

August 15, 2018

The Honorable John Barrasso
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

The Honorable Thomas R. Carper
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of our millions of members and supporters nationwide, we write in opposition to S. 3303, the “Water Quality Certification Improvement Act of 2018” and any other efforts to undercut state authorities under section 401 of the Clean Water Act (CWA).

In 2006, the United States Supreme Court unanimously ruled that “[s]tate certifications under [Section] 401 are essential...to preserve state authority to address the broad range of pollution.” We agree, which is why we urge the Committee to reject S. 3303.

The Clean Water Act gives the states a key role in implementing water quality standards for direct discharges and non-point source pollution. Under section 401 of the CWA, states and tribal authorities enjoy the ability to ensure federal permits and licenses comply with state water quality standards and state law by requiring that permit applicants obtain state or tribal certification that their projects have met those conditions that would ensure the project’s compliance with applicable federal, state, and tribal law. This legislation would undermine the ability of states and tribal authorities to ensure that proposed projects comply with state and tribal water quality standards.

The states and the federal government enjoy a special partnership for purposes of implementing the Clean Water Act. Congress specifically designated states and tribal authorities as co-regulators, recognizing state interests and authorities. As proposed, S. 3303 would run counter to the purpose of the Act and overturn decades of deference to state authority by diminishing the ability of states to manage or protect water quality, and in some cases quantity, within their boundaries.

S. 3303 could lead to an overly narrow reading of section 401 that would deprive states of the ability to maintain those beneficial uses the Clean Water Act was designed to protect. Federal agencies would be able to override state and tribal concerns and permit some activities and projects that would directly conflict with state and tribal efforts and investments in pollution control programs, fish recovery programs, temperature control mechanisms, minimum-flow requirements, and other essential activities. Because states have been authorized to implement Clean Water Act programs, it only makes sense that they have the power to ensure a federally permitted activity does not impair state waters, in accordance with the state standards.

This legislation subordinates the expertise of state and tribal regulators and the interests of state and tribal governments to the interests of the federal government. For example, when certifying a federal permit, some states may find it necessary to condition the certification on meeting state buffer

requirements to ensure state water quality standards are not impacted. S. 3303 would remove that state authority. Because S. 3303 limits the state analysis to discharges only, it could be interpreted to prevent a state from considering the impact of a project or activity on non-point sources of pollution, including increased impervious surfaces and associated impacts to water quality.

Furthermore, this legislation places unreasonable time constraints on states during the 401 certification process. By requiring states and tribal authorities to grant or deny a request for certification within one year, the state agencies may be forced to make a decision before they have all the relevant information or may rush their analysis in order to meet a deadline. Additionally, by limiting state agencies to 90 days in which to identify all necessary materials, information, or deficiencies in an application for certification, S. 3303 may force the states to make decisions without all of the relevant information. This creates a dynamic where, unless every step of the process proceeds seamlessly, agencies are faced with the impossible decision to either exercise their authority without necessary information (which exposes them to legal liability) or to fail to meet the schedule. This change will constrain federal, state, and tribal agency use of their independent authorities and rush decision making, potentially making it more difficult to protect water quality, recover threatened and endangered species, and manage tribal-trust resources and public lands. States, constrained by the proposed time limitations, may deny certifications more often because they will not have enough information for decision making. Last, federal agencies and developers may be incentivized to withhold information in order to get a decision within a certain period of time.

This proposed legislation would also impact a state's role in hydropower relicensing. Because hydropower licenses are issued for up to 50 years, many hydropower facilities that are now coming up for relicensing were first constructed before virtually all modern environmental laws were in place. It is during relicensing proceedings that the public gets the opportunity to ensure that dam owners make the necessary changes to comply with modern laws. The opportunity to mitigate for the damage to the environment, while still providing reliable electricity, only arises once in a generation or two. S. 3303 would significantly curtail state and tribal authority to ensure the licenses include conditions that protect state water quality standards and beneficial uses.

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. This authority has helped ensure that activities associated with federally permitted discharges will not impair state water quality. S. 3303 does not reflect the historic relationship between states and the federal government with respect to managing water, and instead would upend the careful balance between the states and the federal government inherent in the Clean Water Act. By seizing power from states and tribes, S. 3303 puts the interests of power companies, pipelines, railroads, and other developers ahead of the interests of the states and the public that wants to enjoy access to clean water.

We urge the Committee to reject S. 3303.

Sincerely,

American Rivers
American Whitewater
Clean Water Action
Earthjustice
Environment America
Environmental Protection Network
Friends of the Earth
Hip Hop Caucus
Izaak Walton League of America
League of Conservation Voters
National Audubon Society
National Latino Farmers & Ranchers Trade Association
National Parks Conservation Association
National Wildlife Federation
Natural Heritage Institute
Natural Resources Defense Council
Quad Cities Waterkeeper Inc.
Rachel Carson Council
Sierra Club
Waterkeeper Alliance
Alliance for the Great Lakes
Religious Coalition for the Great Lakes
Environmental Law & Policy Center, *Midwest*
New England FLOW
Connecticut River Conservancy, *Northeast*
Waterkeepers Chesapeake
Appalachian Mountain Club, *Southeast*
Southern Environmental Law Center
Tennessee Riverkeeper, *Southeast*
Pacific Coast Federation of Fishermen's Associations (PCFFA)
Western Organization of Resource Councils
Black Warrior Riverkeeper, *Alabama*
One World Adventure, *Alabama*
Alaska Survival
Kenai River Watershed Foundation, Inc., *Alaska*
Susitna River Coalition, *Alaska*
California Sportfishing Protection Alliance
Environmental Protection Information Center, *California*
Humboldt Baykeeper, *California*
Klamath Forest Alliance, *California*
San Francisco Baykeeper, *California*
South Yuba River Citizens League, *California*
Animas Riverkeeper, *Colorado*

Delaware Nature Society
Potomac Riverkeeper Network, *District of Columbia*
Apalachicola Riverkeeper, *Florida*
Emerald Coastkeeper. Inc., *Florida*
Tampa Bay Waterkeeper, *Florida*
Altamaha Riverkeeper, *Georgia*
Chattahoochee Riverkeeper, *Georgia*
Coosa River Basin Initiative/Upper Coosa Riverkeeper, *Georgia*
Ogeechee Riverkeeper, *Georgia*
Idaho Rivers United
Kootenai Environmental Alliance, *Idaho*
Selkirk Conservation Alliance, *Idaho*
Holy Spirit Missionary Sisters - USA-JPIC, *Illinois*
Hoosier Environmental Council, *Indiana*
Indiana Wildlife Federation
Lower Ohio River Waterkeeper, *Indiana*
Northwest Indiana Steelheaders, *Indiana*
Wabash Riverkeeper, Banks of the Wabash, Inc., *Indiana*
Friends of the Kaw, *Kansas*
Atchafalaya Basinkeeper, *Louisiana*
Conservation Law Foundation, *Maine*
Friends of Merrymeeting Bay, *Maine*
Natural Resources Council of *Maine*
Audubon Naturalist Society, *Maryland*
South River Federation, Inc., *Maryland*
SouthWings, *Maryland*
St. Mary's River Watershed Association, *Maryland*
Upper Peninsula Environmental Coalition, *Michigan*
WasteWater Education 501(c)3, *Michigan*
Yellow Dog Watershed Preserve, *Michigan*
Minnesota Division Izaak Walton League of America
Save Our Sky Blue Waters, *Minnesota*
Pearl Riverkeeper, *Mississippi*
Upper Missouri Waterkeeper, *Montana*
Raritan Riverkeeper, *New Jersey*
Buffalo Niagara Waterkeeper, *New York*
Concerned Citizens of Cattaraugus County , *New York*
Genesee Valley Audubon Society, *New York*
Sierra Club Niagara Group, *New York*
WE ACT for Environmental Justice, *New York*
WESPAC Foundation, Inc, *New York*
Western New York Environmental Alliance
Broad River Alliance, a Waterkeeper Affiliate, *North Carolina*
Carolina Canoe Club, *North Carolina*

Catawba Riverkeeper Foundation, *North Carolina*
Coastal Carolina Riverwatch, *North Carolina*
Crystal Coast Waterkeeper, *North Carolina*
Green Riverkeeper, *North Carolina*
MountainTrue, *North Carolina*
Riover Guardian Foundation, *North Carolina*
White Oak-New Riverkeeper Alliance, *North Carolina*
Yadkin Riverkeeper, *North Carolina*
Watauga Riverkeeper , *North Carolina*
Winyah Rivers Foundation, *North Carolina & South Carolina*
Headwaters Chapter Izaak Walton League of America, *Ohio*
Junction Coalition, *Ohio*
Ohio River Foundation
Columbia River Estuary Action Team, *Oregon*
Deschutes River Alliance, *Oregon*
Friends of the Columbia Gorge, *Oregon*
Greater Hells Canyon Council, *Oregon*
KS Wild, *Oregon*
Oregon Physicians for Social Responsibility
WaterWatch of *Oregon*
Western Environmental Law Center, *Oregon*
Lower Susquehanna Riverkeeper Association , *Pennsylvania & Maryland*
Middle Susquehanna Riverkeeper Association, Inc., *Pennsylvania*
PennFuture
Pennsylvania Council of Churches
Audubon South Carolina, *South Carolina*
Friends of the Reedy River , *South Carolina*
Mountain Bridge Trout Unlimited, *South Carolina*
Naturaland Trust, *South Carolina*
Save Our Saluda, *South Carolina*
Spearfish Canyon Society, *South Dakota*
Bayou City Waterkeeper, *Texas*
Living Rivers & Colorado Riverkeeper, *Utah*
Rappahannock League for Environmental Protection, *Virginia*
Center for Environmental Law and Policy, *Washington*
Conservation Northwest, *Washington*
Kettle Range Conservation Group, *Washington*
Loo Wit Group of Sierra Club, *Washington*
North Cascades Conservation Council, *Washington*
Puget Soundkeeper Alliance, *Washington*
The Lands Council, *Washington*
Washington Environmental Council
Cacapon Institute, *West Virginia*
Sleepy Creek Watershed Association, *West Virginia*

West Virginia Rivers Coalition

Milwaukee Riverkeeper, *Wisconsin*

Superior Rivers Watershed Association, *Wisconsin*

Wisconsin Metro Audubon Society, *Wisconsin*

Wisconsin Trout Unlimited, *Wisconsin*

American Packrafting Association, *Wyoming*