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U.S. Environmental Protection Agency
EPA Docket Center
EPA-HQ-OA-2020-0128
Office of Regulatory Policy and Management
Mail Code 1803A
1200 Pennsylvania Avenue NW
Washington, DC 20460

Via regulations.gov: Docket ID No. EPA-HQ-OA-2020-0128

RE: Administrative Procedures for Issuance and Public Petitions

The Association of Clean Water Administrators (“ACWA”) is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers, who on a daily basis implement the water quality programs of the Clean Water Act (“CWA”). As the primary entities responsible for carrying out CWA programs, states are very interested in any/all national regulatory or policy positions that may impact their ability to implement the CWA in their states.

In the spirit of cooperative federalism, and before the rule is finalized, states request Environmental Protection Agency (EPA) meet with states to discuss in greater detail the scope and intent of this rule, and further consider the unique and distinct role that states play in implementing guidance in authorized and delegated programs.

General Overview

ACWA and the states support transparency in developing regulations and guidance documents. We also support regulatory recognition that guidance documents are not legally binding and should refrain from including mandatory language such as “shall,” “must,” “required” or “requirement,” unless these words are used to describe a statutory or regulatory requirement. States also agree that a final rule should cover both new guidance and updates to historical guidance. States support ECOS Resolution 11-8, which highlights that EPA should “use guidance only to interpret its regulations rather than as a substitute for regulation, as a change to its regulation, or as an expansion of its regulation.”¹

¹ ECOS Resolution 11-8, *On the Use of Guidance*, Revised 9/13/17.

States recognize and agree that not all guidance should go through the traditional rulemaking notice and comment process but also believe defining “significant guidance” as a scope threshold by simply referencing Executive Orders 12866 and 13891 may be too vague and potentially too narrow. While referencing a \$100 million dollar economic impact threshold may require a straight forward analysis, in reviewing the Office of Water rules that met this threshold, there have been just four rules over the last ten years.² Likewise, it is not completely clear which guidance documents would “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities...”, requiring a “significant” designation.³ Most of EPA’s Office of Water guidance documents affect the environment. EPA should consider expanding the scope and more clearly defining some of other factors beyond a \$100 million dollar economic impact that might warrant traditional public notice and comment. On a related note, several “non-significant” guidance documents also have major impacts on the work of states and interstates. Greater care and communication on these documents should also be paramount to EPA.

States generally support the public notice and comment process for significant guidance documents as outlined in the proposed rule. However, EPA should reconsider limiting the comment period to just 30 days. Many guidance documents are more complex and more nuanced than the rule they are intended to support. Likewise, more time is sometimes needed to consider national guidance that may supersede conflicting/overlapping guidance provided to states by a regional office. Finally, comments provided by states must sometimes follow a time-consuming approval process before those comments can be submitted on behalf of the state. States recommend EPA leave open, and not regulatorily limit, the amount of time available for a comment period.

For over 45 years, EPA has provided assistance and support to states, and together we have achieved significant improvements in water quality through a combination of sound policy, regulation, and funding. This partnership has not always worked as efficiently and effectively as it should though. In order to achieve the stated goal of efficiency, consistency, and optimization, EPA has at times instituted a number of new program requirements, performance measures, guidance policies, and initiatives without meaningful consideration of state input. States are not simply another stakeholder. When EPA partners with states, and true collaboration is the goal, better regulations are drafted, superior policy is created, duplication is curtailed, national consistency is improved, necessary flexibility is incorporated, unintended consequences are avoided, greater certainty is realized, legal

² National Primary Drinking Water Rule: Stage 2 Disinfectants and Disinfection Byproducts Final Rule published on January 2, 2006 (71 FR 388-493); Cooling Water Intake Existing Facilities Rule, Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities (aka CWA Section 316(b)) published on August 15, 2014 (79 FR 48299); Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category published on November 3, 2015 (80 FR 67837); Clean Water Rule published on June 29, 2015 (80 FR 37053).

³ Executive Order 13891, §2 (c), definition for “significant guidance document”.

challenges are minimized, and the public is much better served. States recommend that EPA incorporate into this rule all state recommendations that support this continued partnership and recognize the unique role states play in implementing guidance in authorized and delegated programs. As noted by ECOS Resolution 11-8, EPA is urged “when guidance is deemed necessary, to seek early, meaningful, and substantial involvement from states about the content of guidance and the practicalities of implementation.”⁴

Proposed Rule Questions

In the proposed rule, EPA asked for comment on these three important questions:

Q1. Whether the issuance of a modification to an active significant guidance document or the withdrawal of an active significant guidance document should be announced via the Federal Register and subject to a 30-day public comment period, or if other means of public engagement, such as the EPA's Guidance Portal or other Agency website, could be used to announce such actions.

A1: ACWA and states support use of the Federal Register and a defined comment period for each significant guidance document that will be developed, amended, or withdrawn. However, states do not believe EPA should regulatorily limit the length of the comment period to just 30 days. Also, a couple of states raised concerns that EPA might get inundated with requests from groups that could overwhelm the new system/process.

Q2. Whether the procedural rule should specify any other information elements that should be addressed in a petition to modify or withdraw an active guidance document. The EPA requests that any such comments explain how additional information elements would enable the Agency to correctly identify and more completely evaluate a petition.

A2: ACWA and states support use of the proposed informational elements as striking an appropriate balance between helping EPA and the public understand what the petition is asking for and why it was submitted versus making the petition submission process too burdensome.

Q3. The EPA solicits comment on the most effective means to inform the public that a new guidance document has been issued, an active guidance document has been modified, or an active guidance document has been withdrawn.

A3: ACWA and states recommend a simple Federal Register notice and then a link to EPA's webpage would be sufficient. States also support EPA's continued long-term maintenance and improvements to the new guidance database/portal.

⁴ See ECOS Resolution 11-8.

Conclusion

Thank you for the opportunity to comment. ACWA and states support regulatory and guidance development transparency. As this rule is further refined, ACWA requests that EPA meet with states to discuss the importance of ensuring this rule supports cooperative federalism and the unique role of states. As with all ACWA comment letters, we encourage the agency to also consider recommendations provided by individual states. If you have any questions regarding this comment letter, please contact ACWA Executive Director Julia Anastasio at janastasio@acwa-us.org or (202) 756-0600.

Sincerely,

A handwritten signature in blue ink that reads "Melanie D. Davenport".

Melanie Davenport
ACWA President
Water Permitting Division Director
Virginia Department of Environmental Quality