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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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WESTERN GOVERNORS/CONGRESS
CWA/Section 401 State Certifications

On November 18, a coalition of organizations sent a letter to the Senate Committee on Environment and Public Works. The letter expressed concern about "any legislation or federal action that would alter states' water quality certification processes under Section 401 of the Clean Water Act" (CWA) and urged Congress to reject changes that "diminish, impair or subordinate states' authority…or the ability of states and their designated entities to manage or protect water resources."

The letter emphasized the critical importance of cooperative federalism, respecting state sovereign authority to protect water quality within their boundaries, and recognizing that states and localities are in the best position "to design and implement regulatory strategies and certification programs to protect human health and the environment in a manner that appropriately accounts for local needs and conditions." The letter also notes that any efforts "to streamline environmental permitting should be informed through consultation with states and must not be achieved at the expense of state authority."

Members of the coalition included: the Western Governors' Association; the National Conference of State Legislatures; the National Association of Counties; the National League of Cities; the U.S. Conference of Mayors; the Council of State Governments (CSG); CSG-West; the Association of Clean Water Administrators; the Association of Floodplain Managers; the Association of State Wetland Managers; and the Western States Water Council.

CONGRESS/WATER QUALITY
CWA/Section 401 State Certifications

On November 19, the Senate Committee on Environment and Public Works held a hearing on the Water Quality Certification Improvement Act (S. 1087). The hearing focused on state perspectives on potential reforms to the implementation of Section 401 of the CWA. Witnesses included: Governors Mark Gordon (R-WY) and J. Kevin Stitt (R-OK), and Laura Watson, Washington Senior Assistant Attorney General and Division Chief.

Chairman John Barrasso (R-WY) opened the hearing with his perspective of problems with the implementation of Section 401: "Governor Gordon and Governor Stitt have joined us to discuss a dangerous trend preventing our nation from reach full energy independence. A group of states are holding critical energy infrastructure projects hostage by abusing a provisions in the [CWA]. Congress created Section 401 of the [CWA] to give states a seat at the table before federal permits are issued. States deserve a seat at the table. The majority of states carry out this role in a responsible way. Recently, a select group of states have weaponized Section 401 to stop energy projects from moving forward." He described the potential economic and cleaner energy benefits of the Millennium Bulk Terminal Project blocked by Washington, a liquefied natural gas terminal and pipeline project denied by Oregon, and multiple natural gas pipeline certifications denied by New York. Barrasso said: "That is why I introduced [S.1087] so that states cannot unfairly block energy projects.... States like Wyoming, Oklahoma, and others have found responsible ways to protect the water within their borders while growing their economies."

Gordon said: "Protecting water quality within our state, and when it flows across state boundaries, has always been important to Wyoming.... It is in our best interest to protect our waters. This is done, in part, through responsible application of the [CWA] Section 401 certification decisions." He described Wyoming's energy production and environmental protection, and noted that Section 401 is designed to allow states to protect water quality. "It is not a tool to erect a trade barrier based on political whims or parochial politics. I strongly contend that Section 401 must not be used to impede lawful interstate commerce. Thus, Section 401 reform is not an 'assault on the environment,' a means to prevent states from 'taking control of their own destiny' or, at worst, a cloaked attempt at 'climate change denial.' We know the world needs power to build things, transport things, and improve the quality of life. We acknowledge that CO2 concentrations in our atmosphere are an urgent concern for our climate that must be addressed effectively. With commitment, vision, and courage, we can take advantage of all our resources in a responsible manner. However, Section 401 certification decisions are not the appropriate means to achieve this."

Gordon recommended reforms for focused and efficient decisions, with an appropriate balance between state autonomy and federal jurisdiction. "I advocate that certification denials must have a clear and reasonable assertion that project activities would: (1) result in violation or fail to conform to one or more surface water quality standards; (2) result in an increase in pollutant loading to a [CWA] 303(d) listed water; or (3) would not conform to applicable 401 certification conditions or Corps nationwide permit conditions."

Stitt said that regulations are best left to the states as often as possible. "We know our people. We know our geography. We know our economies. And we know best when innovation demands regulatory flexibility and when protecting our citizens requires action." He described Oklahoma's success in being a leader in energy production and environmental protection, and striking a balance between state's rights and federal partnerships. "Unfortunately, the misuse of Section 401 threatens Oklahoma's potential and the endless opportunities for her 4 million residents. It prevents Oklahoma from achieving all it can be because a loophole within Section 401 is allowing a small handful of coastal states to dictate the future for all 40-plus states. That is unacceptable." He noted that the northeastern fuel needs last winter "could have been met safely and reliably with a steady supply of clean burning natural gas from Oklahoma," but due to stalled pipeline development, were instead met by a Russian tanker of liquefied natural gas sitting in the Boston Harbor.

Watson emphasized that Section 401 is not broken, that allegations of improper motives for two state certification denials are unfounded, and that judicial review has been a sufficient safeguard for the small number of cases where an applicant disagrees with the state's decision. She described the bipartisan concerns and opposition of state water quality managers, attorneys general, and coalitions of multi-state organizations such as the WGA, both to the recent rulemaking efforts of the Environmental Protection Agency (EPA), as well as Senator Barrasso's bills in 2018 and 2019.

Watson said the proposed limits to Section 401 would "eliminate states' ability to apply state water quality requirements to 401 decisions and would allow states to consider only a short list of federal requirements. As a result, several water pollution prevention measures would be on the chopping block – including measures related to erosion and sedimentation standards, construction and post-construction stormwater management, coastal protections, groundwater protections, and state laws protecting threatened and endangered species." She said the legislation would transfer traditional state power to federal agencies. "Washington State supports streamlining federal and state processes in a responsible and transparent manner, and we are always willing to assist in good faith efforts to make the process work better. However, Section 401 is not a problem that needs to be fixed. It is working as effectively today as it has over the past five decades. We urge you not to dismantle this important tool for preventing water pollution."

WATER QUALITY/ADMINISTRATION

EPA/SDWA/Lead and Copper Rule

On November 13, EPA published a proposed rule, National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions (84 FR 61684). The rulemaking does not change the current action level of 15 parts per billion (ppb), but rather proposes a new 10ppb trigger level to enable systems to better prepare should they exceed the 15ppb action level in the future. At the trigger level, water systems would reevaluate current treatment or conduct a corrosion control study. Above the trigger level, they would set annual goals for conducting pipe replacements and conducting outreach to encourage resident participation in infrastructure replacement programs. Above the action level, systems would be required to annually replace a minimum of 3% of the known or potential lead service lines in the inventory. Small systems exceeding the trigger and action levels would have flexibility to protect public health by taking the action that makes sense for their community.

The proposed rule focuses on six key areas of action for community water systems: (1) identify impacted areas by preparing and updating a publicly-available inventory of lead service lines; (2) strengthen drinking water treatment by requiring corrosion control treatment at the trigger level; (3) require water systems to replace the system-owned portion of a lead service line when a customer chooses to replace their portion of the line; (4) increase drinking water sampling reliability with new sampling procedures and targeted sampling sites; (5) immediate (24-hour) risk communication to customers when water samples are above 15ppb; and (6) protect children by sampling at schools and child care facilities.

EPA Administrator Andrew Wheeler noted that this was the first major overhaul of the Lead and Copper Rule in over two decades. "By improving protocols for identifying lead, expanding sampling, and strengthening treatment requirements, our proposal would ensure that more water systems proactively take actions to prevent lead exposure, especially in schools, child care facilities, and the most at-risk communities. We are also working with the Department of Housing and Urban Development to encourage states and cities to make full use of the many funding and financing options provided by the federal government." Comments on the proposed rule are due by January 13, 2020.