



Committee on Transportation and Infrastructure
U.S. House of Representatives

Peter A. DeFazio
Chairman

Washington, DC 20515

Sam Graves, MO
Ranking Member

July 29, 2019

Katherine W. Dedrick, Staff Director

Paul J. Sass, Republican Staff Director

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Dear Administrator Wheeler:

This letter requests that the U.S. Environmental Protection Agency (“EPA”) provide the Committee on Transportation and Infrastructure with information that will assist the Committee in further understanding the impacts of any changes in the Agency’s interpretation of Section 401 of the Federal Water Pollution Control Act Amendments of 1972, more commonly known as the Clean Water Act (“Act”).

Following President Trump’s issuance of Executive Order 13868, titled “Promoting Energy Infrastructure and Economic Growth” on April 10, 2019, EPA began the process of developing new guidance for implementing Section 401 of the Clean Water Act. On June 7, 2019, the EPA issued new guidance, entitled “Clean Water Act Section 401 Certification Guidance for Federal Agencies, States, and Authorized Tribes.” According to the Office of Information and Regulatory Affairs at the Office of Management and Budget, the EPA will propose a rule in August of this year regarding the “Clarification of State Certification Procedures Under Section 401 of the Clean Water Act.”¹

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 Act, states and tribal authorities enjoy the ability to ensure that federal permits and licenses comply with state water quality standards and state law. States and tribal authorities can require 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. The role of states under Section 401 is an essential component of the Act’s system of cooperative federalism.

The June 2019 EPA guidance is a departure, and in some cases a reversal, from EPA’s previous guidance on Section 401. For example, in the EPA’s most recent guidance, EPA reverses its policy regarding the commencement of a one-year timeline for state review. Whereas EPA’s

¹ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2040-AF86>.

The Honorable Andrew Wheeler

July 29, 2019

Page 2

previous policy was that states determined what a “complete application” is, the new guidance would have the clock start as soon as the state receives a written request for certification.

Additionally, while EPA once recognized a state’s authority to determine which materials it needed in order to make a Section 401 certification determination, the latest guidance overturns this precedent and limits states to reviewing only the application materials submitted, regardless of whether these materials are complete or provide necessary information for states to adequately review the impacts of the proposed activity or project. These are just two examples of the June 2019 EPA guidance attempting to curtail states’ authority under Section 401. Therefore, the Committee has an interest in understanding the Agency’s justification for its proposed changes to Section 401.

In order to evaluate the basis for and impacts of EPA’s guidance titled “Clean Water Act Section 401 Certification Guidance for Federal Agencies, States, and Authorized Tribes” and its forthcoming rulemaking, I am requesting that EPA provide the following information to the Committee on Transportation and Infrastructure:

1. Any correspondence to or from entities other than states or tribal nations concerning proposed changes to Section 401 of the Act.
2. Any records of meetings or phone calls – including notes of such interactions – with entities other than states or tribal nations concerning potential changes to Section 401.
3. Any correspondence to or from states or tribal nations concerning potential changes to Section 401.
4. Any records of meetings or phone calls – including notes of such interactions – with states or tribal nations concerning potential changes to Section 401.
5. Any data on the number of state certifications under Section 401 over the past 10 years, how many of those requests for certification were denied, how many were granted with conditions, how long the average time to complete the certification was, the average time for the state to determine the application was complete, the types of projects for which certification was sought, and the average amount of time for federal agencies to issue the final approval for projects after a State issues section 401 certifications.
6. Provide EPA’s explanation of the statutory basis for its proposed limits to what constitutes “appropriate state law” in the recent guidance and forthcoming regulations.

Thank you for your prompt attention to this matter, and I request a reply as soon as possible, but no later than September 3, 2019. Please provide two sets of copies of all of the requested data above. Please deliver one set of these records to the Majority Staff in Room 2165 of the Rayburn House Office Building and one set of records to the Minority Staff in Room 2164 of the Rayburn House Office Building. If you have any questions, please contact Navis Bermudez of the Committee on Transportation and Infrastructure at (202) 225-0060.

Sincerely,


PETER A. DeFAZIO
Chairman

cc: Representative Sam Graves, Ranking Member