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June 19, 2020

The Honorable Andrew Wheeler  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Re: Proposed Rule – EPA Guidance; Administrative Procedures for Issuance and Public Petitions  
(Docket ID No. EPA-HQ-OA-2020-0128)

Dear Administrator Wheeler:

The Western Governors' Association (WGA) submits the following comments in response to the U.S. Environmental Protection Agency's (EPA) proposed rule, EPA Guidance; Administrative Procedures for Issuance and Public Petitions (85 Fed. Reg. 31104, May 22, 2020).

### **Statement of Interest**

WGA is an independent organization representing the Governors of the 22 westernmost states and territories. The Association is an instrument of the Governors for bipartisan policy development, information-sharing, and collective action on issues of critical importance to the western United States.

Western Governors value the historic partnerships between the EPA and western states in successfully implementing a wide array of laws to protect human health and our environment. As articulated in WGA Policy Resolution 2020-01, *Strengthening the State-Federal Relationship*, we recognize that, “[b]y operating as authentic collaborators on the development and execution of policy, the states and federal government can demonstrably improve their service to the public.” In addition to their sovereign powers, states have been delegated with various federal statutory authorities to serve as co-regulators and partners with the EPA in protecting and improving the quality of our nation’s air, lands, and water.

### **Western Governors' Analysis and Recommendations**

Western Governors commend EPA’s stated purposes for the proposed rule. Specifically, the rule is being promulgated to ensure that guidance documents upon which agency officials rely are: developed with appropriate review; accessible and transparent to the public; and subject to basic public notice and comment processes. Federal agencies have, in the past, relied on the issuance of guidance documents to communicate policies that should be developed under more defined and transparent processes and subject to state consultation and public input.

Further, members of the regulated community have historically had difficulty identifying and accessing active guidance documents upon which federal agencies rely. Western Governors commend EPA for the timely launch of its agency guidance portal and for including in the proposed

rule clear requirements for its maintenance, including a requirement that portal entries clearly state that guidance documents do not have the force and effect of law.

To inform EPA's further refinement of the proposed rule, Western Governors offer the following recommendations:

- **Distinguish States from the Members of the Public:** States are not stakeholders. They are sovereignties, with reserved powers under the U.S. Constitution, as well as express statutory authorities pursuant to which they serve as co-regulators with the EPA in a system of cooperative federalism. Federal agency decisions and policies are more effective, efficient, and enduring when informed by state consultation and the expertise of state officials. We urge EPA to revise the proposed rule to expressly distinguish states and state officials from the general public and to provide states with opportunities to engage with EPA officials, on a government-to-government basis, beyond the public comment process.
- **Require State Consultation:** We urge EPA to revise the proposed rule to direct agency officials to conduct early, meaningful, substantive and ongoing consultation with states – through Governors or their designees – in the development of guidance documents that affect states as sovereignties or as co-regulators. Such state consultation should be required: (i) upon the request of a Governor's office; or (ii) when a proposed guidance document has federalism implications, triggering the requirements of Executive Order 13132, Federalism. EPA's consultation with states in the development of guidance documents should not, however, be limited to these instances. EPA officials should be directed to consult with states when developing any guidance document that may affect state authorities (sovereign or statutory) and to be responsive to states' input and concerns.
- **Public Notification of Issued, Modified, and Rescinded Guidance Documents:** In response to EPA's solicitation for input regarding the agency's issuance, modification, and rescission of guidance documents, we recommend that the proposed rule require EPA to maintain and update, as part of its agency guidance portal, a publicly accessible inventory of all agency guidance documents that have been issued, modified or rescinded, including all relevant information and links to all relevant documents. Any changes to significant agency guidance documents included in the inventory should be published in the *Federal Register* and subject to public notice and comment for a period of at least 30 days. The proposed rule should also expressly require EPA officials to engage in proper state consultation, as described above, as part of the development, modification, and rescission of agency guidance documents.
- **Process for Categorization of Guidance Documents:** We recommend that the proposed rule be revised to require a transparent and accountable process for EPA officials to determine whether a particular agency policy or decision may be properly communicated through a guidance document, or whether such action is subject to more formal procedural requirements under the Administrative Procedure Act.

The proposed rule would promote a more transparent and inclusive process in the development of EPA guidance documents and provide for increased public access to the thousands of guidance documents upon which the agency relies. Its language, however, should be revised to expressly

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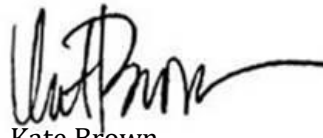
recognize the unique status of states, as sovereigns and co-regulators, and to provide states with opportunities to be properly consulted beyond basic public comment policies. Western Governors request that you carefully consider the comments submitted in this letter, as well as those submitted by individual states, as you refine the proposed rule.

Western Governors submit these remarks through the public notice and comment process for administrative recordkeeping purposes. The Governors, however, maintain that this process is an insufficient channel for state-federal communication on federal actions that may affect state authority or administrative activity. Western Governors strongly urge federal agencies to engage in meaningful, substantive, and ongoing consultation with states in advance of any such decisions or related public processes. Such consultation will result in more effective, efficient, and resilient federal policy, benefiting our shared constituents.

Sincerely,



Doug Burgum  
Governor of North Dakota  
Chair, WGA



Kate Brown  
Governor of Oregon  
Vice Chair, WGA