



WESTERN STATES WATER COUNCIL

682 East Vine Street, Suite 7 / Murray, Utah 84107 / (801) 685-2555 / FAX (801) 685-2559

Web Page: www.westernstateswater.org

May 21, 2019

The Honorable Andrew Wheeler
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Clean Water Act Section 401 State Certifications (EPA-HQ-OW-2018-0855)

Dear Administrator Wheeler,

The Western States Water Council is a bi-partisan government entity created by a resolution of Western Governors in 1965. Our members are appointed by and serve at the pleasure of their respective Governors, advising them on water policy issues. Our mission is to ensure that the West has an adequate, secure and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future. The Council has been a continuous advocate for the rights of States to conserve and protect their water resources.

The Clean Water Act (CWA) §§101(b) and (g) explicitly recognize the important role of states as co-regulators to achieve state and federal water quality goals, without abrogating, superseding, or impairing the authority of the States to allocate water. The state water quality certification authority in CWA §401 is a vital component of our federalist system of protecting water resources. States use this important tool to conserve and protect their water resources, ensuring that federally-permitted projects comply with state water quality standards.

Over the past several months, the Administration and Congress have placed great emphasis on permitting delays and state certification denials of a few projects, with an interest in curbing state authority under CWA §401. However, States have responsibly carried out their CWA §401 certification authority for decades. Our survey of Western States indicates that the vast majority of applications are handled expeditiously, and that occasional delays are most often the result of incomplete applications and complex projects that require further study to ensure water quality protection. While there may be opportunities to improve communication and coordination between applicants, federal agencies, and state agencies responsible for CWA §401 certifications, the authority of states to protect their water quality should not be reduced in scope nor arbitrary deadlines imposed, particularly without accounting for legitimate reasons for any delays.

Included as attachments are: (1) our current policy positions on States' CWA §401 certification authority (#426) and on renewable hydropower development (#433); (2) an August 14, 2018, letter from the Council to Senate Energy and Natural Resources (ENR) and Environment and Public Works (EPW) Committees, addressing the importance of this authority to States, together with a summary of our States' responses to a 2014 survey on CWA §401 certification activities; and (3) testimony we provided at a Senate EPW Committee hearing on S. 3303, legislation introduced in the 115th Congress which proposed to limit the scope of review and timing of CWA §401 certifications. We provided an historical overview of why this authority has been so important to our States for many years, and provided extensive responses from our States to the Committee's follow-up questions regarding how States handle CWA §401 certifications.

Thank you for the opportunity to comment during this pre-proposal period. We strongly encourage the Environmental Protection Agency and other federal agencies to continue communicating and consulting with the States as you consider changes to the guidelines or regulations.

Sincerely,

A handwritten signature in black ink that reads "Tony Willardson". The signature is written in a cursive, flowing style.

Tony Willardson
Executive Director
Western States Water Council



**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
STATE CWA SECTION 401 CERTIFICATION AUTHORITY**

**Coeur d'Alene, Idaho
October 26, 2018**

WHEREAS, States have responsibly exercised their delegated authority under the Clean Water Act (CWA) Section 401 and under state water quality statutes to protect water quality, and must consider proposed activities and discharges in light of the states' designated water uses and related water quality standards; and

WHEREAS, the Council supports a balanced and integrated approach to achieve water and energy policy goals that plans for the future in sustainable ways, and recognizes legitimate state water and water quality management, protection and planning authorities to balance competing water uses; and

WHEREAS, the western states strongly support the planning and development of critical infrastructure and streamlined permitting processes, but such efforts should not come at the expense of states' authority to allocate, manage, and protect their water resources; and

WHEREAS, the development of hydropower and other federally permitted and licensed projects involving activities that may impact states' water quality standards should be appropriately undertaken in compliance with substantive and procedural state water law and delegated authority under CWA Section 401; and

WHEREAS, CWA Section 101(b) supports the states' critical role in protecting water quality by stating: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."; and

WHEREAS, CWA Section 101(g) of the CWA further provides that it is the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act"; and

WHEREAS, Section 27 of the Federal Power Act declares: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."; and

WHEREAS, the Supreme Court has narrowly interpreted the Federal Power Act (16 U.S.C. 791a et seq.) reading Section 27 (16 U.S.C. 821) to limit state authority to set streamflow requirements on federally permitted and licensed projects, holding in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946) and in *California v. FERC*, 495 U.S. 490 (1990) that federal requirements preempted any state requirements, including efforts to establish minimum stream flows, noting that "...Congress remains free to alter what we have done"; and

WHEREAS, these rulings eroded state authority over state resources, and the Council has supported federal legislation to restore states' primary authority for regulating streamflows and water use and clarifying Congressional intent under the Federal Power Act; and

WHEREAS, in *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Supreme Court upheld a state's delegated authority to impose minimum stream flow conditions under the CWA Section 401 certification process where necessary to protect a designated use for fish habitat, expressly rejecting any implied limitations on Section 401 certifications based on the *First Iowa* interpretation of the Federal Power Act; and

WHEREAS, an overly narrow reading of Section 401 would deprive the states of the ability to maintain the very beneficial uses that the Clean Water Act was designed to protect, and threaten the existing partnership between states and federal agencies based on cooperative federalism; and

WHEREAS, the vast majority of Section 401 certification requests are processed within 90 days, well within the one year allowed by current law, with relatively little if any backlog of certification actions; and

WHEREAS, most delays are typically due to submission of an incomplete application, applicants' non-responsiveness to requests for additional information, the completion of necessary study requirements, the size and complexity of some projects (and related impacts), substantive changes to the proposed project requiring further review, or constraints on state resources; and

WHEREAS, CWA Section 401 certification denials by states are rare and carefully considered, and are not examples of the failure of the system, as the current process is well-understood, reliable and supported by case law that provides certainty for both the states, federal agencies, and the regulated community; and

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council opposes any changes that may weaken the deference to state water laws and diminish the primary state authority and responsibility for the appropriation, allocation, development, conservation, and protection of their water resources, including minimum streamflows, and the protection of water quality and designated uses.

BE IT FURTHER RESOLVED that the Western States Water Council strongly supports early state engagement in federal permitting and licensing actions and the coordination of state and federal environmental requirements and review processes for critical infrastructure without diminishing state authority.



**POSITION STATEMENT
of the
WESTERN STATES WATER COUNCIL
in support of
RENEWABLE HYDROPOWER DEVELOPMENT
Chandler, Arizona
March 22, 2019**

WHEREAS, the water and hydropower resources of the West have been developed through partnerships between energy and water users, and continue to be inextricably connected; and

WHEREAS, clean, efficient, inexpensive hydropower is a vital part of the energy resources needed to meet our present and future energy demands; and

WHEREAS, hydropower is the primary source of renewable electricity in the United States, representing about 48% of total renewable electricity generation, with approximately 101 gigawatts (GW) of capacity and nearly 7% of total electricity generation¹; and

WHEREAS, the potential exists for further public and private development of this valuable resource, including upgrading existing generators, developing small hydro and the power potential from low-head hydro on existing man-made conduits and canals, as well as hydroelectric pumped storage projects; and

WHEREAS, such development can often be undertaken with little impact on the environmental and important ecological resources, requiring minimal further environmental review; and

WHEREAS, permitting requirements may be appropriately minimized and streamlined so as to promote reasonable development while avoiding unnecessary costs; and

WHEREAS, the future development of potential hydropower resources should be appropriately undertaken in compliance with substantive and procedural state water law and interstate compacts, and consistent with the States' authority under Clean Water Act Section 401; and

WHEREAS, the rights and preference privileges of existing water and power users should be respected; and

WHEREAS, federal legislation has from time to time been introduced to further authorize and promote the wise and sustainable development of our renewable hydropower resources, also creating jobs and reducing carbon emissions; and

WHEREAS, hydropower is a prominent component of electricity generation in a number of western states, and important part of state renewable portfolio standards; and

WHEREAS, the potential exists to increase hydropower productions by as much as 189 GW by rehabilitating, expanding and upgrading existing facilities, powering non-powered dams, installing hydropower at existing conduits and canals, as well as developing new project sites².

NOW THEREFORE BE IT RESOLVED that the Western States Water Council supports federal legislative and administrative actions to authorize and implement reasonable hydropower projects

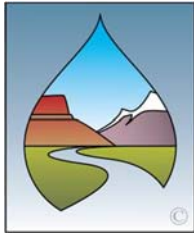
¹ <https://www.energy.gov/sites/prod/files/2016/10/f33/Hydropower-Vision-Chapter-2-10212016.pdf>; p. 3, 76.

² Ibid, pg. 95.

and programs that enhance our electric generation capacity and promote economic development, through efficient permitting processes, while appropriately protecting environmental resources and respecting States' 401 certification authority under the Clean Water Act.

BE IT FURTHER RESOLVED that the Western States Water Council also supports the development and implementation of appropriate energy and water conservation programs at all levels to minimize demands placed on our natural resources and ecosystems.

BE IT FURTHER RESOLVED that past, present and future hydropower development and operational changes should recognize and ensure consistency with state law and regulatory authority and delegated authority under federal law.



WESTERN STATES WATER COUNCIL

*682 East Vine Street, Suite 7 / Murray, Utah 84107 / (801) 685-2555 / FAX
(801) 685-2559 Web Page: www.westernstateswater.org*

August 14, 2018

The Honorable Lisa Murkowski, Chairwoman
Energy and Natural Resources Committee
United States Senate
304 Dirksen Senate Building
Washington, DC 20510

The Honorable Maria Cantwell, Ranking Member
Energy and Natural Resources Committee
United States Senate
304 Dirksen Senate Building
Washington, DC 20510

The Honorable John Barrasso, Chairman
Environment and Public Works Committee
United States Senate
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper, Ranking Member
Environment and Public Works Committee
United States Senate
456 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairs and Ranking Members:

The Western States Water Council, a government entity advising western governors on water policy issues, supports collaboration and leadership at all government levels – federal, state, tribal, and local – and the private sector – to address the Nation’s infrastructure needs and establish water infrastructure improvements as a public policy priority. The Council has supported federal investments in water-related infrastructure projects and programs, and called on the Congress and the Administration to continue to work together and with States to streamline permitting processes and coordinate environmental and other regulatory reviews to eliminate duplicative procedures, reduce costs of compliance and construction, and ensure timely completion, maintenance, or relicensing of authorized infrastructure projects so vital to the West and the Nation. Clean Water Act Section 401 State Water Quality Certification alone is not usually an obstacle in itself to timely federal licensing and permitting.

It should be noted that the Council has been a continuous advocate for the rights of States to conserve and protect their water resources, a primary responsibility often cited in state constitutions. States and federal agencies strive to work in concert as co-regulators to achieve water quality goals. The Clean Water Act (CWA) clearly recognizes the important role of the States. Section 101(b) declares: “It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution;” and Section 101(g) adds that the authority of the States to “allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act...”

Section 401 requires: “Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions...” of various CWA sections. This state water quality certification authority is a vital component of our federalist system for

protecting water resources, and any conditions deemed necessary by the States to ensure compliance are a mandatory addition to any federal license or permit.

In 2014, in response to criticism of States' actions under Section 401, including claims of unnecessary project delays, primarily as related to development of hydropower, the Council surveyed its membership to get a regional perspective on the certification process. Fifteen of our eighteen-member states responded and a summary is attached. The following are some of the highlights:

- *Provided that applications are complete and ancillary federal activities are complete or nearly complete (e.g. public notice, study requirements, a complete EIS, mitigation requirements, etc.), 401 certification is not usually an obstacle to timely federal licensing and permitting.*
- *401 certifications related to CWA Section 404 permitting dominate the number of requests. Many times certification requests are filed before the Corps has completed their assessment. Also, it is not uncommon for 404 permitting applications to be elevated to Corps/EPA Headquarters for consideration.*
- *States and the U.S. Army Corps of Engineers collaborate to expedite the process, but projects requiring an individual 404 permit can be time consuming.*
- *CWA 401 certifications are also used to inform state 402 NPDES permits issued by states.*
- *Hydropower permitting-related requests vary with hardly any in Plains States, few in the Rocky Mountain States, while West Coast States face more permitting and 401 certification requests.*
- *The complexity and long duration of the FERC licensing and relicensing process is a major contributing factor in those States with related 401 certification requests pending. FERC's Integrated Licensing Process (ILP) takes a minimum of five years to complete.*
- *All States act on 401 certification requests within the one-year period allowed by the CWA. The majority of requests, on average, are processed within 40-90 days, some in a couple of weeks.*
- *States report certification applications filed with missing signatures, illegible maps, and/or lacking required documents such as a CWA Section 404 application.*
- *Certifications may also be held up by the applicant not responding to States' requests for additional information or failing to comment on proposed project conditions. Often substantive details of the proposed action change, requiring further review.*
- *States generally have a process and rules outlining a formal timetable or goal for action, but where there is not, every effort is made to issue the certification or a waiver in a timely manner.*
- *The vast majority of states have no backlog of certification actions, but a few do. Delays are typically due to submission of an incomplete application, completion of study requirements, and constraints on state resources, including staff limitations and turnover.*
- *States have undertaken various process improvements, including coordinating state and federal environmental reviews, some through formal memoranda of understanding.*
- *Many States provide information in advance to assist applicants in navigating the 401 certification process, including online resources.*
- *Most states do not anticipate a significant increase in 401 certification requests. Some do. Some states have actually seen significant declines in requests. Again, most requests appear to be related to 404 permitting, which in turn increases with general economic conditions and related construction starts, oil and gas development, etc.*

The 401 certification process is an important tool for States to fulfill their responsibilities to conserve and protect their water resources, and States are responsibly acting to execute their delegated authority in a timely manner. Ensuring federally permitted projects comply with state water quality standards is a proven process. Resources should be focused on reforming, streamlining, and expediting time consuming and costly federal requirements – such as the 404 permitting process. The Administration's efforts in consultation with the States to refine the definition of and jurisdiction over Waters of the United States holds greater promise of simplifying and expediting infrastructure project approvals.

We look forward to working with the Administration and the Congress to appropriately remove obstacles to timely action on infrastructure projects.

Sincerely,

A handwritten signature in black ink, reading "Tony Willardson". The signature is written in a cursive, flowing style.

Tony Willardson, Executive Director
Western States Water Council

Attachment

WESTERN STATES WATER COUNCIL
Summary of State Responses
Clean Water Act Section 401 Water Quality Certification Activities
April 2014

The Council surveyed its 18 member states. Responses have not yet been received from Nebraska, North Dakota and Washington.

Hydropower permitting-related requests vary widely by state as might be expected, with little or no hydropower development and related 401 certification requirements in most Plains States. Even in the Rocky Mountains there appear to be relatively few active requests. West Coast States have more certification and permitting actions.

It appears that 401 certifications related to CWA Section 404 permitting dominate the number of certification requests. Coordination and collaboration between the States and Corps often expedite the process, but projects requiring an individual 404 permit can be time consuming.

CWA 401 certifications are also used to inform state 402 NPDES permits issued by states, and would be required in those states without primacy to issue 401 permits, which would include Idaho and New Mexico.

1. In your opinion is State 401 certification authority a significant obstacle to timely federal licensing and permitting activities? Specifically hydropower licensing? Other permits (such as CWA Section 404 permits)?

States unanimously reported that the CWA 401 State Water Quality Certification is not usually an obstacle in itself to timely federal licensing and permitting, provided that all applications are complete and ancillary federal activities are complete or nearly complete (e.g. public notice, study requirements, a complete EIS, mitigation requirements, etc.).

States report certification applications filed with missing signatures, illegible maps, and/or required documents such as a CWA Section 404 application. Often substantive details of the proposed action requirement certification can also change. Many times certification requests are filed before the Corps has completed their assessment. Certifications may also be held up by the applicant not responding to requests for additional information, or failing to comment on proposed project conditions.

EPA and other federal agency comments, conditions and other actions can delay certification. It is not uncommon for example for 404 permitting applications to be elevated to Corps/EPA Headquarters for consideration.

The complexity and long duration of the FERC licensing and relicensing process is a major contributing factor in those States with related 401 certification requests pending. FERC's Integrated Licensing Process (ILP) takes a minimum of five years to complete.

Some States have separate environmental review requirements, such as the California Environmental Quality Act (CEQA) process required for non-governmental entities (which can be time consuming). The federal NEPA process is the starting point for CEQA. Further, the California State Water Resources Control Board, consistent with maintaining a transparent and public process, provides a public comment opportunity on draft certification decision before issuance. As project licenses typically range from 30 to 50 years, this is considered to be important, though this is not a required step.

Oregon has a separate state hydropower licensing process, in parallel to the federal process.

2. How long does it usually take for your State to act on a certification application? Is there a specific goal or timeline for action?

This varies by state, but all are within the one year period allowed by law. The majority, on average, fall between 40-90 days, while some may process certification requests within a couple of weeks. Action on a request can depend on a number of factors, such as a 30-day public comment period requirement. Other reasons for delay are listed below under Question #3.

States generally do have a process and specific rules outlining a formal timetable or goal for action, but where there is not, every effort is made to issue the certification or a waiver in a timely manner.

Alaska has a goal of processing 401 certification requests within 10 days after the close of the public notice and comment period.

Similarly, the Texas Commission on Environmental Quality (TCEQ) reviews 401 certification requests in parallel with federal licensing and 404 permitting activities, and based on an memorandum of agreement (MOA) with the Corps Southwestern Division, TCEQ make a decision within 10 days of the Corps having reached a permitting decision (certification is required before a permit is issued).

3. Does the State currently have a backlog of certification applications? If so, what is the size of the backlog? What types of licenses or permits are most likely to be delayed? What are the primary reasons for delays (incomplete applications, study requirements, state staff or other resource limitations, etc.)?

The vast majority of states have no backlog of certification actions, but a few do. Delays are typically due to submission of an incomplete application, completion of study requirements, and constraints on state resources, including staff limitations. Often, 401 certification is a part-time duty for staff, assigned as needed. State turnover is another problem, and often entry level staff is assigned 401 certification responsibilities. Given the length of the FERC permitting process staff may change over time.

California reported the most delayed FERC projects and certification requests (only 2-3 staff are devoted to requests). California is working on certification for sixteen FERC licensed projects where their license has expired. Most should be completed within two years. Post-licensing monitoring of certification and

permitting conditions, which may involve continuing studies given the uncertainty regarding future conditions, also place an increasing burden on staff time.

Oregon does have two large hydropower projects which haven't been certified within one year of the original application, one due to ongoing federal activities, and ongoing mitigation studies have delayed the other.

At least one state will no longer accept 401 certification applications as complete until required federal actions have already been approved or completed.

4. What actions has the state taken to simplify or expedite the certification process (such as interagency MOUs, online applications, etc.)? Please provide references and copies.

States have undertaken various process improvements, including coordinating state and federal environmental reviews, some through formal memoranda of understanding.

The Alaska Department of Environmental Conservation has developed a waiver process applied to individual 404 permits issued by the U.S. Army Corps of Engineers. Criteria are based on the potential risk of a particular activity that may affect water quality, such as the size of the wetlands fill, the type of activity, the proximity to a waterbody and the particular wetlands functions and values.

On November 19, 2013, The California State Water Resources Control Board (SWRCB) executed a memorandum of understanding (MOU) with FERC that covers coordination of pre-application activities that include "consultation, environmental scoping, study planning, and submittal of and commenting on the applicant's preliminary licensing proposal." A copy of the MOU is available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/ferc_mou/index.shtml

Also, with the support of the California Hydropower Reform Coalition and FERC licensees, SWRCB is ramping up staffing resources and increasing fees. Three 401 certification requests were completed within an eight month period. Each project request is also assigned a back-up staff person to assure continuity. There are templates for standard letters and more common certification conditions, and SWRCB is developing a program manual and training staff on up-to-date techniques.

For large, complex projects the Colorado Department of Public Health and Environment works with applicants prior to formal filing of a certification request to streamline the review process and minimize requests for additional information. In 2010, Colorado executed an MOU with FERC, and also hired a contractor to identify a number of small projects that were reviewed and certified, but the contract was not renewed and FERC has not informed the State of new conduit or other small scale hydropower project licensing applications, though some potential projects have come to light through public information and conversations with Corps staff.

Idaho has used settlement agreements to develop FERC 401 certifications.

New Mexico has expedited the certification process through the use of general permits and established procedures. The “New Mexico Implementation Plan” governs the process for issuing NPDES permits.

Oklahoma meets regularly with the Corps to coordinate procedures for public notice and processing of permit and certification applications.

Oregon Department of Environmental Quality staff work with applicants on study design and data review early on to ensure a 401 request is complete. Oregon also has a statute outlining state review of hydropower relicensing in coordination with federal relicensing to avoid duplication through a Hydroelectric Application Review Team (HART) with staff from DEQ, the Department of Water Resources, and the Department of Fish and Wildlife. Other state agencies may participate as well.

HART may provide applicants with an estimate of costs for relicensing work, including certification, and one applicant entered into an agreement to pay the state agencies’ costs. HART addresses relicensing, but state agencies coordinate as needed for any new project to reduce inefficiencies. Also, DEQ invoices all 401 certification applicants for costs incurred in processing, providing the revenue necessary for timely action, including reassigning staff work.

A Texas/Corps MOA implements a tiered classification system for projects that require an individual CWA 404 permit, which require certification reviews for proposed projects that directly impact aquatic resources of greater than three acres or 1500 linear feet of stream (Tier II projects). For Tier I projects (below that threshold), TCEQ waives certification if the permit applicant agrees to incorporate specific best management practices.

In Wyoming, electronic delivery of certification requests directly from the USACE (Corps) Wyoming Regulatory Office to the Department of Environmental Quality facilitates timely review and processing. WY DEQ encourages project proponents to contact the agency prior to submitting their 404 application to the Corps. Lastly, Wyoming has categorically certified several nationwide permits, further expediting the process.

5. What public information regarding 401 certification is available from the State (include state websites and addresses)?

Many states provide information in advance to assist applicants in navigating the 401 certification process, including online resources. This may include current program activity, staffing, current projectspecific webpages, 401 certifications issued, etc. FERC also posts 401 certification information on its website. Further, Corps Districts may post information on 404 permit applications.

AK: <http://dec.alaska.gov/water/wwdp/wetlands/index.htm>

AZ: <http://www.azdeg.gov/envirom/water/permits/cwa401.html>

CA: http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/

CO: <http://www.colorado.gov/cs/Satellite/CDPHE-WQ/CBON/1251596872987>

ID: <http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification.aspx>

This is Idaho's 401 certification website. The 401 certification list of projects is on these webpages:

NPDES: <http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification/401certifications-npdes-permits.aspx>

404 Permits: <http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification/401certifications-dredge-fill.aspx>

MT: All FERC related 401 water quality certifications are posted on the FERC website. Montana shares the public notice with the Army Corps of Engineers for individual 404 related 401 water quality certifications.

NV: <http://ndep.nv.gov/bwqp/401cert.htm>

NM: Section 404 program can be found at <http://www.nmenv.state.nm.us/swqb/404/>. The web site for the NPDES program can be found at <http://www.nmenv.state.nm.us/swqb/Permits/>.

OK: http://www.deq.state.ok.us/wqdnew/401_404/index.htm.

Public notices for the Section 404 permits are located on the U.S. Army Corps of Engineers, Tulsa District website: <http://www.swt.usace.army.mil/Missions/Regulatory/PublicNotices.aspx>

OR: <http://www.deq.state.or.us/wq/sec401cert/hydro.htm>

SD: <http://denr.sd.gov/des/sw/401.aspx>

TX: The TCEQ maintains several public web pages containing information about the TCEQ 401 certification program. Each page can be accessed from the following URL:

<http://www.tceq.texas.gov/permitting/401certification> UT:

<http://www.waterquality.utah.gov/permits/index.htm>

WA:

WY: The USACE Wyoming Regulatory Office website provides a link to the Wyoming Department of Environmental Quality website that contains information on specific State 401 certification.

6. Do you anticipate an increase in the number of 401 certification requests in the future, and what might be the impact on State administrative resources?

Most states do not anticipate a significant increase in 401 certification requests. Some do. Some states have actually seen significant declines in requests. Again, most requests appear to be related to 404 permitting, which in turn increase with general economic conditions and related construction starts, oil and gas development, etc.

[Expansion of CWA jurisdiction as may be proposed by new rules could have an undetermined impact on the number of requests related to any increase in Section 404 permitting requirements.]

California expects an increase in requests due to FERC relicensing, license amendments, and new projects. Further, as described post-licensing monitoring of conditions, as well as non-hydropower certification requests will significantly impact the State's administrative resources. FERC currently lists 115 non-federal hydropower projects in California, not including transmission line projects, with varying expiration dates. Since 2000, 22 FERC project licenses have expired, and another 26 will expire through 2029, necessitating either relicensing or surrender of the license. Decommissioning can also have water quality impacts. SWRCB is already involved in a number of relicensing pre-application activities. The Division of Water Rights Water Quality Certification Program also certifies non-hydropower projects that involve water rights.

Colorado does not anticipate a significant increase in the number of requests, but does anticipate 4-5 very large and complex project certification requests from water diversion and storage projects over the next 3-4 years.

Idaho does expect an increase in requests, as well as additional review requirements related to antidegradation reviews and analyses associate with federal permits, placing greater demands on static staff.

New Mexico noted drought limits the viability of hydropower projects.

Oregon has certified several projects through the federal relicensing process over the past several years. Currently there are only a few projects under relicensing review. Oregon anticipates ongoing interest in retrofitting both irrigation and drinking water systems with hydro turbines, but many will be exempt from licensing and no 401 certification will be required. Many preliminary permit applications have not proceeded to licensing, making certification requirements difficult to estimate.

Testimony of the Western States Water Council
Submitted to the
Senate Committee on Environment and Public Works
Regarding State Authorities and
S. 3303 – Water Quality Certification Improvement Act
August 16, 2018

I. INTRODUCTION

My name is Tony Willardson, and I am the Executive Director of the Western States Water Council (WSWC). The Council is a government entity, instrumentality of each and every participating member state. A bi-partisan organization created pursuant to a Western Governors' resolution in 1965, we represent eighteen states. Our members are appointed by and serve at the pleasure of their respective Governors, advising them on water policy issues. Our mission is to ensure that the West has an adequate, secure and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.¹

Chairman Barrasso, Senator Carper and members of the Committee, we appreciate your leadership on issues related to water, public works, the environment and the economy, and particularly your efforts to achieve a balance between federal policies and programs and the role of the states in our federalist system. The Council represents a diverse set of States but find common ground in declaring that Western states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of water resources, both groundwater and surface water, including protection of water quality, instream flows and aquatic species.

The Congress has historically deferred to state water law as embodied in Section 8 of the Reclamation Act, Section 10 of the Federal Power Act, Section 101(g) and 101(b) of the Clean Water Act, and myriad other statutes. Any weakening of the deference to state water laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states.² The Council has addressed many issues under the jurisdiction of this Committee.

The Council has called for leadership at all levels of government, in partnership with the public sector, to address the Nation's infrastructure and water needs as a public policy priority – and to work together with each other and with States to streamline permitting processes and coordinate environmental and other regulatory reviews to eliminate duplicative procedures, reduce costs of compliance and construction, and ensure timely completion, maintenance, or relicensing of authorized infrastructure projects so vital to the West and the Nation.³

This month, meeting in Newport, Oregon, the Council adopted two resolutions. One recognizing Congress stated policy in the Endangered Species Act Section 2(c)(2) that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert

with conservation of endangered species,” and calling upon “federal agencies to engage is a substantive discussion of past, present and future efforts to work in concert with State agencies to implement Congress’ intent....”⁴

The second reiterates our position that the transport of water through constructed conveyances to supply beneficial uses – without subjecting the water to intervening industrial, municipal, or commercial use – should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents, and calls for the use of available State authorities to protect the water quality of the receiving water body in a water transfer. The Council supports EPA’s current rule expressly excluding water transfers from regulation under the NPDES permitting program and supports the codification of 40 CFR 122.3(i) into statute.⁵

Lastly, the Council been working with its member states to revise and refine recommendations for redefining waters of the United States under the Clean Water Act and clarifying federal and state jurisdiction, recognizing that all waters are protected by the States, regardless of the extent of federal jurisdiction or limits thereof.

II. THE WATER/ENERGY NEXUS IN THE WEST

The Council has called for integrating water and energy resources planning and policy.⁶ The West enjoys diverse and abundant energy resources, including renewable and non-renewable resources, but water is scarce in much of the region and may or may not be sufficient for all proposed uses. Maintaining adequate and sustainable supplies of clean water and energy present interrelated challenges given a growing population, increasing water and energy demands, and an uncertain climate subject to multi-year drought and other extremes. An integrated approach to water and energy resource planning, development, diversification, management and protection is necessary to achieve a thriving and sustainable future for the West.

The Council has specifically supported federal legislative and administrative actions to authorize and implement reasonable hydropower projects and programs that enhance our electric generation capacity and promote economic development, through streamlined permitting processes, while appropriately protecting environmental resources – also declaring that past, present and future hydropower development and operational changes should recognize and ensure consistency with state law and regulatory authority, including delegated authority under federal law.⁷

The Federal Power Act

Of note, Section 10 of the Federal Power Act (FPA) of 1920 directed the Federal Energy Regulatory Commission (FERC) to coordinate the development of hydroelectric projects as part of a comprehensive plan for improving our waterways. Section 10(a)(1) required that any plan “...shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the

adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes...and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.”

Section 10(a)(2) requires that the Commission shall consider the “...extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared...” pursuant to federal law or the state in which the project is located. Moreover, FERC is to consider: “The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.”

Further, Section 27 states: “That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.”⁸

Balancing federal and state authority related to hydropower development has been a difficult and sometime contentious undertaking.

In 1983, FERC issued a license authorizing the operation of a hydroelectric project along Rock Creek in California, setting an interim minimum flow rate of water that must remain in the bypassed section of the stream rather than drive the generators. The State Water Resources Control Board (SWRCB) issued a state permit conforming to those federal requirements but reserving the right to set different permanent requirements. When SWRCB considered a draft with considerably stricter requirements, the licensee petitioned FERC for a declaration that FERC possessed exclusive jurisdiction to determine the project’s minimum flow rates. FERC agreed, concluding that setting flow rates was “integral to its planning and licensing process” under the Federal Power Act, and that “giving effect to competing state requirements would interfere with its balancing of competing considerations in licensing and would vest in States a veto power over federal projects inconsistent with the FPA,” as interpreted by the Supreme Court in *First Iowa*.⁹ California sued.

California v. FERC reached the 9th Circuit Court of Appeals which found that “...one reading would construe the [Section 27] to limit state authority to the area of property rights involving water for irrigation, municipal use, and related activities. Under this reading, any aspect of operating a hydropower project not implicating these rights would fall under exclusive federal regulation. A second reading would construe the section much more broadly as an anti-preemption clause that gives the states final authority over all issues connected to the control and use of water....” California argued for the latter interpretation, but the 9th Circuit disagreed, and held that “...Congress intended to vest regulatory authority in FERC over most aspects of hydropower projects. Only control over certain limited proprietary rights remains in state hands.”¹⁰

California appealed the decision to the Supreme Court, which granted certiorari.¹¹ The issue on appeal was “Whether the Federal Power Act preempts state regulatory water right laws otherwise applicable to hydropower projects licensed by FERC, or instead, whether Section 27 of the Act – which subjects such projects to state laws relating to control, appropriation, use, or distribution of water – precludes such preemption?” Forty-nine states supported California in an amicus brief. The Supreme Court unanimously affirmed the 9th Circuit’s decision.¹²

The Supreme Court determined that the narrow reading of Section 27 of the Federal Power Act in *First Iowa* was not dicta but was necessary to the Court’s holding and interpretation of the law. The Court declined to revisit *First Iowa* and disturb 44 years of precedent governing state and regulatory authority over hydroelectric projects, particularly where there had been no intervening change of law. “The California requirements for minimum streamflows cannot be given effect and allowed to supplement the federal flow requirements.” The Court did, however, note that “...Congress remains free to alter what we have done.”

The states unanimously viewed this ruling as an erosion of state authority over water resources. Shortly after the decision, the Idaho congressional delegation introduced legislation (S. 2805 and H.R. 5194) in the 101st Congress to restore states’ primary authority for regulating water use related to hydropower projects. The WSWC subsequently supported federal legislation to “...assure that applicants for hydropower licenses comply with state substantive and procedural water law, thus restoring to the Act Congress’ intent that state law govern water use associated with a hydropower project.”

III. THE CLEAN WATER ACT

Within the year, the states were looking at amendments to the Clean Water Act to strengthen states’ abilities to mandate minimum streamflows and protect designated uses through Section 401 certification.¹³ Opposing interests sought to further limit state authority while streamlining the federal hydropower licensing process, proposing a bill.¹⁴ to prohibit states from including any conditions for Section 401 certifications not directly related to water quality. The WSWC adopted a position supporting a balanced national energy policy that recognizes legitimate state water management and planning authority to balance competing water uses.

Ironically, as the Congress considered legislation, the Supreme Court in another case upheld States’ authority delegated under Section 401 of the Clean Water Act to impose bypass flows to protect water quality and fish and wildlife – the same requirements States had argued they had power to impose under state law in *California v. FERC*.

In 1994, the U.S. Supreme Court issued a 7-2 decision declaring that minimum streamflow requirements are a permissible condition of Clean Water Act Section 401 certifications. A Washington city and local utility district sought a license to build a hydroelectric project on the Dosewallips River. The proposed project would reduce the water flow below the state’s minimum stream flow requirement to protect fish habitat, a state-designated use of the water under Section 303 of the Clean Water Act. The Washington

Department of Ecology issued a Section 401 certification imposing a minimum stream flow requirement as a condition of the hydropower license, and the applicants objected to the state's authority to impose water flow requirements. In *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Court upheld a state's authority to impose conditions under the Section 401 certification process where necessary to protect a designated use for fish habitat.¹⁵

The Court rejected the argument that water quality requirements were limited to discharges under the Clean Water Act, noting that Washington's instream flow requirement was necessary to enforce the designated use of the river. The Court said that the Clean Water Act preserves each state's authority to allocate water quantity between users and does not limit Section 401 to water quality concerns when protecting designated uses. Importantly, the Court also rejected an effort to read "implied limitations" into Section 401 based on a perceived conflict between Section 401 state certifications and FERC authority under the Federal Power Act and the *First Iowa* interpretation.

Again in 2006, the Supreme Court recognized that State 401 certification authority is "...essential in the scheme to preserve state authority to address the broad range of pollution."¹⁶

Clean Water Act Section 101(b) recognizes the states' critical role in protecting water quality and declares: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution...." Similarly, Section 101(g) further provides that the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act...."

The latter, known as the Wallop amendment, was sponsored by Senator Malcolm Wallop of Wyoming, a respected rancher, conservative, and critic of regulatory red-tape.

Senator Barrasso we look forward to continuing to work with you and other Committee members to balance environmental protection and economic development needs, as well as the respective roles of state and federal agencies in the development, conservation and protection of our water resources – including protection of water quality, instream flows, aquatic species, and States' rights to allocate water and water rights.

Attached to my testimony is a letter summarizing a 2014 survey that addresses questions related to state administration of 401 certification authority that are sometimes raised by critics of the process. Section 401 State certification alone is not usually an obstacle in itself to timely federal licensing and permitting, provided that applications are complete and ancillary federal activities are complete or nearly complete. The majority of requests are processed within 40-90 days, some within a couple of weeks. The vast majority of states have no backlog of certification actions, but a few do. Delays are typically due to submission of an incomplete application, completion of necessary study requirements, and constraints on state resources, including staff limitations and turnover. Certifications may also be held up by the applicant not responding to States' requests for additional information or failing to comment on proposed project conditions. Often substantive details of the proposed action change requiring further review.

IV. CONCLUSION

In conclusion, the Western States Water Council reiterates its position that states have primary jurisdiction over water quantity and quality issues and should retain primary jurisdiction under the Clean Water Act for the integration of water quantity and water quality considerations through the water quality certification process set forth under Section 401.

The Council recently signed a joint letter together with western governors, legislators, attorneys general and various interstate associations of state water and wetland agencies recognizing the “importance of partnerships between states and the federal government,” and that a “balanced system of cooperative federalism has enabled states to implement the CWA effectively and with flexibility.... A vital component of the CWA’s system of cooperative federalism is state authority to certify and condition federal permits of discharges into waters of the United States under Section 401.”

Again, as States, we look forward to working with the Committee to balance the sometimes competing interests surrounding our water and energy policy goals.

END NOTES

¹ http://www.westernstateswater.org/wp-content/uploads/2014/01/Revised-Rules-of-Organization_2015_July_10.pdf. The purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources, in order to ensure that the West has an adequate, sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

² WSWC Position #406 – Regarding Preemption of State Law in Federal Legislation;
<http://www.westernstateswater.org>.

³ WSWC Position #419 – Supporting Water Infrastructure Funding.

⁴ 16 U.S.C. 1531; WSWC Position #425 Regarding Endangered Species and State Water Rights.

⁵ WSWC Position #424 – Regarding Water Transfers and NPDES Permits.

⁶ WSWC Position #420 – Integrating Water and Energy Planning and Policy.

⁷ WSWC Position #391 – Supporting Renewable Hydropower Development.

⁸ Federal Power Act, 16 U.S.C. 791a et seq.; P.L. 114-94. Section 27 at 16 U.S.C. 821.

⁹ FERC relied on a narrow reading of Section 27 of the Federal Power Act suggested by the Supreme Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946).

¹⁰ *California v. FERC*, 877 F.2d 743 (9th Cir. 1989).

¹¹ In 1989, the WSWC passed a resolution supporting California's efforts to overturn the 9th Circuit's decision on appeal.

¹² On May 21, 1990.

¹³ S. 3186 introduced in the 101st Congress on October 11, 1990; S. 106 and H.R. 649 introduced in the 102nd Congress on January 14 and 24, 1991.

¹⁴ The National Energy Security Act (S. 341) introduced in the 102nd Congress on February 5, 1991.

¹⁵ The *P.U.D. No. 1* decision effectively restored to the states authority under federal law to accomplish what the *California v. FERC* decision said they could not do under state law.

¹⁶ *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), citing 116 Cong. Rec. 8984 (1970).

U.S. Senate Committee on Environment and Public Works
Hearing titled, “Hearing to Examine Implementation of Clean Water Act Section 401 and S.
3303, the Water Quality Certification Improvement Act of 2018”

August 16, 2018

Questions for the Record for Mr. Willardson

Ranking Member Carper:

1. When does the Clean Water Act’s requirement that the certification timeline begins upon the “receipt of a request for certification” begin?

The Clean Water Act (CWA) does not provide guidance with respect to what constitutes the appropriate form or timing for “receipt of a request for certification,” and the start of the certification timeline is generally determined by the federal agency issuing the permit or license. Consequently, this varies with the federal agencies’ process for the different kinds of permits or licenses issued that are subject to water quality certification. The Section 404 program of the Clean Water Act, the Natural Gas Act and the Federal Energy Regulatory Commission (FERC) hydropower licensing programs are all different. It can also vary within one federal program from one part of the country to another. The Army Corps of Engineers’ (Corps) regulations (33 C.F.R. § 325.2(b)(1)(ii)) require that applicants submit a “valid” request for certification before the prescribed timeline for state review commences. FERC now requires only evidence that a request has been submitted.

Often, but not always, a certification request follows review of a federal permit application such as a 404 permit, which is by far the most common federal action triggering the need for State 401 certification. For a Section 404 permit the timeline may begin once the Corps publishes a Public Notice that a 404 application is complete, with the information needed for reviewing a permit. However, in some cases, the Corps issues a Public Notice with no information and the State may deny certification without prejudice pending receipt of adequate information to evaluate the project.

In 1987, FERC issued Order No. 464 unilaterally and retroactively waiving Section 401 requirements for 227 hydropower projects in 32 States with requests pending for more than one year. FERC determined that States had not acted on requests within the time period required, whether or not the States considered an application to be complete. States were allowed 30 day to submit suggested project conditions. A number of States protested and requested a rehearing, which was denied. Federal legislation was also proposed to overturn the order, which passed both the House and Senate, but was never reconciled and enacted. Since then, States have usually denied rather than hold incomplete applications.

In 1989, in City of Fredericksburg v. FERC, 876 F.2d 1109 (4th Cir. 1989), the Fourth Circuit Court vacated a license granted by FERC, for a hydropower project on the Rappahannock River in Virginia, granted by FERC under Order No. 464, after finding the developer, Commonwealth Hydroelectric, Inc. had refused to complete a 43-page

application required by the Virginia Water Control Board to inform a decision as to the project's impact on the river, Fredericksburg's drinking water supply.

*With respect to non-federal hydropower licensing, under the jurisdiction of the Federal Energy Regulatory Commission (FERC), in a 1992 case the Commission addressed the issue of incomplete applications and state waivers in Wyoming Valley Hydro Partners, 58 F.E.R.C. P61,219, 61693-61694, 1992 FERC LEXIS 421, *8-10 (F.E.R.C. February 27, 1992). FERC noted that (under their new determination) the one-year period begins when the certifying agency receives the request for certification. "As a result, it is no longer necessary for the Commission to determine whether the various state filing requirements have been met. As we explained in Order No. 533, the new rule [56 FR 23108] makes the states responsible for determining whether an applicant has complied with their procedural requirements. If an applicant fails to do so, the state agency has the power to deny the request for certification. The denial can be without prejudice to the applicant's refiling of an application that conforms to the state's requirements."*

In some States for some programs, the Section 401 certification review starts when the NEPA review or a States' equivalent environmental review of a project is complete. In others, it's triggered by the receipt of a complete 401 certification application by the state. In others, the review begins as soon as a 401 application is received, even if it is only a request without any information.

As noted, state and federal agencies sometimes have specific criteria that must be met before accepting a permit or certification application as complete.

Obviously, any Section 401 certification application must sufficiently define the scope of a project or action (and anticipated impacts) for a State to be able to adequately evaluate the effects on water quality standards and designated stream uses. A simple request for certification with little or no material information is not enough. Ideally, state agencies would be involved early in the federal review process so as to have access to all pertinent information and not unnecessarily delay a State's certification decision. As it now stands, if States don't have the necessary information, their options are to request the information needed, and if it is not submitted in a timely manner, the State denies the 401 certification request.

2. Do states, on occasion, seek additional information from applicants to make certification decisions?

Yes, States can and do request additional information in order to make sound informed decisions as to expected water quality impacts, and the viability of plans to monitor, avoid, or mitigate those impacts. The extent and timing of the studies, data and information requested largely depend of the size and complexity of a project or action, as well as what information is readily available.

- a. On such occasions, how long does it typically take for states to ensure they have the information they need?

This often differs based on the size and complexity of the project, the responsiveness of the applicant, and the involvement of the State in identifying the information needed prior to the start of the official receipt of a request for certification. With routine certification requests such as those often tied to a CWA 404 permit that the Corps has approved, little or no additional information may be necessary and certification may be waived or expeditiously approved, often within 30-days. The vast majority of State 401 certification requests are acted on within 90-days, well before the one-year mark.

- b. In your experience, is 90 days sufficient for states to obtain the additional information they need from an applicant that has provided poor or insufficient information, or in cases involving of large or complex projects?

In the case of large and complex projects it is difficult to speculate as to what would be a reasonable period of time for a State to request and then acquire the information needed. Given the scope and impact of the project, 90-days may not be enough to determine all the information that may be needed, let alone obtain that information. Some of the types of information States require include topography, hydrology, and treatment processes. Other factors are important. The project may involve multiple discharges or other disturbances. Some waters may already be listed as impaired. Discharges may involve unusual contaminants of concern. There may be endangered species to protect. Compliance with state non-point source programs may be considered.

All the information needed may not be readily apparent upfront. This may be the case where the scope and impact of the project changes over time as the federal permitting and licensing process proceeds. Delays often arise when applicants or consultants do not respond to requests for additional information.

Further, States may require public notice and hearings related to certification requests. Issues may be raised or information presented that may result in additional information requests by the state agency.

A 90-day period may be sufficient, if States have been involved in any pre-application/pre-certification permit or license process. Several States and local federal offices have worked together to improve consultation on projects prior to 401 certification requests to better streamline the process. Some meet on a regular schedule to address concerns.

States for a variety of reasons may not be able to determine what information is needed within 90-days, and subsequently cannot make an informed decision on whether the project will meet or violate state water quality standards for designated uses and may deny certification on that basis.

Setting a hard and fast deadline for information requests would likely be arbitrary and possibly counter-productive, forcing States to deny requests.

- c. Could limiting states to a 90-day window to obtain additional information from applicants impair a state's ability to make well-informed certification decisions?

Such a limitation could very well restrict a state's access to adequate information to make a reasoned decision related to large and complex projects, which are often subject to continuing changes in scope and anticipated impacts. In some specific cases where information needed to assess impacts to water quality was not provided, a 90-day limit would mean that a decision could not be made or a potentially uniformed decision (one that could lead to failure to meet water quality standards) would be made. In some cases, information needed can only be collected seasonally so the applicant cannot acquire the information until a different time of year. In addition, information collection can be iterative. The acquisition of information can lead to the need for additional information, or necessary changes to the project that would require a new evaluation of the impacts. Sometimes applicants also take a long time to respond or refuse to provide information. Securing access to private lands to gather information can also be an issue delaying reviews.

- d. Could limiting states to this 90-day window lead to the denial of projects because the applications are incomplete, but would otherwise been approved but for the imposition of a 90-day deadline?

Yes. Such a limitation could very well force a state to deny a certification request, likely without prejudice, allowing an applicant to reapply once the required information is provided. An applicant may also elect to withdraw and later resubmit an application with the required information. It should be noted that the denial of Section 401 certification can also halt federal permitting procedures and lead to delays. Short inflexible deadlines for large, complex projects that may affect hundreds of streams and wetlands can be problematic for both applicants and States.

- e. Should states be permitted to deny a Section 401 certification due to an applicant's failure to submit required information with an application?

Yes. States may only issue a water quality certification under Section 401 if the applicant can demonstrate that the proposed activity will comply with applicable sections of the CWA. Where applicants fail to fulfill this affirmative duty by failing to submit necessary information, States may lawfully deny certification. States must have the information required to assess whether or not there are water quality impacts to waters of the state. Without adequate information, States cannot make this determination and are and should be able to deny certification for this reason.

Recently, in Constitution Pipeline Co., LLC v. New York State Department of Environmental Conservation, 868 F.3d 87 (2nd Cir. 2017), the State's denial of a certification request due to the lack of information on impacts to streams was

upheld. State decisions to deny certification are often subject to either or both state administrative and state and federal judicial review.

Federal agencies have their own rules and regulations governing what information must be included in a federal application for it to be considered “substantially complete” and ready for review.

- i. Would you consider such a denial to be unrelated to “water quality?”

No. Any denial based on the lack of information related to impacts on the quality of state waters (its water quality standards and designated uses) is, on its face, directly related to water quality. If information is not available for States to be able to evaluate whether there are or are not impacts and how they may be addressed by the applicant, then it is appropriate to deny the request to protect water quality.

3. Based on your survey of western states, are most 401 certification requests delayed?

Among our western States, and nationally, few requests are delayed and denials are rare.

- a. Roughly how often—or in what percent of cases—are these decisions delayed beyond the year mandated in Section 401?

Certification decisions that extend beyond one year are rare and generally related to large, complex and sometimes speculative projects or actions. The vast majority of actions are taken in a timely manner, though there apparently are no statistics kept related to State actions regionally or nationally.

Responses from several States indicate that they have no projects that have been delayed due to Section 401 certification requests for at least the past five years, if not longer. However, this is not the case for all States, as some receive a high volume of complex applications and are working with the federal agencies to overcome backlog issues and improve streamlining of the overall application process.

It is important to note that several factors involved with the permitting and approval of projects, beyond state water quality certification under Section 401, contribute far more substantially to delays in the development of energy-related infrastructure. Such factors include delays within federal agencies, project financing issues, and logistical delays associated with planning construction.

4. In your estimation, what percentage of all energy-related infrastructure projects are stopped because a state does not grant 401 certification?
 - a. Is it 50 percent? 10 percent? 1 percent? Less than 1 percent?

I am unaware of any regional or national database with such information for Section 401 certification requests for energy or other projects. The number would likely be less than one percent, as most Section 401 certification requests are tied to CWA Section 404 permits, and there are tens of thousands of Section 404 permit applications annually. President Trump's outline of legislative goals on infrastructure (Feb 12, 2018) indicated that the Corps makes 59,000 jurisdictional determinations on Section 404 permits, annually.

The vast majority are relatively routine and granted in a timely manner. Given the very few Section 401 certification requests that take a year or more to complete, compared to the thousands of such requests, the percentage would be very small. Literally, hundreds of thousands of projects over the years have been approved by States.

However, in those relatively few cases where projects are large and complex, the delay can be significant and may or may not be avoidable. While there have been some recent high-profile projects where water quality certification was denied, those cases have well-documented water quality concerns and impacts identified by the States, some of which could not be mitigated, and in each case the denial has been upheld by reviewing administrative agencies and the courts.

With respect to the scope and timing of States' Section 401 review, there are opportunities to better coordinate state and federal environmental reviews to minimize necessary delays in Section 401 decision-making. Some States and federal agencies have worked toward such coordination with regular meetings to discuss pending project applications and memoranda of understanding to facilitate inter-agency processes.

5. One of the themes in the statements of your fellow witnesses and in some of the letters we have received from groups supporting this legislation is that the bill would not diminish water quality protection in any way.
 - a. Do you agree with that assessment?

The proposed legislation, as written, would substantially change States' ability to condition permits to satisfy state laws addressing water management and protection. Specifically, the bill would strike critical language in Section 401(d) which allows certification conditions imposed by States to ensure that the proposed activity complies with "any other appropriate requirement of State law." Because water management and allocation are under the primary jurisdiction of States and, therefore, controlled largely by state law, S.3303 would substantially interfere with (and likely preclude) States' ability to mandate streamflow requirements and other conditions not related to a "discharge" through the Section 401 certification process.

In 2008, in Oregon Natural Desert Association v. Forest Service, 550 F.3d 778 (9th Cir. 2008), the court notably determined “discharges” do not include non-point source pollution. The changes in S. 3303 would likely lead to more litigation questioning the definition of a “discharge” and the scope of States’ authority. This includes authority to consider non-point source pollution, including stormwater runoff, the effectiveness of best management practices, proposed prevention or mitigation plans, minimum streamflow requirements, impacts on endangered species, streambed and bank alterations, and other water quality related considerations that are not “discharges” as defined under Clean Water Act Section 402 (as an addition of a pollutant from a point source). Similarly, conditions required to protect already impaired waters, address cumulative and downstream impacts, or proposed activities intended to improve water quality might be excluded.

S. 3303 Section 2(1)(D)(i) limits State authority to “any discharge into the navigable waters” [of the United States] by the applicant and strikes the broader language asserting States authority to consider “applicable effluent limitations or other limitations or other applicable water quality requirements.”

Many state regulations for Section 401 certifications also tie in relevant state water quality statutes and state environmental statutes related to wetlands, fish and aquatic life protections. Consideration of State water allocation and water rights laws might also be precluded.

“State certifications under [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).

“[A]n overly narrow reading of section 401 would deprive the States of the ability to maintain the very beneficial uses that the Clean Water Act was designed to protect. Federal agencies could permit activities that would undermine a State’s investment in pollution control efforts and impose a double standard for different activities affecting the same in-stream values. It makes no sense to authorize States to implement Clean Water Act programs designed to protect beneficial uses and yet leave them powerless to prevent a federally permitted activity from impairing those values. The comprehensive nature of State management of water quality and water quantity means that the States are best situated to determine whether a federally permitted activity will fully protect beneficial uses. The States have lead responsibility for protecting water quality under the Clean Water Act and for administering laws governing allocation of water quantity. Water quality and quantity are inextricably linked; both are essential to maintaining the integrity of the nation’s waters.” Clive J. Strong, Statement on behalf of the National Association of Attorneys General, in, U.S. Congress, Senate, Committee on Environment and Public Works, Subcommittee on Environmental Protection. Water Pollution Prevention and Control Act of 1991, hearings on S. 1081, 102d Congress, 1st session, Washington: GPO, 1991 (S. Hearing. 102-335), p. 805.

- b. As you read it, would the language of this bill (S. 3303) allow western states—or any others for that matter—to mandate streamflow requirements through the 401 certification process?

As written, S.3303 could likely interfere with (and perhaps preclude) States' ability to mandate streamflow requirements through the Section 401 certification process. States now clearly have authority to broadly review and require mandatory conditions, including minimum streamflow requirements. Minimum streamflow requirements are essential to protect streams' designated uses, including fish and wildlife, recreation and other uses. States have required conditions regarding streamflow for hydropower projects.

At present, States' authority to broadly protect the quality of their waters under Section 401 is a well-established matter of law. In 1992, in United States Department of the Interior v. FERC, 952 F.2d 538, 548 (D.C. Cir. 1992,) the court held that "FERC may not alter or reject conditions imposed by the states through section 401 certificates."

In 1997, in American Rivers, Inc. v. Federal Energy Regulatory Commission, 129 F.3d 99 (2nd Cir. 1997,) the court rejected the position of FERC that it had authority to decide whether conditions of a state certification under § 401 of the CWA are unlawful and, therefore, not include such conditions as part of a hydropower license. Instead, the court held, that FERC "is bound by the language of § 401 to incorporate all state-imposed certification conditions into hydropower licenses and that the legality of such conditions can only be challenged by the licensee in a court of appropriate jurisdiction."

State authority over withdrawals and minimum bypass flows is essential to protecting streams designated for fish and wildlife and other uses, including recreation, as well as necessary water quality standards to support these uses and aquatic ecosystems, particularly as it relates to hydropower development, but any water resources diversion.

In 2006, in S.D. Warren Company v. Board of Environmental Protection, 547 U.S. 370 (2006), the Supreme Court held that States may consider a "discharge" from a hydropower project to include much more than a "discharge" as defined under Sec. 402 of the Clean Water Act that requires the addition of a pollutant. What may be considered a "discharge," should S. 3303 be enacted is unclear.

- c. What other certification conditions would states be prevented from considering if S. 3303 were to become law?

The language changing "activity" to "discharge" and replacing "will violate applicable effluent limitations or other limitations or other water quality requirements, as well as "other appropriate state laws," and restricting the

States' authority to consider only discharges related to Sections 301, 302, 303, 306 and 307 would prevent States from conditioning project related activities that result may involve non-point source pollution, including stormwater runoff, minimum streamflow requirements, streambed alterations and other state water quality related requirements under state law.

They may also limit conditions set on construction activity during critical fish spawning periods, setting requirements on how high streamflow will be handled until completion of the project, requiring excess dredge and fill to be disposed in upland areas, establishing culvert placement criteria, requiring native material for in-stream structures and for structures to be built to withstand expected high flow periods, establishing bed and bank erosion criteria, and other streamflow-related requirements.

States may be limited in their ability to impose conditions that require: the installation of stormwater controls; water quality mitigation and monitoring plans and technologies; best management practices for non-point source pollutants; replacement of disturbed wetlands; erosion control and restoration and revegetation of disturbed areas; prohibition of non-native materials or refuse in fill materials; attention to aquatic habitat dependent on water quality; invasive species management plans; consideration of the impacts of temperature and dissolved oxygen for hydroelectric dams; downstream water users notification requirements during project construction; equipment inspections and reporting for petroleum leaks, refueling distances from streams, removal of stored fuels during predicted floods, and other spill prevention controls and countermeasures; limits on construction equipment fording and access points; set-back criteria; floodplain development permits; and adaptive management plans.

Further, States might be precluded from otherwise requiring general conditions that specifically support maintenance of designated uses of the state's waters (including environmental protection, but also agricultural, municipal, industrial, recreational, and drinking water uses). The changes could negatively impact the ability of some States to require flows of sufficient volumes of clean water for some drinking water intakes.

The changes could also negate the State's current ability to use complex, interwoven state and federal authorities to protect the States' water resources. States also have questions about whether and to what degree Section 401 will be applied under the Section 404 program, and conditions such as mitigation, if the bill were law. States have indicated that sometimes the only way to meet water quality standards and approve a project is through mitigation. The narrowing of States' 401 authority as proposed is likely to have uncertain outcomes that lead to unintended consequences.

The impact will also depend on past and future court determinations on the definition of "discharge," and States' authority, but might preclude consideration

of non-point sources of pollution such as stormwater runoff attributable to a project. Further, any indirect impacts on water quality attributable to the project would likely be excluded, including those related to secondary developments that Section 401 may or may not require a separate federal permit and subsequently a separate certification.

6. Regarding streamflow requirements, if 401 certifications were not available, what other avenues do states have to set streamflow requirements associated with hydropower facilities, for example?

Several federal laws preempt state law and regulation, including the Federal Power Act (under which non-federal hydropower projects are licensed) and the Natural Gas Act (under which natural gas pipelines are licensed). Language in those statutes preserving state authority under Section 401 protects what is often States' only chance to review federally-permitted activities that would impact their waters. States may or may not have separate state statutes, including their own water quality, water allocation and water rights laws, and other statutes that might be used to require minimum streamflows.

For example, the Federal Power Act of 1920, Section 27 reads: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (16 U.S.C. 821)

States' assumed this protected States' ability to allocate water and mandate bypass flows related to hydropower projects to protect minimum streamflows and related designated uses, including fish and wildlife and recreation. However, in 1990, the Supreme Court in California v. FERC, 495 U.S. 490 (1990), determined States' authority to mandate minimum bypass flows was preempted.

If Section 401 certification authority were no longer available to States, FERC, not States would be the arbiter "balancing" competing interests and determining whether or not to recognize state laws requiring minimum flows.

7. Critics of this bill have suggested it will lead to further restrictions being placed on facilities that are already subject to state permitting in order to address the shortfall created by limiting states' role in the federal permitting process. Do you share this concern?

My primary concern is the potential for taking primary decision-making authority related to water quality protections out of the hands of States and state agencies with the greatest expertise and experience, and placing a distant federal agency, such as the Federal Energy Regulatory Commission or the Army Corps of Engineers, in charge of balancing state water quality protections against other national interests. It is likely that should States' Section 401 certification authority be diminished, other permitting and review

requirement under state and local law might be relied on to a greater extent to try to fill the void.

This may be particularly true in States that decide to develop new permitting requirements to replace lost authority to protect state waters. These potential disparate State requirements would likely add to the complexity of project approvals for applicants. Moreover, such additional permitting processes may result even more stringent requirements. In addition, the potential for litigation in response to changes to the federal statute and any new state requirements will likely lead to greater uncertainty.

8. Water is a precious resource that is best managed by those closest to the ground (i.e., states, tribes, and local governments). Does the denial of state certifications of two projects, one of which was upheld by the federal courts and the other of which is currently being litigated, justify a sweeping one-size-fits-all solution to a program that has been effectively implemented for 45 years?

States have the on-the-ground experience and expertise to best address water quality concerns and streamflow needs and have responsibly exercised their delegated authority under Section 401. Limiting that authority is not in the best interest of efficient, distributed decision-making and conflicts with the fundamental principles of cooperative federalism. Certification denials by States are rare and carefully considered. The Section 401 certification process is well-understood, reliable and supported by case law. The proposed changes may have considerable adverse unintended consequences for water resources, water quality, human health, ecosystems, agriculture, industry, and state and local economies.

Additionally, States and federal agencies recognize the importance of these projects, and on a regional or local level have worked together to identify problems and ways to improve and streamline the process. They have formed inter-agency agreements to facilitate the exchange of necessary information at earlier stages of the project application process and hold regular meetings (annually or semi-annually) to review pending projects and identify needs going forward. While this is not true of all States and local federal offices, it demonstrates the potential to address problems that may be unique to particular regions or States on a case-by-case basis rather than resorting to one-size-fits-all solutions. This sort of state-federal consultation and cooperation to accomplish the goals of the CWA, while balancing competing interests is precisely what was intended when the statute was enacted.

The few projects denied certification are not examples of the failure of the system or of the States to appropriately apply Section 401 certification as the applicants either refused to provide requested information and/or neglected to take into consideration and/or were unable to address and mitigate critical water quality considerations identified by the States during the Section 401 certification process.

- a. Are you aware of any other instance in which such sweeping changes to the CWA have been made to target such limited circumstances?

The CWA has not been significantly amended to change its regulatory scheme to accomplish its goals in partnership with States since it was enacted. Its carefully crafted cooperative federalism approach to water quality regulation has led to tremendous improvements in the integrity of the Nation's water quality.

Process improvements can be made through closer cooperation between State and Federal environmental reviews, but wholesale changes to Section 401 certification do not appear warranted in view of the limited denials. Curtailing States' review and mandatory conditioning authority will lead to less water quality protection. There should be greater recognition of States' ability to responsibly regulate the quality of their waters, including States' consistently responsible and timely implementation of Section 401 certification requirements.

9. Are you concerned that by limiting the state's use of Section 401 certification, some states may establish new state permitting requirements independent of the Clean Water Act, resulting in a patchwork of permit requirements that vary from state to state that would need to be met in order to ensure compliance with state statutes and regulations?

As described in my response to Question #7, it is likely that should States' Section 401 certification authority be diminished, other permitting and review requirements under state and local law would be relied upon, to a greater extent, to try to fill the void – and those requirements are likely to vary considerably among state and local jurisdictions. It is also likely some States will seek to fill the regulatory void with new state statutory or regulatory requirements in lieu of the use of Section 401, that may perhaps preclude current efforts to integrate state water quality and related program requirements with federal agency permit or license requirements. Some States may not take any action in response to the changes.

The resulting inconsistent regulatory approaches would likely lead to differences in compliance requirements between States and regions, which may lead to potential inconsistencies between and within individual projects, more so for projects that cross state lines. This is also likely to lead to further delays and increase permitting costs.

10. Have you, or any of the states with which you work, considered including state 401 certification programs as part of NEPA compliance?

Integrating Section 401 certification reviews as part of the federal NEPA review and/or as part of precertification/preapplication processes for specific federal permits or licenses for large, complex projects has been successfully done on a voluntary basis. Requiring early engagement with States would allow information required for completing Section 401 certifications to be communicated and changes and adjustments to the project to be addressed early. It could facilitate expedited Section 401 certification

approval. It is inefficient, with respect to the resources required of the applicant, to revisit issues addressed in NEPA/precertification/preapplication stages of a project, which is likely to occur with large, complex projects when the State is not included until after these federal processes have been concluded.

The Western States Water Council supports appropriate streamlining of state and federal permitting requirements, including integration of environmental reviews. A lack of cooperation and collaboration limits information sharing and may unnecessarily delay Section 401 certification decisions. Consulting with States early and often as part of federal reviews and environmental impact analyses would be an effective approach to expediting Section 401 certification decision-making.

It is also important to note that some States require completion of their own environmental reviews under state law, before acting on a request for Section 401 certification. For example, the California Environmental Quality Act requirements must be completed before the State will act on a Section 401 certification request.

The Council is surveying its member States and has asked about their participation in NEPA reviews, and other efforts to expedite certification decisions.

- a. Would making that change improve permitting efficiency, since many of the issues that come up when a permit is applied for and 401 certification begins are typically included in the earlier NEPA reviews in which the state does not participate?

Yes, State participation early and often would help identify issues that should be addressed, information needed for sound decision-making, and appropriate study requirements. Early engagement with States would also clarify expectations related to Section 401 certification and advise applicants of related requirements.

- b. Would including states early (i.e., when the permit application that triggers 401 certification is submitted) lead to more efficient processing?

State involvement should allow for prompt processing of Section 401 certification requests, based on the information gathered cooperatively improving the efficiency and effectiveness of the environmental review process. Delays and denials due to a lack of adequate information would be minimized. With large and complex projects where federal pre-application processes exists, such as FERC's pre-licensing or relicensing application process, even earlier State consultation and involvement would be most effective and efficient.

Early engagement provides States with the opportunity to address potential problems and barriers in advance through recommending project changes, or the use of specific practices, or provision of critical data to support decision-making, which would help avoid conflicts and delays. For large and complex projects in

particular this would require meaningful state engagement prior to when the Section 401 “receipt of a request for certification” occurs.

Senator Markey:

11. If Congress passed a bill that significantly narrows the scope of Section 401 of the Clean Water Act, could federal agencies permit projects that directly conflict with state water quality programs? Can you give any examples?

Narrowing States’ delegated authority to evaluate the full water quality impact of federal permitting decisions and their ability to require mandatory conditions would put federal agencies in the position of only considering limited impacts and would likely lead to instances where States’ concerns are discounted in favor of advancing the federal agencies’ missions. As noted earlier, most of the Council’s experience has been with federal permitting of non-federal hydropower projects. As previously described, the Federal agencies have limited understanding of state water quality standards, particularly the complex way they are interwoven with other state and federal programs that support water quality. Without consideration of state requirements and conditions under all the components of state law that support water quality standards, many projects could be permitted that would be in violation of state water quality programs. States would then have to decide whether to pursue enforcement actions under State law or allow the pollution to continue unabated.

12. The Clean Water Act prioritizes states’ role in protecting water quality within their states. In your opinion, would S. 3303 undermine state input in the process?

In my opinion, States have responsibly exercised their delegated authority under Section 401 to protect water quality standards and designated stream uses. Moreover, the law currently recognizes that state water quality interests go well beyond what the Clean Water Act requires. That’s why the current 401 statutory language doesn’t just enumerate sections 301, 302, etc., but rather says applicable water quality requirements and other appropriate requirements of state law.

Limiting States’ broad authority under Section 401 is not in the best interest of efficient, distributed decision-making and cooperative federalism. Nor does it provide equivalent protections. A better option, in my opinion, to expedite certification decisions would be greater involvement of States earlier in federal environmental reviews as noted above in response to question #10.

The role of States in protecting water quality is a critical component of the CWA and appropriately gives States the ability to protect state waters when federal permits or licenses are issued. Traditionally the States have had the primary role in ensuring water quality standards are met and in carrying out and achieving the goals of the CWA. Undermining State’s historic role in both protecting water quality and States’ primary role in allocating state water resources, is contrary to the concept of cooperative

federalism and unravels years of established law, and Congressional deference to States. Inhibiting the State's ability to ensure that historic designated uses and water allocations policies are supported for industry, agriculture, recreation, and wildlife is likely to have detrimental impacts on both the quality of the States' waters and specific economic interests in a state.

S. 3303, as written, would substantially undermine States' authority, autonomy, and input in the Section 401 water certification process. The proposed legislation would diminish water quality protection by unnecessarily limiting States' ability to gather information necessary for review; and unduly curtailing the scope of state review under Section 401.

13. Would requiring states to only look at water discharge, as S. 3303 would do, prevent states from seeing other ways that projects might affect water resources? Can you give any examples?

Limiting the scope of state review to any "discharge," by the applicant, instead of the overall proposed "activity" is a dramatic change from the interpretation of the U.S. Supreme Court, which has held that, under Section 401, States may regulate the impact of a project as a whole, rather than just the associated discharge. The conditions a state may require are not confined to the discharge itself but can also address a range of impacts. PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994). The ruling said that States may regulate the impacts of a project as a whole, so long as there is a discharge involved. Thus, the conditions a state may require are not confined to the discharge itself but can address a range of conditions as part of their certifications.

Narrowing States' review to only "discharges" will affect States' ability to comprehensively evaluate broad water quality impacts under both state and federal law, and has the potential to prevent States from conditioning project related activities that result in non-point source pollution, including stormwater runoff, as well as minimum streamflow requirements, narrative water quality standards, streambed alterations and other state water quality related concerns (See 5.c above).

If the States cannot condition a project to ensure water quality standards are achieved, then States may elect to deny more 401 certifications. Meeting water quality standards requires the flexibility to develop conditions that may ultimately lead to the decision to grant certification, or in the absence of such conditions to deny certification.

It is also important to recognize that States have built their programs around the current law, with the knowledge that Section 401 requirements could be applied to ensure States' water quality standards and designated uses are protected and other relevant state statutes are enforced. The limitations imposed by the legislation would narrow the ability of States to achieve water quality standards through 401 certifications, and many States would pursue other alternative strategies. As States now responsibly act within

their current authority, narrowing that authority will create confusion and likely further litigation.

14. Why might states care about the amount of water in a stream—also known as “minimum stream flow”? Would S. 3303 make it harder for states to manage minimum stream flow?

In the West, water quantity and quality are directly related, and minimum flows are required to maintain designated uses, which including protecting fish and wildlife, as well as achieving related water quality standards. If streamflow is stopped or is too low, fish habitat is adversely affected and fish kills may occur. In addition, low flows can lead to increased stream temperatures, which drive down dissolved oxygen levels threatening fish and other aquatic life.

Maintaining streamflow may be essential to achieving the downstream designated uses within the water quality standards, including agricultural uses, industrial uses, recreational uses and ensuring in some locations that there is sufficient clean water in streams to supply drinking water. The language of the bill could potentially result in federal agencies exerting expanded control over water allocation, which has historically been a state right, as recognized in both the Clean Water Act and the Federal Power Act.

Without the ability under Section 401 to mandate minimum stream flows, States’ ability to require flows under state law would be preempted, pursuant to California v. FERC. This is not only a water quality and environmental protection issues, it is also a water rights and water allocation issue for the States.

15. Would a bill that narrows the scope of Section 401, like the Water Quality Certification Improvement Act, limit a state’s authority to have hydroelectric dam operators better comply with modern water quality standards? Do you think this could undermine the goal of balancing the many uses of our waterways, which has been set in statute for the last 30 years?

Under the Federal Power Act (FPA), in licensing non-federal hydro-electric projects, FERC is directed to balance competing uses of a waterway, including agricultural, energy, environmental and municipal and industrial uses. However, despite FPA Section 27, addressing the rights of States to allocate their water resources, the Supreme Courts interpretation of FERC authority under the FPA means that narrowing States’ Section 401 certification authority will impact States’ ability to protect both the quality and the quantity of water in streams and rivers. It would shift more authority to FERC and away from States to weigh and balance competing uses and protect State designated stream uses and achieve related water quality standards.

As proposed, the legislative changes would greatly reduce States’ authority to ensure compliance with water quality standards and would undermine the CWA’s goals, including balancing the authority between States and the federal government to implement the statute.

Senator Merkley:

16. Water quality is especially important in the West—it has impacts on local economies through irrigation, recreation, maintaining fisheries, and drinking water supply. Hydropower projects in Oregon in particular have impacted surface waters in a positive manner, with 401 certification conditions for dams that address a multitude of concerns, such as water flow requirements, habitat concerns, and fish and wildlife effects. Can you give some examples of 401 certification conditions that may not be directly related to the discharge, but improve downstream water quality and uses?

Please see the response to Question 5.c.

Narrowing the scope of Section 401 from “activity” to “discharge” would limit a State’s ability to condition certification to ensure water quality standards are achieved. Other provisions of the bill place constraints on how it would be used, as indicated in answers to previous questions. This is likely to lead to substantial uncertainty and litigation related to the changes in the law.

One example of a consequence would be limiting a state’s ability to prevent actions that destabilize streambanks leading to pollution from sedimentation and threats to aquatic life, as well as human safety and property, resulting from increased erosion and sedimentation.

Another illustrative example is again the States’ ability to mandate minimum bypass flows around hydropower facilities to protect downstream uses and manage instream temperatures, for the benefit of the aquatic environment, including fish and wildlife. Protection of swimmable and fishable streams is a basic purpose of the Clean Water Act, and States can and do designate streams for fishery purposes, both commercial and recreational, and set water quality standards to protect those fisheries and primary contact recreational uses. Section 401 conditions are used to protect these and other designated uses.

17. There are many benefits to 401 certification conditions that may not be directly related to the discharge, for water quality and other areas as well. Can you speak to some potential economic benefits for local communities that may result from 401 certification conditions?

There are many economic benefits to clean sustainable water supplies. The WSWC was created to advise the governors on strategies to ensure that the West has adequate supplies of water of suitable quality for present and future uses. States protect watersheds that provide ecological and other services. Streams provide essential drinking water to communities, as well as aesthetic and recreational opportunities, including fish and wildlife benefits supporting tourism and related economies. Clean water protected by state standards for agricultural and industrial uses are also important

to state and local economies, as well as the national economy. In the West, the economic contribution of recreation and tourism is well documented. Degraded water quality also imposes costs related to water and wastewater treatment.

Water quality standards provide an important tool for States to balance economic uses, environment, and human health with respect to a state's water resources. As discussed in previous questions, the proposed changes to Section 401 could significantly reduce a state's ability to achieve that balance.

18. S. 3303 will limit state agencies to just 90 days in which to identify all necessary materials, information, or deficiencies in an application for 401 certification. What are some of the negative downstream impacts would you expect to see if a State were forced to act on incomplete or rushed applications?

As earlier described, large complex projects often change over time as the permitting and licensing process proceeds in response to any number of factors, some related to federal regulator requirements and other due to technological or economic obstacles. The 90-day requirement would not allow States to address any future changes in the scope or impact of a project on state water quality standards. As a result, States may deny more 401 certification requests. In addition to an increase in denials, some projects may be granted a federal license or permit in spite of possible violations of state water quality standards, which could eventually lead to enforcement action

States are concerned that the inability to have sufficient information to condition a permit or license to meet water quality would result in limiting the States' ability to ensure compliance with water quality standards and support state-designated uses, including agricultural, fish and wildlife, municipal and industrial, and recreational uses. Degradation of water quality may lead to more state waters being identified as impaired, which may subsequently lead to threats to human health, decreased property values (adjacent to the newly impaired streams) and loss of aquatic life, including highly valued game species such as rainbow and brook trout.

S. 3303 would unnecessarily and arbitrarily constrain States' ability to identify and gather all information necessary to make an accurate assessment of the potential impacts of a proposed project upon water quality. As a result, States would inevitably lack the information and time necessary to make informed, scientifically sound and legally-defensible determinations. States would be forced to deny a greater number of requests for certification, which would likely lead to increased litigation and delay development of projects requiring state certification.

An informed understanding of the scope and impacts of the proposed activity is necessary for States to identify what, if any, additional data or materials are necessary to make a decision. Early engagement can improve this flow of information for complex projects. This likely has the ancillary benefit of improving permit processing times by improving the overall quality of certification requests.