

United States Senate

WASHINGTON, DC 20510

October 4, 2018

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

Dear Acting Administrator Wheeler:

We are writing to request your review of the federal government's implementation of Clean Water Act Section 401 to ensure it is consistent with the statute. We ask that you work with other federal agencies to determine whether new clarifying guidance or regulations are needed in light of recent abuses of the Section 401 process by certain states.

In the last few years, a troubling trend directed at fossil energy projects has arisen. A select number of states have hijacked Section 401 to delay or block the development of natural gas pipelines and a coal export terminal. While the focus of these abuses today is fossil energy, the approach could be used to target any type of project that is disfavored politically.

To address this concern, we introduced S. 3303, the Water Quality Certification Improvement Act of 2018. This bill clarifies appropriate considerations and processes to evaluate water quality impacts under Section 401. Recent obstruction of energy infrastructure projects has directly threatened national security by forcing reliance on foreign energy and increased air emissions.¹ This obstruction has hurt American workers,² states,³ and tribes.⁴

We are firmly committed to states' and tribes' central role in protecting water resources, as we have maintained in other contexts.⁵ In the few instances mentioned above, Section 401 is currently being used inappropriately to "fight" projects rather than protect water quality.⁶ As the primary agency responsible for implementation of the Clean Water Act,⁷ the Environmental Protection Agency (EPA) plays a critical role in ensuring that the statute is fairly

¹ Editorial, *Why You'll Pay for Beacon Hill's Pipeline Folly*, BOSTON GLOBE, Apr. 22, 2018.

² *Hearing to Examine Implementation of Clean Water Act Section 401 and S. 3303, the Water Quality Certification Improvement Act of 2018: Hearing Before the S. Comm. on Env't & Pub. Works*, 115th Cong. (2018) [hereinafter §401 Hearing] (statement of Brent Booker, Secretary-Treasurer, North America's Building Trades Unions).

³ Tim Fox, Attorney General of Montana, Opinion, *Washington State Should Stop Blocking Planned Coal Export Terminal*, N.Y. TIMES, June 21, 2018.

⁴ §401 Hearing, *supra* note 2 (statement of CJ Stewart, Board Director, National Tribal Energy Association).

⁵ *The Appropriate Role of States and the Federal Government in Protecting Groundwater: Hearing Before the S. Comm. on Env't & Pub. Works*, 115th Cong. (2018).

⁶ See Tom Johnson, *Move in Congress to Weaken Clean Water Act Could Have Impact in New Jersey*, NJ SPOTLIGHT, Aug. 16, 2018 ("If this bill happens, it will make it extremely difficult to fight these dangerous projects," said Jeff Tittel, director of the New Jersey Sierra Club. "It (the Section 401 review) is probably the most effective tool we have to fight these projects."); see also §401 Hearing, *supra* note 2 (letter of Millennium Bulk Terminals-Longview LLC submitted to the record).

⁷ 33 U.S.C. §1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency ... shall administer this chapter.").

and uniformly applied. To our knowledge, the most recent EPA document regarding Section 401 is a 2010 interim “handbook” issued by the prior administration. EPA did not ask for public comment on the handbook, and it contains clear misstatements of law. For example, the handbook suggests that a state’s “reasonable period” of time to act on a request for a water quality certification begins to run when an application is complete.⁸ This is incorrect. That period begins to run when the state receives the application.⁹

We ask that you take immediate steps to review this handbook and other EPA materials. We also request that 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. All parties must have a clear understanding of the appropriate scope of water quality certification decisions. The federal permits and licenses that trigger the water quality certification process are often issued by other federal agencies, including the Federal Energy Regulatory Commission and U.S. Army Corps of Engineers. EPA must ensure that these agencies have consistent, coordinated direction.

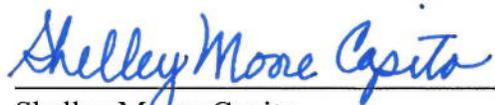
Sincerely,



John Barrasso, M.D.
Chairman
Committee on Environment & Public Works



James M. Inhofe
U.S. Senator



Shelley Moore Capito
U.S. Senator



Steve Daines
U.S. Senator



Michael B. Enzi
U.S. Senator

Enclosures

⁸ EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* at 11 (2010) (“The amount of time allowed for action on a certification application is determined by the Federal agency issuing the license or permit, while the certifying agency determines what constitutes a ‘complete application’ that starts the timeframe clock.”).

⁹ *NY State Dep’t of Env’t Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018).