

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

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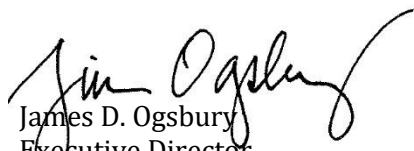
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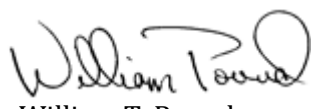
A vital component of the CWA's system of cooperative federalism is states' authority to certify and condition federal permits of discharges into waters of the United States under Section 401, an authority which has helped to ensure that activities associated with federally-permitted discharges will not 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).

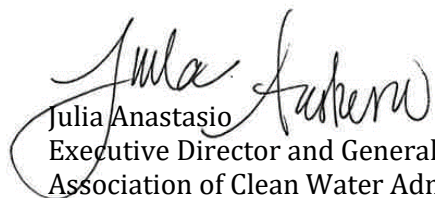
Since the enactment of the CWA, states have exercised their authority under Section 401 efficiently, effectively, and equitably. We question the need for any agency action aimed at amending or clarifying EPA's policy or regulations governing the implementation of Section 401. Instances of delays or denials 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,


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Western Governors' Association


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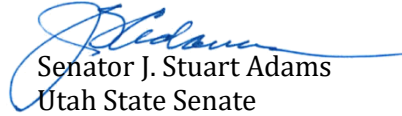

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Chair, Council of State Governments - West



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