



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 07 2019

The Honorable Kay Ivey
Governor of Alabama
State Capitol
600 Dexter Avenue
Montgomery, Alabama 36130-2751

THE ADMINISTRATOR

Dear Governor Ivey:

Enclosed with this letter is the Environmental Protection Agency's (EPA's) updated Clean Water Act (CWA) Section 401 guidance for federal agencies, states, and authorized tribes. The guidance is intended to help streamline the Section 401 certification process to promote timely action on important federal permits and licenses while the agency works to modernize its Section 401 implementing regulations.

Consistent with Executive Order No. 13868 (E.O. 13868), this letter withdraws and rescinds the EPA's April 2010 interim handbook titled, "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes" (the 2010 Interim Handbook). The 2010 Interim Handbook provided guidance on the CWA Section 401 water quality certification provisions and a compilation of information and implementation practices from states and authorized tribes.

The EPA issued the 2010 Interim Handbook nearly nine years ago to provide a resource for states and authorized tribes tasked with issuing Section 401 certifications. The 2010 Interim Handbook clearly states that it "is not a rule and does not create any legal requirements or set policy," that it is not a substitute for CWA Section 401 or implementing regulations, and that the EPA reserved its discretion to revise the handbook in the future. The EPA has not updated or modified the 2010 Interim Handbook since it was issued, and the document no longer reflects the most recent case law interpreting the plain language of CWA Section 401.

In addition, the 2010 Interim Handbook was never finalized, and the EPA is concerned that an interim handbook such as this one, that has not been updated in nearly a decade and has neither been finalized nor formally withdrawn, may lead to confusion for both regulators and the regulated community. This is especially true in circumstances, including litigation, in which such a document may be interpreted as mandating certain actions or outcomes. Withdrawal of the 2010 Interim Handbook is intended to reduce stakeholder confusion. The EPA anticipates that the additional activities it is undertaking in response to E.O. 13868, including additional engagement with state and tribal stakeholders, issuing new guidance, and modernizing federal rules implementing CWA Section 401, will increase transparency and regulatory certainty.

Consistent with E.O. 13868, the EPA is concurrently issuing new guidance pertaining to Section 401 certifications. This new guidance will provide information and recommendations on the substantive and procedural requirements of CWA Section 401, consistent with the areas of focus in E.O. 13868. Finally, the EPA will continue its ongoing rulemaking process and collaboration with its federal partners to modernize and revise the suite of federal rules implementing CWA Section 401. Robust state and tribal engagement and coordination will be crucial to this process. The EPA is taking all of these actions in accordance with the timelines set forth in E.O. 13868.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew R. Wheeler", with a long horizontal flourish extending to the right.

Andrew R. Wheeler