



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