

United States Senate

WASHINGTON, DC 20510

September 6, 2018

Colonel Mark A. Gerald
Seattle District Commander
Executive Office
U.S. Army Corps of Engineers
4735 East Marginal Way South
Seattle, WA 98134-2329

Dear Colonel Gerald:

We write to ask that the Seattle District expeditiously complete its processing of the U.S. Army Corps of Engineers permit requested by the Millennium Bulk Terminals-Longview (MBT) for a planned coal export terminal project. Specifically, we request that you determine that the State of Washington has waived its authority to issue a water quality certification under Section 401 of the Clean Water Act as you process the permit. The determination would ensure the denial by the State of Washington cannot serve as a barrier to the issuance of a Corps permit to MBT.

Over the last few years, a few states have tried to abuse their authority under Section 401 to block projects with a connection to fossil fuels. We recently introduced the Water Quality Certification Improvement Act of 2018 (S. 3303). This bill seeks to curb some of the recent, troubling abuses of the water quality certification process by a handful of States through surgical amendments to existing law.

During a recent hearing on the bill, Members of the U.S. Senate Environment and Public Works Committee heard about the negative effects that these States' obstruction has on a wide range of groups – from labor organizations to tribes. This abuse distorts a tool to protect water quality into a weapon to stop or slow projects. For example, Section 401 has been used in New York to block pipeline projects. States have raised the banner of Section 401 to block projects that they do not like for political reasons.


The State of Washington's abuses are patently unlawful even under the plain terms of the statute as currently written. The State of Washington's decision to deny a Section 401 certification was based on non-water quality impacts. In fact, the State of Washington cited nine reasons not tied to water quality. At the end of the denial, the State asserted concerns that it does not have "reasonable assurance that the Project will meet water quality standards." The State of Washington's own Environmental Impact Statement found "[t]here would be no unavoidable and significant adverse environmental impacts on water quality."¹

¹ Cowlitz County & Washington State Department of Ecology, "Millennium Bulk Terminals—Longview State Environmental Policy Act Final Environmental Impact Statement," Ch. 4 at p. 4.5-34 (Apr. 2017).

Even more importantly, the State of Washington failed to finalize its certification denial within the one-year period stated in the law. Specifically, Section 401(a)(1) of the Clean Water Act states that where a State “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.”² MBT applied for a Section 401 certification on June 27, 2017. The denial was not final until an August 15, 2018 ruling by the Pollution Control Hearings Board in Washington.³ Because the process took longer than one year, Washington waived its ability to object.

We ask that you promptly determine that the State of Washington has waived its authority under Section 401 and that you process MBT’s permit as quickly as possible.


Sincerely,



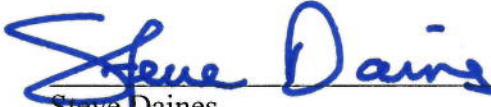
John Barrasso, M.D.
U.S. Senator



James M. Inhofe
U.S. Senator



Michael B. Enzi
U.S. Senator



Steve Daines
U.S. Senator

² Of note, a federal court recently upheld a determination by the Federal Energy Regulatory Commission that the State of New York had waived its authority to issue a section 401 water quality certification decision for a pipeline project. *N.Y. State Dep’t of Env’tl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018).

³ During a March 2, 2018 hearing before Division II of the Court of Appeals in Washington, the Washington Department of Ecology’s attorney stated, “the Department of Ecology’s decision-making [on a section 401 certification] isn’t final until the [Pollution Control Hearings Board] has issued a final decision on the merits.” Transcript of Hearing at 5, *Millennium Bulk Terminals Longview, LLC v. Wash. Dep’t of Ecology*, No. 17-2-01166-08 (Wash. Ct. App. May 14, 2018).