

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, 102^d 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 and 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.