September 6, 2018

The Honorable John Barrasso
U.S. Senate Environment &
Public Works Committee
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Thomas R. Carper
U.S. Senate Environment &
Public Works Committee
456 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Barrasso and Carper:

The Association of Clean Water Administrators (ACWA) and the Association of State Wetland Managers (ASWM) write to you today to express our concerns over the Water Quality Certification Improvement Act of 2018 (S. 3303). Our members believe that by curtailing §401 authority, S. 3303 would diminish states' ability to manage and protect water quality within their boundaries, contrary to the principles of cooperative federalism upon which the Clean Water Act (CWA) is based.

ACWA is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers, who on a daily basis implement the water quality programs of the CWA, as well as the comprehensive and diverse set of state water programs that exist beyond the CWA. ASWM plays a similar role nationwide working directly with state and tribal wetland managers who administer wetland programs both as required by the CWA and independent of the CWA.

States are responsible, under both the CWA and a state's own laws and regulations, to advance the attainment of clean and healthy waters and to prevent violations of the water quality standards designed to achieve these goals. In the CWA, Congress purposefully designated states as co-regulators and tasked states with most implementation responsibilities as part of a system of cooperative federalism recognizing state interests and authority. This cooperative co-regulator relationship works and has stood the test of time.

If enacted as written, S. 3303 would modify the CWA, and limit the states' authority under §401 to protect state water quality and provide critical input on the impacts posed by federal permits and licenses. States are best suited to determine whether a federally permitted activity will fully protect a state's designated uses because states comprehensively manage water quality and water quantity within their borders. It is well established[1] that §401 authorizes states to consider additional requirements or limitations on the potential permitted activity once it is determined that the activity will result in a discharge to waters. Curtailing or

[1] PUD No. 1 of Jefferson Co. v. Washington State Dept. of Ecology, 511 U.S. 700 (1994).

reducing state authority or limiting the vital role of states in maintaining water quality within their boundaries would inflict serious harm to the collaborative and cooperative relationship established by Congress when passing the CWA, undermining state expertise and experience with local waterbodies. We firmly believe that any legislative or regulatory effort to streamline environmental permitting should be developed in consultation with states and must not occur at the expense of clearly articulated statutory authority delegated to states.

The states have decades of experience implementing §401 authority to review the water quality impacts of federal licenses and permits, impose water quality conditions where necessary, and, in rare cases, withhold water quality certification entirely. Section 401 certification is not the obstacle to issuing federal permits or licenses that some supporters of §401 reform claim, as most state §401 certifications are issued within a year of their request. We believe states have acted efficiently under this authorization, as required by the regulations related to §401, in certifying projects, establishing procedures, and providing primary responsibility to ensure that water quality standards are met and believe the problems identified by supporters of these efforts are exaggerated.

States' certainly recognize and appreciate that regulated entities depend on efficient and timely responses to certification requests and strive to complete their reviews in a timely and efficient manner. As mentioned earlier, the majority of certifications are indeed issued in timely fashion, with few exceptions. In these rare instances, states often encounter challenges in issuing timely responses due to actions or inactions by the project proposers themselves. Examples of these challenges include: 1) incomplete or inconsistent application packages that are missing key information, and/or maps that would enable states to make an informed decision on a project or the project scope, 2) design or construction plans that may have been altered without supplying regulators with updates on the impacts of the changes,3) slow responses (and sometimes refusals) by regulated entities to respond to state requests for information needed to complete an application and allow for effective review of water quality impacts, and 4) certification requests that are filed prior to completion of all federal permitting reviews.

Furthermore, the failure of project applicants and/or federal partners to engage with state regulators early in the planning process can and does lead to unnecessary delays. Meaningful early engagement gives states a chance to raise water quality concerns about projects during the planning process and gives project proposers and federal agencies a chance to address those concerns in ways that facilitate the certification process and protect water quality. Early engagement also ensures that states have timely access to the information they need to make informed certification decisions. The recent limited instances where projects have been stopped due to a water quality certification denial are not adequate to justify minimizing clearly authorized state authority to manage and protect the water resources in their states.

In closing, we would like to discuss your proposed legislation and the importance of clearly preserving state's rights under the CWA, to ensure that any efforts to enhance efficiency do not come at the expense of water quality and do not minimize state experience, expertise, and statutory authority. Thank you for your consideration of our concerns.

Sincerely,

Julia Anastasio
Executive Director & General Counsel
ACWA

Marla Stelk
Executive Director
ASWM