



Oct. 3, 2018

Toi Hutchinson
State Senator
Illinois
President, NCSL

Jon Heining
General Counsel
Legislative Council
Texas
Staff Chair, NCSL

William Pound
Executive Director

The Honorable Mitch McConnell
Majority Leader
United States Senate

The Honorable Chuck Schumer
Democratic Leader
United States Senate

The Honorable Paul Ryan
Speaker
United States House of Representatives

The Honorable Nancy Pelosi
Democratic Leader
United States House of Representatives

The Honorable John Barrasso
Chairman
Senate Environment and Public Works
Committee

The Honorable Tom Carper
Ranking Member
Senate Environment and Public Works
Committee

The Honorable Bill Shuster
Chairman
House Transportation and Infrastructure
Committee

The Honorable Peter DeFazio
Ranking Member
House Transportation and Infrastructure
Committee

The Honorable Rodney Frelinghuysen
Chairman
House Appropriations Committee

The Honorable Nita Lowey
Ranking Member
House Appropriations Committee

RE: Protecting States' Authorities Under Section 401 of the Clean Water Act

Dear Majority Leader McConnell, Democratic Leader Schumer, Speaker Ryan, Democratic Leader Pelosi, Chairmen Barrasso, Shuster and Frelinghuysen, and Ranking Members Carper, DeFazio, and Lowey,

On behalf of the National Conference of State Legislatures (NCSL), the bipartisan organization representing the legislatures of our nation's states, territories and commonwealths, I write to express NCSL's concerns surrounding recent congressional attempts to erode the cooperative federalism principles within the Clean Water Act (CWA) by restricting states' authorities to protect and manage their water resources.

Specifically, the Water Quality Certification Improvement Act of 2018, S. 3303, seeks to deny

states their authority to account for their unique water quality needs when determining if a project meets specifications for certification. It would also require states to abide by a more stringent timeline, ignoring the intricacies of such a certification process. In the House, *Building 21* includes provisions that would restrict state authority under the CWA. Additionally, both the House's Appropriations Committee Report on the Department of Interior, Environment and Related Agencies 2019 Appropriations Bill, and its Report on the House's Energy and Water Development, and Related Agencies 2019 Appropriations Bill, include provisions that would, if enacted, call for the review and restriction of state authority under Section 401. Such efforts are in direct opposition to the original intent of the CWA and would deprive states of the ability to defend the very resources the CWA was designed to protect.

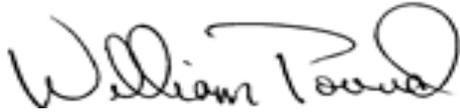
Over 40 years ago, Congress enshrined the principle of cooperative federalism into the CWA—explicitly stating in Section 101 that “it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources,” and that “federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.” This model of cooperative federalism within the CWA acknowledges that a singular, universal approach to water protection and management does not consider the unique water challenges individual states face, and instead affords states the flexibility required to address their water needs as they see fit, relying upon the expertise within their state to protect the unique chemical, physical and biological integrity of the nation's waters. Specifically, Section 401 of the CWA, which provides states the ability to certify, or condition, “any activity” which “may result in any discharge into the [Nation's] navigable waters,” ensures that permits issued at a desk in Washington do not negatively impact water quality at a farm in Kentucky, a lake in New York or a city in California.

Additionally, the U.S. Supreme Court has addressed this issue twice—once in 1994, and again in 2006. In both instances, the court acted to reaffirm and strengthen states' authorities to protect their water resources. In 1994, in *PUD No. 1 v. Washington Department of Ecology*, the Court found that the CWA went beyond allowing states to issue or deny certification based solely on discharges of the project and allowed states to include additional limitations on the activity as a whole in order to protect their water quality standards. Again, in 2006, in *S.D. Warren Co v. Maine Bd. Of Environmental Protection*, the Court affirmed that “state certifications under Section 401 are essential in the scheme to preserve state authority to address the broad range of pollution.”

As the 115th Congress comes to a close and preparations for the 116th begin, we urge you to uphold states' authorities to manage and protect the water within their boundaries. Federal policy should be directed towards strengthening the capacity of states to act as the integrator and manager of all programs affecting their water resources, not stripping them of that role. Any alteration of Section 401 should be done with great care and caution to avoid unintended consequences for states and done in such a manner that preserves states' rights to use Section 401 authority to protect their waters. NCSL looks forward to a continuing dialogue to ensure that the principle of cooperative federalism, as modeled in the CWA, is maintained. If you have any additional questions or would like to discuss further, please contact NCSL staff Kristen Hildreth

at kristen.hildreth@ncsl.org, or 202.624.3597, and Ben Hush at Ben.Husch@ncsl.org, or 202.624.7779.

Sincerely,

A handwritten signature in black ink that reads "William T. Pound". The signature is written in a cursive style with a large, prominent "W" and "P".

William T. Pound
Executive Director
National Conference of State Legislatures