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March 25, 2019

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

Dear Administrator Wheeler:

On behalf of Western Governors, I am writing to congratulate you on your confirmation as Administrator of the U.S. Environmental Protection Agency (EPA). The Western Governors' Association (WGA) looks forward to continuing to work with you in your new capacity as the chief environmental officer of the United States.

Western Governors recognize the essential role of partnerships between the states and EPA in protecting our nation's environment. As articulated in WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, Western Governors 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."

Consistent with the Governors' resolution, EPA's "Guidance on Executive Order 13132: Federalism" (Guidance) expresses EPA's policy, "to promote communications between EPA and [state and local] governments and solicit input from [state and local] government representatives when developing a regulation that will have any adverse impact above a minimal level on [state and local] governments." In its Guidance, EPA recognizes that the subject executive order applies broadly to "policies, guidelines, guidance, and interpretive documents" (*i.e.*, "guidance documents").

EPA's Guidance clarifies that consultation with state officials should: "be meaningful and timely"; "begin as early as possible"; and continue throughout the development of a proposed rule. Agency officials are directed to, "explore a variety of approaches for involving [state and local] government officials in developing a regulation – including one-on-one discussions, public meetings, and interest group forums."

Western Governors have been encouraged by the efforts of EPA, as well as the U.S. Army Corps of Engineers (USACE), to engage with states during and throughout the promulgation of its currently-proposed rule, "Definition of 'Waters of the United States'" (RIN 2040-AF75) (the WOTUS Rulemaking). EPA conducted early outreach and consultation with states in 2017 to identify and address potential federalism implications of the WOTUS Rulemaking. EPA and USACE have drafted and provided WGA with a *Summary Report on Federalism Consultation: Revised Definition of "Waters of the United States" Proposed Rule*, describing these efforts. As a result of these early meetings, WGA submitted analysis and recommendations to EPA and USACE in a June 19, 2017 letter to the agencies.

Additionally, as part of the WOTUS Rulemaking, EPA and USACE hosted officials from nine states for a State Co-Regulators Workshop at EPA Headquarters in March 2018. Western Governors would like to better understand the planning, development, and outcomes of the March 2018 State Co-

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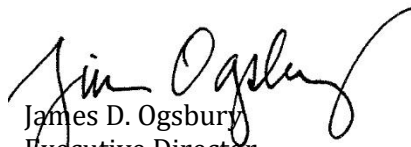
Regulators Workshop to determine if the approach could serve as a model for state engagement in future EPA rulemaking efforts.

Western Governors urge EPA to employ the same robust approach to state engagement and consultation as was used in the WOTUS Rulemaking – and which is encouraged in the Guidance - in other EPA rulemakings that may affect states. Specifically, EPA should conduct early, meaningful, substantive, and ongoing consultation with states in the development of its announced action, “Clarification of State Certification Procedures under Section 401 of the Clean Water Act” (RIN 2040-AF86). For your reference, attached please find a January 2019 letter from Western Governors to President Trump, urging the Administration to ensure that any changes to the Clean Water Act’s Section 401 program be informed by state consultation, and any such changes do not curtail, diminish or otherwise negatively affect states’ well-established legal authorities over water resources.

Western Governors value their partnerships with EPA and expect that you will engage states in a productive and substantive manner befitting cooperative federalism. Only through cooperation and collaboration can state and federal officials effectively and efficiently implement federal programs to protect our environment while respecting the balance of state and federal powers envisioned by Congress.

With warm regards and best wishes, I am

Respectfully,



James D. Ogsbury  
Executive Director

Attachment

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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