



November 26, 2019

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

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

**RE: S. 1087 – Water Quality Certification Improvement Act of 2019**

Dear Chairman Barrasso and Ranking Member Carper:

The Association of Clean Water Administrators (hereinafter “ACWA” or the “states”) 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 Clean Water Act (“CWA”).

ACWA writes you to express our concerns over the *Water Quality Certification Improvement Act of 2019* (S. 1087). As expressed in a previous letter to you on the *Water Quality Certification Improvement Act of 2018* (S. 3303), states have consistently exercised their statutorily granted authority under CWA Section 401 in an efficient, effective, and equitable manner and as such, we think this legislation is unnecessary. Curtailing or reducing state authority under Section 401, or the vital role of states in maintaining water quality and protecting water resources within their boundaries, would inflict serious harm to the division of state and federal authorities established by Congress. Any statutory change to the Section 401 permitting process should not come at the expense of state authority and should be developed through genuine consultation with state environmental and public health agencies. Congress should ensure the CWA continues to effectively protect water quality, while maintaining the partnerships and the essential balance of authority between states and the federal government.

Moreover, given that EPA is currently in the middle of a rulemaking process to update the Section 401 regulations, ACWA’s members question the need for legislative action at this time. The rulemaking process ensures that the public and interested stakeholders have an opportunity to participate, provide additional data and details to the rulemaking agency, and offer real-world implications of proposed changes to regulators and regulated entities. To ensure clarity and minimize confusion for states implementing Section

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Executive Director & General Counsel  
**Julia Anastasio**

1634 EYE Street, NW, Ste. # 750,  
Washington, DC 20006

TEL: 202-756-0605

WWW.ACWA-US.ORG

401, the Senate should refrain from action on S. 1087 until EPA completes its rulemaking process. Further, before you proceed with S. 1087 ACWA would like to meet with your staff to discuss the legislation and provide you with information on the potential ramifications to state resources, both intended and unintended, of the proposed changes to Section 401.

As stated above, ACWA's members have consistently exercised their statutorily granted authority under Section 401 in an efficient, effective, and equitable manner. In May 2019, ACWA completed a survey to states inquiring into state Section 401 certification processes (See attached *401 Certification Survey Summary – May 2019*). ACWA received thirty-one (31) responses to the survey. The results show that the median of the average number of certification requests received per state per year is approximately seventy (70)<sup>1</sup>. The average length of time it takes these states to complete a review once a request with all necessary information is received is approximately 132 days (under 4.5 months). Seventeen (17) states average zero (0) denials per year. The rest of the states very rarely issue denials of certification. States most often work diligently with applicants to make certifications in a timely manner.

Though delays occur, for reasons such as incomplete requests, slow responses from applicants, state public comment periods, lengthy negotiations, and staff workload, states have taken significant steps to ensure timely Section 401 certifications. Most states either require or encourage pre-submittal meetings with applicants. States have also adopted electronic submittal and hired additional staff to assist with making certifications. Regulatorily, states have clarified “completeness” of requests and set hard time limits for review in regulations.

Because it is the most common reason for certification delays, states have taken significant steps to inform applicants what constitutes a “complete” request for certification. Twenty-one (21) states either have regulations that explain completeness, accept the federal Army Corps of Engineers application, or clearly list requirements on state applications. Some states work with applicants through early engagement to ensure applicants are aware of request requirements.

States also employ a series of “best practices” to ensure complete requests and timely certifications. Twenty-seven (27) states require or encourage pre-request consultations with applicants or their consultants or have clear request instructions. State websites often have guidance documents and other materials to assist applicants. States also reach out directly to applicants when requests are incomplete.

The results of the survey show that states have been effectively and efficiently utilizing Section 401 authority to protect their water resources.

In conclusion, we urge Congress to hold off on any legislative changes that may diminish, impair, or subordinate states' authority under the CWA or the ability of states and their designated entities to manage or protect water resources. Further, the Senate should refrain from action on S. 1087 until EPA completes its ongoing rulemaking. Simultaneously, ACWA would like to meet with your staff to discuss the legislation and the importance of preserving states' rights under the CWA,

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<sup>1</sup> The survey found a large range of average annual number of certification requests. At the high end, Michigan has approximately 5000 requests and New York approximately 4000 annual requests. On the low end, New Hampshire has approximately 10 annual requests and South Dakota approximately 15 requests.

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 authority.

Thank you for your consideration of our concerns. Please contact ACWA's Executive Director Julia Anastasio at [janastasio@acwa-us.org](mailto:janastasio@acwa-us.org) or (202) 756-0600 with any questions regarding ACWA's letter.

Sincerely,



Melanie Davenport  
ACWA President  
Water Permitting Division Director  
Virginia Department of Environmental Quality

Enclosures:

*ACWA Comment Letter – 401 Certification Proposed Rule – 10-21-19*

*ACWA Comment Letter – 401 Certification Pre-Proposal Recommendations – 5-24-19*

*ACWA 401 Cert State Survey Summary – May 2019*

*Coalition Letter – Clean Water Act Section 401 Process Improvements...State Authority – 2-20-19*

*ACWA-ASWM Coalition Letter – S3303 – 9-6-2018*