When this bill was first introduced in 2018, a broad coalition of governmental organizations, led by the Western Governors' Association, wrote a letter to "urge Congress to reject any legislative or administrative effort that would diminish, impair or subordinate states' ability to manage or protect water quality within their boundaries." The letter recognized that Section 401 is a "vital component of the CWA's system of cooperative federalism" and that 401 authority helps "ensure that activities associated with federally permitted discharges will not impair state water quality." Any effort to

²² 33 U.S.C. § 1370.

²³ See, e.g., *People of State of Ill. ex rel. Scott v. City of Milwaukee*, 366 F. Supp. 298, 301–02 (N.D. Ill. 1973).

streamline the 401 process “must recognize, and defer to, states’ sovereign authority over the management and allocation of their water resources.”²⁴

The Utah Department of Environmental Quality points out that “Utah is in the best position to protect the unique waters within our boundaries” and that “Utah’s state water quality laws are designed to protect the unique aspects of [state] waters.” For that reason, “state management is preferable to a federally mandated one-size-fits-all approach to water management and protection that does not accommodate the practical realities of geographic and hydrologic diversity among states.”²⁵

There is no question the Water Quality Certification Improvement Act infringes on state and tribal sovereignty and sacrifices clean water under the guise of process improvements. Washington State supports streamlining federal and state processes in a responsible and transparent manner, and we are always willing to assist in good faith efforts to make the process work better. However, Section 401 is not a problem that needs to be fixed. It is working as effectively today as it has over the past five decades. We urge you not to dismantle this important tool for preventing water pollution.

Washington State Did Not Deny a Section 401 Certification on Non-Water-Quality Grounds

As this Committee knows, in September 2017, the Washington State Department of Ecology denied a Section 401 certification for a proposed coal export terminal on the Columbia River. This decision has been improperly cited as an “abuse of authority” and “hijacking” of the 401 process by the Chairman. Because the facts underlying the decision continue to be mischaracterized, I would like to set the record straight today.

We have sent a copy of the decision to the Chairman and Ranking Member, and I understand it will be inserted into the record for today’s hearing. The decision speaks for itself and should dispel any notion that Washington’s 401 denial was not based on water quality grounds. Pages 13–18 of the decision describe in detail the numerous water quality concerns posed by the project. For example, over 30 acres of wetlands would have been destroyed by this project. The project would have required dredging of 41 acres of Columbia River bed and would have produced contaminated stormwater from stockpiling 1.5 million tons of material onsite. The company had the opportunity but failed to come forward with sufficient information to demonstrate how these water quality impacts would be avoided or mitigated.

This is not the first time that the company failed to provide requested information to regulators. In fact, it was discovered that the company intentionally and deceptively concealed information about the scope and size of its project in order to evade full

²⁴ The organizations joining the Western Governors’ Association are the Association of Clean Water Administrators; Association of Fish and Wildlife Agencies; Association of Wetland Managers; Conference of Western Attorneys General; Council of State Governments; West Council of State Governments; Western Interstate Region; Western Interstate Energy Board; and Western States Water Council.

²⁵ *Supra* note 9.

environmental review.²⁶ In another instance, the company refused to provide requested financial information to the Washington State Department of Natural Resources despite seeking a sub-lease from the Department to construct its terminal on state-owned aquatic lands. This resulted in a denial of the sub-lease, which was recently upheld by the Washington State Court of Appeals.²⁷

There have been false claims that the Section 401 water quality certification denial was based on climate change impacts linked to concerns about coal as a product. Again, the decision speaks for itself. Climate change considerations were not a factor in the state's denial.

The truth is that this was an enormous industrial proposal that would have had significant adverse environmental impacts, as shown by the unchallenged environmental impact statement. If constructed, this terminal would not only have been the biggest thermal coal export terminal in all of North America, but would also have exported more tons of dry bulk commodities than all of the existing marine terminals in Washington (and Oregon on the Columbia River) *combined*.

Faced with these significant adverse environmental impacts, Cowlitz County independently denied land use permits under the state Shoreline Management Act that would have been necessary for the project to proceed.²⁸ I cannot emphasize enough the significance of this. That the local government denied land use permits independent of the state's decision means all the brouhaha over the 401 denial — from the project sponsors, EPA, the Chairman of this Committee — is much ado about nothing. Even if the Washington Department of Ecology changed its mind and issued a 401 certification tomorrow, the project *still* could not be built because it lacks a sub-lease and necessary land use permits.²⁹ In other words, the 401 denial is effectively moot.

Contrary to the rhetoric, permit denials for this project are not a referendum on coal. There is no anti-coal conspiracy. Rather, the decisions reflect the thoughtful and thorough decision-making process that Washingtonians have a right to expect of their public servants.

It seems only fair that we should expect the same from this Committee and from EPA. Rather than upending five decades of cooperative federalism and eroding the rights of every state and tribal government over one or two permitting denials, we urge this Committee to recognize the important role states and tribes play in protecting water quality, and to uphold the longstanding partnership we share under the Clean Water Act.

²⁶ *Northwest Alloys, Inc. v. Dep't of Natural Resources*, 447 P.3d 620, 624 (Wash. App. 2019).

²⁷ *Northwest Alloys*, 447 P.2d at 632.

²⁸ Wash. Rev. Code ch. 90.58.

²⁹ *In re the Matter of Millennium Bulk Terminals-Longview LLC Coal Export Facility*, File No. 12-04-0375. Findings of Fact, Conclusions of Law, and Decision Denying Permits (Nov. 13, 2017).

<http://www.co.cowlitz.wa.us/2204/Hearing-Examiner>.

Congress and EPA Should Not Eliminate the Authority of 50 States Over One or Two Decisions They Disagree With

In Washington, we have become accustomed to being targets of the rhetoric used to justify the undoing of Section 401, but I feel compelled to tell this Committee — in no uncertain terms — the extreme changes being proposed to Section 401 are unfounded and unnecessary; they run counter to congressional intent and the concept of cooperative federalism; and they carry grave risks to clean water for families in every state.

As I have demonstrated today, the coal export terminal in Washington was properly and lawfully denied by the state Department of Ecology. Every tribunal that has thus far reviewed Washington's decision has upheld it. Although the 401 denial is still in the process of being litigated, we have full confidence that the decision will be upheld at the end of the day. And even if the 401 certification had been granted, the project in question would still not have moved forward due to other, independent denials.

New York has also been a target of these attacks, based on the denial of three Section 401 certifications by that state's Department of Environmental Conservation. But these denials represent a miniscule percentage of the 4,000-plus water quality certifications received and processed in a noncontroversial manner by the Department each year. Moreover, each of the denials were based on the project proponent's failure to demonstrate compliance with water quality standards.³⁰

Allegations of improper motive by both states are unfounded, and judicial review has been a sufficient safeguard in the small handful of cases in which an applicant disagrees with a state's decision.

The Clean Water Act entrusts states with the responsibility of protecting water by denying or conditioning projects that will degrade water quality. Individual states and clean water administrators — across the country and political spectrum — have objected to the drastic changes embodied in EPA's rule and the Water Quality Certification Improvement Act because it will strip states of their authority to do this work.

We cannot afford to throw away Clean Water Act protections for millions of Americans over a couple denials. Clean water for our communities is at stake.

Thank you, and I look forward to answering your questions.

³⁰ New York Office of the Attorney General. August 15, 2018. Letter to Senator Gillibrand. See page 16 at <https://www.govinfo.gov/content/pkg/CHRG-115shrg31623/pdf/CHRG-115shrg31623.pdf>.