



The Association of State Wetland Managers, Inc.

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

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November 27, 2019

The Honorable John Barrasso
Chairman
Senate EPW Committee
United States Senate
410 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Tom Carper
Ranking Member
Senate EPW Committee
United States Senate
456 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper,

The Association of State Wetland Managers (ASWM) is writing to express our concerns around any legislative or federal action that would reduce state and tribal authority to manage water quality within their boundaries under Section 401 of the Clean Water Act (CWA). We strongly oppose any efforts by Congress to diminish, impair or subordinate the scope of state or tribal authority as designed by Congress in the CWA.

ASWM 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 and our member states and tribes have had long standing positive and effective working relationships with federal agencies in the implementation of dredge and fill regulations and 401 certifications to protect our nation’s aquatic resources.

States are expressly designated as co-regulators through the well-established CWA cooperative federalism relationship. The important and unique role of states in the management of water resources is clearly recognized in the CWA. Therefore, any action taken by the federal government to either expand or contract the scope of federal protection and the role of states in cooperative federalism relationship will have direct and significant impacts on states and tribes.

Through the 1977 amendments to the CWA, Congress more fully recognized and protected the rights and responsibilities of the states by ensuring a major role in the implementation of many CWA programs. With § 401 certification being a key element of CWA compliance, without adequate state/tribal review of § 401 certifications, the goals of the CWA will not be met. Section 401 certification has long been identified as a successful model of cooperative federalism.

Section 401 certifications are essential to many states for protecting their wetlands and waters, preserving the uses for those resources (e.g., drinking water, ecological functions), and ultimately protecting public health. Section 401 certifications provide that essential link between state environmental statutes and regulations and the activities related to a discharge into a water resource.

Section 401 certifications have also helped to dispel any confusion regarding environmental provisions with which a project proponent must comply. Without the certification, a project proponent might erroneously believe that the only environmental conditions required are those in the federal permit. Certification brings both federal and state/tribal conditions into one document, and thus makes it clear what a project proponent must do to comply with both federal and state/tribal laws and regulations.

The § 401 certification process is used to protect, restore and maintain designated uses, which under the CWA are specifically established by individual states. Designated uses commonly include aquatic life and fish and shellfish for human consumption, drinking water, and commercial, agricultural and recreational uses, including activities requiring contact with water. Clean water is vital for economic and public health. For these reasons, state and tribal safeguards under § 401 are essential and within the state's legal purview to enforce.

During the Senate Environment and Public Works Committee hearing conducted November 19, 2019 regarding S. 1087, the Water Quality Certification Improvement Act of 2019, Chairman Barrasso stated that there is a "dangerous trend preventing our nation from reaching full energy dependence in regard to states using 401 as a tool to block fossil fuel infrastructure." Respectfully, ASWM disagrees with the Chairman's characterization. Only a few, unique, non-representative cases have been cited as evidence of an alleged problem. Across the nation, § 401 certifications are issued every day without delay or denial. While a few high-profile cases have gained national attention, thousands of certificates are issued annually without raising any concerns by the current Administration.

We also strongly object to the misinterpretation of the statement by the Director of the New Jersey Chapter of the Sierra Club who was quoted as saying "Section 401 review is probably the most effective tool we have to fight these projects." This is a misleading statement. While the Sierra Club is afforded the opportunity to comment on projects seeking authorization under § 401, it does not have any role or responsibility in administering § 401 certification reviews, and any misinterpretation of the Sierra Club's statement that implies that states or tribes are colluding with them to issue § 401 certification denials is absolutely false. States are bound by their authority as designated by Congress under the CWA and by state laws and regulations to ensure that impacts authorized under § 401 do not violate state water quality standards.

States and tribes are equipped to conduct § 401 reviews with a critical understanding of the resources they are tasked with protecting, an understanding of regional- and site-specific needs, and knowledge of the most effective methods for preventing and mitigating impacts within that context. While ASWM works with states and tribes to continue to improve their permitting programs and systems, this must not be at the expense of state/tribal authority.

ASWM urges Congress to continue to recognize and respect state and tribal authority under the CWA and work to uphold the balance between state/tribal and federal authorities in ways that work together within the existing cooperative federalism construct as provided by the CWA.

While these comments have been prepared by ASWM with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations. Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Marla J. Stelk". The signature is fluid and cursive, written on a white background.

Marla J. Stelk, Executive Director
Cc: ASWM Board of Directors