

Congress of the United States
Washington, DC 20515

December 20, 2019

Mr. David Ross
Assistant Administrator
Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Assistant Administrator Ross:

We write to express our serious concerns regarding the proposed rule entitled, "Updating Regulations for Water Quality Certification," which attacks state and tribal rights under Section 401 of the Clean Water Act (CWA). We urge EPA to withdraw this harmful proposal.

Section 401 review empowers states and authorized tribes¹ to issue water quality certifications (WQCs) that must be included within certain federal permits and licenses. These permits and licenses cover such projects as pipeline and hydropower development, sewage and wastewater treatment, and the dredging of rivers and filling of wetlands. Importantly, these permits cannot be issued unless the states and authorized tribes are given an opportunity to ensure that local resource management standards consistent with the CWA are satisfied. Section 401 is vital as it can be states' and authorized tribes' only meaningful opportunity to protect their water resources from potentially harmful projects. Undermining this authority will not only put critical resources at risk, but also the local communities and tribes that rely on these resources.

The CWA was enacted in 1972 to restore and maintain the integrity of the Nation's waters. Section 401, which was added to the CWA in 1973, recognizes that the Environmental Protection Agency (EPA) alone could not provide sufficient oversight and guidance of the Nation's waters, but needed to work collaboratively with states and tribal authorities. The U.S. Supreme Court has also upheld this intent, hailing Section 401 as a model of cooperative federalism and "essential in the scheme to preserve state authority to address the broad range of pollution"² that threatens our nation's waters. Unfortunately, EPA's proposal, which was prompted by Executive Order 13868, appears to be intended to promote the development of new energy infrastructure regardless of the environmental and community impact concerns raised by states and tribes.

Beyond the substance of the proposed rule being diametrically opposed to the intent of Congress, EPA's proposed rulemaking attempts to overturn the Supreme Court's precedent as decided in *P.U.D. No.*

¹ About 60 tribes have applied and received "treatment as state" approval from EPA to exercise their own 401 authority under the Clean Water Act. They are referred to here as authorized tribes. *Tribes that have not received the "treatment as state" approval rely on the EPA to exercise §401 authority for them as trustee.*

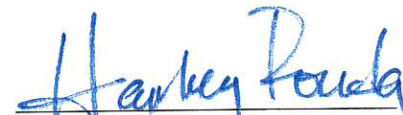
² *S.D. Warren Co. v. Maine Bd. Of Environmental Protection*, 547 U.S. 370 (2006)

1 of *Jefferson County v. Washington Department of Ecology* (511 U.S. 700)³ and *S.D. Warren v. Maine Board of Environmental Protection* 547 U.S. 370 (2006)⁴. It's incumbent on EPA to uphold its mission to protect public health and the environment and maintain the rights of state and tribal authorities as Congress intended.

The implementation and enforcement of science-based and legally defensible water quality standards are as important today as they have ever been. The current proposed rule stands to limit the scope of what states and authorized tribes may review and prevent states and authorized tribes from working with applicants to ensure that applications include the information states and authorized tribes deem necessary under state and tribal law. These changes are not consistent with Section 401 and will make it impossible for states and authorized tribes to fulfill their obligations under the CWA – leading to project delays and approval of projects that are damaging to water quality, biodiversity, and human health. Section 401 has provided communities a voice in the federal permitting process to not only safeguard their local resources but to protect frontline communities who are disproportionately impacted by environmental stressors.

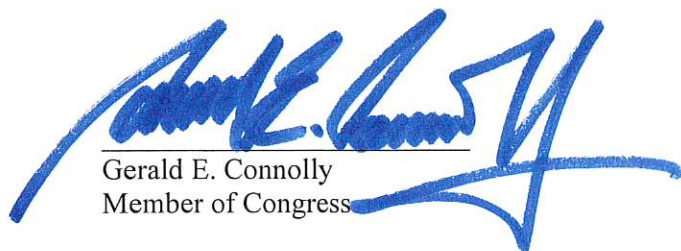
Ensuring the fullest protections of our waters is essential to communities, especially our most vulnerable, and ecosystems across the Nation. Our constituents rely on clean water for consumption, recreation, and agriculture, not to mention the use of water in industrial and commercial operations. For these reasons and more, we respectfully urge EPA to withdraw the proposed rule.

Sincerely,



John P. Sarbanes
Member of Congress
Harley Rouda
Member of Congress
Deb Haaland
Member of Congress
Paul Tonko
Member of Congress

³ In *Jefferson County*, the Court ruled 7-2 that §401 enabled the State of Washington (and any state or authorized tribe) to impose conditions on a license to maintain water quality standards regardless of whether the entity seeking the license itself alters the condition of the waterway. In other words, states and authorized tribes can prevent projects impacting water quality from contributing to downstream impairment,

⁴ In *S.D. Warren*, the Court upheld the State of Maine's right to issue 401 certifications for hydroelectric dams by a vote of 9-0. The decision reaffirmed that the Clean Water Act applies broadly to the management of water quality. Although the "discharge" through a dam is mostly water, the discharging itself changes the physical and chemical nature of the waterway, thereby requiring that the state be allowed to exercise its authority under §401



Gerald E. Connolly
Member of Congress



A. Donald McEachin
Member of Congress



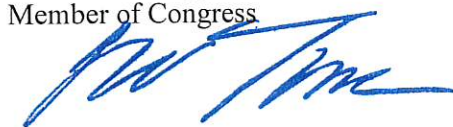
Matthew Cartwright
Member of Congress



Mike Quigley
Member of Congress



C.A. Dutch Ruppersberger
Member of Congress



David Trone
Member of Congress



Betty McCollum
Member of Congress




Lucille Roybal-Allard
Member of Congress



Doris Matsui
Member of Congress



Chellie Pingree
Member of Congress



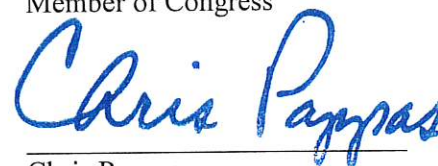
Alan Lowenthal
Member of Congress



Nanette Diaz Barragan
Member of Congress



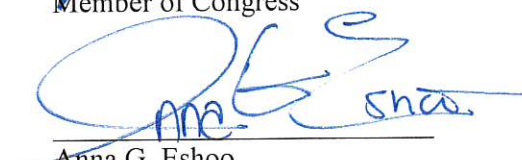
Raúl M. Grijalva
Member of Congress



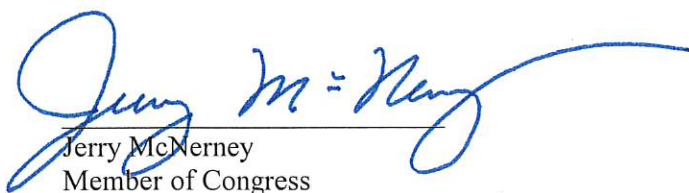
Chris Pappas
Member of Congress



Jared Huffman
Member of Congress

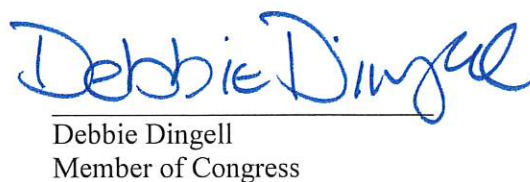


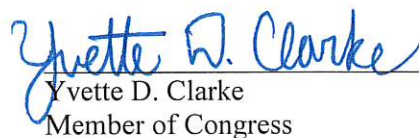
Anna G. Eshoo
Member of Congress

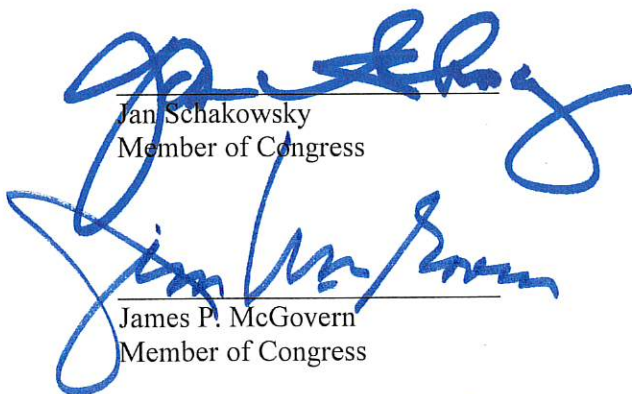

Jerry McNerney
Member of Congress



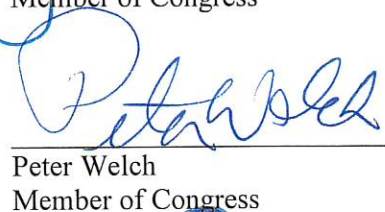
Anthony G. Brown
Member of Congress


Debbie Dingell
Member of Congress

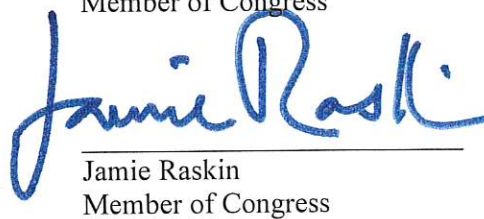

Yvette D. Clarke
Member of Congress

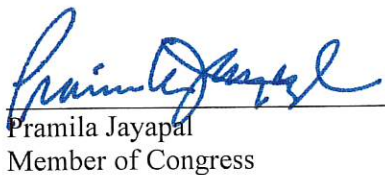

Jan Schakowsky
Member of Congress


Jackie Speier
Member of Congress


Peter Welch
Member of Congress


Grace Napolitano
Member of Congress


Jamie Raskin
Member of Congress


Pramila Jayapal
Member of Congress