Oral Statement Regarding the EPA's "Notice of Intention To Reconsider and Revise the Clean Water Act Section 401 Certification Rule"

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Thank you for this opportunity to provide comments.[1]

My name is Daren Bakst and I'm a Senior Research Fellow at The Heritage Foundation. The views I express in this statement are my own and shouldn't be construed as representing any official position of The Heritage Foundation.

A central feature of the Clean Water Act (CWA) is cooperative federalism. Section 401 is a great example of this feature.

States can use the Section 401 certification process to ensure that state water quality won't be harmed by federally permitted activities.[2]

But what happens when states abuse this process to address issues that have nothing to do with water quality?[3] What happens when non-water quality issues delay critical projects?

For example, the state of Washington blocked the Millennium Bulk Terminal project, a proposed large coal export facility along the Columbia River that would help export coal to Asia.

In order to deny the Section 401 certification, the state of Washington heavily relied upon factors that have nothing to do with water, such as vehicle traffic, train noise, and rail safety.[4]

In the final 401 certification rule,[5] the EPA provided numerous examples of abuse.

For example, the EPA explained:

Certifying authorities have on occasion required in a certification condition the construction of biking and hiking trails, requiring one-time and recurring payments to State agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and the creation of public access for fishing along waters of the United States.

The final 401 rule would eliminate some of these abuses.

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[1] These comments were drafted to be presented orally.
[2] In the preamble of the rule, the EPA correctly states, "The imposition of conditions unrelated to water quality is not consistent with the scope of the CWA generally or section 401."
[3] See e.g. https://www.epw.senate.gov/public/index.cfm/press-releases-republican?ID=C879237F-48BD-4173-8440-73DE2B363C80
[4] See e.g. https://ecology.wa.gov/DOE/files/83/8349469b-a94f-492b-acca-d8277e1ad237.pdf
[5] https://www.epa.gov/sites/production/files/2020-07/documents/clean_water_act_section_401_certification_rule.pdf

The rule text itself correctly states, "[t]he scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements."

There are two key components of this scope language that helps to ensure the section 401 process is consistent with the Clean Water Act. First, states are required to focus on discharges from the activity itself and not on other alleged impacts of a project. Second, states must focus on water quality requirements only and not use the process to achieve other state objectives, such as addressing climate change.

The EPA should maintain the 401 certification rule's efforts to address these abuses.

I appreciate concerns regarding cooperative federalism. That's why, for example, I would hope the EPA doesn't undermine cooperative federalism as it has in the past by trying to claim that almost every water is a "water of the United States."

Fortunately, the 401 certification rule doesn't create cooperative federalism problems. In fact, it strengthens the cooperative federalism model. It would simply rein in abuses and ensure that the cooperative federalism model of Section 401 is applied consistently with the plain language and intent of the Clean Water Act.

After all, Section 401 doesn't give states a green light to veto projects for whatever reasons they desire.

Thank you.