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# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RICHARD M. RUSSELL, MAJORITY STAFF DIRECTOR  
MARY FRANCES REPKO, MINORITY STAFF DIRECTOR

October 21, 2019

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

RE: Regulations on Water Quality Certification  
EPA-HQ-OW-2019-0405

Dear Administrator Wheeler:

We write with grave concerns about the Environmental Protection Agency's (EPA's) proposed rule to change the state water certification process under section 401 of the Clean Water Act (CWA).<sup>1</sup> We ask that our comments be included in the docket on this proposal.

We are concerned that the proposal undercuts state authorities and undermines the principles of cooperative federalism. Attached is a letter we wrote you on June 3, 2019. In that letter we laid out the explicit authorities that Congress vested in the states to regulate water quality. These are, as the EPA robustly pointed out in its proposed rule to redefine the waters of the U.S. (WOTUS) under the Clean Water Act, the essence of cooperative federalism—the epitome of shared responsibility and teamwork.

The EPA seems, with this proposed rule and with other recent actions, to be prepared to walk away from the principals of cooperative federalism. The proposed 401 rule is among a series of recent communications and actions by EPA that fly in the face of these principals, including efforts to eliminate the California waiver under Section 177 of the Clean Air Act and a letter challenging California's and San Francisco's protection of water quality from the City's large homeless population. The EPA-state relationship is getting so fraught that the Environmental Council of the States (ECOS), the nonprofit, nonpartisan association of state and territorial environmental agency leaders, was compelled to write you to say: "We are concerned about the lack of advance consultation with states and the impact of these and several other actions on the ability of states to protect human health and the environment, and call on U.S. EPA to return to the appropriate relationship with the states as co-regulators under our nation's environmental protection system."<sup>2</sup>

We are also highly skeptical of the need for the proposed 401 changes. States and tribes have acted responsibly and expeditiously in discharging their responsibilities under section 401 over

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<sup>1</sup> 33 U.S.C. § 1341

<sup>2</sup> Letter to EPA Administrator Andrew R. Wheeler from Don Walsh, ECOS Executive Director, September 26, 2019.

the past 45 years. According to a survey of its member states by the Western States Water Council issued in April 2014, all certifications were acted upon “within the one year period allowed by law.” The survey goes on to point out that, “The majority, on average, fall between 40-90 days, while some may process certification requests within a couple of weeks.”<sup>3</sup>

A former Nebraska Clean Water Act 401 Coordinator summed up the states’ experience by stating: “I cannot recall one single case of a WQC [water quality certification] being denied during my tenure or at any time in the history of the state’s Section 401 program. As no published data exists regarding the annual number of Section 401 WQC denials or delays on a national basis, EPA has not supported its claim that state regulations and/or processes are hindering infrastructure development. . . . Additionally, in the absence of any rigorous analysis, restriction of a state’s or tribe’s ability to administer a Section 401 WQC program in a manner that they see fit can be viewed as an arbitrary and capricious limitation of the cooperative federalism goals of the CWA.”<sup>4</sup>

We are concerned that EPA is responding to pressure from the fossil fuel industry. The industry opposes the denial under section 401 of two high-profile energy projects—Washington State’s denial of the Millennium Bulk Terminals-Longview project (proposed coal export facility that would be an important export outlet for coal mined in Wyoming) and New York’s denial of certification for the Valley Lateral natural gas pipeline project. Reviewing courts have viewed the states’ actions as reasonable exercises of their Section 401 authorities, and their doing so has added to industry’s advocacy of this proposed broad regulatory response to a very narrow set of cases.<sup>5</sup>

States on a bipartisan basis continue to express the deepest concerns about this Administration’s assault on state Section 401 certification practice, federal agency interpretation, and court affirmation. On September 27, 2019, Attorneys General from red and blue states joined to express their profound disagreement with the United States Court of Appeals for the District of Columbia Circuit decision in the so-called Hoopa Valley Tribe case, where the Circuit Court invalidated a long-standing practice of 401 certification applicants withdrawing and resubmitting their requests in order to avoid Section 401’s one-year limit for application review.<sup>6</sup> That

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<sup>3</sup> Western States Water Council, Summary of State Responses, Clean Water Act Section 401 Water Quality Certification Activities, April 2014 – submitted as attachment to testimony of Tony Willardson, Executive Director, Western States Water Council, U.S. Senate Environment and Public Works Committee Hearing titled, “Regarding State Authorities and S. 3303 – Water Quality Certification Improvement Act,” August 16, 2018

<sup>4</sup> Submission of comments to the docket, EPA-HQ-OW-2019-0405-0132, by Robert Parker, September 24, 2019.

<sup>5</sup> See *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, No. 16-1568 (2d Cir. 2017)—upholding New York Department of Environmental Conservation’s denial of water quality certification on grounds that the applicant failed to provide sufficient information; *Lighthouse Resources v. Inslee*, Case No. 3:18-cv-05005-RJB (W. Dist. Wash. 2019)—granting motion for summary judgment to dismiss claims that Washington violated the foreign affairs doctrine by denying certification; *Lighthouse Resources, Inc., et al. v. Inslee, et al.*, 3:18-cv-05005-RJB (W. Dist. Wash., 2019)—granting motion for summary judgment to dismiss claims that WA denial of certification was preempted by federal law (Interstate Commerce Commission Termination Act; Ports and Waterways Safety Act); *Millennium Bulk Terminals-Longview, LLC v. State of Washington Department of Ecology*, PCHB No. 17-090 – Order granting summary judgment, upholding WA denial of water quality certification.

<sup>6</sup> In the Supreme Court of the United States, *California Trout, et al. v. Hoopa Valley Tribe, et al.*, Brief of the States of Oregon, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Rhode Island, South Dakota, Utah, Washington,

decision has prompted the Federal Energy Regulatory Commission (FERC) and EPA to establish a bright-line rule: that withdrawal and resubmission is never, under any circumstances, a permissible outcome of a request for state water quality certification. As the amici assert, the implications are stark:

“The decision of the courts of appeals in this case, and actions taken by federal regulatory agencies to implement that decision, have resulted and will continue to result in States being deemed to have unwittingly waived their authority to certify that certain projects requiring federal licenses and permits comply with State water quality requirements. As a result, complex federal projects are likely to be approved without state certifications even though they are inconsistent with those requirements, threatening significant environmental harm and degrading the quality of water needed for human health, fisheries, irrigation, and other uses.”<sup>7</sup>

The amici conclude, “This is not the robust role for the States that the Clean Water Act requires.”<sup>8</sup>

As you well know, the President’s Executive Order 13868 directed the EPA to engage with states, tribes, and federal agencies to update the certification framework. The feedback you received from states and tribes indicates that EPA failed to do so.<sup>9</sup>

Each of us is a veteran of state and local government service. We believe deeply in the inherent capacity of our state and local governments to take the lead in addressing many of our societal challenges—particularly in our natural environments and especially as it relates to the quality of our waters. We know you believe the same thing, at least if we are to take you at your word as you promote a major redefinition of “waters of the U.S.” (WOTUS). Fundamental to your Administration’s WOTUS strategy is the belief that states will have and exercise the capacity to protect the extraordinary numbers of miles of streams and acres of wetlands your WOTUS proposal would rob of federal Clean Water Act protections.<sup>10</sup>

What we cannot square is how this passion for states’ rights and abilities suddenly vanishes when those notable qualities become inconvenient. Inconvenient, for example, when states exercising their lawful rights under the federal Clean Water Act determine that pipelines and deep-water coal terminals threaten their water quality. Or when a State’s exercise of its

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and Wisconsin as Amici Curiae on the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 19-257, September 27, 2019.

<sup>7</sup> Id. at 1.

<sup>8</sup> Id., p. 21.

<sup>9</sup> See, for example, State of Washington (Governor Jay Inslee and Attorney General Bob Ferguson) letter to EPA Administrator, dated September 9, 2019 regarding public hearings; Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, letter to the docket EPA-HQ-OW-2019-0405-0124], dated September 6, 2019; State of Minnesota (Katrina Kessler, Assistant Commissioner, Minnesota Pollution Control Agency), letter to the docket EPA-HQ-OW-2019-0405-0042, dated August 23, 2019; Pechanga Indian Reservation, letter to the docket EPA-HQ-OW-2019-0405-0137.

<sup>10</sup> “Changing the definition of “waters of the United States” in a way that reduces the amount of aquatic resources under federal jurisdiction effectively hands sole regulatory authority of those resources to the states and tribes.” Economic Analysis for the Proposed Revised Definition of “Waters of the United States,” U.S. Environmental Protection Agency and Department of the Army, December 14, 2018, p. 35.

congressionally granted authority to regulate auto emissions more rigorously than EPA runs afoul of fossil fuel industry desires. Or when States and localities endeavor to act singly or collectively to control air emissions that compromise downwind public health and the global climate.

How fundamentally would EPA's proposed changes to the Clean Water Act section 401 certification process rob states of their clean water protection power? The proposed regulation improperly attempts to curtail the ability of states and authorized tribes to effectively carry out their statutory duties under Section 401 to ensure that federally licensed activities will not threaten water quality or conflict with appropriate state laws by:

- Removing final decision-making authority from states and giving a new veto authority to federal licensing agencies (e.g., Federal Energy Regulatory Commission—FERC—and the U.S. Army Corps of Engineers—USACE) over state certification and permit-modification decisions;
- Vesting sole discretion to those federal agencies to rule on the legality of state decisions (with no guarantee of state participation or ability to appeal);
- Transferring review of final certification determinations from state to federal courts of jurisdiction;
- Increasing the frequency in which states will have inadvertently waived their authority under Section 401 and/or substantially increase the frequency of certification denials by States due to limited information provided by applicants and constrained timelines for State review of complex projects;
- Reversing EPA's long-standing policy endorsing the practice of applicants' withdrawal and refile of certification applications to restart the certification timeline, thus reducing flexibility for applicants and states to work together to facilitate the review and certification of complex projects;
- Reversing EPA's longstanding policy on what actions mark the commencement of the timeline for state certification review by removing states' authority to determine when a complete application for Section 401 certification has been submitted;
- Limiting the scope of environmental impacts that states may consider when certifying or conditioning federally-licensed projects, including new limitations that directly conflict with well-established case law of the U.S. Supreme Court (i.e., certification of the federally-permitted activity vs. the discharge itself);
- Reducing the scope of states' current authority to impose conditions on federal licenses to ensure that activities will comply with all appropriate state laws and eliminate current requirements that federal permitting agencies must include all state-imposed conditions in federal permits and licenses;
- Usurping states' authority to enforce the conditions they have imposed through Section 401 certification, leaving enforcement entirely to federal agencies; and
- Placing new requirements on states to provide supporting documentation to federal agencies for all certification and conditioning decisions.

In our view, this is a full-throated refutation of the state authority explicitly preserved within the Clean Water Act, and a total abdication of any pretense of cooperative federalism carefully created by Congress. There is no legal basis, no national economic justification, and no

definable wrong that would motivate rational policymakers to undertake such a rulemaking. It is just wrong. We suggest that EPA consider options other than gutting foundational environmental protections and states' rights. Rather, EPA should support the efforts and commitments of states to drive toward sustainable power supplies that will preserve water quality, avoid stranding massive fossil-fuel infrastructure investments, and better ensure the curtailment of greenhouse gas emissions.

Should you have questions, please contact Christophe Tulou of the Senate Committee on Environment and Public Works staff at [christophe\\_tulou@epw.senate.gov](mailto:christophe_tulou@epw.senate.gov); Radha Adhar of Senator Duckworth's staff at [radha\\_adhar@duckworth.senate.gov](mailto:radha_adhar@duckworth.senate.gov); or Adam Zipkin of Senator Booker's staff at [adam\\_zipkin@booker.senate.gov](mailto:adam_zipkin@booker.senate.gov). Thank you for your consideration of these comments.

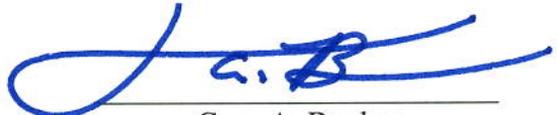
Sincerely,



Tom Carper  
Ranking Member



Tammy Duckworth  
Ranking Member  
Subcommittee on Fisheries, Water, and  
Wildlife



Cory A. Booker  
Ranking Member  
Subcommittee on Superfund, Waste  
Management, and Regulatory Oversight

Attachment