



May 24, 2023

The Honorable Charles Schumer  
Majority Leader  
United States Senate

The Honorable Mitch McConnell  
Minority Leader  
United States Senate

RE: Clean Water Act Section 401 Water Quality Certification

Dear Senator Schumer and Senator McConnell:

We write to express our concerns about recent legislation that proposes to alter States' water quality certification processes under Section 401 of the federal Clean Water Act (CWA).<sup>1</sup> We urge you to reject any changes that may diminish, impair or subordinate States' ability to manage or protect water resources and water quality within their boundaries. This legislation would significantly reshape the cooperative federalism approach under the CWA, eliminate certain categories from state certification altogether<sup>2</sup> and overturn previous Supreme Court findings on the appropriate scope of analysis for Section 401 review.<sup>3</sup> The bill also unrealistically sets a 30-day requirement for publication of certification requirements following its enactment, undermining protections afforded by the Administrative Procedures Act and time for adequate public comment.

Congress purposefully and clearly designated States as having primary responsibility for controlling water pollution under the CWA. Section 101 of the CWA (33 U.S.C. 1251(b)), which states: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." The CWA establishes minimum requirements, but the States have always retained the authority to impose and enforce more stringent requirements.

Congress included Section 401 codifying state authority to certify and condition federal permits and licenses in the Water Quality Improvement Act of 1970. At that time, Senator Edmund Muskie stated, "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]." 116 Cong. Rec. 8984 (1970). States have effectively used this clear statutory authority to protect their water resources for over 50 years.

In the 1994 decision in *Jefferson County PUD No. 1*, the U.S. Supreme Court considered the appropriate scope of analysis for section 401, and concluded it encompassed the project as a whole and was not limited to water quality controls specifically tied to a discharge. The Court noted that section 401 "allows [certifying authorities] to impose 'other limitations' on the project in general to assure compliance with various provisions of the Act and with 'any other appropriate requirement of State law.'"<sup>4</sup> As a result, while section 401(a)(1) "identifies the category of activities subject to certification — namely, those with

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<sup>1</sup> The Limit, Save, Grow Act (H.R. 2811), passed by the House on April 25, 2023. Identical language was included in the Lower Energy Costs Act (H.R. 1), passed by the House on March 30, 2023.

<sup>2</sup> H.R. 2811 §10009(e)(1) (as passed by U.S. House of Representatives).

<sup>3</sup> *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 411 U.S. 700, 711 (1994).

<sup>4</sup> *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 411 U.S. 700, 711 (1994).

discharges” -- the Court held section 401(d) authorizes additional conditions and limitations “on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”<sup>5</sup> Recent legislation would change the Supreme Court’s holding and establish just the discharge as the scope of analysis, undoing almost thirty years of practice.

In 2006, the United States Supreme Court declared, “State certifications under [CWA Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution.” *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006).

Any alteration of Section 401 should be done with great care and caution to avoid unintended consequences for States. Concerns have been raised regarding how the Section 401 certification process has been used in the context of certain energy-related development projects, yet States only rarely deny permit certifications.

In 2019, the Association of Clean Water Administrators (ACWA) released the results of a survey of state Section 401 certification processes. ACWA received thirty-one (31) responses. The median of the average number of certification requests received per State per year was approximately seventy (70)<sup>6</sup>. The average length of time to complete a review once a request with all necessary information was received was approximately 132 days (under 4.5 months). Seventeen (17) states had zero (0) denials per year. The rest of the states very rarely issued denials. States most often work diligently with applicants to make certifications possible in a timely manner.

States have taken significant steps to ensure timely Section 401 certifications by addressing common delays such as incomplete certification requests and inadequate state staffing levels. States have adopted electronic submittals and hired additional staff to assist with certifications. Through regulation, States have clarified request requirements and “completeness,” and set hard time limits for review.

States employ a series of “best practices” to ensure complete requests and timely certifications. Twenty-seven (27) states require or encourage pre-request consultations and early engagement with applicants or their consultants to clarify certification request requirements and processes. State websites often have guidance documents and other materials to assist applicants. States also reach out directly to applicants when requests are incomplete. Twenty-one (21) States accept the information provided in a related federal Army Corps of Engineers Section 404 permit applications as sufficient for certification reviews.

States have exercised their authority under CWA Section 401 for many years and have done so in an efficient and effective manner. The signatories to this letter cannot identify a clear justification for legislative changes to the CWA Section 401 certification process.

Responsible growth and economic development, as well as proper environmental management, depend on the recognition and preservation of state stewardship. Efforts to streamline or modify consideration of duly-adopted state established water quality standards in environmental permitting should be informed through consultation with States without altering the cooperative federalism equilibrium carefully crafted by Congress. As written, current legislative proposals would *prevent* a state from comprehensively protecting its water from potential adverse effects from projects requiring federal licenses and permits.

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<sup>5</sup> Id. at 711-12.

We urge the Senate to continue its historic recognition of, and deference to, states' sovereign authority over the protection, management, and allocation of their water resources. We implore you to maintain the current proper balance between state and federal authorities.

We thank you for considering our request,



Marla J. Stelk  
Executive Director  
National Association of Wetland Managers



Susan J. Sullivan  
Executive Director  
NEIWPCC

Cc: President Biden  
Kevin McCarthy, Speaker of the House of Representatives  
Hakeem Jeffries, Democrat Leader House of Representatives  
Chellie Pingree, Ranking Member, House Appropriations Subcommittee on Interior & the Environment  
Shalanda Young, Office of Management and Budget  
Brenda Mallory, Council of Environmental Quality  
NEIWPCC Executive Committee & Commissioners  
NAWM Board of Directors

## Who We Are

NEIWPCC is a regional commission that helps the states of the Northeast preserve and advance water quality. Established in 1947, we engage and convene water quality professionals and other interested parties from New England and New York to collaborate on water, wastewater, and environmental science challenges across shared regions, ecosystems, and areas of expertise.

The National Association of Wetland Managers (NAWM) is a nonprofit professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland programs. Since 1983, our organization has been representing states as co-regulators tasked with implementation of regulations governing water quality.

## Background

On April 25, 2023, the House passed the Limit, Save, Grow Act (H.R. 2811), providing for an increase to the debt ceiling. The bill also incorporated the provisions of the Lower Energy Costs Act (H.R. 1), separately passed by the House on March 30, 2023. Both bills contain identical language that would amend Section 401 of the Clean Water Act, limiting the authority of States to issue water quality certifications. In particular, the bill would limit decisions to consideration only of direct discharges into navigable waters and in several places replaces consideration of “water quality requirements” established under state law with the more narrow provisions of CWA 301, 302, 303, 306, or 307. The bill would require states to establish new regulations within 30 days of the enactment of the bill. The bill language also explicitly exempts natural gas pipelines from the CWA §401 state certification process and shifts any discretionary decisions about terms and conditions to mitigate the discharge of pollutants to FERC as the lead coordinating agency.