



July 30, 2021

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

Robin Vos
Assembly Speaker
Wisconsin
President, NCSL

Martha R. Wigton
Director
House Budget & Research
Office
Georgia
Staff Chair, NCSL

Tim Storey
Executive Director

RE: Response to EPA’s Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule: Docket ID No. EPA-HQ-OW-0302.

Dear Administrator Regan,

On behalf of the National Conference of State Legislatures (NCSL), the bipartisan organization representing the legislatures of our nation’s states, commonwealths and territories, I am writing in response to the U.S. Environmental Protection Agency’s (EPA) Notice of Intention to Reconsider and Revise the Clean Water Act (CWA) Section 401 Certification Rule.

States and tribes have historically been provided with the well-established authority to review and approve, condition or deny any required federal permits or licenses for projects that would discharge pollutants into a water of the United States under CWA Section 401. However, EPA’s 2020 rulemaking affecting the implementation of Section 401 of the Clean Water Act placed significant new limits on state authority and autonomy to manage and protect water resources.

During the previous administration’s rulemaking, NCSL and other stakeholders raised strong concerns that the agency had not consulted with states or their intergovernmental organizations in a meaningful or timely manner. Such inaction was a disappointment, as over 40 years ago, Congress enshrined the principle of cooperative federalism into the CWA— explicitly stating in Section 101 that:

“...it is the policy of the Congress 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 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”

Congress purposely recognized states’ primary authority over water resources, designating states and their delegated entities as co-regulators under a system of cooperative federalism. The absence of consultation by the previous administration not only disregarded congressional intent, but also led to ambiguity and confusion with the agency’s new Section 401 certification process

due to a lack of comprehensive understanding of the actual permitting environment during promulgation of the rule.

We urge EPA to ensure that any upcoming regulatory changes to the Section 401 certification process be informed, developed and refined through genuine consultation with state and local governments and that it not come at the expense of state authority. NCSL looks forward to continuing a strong relationship with EPA and to working with the agency as the certification rule is revised and reconsidered. If you have any questions, do not hesitate to contact NCSL staff Kristen Hildreth (202-624-3597 or kristen.hildreth@ncsl.org).

Sincerely,

A handwritten signature in blue ink that reads "Tim Storey". The signature is written in a cursive style with a long horizontal stroke at the beginning.

Tim Storey
Executive Director
National Conference of State Legislatures