



## STATE OF WASHINGTON

May 21, 2019

Lauren Kasparek  
Program Development and Jurisdiction Branch  
Office of Wetlands, Oceans and Watersheds  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue  
Mail Code 4502T  
Washington, DC 20460

**RE: CWA Section 401 Water Quality Certification  
Docket ID No. EPA-HQ-OW-2018-0855**

Dear Ms. Kasparek:

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.

In response to the referenced notice, 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.

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.

The Executive Order states: "Outdated federal guidance and regulations regarding section 401 ... are causing confusion and uncertainty and are hindering the development of energy infrastructure." We are unaware of facts or circumstances supporting this conclusion, and neither the White House nor the EPA have provided any. Fabricated allegations of "confusion" or lack of clarity put forth by industry interests proposing unsuccessful projects do not create a basis for the

Lauren Kasparek

May 21, 2019

Page 2

EPA to compromise the careful balance of state-federal cooperation that has existed under every Federal Administration for every decade since the Clean Water Act was passed.

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 (9<sup>th</sup> 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.

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.

Sincerely,



JAY INSLEE  
Washington State Governor



BOB FERGUSON  
Washington State Attorney General