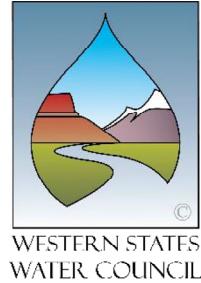




West

THE COUNCIL OF STATE GOVERNMENTS



October 16, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Updating Regulations on Water Quality Certification (Docket ID: EPA-HQ-OW-2019-0405)

Dear Administrator Wheeler:

We submit the following comments in response to the U.S. Environmental Protection Agency's (EPA) proposed rule, Updating Regulations on Water Quality Certification, for inclusion in Docket ID No. EPA-HQ-OW-2019-0405.

We have numerous concerns about the substantial effects the proposed rule would have on states' authority and autonomy to manage and protect water resources and to implement Clean Water Act (CWA) Section 401. We are also concerned about the compressed timeframe for this rulemaking and public comment period, as well as the agency's inadequate engagement with states during the development of the proposed rule.

Under the CWA, Congress recognizes states' primary authority over water resources, purposefully designates states and their delegated entities as co-regulators under a system of cooperative federalism, and clearly expresses its intent to:

recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

We were disappointed to learn that EPA will not extend the public comment period for the proposed rule, despite receiving several requests to do so. In its Notice of Proposed Rulemaking, EPA solicits input on over 100 substantive matters of legal complexity, many of which propose major changes to the agency's historic policies and positions. Meaningful consultation with state and local government officials early in the rulemaking process would have revealed to EPA that states' diverse experiences and expertise with the CWA 401 program requires more time for informed federal decision making.

We further request that, as EPA refines and finalizes the proposed rule, the agency respond to and incorporate the numerous CWA Section 401 process reforms proffered to the agency on February 20, 2019, by the Western Governors' Association, National Conference of State Legislatures, Association of Clean Water Administrators, Association of State Wetland Managers, Council of State Governments – West, and Western States Water Council (attached). Those recommendations are intended to address several aspects of CWA Section 401 that EPA has identified as needing clarification and revision, including:

- Preservation of state authority under a system of cooperative federalism;
- Timelines for state certification review;
- Increased early coordination and communication between applicants and state and federal officials;
- The scope of state certification review and conditioning; and
- Data and staffing needs.

We are disappointed that EPA has failed to acknowledge these process recommendations, let alone explain why the process reforms were not incorporated into the proposed rule.

We urge EPA to substantially increase its engagement with state and local officials as the agency refines and finalizes the proposed rule, in adherence to the express directives requiring meaningful state consultation in: Executive Order 13868, Promoting Energy Infrastructure and Economic Growth; Executive Order 13132, Federalism; and EPA's Action Development Process Guidance on Executive Order 13132, Federalism. These directives are vital to realizing express congressional intent that the CWA be administered under a system of genuine cooperative federalism. Please see the attached letters from associations of state and local officials to EPA dated May 24, 2019.

Administratively curtailing states' historic and well-established authority under CWA Section 401 would inflict serious harm to the cooperative federalism model established by Congress under the CWA and the fundamental constitutional authority of states over water resources within their boundaries. Any regulatory change to the Section 401 permitting process must preserve states' authority and autonomy and should be informed, developed, and refined through genuine consultation with states. By operating as authentic collaborators, states and federal agencies can demonstrably improve their service to the public.

The Honorable Andrew Wheeler
October 16, 2019
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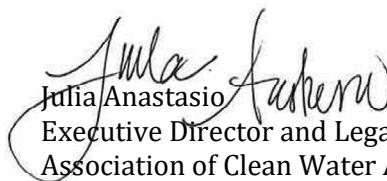
Sincerely,

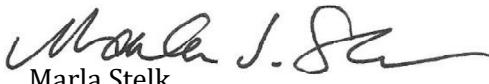

James D. Ogsbury
Executive Director
Western Governors' Association


Matthew Chase
Executive Director
National Association of Counties

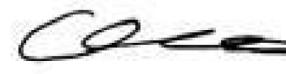

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors


Representative Kimberly Dudik
Montana House Representative
Chair, Council of State Governments – West


Julia Anastasio
Executive Director and Legal Counsel
Association of Clean Water Administrators

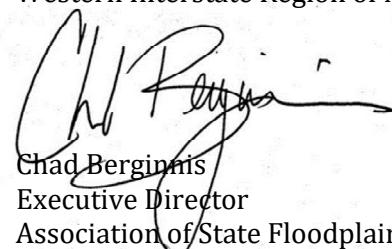

Marla Stelk
Executive Director
Association of State Wetland Managers


Tim Storey
Executive Director
National Conference of State Legislatures


Clarence E. Anthony
CEO and Executive Director
National League of Cities


David Adkins
Executive Director / CEO
Council of State Governments


Kevin Cann
President
Western Interstate Region of NACo


Chad Bergmann
Executive Director
Association of State Floodplain Managers


Tony Willardson
Executive Director
Western States Water Council

Attachments



February 20, 2019

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

The Honorable R.D. James
Assistant Secretary for the Army for Civil Works
U.S. Army Corps of Engineers
441 G Street, N.W.
Washington, D.C. 20314

Dear Acting Administrator Wheeler and Assistant Secretary James:

We are aware of reports of efforts within your agencies to develop rules, guidance, or policies that would modify state water certification processes under Section 401 of the federal Clean Water Act (CWA). Curtailing or reducing state authority under CWA Section 401, or the vital role of states in maintaining water quality within their boundaries, would inflict serious harm to the division of state and federal authorities established by Congress.

Any regulatory change to the Section 401 permitting process must not come at the expense of state authority and – regardless of whether promulgated through Administrative Procedure Act rulemaking or otherwise – federal action should be informed by early, meaningful, substantive, and ongoing consultation with state officials.

We stand ready to be helpful in that regard. Accordingly, attached please find a list of potential process reforms that would reduce the instances of certification delays or denials, while preserving the balance of state and federal powers in the implementation of the CWA. We have also attached, for your review, prior letters to the White House, Environmental Protection Agency, and Congressional leadership addressing this important issue.

These proposed reforms represent a good starting point for discussions to improve federal permitting processes while protecting state authority. We expect that, with respect to this and other issues, Administration officials will engage states in a productive and substantive manner befitting of a genuine system of cooperative federalism. Moreover, we look forward to discussing these potential reforms with you at your earliest possible convenience.

Sincerely,

The signature of James D. Ogsbury, Executive Director of the Western Governors' Association.
James D. Ogsbury
Executive Director
Western Governors' Association

The signature of William T. Pound, Executive Director of the National Conference of State Legislatures.
William T. Pound
Executive Director
National Conference of State Legislatures

The Honorable Andrew Wheeler

The Honorable R.D. James

February 20, 2019

Page 2



Julia Anastasio

Executive Director and General Counsel
Association of Clean Water Administrators



Marla Stelk

Executive Director
Association of State Wetland Managers



Representative Kimberly Dudik

Montana House of Representatives

Chair, Council of State Governments – West



Tony Willardson

Executive Director

Western States Water Council

Clean Water Act Section 401: Process Improvements and the Preservation of State Authority

In response to calls for improvement of the state water quality certification program under Clean Water Act (CWA) Section 401, associations of state officials have developed the following list of potential process improvements to ensure the efficient and effective administration of this vital state authority.

These recommendations are intended to provide federal regulatory bodies positive suggestions for measures that could strengthen the efficiency and efficacy of CWA Section 401 programs by clarifying responsibilities of parties regarding consultation and better defining information required by project proponents in the application process.

These measures are intended to help promote better, more efficient permitting processes in a manner that is consistent with our clear and unambiguous position that state authority must be preserved under any federal action affecting the CWA Section 401 program. The recommendations also address several aspects of cooperative federalism and offer significant opportunities to strengthen the state-federal relationship.

Preservation of Cooperative Federalism

1. Ensure strict adherence to the stated intent of Congress to, “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority,” under the CWA.¹
2. Ensure that any changes to CWA Section 401 or associated regulations, rules, policies, handbooks or guidance do not impair, diminish, or subordinate states’ well-established authority to manage and protect water resources.
3. Ensure that any changes to the regulations, rules, policies, handbooks or guidance governing the implementation of CWA Section 401 adhere to precedents of reviewing state and federal courts, particularly to the opinions of the U.S. Supreme Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*² and *S.D. Warren Co. v. Maine Board of Environmental Protection*.³
4. Recognize the authority of states under the CWA and their role as partners with the federal government and co-regulators under the Act by consulting with state officials regarding aspects of the Section 401 program that warrant review and potential reform. Federal agencies should solicit early, meaningful, substantive, and ongoing input from states in the

¹ 33 U.S.C. § 1251(b).

² *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994).

³ *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 385 (2006), in which the Court emphasizes that, “State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution.”

development of regulatory policies intended to clarify states' authority under CWA Section 401 and improve processes in water quality certification.

5. In addition to engaging in early, meaningful, substantive and ongoing consultation with state officials, provide genuine avenues for the solicitation of input from stakeholders and the general public in adherence to CWA Section 101(e).⁴

Timelines for State Review / Waiver of State Authority

1. Recognize that states have up to one year to act on requests for water quality certifications under the CWA Section 401; consult and work with state officials if shorter timelines may be necessary and appropriate.
2. Ensure that any state laws and regulations relating to the processing of requests for water quality certification - including those that require certain information to be submitted with applications for water quality certification - are incorporated into, and given deference by, any federal rules, regulations, policies, guidance, etc.
3. In order to preserve state flexibility, continue to work with states to define "receipt of request for certification"⁵ to require applicants for CWA Section 401 certification to submit baseline data and information to states before the commencement of any statutory or regulatory timeline for review. Applications should include, at a minimum, the same information that is required to be submitted to the federal licensing agency to act on associated applications.
4. Adopt policies expressly stating that timelines for state action under CWA Section 401 do not begin until an applicant has submitted a substantially complete application to request the issuance of a water quality certification. Encourage states to adopt – by statute, regulation, or guidance – standards for information that must be submitted for an application to be deemed "substantially complete."
5. Define processes, timelines, and expectations of project applicants for submitting and supplementing information to states (and applicable federal agencies) in relation to any request for CWA Section 401 certification.

Increased Early Coordination and Communication Between Applicants and State/Federal Officials

1. Institute a pre-consultation process involving applicants, states, and federal licensing agencies before the commencement of any prescribed timelines required by a CWA Section 401 review. Such a process should be used to define the parameters of a proposed project and its potential effects on water quality, scope of state review, points of contact, information required to render an application complete and ready for state review (*i.e.*, the commencement of any prescribed timelines for state review), and expectations for supplementing information related to a proposed project.

⁴ 33 U.S.C. § 1251(e), "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."

⁵ 33 U.S.C. § 1341(d).

2. Ensure, where appropriate, that material information about water quality certification is included in other environmental review processes (e.g., the National Environmental Policy Act [NEPA], the Endangered Species Act [ESA], etc.).
3. Ensure consistency in the implementation of CWA Section 401 review among federal departments and agencies, and among districts and offices within federal departments and agencies.
4. Ensure that federal agencies include state-imposed certification conditions within federal licenses and permits and that such conditions are being enforced.

Scope of State Review

1. Emphasize the relationships between water quantity, water management, and water quality, and recognize that state water quality certification extends beyond the chemical composition of waters of the United States.
2. Ensure that any regulation, policy, or guidance that defines “other appropriate requirements of state law” is developed through effective consultation with states and adheres to the principles expressed in applicable state and federal case law.
3. Recognize the consistent interpretations of state and federal courts, including the U.S. Supreme Court, that state authority to review and act upon requests for water quality certification under CWA Section 401 is to be construed broadly and that the scope of states’ certification authority extends to the proposed activity as a whole.⁶

Data and Staffing

1. To avoid duplicative analysis, ensure that states have access to application information relating to a proposed project’s review under other federal statutes (e.g., NEPA, ESA, etc.) to use, when appropriate, in their water quality certification review under CWA Section 401.
2. Ensure extensive consultation and communication between states and the federal government in the process of developing any regulations, rules, policies, guidance or handbooks governing the implementation of CWA Section 401 and associated state authority.
3. Encourage, facilitate and support the development by states of their own best practices for implementation of CWA Section 401 state water quality certification programs, and encourage federal participation in such development.
4. Support the adequate funding and staffing of state and federal agencies charged with implementing CWA Section 401.

⁶ See, e.g., *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994).

January 31, 2019

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear President Trump:

Western Governors are aware of reports that the White House is considering issuance of an executive order to address energy infrastructure development and that the order may include provisions affecting the implementation of the state water quality certification program under Section 401 of the federal Clean Water Act (CWA). We urge you to direct federal agencies to reject any changes to agency rules, guidance, or policy that may diminish, impair, or subordinate states' well-established sovereign and statutory authorities to protect water quality within their boundaries. Further, any executive order (or corresponding federal action) aimed at improving or streamlining the state water quality certification program under CWA Section 401 should be informed by early, meaningful, substantive, and ongoing consultation with state officials who have vast experience and expertise in the program's implementation.

With the adoption of the CWA, Congress purposefully designated states as co-regulators under a system of cooperative federalism that recognizes the primacy of state authority over the allocation, administration, protection, and development of water resources. Section 101 of the CWA clearly expresses congressional intent to:

...recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

This declaration demonstrates the understanding of Congress that a one-size-fits-all approach to water management and protection does not accommodate the practical realities of geographic and hydrologic diversity among states.

State authority to certify and condition federal permits of discharges into waters of the United States under Section 401 is vital to the CWA's system of cooperative federalism. This authority helps ensure that activities associated with federally permitted discharges will not impair state water quality. The U.S. Supreme Court has addressed the issue of state authority and concluded that, "[s]tate certifications under [CWA Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), citing 116 Cong. Rec. 8984 (1970).

Since the enactment of the CWA, states have exercised their authority under Section 401 efficiently, effectively and equitably. We question the need for any federal action to amend or clarify federal policy or regulations governing the implementation of Section 401, as instances of delays or denials

The Honorable Donald J. Trump

January 31, 2019

Page 2

of state water quality certifications are extremely limited. Moreover, the CWA provides ample avenues for challenging state certification determinations.

Curtailing or reducing state authority under CWA Section 401, or the vital role of states in maintaining water quality within their boundaries, would inflict serious harm to the division of state and federal authorities established by Congress. Any executive order addressing the implementation of CWA Section 401 should be developed in genuine consultation with states to ensure that the CWA continues to effectively protect water quality, while maintaining the partnerships and the essential balance of authority between states and the federal government.

Western Governors are committed to establishing a framework to incorporate the early, meaningful and substantive input of states in the development of federal regulatory policies that have federalism implications. By operating as authentic collaborators in the development and execution of policy, the states and federal government can demonstrably improve their service to the public. By working cooperatively with the states, the Administration can create a legacy of renewed federalism, resulting in a nation that is stronger, more resilient and more united.

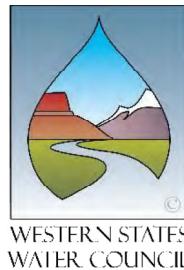
Sincerely,



David Ige
Governor of Hawai'i
Chair, WGA



Doug Burgum
Governor of North Dakota
Vice Chair, WGA



December 3, 2018

The Honorable David Ross
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Assistant Administrator Ross:

We understand the Environmental Protection Agency's (EPA) Office of Water is considering regulatory action related to the interpretation of state statutory authority under Clean Water Act (CWA) Section 401. We urge you to reject any changes to agency rules, guidance, and/or policy that may diminish, impair, or subordinate states' well-established sovereign and statutory authorities to protect water quality within their boundaries. Any regulatory action related to states' CWA Section 401 authority raises significant federalism concerns, and therefore, we request that EPA engage in meaningful and substantive consultation with state officials before the commencement of such action.

With the adoption of the CWA, Congress purposefully designated states as co-regulators under a system of cooperative federalism that recognizes state authority over the allocation, administration, protection, and development of water resources. Section 101 of the CWA clearly expresses Congress's intent to:

...recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

This declaration demonstrates Congress's understanding that a one-size-fits-all approach to water management and protection does not accommodate the practical realities of geographic and hydrologic diversity among states.

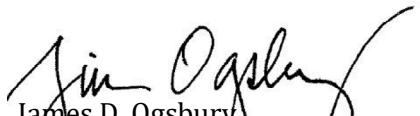
The Honorable David Ross
December 3, 2018
Page 2

A vital component of the CWA's system of cooperative federalism is states' authority to certify and condition federal permits of discharges into waters of the United States under Section 401, an authority which has helped to ensure that activities associated with federally-permitted discharges will not impair state water quality. The U.S. Supreme Court has addressed this issue of state authority and concluded that "[s]tate certifications under [CWA Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), citing 116 Cong. Rec. 8984 (1970).

Since the enactment of the CWA, states have exercised their authority under Section 401 efficiently, effectively, and equitably. We question the need for any agency action aimed at amending or clarifying EPA's policy or regulations governing the implementation of Section 401. Instances of delays or denials of state water quality certifications are extremely limited. Where parties wish to contend that a state has exceeded its authority under Section 401, the CWA provides avenues for challenging state certification determinations.

Curtailing or reducing state authority under CWA Section 401, or the vital role of states in maintaining water quality within their boundaries, would inflict serious harm to the division of state and federal authorities established by Congress. Any regulatory change to the Section 401 permitting process must not come at the expense of state authority and should be developed through genuine consultation with states. EPA must also recognize, and defer to, states' sovereign authority over the management and allocation of their water resources. EPA should ensure the CWA continues to effectively protect water quality, while maintaining the partnerships and the essential balance of authority between states and the federal government.

Sincerely,



James D. Ogsbury
Executive Director
Western Governors' Association



William T. Pound
Executive Director
National Conference of State Legislatures


Julia Anastasio
Executive Director and General Counsel
Association of Clean Water Administrators

Ed Carter
President
Association of Fish and Wildlife Agencies


Marla Stelk
Executive Director
Association of State Wetland Managers
Karen White
Executive Director
Conference of Western Attorneys General

The Honorable David Ross

December 3, 2018

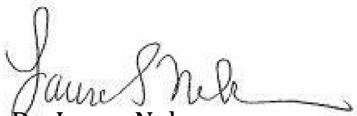
Page 3



David Adkins

Executive Director / CEO

Council of State Governments



Dr. Laura Nelson

Chair

Western Interstate Energy Board



Senator J. Stuart Adams

Utah State Senate

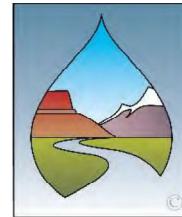
Chair, Council of State Governments - West



Tony Willardson

Executive Director

Western States Water Council



August 9, 2018

The Honorable Paul Ryan
Speaker of the House
U.S. House of Representatives
H-232 U.S. Capitol
Washington, D.C. 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 U.S. Capitol
Washington, D.C. 20515

The Honorable Mitch McConnell
Majority Leader
United States Senate
S-230 U.S. Capitol
Washington, D.C. 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
419 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators McConnell and Schumer, and Representatives Ryan and Pelosi:

We write to express our concerns about various proposals to alter the state certification process under Section 401 of the federal Clean Water Act (CWA). Because each state is unique, we need the flexibility and authority to address our individual water needs. We urge Congress to reject any legislative or administrative effort that would diminish, impair or subordinate states' ability to manage or protect water quality within their boundaries.

States have primary legal authority over the allocation, administration, protection and development of their water resources. Responsible growth and development, as well as proper environmental management, depend upon the recognition and preservation of state stewardship.

We recognize the importance of partnerships between states and the federal government. To implement the CWA, Congress purposefully designated states as co-regulators under a system of cooperative federalism that recognizes state interests and authority. Congress recognizes the legal position of states in the CWA; Section 101 clearly expresses Congress's intent to:

recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to

The Honorable Paul Ryan
The Honorable Mitch McConnell
The Honorable Nancy Pelosi
The Honorable Charles Schumer
August 9, 2018
Page 2

consult with the Administrator in the exercise of his authority under this chapter...Federal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources.

A balanced system of cooperative federalism has enabled states to implement the CWA effectively and with flexibility. The CWA correctly recognizes that a one-size-fits-all approach to water management and protection does not accommodate the practical realities of geographic and hydrologic diversity among states.

A vital component of the CWA's system of cooperative federalism is state authority to certify and condition federal permits of discharges into waters of the United States under Section 401. This authority has helped ensure that activities associated with federally permitted discharges will not impair state water quality. The U.S. Supreme Court has addressed this issue of state authority and concluded that, "[s]tate certifications under [Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), citing 116 Cong. Rec. 8984 (1970).

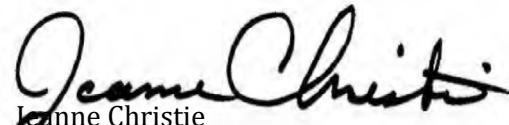
Curtailing or reducing state authority or the vital role of states in maintaining water quality within their boundaries would inflict serious harm to the division of state and federal authorities established under the Constitution and recognized by Congress in the CWA. Any legislative or regulatory effort to streamline environmental permitting should be developed in consultation with states and must not be achieved at the expense of authority delegated to states under the CWA or any other federal law. Any such effort must also recognize, and defer to, states' sovereign authority over the management and allocation of their water resources. We implore you to ensure that the CWA continues to effectively protect water quality while maintaining the proper balance between state and federal authorities.

Sincerely,


James D. Ogsbury
Executive Director
Western Governors' Association


Virgil Moore
President
Association of Fish and Wildlife Agencies

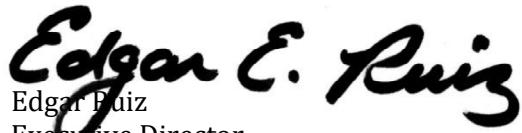

Julia Anastasio
Executive Director and General Counsel
Association of Clean Water Administrators


Joanne Christie
Executive Director
Association of State Wetland Managers

The Honorable Paul Ryan
The Honorable Mitch McConnell
The Honorable Nancy Pelosi
The Honorable Charles Schumer
August 9, 2018
Page 3



Karen White
Executive Director
Conference of Western Attorneys General



Edgar Ruiz
Executive Director
Council of State Governments – West



Dr. Laura Nelson
Chair
Western Interstate Energy Board



David Adkins
Executive Director / CEO
Council of State Governments



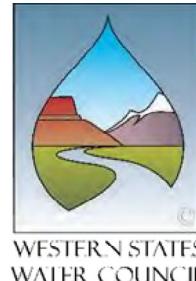
Tommie Cline Martin
President
Western Interstate Region of NACo



Tony Willardson
Executive Director
Western States Water Council



**The Council
of State
Governments**



May 24, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Consultation and Transparency with Respect to EPA's Announced Actions Affecting Clean Water Act Section 401 Guidance and Regulations (Docket ID: EPA-HQ-OW-2018-0855)

Dear Administrator Wheeler:

We write to express our continued concerns about the Environmental Protection Agency's (EPA) plans and processes to revise its guidance and promulgate agency regulations governing the implementation and administration of the Clean Water Act (CWA) Section 401. EPA's engagement with state and local officials on this issue has thus far failed to satisfy the express directives requiring meaningful consultation in Executive Order 13868, Promoting Energy Infrastructure and Economic Growth; Executive Order 13132, Federalism; and EPA's Action Development Process, Guidance on Executive Order 13132, Federalism. This conflicts with Congress's express intent that the CWA be administered under a genuine system of cooperative federalism.

The agency's constrained timelines to review, revise, and replace longstanding guidance and rules – as directed by Executive Order 13868 – heighten our concerns about the agency's ability to consult in a meaningful and collaborative manner. EPA's inadequate outreach reduces our confidence in the prospects for improved cooperation between federal agencies and state and local governments on issues of joint interest and concern.

Executive Order 13132, Federalism, emphasizes that:

National action limiting the policymaking discretion of the States shall be taken only where...the national activity is appropriate in light of the presence of a problem with national significance...With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum

administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable.

EPA has failed to provide states or local governments with substantive information supporting the need for this agency action. Our organizations have contacted the agency numerous times – both in advance of formal action, and afterwards – without receiving adequate, if any, response. The agency has failed to meaningfully respond both to questions posed and to substantive suggestions proffered by our associations. Without knowing the direction that the agency plans to take concerning revisions to CWA 401 guidance and regulations, or the details of the agency's proposals, state and local officials are hindered from offering substantive comments, which would specifically address the agency's needs and inform its actions.

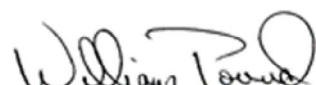
EPA should adhere to its own policy that consultation with governmental officials should be “meaningful and timely,” “begin as early as possible,” and continue throughout the development of a proposed rule or policy. Any regulatory change to the Section 401 certification process should be developed through genuine consultation with state and local governments and must not come at the expense of state authority. EPA must ensure the CWA continues to effectively protect water quality, while maintaining critical partnerships and the essential balance of state and federal authorities.

We appreciate your prompt attention and response to this communication and the concerns it expresses.

Sincerely,



James D. Ogsbury
Executive Director
Western Governors' Association



William T. Pound

Executive Director
National Conference of State Legislatures

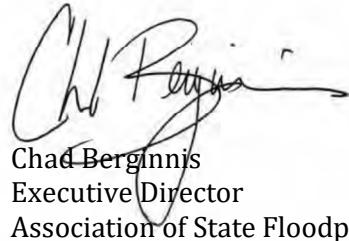


Julia Anastasio
Executive Director and Legal Counsel
Association of Clean Water Administrators

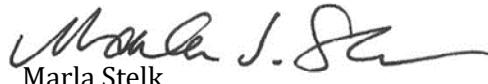


Ed Carter

President
Association of Fish & Wildlife Agencies



Chad Berginnis
Executive Director
Association of State Floodplain Managers



Marla Stelk

Executive Director
Association of State Wetland Managers

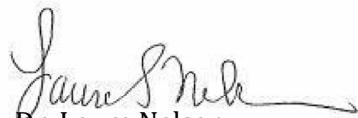
The Honorable Andrew Wheeler

May 24, 2019

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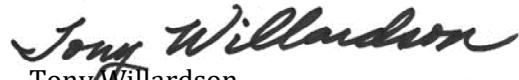
David Adkins
Executive Director / CEO
Council of State Governments



Dr. Laura Nelson
Chair
Western Interstate Energy Board



Representative Kimberly Dudik
Montana House Representative
Chair, Council of State Governments - West



Tony Willardson
Executive Director
Western States Water Council



May 24, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Clean Water Act Section 401 Water Quality Certification Pre-Proposal Recommendations, Docket ID: EPA-HQ-OW-2018-0855

Dear Administrator Wheeler:

On behalf of counties, cities and mayors, we appreciate the opportunity to provide comments on potential revisions of the Clean Water Act (CWA) Section 401 Water Quality Certification program. We thank the U.S. Environmental Protection Agency (EPA) for holding a briefing on April 23, 2019 for state and local governments on the agency's plan to update these regulations.

Since state and local governments play a strong role as co-regulators in CWA implementation, we are interested in how these regulatory updates will impact the role of non-federal actors in the CWA permitting process. Under federal law, any project that may have an impact on water resources is required to receive a CWA Section 401 Water Certification from the impacted state that "certifies" that the project meets state-established water quality standards (WQS) requirements. This includes the option to impose specific conditions on the certifications to protect water resources, which allows states to take into account a variety of factors to protect both water supplies and residents from potential pollution risks. This is consistent with the concept of federalism, in which federal, state and local governments work cooperatively and collectively to solve common problems.

We understand that EPA is under a 120-day deadline to release new regulations as instructed by Executive Order 13878: Promoting Energy Infrastructure and Economic Growth. However, we are concerned that this short time frame does not allow EPA to fully consult with state and local governments nor to fully consider the implications of changes to the program.

Under Executive Order: 13132 (EO 13132), federal agencies must consult with state and local government officials early and often in the rulemaking process, even before a rule is proposed, when it will directly impact these entities. This process is especially important under the CWA since the programs are co-regulated by federal, state and local governments working together as partners to implement. Additionally, as part of the rule-making process, federal agencies must include a federalism summary impact statement,

which details state and local government concerns and describes the extent to which the agencies were able to address those concerns in the final rule.

Furthermore, since so many environmental policies directly impact state and local governments, EPA has an internal *Action Development Process Guidance on Executive Order 13132: Federalism* (Nov. 2008), for “planning or developing actions such as regulations, policies, legislative proposals, adjudications, and waivers.” The policy requires the EPA to consult with “elected officials or their representative national organizations” throughout the rulemaking process, from pre-proposal to final product, on policies that impact its intergovernmental partners. This consultation process has worked successfully for a number of EPA rules where state and local government organizations were able to provide feedback on various options under consideration before the rule is even proposed. This, in turn, leads to rules that are realistic, workable, and implementable at the federal, state and local levels.

As CWA Section 401 certifications are undertaken by states, it is important to involve states and local governments early on in the process of revising the program to give the EPA the opportunity to share with states and local governments specific examples on why the agency is proposing changes. Furthermore, it would help if the agency could highlight whether these examples are national or regional in scope. Having specific examples helps states and local governments understand the agency’s specific concerns and allows us to focus our comments on areas most helpful to EPA.

For these reasons, we urge EPA to delay developing a proposed rule on the CWA Section 401 permitting process and to undergo a proper federalism consultation process. This is a complex issue that will have long-term implications for state and local governments across the country and potentially impact our ability to effectively address water quality issues within our jurisdiction. Any regulatory change to the Section 401 certification process should be developed through genuine consultation with state and local governments and must not come at the expense of state and local authority.

We appreciate the opportunity to comment and look forward to working together to ensure state and local authorities are protected as we work to achieve our mutual goals of clean and safe water, healthy communities, and economic prosperity.

Sincerely,



Matthew Chase
Executive Director
National Association of Counties



Clarence Anthony
CEO and Executive Director
National League of Cities



Tom Cochran
CEO and Executive Director
U.S. Conference of Mayors