



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

682 East Vine Street / Suite 7 / Murray, UT 84107 / (801) 685-2555 / Fax 685-2559 / www.westernstateswater.org

Chairwoman - Jeanine Jones; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

WESTERN GOVERNORS

Washington/CWA 401 Certifications

On May 21, Washington State Governor Jay Inslee and Washington State Attorney General Bob Ferguson jointly responded to the Environmental Protection Agency's (EPA) call for comments on guidance related to administration of Clean Water Act (CWA) Section 401 state certifications. The letter read: "Section 401 of the Clean Water Act gives states a vital role in decisions that could impact the quality of their waters. This Administration must not undermine the states' role at the behest of a few special interests who stand to profit at the expense of our environment and our residents.... Washington State submits this letter to express opposition to any proposal changing the existing EPA guidance and regulations regarding states' section 401 certification under the Clean Water Act if the change is in any way detrimental to state authority. The notice from the EPA stems from an ill-advised Executive Order issued by President Trump on April 10, 2019, to speed up approval for energy projects."

The letter adds: "In moving in this direction, it is clear that the Trump Administration has consulted with - and responded to - industry interests. However, this Administration has failed to satisfy its fundamental obligation to consult with the states or tribal governments. The EPA has not released any draft guidance or draft rule changes. Additionally, the EPA has not identified any specific section of regulations or guidance for revision. The EPA must provide more detailed information and a meaningful opportunity for states to engage in a dialogue on any proposed changes (see *California Wilderness Coalition v. Department of Energy*, 631 F. 3d 1072, 1087 (9th Cir. 2011)). Two one-hour webinars during which the EPA refuses to provide information about what changes are actually being considered does not constitute 'consultation' under any understanding of that term. Proper respect for federalism demands that states have the opportunity to help craft any regulatory changes that the EPA contemplates in this area."

The letter continued: "Under a system of cooperative federalism, the Clean Water Act and EPA's current guidance and regulations properly recognize that section

401 determinations are fundamentally matters of state law. The courts have held that state law governs the scope of state review, the information the state may consider, and the conditions the state may impose (see, e.g., *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994)). To the extent a dispute arises, an applicant can file a 401 appeal in state court. Within this framework, there is very little room for the EPA to establish generally applicable rules or to provide additional guidance beyond what already exists."

In conclusion, the letter declared: "For over forty years, Washington State has worked cooperatively with our federal partners - including the EPA, Federal Energy Regulatory Commission, National Oceanic and Atmospheric Administration, and Army Corps of Engineers - to allow development projects to move forward while preserving and protecting our state's water quality. We are proud of our achievements and our track record of environmental stewardship. This legacy would be threatened by any effort by the EPA to undermine the careful balance of state-federal cooperation currently in place.... As our actions have demonstrated, we stand ready to take all steps necessary to manage and protect our state's water quality, and to preserve the State's important role under section 401 of the Clean Water Act. We urge the Administration to reverse the ill-founded, short-sighted and dangerous path it has chosen."

On May 24, Maia Bellon, Director, Washington Department of Ecology also commented. "Ecology is the state agency responsible for protecting water quality in Washington through the Section 401 process. EPA has indicated its intention to curtail state authority by limiting the scope and shortening timelines for review of applications. Pursuant to the CWA and Congressional authority, states are the government entities charged with reviewing Section 401 permit applications. We strongly oppose EPA's attempts to subvert authority and responsibility from state governments. Furthermore, since EPA has failed to consult with Washington or any other state, we question the justification for such action."

She continued: "The CWA Section 401 certification process is critical to ensuring that state water quality standards will be met by proposed projects needing a

federal permit or license. Any action taken by EPA to constrict the scope of federal protection will have direct and significant impacts on Washington State's water quality and beneficial uses. Washingtonians expect and demand clean water for agriculture, industry, residential use (including drinking water), and recreation (including clean, cool water for fishing and swimming). Therefore, we emphasize that no changes to the scope of water quality review for Section 401 certifications should be made and there should not be any restrictions on the types of conditions that states or tribes determine to be reasonably appropriate to include in a Section 401 certification. Any attempted changes by EPA must uphold United States Supreme Court rulings that states may impose permit conditions in accordance with state law."

Bellon added Congress clearly intended States to have adequate time to review requests providing up to one year to issue certification decisions. Further, States need sufficient information in order to be able to ensure "state water quality standards will be met and beneficial uses protected. Constrained review times will likely have the unintended consequence of increasing denials.... My agency reviews are conducted fairly, on time, and in compliance with the law. That is why Ecology's certifications and denials continue to prevail in the courts. Furthermore, EPA has failed to provide evidence supporting the assertion that states have been abusing the Section 401 certification process and that it needs to be fixed."

She echoed concerns raised by many related to the constrained period of time provided for state comments. "I am also troubled with the 30-day time frame EPA has provided Washington and others to comment on changes to so-called guidance without even providing us proposed language. The two webinars EPA held for states and tribes are not a replacement for consultation and did not provide an adequate forum for us to provide feedback. Many of the questions posed during the first webinar in particular were left unanswered.... EPA is not actually interested in earnest conversations with states but rather simply going through the motions. Again, without EPA consulting with states and tribes and without our consent to changes, we question the justification for moving forward.... In conclusion, I urge you to withdraw this misguided attempt to diminish state authority for the sake of furthering special interests. States, like Washington, have a long record of stewarding Section 401 permitting responsibly, justly, and consistent with the law. The people of Washington deserve clean water, and they do not deserve to be glossed over and ignored."

CONGRESS/WATER RESOURCES

Missouri River/Corps

On May 21, Senator Josh Hawley (R-MO) introduced two bills related to the recent flooding on the Missouri River. The U.S. Army Corps of Engineers

(Corps) Flood Control Civilian Advisory Council Act (S. 1565) would establish an advisory council composed of two representatives from each of the States of Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, and South Dakota, as well as representatives from the agriculture and river commerce industries, and any other industries as deemed appropriate. The members of the council will be appointed by the President based on recommendations of the Senators from those respective States. The advisory council is intended to last one year, and its purpose is to "develop recommendations on how to best revise the Missouri River Mainstem Reservoir System Master Water Control Manual to prioritize flood control and navigation."

The second bill is the Missouri River Flood Control Prioritization Act (S. 1571), which would remove fish and wildlife as an authorized purpose of the Missouri River Mainstem Reservoir System, and would make flood control the highest priority. The bill directs the Corps to revise the Master Water Control Manual accordingly within 90 days.

Senator Hawley stated: "The Missouri River flooding has once again devastated our state and it's clear something has to change. People who live along the river regularly deal with catastrophic flooding, simply because the Army Corps is acting under conflicting priorities. What's more, farmers feel like they have been shut out and their voices don't matter – and that is completely unacceptable. By introducing these bills, we can get at the root of the problem, demand change, and ensure the Army Corps prioritizes the safety and sustainability of our communities."

Rep. Sam Graves (R-MO) introduced the House companion bill Missouri River Flood Control Prioritization Act (H.R. 2174) and said: "Flood control must be the main priority on the Missouri River. People and property should always take precedent over fish and birds. Senator Hawley recognizes this and I'm thrilled that he is leading on this issue in the Senate. Working together, I'm hopeful that we can properly address the management priorities on the Missouri River, saving lives and livelihoods in the process." Rep. Graves has introduced similar legislation deleting fish and wildlife as an authorized purpose, and elevating flood control as the highest priority at all times, over the past four Congresses since 2011.

The WSWC supports a comprehensive study of the Missouri River Mainstem Reservoir System's authorized purposes and related benefits before addressing priority uses. Maintaining fish and wildlife as an authorized purpose provides substantial recreational and economic activity, and the U.S. Fish and Wildlife Coordination Act requires the Corps to continue mitigating fish and wildlife habitat losses. Additionally, flood control, hydropower, and water supply have provided significant benefits, while navigation has decreased significantly in recent decades.

The WESTERN STATES WATER COUNCIL is an organization of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.