

# Reject Attacks on States' and Tribes' Ability to Protect Their Water: The Importance of Clean Water Act Section 401

**The Clean Water Act is one of our nation's bedrock environmental laws.** Congress passed this popular law in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To protect water resources, section 401 of the Clean Water Act authorizes states and tribes to review the impacts of many different types of federally-licensed projects on waterways within their borders and to limit or stop unacceptable projects. States and tribes have up to one year to act on a request for water quality "certification" for a project. Some projects have the potential to significantly degrade water quality by, for example, cutting trenches through hundreds of waterways, damming major rivers, or destroying acres of wetlands.

**Section 401 review can be states' and tribes' only meaningful opportunity to protect their own resources.** States and tribes review hundreds of 401 certification requests annually, allowing for better protection of water resources for all uses, including: drinking water; commercial, tribal, and recreational fishing; swimming; critical wildlife habitat; and outdoor recreation. Because federal agencies may not adequately protect state or tribal resources



and because states are preempted by federal law from regulating certain discharging projects, state and tribal representatives strongly oppose weakening state authority under the Clean Water Act.

The Trump administration and some members of Congress are trying to attack this important safeguard, **diminishing the important role states and tribes play in managing and protecting water quality within their boundaries.**

## Attacks on Section 401 of the Clean Water Act

**On June 7, 2019, EPA released a new policy statement** that reveals the agency's plan to undercut states' authority under 401, as directed by an Executive Order signed by President Trump on April 10. This new "guidance" changed EPA's prior position that the review period only begins when a complete application is submitted. Additionally, EPA plans to propose new regulations in August 2019, which will likely include new limitations on states' and tribes' ability to protect water quality under 401, such as:

- **Limiting the reasons states and tribes can reject, or place conditions on, projects that could pose harm to water quality.** By restricting the kinds of considerations on which states and tribes can base certification decisions, EPA would constrain states' and tribes' longstanding authority to ensure that important state water resources are not damaged by federally-permitted actions. The agency also indicated that a future rule could allow a federal agency to overrule a state if it determines the state has not relied on an "appropriate" factor, again limiting state and tribal authority.
- **Limiting state and tribal authorities' ability to adequately review applications by imposing arbitrary time constraints.** As noted, EPA's guidance says the review period starts immediately upon receipt of a request for approval, even if a state has not received sufficient information to assess the project. The new regulations will likely codify this change and make additional changes limiting the amount of time states have to review projects. Together, these regulatory changes could create a perverse incentive for applicants to withhold information or cause the state to deny projects simply because they do not have all of the relevant information.

All of these potential changes would leave states and tribes without enough time, information, or resources to ensure that a project will not harm water quality.

**Legislation has been introduced (S. 1087 and H.R. 2205) that would similarly limit state and tribal authority under Section 401 of the Clean Water Act.** It is vital that members of Congress oppose these legislative attacks to ensure that states and tribes continue to have the ability to ensure that federally licensed projects do not harm downstream fisheries, historical or cultural resources, water quality, or other public interests.

## Examples of projects where states have acted in accordance with Clean Water Act Section 401 to protect their water quality

**Longview Coal Terminal:** In 2017, the State of Washington's Department of Ecology denied a section 401 certification for a proposed coal export facility in Longview. The proposed terminal would have been the largest coal export facility in North America, sending up to 44 million tons of coal overseas annually. It would also have caused 16 additional mile-and-a-half long trains per day to travel between the Powder River Basin in Montana/Wyoming and Longview. During its review, the Ecology Department detailed impacts including the potential for significant accumulations of coal dust pollution in and along the Columbia River, harm from more than 1,600 additional large vessel trips through the Columbia River estuary, harm to Tribal fishing access, and the destruction of dozens of acres of ecologically vital wetlands.

**Conowingo Dam:** The Conowingo Dam and Reservoir is a major hydroelectric operation owned and operated by Exelon Generating Company that crosses the lower Susquehanna River, just north of its confluence with the Chesapeake Bay. As part of its process to obtain a 50-year federal operating license, Exelon must get a water quality certification from Maryland under section 401. Maryland's Department of the Environment certified the renewal with special conditions that require Exelon to reduce sediment and nutrient pollution that flow from the dam and associated reservoir into the lower Susquehanna River and the Bay. Exelon has challenged this pollution cleanup requirement, even though it is well within Maryland's authority under the Clean Water Act. Exelon's refusal to clean up the pollution in its reservoir undermines the health of the Chesapeake Bay, forcing Maryland residents to carry the cost of clean-up.



**Constitution Pipeline:** As proposed, the Constitution Pipeline would have cut a 100-foot wide swath through four New York counties, crossed waterways 251 times, disturbed 3,161 linear feet of streams, destroyed or degraded at least 95 acres of wetlands, and stripped the area of thousands of acres of trees. During its review of these impacts under section 401, New York State's Department of Environmental Conservation determined that the company failed to meaningfully address the project's profound water resource impacts. This failure led to the denial of its certification.

# PROTECT WATER QUALITY: Oppose any attack on Section 401 of the Clean Water Act!

### Questions/Comments? Contact:

Jenifer Collins, Earthjustice, [jcollins@earthjustice.org](mailto:jcollins@earthjustice.org)

Kate Miller, Trout Unlimited, [kate.miller@tu.org](mailto:kate.miller@tu.org)

Brendan Mysliwiec, Appalachian Trail Conservancy, [bmysliwiec@appalachiantrail.org](mailto:bmysliwiec@appalachiantrail.org)

Jon Devine, Natural Resources Defense Council, [jdevine@nrdc.org](mailto:jdevine@nrdc.org)

**CLEAN  
WATER  
FOR ALL**