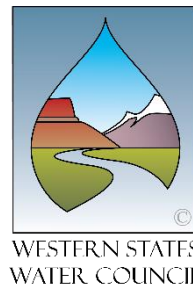




West
THE COUNCIL OF STATE GOVERNMENTS



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:

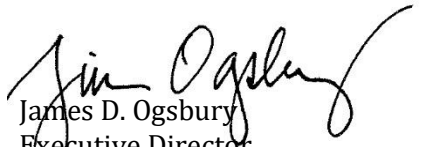
- Preservation of state authority under a system of cooperative federalism;
- Timelines for state certification review;
- Increased early coordination and communication between applicants and state and federal officials;
- The scope of state certification review and conditioning; and
- Data and staffing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

Sincerely,



James D. Ogsbury
Executive Director
Western Governors' Association



Tim Storey
Executive Director
National Conference of State Legislatures


Matthew Chase
Executive Director
National Association of Counties


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

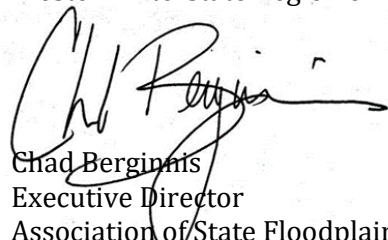

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors


David Adkins
Executive Director / CEO
Council of State Governments


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


Kevin Cann
President
Western Interstate Region of NACo


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


Chad Bergin
Executive Director
Association of State Floodplain Managers


Marla Stelk
Executive Director
Association of State Wetland Managers


Tony Willardson
Executive Director
Western States Water Council

Attachments