

WATER QUALITY CERTIFICATION AND ENERGY PROJECT IMPROVEMENT ACT OF 2023

MARCH 17, 2023.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. GRAVES of Missouri, from the Committee on Transportation
and Infrastructure, submitted the following

R E P O R T

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany H.R. 1152]

The Committee on Transportation and Infrastructure, to whom
was referred the bill (H.R. 1152) to amend the Federal Water Pol-
lution Control Act to make changes with respect to water quality
certification, and for other purposes, having considered the same,
reports favorably thereon without amendment and recommends
that the bill do pass.

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PURPOSE OF LEGISLATION

The purpose of H.R. 1152, the “*Water Quality Certification and Energy Project Improvement Act*”, is to promote the development of the Nation’s infrastructure by streamlining the permitting process under Section 401 of the *Clean Water Act (CWA)* and clarifying Section 401’s focus on CWA water quality.

BACKGROUND AND NEED FOR LEGISLATION

Section 401 of the CWA requires applicants seeking a Federal permit or license for an activity that may result in discharge into “navigable waters” to obtain a water quality certification from the state or tribe with jurisdiction of the area of possible discharge.¹ The certification demonstrates that any discharge will comply with enumerated water quality standard provisions in the CWA and “any other appropriate requirement” of state or Tribal laws.² As such, Section 401 allows certifying authorities to grant, grant with conditions, deny, or waive certification of proposed Federal licenses and permits based on water quality standards.³

Water quality certifications, as laid out in Section 401, are necessary for “any activity that (1) requires a federal license or permit and (2) may result in a discharge into waters of the United States,”⁴ including projects under the Sections 402 and 404 of the CWA, the *Rivers and Harbors Act*, as well as from the Federal Energy Regulatory Commission (FERC).⁵ Section 402 governs projects falling under the National Pollutant Discharge Elimination System (NPDES), and Section 404 governs projects for release of dredged or fill material.⁶ Common projects requiring Section 401 water quality certifications include hydropower facilities, natural gas pipelines and export terminals, water resources projects, mining projects, and residential and commercial development.⁷

In recent years, some stakeholders have become concerned that states have been misusing Section 401 jurisdiction to prevent certain important energy projects from obtaining certification and halting their progress in construction.⁸ Despite Congressional intent and CWA language for Section 401 to focus on water quality standards, some states have denied certification applications by citing non-water quality standards, such as noise and greenhouse gas emissions, particularly for pipelines and export terminals.⁹

For example, when the state of Washington denied certification to a coal export terminal in 2017, it did not cite water quality standards as a reason for denial, instead claiming adverse impacts on air quality, vehicle transportation, noise, community resources,

¹ CWA, Pub. L. No. 92–500, § 401, 86 Stat. 816.

² *Id.* §§ 301–307.

³ *Id.* § 401; see also LAURA GATZ & KATE R. BOWERS, CONG. RSCH. SERV., R46615, CLEAN WATER ACT SECTION 401: OVERVIEW AND RECENT DEVELOPMENTS (2022), available at <https://crsreports.congress.gov/product/pdf/R/R46615> [hereinafter *CWA Section 401: Overview and Recent Developments*].

⁴ CWA Section 401: Overview and Recent Developments, *supra* note 3, at 3.

⁵ *Id.*

⁶ CWA, §§ 401–404.

⁷ CWA Section 401: Overview and Recent Developments, *supra* note 3.

⁸ See, e.g., Letter from Int’l Union of Operating Engineers to Reps. David Rouzer & Garret Graves (Feb. 28, 2023) (on file with the Comm.).

⁹ *Id.*; see also CWA Section 401: Overview and Recent Developments, *supra* note 3, at 12–14.

rail transportation, rail safety, vessel transportation, and cultural and tribal resources.¹⁰

While the CWA puts a one-year maximum on a state certification decision, some stakeholders have noted the potential for states to toll or otherwise administratively extend this deadline.¹¹ The statute initiates the one-year timeline “after receipt of such request,”¹² which has led to mixed interpretations. States assert that it is within their authority to define the contents of a complete request for certification, as well as to request clarifications, corrections, or additional information from an applicant necessary for comprehensive review of the project by the State.¹³ However, these interpretations have led states to act beyond the one-year time limit, causing project certification applications to drag on beyond the timeframe laid out in the CWA.¹⁴ One stakeholder described a case in New York where the state “repeatedly moved the goalposts on what it would deem satisfactory”¹⁵ on a project application which had a *de facto* effect of extending the review timeline beyond one year.¹⁶ This example also demonstrates the need to ensure states have clear and transparent standards for applicants.

In some cases, states are looking far afield from the immediate effect of the project. For instance, in its denial of certification to a pipeline project in 2019, the State of New York stated “. . . the Project would result in greenhouse gas (“GHG”) emissions, which cause climate change and thus indirectly impact water and coastal resources, including from the construction and operation of the Project, and from reasonably foreseeable upstream and downstream GHG emissions.”¹⁷ In 2020, the State of New York submitted a subsequent denial of certification for similar reasons.¹⁸ However, FERC’s final environmental impact statement found that any environmental impacts “would be temporary and occur during construction,”¹⁹ and that all “Project effects would be reduced to less-than-significant levels”²⁰ under the project’s avoidance, minimization, and mitigation plan.²¹

¹⁰ CWA Section 401: Overview and Recent Developments, *supra* note 3, at 6.

¹¹ Comment Letter from Marty Durbin, President, Global Energy Institute, U.S. Chamber of Com., Ross Eisenberg, Vice President of Energy and Res. Policy, National Ass’n of Mfrs., & Toby Mack, President & CEO, Energy Equip. and Infrastructure All. to Andrew Wheeler, Administrator, Environmental Protection Agency (Oct. 21, 2019), *available at* https://downloads.regulations.gov/EPA-HQ-OW-2019-0405-0878/attachment_1.pdf.

¹² CWA § 401.

¹³ *See, e.g.*, Letter from States of Cal., N.Y., & Wash. to Chairman Sam Graves (Feb. 28, 2023) (on file with the Comm.).

¹⁴ *See* CWA Section 401: Overview and Recent Developments, *supra* note 3 at 8–11.

¹⁵ Letter from Competitive Enterprise Institute to Environmental Protection Agency (Oct. 21, 2023), *available at* https://downloads.regulations.gov/EPA-HQ-OW-2019-0405-0890/attachment_1.pdf.

¹⁶ *Id.*

¹⁷ *See* Notice of Denial of Water Quality Certification Letter from Daniel Whitehead, Dir., Div. of Environmental Permits, N.Y. State Dep’t of Environmental Conservation, to Joseph Dean, Transcon. Gas Pipe Line Co., LLC, (May 15, 2019), *available at* https://www.dec.ny.gov/docs/administration_pdf/nodtgp.pdf.

¹⁸ *See* CWA Section 401: Overview and Recent Developments, *supra* note 3 (referencing Notice of Denial of Water Quality Certification Letter from Daniel Whitehead, Div. of Environmental Permits, N.Y. State Dep’t of Environmental Conservation to Joseph Dean, Transcon. Gas Pipeline Co., LLC (May 15, 2020), *available at* https://www.dec.ny.gov/docs/permits_ej_operations_pdf/neseqc denial05152020.pdf#page=3).

¹⁹ FERC, NORTHEAST SUPPLY ENHANCEMENT PROJECT: FINAL ENVIRONMENTAL IMPACT STATEMENT (2019), *available at* FERC, NORTHEAST SUPPLY ENHANCEMENT PROJECT: FINAL ENVIRONMENTAL IMPACT STATEMENT (2019), *available at* <https://www.ferc.gov/sites/default/files/2020-05/part-1.pdf/2020-05/part-1.pdf>.

²⁰ *Id.*

²¹ *Id.*

HEARINGS

For the purposes of rule XIII, clause 3(c)(6)(A) of the 118th Congress the following hearings were used to develop or consider H.R. 1152:

On Wednesday, February 1, 2023, the Committee on Transportation and Infrastructure held a hearing entitled “*The State of Transportation Infrastructure and Supply Chain Challenges*.” The hearing provided an opportunity for Members of the Committee to discuss the current state of our Nation’s transportation infrastructure, the implementation of the *Infrastructure Investment and Jobs Act (IIJA)*, P.L. 117–58), and receive updates on North American supply chain challenges. Members received testimony from Mr. Chris Spear, President and Chief Executive Officer at American Trucking Associations; Mr. Ian Jefferies, President and Chief Executive Officer at the Association of American Railroads (AAR); Mr. Jeff Firth, President of Hamilton Construction on behalf of Associated General Contractors of America (AGC); Mr. Roger Guenther, Executive Director, Port Houston, and Mr. Greg Regan, President of the Transportation Trades Department, AFL–CIO (TTD). The witnesses testified about the need to address supply chain issues, including varying permitting issues.

On February 8, 2023, the Subcommittee on Water Resources and Environment held a hearing titled, “Stakeholder Perspectives on the Impacts of the Biden Administration’s Waters of the United States (WOTUS) Rule.” At the hearing Members received testimony from Mr. Garrett Hawkins, President, Missouri Farm Bureau, Ms. Alicia Huey, Chairman, National Association of Home Builders, Mr. Mark Williams, Environmental Manager, Luck Companies, *on behalf of* National Stone, Sand & Gravel Association, Ms. Susan Parker Bodine, Partner, Earth & Water Law LLC, and Mr. Dave Owen, Professor of Law and Faculty Director of Scholarly Publications, UC College of the Law, San Francisco. This hearing examined the rule from the EPA and Corps redefining the term “waters of the United States,” under the CWA, and the regulatory impact of the rule on interested stakeholders. During this hearing, witnesses also broadly discussed the need for permitting and regulatory reform under the CWA.

LEGISLATIVE HISTORY AND CONSIDERATION

H.R. 1152, the “*Water Quality Certification and Energy Project Improvement Act*,” was introduced in the United States House of Representatives on February 24, 2023, by Mr. Rouzer of North Carolina and Mr. Graves of Louisiana and referred to the Committee on Transportation and Infrastructure. Within the Committee on Transportation and Infrastructure, H.R. 1152 was referred to the Subcommittee on Water Resources and Environment. The Subcommittee on Water Resources and Environment was discharged from further consideration of H.R. 1152 on February 28, 2023.

The Committee considered H.R. 1152 on February 28, 2023, and ordered the measure to be reported to the House with a favorable recommendation, without amendment, by voice vote.

The following amendments were offered:

An amendment to H.R. 1152 offered by Mr. Graves of Louisiana (#1); was WITHDRAWN.

Add at the end the following: Sec. 3. Interim Process for Expired Federal General Permits.

An amendment to H.R. 1152 offered by Mrs. Sykes (#2); was NOT AGREED TO by a recorded vote of 26 yeas and 34 nays (Roll Call Vote 002).

Page 2, strike lines 2 through 6. Beginning on page 4, strike line 21 and all that follows through page 5, line 8, and insert the following: (ii) in the second sentence, by striking “applicable effluent limitations or other limitations or other water quality requirements” and inserting “an applicable provision of section 301, 302, 303, 306, or 307”; and Beginning on page 5, strike line 23 and all that follows through page 6, line 6, and insert the following: “(e) For purposes of this section, the applicable provisions of section 301, 302, 303, 306, and 307 are- “(1) any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal License or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302, standard of performance under section 306, or prohibition, effluent standard, or pretreatment standard under section 307; and “(2) any other appropriate requirement of State law set forth in such certification that the State determines necessary to support water quality in the State or the designated use or uses of navigable waters in the State.”

An amendment to H.R. 1152 offered by Mr. Stauber (#3); was WITHDRAWN.

Page 3, after line 21, insert the following: (iii) in the third sentence, by inserting before the period “within a timeframe agreed upon between such State and the applicant”.

An amendment to H.R. 1152, offered by Mr. Stauber (#4); was WITHDRAWN.

At the end of the bill, add the following: Sec. _____. Veto Authority Update. Section 404 (c) of the Clean Water Act (33 U.S.C. 1344 (c)) is amended in the second sentence by striking “Secretary.” And inserting “Secretary, Secretary of Defense, Secretary of Commerce, and Secretary of the Interior to determine whether there are any materials on the Critical Minerals list, materials needed for grid security, or materials needed for national defense.”

An amendment to H.R. 1152, offered by Mr. Huffman, (#5); was NOT AGREED TO by a recorded vote of 26 yeas and 34 nays (Roll Call Vote 003).

Add at the end the following: Sec. 3. No Effect on Tribal Rights. Nothing in this Act, or the amendments made by this Act, shall be construed to affect any Tribal rights or authorities under the Federal Water Pollution Control Act, including any review by a Tribal Government of a discharge or activity under a Federal permit in order to protect treaty rights, including water rights, fishing rights, and cultural resources.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report

and on any amendment offered to the measure or matter, and the names of those members voting for and against.

Committee on Transportation and Infrastructure Roll Call Vote No. 002

On: Agreeing to amendment #2 offered by Mrs. Sykes.

Not Agreed to: 26 yeas and 34 nays.

Member	Vote	Member	Vote
Mr. Graves of MO	Nay	Mr. Larsen of WA	Yea
Mr. Crawford	Nay	<i>Ms. Norton</i>	Yea
Mr. Webster of FL	Nay	Mrs. Napolitano	Yea
Mr. Massie	Nay	Mr. Cohen	Yea
Mr. Perry	Nay	Mr. Garamendi	Yea
Mr. Babin	Nay	Mr. Johnson of GA	Yea
Mr. Graves of LA	Nay	Mr. Carson	Yea
Mr. Rouzer	Nay	Ms. Titus	Yea
Mr. Bost	Nay	Mr. Huffman	Yea
Mr. LaMalfa	Nay	Ms. Brownley	Yea
Mr. Westerman	Nay	Ms. Wilson of FL .....	.....
Mr. Mast .....	.....	Mr. Payne	Yea
<i>Mrs. González-Colón</i>	Nay	Mr. DeSaulnier	Yea
Mr. Stauber	Nay	Mr. Carbajal	Yea
Mr. Burchett	Nay	Mr. Stanton	Yea
Mr. Johnson of SD	Nay	Mr. Allred	Yea
Mr. Van Drew	Nay	Ms. Davids of KS	Yea
Mr. Nehls	Nay	Mr. García of IL .....	.....
Mr. Gooden of TX	Nay	Mr. Pappas	Yea
Mr. Mann	Nay	Mr. Moulton .....	.....
Mr. Owens	Nay	Mr. Auchincloss	Yea
Mr. Yakym	Nay	Ms. Strickland	Yea
Mrs. Chavez-DeRemer	Nay	Mr. Carter of LA .....	.....
Mr. Edwards	Nay	Mr. Ryan	Yea
Mr. Kean of NJ	Nay	Mrs. Peltola	Yea
Mr. D'Esposito	Nay	Mr. Menendez	Yea
Mr. Burlison	Nay	Ms. Hoyle of OR	Yea
Mr. James	Nay	Mrs. Sykes	Yea
Mr. Van Orden	Nay	Ms. Scholten	Yea
Mr. Williams of NY	Nay	Mrs. Foushee	Yea
Mr. Molinaro	Nay		
Mr. Collins	Nay		
Mr. Ezell	Nay		
Mr. Duarte	Nay		
Mr. Bean of FL	Nay		

Committee on Transportation and Infrastructure Roll Call Vote No. 003

On: Agreeing to amendment #5 offered by Mr. Huffman.

Not Agreed to: 26 yeas and 34 nays.

Member	Vote	Member	Vote
Mr. Graves of MO	Nay	Mr. Larsen of WA	Yea
Mr. Crawford	Nay	<i>Ms. Norton</i>	Yea
Mr. Webster of FL	Nay	Mrs. Napolitano	Yea
Mr. Massie	Nay	Mr. Cohen	Yea
Mr. Perry	Nay	Mr. Garamendi	Yea
Mr. Babin	Nay	Mr. Johnson of GA	Yea
Mr. Graves of LA .....	.....	Mr. Carson	Yea
Mr. Rouzer	Nay	Ms. Titus	Yea
Mr. Bost	Nay	Mr. Huffman	Yea
Mr. LaMalfa	Nay	Ms. Brownley	Yea
Mr. Westerman	Nay	Ms. Wilson of FL .....	.....
Mr. Mast	Nay	Mr. Payne	Yea
<i>Mrs. González-Colón</i>	Nay	Mr. DeSaulnier	Yea

Member	Vote	Member	Vote
Mr. Stauber	Nay	Mr. Carbajal	Yea
Mr. Burchett	Nay	Mr. Stanton	Yea
Mr. Johnson of SD	Nay	Mr. Allred	Yea
Mr. Van Drew	Nay	Ms. Davids of KS	Yea
Mr. Nehls	Nay	Mr. Garcia of IL .....	.....
Mr. Gooden of TX	Nay	Mr. Pappas	Yea
Mr. Mann	Nay	Mr. Moulton .....	.....
Mr. Owens	Nay	Mr. Auchincloss	Yea
Mr. Yakym	Nay	Ms. Strickland	Yea
Mrs. Chavez-DeRemer	Nay	Mr. Carter of LA .....	.....
Mr. Edwards	Nay	Mr. Ryan	Yea
Mr. Kean of NJ	Nay	Mrs. Peltola	Yea
Mr. D'Esposito	Nay	Mr. Menendez	Yea
Mr. Burlison	Nay	Ms. Hoyle of OR	Yea
Mr. James	Nay	Mrs. Sykes	Yea
Mr. Van Orden	Nay	Ms. Scholten	Yea
Mr. Williams of NY	Nay	Mrs. Foushee	Yea
Mr. Molinaro	Nay		
Mr. Collins	Nay		
Mr. Ezell	Nay		
Mr. Duarte	Nay		
Mr. Bean of FL	Nay		

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to the requirements of clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the *Congressional Budget Act of 1974* and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget Act of 1974*, the Committee has requested but has not received a cost estimate for this bill from the Director of Congressional Budget Office. Further, the Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. The Committee additionally requested and received from the Congressional Budget Office a preliminary estimate of the budgetary effects for this bill. The Congressional Budget Office estimated on a preliminary basis that enactment of H.R. 1152 would not affect direct spending or revenues.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, a cost estimate provided by the Congressional Budget Office pursuant to section 402 of the *Congressional Budget Act of 1974* was not made available to the Committee in time for the filing of this report. Pursuant to clause 3(d)(1) of House rule XIII, in the absence of an estimate from the Director of the Congressional Budget Office, the Committee adopts its own cost estimate based on the preliminary findings of the Congressional Budget Office. The Congressional Budget Office esti-

mated on a preliminary basis that enactment of H.R. 1152 would not affect direct spending or revenues.

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goal and objective of this legislation is to provide promotion of the development of the Nation's infrastructure by streamlining the permitting process under Section 401 of the *Clean Water Act* (CWA) and clarifying Section 401's focus on CWA water quality.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee finds that no provision of H.R. 1152 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

CONGRESSIONAL EARMARKS, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9 of rule XXI of the Rules of the House of Representatives, this bill, as reported, contains no congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of the rule XXI.

FEDERAL MANDATES STATEMENT

An estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the *Unfunded Mandates Reform Act* was not made available to the Committee in time for the filing of this report. The Chairman of the Committee shall cause such estimate to be printed in the *Congressional Record* upon its receipt by the Committee.

PREEMPTION CLARIFICATION

Section 423 of the *Congressional Budget Act of 1974* requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee finds that H.R. 1152 does not preempt any state, local, or tribal law.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the *Federal Advisory Committee Act* were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the *Congressional Accountability Act* (Public Law 104–1).

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section provides that this bill may be cited as the “Water Quality Certification and Energy Project Improvement Act of 2023”.

Section 2. Certification

This section clarifies that activities under review pursuant to this section shall be limited to CWA-related water quality standards and to the effects of specific discharges. It also clarifies that state review requirements must be clear and available to applicants and that within 90 days applicants must be made aware of any additional information a state requires to process its review of the permit.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

With respect to the requirement of clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, this section was not made available to the Committee in time for the filing of this report. The Chair of the Committee shall have this printed upon its receipt by the Committee.

MINORITY VIEWS

We oppose H.R. 1152. This bill significantly curtails the authority of states and Tribes to protect their water resources. The changes in H.R. 1152 defy the overarching intent of the *Clean Water Act* (CWA, or the *Act*) and gut the explicit authority under section 401 of the Act for states and Tribal governments to ensure that projects and activities carried out within their jurisdictions are consistent with their water quality standards and other relevant state and Tribal laws. This partisan bill weakens CWA protections while allowing special interests to override state and Tribal concerns over potential development within their own borders.

The bill narrows section 401 authority, in place since the enactment of the CWA, to the point of obsolescence.

First, it limits the scope of state and Tribal review to only specific, direct discharges associated with the proposed project or activity. Congress created section 401 to allow a state or Tribe to consider the impact of an “activity as a whole” on its waterbodies and associated water resources. By limiting the review to direct discharges, a state or Tribe will be barred from considering the water quality impacts of the project or activity generally, such as discharges after construction, discharges by entities other than the applicant, or other impacts that result from the project or activity changing the natural environment.

Additionally, the bill restricts the conditions a state or Tribe may impose on a project or activity to only those directly related to specified provisions within the *Act* related to effluent limitations, water quality standards, treatment standards, and toxic and pretreatment requirements. By narrowing the conditions a state or Tribe may impose on the project or activity, the bill repeals existing authority for states and Tribes to consider the potential impacts of a project or activity in the context of state pollution control programs, fish recovery programs, temperature control mechanisms, and minimum flow requirements.

Finally, H.R. 1152 imposes strict and nearly impossible time limits to review applications for proposed projects or activities, regardless of whether these applications are complete or contain information sufficient for a thorough state and Tribal review.

Proponents of this legislation point to these changes as a way to curb state overreach and to accelerate permitting review times. However, in a letter to the Committee dated February 28, 2023, the states of California, Washington, and New York expressed serious concern with the changes proposed in this legislation, stating that “[revising] the statutory language to contradict longstanding interpretations would induce confusion and invite arguments about the

nexus between the discharge and the impact.”²² In addition, state organizations, such as the Western States Water Council, have expressed concern that placing arbitrary and strict limits on section 401 application review times and processes will require states “to issue an increased number of denials, due to inflexible deadlines that do not accommodate state public engagement laws or allow sufficient time to gather adequate information on project impacts.”²³ In practice, enactment of H.R. 1152 may increase project delays, as a state may be forced to deny a certification for a project or activity rather than grant it blindly and cede its authority over protecting its water.

Changing the timing and process for EPA review shifts additional burden, but less control, to the states and Tribes. Under the bill, responsibility for EPA notification shifts from the applicant to a state or Tribe. The bill also requires concurrent review by EPA and the state or Tribe, which removes the ability of EPA to understand the local views on a project (which is the purpose of section 401) before EPA conducts its assessment.

During consideration of H.R. 1152, Committee Democrats sought to lessen its negative impacts. For example, Representative Emilia Sykes (OH-13) offered an amendment to preserve existing authority to review and prevent potential adverse consequences of projects or activities, including “the potential for a pipeline to leak dangerous chemicals into groundwater; any toxic runoff from an approved factory; or pollution in our waterways that results from a train derailment.” The devastating impacts of the Norfolk Southern derailment in East Palestine, Ohio are a stark reminder of the importance of section 401 reviews and why Congress should retain authority for states to address the potential impacts of projects and activities within their borders.

Similarly, Representative Jared Huffman (CA-02) offered an amendment to maintain the current rights of Tribes under the section 401 process and ensure that H.R. 1152 does not hinder their sovereignty. This amendment sought to protect the current authority of Tribes to be treated as separate and co-equal entities in approving, denying, or conditioning projects or activities that could impact jurisdictional waters.

Section 401 has been an effective tool for states—a successful example of cooperative federalism at work and partnership between states and the EPA. States across the country process hundreds of CWA certifications annually, and instances where they reject or place conditions on a permit are limited. Yet, H.R. 1152 would significantly curtail state and Tribal authority based on nebulous concern that a handful of projects were denied state certification.

In our view, this legislation is unnecessary and unwarranted.

²² See Letter from the California State Water Resources Control Board, the New York State Department of Environmental Conservation, and the Washington State Department of Ecology to Chairman Sam Graves, dated February 28, 2023, submitted to the record of the Full Committee Markup of February 28, 2023.

²³ Resolution of the Western States Water Council in Support of State CWA Section 401 Certification Authority, Position #471, September 16, 2021.

RICK LARSEN,
Ranking Member.
 GRACE F. NAPOLITANO,
Ranking Member, Sub-
committee on Water Re-
sources and Environment.
 ELEANOR HOLMES NORTON.
 STEVE COHEN.
 HENRY C. "HANK" JOHNSON, Jr.
 ANDRÉ CARSON.
 DINA TITUS.
 JARED HUFFMAN.
 JULIA BROWNLEY.
 FREDERICA S. WILSON.
 DONALD M. PAYNE, Jr.
 MARK DESAULNIER.
 COLIN Z. ALLRED.
 JESÚS "CHUY" GARCÍA.
 SETH MOULTON.
 JAKE AUCHINCLOSS.
 MARILYN STRICKLAND.
 TROY A. CARTER.
 ROB MENENDEZ.
 VAL HOYLE.
 EMILIA SYKES.
 VALERIE P. FOUSHEE.

ADDITIONAL VIEWS

I file these additional views because I strongly disagree with the Majority's implication in this Committee report that states and Tribes have misused their authority under section 401 of the Clean Water Act to deny the certification of projects affecting state or Tribal waters solely for impacts unrelated to water quality. There are multiple letters, witness statements, and evidence to the contrary.

First, during the Committee markup of H.R. 1152, I included in the record a letter from the Water Resources Control Board of my state of California, who, along with the New York State Department of Environmental Conservation and the Washington State Department of Ecology, expressed opposition to H.R. 1152. In this letter, the states highlight how this legislation will "undermine states' ability to protect water quality within their states and erode five decades of successful, cooperative federalism."

A copy of that letter is included with these views.

Second, the Majority continues to inaccurately imply that states are wrongfully denying section 401 certifications solely based on reasons outside of state water quality concerns.

For example, in the Committee report, the Majority references the section 401 certification denial by the State of Washington in 2017 of the Millennium Bulk Materials coal export terminal. In this report, the Majority claims that the State of Washington "did not cite water quality standards as a reason for denial." However, in 2019, the former-Director of the Washington State Department of Ecology, Maia Bellon, testified before the Subcommittee on Water Resources and Environment on this issue, where she noted that:

For two years we have been falsely accused of "abusing our 401 authority" and denying the [Millennium] project based on our so-called philosophical opposition to coal. This is frankly nonsense. The fact is that our decision was based on the project's failure to meet water quality standards, and its further failure to meet our state's environmental standards. The project proponent failed to provide any mitigation for the areas the project would devastate, especially along the Columbia River. The environmental analysis demonstrated that this project would have destroyed 24 acres of wetlands and 26 acres of forested habitat, as well as dredged 41 acres of riverbed. It would have contaminated stormwater from stockpiling 1.5 million tons of material onsite near the river—picture, if you will, an 85-foot-high pile of coal running the length of the National

Mall, from the steps of the Capitol to the foot of the Lincoln Memorial.²⁴

Similarly, the Majority's Committee report references the denial by the State of New York of the Northeast Supply Enhancement Project proposed by the Transcontinental Gas Pipe Line Company (Transco) in 2019. Again, the Majority inaccurately suggests that the State of New York based its section 401 certification denial solely on the project's likely increase of greenhouse gas emissions and associated impacts on climate change. However, in the 2019 letter to the project applicant, the State highlights that the "Department does not have reasonable assurances that construction and operation of the [Northeast Supply Enhancement] Project would meet all applicable water quality standards."²⁵ Specifically, the State explains that:

Most notably, according to Transco's own submissions and as acknowledged by FERC, water quality standards for both mercury and copper are projected to be exceeded in certain areas in New York State waters. In addition, at this time, due in part to the Department's ongoing consideration of public comments received on the WQC Application and of the Project's water quality impacts, Transco and the Department have not finalized appropriate requirements to mitigate for impacts to water quality, shellfish beds, other benthic resources, and other relevant environmental impacts.²⁶

Similarly, in its 2020 denial of the same project, the State further notes that:

Transco has not demonstrated that construction and operation of the Project would comply with applicable water quality standards. Because the Department lacks reasonable assurances that the Project would comply with applicable water quality standards, particularly without the use of a default 500-foot mixing zone for mercury and copper, the Department hereby denies the 2019 WQC Application.²⁷

I continue to oppose H.R. 1152, but believe it is also important that the Committee report accurately and completely reflect the evidence presented to the Committee members for consideration.

²⁴ See <https://democrats-transportation.house.gov/download/bellon-testimony>; see also, Section 401 Water Quality Certification Denial (Order No. 15417) for Corps Public Notice No. 2010-1225 Millennium Bulk Terminals-Longview, LLC Coal Export Terminal from Maia D. Bellon, Director, State of Washington Department of Ecology to Millennium Bulk Terminals-Longview, LLC, available at <https://ecology.wa.gov/DOE/files/83/8349469b-a94f-492b-acc4-d8277e1ad237.pdf>.

²⁵ See Notice of Denial of Water Quality Certification from Daniel Whitehead, Director, Division of Environmental Permits, NY State Dep't of Environmental Conservation, to Joseph Dean, Transcontinental Gas Pipe Line Company, LLC, (May 15, 2019), available at https://www.dec.ny.gov/docs/administration_pdf/nodtgp.pdf.

²⁶ Id.

²⁷ See Notice of Denial of Water Quality Certification from Daniel Whitehead, Director, Division of Environmental Permits, NY State Dep't of Environmental Conservation, to Joseph Dean, Transcontinental Gas Pipe Line Company, LLC, (May 15, 2020), available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/neseqwqcd denial05152020.pdf.

GRACE F. NAPOLITANO,
Ranking Democrat, Sub-
committee on Water Re-
sources and Environment.

**California State Water Resources Control Board, New York State Department of
Environmental and Conservation, and Washington State Department of Ecology**

February 28, 2023

The Honorable Chairman Graves
Committee on Transportation & Infrastructure
2165 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Graves:

As the water quality certifying agencies for California, New York, and Washington, we write to underscore the importance of existing law in protecting state waters from water pollution associated with federally licensed projects. On February 24, 2023, Representatives Rouzer and Graves introduced H.R. 1152 - Water Quality Certification and Energy Project Improvement Act of 2023, to amend section 401 of the Clean Water Act that would, among other things, revise section 401 to: (1) reduce the scope of states' and tribes' 401 water quality certification authority to apply only to the discharge to a water of the United States, rather than the whole of the activity; (2) narrow states' and tribes' section 401 water quality certification authority to exclude much of what is required to comply with water quality standards and implementation plans under section 303 of the Clean Water Act; (3) remove the states' and tribes' authority to ensure compliance with "other appropriate requirement[s] of State law"; (4) replace references to an "application" for certification with a "request" for certification; and (5) impose a time requirement on states and tribes to identify information needed before taking an action on a certification request, (6) make other changes to the law that introduce substantial uncertainty about the scope of section 401 for project proponents and state and tribes. Each of these changes would undermine states' abilities to protect water quality within their states and erode five decades of successful, cooperative federalism. We ask that Congress preserve the existing state authority in the Clean Water Act to substantively review a project's effects on water quality before a federal permit or license is issued.

Background

Under section 401 of the Clean Water Act, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a section 401 water quality certification is issued, or certification is waived. The State Water Resources Control Board ("State Water Board") and the nine California Regional Water Quality Control Boards (collectively, "Water Boards"), [NY Signatory], [WA Signatory] are certifying agencies pursuant to section 401 of the Clean Water Act. In all three states, the most common federal licenses subject to section 401 are Clean Water Act section 404 dredge or fill permits issued by the U.S. Army Corps of Engineers and licenses for hydropower facilities issued by the Federal Energy Regulatory Commission.

During the five decades since Congress enacted section 401 in the Water Quality Improvement Act of 1970, state water quality agencies diligently processed thousands of section 401 requests each year with little controversy. The vast majority of section 401 certifications were issued promptly and most section 401 certifications were granted, with only a handful of denials issued

each year. Beginning around 2016, prompted by a handful of high-profile section 401 denials, some project applicants and industry lobbyists began claiming that states were “abusing” their section 401 authority. Such claims of abuse are not, and never have been, true. In the handful of cases when project applicants have alleged improper certification decisions or delay by state agencies, they have been fully capable of protecting their rights under section 401 through the traditional framework of administrative and judicial review.

Section 401 is a cornerstone of the cooperative federalism principles enshrined by the Clean Water Act.

Cooperative federalism is a foundational component of the Clean Water Act. As set forth in Clean Water Act section 101(b), “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.” Section 510 further specifies that except as expressly provided, nothing in the Clean Water Act shall preclude or deny the right of any State to adopt or enforce any standard or limitation respecting discharges of pollutants or any requirement respecting control or abatement of pollution.

The section 401 certification program is an embodiment of these cooperative federalism principles. A state certification is the mechanism of ensuring that a federal license or permit is not used as an excuse to violate state or federal water quality standards. As currently written, the language in section 401 acknowledges that states are in the best position to understand their own laws and that additional conditions may be necessary to ensure compliance with state law and applicable Clean Water Act requirements. As the federal permitting or licensing agency is often not an agency primarily tasked with managing environmental issues, the federal agency may in fact be reliant on the certification authority’s expertise regarding water quality. To prevent a section 401 certification from becoming a rubber stamp, any revision to the section 401 language must preserve an expansive view of the cooperative federalism principles originally envisioned by the Clean Water Act and repeatedly affirmed by the Supreme Court. *PUD No. 1 of Jefferson Cnty. v. Washington Dep’t of Ecology*, 511 U.S. 700 (1994); *S.D. Warren Co. v. Maine Bd. of Env’t Prot.*, 547 U.S. 370 (2006).

The Clean Water Act should continue to protect the whole range of water quality effects resulting from the proposed activity.

We strongly support the existing statutory language, which gives states and tribes the authority to regulate the potentially water-polluting activity as a whole, rather than being limited to a strict interpretation of effects from only the discharge, because regulation of the activity as a whole protects waters from the widest range of impacts. States should be able to protect water quality regardless of whether the pollution or other water quality impacts would be specifically attributable to a discharge or from some other aspect of the activity being permitted. States should be able to use the certification process to address impacts to groundwater, impacts to isolated surface waters, or impacts from non-point sources, all of which are likely not directly attributable to the discharge to a water of the United States, because these are water quality impacts that would not occur without issuance of the federal permit or license.

The problems with limiting certifications to the discharge rather than the whole of the activity would be particularly impactful on the states’ ability to protect water quality during the decades-long term of Federal Energy Regulatory Commission (“FERC”) licenses in the hydropower licensing context. States and tribes must be able to fully address the water quality impacts of

such activities as a whole during the 30- to 50- year term of the FERC license to reduce water quality impacts that, depending on the circumstances, may not be attributable to a point-source discharge, but result from the activity's construction, operations, and facilities. Common water quality impacts associated with hydropower activities include changes in turbidity, sediment, siltation, temperature, habitat loss, alterations to stream geomorphology, dissolved oxygen, algal productivity and algal-produced toxins, erosion, barriers to fish passage, alterations to stream geomorphology, and reductions in streamflow. Each of these impacts can have profound, generational impacts on the state's water resources.

To prevent or minimize these potential impacts, states have imposed, or considered the need for certification conditions to protect water quality on project activities that fall outside the typical understanding of point-source discharges, such as requirements for minimum instream flows and ramping rates; temperature management; aquatic invasive species management; plans for gravel replenishment, large woody material placement and other habitat measures; reservoir operation plans; erosion and sediment management plans; and monitoring and management of dissolved oxygen, mercury, pesticides, and other constituents of concerns. Previously issued certifications have typically included management, monitoring, and reporting measures to ensure compliance with water quality measures and to identify potential modifications if circumstances change. Revising the statutory language to contradict longstanding interpretations would introduce confusion and invite arguments about the nexus between the discharge and the impact, when a state or tribe's focus should more appropriately be on all water quality impacts resulting from the project. Introducing the concept of whether the activity will "directly result" in a discharge in subsection (a)(1) and (a)(4) would inject additional uncertainty and potentially further limit the certifying authority's ability to protect water quality.

Although the states would rely on their state authority to continue to preserve robust protection of water quality whenever possible, state authority would not be an available remedy where state law is preempted by federal law. Because the Federal Power Act preempts the field of hydropower regulation absent an express exception to preemption, and FERC project licenses are valid for a fixed period of up to 50 years, water quality certifications for FERC license applications provide the states with a singular opportunity to ensure compliance with the state's water quality standards and other requirements. If the states' ability to regulate FERC licensed projects to the same extent that it has been able to for decades is significantly weakened, other, non-FERC projects would be subject to more stringent requirements to compensate for the failure of FERC-licensed projects to contribute what would otherwise be their allocated responsibility.

The Clean Water Act should continue to authorize certifications to implement water quality standards and implementation plans adopted or approved under section 303 of the Clean Water Act.

Under section 401 of the Clean Water Act a water quality certification implements the applicable provisions of sections 301, 302, 303, 306 and 307 of the Clean Water Act and any other appropriate requirement of state law. The most important of the enumerated provisions of the Clean Water Act is section 303, which provides for water quality standards and implementation plans. Section 303 requires development and approval of water quality standards, which consist of designated uses, criteria, and anti-degradation policies; establishment of total maximum daily loads, which allocate responsibility for meeting standards that cannot be met solely through

compliance with the technology-based requirements of the Clean Water Act; and implementation of a continuing planning process.

In 1994, the Supreme Court upheld state authority to set conditions of certification to protect uses designated as part of the water quality standards under section 303. *PUD No. 1*, 511 U.S. at 700. The Court rejected an argument that certification is limited to implementing the criteria component of those standards. Consistent with the Supreme Court's ruling, states have made effective use water quality certification authority to protect water quality needed for commercial, tribal, and recreational fisheries and other important uses of state waters.

The proposed revision to limit "applicable provisions" of section 303 to "requirement of state law implementing water quality criteria under section 303 necessary to support the designated use or uses of the receiving navigable waters" could strip the states' authority to use their certification authority to protect the uses of waters of the United States designated as part of water quality standards under section 303. By inexplicably omitting any reference to federal requirements that implement section 303, it would also create substantial uncertainty about states' and tribes' ability to enforce water quality criteria, total maximum daily loads, and antidegradation requirements adopted by U.S. EPA.

Congress should not remove the states' authority to require compliance with state water quality requirements.

We strongly oppose the bill's proposed revisions that would limit the certifying authority to ensuring compliance with only specific sections of the Clean Water Act by deleting the existing reference to "any other appropriate requirement of State law" set forth in section 401 subsection (d). Such a revision would disregard a state's right to impose more stringent water quality requirements and be contrary to the protective goals of the Clean Water Act. As is accounted for and endorsed by the Clean Water Act, many states have state-based programs and attendant requirements that arguably or explicitly expand beyond the state's Clean Water Act authorities. The Clean Water Act expressly contemplated a state's authority to establish and enforce more stringent state requirements beyond the Clean Water Act. For example, certifications may include monitoring and reporting requirements that arguably go beyond ensuring compliance with specific sections of the Clean Water Act, and instead help determine whether water quality is being degraded or to shape the development of future actions to protect water quality.

We urge Congress to refrain from making an unwarranted intrusion into a state's authority to impose stricter conditions to protect the quality of waters within its borders.

Section 401 should preserve the certifying authority's ability to define the contents of a request for certification and create submission procedures.

The bill proposes revising references to "application" to be "request." Although the intention behind that revision is not clear, we support language that recognizes that the certifying authority may define the contents of a request for certification and create submission procedures. The state's ability to define what is required for a request for certification is significant because a receipt of such a request is the trigger for the beginning of the reasonable period of time for a certifying authority to act on the request. The bill proposes an addition requiring certifying authorities to "publish requirements for certification," but it is not clear

whether this language is an indirect reference to a certifying authority's ability to define required information for applications and submittal procedures. To the extent that "requirements" were intended to require the enactment of new state regulations, 30 days is insufficient time to comply with public notice and comment requirements for State Water Board adoption.

Section 401 should not impose an arbitrary time limit on the certifying authority's ability to request information.

The bill proposes revisions to subsection(a)(1) that specify that by 90 days after request for a certification, the certifying authority must inform the applicant if any additional information is necessary for the certification authority to take an action on the request. As explained above, to the extent that the language requires the certifying authority to identify what, if any, information is necessary to submit a complete application for water quality certification, many state laws, including California's, do this. But the revised language may be construed as preventing the states from requesting that the applicant clarify, amplify, correct, or supplement information required in the application, which is permissible under state law.

For these reasons, we write to ask that Congress preserve the existing state authority in Clean Water Act Section 401 to substantively review a project's effects on water quality before a federal permit or license is issued, and protect five decades of successful, cooperative federalism.

Sincerely,



Eileen Sobeck
Executive Director
California State Water Resources Control Board



Basil Seggos
Commissioner
New York State Department of Environmental Conservation



Laura Watson
Director
Washington State Department of Ecology