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Peggy S. Browne  
Acting Assistant Administrator for Water  
U.S. Environmental Protection Agency

Re: E.O. 13132 (Federalism) Consultation and Coordination on Clarification  
Regarding the Application of Clean Water Section 401 Certification

The Association of Clean Water Administrators (ACWA) is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers who serve as co-regulators of the federal Clean Water Act (CWA). The U.S. Environmental Protection Agency (EPA) has announced that it is in the process of determining whether guidance or rulemaking may be necessary to address identified areas of regulatory uncertainty or implementation challenges regarding the scope of state water quality certification under CWA Section 401. ACWA appreciates EPA's early engagement with states and others regarding this effort and submits the following comments.

ACWA's members are primarily responsible for implementing Section 401 of the CWA and have a unique and important interest in working cooperatively with EPA as any changes to applicable regulations or policies are considered and developed. Section 101 of the CWA unambiguously expresses Congress' 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... 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."

Through the CWA, Congress expressly authorized states to protect the nation's waters through various programs and demonstrated its recognition that states have unique technical expertise and specialized knowledge to manage and protect their water resources. This balanced system of cooperative federalism has enabled states to implement CWA programs, including Section 401 certification, effectively and with flexibility for over 50 years. Congress correctly recognized – and courts have consistently reiterated - that a one-size-fits-all approach to water management and protection does not accommodate the diverse geographic and hydrologic realities among states.

CWA Section 401 water quality certification represents a vital state authority, expressly delegated by Congress, to ensure that federally permitted activities do not impair waters of the United States. 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). Any efforts to update or change EPA policies or regulations governing CWA section 401 must recognize states’ authority and role in Section 401’s implementation and must not diminish state authority.

ACWA recognizes and appreciates EPA’s early engagement with states on this matter through recent federalism (E.O. 13132, *Federalism*) consultation sessions, in addition to public listening sessions and opportunities for public comment. In response to EPA’s request for information under its federalism consultation process, ACWA provides the following recommendations for any changes or updates to EPA policies or regulations should EPA determine that amendments are necessary, based on public comments received:

1. Recognize states’ Congressionally delegated CWA authority and role as co-regulators in CWA program implementation and ensure that any new CWA Section 401 regulations and/or policies do not diminish or impair state certification authority or impose new mandates that limit states’ exercise of such authority
2. Continue to provide states with ongoing opportunities for meaningful dialogue and substantive input throughout the development of any new CWA Section 401 regulations and/or policies
3. Respect and follow the language of the CWA, Congressional intent, binding legal precedent, and the doctrine of cooperative federalism in any new CWA Section 401 regulations and/or policies
4. Prepare to provide state regulators with technical assistance, tools, and training to assist with the implementation of any new CWA Section 401 regulations and/or policies

While these comments and recommendations are intended to capture the diverse perspectives of the state, interstate, and territorial clean water administrators, EPA should also seriously consider the recommendations that come directly from individual states, interstates, and territories. ACWA would like to reiterate its appreciation to EPA for the opportunity to provide pre-proposal recommendations and looks forward to continuing meaningful engagement with EPA throughout this effort.

Sincerely,



Julia Anastasio

ACWA Executive Director and General Counsel