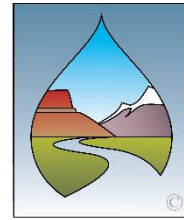




West  
THE COUNCIL OF STATE GOVERNMENTS



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:

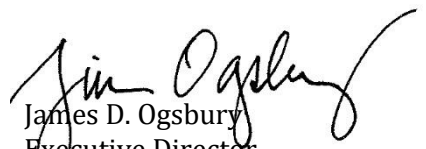
We are aware of reports of efforts within your agencies to develop rules, guidance, or policies that would modify state water certification processes under Section 401 of the federal Clean Water Act (CWA). Curtailing or reducing state authority under CWA Section 401, or the vital role of states in maintaining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

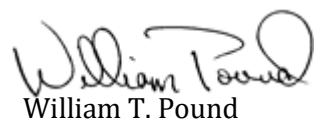
Any regulatory change to the Section 401 permitting process must not come at the expense of state authority and – regardless of whether promulgated through Administrative Procedure Act rulemaking or otherwise – federal action should be informed by early, meaningful, substantive, and ongoing consultation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

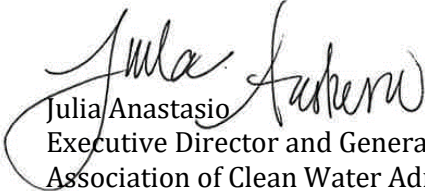
These proposed reforms represent a good starting point for discussions to improve federal permitting processes while protecting state authority. We expect that, with respect to this and other issues, Administration officials will engage states in a productive and substantive manner befitting of a genuine 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

The Honorable Andrew Wheeler  
The Honorable R.D. James  
February 20, 2019  
Page 2

  
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

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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.<sup>1</sup>
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*<sup>2</sup> and *S.D. Warren Co. v. Maine Board of Environmental Protection*.<sup>3</sup>
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

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<sup>1</sup> 33 U.S.C. § 1251(b).

<sup>2</sup> *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994).

<sup>3</sup> *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).<sup>4</sup>

### **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"<sup>5</sup> 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.

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<sup>4</sup> 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."

<sup>5</sup> 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.<sup>6</sup>

### **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.

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<sup>6</sup> See, e.g., *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994).

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January 31, 2019

The Honorable Donald J. Trump  
President of the United States  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

Dear President Trump:

Western Governors are aware of reports that the White House is considering issuance of an executive order to address energy infrastructure development and that the order may include provisions affecting the implementation of the state water quality certification program under Section 401 of the federal Clean Water Act (CWA). We urge you to direct federal agencies to reject any changes to agency rules, guidance, or policy that may diminish, impair, or subordinate states' well-established sovereign and statutory authorities to protect water quality within their boundaries. Further, any executive order (or corresponding federal action) aimed at improving or streamlining the state water quality certification program under CWA Section 401 should be informed by early, meaningful, substantive, and ongoing consultation with state officials who have vast experience and expertise in the program's implementation.

With the adoption of the CWA, Congress purposefully designated states as co-regulators under a system of cooperative federalism that recognizes the primacy of state authority over the allocation, administration, protection, and development of water resources. Section 101 of the CWA clearly expresses congressional 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.

This declaration demonstrates the understanding of Congress that a one-size-fits-all approach to water management and protection does not accommodate the practical realities of geographic and hydrologic diversity among states.

State authority to certify and condition federal permits of discharges into waters of the United States under Section 401 is vital to the CWA's system of cooperative federalism. This authority helps ensure that activities associated with federally permitted discharges will not impair state water quality. The U.S. Supreme Court has addressed the issue of state authority and concluded that, "[s]tate certifications under [CWA Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), citing 116 Cong. Rec. 8984 (1970).

Since the enactment of the CWA, states have exercised their authority under Section 401 efficiently, effectively and equitably. We question the need for any federal action to amend or clarify federal policy or regulations governing the implementation of Section 401, as instances of delays or denials


of state water quality certifications are extremely limited. Moreover, the CWA provides ample avenues for challenging state certification determinations.

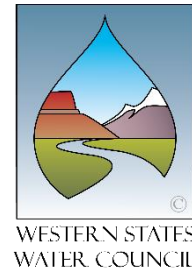
Curtailing or reducing state authority under CWA Section 401, or the vital role of states in maintaining water quality within their boundaries, would inflict serious harm to the division of state and federal authorities established by Congress. Any executive order addressing the implementation of CWA Section 401 should be developed in genuine consultation with states to ensure that the CWA continues to effectively protect water quality, while maintaining the partnerships and the essential balance of authority between states and the federal government.

Western Governors are committed to establishing a framework to incorporate the early, meaningful and substantive input of states in the development of federal regulatory policies that have federalism implications. By operating as authentic collaborators in the development and execution of policy, the states and federal government can demonstrably improve their service to the public. By working cooperatively with the states, the Administration can create a legacy of renewed federalism, resulting in a nation that is stronger, more resilient and more united.

Sincerely,

  
David Ige  
Governor of Hawai'i  
Chair, WGA

  
Doug Burgum  
Governor of North Dakota  
Vice Chair, WGA



December 3, 2018

The Honorable David Ross  
Assistant Administrator  
Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Dear Assistant Administrator Ross:

We understand the Environmental Protection Agency's (EPA) Office of Water is considering regulatory action related to the interpretation of state statutory authority under Clean Water Act (CWA) Section 401. We urge you to reject any changes to agency rules, guidance, and/or policy that may diminish, impair, or subordinate states' well-established sovereign and statutory authorities to protect water quality within their boundaries. Any regulatory action related to states' CWA Section 401 authority raises significant federalism concerns, and therefore, we request that EPA engage in meaningful and substantive consultation with state officials before the commencement of such action.

With the adoption of the CWA, Congress purposefully designated states as co-regulators under a system of cooperative federalism that recognizes state authority over the allocation, administration, protection, and development of water resources. Section 101 of the CWA clearly expresses Congress's 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.

This declaration demonstrates Congress's understanding that a one-size-fits-all approach to water management and protection does not accommodate the practical realities of geographic and hydrologic diversity among states.



The Honorable David Ross

December 3, 2018

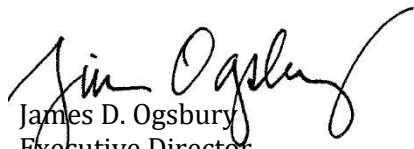
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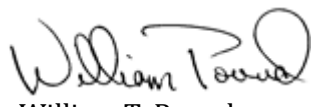
A vital component of the CWA's system of cooperative federalism is states' authority to certify and condition federal permits of discharges into waters of the United States under Section 401, an authority which has helped to ensure that activities associated with federally-permitted discharges will not impair state water quality. The U.S. Supreme Court has addressed this issue of state authority and concluded that "[s]tate certifications under [CWA Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), citing 116 Cong. Rec. 8984 (1970).

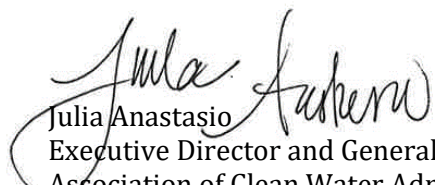
Since the enactment of the CWA, states have exercised their authority under Section 401 efficiently, effectively, and equitably. We question the need for any agency action aimed at amending or clarifying EPA's policy or regulations governing the implementation of Section 401. Instances of delays or denials of state water quality certifications are extremely limited. Where parties wish to contend that a state has exceeded its authority under Section 401, the CWA provides avenues for challenging state certification determinations.

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 should be developed through genuine consultation with states. EPA must also recognize, and defer to, states' sovereign authority over the management and allocation of their water resources. EPA should ensure the CWA continues to effectively protect water quality, while maintaining the partnerships and the essential balance of authority between states and the federal government.

Sincerely,

  
James D. Ogsbury  
Executive Director  
Western Governors' Association

  
William T. Pound  
Executive Director  
National Conference of State Legislatures

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

  
Ed Carter  
President  
Association of Fish and Wildlife Agencies

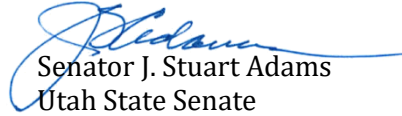
  
Marla Stelk  
Executive Director  
Association of State Wetland Managers

  
Karen White  
Executive Director  
Conference of Western Attorneys General

The Honorable David Ross  
December 3, 2018  
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David Adkins  
Executive Director / CEO  
Council of State Governments



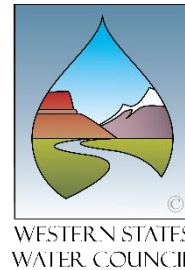
Senator J. Stuart Adams  
Utah State Senate  
Chair, Council of State Governments - West



Dr. Laura Nelson  
Chair  
Western Interstate Energy Board



Tony Willardson  
Executive Director  
Western States Water Council



August 9, 2018

The Honorable Paul Ryan  
Speaker of the House  
U.S. House of Representatives  
H-232 U.S. Capitol  
Washington, D.C. 20515

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
S-230 U.S. Capitol  
Washington, D.C. 20510

The Honorable Nancy Pelosi  
Minority Leader  
U.S. House of Representatives  
H-204 U.S. Capitol  
Washington, D.C. 20515

The Honorable Charles Schumer  
Minority Leader  
United States Senate  
419 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senators McConnell and Schumer, and Representatives Ryan and Pelosi:

We write to express our concerns about various proposals to alter the state certification process under Section 401 of the federal Clean Water Act (CWA). Because each state is unique, we need the flexibility and authority to address our individual water needs. We urge Congress to reject any legislative or administrative effort that would diminish, impair or subordinate states' ability to manage or protect water quality within their boundaries.

States have primary legal authority over the allocation, administration, protection and development of their water resources. Responsible growth and development, as well as proper environmental management, depend upon the recognition and preservation of state stewardship.

We recognize the importance of partnerships between states and the federal government. To implement the CWA, Congress purposefully designated states as co-regulators under a system of cooperative federalism that recognizes state interests and authority. Congress recognizes the legal position of states in the CWA; Section 101 clearly expresses Congress's 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

The Honorable Paul Ryan  
The Honorable Mitch McConnell  
The Honorable Nancy Pelosi  
The Honorable Charles Schumer  
August 9, 2018  
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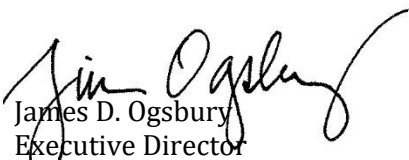
consult with the Administrator in the exercise of his authority under this chapter...Federal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources.

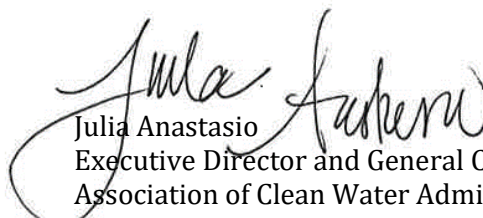
A balanced system of cooperative federalism has enabled states to implement the CWA effectively and with flexibility. The CWA correctly recognizes that a one-size-fits-all approach to water management and protection does not accommodate the practical realities of geographic and hydrologic diversity among states.


A vital component of the CWA's system of cooperative federalism is state authority to certify and condition federal permits of discharges into waters of the United States under Section 401. This authority has helped ensure that activities associated with federally permitted discharges will not impair state water quality. The U.S. Supreme Court has addressed this issue of state authority and concluded that, "[s]tate certifications under [Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), citing 116 Cong. Rec. 8984 (1970).

Curtailing or reducing state authority 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 under the Constitution and recognized by Congress in the CWA. Any legislative or regulatory effort to streamline environmental permitting should be developed in consultation with states and must not be achieved at the expense of authority delegated to states under the CWA or any other federal law. Any such effort must also recognize, and defer to, states' sovereign authority over the management and allocation of their water resources. We implore you to ensure that the CWA continues to effectively protect water quality while maintaining the proper balance between state and federal authorities.

Sincerely,

  
James D. Ogsbury  
Executive Director  
Western Governors' Association

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

  
Virgil Moore  
President  
Association of Fish and Wildlife Agencies

  
Janne Christie  
Executive Director  
Association of State Wetland Managers

The Honorable Paul Ryan  
The Honorable Mitch McConnell  
The Honorable Nancy Pelosi  
The Honorable Charles Schumer  
August 9, 2018  
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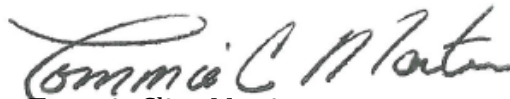
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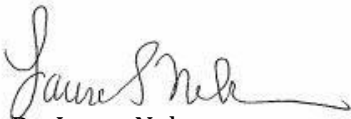
David Adkins  
Executive Director / CEO  
Council of State Governments



Edgar Ruiz  
Executive Director  
Council of State Governments - West



Pommie Cline Martin  
President  
Western Interstate Region of NACo



Dr. Laura Nelson  
Chair  
Western Interstate Energy Board



Tony Willardson  
Executive Director  
Western States Water Council