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2019

## Association of State Wetland Managers Consultation and Transparency with Respect to EPA's Announced Actions Affecting Clean Water Act Section 401 Guidance and Regulations (Docket ID: EPA-HQ-OW-2018-0855)

Association of State Wetland Managers

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The Council of State Governments



West THE COUNCIL OF STATE GOVERNMENTS



Western Interstate Energy Board



WESTERN STATES WATER COUNCIL

May 24, 2019

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

Re: Consultation and Transparency with Respect to EPA’s Announced Actions Affecting Clean Water Act Section 401 Guidance and Regulations (Docket ID: EPA-HQ-OW-2018-0855)

Dear Administrator Wheeler:

We write to express our continued concerns about the Environmental Protection Agency’s (EPA) plans and processes to revise its guidance and promulgate agency regulations governing the implementation and administration of the Clean Water Act (CWA) Section 401. EPA’s engagement with state and local officials on this issue has thus far failed to satisfy the express directives requiring meaningful consultation in Executive Order 13868, Promoting Energy Infrastructure and Economic Growth; Executive Order 13132, Federalism; and EPA’s Action Development Process, Guidance on Executive Order 13132, Federalism. This conflicts with Congress’s express intent that the CWA be administered under a genuine system of cooperative federalism.

The agency’s constrained timelines to review, revise, and replace longstanding guidance and rules – as directed by Executive Order 13868 – heighten our concerns about the agency’s ability to consult in a meaningful and collaborative manner. EPA’s inadequate outreach reduces our confidence in the prospects for improved cooperation between federal agencies and state and local governments on issues of joint interest and concern.

Executive Order 13132, Federalism, emphasizes that:

National action limiting the policymaking discretion of the States shall be taken only where...the national activity is appropriate in light of the presence of a problem with national significance...With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum

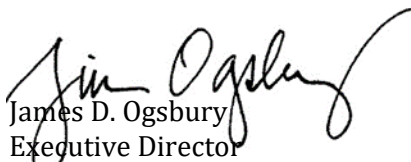
administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable.

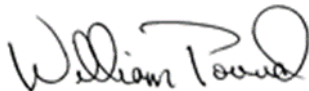
EPA has failed to provide states or local governments with substantive information supporting the need for this agency action. Our organizations have contacted the agency numerous times – both in advance of formal action, and afterwards – without receiving adequate, if any, response. The agency has failed to meaningfully respond both to questions posed and to substantive suggestions proffered by our associations. Without knowing the direction that the agency plans to take concerning revisions to CWA 401 guidance and regulations, or the details of the agency’s proposals, state and local officials are hindered from offering substantive comments, which would specifically address the agency’s needs and inform its actions.

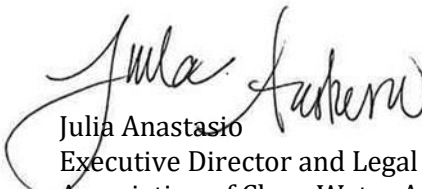
EPA should adhere to its own policy that consultation with governmental officials should be “meaningful and timely,” “begin as early as possible,” and continue throughout the development of a proposed rule or policy. Any regulatory change to the Section 401 certification process should be developed through genuine consultation with state and local governments and must not come at the expense of state authority. EPA must ensure the CWA continues to effectively protect water quality, while maintaining critical partnerships and the essential balance of state and federal authorities.

We appreciate your prompt attention and response to this communication and the concerns it expresses.


Sincerely,

  
James D. Ogsbury  
Executive Director  
Western Governors’ Association

  
William T. Pound  
Executive Director  
National Conference of State Legislatures

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

  
Ed Carter  
President  
Association of Fish & Wildlife Agencies

  
Chad Berginnis  
Executive Director  
Association of State Floodplain Managers

  
Marla Stelk  
Executive Director  
Association of State Wetland Managers

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David Adkins  
Executive Director / CEO  
Council of State Governments



Representative Kimberly Dudik  
Montana House Representative  
Chair, Council of State Governments - West



Dr. Laura Nelson  
Chair  
Western Interstate Energy Board



Tony Willardson  
Executive Director  
Western States Water Council