November 19, 2019

Senator John Barrasso
Chairman, U.S. Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington D.C. 20510

Senator Tom Carper
Ranking Member, U.S. Senate Committee on Environment and Public Works
465 Dirksen Senate Office Building
Washington D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper,

On behalf of the Appalachian Trail Conservancy (ATC), our members and volunteers, and the more than 3 million visitors the Trail receives annually, I write to express our opposition to S. 1087, the Water Quality Certification Improvement Act of 2019 as well as our opposition to the currently proposed rule regarding Clean Water Act (CWA) §401 under consideration at the Environmental Protection Agency (EPA). Both the legislation and proposed rule violate the central tenets of cooperative federalism that provide the basis of §401 and, if law, would severely hamper ATC's state cooperative management partners in their ability to ensure proper water quality standards are met to oversee natural resources for health, recreation, and conservation. In fact, in individual or group submissions, 13 of the 14 Appalachian Trail states are on the record at EPA opposing the currently proposed rule.

The Appalachian National Scenic Trail (A.T. or Trail) is the longest hiking-only footpath in the world, measuring roughly 2,190 horizontal miles in length. The Trail travels through 14 states along the crests and valleys of the Appalachian Mountain Range, from its southern terminus at Springer Mountain, Georgia, to the northern terminus at Katahdin, Maine. Radiating outwards from the Trail is the A.T. Landscape, which connects rural communities and working farms and forests while squeezing through rapidly developing regions and providing the foundation for world-class outdoor recreation and tourism opportunities. When evaluating everything from how filling an adjacent wetland could impact habitat and drinking water for Trail users and communities along the Trail to how the construction of a natural gas pipeline could alter the view from our trust resource, the A.T., states employ their authority under §401 to ensure a thorough consideration of potential impacts and to mitigate against them when necessary.

More than 3 million people visit the Trail every year and over 3,000 people attempt to "thru-hike" the entire footpath in a single year. People from across the globe are drawn to the A.T. for a variety of reasons, such as connecting with nature, exploring the cultural resources of the Appalachian Mountain range, meeting new people or deepening old

friendships, and accessing any of the almost 100 parcels of state and federal public lands connected by the A.T.

ATC's first and foremost responsibility is to ensure the proper management and maintenance of the A.T., which is possible only through a cooperative management system involving 31 maintaining clubs, 6,000 volunteers, and federal and state land management agencies. Section 401 is a critical tool used by states and authorized tribes to ensure that local expertise is included in federal permits/licenses and that local managers are not required to mitigate against the damage that federal authorities may inflict by not considering the interests of those who manage the day-to-day realities of our dynamic ecosystems and communities. In arguing for the necessity of S. 1087 and the proposed rule, no justification has been shown for the complete upending that would occur to the cooperative management system outlined by the Act. For these reasons and because we see firsthand every day the level of professionalism and experience of our state cooperative partners, we oppose the proposed legislation and rule.

The legislation and proposed rule would significantly hamper the cooperative federal management system dictated by Congress in §401 and the issuance of water quality certifications (WQCs) in five primary ways: (1) restricting the information states and authorized tribes may consider before issuing a decision on a §401 application; (2) limiting the amount of time states and authorized tribes have to issue scientifically based and legally defensible conditions; (3) infringing on state and tribal authority to enforce conditions; (4) preventing the inclusion of appropriate state or tribal law; and (5) extra-statutorily allowing EPA, the Federal Energy Regulatory Commission (FERC) and the Army Corps of Engineers (ACE) to veto conditions placed within a certification.

Because ATC respects and values the perspectives of our cooperative management partners to an extent that is not reflected in either S. 1087 or the proposed rule, and because we want to make sure that our states' views are represented, we are including some of their comments in this letter. As the State of Tennessee's Department of Environment and Conservation (TN DEC) explained, "[t]he structure and substance of these [401] processes and procedures were not created in a vacuum-they were developed through an extensive process that involved environmental regulatory personnel, environmental professionals, legal professionals, and various other stakeholders."

Lack of Justification

Neither ahead of the initial introduction of the predecessor legislation to S. 1087 nor within the preamble to the proposed rule published at the direction of the President in Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth," has there been any explanation as to why a wholesale alteration of the §401 process is required or how the critical needs of state and authorized tribal regulators will be addressed. As a matter of fact, the Executive Order that required the composition of the proposed rule was focused not on improving water quality or healthy ecosystems—the Congressionally declared purposes of the Clean Water Act—rather; the directives in the Executive Order were explicitly related to addressing concerns from energy infrastructure

developers that it wasn't easy enough for them to obtain the kind of environmental review that would enable them to build pipelines based on their personal preferences and on their preferred timelines.

In discussing the lack of justification for the proposed rule, the New England Interstate Water Pollution Control Commission (NEIWPCC) cited a lack of "…any thorough analysis that gives cause to suggest the proposed changes will achieve the E.O.'s objectives, nor are we aware of any analysis performed on how the Proposed Rule will protect our nation's water resources according to the objective of the CWA, 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters' (CWA §101(a)." Echoing this sentiment, the State of New York, through its Department of Environmental Quality (NY DEQ), submitted to EPA that, "[r]egardless of the reasons behind the [p]roposal, EPA seeks to overturn its own longstanding legal interpretations, as well as those of the U.S. Supreme Court. The preamble for the [p]roposal is filled with creative attempts to reinterpret decades of successful implementation of Section 401 by EPA itself, other agencies, and the courts. While EPA deserves credit for its creativity, these efforts will ultimately fail."

Restricting Information

The proposed rule and S. 1087 approach the evaluation of an application for a water quality certification from the perspective that projects exist in isolation. This is obviously and demonstrably false, as ecosystems are complex and waterways connect mountains to the oceans and everything in between. The presumption that the CWA's declaration that states and authorized tribes may consider "any appropriate" law while processing an application recognizes the reality that the Act was written to address certain federally recognized needs, but that states and tribes must also be able to manage resources for purposes not addressed by the Act. As the State of West Virginia Department of Environmental Protection (WV DEP) wrote, "[t]he WVDEP's scope of review for a certification may extend beyond a point source discharge to comply with state law and consider the proposed activities impact on water resources, fish and wildlife, recreation, critical habitats, wetlands, and other natural resources."

WV DEP further informed EPA that "[t]hrough the implementation of the proposed rule, state rights to protect resources from degradation and to plan the development and use of land and water resources would be reduced" and that "[i]f the intent of this proposed rule is to exclude requirements of state law that are not EPA-approved, then additional state permitting may be required of the applicant which would not meet the intent of the proposed rule to increase the predictability or timeliness of certification." The Commonwealth of Massachusetts, through its Department of Environmental Protection (MA DEP), concurred, writing EPA that as, "[a] direct consequence of this new approach to state §401 certification, states would need to consider separating state permits programs from their federal counterpart to preserve state law authorities and carry out state agency responsibilities."

Furthermore, Massachusetts explained that development in one corner of the ecosystem could have domino effects downstream that must be considered, by writing, "[i]n the context of FERC licenses and Corps permits, states would no longer focus their review on the effects of the discharge on the *aquatic ecosystem* as a whole, and, for example, states would be prohibiting from imposing conditions in §401 certifications to protect groundwater, establish construction season restrictions meant to prevent landslides, soil erosion, or impairment of riparian habitat, or establish conditions requiring maintenance of buffer zones, revegetation, protection of intermittent streams, or compensatory mitigation under state law."

The State of North Carolina Department of Environmental Protection (NC DEP) highlighted that the process under which §401 certifications are issued is already operating under less-than-ideal information sharing realities. It wrote that, "EPA should also consider [f]ederal program requirements that require submittal of a 401 application well before an applicant has the necessary information for a 401 application. For example, FERC requires applicants for a 'Certificate of Public Convenience and Necessity' ('Certificate') to concurrently file an application for a state 401 certification. [18 CFR 157.13]. The State needs information that will be contained in the FERC environmental document, but that document is not available until later in the process. Preferably an applicant should be able to apply for the 401 water quality certification after FERC has released the draft EIS." The proposed rule and S. 1087 would, of course, prevent the draft EIS from being considered by a state or authorized tribe as they review an application under §401.

Limiting Time

West Virginia DEP underscored that many delays in review are the result of applicants failing to provide sufficient information in their applications and that, under the proposed rule or S. 1087, "[i]n cases where permitttees egregiously disregard agency requests for information, a denial of a certification may be required due to the inadequate information to determine effects of the proposed activity on water quality or designated uses." The TN DEC also wrote that "[t]he definition of a 'certification request' does not include all of the information required to constitute a complete application under Tennessee law, and it is likely that the same is true for other states as well."

Tennessee DEC further expounded, "EPA's proposal to establish a process that initiates certification timeframes upon receipt of an incomplete application potentially would force TDEC to deny certification request in order to comply with newly proposed certification timelines, whereas currently TDEC is able to work with the applicant to request additional information necessary to make a determination of compliance with state water quality standards…Initiating a Section 401 certification based on an incomplete application or project scope may also have negative impacts on the public's ability to fully understand the project and provide meaningful input as contemplated by Section 401(a)(1) of the CWA."

Constricting Enforcement Authority

Since the enactment of the CWA, local laws have been incorporated into federal permits and objections to those permits (issued under state water quality requirements) have been heard in the appropriate state or tribal court. S. 1087 and the proposed rule both pursue a change of venue and put the burden on those issuing a water quality certification to defend the regulatory decisions that uphold statutory requirements for environmental conservation. In questioning the removal of authority from states to include local water quality conditions and enforce them in state court, the Commonwealth of Pennsylvania Department of Environmental Protection (PA DEP) informed EPA that, "EPA's [p]roposed [r]ule conflicts with the intent of the Clean Water Act, diminishes Pennsylvania's rights to ensure that water quality standards are maintained, and threatens the health of Pennsylvania's waters by circumventing the Commonwealth's longstanding protections under state law."

Illegal Federal Veto of Conditions

The potential of duplication of efforts, or of not granting the states or authorized tribes their professional due may be unavoidable under the proposed rule/S. 1087. The State of Connecticut, through its Department of Energy and Environmental Protection (CT DEEP) elucidated that EPA currently accepts state analysis for the expert product it is, writing "…a hydraulic model is part of the application package where the current practice in EPA Region 1 is to defer the analysis of complex hydraulic/hydrologic modeling to the state. Reviewing intricate hydraulic modeling can be time consuming to perform and should not be circumvented." Second-guessing the states and authorized tribes and potentially requiring unnecessary federal level review would be time-consuming and ultimately unproductive.

In responding to the extra-statutory power EPA grants to itself and its sibling agencies in the proposed rule, the State of Maryland's Department of the Environment (MDE) wrote, "[i]n particular, by altering the scope of CWA Section 401 certification review, and granting authority to federal permitting agencies to review and effectively 'approve' or 'disapprove' state-issued certifications, the Proposed Rule has the effect of transferring decision-making authority from the states to the federal permitting agencies. Such a fundamental change could only be made by Congress."

Agreeing, NEIWPCC wrote, "[t]his unilateral veto-power given to the federal agency is an infringement on the statutory authority granted to states and is unfitting with cooperative federalism and the co-regulatory design of the CWA." Moreover, "[s]tates are the one and only entity who can evaluate their resources and capacity for certification review, and substituting federal judgement over that of states goes against the state authority established in the CWA."

For almost 50 years, §401 of the Clean Water Act has enabled states and authorized tribes to substantially participate in the regulation of federal projects authorized by the EPA,

ACE, and FERC. By the plain language of the Act, without the approval of the impacted states and authorized tribes, as reflected in their issuance of a §401 WQCs, the projects cannot occur. The Act did not create this authority; the right of states and tribal nations to manage their own resources is inherent. Section 401 simply directed the time and place when those local laws would be placed into the federal permit/license. The current efforts to undercut states and authorized tribes are misguided and do not reflect a genuine understanding of how the certification process works and what the aims of the authorities issuing WQCs—promoting clean water for consumption and recreation—are.

In order to serve our essential conservation mission of protecting the Appalachian National Scenic Trail and the broader, vulnerable A.T. Landscape forever, for all, and in solidarity with our cooperative management partners, who have submitted vigorous objections to the goals of and changes wrought by the proposed rule (and, by extension, S. 1087), we strongly object to the Committee's consideration of S. 1087. We further urge the Committee to cease all consideration of the bill and instead work with ATC and our partners to craft legislation that would assist states and authorized tribes in conserving their land and water resources to provide for the public good.

Sincerely,

Brendan Mysliwiec
Director of Federal Policy and Legislation
Appalachian Trail Conservancy

CC: Members, U.S. Senate on Environmental and Public Works