



Democrats see changes in S. 3303 as threat to cooperative federalism

WASHINGTON, DC, Aug. 20

08/20/2018

By Nick Snow

OGJ Washington Editor

US Senate Environment and Public Works Committee Democrats questioned whether a bill proposed by Republicans, ostensibly to make minor changes in a Clean Water Act (CWA) project permit certification provision, actually would undermine the bedrock cooperative federalism principle that helps federal and state governments work together.

"When it comes to protecting the environment, we have a solemn responsibility to do everything we can to protect clean water. Unfortunately, the bill we are hearing testimony on today...would fundamentally alter the role states have in permitting projects that cross rivers, streams, and wetlands," Sen. Kirsten Gillibrand (D-NY) said in the Democrats' opening statement at an Aug. 16 committee hearing about [S. 3303](#). Committee Chairman John A. Barrasso (R-Wyo.) and four GOP cosponsors introduced the measure previously ([OGJ Online, July 31, 2018](#)).

Congress intended states to have authority under the CWA by setting standards that are more stringent than the federal government, Gillibrand said. "States have a responsibility to make sure that those standards are enforced by setting conditions on federally permitted activities to protect state water quality," she said. "I'm concerned the changes to the Section 401 certification process envisioned in the bill would create a situation where applicants are given permits to violate state water-quality standards. That should not happen."

Gillibrand also expressed concern that a provision in the bill establishing a 90-day deadline for states to determine whether a project's permit application was complete is unrealistic. "This is inconsistent with state and federal practices and ignores the fact that these projects often change during the course of the review and require new or different information," she said. Another provision would let states deny certification if an applicant did not supply adequate information, an approach the senator considers heavy-handed because it could pressure states to approve potentially risky projects.

In his opening statement, and at several points during the hearing, Barrasso said reforms in the CWA's Section 401 provision giving states certification authority are necessary because a few have made the process political in their denials. "The State of Washington has abused [its] authority to block the export of coal mined in Wyoming, Utah, Colorado, and Montana. [It] has refused to grant a water-quality certification for the Millennium Bulk Terminal project,... [which] would enable the export of Western coal to markets in Asia," he said.

The state also cited conditions not related to water quality when it denied the Millennium Terminal application, Barrasso said. Attorneys general from Wyoming, Kansas, Montana, Nebraska, South Dakota, and Utah who support the project have sued Washington State for allegedly preventing interstate commerce in violation of the US Constitution, he said.

Pipelines blocked in New York

Across the country, New York State's Department of Environmental Conservation has denied water-quality certifications to two proposed interstate pipelines, effectively blocking transmission of gas from production sites in Pennsylvania to New England markets, the committee's chairman said.

"In January, power plants and utilities in New England had to take the dramatic and drastic step of importing LNG from Russia to meet their energy demands. It makes no sense for America to import LNG from our adversaries, Russia, when we have that resource right here at home," he said.

The bill would clarify that under CWA Section 401, certification reviews would be limited to water quality only, Barrasso said. "Under our legislation, states, when evaluating water quality, can only consider discharges from the federally permitted or licensed activity itself—not from other unrelated sources," he said.

"Interstate pipeline projects often traverse hundreds, and sometimes thousands, of miles. They cross rivers, streams, and wetlands, and have a cumulative impact on the ability of a state to meet its water-quality standards," Gillibrand noted. She said some critics have pointed to a handful of high-profile examples where states denied Section 401 certifications

for major interstate projects and argue that the states have abused their roles and their authority should be restricted.

"Those assertions ignore the fact that New York State has denied Section 401 certification to only those instances where the project fails to comply with water-quality standards or failed to provide sufficient information to demonstrate compliance. In 2017, New York State issued about 90.9% of all water-quality certifications which were requested," Gillibrand said.

Another committee Democrat, Jeff Merkley (Ore.), asked Western States Water Council Executive Director Anthony Willardson, one of the hearing's three witnesses, whether states often deny projects because of inadequate communications with stakeholders. "It's only one of the reasons," Willardson replied. "From a state perspective, there are challenges related to staffing and turnover of that staffing. States have made adjustments. One state now assigns 2 people to work on any [Federal Energy Regulatory Commission] licensing or relicensing application, given the length of time and the potential for [staff] turnover."

Supplied information inadequate

When Merkley indicated his impression was that Willardson said most water-quality certification applications were rejected because the provided information was not adequate, the witness said that was correct. "Where states have not been able to act in a timely manner, it's because of the information they've received or not received. Another area is when states have been disappointed with information which was sought on a hydropower issue, they were unilaterally told to act," he added.

Sen. Shelley Moore Capito (R-W.Va.), one of S. 3303's cosponsors, pointed out that a second witness, Brent Booker, secretary treasurer of North America's Building Trades Union, testified that the New York State DEC's water-quality certification denials to the two proposed gas pipelines had far-reaching effects on his organization's membership. She then asked him how he thought these would play out.

"The simple answer is people aren't going to work," he responded. "They're not earning a paycheck, not supporting their families, and not participating in the local economy. We pride ourselves on our training and invest \$1 billion/year in it. We have training centers in every state in this country. We also have apprenticeship readiness programs. It's not an easy career. You have ebbs and flows. When you take away the predictability of the permitting process, it adds even more uncertainty."

Booker said later in the hearing that the discovery of gas in the Marcellus and in other Northeastern shales helped the US construction industry put a lot of people to work. "If you look back to 2008 to 2009, when the general US economy crashed, the sector that kept going was in the pipeline industry and the discovery of natural gas. It kept communities together. It

kept families together. It kept people working. So it's critically important. The lack of pipeline infrastructure as well as the need to modernize the pipelines we have will create jobs for millions of Americans," he declared.

The third witness—CJ Stewart, a board member and co-founder of the National Tribal Energy Association and a member of the Crow Indian Tribe—said in his written testimony that the Crow Nation deeply respects states and other tribes' need to protect their water quality from potential damage from projects. "We also need the same respect in terms of our commercial endeavors, including our sovereign resource development and commercialization," he added.

"[CWA] Section 401 was intended to provide states with a way to apply key water-quality protections to federally permitted activities. However, certain states have misused the process to block Crow economic projects for political reasons that have nothing to do with water quality," said Stewart. "These states have hijacked the 401 certification process and used it as a means to interfere with tribal and international trade policy in violation of the Commerce Clause of the US Constitution, including and specifically the Indian Commerce Clause."

Contact Nick Snow at nicks@pennwell.com.



1455 West Loop South
Houston, Texas 77027
(713) 621-9720

Copyright © 2018: PennWell Corporation
All Rights Reserved.

[Advertise](#)
[Newsletter Subscription](#)
[Book Store](#)
[Privacy Policy](#)
[Terms & Conditions](#)
[Contact Us](#)
[Magazine Subscription](#)
[Mobile](#)

[About Us](#)
[PennWell](#)
[View All Pennwell Websites](#)
[View All Pennwell Events](#)
[Site Map](#)
[Webmaster](#)



[Home](#)
[General Interest](#)
[Exploration & Development](#)
[Drilling & Production](#)
[Processing](#)
[Transportation](#)
[Unconventional](#)
[GIS Data & Maps](#)
[RSS](#)

[Events](#)
[Market Connection](#)
[White Papers](#)
[Webcasts](#)
[PennEnergy Jobs](#)
[Equipment](#)
[Research](#)