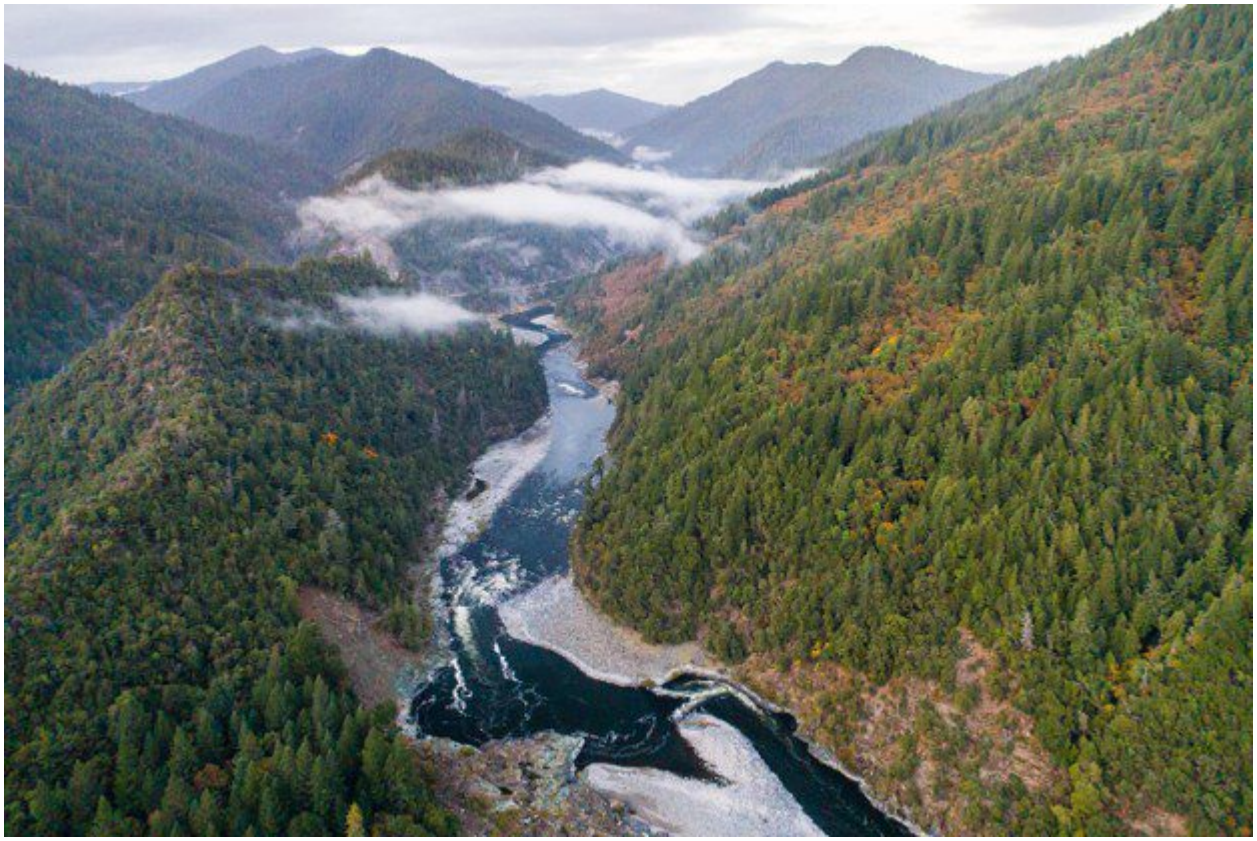
Summary

The proposed permitting reform bill needlessly sacrifices water quality in the name of faster permitting. If legislators are determined to do something with water quality requirements, the bill still could be greatly improved.

Dave Owen is a Professor of Law and Associate Dean for Research at UC College of the Law, San Francisco.

The Bipartisan American Affordability and Jobs Act (BAAJA) includes major changes that would weaken the Clean Water Act. Many of the changes involve Clean Water Act section 401, and there is confusion on Capitol Hill about why section 401 is important and what effects the changes would have. This post explains the stakes and tries to clear things up.



The Klamath River. Image from fisheries.noaa.gov; Jason Hartwick, photographer

Eric Biber also recently posted here about the Clean Water Act changes. This post provides more context and identifies some additional consequences.

The takeaway message is straightforward. Clean Water Act section 401 is an important tool for allowing states to protect water quality. The bill would take that away. That change should worry any legislator who cares about water quality or states.

What does Clean Water Act section 401 do? Clean Water Act section 401 lets states evaluate whether federally authorized activities that involve a "discharge" will cause problems with meeting state water-quality standards. If a state refuses to issue a section 401 certification—which rarely happens—the activity cannot go forward. More often, the state issues a certification with conditions attached, and those conditions then become part of the federal authorization.

When does it matter? Clean Water Act section 401 applies primarily in three settings.

First, it applies when the Federal Energy Regulatory Commission licenses hydropower projects. Even though water law is generally deferential to state authority, the Federal Power Act has a sweeping preemption provision, which the United States Supreme Court has interpreted as limiting states' ability to set flow requirements below dams. That would leave states with limited ability to protect their waters from dams, many of which are highly environmentally destructive. Section 401 gives states some of that authority back, thus limiting FERC's ability to ignore state goals for managing rivers.

A few examples capture the importance of these provisions. Some of the most inspiring environmental successes of recent decades have been dam-removal projects on the Klamath River in California and on the Kennebec and Penobscot Riversin Maine. The environmental and community benefits of the Maine projects have been huge, and the cost to hydropower generation has been minimal (the Penobscot project increased hydropower generation). The Klamath project is newer, but the prospects for major improvement—again, for human communities as well as for fish—are bright. Dam removals happen for many reasons, but section 401 is an important part of the story.

The Penobscot River, Maine. Image from usgs.gov; John Hammond, photographer

Second, section 401 lets states influence the section 404 permitting done by the US Army Corps of Engineers. Rather run their own permitting programs, many states have chosen to use section 401 as a basis for working collaboratively with the Corps. That collaborative relationship lets states condition projects in ways that make them more protective of state resources. Several years ago, I worked on a research project that involved extensive interviews with Army Corps staff, and they consistently described section 401 authority as an important basis for successful partnerships with states. As one Corps staffer explained:

> "When we develop a regional permit for any specific activity… [w]e work those out specifically with the state agencies and the federal agencies involved and [ask] 'ok, if we're going to develop this permit, are there any special conditions you'd like to see on it,' and hammer those out just to make it easier to issue

> that permit in a way that the state's good with it."

Another staffer, again talking about state influence, through section 401, on section 404 permitting, stated:

> "One… strength of the program… is that we can tailor the program, within sideboards, so that it fits as well as it could possibly be with the individual state program …. [W]e want to make sure that we're working hand-in-glove with the states…. Each state does its business a little differently, and (if) we have one-size-fits-all for fifty states across the nation …. I think it's going to compromise the effectiveness of the program. If we can work individually with each state and generally follow the rules and regulations but try to tailor the program to interact effectively with the state programs, I think it's a good thing."

Third, section 401 lets states influence National Pollutant Discharge Elimination System (NPDES) permits issued by the federal government. A few states have chosen for EPA to retain NPDES permitting authority, and there are areas, including some federal lands, within delegated-authority states where EPA still does the permitting. In those places, section 401 gives states a voice on water-quality protection.

A few themes cut across these contexts. Most importantly, states use this authority all the time. It affects thousands of federal decisions every year. And while occasionally section 401 authority contributes to dramatic changs, like dam removals, blocked projects are rare. As is true with most environmental permitting, states are much more likely to impose some conditions while still issuing the certification. The level of review also can be tailored. States can waive 401 authority for projects that do not raise significant concerns. They also provide standardized certifications for categories of projects, which expedites the 401 process.

Why has section 401 been controversial? The most commonly discussed sources of section 401 controversies have been natural gas pipelines. In recent years, a few states denied certifications for pipeline projects, sometimes citing concerns that weren't specifically focused on water quality. That led to complaints that section 401 was being overextended.

But section 401 controversies aren't just about pipelines. The hydropower industry has fought section 401 for decades. The reason is straightforward: section 401

requires dam operators to protect water quality, which isn't always consistent with maximizing revenue, and to deal with another authority besides FERC. Similarly, applicants for section 404 permits would prefer fewer requirements and one less authority.

How would the bill change section 401? The bill would change section 401 in several ways. And while there have been inaccurate suggestions that those changes are limited to certain types of linear infrastructure, the changes in fact sweep across all categories of projects.

First, the bill would prevent states from imposing any condition that isn't specifically focused on the water quality impacts of the discharge. This would be a change from the traditional approach, which is to allow states to impose conditions focused on the water-quality impacts of the applicant's activities as a whole.

This consequence flows from the interrelationship of several textual provisions. Section 1202(e)(2) limits the state to conditions protecting water quality, and section 1202(h)(3)(B) defines a water quality condition as "any Federal and State or Tribal laws (including regulations) implementing sections 301, 302, 303, 306, and 307 *that are applicable to discharges into waters of the United States*" (emphasis added). The combined effect is to take away the previous focus on the activities of the applicant as a whole. These provisions also eliminate states' abilities to use section 401 to protect waters that the state considers important but that are not "waters of the United States."

Second, the bill imposes extraordinary burdens on a state that wishes to deny or to attach conditions to a certification. Presently, states are subject to normal administrative-law standards of review, which means states need a reasonable basis and explanation for imposing conditions. If the bill passes unchanged, states instead will have to demonstrate, by "clear and convincing evidence," that the denial or the condition is the "least burdensome alternative," is "necessary" to prevent a violation of water quality standards, and is "consistent with the requirements" of the federal license. In a world where perfect evidence is hard to come by and certainty is rarely attainable, those high bars will be so daunting that states will not even try to meet them—even if they have reasonable and well-founded concerns about water quality and sensible fixes to offer (or, alternatively, they will demand massive amounts of documentation as they try to gold-plate the record supporting their actions). Piling on, the bill also exempts state decisions against using section 401 authority from judicial review. The basic message is that

when the federal government might harm water quality, the states' job is to get out of the way.

Third, and conversely, the bill also may let states cut the federal government out of water quality protection. Section 1201(e)(1) says that if a state issues a waiver or a water quality certification, the federal government "shall consider water quality requirements satisfied for the purpose of considering the application for the Federal license or permit." Thus, if a state does not care about a project's water quality impacts—perhaps the project is located just upstream of a border—and the state waives its certification authority, the federal permitting authority could not address the resulting water-quality problems.

Whether courts will interpret the new law this way is unclear, because section 401(b) of the existing statute seems to contradict section 1201(e)(1). But having two contradictory provisions in the same statute is confusing at best. At worst, the changes could undercut protection for downstream states—and confer final authority on whatever level of government cares the least about water-quality protection.

How could the text be different? The most obvious change would be to simply delete the provisions governing section 401. There is no good reason why legislators who care about water quality and state authority should mess with a successful part of an iconic environmental statute.

If legislators are determined to do something with section 401, the text still could be greatly improved. Legislators could delete the text that defines water quality standards as relating only to the point of discharge. They could delete the language about "clear and convincing evidence" and return to normal administrative-law standards of review. They could delete the language that may allow state waivers or certifications to foreclose federal agencies' ability to address water-quality impacts. Or, alternatively, they could preface all the changes with language stating that their impact is to be cabined only to the special classes of linear-infrastructure projects addressed later in the proposed text.

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There is, of course, a larger context here. The main argument in favor of accepting this bill's drastic changes to environmental laws is that the climate benefits of other parts of the bill make the changes worthwhile. But water management is a crucially

important part of climate adaptation. Especially in a changing climate, protecting streams and wetlands is a matter of public safety; protecting aquatic resources is one of our most effective ways of managing floods. If legislators choose to sacrifice those benefits and to significantly limit states' ability to protect their water quality, they should at least know what they are doing.