

Weakening Section 401 of the Clean Water Act Eviscerates State Efforts to Protect Communities and Address Climate Change

- Section 401 of the Clean Water Act provides states and tribal nations an opportunity to review any project that requires a federal permit, which could impact streams, rivers and lakes within their jurisdiction. States and tribes may grant certification, require additional conditions on a project, deny the certification or waive their right to review a project.
- Section 401 clearly allows a state to deny a project such as an oil/gas pipeline if the project does not “comply with any applicable effluent limitations and other limitation” set forth by the Clean Water Act as well as any “other appropriate requirement of state law.”
- Section 401 provides states and tribes an important safeguard to protect water quality as well as meet larger policy objectives of protecting the environment and the well-being of its communities while also addressing climate change. Section 401 also has been used to address endangered species conservation, protect groundwater from pollution, reduce the risk of landslide to communities, and protect unique habitats.
- Senator Manchin’s draft legislation fundamentally changes Section 401 of the Clean Water Act by eliminating changes set forth in 1972 by prohibiting states from denying certification based on “other appropriate requirement of state law.” These changes would also set an arbitrary deadline of six months to complete Section 401 reviews, making it less likely that state and tribal agencies can adequately assess project impacts.

States Have Used Section 401 to Protect the People, Climate, and the Environment

- States have denied certification to projects that would worsen climate change, harm communities, and violate state laws designed to protect human health.
- In Washington, the state denied certification to a coal export terminal because the project would have resulted in adverse impacts to “social and community resources, cultural resources, tribal resources, rail transportation, rail safety, vehicle transportation, vessel transportation, noise and vibration, and air quality.”
- In [New York](#), the state denied certification to a pipeline project that failed to meet water quality standards as well as violating the state’s Climate Leadership and Community Protection Act, because the pipeline would have increased GHG emissions inconsistent with state limits.

The Legislation Would Ratify the Most Harmful Parts of Trump 401 Regulations

- In 2020, the Trump EPA finalized a rule that would have severely limited Section 401 by barring states from considering climate impacts or environmental justice concerns when undergoing 401 certification reviews.
- Although still being appealed by industry, 21 Attorney Generals brought successful litigation challenging the Trump 401 rule, and the Biden administration is now putting forth new regulations that preserve the full legislative scope of Section 401. This legislative change would undo this important legal victory.
- Recklessly limiting Section 401 to only state “water quality requirements” would result in unintended consequences, and potentially restrict the ability of states to even object to a project if it violates a federal or interstate water quality requirement, such as Total Maximum Daily Loads designed to address pollution in places such as the Chesapeake Bay and Great Lakes.