



WESTERN STATES WATER COUNCIL

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Web Page: www.westernstateswater.org

April 21, 2021

Mr. Michael Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Regan,

The Western States Water Council (WSWC) is a bi-partisan government entity created by Western Governors in 1965 that represents eighteen states. Our members are appointed by and serve at the pleasure of their respective Governors, advising them on water policy issues. Our mission is to ensure that the West has an adequate, secure, and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

A number of our member states have raised concerns regarding their experiences implementing the Clean Water Act (CWA) 401 Certification Final Rule, finalized June 1, 2020. For example, language in Section 401 certifications vary by state, and the new rule did not take into consideration the impact these changes might have on existing state certifications. Additionally, although the statute provides up to one year for states to complete their certifications, the far stricter deadlines in the rule have been inflexibly applied by federal agencies regardless of the complexity of projects. Further, Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis calls for review of this rule. States are uncertain as to how best to proceed - to implement business processes under the new rule or wait for the results of the review. While, historically, state denial of 401 certifications have been rare, complications and time constraints with the new rule are resulting in an uptick of denials.

Section 401 requires: "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions..." of various CWA sections. This state water quality certification requirement is a vital component of our federalist system for protecting water resources.

The Council has always held that States are responsible for exercising their inherent state water quality protection authority, recognized by CWA Section 101(b), which states: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution."

CWA 401 certification authority is not delegated authority from the Congress with Environmental Protection Agency (EPA) oversight, as are most CWA programs. Rather, Congress required that States certify and federal agencies ensure that any federally-licensed or permitted actions are consistent with applicable state water quality requirements and state-required conditions related to certification. States may review compliance with those conditions and the federal agency may revoke any license or permit for failure to comply.

As EPA determines its priorities over the coming weeks and months, the Council would like to express our strong support for prioritizing and accelerating review of the CWA 401 Certification Final Rule. States are currently reviewing and issuing water quality certification determinations, and will continue to do so under the new rule. However, the outstanding uncertainty of the fate of the rule makes it difficult for state agencies to adjust their programs appropriately. As review of the rule and any subsequent rulemaking will take some time, the Council urges EPA to collaborate with the Army Corps of Engineers and with states to develop, publish for comment, and issue interim guidance that provides States with the time, information and flexibility needed to make informed decisions, within the statutory limitations. If EPA decides to leave the rule as-is, States would request prompt communication of that decision combined with clear guidance on implementation of the rule going forward.

Either way, EPA should involve the States as co-regulators in any review or future rulemaking from the start, long before any action is published for public comment. The Council strongly supports meaningful, substantive and early consultation with States as they work in tandem with EPA to achieve national water quality goals.

We thank you for considering these requests, and we look forward to working together to protect and restore water quality across our Western States.

Sincerely,



Jennifer Verleger, Chair
Western States Water Council



Jon Niermann, Vice-Chair
Western States Water Council



Erica Gaddis, Chair
WSWC Water Quality Committee

cc: Ms. Radhika Fox
Acting Assistant Administrator, Office of Water
Environmental Protection Agency

cc: Mr. John Goodin
Director, Office of Wetlands, Oceans and Watersheds
Environmental Protection Agency

cc: Mr. Roger Gorke
Senior Policy Advisor, Office of Water/WestFAST Liaison
Environmental Protection Agency