



August 15, 2018

The Honorable Paul Ryan
Speaker of the House
U.S. House of Representatives
H-232 U.S. Capitol
Washington, DC 20515

The Honorable Mitch McConnell
Majority Leader
U.S. Senate
S-230 U.S. Capitol
Washington, DC 20510

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 U.S. Capitol
Washington, DC 20515

The Honorable Charles Schumer
Minority Leader
U.S. Senate
419 Hart Senate Office Building
Washington, DC 20510

Dear Senators McConnell and Schumer, and Representatives Ryan and Pelosi:

The Environmental Council of the States (ECOS), the Association of Clean Water Administrators (ACWA), and the Association of State Wetland Managers (ASWM) urge Congress to preserve states' ability to protect water quality under Section 401 of the Clean Water Act. Our members believe that Section 401 is an important tool states can use to protect their waters for the benefit of their citizens.

Congress built the Clean Water Act on the foundation of cooperative federalism—the principle that states are best positioned to implement federal environmental laws because of their expertise on local conditions and concerns. The Act therefore allows states to take on the legal authority to protect, restore, develop, and use their water resources. It also creates the Section 401 certification process, which allows states to review federal agencies' permitting decisions to ensure that permitted activities do not lead to violations of a water quality standard. This makes sense; states are best situated to determine whether a federally permitted activity will fully protect designated uses because states comprehensively manage water quality and water quantity within their borders.

For nearly 50 years, states have used Section 401 authority to review the water quality impact of federal licenses and permits, impose water quality conditions where necessary, and, in rare cases, withhold water quality certification entirely. States recognize that regulated entities depend on efficient and timely responses to certification requests, but states sometimes face challenges in issuing these responses. One

source of delay is resource limitations; funding for Section 401 programs has not grown at the same pace as the frequency and complexity of certification requests. But delays also frequently occur when state agencies lack proper access to the information they need to evaluate resource impacts and guarantee compliance with state water quality standards. Federal agencies and permit applicants can also cause delays when they do not adequately engage states during the scoping phase of infrastructure projects. Meaningful early engagement gives states a chance to raise water quality concerns about projects during the planning process, and gives federal agencies and private parties a chance to address those concerns in ways that facilitate the certification process. Early engagement also ensures that states have timely access to the information they need to make informed certification decisions.

In recent years, states, regulated communities, and others have also raised concerns about the ways in which the Section 401 certification process has been used in the context of certain energy related development projects. While these concerns are recognized, to be fair, it should also be recognized that states only rarely deny permit certifications. Congress should exercise caution when considering proposals to altering its scope or substance. Any alteration of Section 401 should be done with great care and caution to avoid unintended consequences for states, and done in such a manner that preserves states' rights to use Section 401 authority to protect their waters from the impact of a wide range of federal permitting decisions, including:

- Clean Water Act Section 404 permits for discharge of dredged or fill material
- FERC licenses for hydropower
- Permits issued under sections 9 and 10 of the Rivers and Harbors Act
- National Pollutant Discharge Elimination System (NPDES) permits in states where U.S. EPA administers the permitting program and
- Licenses from the Nuclear Regulatory Commission.

As Congress considers legislation that would modify the certification process, we ask that it work with ECOS and the states to ensure that any changes respect principles of cooperative federalism.

If you would like to discuss this further, please feel free to contact us. Thank you for your attention.

Sincerely,



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