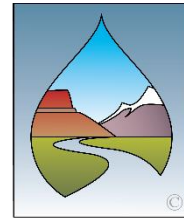




West
THE COUNCIL OF STATE GOVERNMENTS



WESTERN STATES
WATER COUNCIL

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:

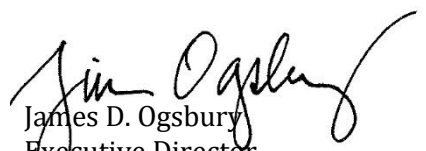
We are aware of reports of efforts within your agencies to develop rules, guidance, or policies that would modify state water certification processes under Section 401 of the federal Clean Water Act (CWA). Curtailing or reducing state authority under CWA Section 401, or the vital role of states in maintaining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

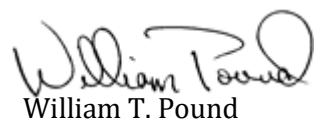
Any regulatory change to the Section 401 permitting process must not come at the expense of state authority and – regardless of whether promulgated through Administrative Procedure Act rulemaking or otherwise – federal action should be informed by early, meaningful, substantive, and ongoing consultation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

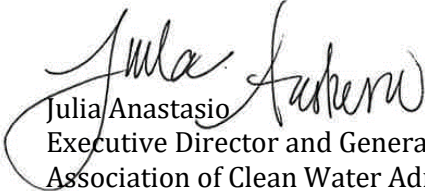
These proposed reforms represent a good starting point for discussions to improve federal permitting processes while protecting state authority. We expect that, with respect to this and other issues, Administration officials will engage states in a productive and substantive manner befitting of a genuine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


Sincerely,



James D. Ogsbury
Executive Director
Western Governors' Association


William T. Pound
Executive Director
National Conference of State Legislatures

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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).