

# Wisconsin Department of Justice: AG Kaul acts to protect Wisconsin's ability to regulate states' natural resources

Posted on Wednesday, Oct 23, 2019

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MADISON, Wis. – Attorney General Josh Kaul this week acted to fight polluters and to protect Wisconsin waters. Wisconsin has joined a coalition of 15 attorneys general in submitting an amicus brief to the United States Supreme Court regarding states' ability to hold polluters accountable and joined a separate state coalition in submitting a letter to the Environmental Protection Agency (EPA), commenting on a proposed rule that would limit Wisconsin's ability to oversee the Clean Water Act.

“At a time when we need to step up our efforts to safeguard access to clean water, the Trump administration is trying to limit states' ability to protect and improve water quality,” said Attorney General Kaul. “We must maintain our ability to preserve our natural resources.”

In *Atlantic Richfield Company v. Gregory A. Christian, et al.*, a case out of Montana, a heavy manufacturing company is trying to avoid paying for the cleanup of its former site by saying that federal law blocks the ability of states to address, respond to, and clean up hazardous waste sites. Attorney General Kaul and his colleagues argue that federal law clearly allows states to protect their land, air, and water from damage, and to hold polluters accountable for the damage they cause.

In their brief, Attorney General Kaul and his colleagues write that “States have a strong interest in ensuring that their citizens (and the State itself) are compensated for injuries caused by releases of hazardous materials and in preserving their authority to address, respond to, and remediate harm from environmental

contamination.”

The states further explain that, far from preempting states’ ability to punish polluters, the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) actually “aimed to preserve the States’ traditional role in addressing environmental contamination,” and recognized “that States play an important role in addressing, responding to, and remediating environmental disasters.”

Read the [brief here](#).

Attorney General Kaul also joined a 23-state coalition filing a comment letter opposing the U.S. Environmental Protection Agency’s (EPA) proposed rule which would unlawfully curtail state authority under Section 401 of the Clean Water Act. In the Clean Water Act, Congress recognized and preserved states’ broad, pre-existing powers to protect their state waters. EPA has no statutory authority to limit state powers under Section 401. The proposed rule is an unlawful and misguided policy that would infringe on states’ rights and potentially degrade water quality. Consistent with the plain language of the Clean Water Act and the clear legislative intent, EPA’s acknowledgement of state authority spans three decades and four administrations. The proposed rule is a dramatic departure from EPA’s longstanding position and the states demand that EPA withdraw it.

In the letter, the coalition asserts that the proposed rule conflicts with the Clean Water Act’s language, Congressional intent, and applicable case law interpreting the Clean Water Act’s language. The proposed rule:

- Unlawfully limits the scope of state certification authority only to certain types of discharges;
- Illegally restricts state conditions on Section 401 certifications to a narrow set of EPA-approved water quality standards;
- Purports to authorize federal agencies to illegally disregard state-issued denials and conditions on certification applications; and
- Unlawfully restricts the timing and scope of state review of certification applications.

The EPA’s unlawful action is the product of President Trump’s April 2019 Executive

Order, designed to promote energy infrastructure rather than to protect water quality. The proposed rule violates the Administrative Procedure Act because it is contrary to law, arbitrary and capricious and an abuse of discretion. The rule also violates the plain language of Section 401 and other provisions of the Clean Water Act. Moreover, the EPA fails to consider any water-quality related factors in its decision, fails to explain why it is changing its position from the prior Section 401 regulations and guidance, and fails to analyze the effects of the proposed rule on the states. Because the rule conflicts with Section 401 and limits state authority, EPA does not have the authority to issue it.

The letter is [available here](#).