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Addressing water needs and strategies for a sustainable future.

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ADMINISTRATION/WATER QUALITY

CWA Section 401 Certification Authority

On February 17, the public comment period closed for the Environmental Protection Agencie's (EPA) 2026 Proposed Rule, Updating the Water Quality Certification Regulations (Docket ID No. EPA-HQ-OW-2025-2929). The proposed rule elicited a wide range of state responses, including letters from two coalitions of Attorney Generals. While one group of states views the proposal as an "unlawful stripping of state sovereignty," the other sees it as a "necessary correction to state overreach" that has historically hindered vital energy and development projects.

The Washington State *et al.* coalition included CA, NY, CO, CT, IL, ME, MD, MI, MN, NJ, NM, OR, RI, WI, VT, MA, and DC. These states strongly opposed the Proposed Rule, arguing it repeats failures of the 2020 Rule by "unlawfully curtailing states' rights to address the water quality impacts of federally licensed or permitted activities." The coalition said Section 401 is a "cornerstone" of cooperative federalism intended to preserve state authority to protect their own waters. They contended that the EPA's attempt to narrow the scope of review from the "activity as a whole" to only "point source discharges" directly contradicts the plain language of the CWA and established Supreme Court precedents, such as *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) and *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006).

Washington *et al.* argued the proposed rule would create regulatory gaps, potentially allowing federal projects to circumvent state protections and pollute state waters in cases where local laws are otherwise preempted. They contend that the CWA does not authorize EPA to establish an exclusive list of contents for a request for certification, or to require states to follow a particular procedure in reviewing requests (other than requiring them to establish a procedure, and hold public hearings in some cases.)

They argued that categorically banning certifying authorities from requesting applicants withdraw and resubmit, "including in situations where the applicant has failed to provide the certifying agency with all information necessary to evaluate the request", is arbitrary and capricious and ignores recent court rulings. "Historically, 'withdrawal and resubmission' of section 401 certification requests involved an applicant's withdrawal of a pending request and submission of a new request in order to avoid a denial by the state certifying authority." They described requiring applicant consent for certification modifications an "unlawful grant of veto power to industry," preventing states from responding to changing circumstances. Washington *et al.* argued that reopening provisions are vital for long-term projects to respond to changing environmental conditions like species listings. Furthermore, they argue the rule would violate the Administrative Procedure Act by failing to provide a rational basis for upending decades of successful practice.

The Washington coalition told the EPA to abandon and withdraw the Proposed Rule. Most significantly, the states warned that if these rigid timelines and narrowed standards are imposed, they would be forced to frequently deny certifications without prejudice to prevent waiving certification authority when information is insufficient, leading to increased litigation and project delays rather than the predictability EPA is seeking.

Conversely, the cosigning states with the West Virginia Attorney General, including AL, AK, AR, FL, GA, ID, IN, IA, KS, MI, MT, NE, OH, OK, SC, SD, and UT, strongly supported the Proposed Rule, claiming it appropriately restores a "three-part nexus" for review, focusing on (1) the discharge, (2) the waters of the United States, and (3) the state's water-quality requirements. While supporting state discretion in other contexts, West Virginia *et al.* argued Section 401 has been misused for states to block disfavored infrastructure projects for reasons unrelated to water quality, such as climate change or train noise. The letter asserts that Section 401

authority is not an inherent sovereign right but is directed at a narrow set of "waters of the United States," making it appropriate for EPA to intervene when a state uses the process "as a pretext for reviewing activities well beyond a project's discharges, uses delay as a *de facto* development veto, or employs onerous conditions to make important infrastructure impossible"

West Virginia *et al.* coalition argued that the plain text of Section 401(a)(1) and (a)(2) focuses repeatedly and exclusively on discharge. "Congress thus voiced a repeated concern with the discharge that a project might produce—and nothing else. As the agency has recognized in the Proposed Rule, ignoring that message risks offending both the federalism canon and the major-questions doctrine. 91 Fed. Reg. at 2,026." They argued that State regulators under Section 401 lack the authority to balance economic, energy, or political factors. West Virginia *et al.* cited an instance where Washington State allegedly used Section 401 as a pretext to block a coal terminal based on political grounds, leading Montana and Wyoming to file action in the Supreme Court.

"States cannot use Section 401 to address nonpoint source discharges, effects on state (non-WOTUS) waters, or policy questions like climate change and land use… Opposition to coal, concerns about train noise, endangered species issues, coastal protection, religious respect for certain waters, and other considerations running far afield from a discharge simply should not play a role in Section 401 certifications… The Proposed Rule appropriately resets the board, providing that a State should limit its review under Section 401 'to assuring that a discharge from a federally licensed or permitted activity'— that is, 'a discharge from a point source into waters of the United States'—'will comply with applicable and appropriate water quality requirements.'"

West Virginia *et al.* said the proposed rule appropriately eliminates "tricks" that States have used to "blur" bright-line rules such as "seriatim requests for information" and "unjustified bases for extensions of the reasonable time." They suggested the agency consider eliminating the practice of denying certifications "without prejudice," which they believe has allowed states to indefinitely nullify the one-year review limit.

West Virginia *et al.* disagreed that states should be allowed continued oversight of covered projects. "Through broad certification conditions and lingering threats of modifications, States can effectively appoint themselves project superintendents for the duration of the work." They supported the requirement for states to provide written justifications for conditions which can be scrutinized by courts and the public. "Still, the scrutiny will come through protracted litigation. And litigation is no guarantee; indeed, some courts have demanded that States impose additional expansive conditions to survive judicial review. See, e.g., *Sierra Club v. W. Va. Dep't of Env't Prot*., 64 F.4th 487, 506 (4th Cir. 2023). To avoid leaving it to the courtroom, EPA might consider granting itself a role in reviewing conditions (before adoption) or controlling enforcement (after adoption) to confirm they fall within the statute's scope."

The coalition supported restraining certification modifications by requiring agreement from the state, the federal agency, and the applicant to prevent "backdoor" conditions from being snuck through after initial review. West Virginia *et al.* encouraged EPA to finalize the rule as soon as possible.

Individual state agency comments reflected a nuanced spectrum of concerns, some offering conditional or hybrid views. For example, Idaho and Wyoming generally supported a discharge-focused scope and increased justification requirements. However, Idaho suggested clarification that "point source discharge" includes the placement or release of dredged material, as well as the "reasonably foreseeable water quality effects of that placement on the receiving water." They opposed EPA's alternative proposal to limit state conditions to mere monitoring requirements. Wyoming expressed concern with proposed provisions that "would restrict state authority" including those that limit information requests, restrict water quality standards to numeric criteria, ban "withdraw and resubmit" requests, and grant applicants a veto over certification modifications. Governor Greg Gianforte (R-MT) expressed support for addressing regulatory uncertainty and establishing clearer timelines. But he requested EPA "retain reasonable flexibility for states by allowing them to define and publicly post additional project-specific information requirements" to ensure a complete request and avoid unnecessary denials.

Nevada pointed out that the Proposed Rule might invalidate successful existing agreements, like its Memorandum of Understanding with the Army Corps, which has streamlined certifications with minimal staff. South Dakota supported discharges as the primary

trigger "while allowing states to address reasonably foreseeable water quality impacts caused by any discharge clearly linked to the licensed activity." They suggested EPA allow states "to reference applicable state requirements for non-WOTUS features within the project area when necessary to prevent the discharge from causing or contributing to violations in WOTUS." Many states, including CA, NV, OR, NM, WY, and ID expressed opposition to the proposal that applicants must agree to certification modifications, viewing it as an inappropriate grant of applicant veto power that obstructs necessary water quality safeguards. https://www.federalregister.gov/documents/2026/01/15/2026-00754/updating-the-water-quality-certification-regulations#dates

EPA/Technical Assistance Grants

On March 4, the Environmental Protection Agency announced the launch of the Real Water Technical Assistance (RealWaterTA) initiative, outlining a blueprint for how federal technical assistance dollars are directed into drinking water and wastewater systems. Funding will be redirected from "misaligned" activities such as university website updates, regional communication campaigns, climate change programming, and "storytelling initiatives" to fund more engineering and design help, operational support, workforce development, and financial management guidance. The initiative places particular emphasis on small, rural, and tribal water systems.

The RealWaterTA framework organizes federal technical assistance around eight priorities including: (1) returning to and maintaining compliance; (2) focusing on traditional and innovative water infrastructure; (3) defining the scope of technical assistance; (4) strengthening technical, managerial, and financial management; (5) empowering the water workforce; (6) improving financial readiness and access to assistance; (7) reducing inefficient costs; and (8) driving real-world results.

EPA Headquarters programs, Regional offices, and all technical assistance providers funded through EPA grants, contracts, or cooperative agreements are expected to realign their activities with RealWaterTA's eight priorities immediately. The agency has also signaled that the Office of Water will develop on-the-ground technical assistance that combines applied research with policy implementation, reflecting a unified approach to science and compliance work.

Kramer said: "RealWaterTA ensures that EPA is stewarding taxpayer dollars responsibly with a laser-focus on water quality improvements and high-impact public health protection. It will yield tangible results by providing technical assistance to water systems working day-in and day-out to deliver clean and safe water."

CONGRESS/WATER RESOURCES

Weather Act Reauthorization

On March 4, the Senate Commerce, Science, and Transportation Committee approved the Weather Research and Forecasting Innovation Reauthorization Act (S. 3923). Similar to the House version (H.R. 5089), the bill would reauthorize the 2017 Weather Act. Both bills authorize pilot projects to improve subseasonal to seasonal (S2S) precipitation forecasts. One project would be focused on forecasting for agriculture in the central US. The House bill would direct the other pilot project to be focused on the "western United States," while the Senate directs a focus on areas with "a high level of drought" and a "reliance on reservoirs for water storage." In addition to the scientific objectives outlined in the House bill, the Senate's pilot projects require improving the modeling of interstate or cross-boundary water movement and storage through rivers, tributaries, and aquifers to better understand water availability. The Senate version of the measure authorizes $40M (compared with $50.3M in the House bill) for each of fiscal years 2026 through 2030 to carry out these pilot projects.

The Senate bill also incorporates unique legislative titles to establish a "Fire Ready Nation" program, combat illegal seafood importation, and improve oceanic research cybersecurity. While the House bill broadly directs the use of AI for advanced computing, the Senate mandates the creation of curated training datasets, AI-specific global weather models, and uncertainty quantification research. The Senate bill also mandates that NOAA determine how S2S temperature and precipitation relate to a comprehensive list of hazards including droughts, fires, tornadoes, hurricanes, floods, storm surges, coastal inundation, heat waves, marine heat waves, winter storms, snowpack, permafrost thaw, and

sea ice conditions.

Ranking Member Maria Cantwell (D-WA) said: “After enduring floods, landslides, power outages, and road closures from December’s atmospheric rivers — and facing increasingly destructive wildfires and smoke impacts — Washingtonians know all too well that weather is getting more extreme. NOAA must have the support and resources to protect our communities with cutting-edge weather research and forecasting. From improving our hazardous weather alerts to building out our next generation of radar, this legislation will ensure our country’s weather system is at the forefront of accurate and timely weather forecasting, modeling, and prediction.” https://www.commerce.senate.gov/2026/2/cantwell-cruz-colleagues-introduce-weather-act-reauthorization-to-modernize-weather-forecasting-and-research

LITIGATION

Texas v. New Mexico and Colorado

On February 9, Judge D. Brooks Smith of the 3rd U.S. Circuit *Court of Appeals, acting as Special Master in Texas v. New Mexico and Colorado* (#22O141, U.S. Supreme Court) issued a Fourth Interim Report recommending that the U.S. Supreme Court enter a Compact Decree between the states and the federal government. In its original 2013 complaint, the state of Texas alleged that New Mexico violated the 1939 Rio Grande Compact, which governs the distribution of Rio Grande water among Texas, New Mexico, and Colorado. New Mexico denied the allegation, and the United States filed a motion to intervene on the grounds that the case affects management of the Reclamation’s Rio Grande Project, its calculation of diversion allocations, and its responsibility to deliver water to intended Project beneficiaries and to Mexico pursuant to Treaty.

The parties spent years in litigation before the three states, over the United States' objection, reached a proposed settlement in 2022 (WSW #2588, and Special Report #2616.) Then-Special Master Michael J. Melloy recommended that the Supreme Court enter that decree over the objections of the United States, which argued the agreement would impermissibly dispose of its own claims without its consent. In June 2024, the Supreme Court agreed with the United States, finding that it (1) failed to prohibit New Mexico from interfering with Reclamation’s delivery of water to Texas water districts, (2) failed to enjoin excessive groundwater pumping below Elephant Butte Reservoir; and (3) inappropriately enshrined the D2 baseline (a mathematical formula based on historical water data from 1951 to 1978) as the permanent compliance metric without consent from the United States (Special Report 2616).

After renewed negotiations, the Compacting States filed a joint motion on August 29, 2025, seeking entry of a new Compact Decree, also called the Effective El Paso Index Decree (EEPI) Decree. At the same time, New Mexico and the United States submitted a separate collection of agreements resolving the federal government’s Project interference claims, and many of the Supreme Court’s concerns with the 2022 agreement by: (1) committing New Mexico to reduce groundwater pumping; (2) establishing enforceable hydrologic conditions; (3) establishing a Modified D2 Equation that accounts for more variables for determining Project allocations (4) establishing a formal process for allocation transfers between irrigation districts; (5) creating a legal framework to allow New Mexico to purchase water to satisfy delivery obligations to Texas.

The EEPI Decree clarifies Texas’ Compact apportionment through use of the Effective El Paso Index, which ties Texas’ apportionment to quantifiable hydrologic conditions as measured at gaging stations along the river. The index has two components. First is the index obligation, which is the annual amount of water Texas is entitled to receive. It is calculated using a two-year regression analysis comparing historical releases from Caballo Dam with net stream flows at the El Paso Gage during the D2 period. The second part is the index delivery, or the actual amount of water that passes through the El Paso Gage each year, adjusted to account for Mexico’s treaty water, excess flows, and Texas depletions about the gage.Special Master Smith explained that a precise match between obligation and delivery is unlikely in any given year, so the decree contemplates annual departures. When the Index Delivery falls short of the Index Obligation, a Negative Index Departure accrues against New Mexico. The Compact Decree permits New Mexico to carry some level of negative departures, but if accumulated shortfalls exceed specified limits, New Mexico must take water management actions. One available remedy is a water transfer between the Elephant Butte Irrigation District (New Mexico) and the El Paso County Water Improvement District No. 1 (Texas) executed through agreements involving the United States and both irrigation districts. The Compact Decree also establishes a protected baseline operating condition to ensure long-term viability of the Rio Grande Project. Critically, the

Compact Decree does not impose obligations on the United States.

The Special Master characterized the case as intractable due to shortcomings in the original compact. He said the Compact's drafters had "only a remedial understanding of the hydrological effects of groundwater pumping" and "no means of accurately measuring river flows at the Texas border" given the web of irrigation canals, ditches, and laterals. "All this to say that the current litigation arises from ambiguities that reflect the predicaments of a certain era—predicaments that time and technology have resolved."

He identified two questions the 1938 Compact left unanswered: (1) how much water New Mexico and Texas are each entitled to below the Reservoir; and (2) what baseline conditions the states must protect to keep the Project viable. On the apportionment question, he noted that while the Compact always implied a 57%/43% split, it never defined a denominator, leaving states to argue over "57% and 43% of what?" On the baseline operating conditions question, he noted that the Compact neither froze agricultural practices as they existed in 1938 nor set any express limit on groundwater pumping, even though the drafters understood that pumping at excessive levels could undermine the Project. The result was that groundwater pumping was neither clearly permitted without limit nor clearly prohibited.

Smith found that the Compact Decree satisfies the legal standards required for a consent decree in an original jurisdiction matter before the Supreme Court. Specifically, he concluded that it fully resolves the Compacting States' dispute, falls within the Court's subject matter jurisdiction, is consistent with and furthers the objectives of the 1938 Compact and other federal law, and represents a fair and reasonable settlement. He noted that the Index approach mirrors the same methodology already embedded in Articles III and IV of the Compact, and that it achieves a 57%-43% apportionment of Project supply consistent with the long-standing Downstream Contracts. Smith also recommended that the Court enter the Decree of Dismissal of the United States' claims and New Mexico's counterclaims, which New Mexico and the United States jointly requested and to which neither Texas nor Colorado objected.

State of Oklahoma v. Tyson Foods, Inc. et al.

On February 12, Oklahoma Attorney General Genter Drummond announced that Tyson Foods and Cargill have agreed to pay a combined $25.5 million to settle a 20-year lawsuit over alleging that phosphorus-laden poultry waste, spread across agricultural land in the region, had polluted the Illinois River Watershed over the years.

Under the agreements, Tyson Foods will pay $19 million and Cargill will pay $6.5 million and both companies will contribute to watershed remediation efforts, increase litter removal from the region, fund a Special Master to monitor compliance, and dismiss their appeals. In return, the state will release its claims against them. This advancement follows a January 2025 settlement with Georges, in which they agreed to a similar settlement with damages totaling $5 million. Proceedings continue against the remaining defendants, including Cal-Maine, Peterson Farms and Simmons.

Drummond said: "For over two decades, Oklahoma has fought to protect the Illinois River Watershed and the natural resources that sustain our communities. The decision to settle by Tyson and Cargill makes one thing unmistakably clear: corporate accountability is not optional, and protecting Oklahoma's water can, and must, go hand in hand with a strong poultry and agricultural industry. These settlements provide a path to move forward together, giving certainty for growers, protecting jobs and safeguarding Oklahoma's waters for future generations."

Nathan McKay, President of Poultry for Tyson, said the settlement brings resolution to the dispute, and it allows the company to focus on its growers and communities moving forward. "Tyson Foods is fortunate to have been a part of the agricultural community in the region for our entire 90-year history, and we are deeply grateful for the support we have received from our growers, our neighbors, and elected leaders in both states to achieve this resolution. We are pleased to move forward with our growers in Oklahoma and Arkansas to focus together on our mission of feeding the world like family." https://oklahoma.gov/oag/news/newsroom/2026/february/drummond-secures-major-settlements-with-tyson-cargill-in-landmark-poultry-pollution-case.html